INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

SMM CERRO VERDE NETHERLANDS B.V.

Claimant

and

REPUBLIC OF PERU

Respondent

ICSID Case No. ARB/20/14

AWARD

Members of the Tribunal
Ms. Juliet Blanch, President of the Tribunal
Mr. Oscar M. Garibaldi, Arbitrator
Dr. Claus von Wobeser, Arbitrator

Secretary of the Tribunal
Ms. Marisa Planells-Valero

Date of dispatch to the Parties: 31 August 2026

REPRESENTATION OF THE PARTIES

Representing SMM Cerro Verde Netherlands B.V.:

Mr. Dietmar W. Prager
Ms. Laura Sinisterra
Ms. Julianne Marley
Mr. Nawi Ukabiala
Mr. Sebastian Dutz
Mr. Federico Fragachán
Debevoise & Plimpton LLP
66 Hudson Boulevard
New York, NY 10001
USA
and
Ms. Yoshimi Ohara
Ms. Annia Hsu
Mr. Ryosaku Kondo
Mr. Yusuke Iwata
Mr. Yuji Ibaraki
Ms. Mai Umezawa
Nagashima Ohno & Tsunematsu
JP Tower, 2-7-2 Marunouchi
Chiyoda-ku
Tokyo 100-7036
Japan
and
Mr. Luis Carlos Rodrigo Prado
Mr. Francisco Cardenas Pantoja
Ms. Lourdes Castillo Crisostomo
Estudio RODRIGO
Av. Pardo y Aliaga 652, Piso 8
San Isidro
Lima 15073
Republic of Peru

Representing the Republic of Peru:

Ms. Mónica del Pilar Guerrero Acevedo
Mr. Mijail Feliciano Cienfuegos Falcón
Comisión Especial que representa al Estado en Controversias Internacionales de Inversión
Ministerio de Economía y Finanzas
Jr. Junín No. 319
Cercado de Lima,
Lima
Republic of Peru
and
Prof. Stanimir A. Alexandrov
Stanimir A. Alexandrov PLLC
1717 K Street, NW, Suite 900
Washington D.C. 20006
USA
and
Ms. Jennifer Haworth McCandless
Ms. María Carolina Durán
Ms. Verónica Restrepo
Ms. Natalia Zuleta
Baker Botts LLP
700 K Street, NW,
Washington, DC 20001
USA
and
Dr. Alejandro A. Escobar
Ms. Ana Martínez Valls
Baker Botts (UK) LLP
Level 30, 20 Fenchurch Street,
London EC3M 3BY
United Kingdom
and
Mr. Ricardo Puccio
Mr. Oswaldo Lozano
Estudio Navarro & Pazos Abogados
Av. Del Parque 195,
San Isidro, Lima
Republic of Peru

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TABLE OF SELECTED ABBREVIATIONS/DEFINED TERMS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
BIT	Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Republic of Peru entered into force 21 November 1996
C-[#]	Claimant's Exhibit
Claimant's Memorial	Claimant's Memorial dated 27 August 2021
Claimant's PH Brief	Claimant's Post-Hearing Brief dated 17 April 2023
Claimant's Reply	Claimant's Reply dated 1 July 2022
Claimant's Reply PH Brief	Claimant's Reply Post-Hearing Brief dated 16 June 2023
CL-[#]	Claimant's Legal Authority
Hearing	Hearing on Jurisdiction and Merits held from 6-17 February 2023
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
R-[#]	Respondent's Exhibit
Respondent's Counter-Memorial	Respondent's Counter-Memorial dated 25 February 2022
Respondent's PH Brief	Respondent's Post-Hearing Brief dated 17 April 2023
Respondent's Rejoinder	Respondent's Rejoinder dated 21 September 2022
Respondent's Reply PH Brief	Respondent's Reply Post-Hearing Brief dated 16 June 2023

RL-[#]	Respondent's Legal Authority
SMCV	Sociedad Minera Cerro Verde S.A.A.
Tr. Day [#] [page:line]	Transcript of the Hearing
Tribunal	Arbitral Tribunal constituted on 31 March 2021

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of the Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Republic of Peru which entered into force on 21 November 1996 (the "**BIT**" or "**Treaty**") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the "**ICSID Convention**").

2. The claimant is SMM Cerro Verde Netherlands B.V. (the "**Claimant**" or "**SMM Cerro Verde**"), a limited liability company incorporated under the laws of the Netherlands, with its seat and office in Amsterdam.

3. The respondent is the Republic of Peru (the "**Respondent**" or "**Peru**").

4. The Claimant and the Respondent are collectively referred to as the "**Parties**." The Parties' representatives and their addresses are listed above on page (i).

5. This dispute relates to the Claimant's equity investment in Sociedad Minera Cerro Verde S.A.A. ("**SMCV**"), a Peruvian company operating the Cerro Verde Mine in Arequipa, Peru, and the Claimant's allegation that the Respondent breached its obligation to apply stability guarantees to SMCV's Concentrator. The Claimant alleges that by imposing penalties and interest on SMCV, the Respondent breached (i) Article 3.4 of the Treaty, which requires the Respondent to observe the obligations it entered into with regard to SMM Cerro Verde and (ii) Article 3.1 of the Treaty, which requires the Respondent to treat SMM Cerro Verde's investment fairly and equitably.

A. PROCEDURAL HISTORY

6. On 30 April 2020, the Centre received a request for arbitration from SMM Cerro Verde against the Republic of Peru, with exhibits CE-1 to CE-275 and legal authorities CA-1 to CA-22 (the "**Request**").

7. On 13 May 2020, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and Rules 6 and 7 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the "**ICSID Institution Rules**") and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID Institution Rules.

8. In accordance with Article 37(2)(a) of the ICSID Convention, and pursuant to the provisions of the Treaty, the Tribunal was to be constituted by three arbitrators appointed as follows: one by each Party and the third, the presiding arbitrator, by agreement of the Parties.

9. On 11 September 2020, following appointment by the Respondent, Dr. Claus von Wobeser, a national of Mexico and Germany, accepted his appointment as arbitrator. On 15 September 2020, following appointment by the Claimant, Mr. Oscar M. Garibaldi, a national of Argentina and the United States, accepted his appointment as arbitrator.

10. On 23 December 2020, the Parties adopted a Protocol for Appointing the Presiding Arbitrators in this case and in *Freeport-McMoRan Inc. v. Republic of Peru* (ICSID Case No. ARB/20/8) (the "***Freeport* arbitration**"), whereby the Centre was to circulate to the Parties in both cases one list of ten arbitrators inviting them to strike and rank them in their order of preference and inform the Centre. The Centre would subsequently prepare a ranked list of arbitrators and appoint the candidate with the highest ranking in the respective arbitration.

11. On 29 March 2021, the Centre circulated to the Parties the ranked list of arbitrators, informing them that, as the arbitrator with the highest ranking, Ms. Juliet Blanch was to be appointed as presiding arbitrator. On 31 March 2021, Ms. Blanch, a national of the United Kingdom, accepted her appointment as presiding arbitrator. Following Ms. Blanch's acceptance of her appointment and in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**ICSID Arbitration Rules**"), the Secretary-General notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Marisa

Planells-Valero, ICSID Senior Legal Counsel, was designated to serve as Secretary of the Tribunal.

12. On 19 April 2021, the ICSID Secretariat, acting on behalf of the Tribunal, sent the Parties a draft Procedural Order No. 1 for their discussion. On 4 May 2021, the Parties jointly requested an extension for the submission of their comments regarding draft Procedural Order No. 1. On the same day, the Tribunal granted the requested extension. On 7 May 2021, the Parties submitted their comments on draft Procedural Order No. 1.

13. On 10 May 2021, in accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties by videoconference.

14. On 15 June 2021, following additional communications from the Parties, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters and the decision of the Tribunal on disputed issues ("**PO1**"). PO1 provided, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural languages would be English and Spanish, and that the place of the proceeding would be Washington, D.C.

15. On 2 July 2021, the Claimant submitted a Notice of Additional Claims, with exhibits CE-276 to CE-282 and legal authorities CA-23 to CA-25.

16. On 28 August 2021, in accordance with PO1, the Claimant filed its Memorial dated 27 August 2021 (the "**Claimant's Memorial**"), with exhibits CE-283 to CE-900 and legal authorities CA-26 to CA-261. This pleading was also accompanied by twelve witness statements and five expert reports, as follows: (i) Witness Statement of Ramiro Aquiño, dated 27 August 2021; (ii) Witness Statement of Gianfranco Castagnola, dated 27 August 2021; (iii) Witness Statement of María Chappuis Cardich, dated 27 August 2021; (iv) Witness Statement of Pedro Choque Ticona, dated 27 August 2021; (v) Witness Statement of Randy L. Davenport, dated 27 August 2021; (vi) Witness Statement of Leonel Estrada Gonzales, dated 27 August 2021; (vii) Witness Statement of Hans Flury, dated 27 August 2021; (viii) Witness Statement of Cristián Morán, dated 27 August 2021; (ix) Witness Statement of Hugo Santa María, dated 27 August 2021; (x) Witness Statement of Milagros

Silva-Santisteban Concha, dated 27 August 2021; (xi) Witness Statement of Julia Torreblanca, dated 27 August 2021; (xii) Witness Statement of Yukio Kawaguchi, dated 27 August 2021; (xiii) Expert Report of Pablo T. Spiller and Carla Chavich, dated 27 August 2021, along with Annexes 1 to 4; (xiv) Expert Report of Alfredo Bullard, dated 27 August 2021; (xv) Expert Report of Luis Hernández Berenguel, dated 27 August 2021; (xvi) Expert Report of James M. Otto, dated 27 August 2021; and (xvii) Expert Report of María del Carmen Vega, dated 27 August 2021.

17. On 15 February 2022, the Respondent requested an extension until 25 February 2022 for the filing of its Counter-Memorial. On that same date, the Claimant agreed with the Respondent's request. On 16 February 2022, in view of the Parties' agreement, the Tribunal granted the requested extension.

18. On 25 February 2022, the Respondent filed its Counter-Memorial, with exhibits RE-1 to RE-107 and legal authorities RA-1 to RA-41 (the "**Respondent's Counter-Memorial**"). This pleading was also accompanied by seven witness statements and five expert reports, as follows: (i) Witness Statement of César Augusto Polo Robilliard, dated 25 February 2022; (ii) Witness Statement of Juan Felipe Guillermo Isasi Cayo, dated 18 February 2022; (iii) Witness Statement of Oswaldo Tovar Jumpa, dated 25 February 2022; (iv) Witness Statement of Claudia Gabriela Bedoya Arbañil, dated 25 February 2022; (v) Witness Statement of Zoraida Olano Silva, dated 25 February 2022; (vi) Witness Statement of Marco Camacho Sandoval, dated 25 February 2022; (vii) Witness Statement of Haraldo Cruz Negrón, dated 18 February 2022; (viii) Expert Report of Francisco Eguiguren, dated 25 February 2023; (ix) Expert Report of Rómulo Morales Hervias, dated 25 February 2023; (x) Expert Report of Jorge Bravo and Jorge Picón, dated 25 February 2023; (xi) Expert Report of Stephen F. Ralboysky, dated 25 February 2023; and (xii) Expert Report of Isabel Santos Kunsman, MBA, dated 25 February 2023, along with AP Annex 1 and exhibits AP-1 to AP-21.

19. On 15 April 2022, the Parties jointly requested an extension for the filing of their Replies to Production Responses and Objections until 18 April 2022. On that same date, the Tribunal granted the requested extension.

20. On 18 April 2022, the Parties sent their respective Document Production Requests for the Tribunal's decision.

21. On 20 April 2022, the Claimant requested leave from the Tribunal to file a response addressing a waiver of privilege issue that had been raised by the Respondent in its Reply to the Claimant's Objections to Peru's Request for Production of Documents. On that same date, the Tribunal granted the Claimant's request. The Tribunal further indicated that it was in the process of reviewing the Parties' Document Production Schedules and did not consider it necessary to hold a meeting with the Parties for the purposes of making the ruling on Document Production Requests as contemplated in Annex A of Procedural Order No. 1.

22. On 22 April 2022, the Claimant submitted its response to the waiver of privilege issue raised by the Respondent. On 30 April 2022, the Respondent requested leave to submit comments on the Claimant's communication of 22 April 2022. On 2 May 2022, the Claimant asked the Tribunal to reject the Respondent's request or, in the alternative, to permit only an answer by the Respondent addressing the Claimant's arguments set forth in its 22 April 2022 letter in response to the Respondent's waiver of privilege arguments.

23. On 2 May 2022, the Tribunal invited the Respondent to file a short submission strictly limited to addressing the Claimant's arguments regarding the Respondent's waiver of privilege as contained in the Claimant's letter of 22 April 2022 and added that any new arguments not responsive to such arguments would not be considered by the Tribunal. The Respondent filed its submission on 3 May 2022.

24. On 5 May 2022, the Claimant requested that the Tribunal disregard certain allegedly new arguments in the Respondent's communication of 3 May 2022, on the basis that they were submitted in contravention of the Tribunal's instructions of 2 May 2022. In the alternative, the Claimant requested leave to respond to the alleged new arguments before the Tribunal's ruling. On that same date, the Respondent commented on the Claimant's request.

25. On 13 May 2022, the Tribunal issued Procedural Order No. 2 ("**PO2**") ruling on the Parties' respective Requests for Document Production and on the Respondent's request of 5 May 2022.

26. On 27 June 2022, the Claimant requested that the Tribunal order the Respondent to produce certain unredacted copies of documents responsive to its Document Request No. 1(a), which alleged the Respondent had improperly redacted contrary to its document production obligations. Additionally, in light of the 1 July 2022 deadline for the Claimant's Reply submission, the Claimant requested an authorisation from the Tribunal to supplement its Reply to take into account any of the unredacted documents that the Respondent produced or, alternatively, to submit as exhibits any unredacted documents the Respondent produced, accompanied by a brief explanation of their alleged relevance. On that same date, the Respondent requested an opportunity to respond to the Claimant's request.

27. On 28 June 2022, the Tribunal invited the Respondent's comments on the Claimant's request of 27 June 2022. On 30 June 2022, the Respondent objected to the Claimant's request.

28. On 1 July 2022, the Claimant filed its Reply together with exhibits CE-901 to CE-1055 and legal authorities CA-293 to CA-353[1] (the "**Claimant's Reply**"). This pleading was also accompanied by ten witness statements and five expert reports, as follows: (i) Reply Witness Statement of Ramiro Aquiño, dated 1 July 2022; (ii) Reply Witness Statement of María Chappuis Cardich, dated 1 July 2022; (iii) Reply Witness Statement of Pedro Choque Ticona, dated 1 July 2022; (iv) Reply Witness Statement of Randy L. Davenport, dated 1 July 2022; (v) Reply Witness Statement of Leonel Estrada Gonzales, dated 1 July 2022; (vi) Reply Witness Statement of Hans Flury, dated 1 July 2022; (vii) Reply Witness Statement of Cristián Morán, dated 1 July 2022; (viii) Reply Witness Statement of Hugo Santa María, dated 1 July 2022; (ix) Reply Witness Statement of Julia Torreblanca, dated 1 July 2022; (x) Reply Witness Statement of Yukio Kawaguchi, dated 1 July 2022; (xi) Reply Expert Report of Pablo T. Spiller and Carla Chavich, dated 1 July 2022, along with Annexes 1 and 2; (xii) Reply Expert Report of Alfredo Bullard, dated 1 July 2022; (xiii)

[1] Legal Authority Numbers CA-262 to CA-292, CA-308 to CA-309, CA-345, CA-347, and CA-352 were reserved.

Reply Expert Report of Luis Hernández Berenguel, dated 1 July 2022; (xiv) Reply Expert Report of James M. Otto, dated 1 July 2022; and (xv) Reply Expert Report of María del Carmen Vega, dated 1 July 2022.

29. On 3 August 2022, following additional communications from the Parties concerning the production of unredacted copies of certain documents in accordance with PO2, the Tribunal issued Procedural Order No. 3 proposing, *inter alia*, a procedure for the Tribunal's *in camera* document review to assess the relevance to the dispute of each proposed redaction ("**PO3**"). The Tribunal further indicated that, in the alternative, it would proceed to appoint an independent third-party expert to review the documents and make a determination.

30. On 9 August 2022, the Parties consented to the Tribunal examining the unredacted documents *in camera* for the purpose of determining if the redacted information had a bearing on the Parties' dispute. The Respondent explained that it needed to complete a series of procedures under Peruvian law before it could comply with the order to submit the unredacted documents to the Tribunal only.

31. On 12 September 2022, the Respondent requested that the Tribunal order the Claimant to produce certain documents responsive to its Document Requests Nos. 1 and 7. On that same date, the Claimant agreed to produce the documents identified in the Respondent's communication.

32. On 13 September 2022, the Claimant replied to the Respondent's letter of 12 September 2022 concerning documents allegedly responsive to Respondent's Document Request Nos. 1 and 7. By this same communication, the Claimant also complained, *inter alia*, about the Respondent's failure to produce unredacted copies of the documents for the Tribunal's *in camera* review and requested that the Tribunal order the Respondent to inform the Tribunal and the Claimant as to the approximate date it expected to produce the unredacted documents.

33. On 14 September 2022, the Respondent referred to the Claimant's request of 13 September 2022 and indicated that it expected to provide the Tribunal with the unredacted documents before the end of September.

34. On 16 September 2022, the Respondent requested an extension until 21 September 2022 for the filing of its Rejoinder, and the Claimant agreed with the Respondent's request. On that same day, in view of the Parties' agreement, the Tribunal granted the requested extension.

35. On 21 September 2022, the Respondent filed its Rejoinder with exhibits RE-102 (updated), RE-117 to RE-156, RE-170, RE-172, RE-173, and RE-175 to RE-312,[2] and legal authorities RA-42 to RA-104 (the "**Respondent's Rejoinder**"). This pleading was also accompanied by eight witness statements and five expert reports, as follows: (i) Reply Witness Statement of César Augusto Polo Robilliard, dated 16 September 2022; (ii) Reply Witness Statement of Juan Felipe Guillermo Isasi Cayo, dated 16 September 2022; (iii) Reply Witness Statement of Oswaldo Tovar Jumpa, dated 16 September 2022; (iv) Reply Witness Statement of Claudia Gabriela Bedoya Arbañil, dated 16 September 2022; (v) Reply Witness Statement of Zoraida Olano Silva, dated 16 September 2022; (vi) Reply Witness Statement of Marco Camacho Sandoval, dated 16 September 2022; (vii) Reply Witness Statement of Haraldo Cruz Negrón, dated 16 September 2022; (viii) Witness Statement of Jorge Orlando Sarmiento Díaz, dated 15 September 2022; (ix) Reply Expert Report of Francisco Eguiguren, dated 16 September 2022; (x) Reply Expert Report of Rómulo Morales Hervias, dated 16 September 2022; (xi) Reply Expert Report of Jorge Bravo and Jorge Picón, dated 21 September 2022; (xii) Reply Expert Report of Stephen F. Ralboysky, dated 16 September 2022; and (xiii) Reply Expert Report of Isabel Santos Kunsman, MBA, dated 21 September 2022, along with AP Annex 2 and 3.

36. On 21 October 2022, the Respondent made available to the Tribunal unredacted versions of the documents responsive to the Claimant's Document Request No. 1(a) for the Tribunal's *in camera* review. In doing so, the Respondent requested that, should the Tribunal determine that the redacted information had a bearing on the Parties' dispute and order the production of the documents to the Claimant, it issue a confidentiality order to protect the confidential nature of the documents provided. On 25 September 2022, the Tribunal confirmed access to the confidential documents.

[2] Exhibit Numbers RE-108 to RE-116, RE-157 to RE-169, RE-171 and RE-174 were reserved.

37. On 28 October 2022, the Claimant commented on the Respondent's communication of 21 October 2022 objecting to the Respondent's attempt to reargue the relevance of the documents which were the subject of PO3, and the Respondent's request to restrict access to such documents.

38. On 22 November 2022, the Centre circulated to the Parties a draft procedural order on the organisation of the hearing, inviting them to confer and submit their joint comments, which they did on 12 December 2022.

39. On 30 November 2022, the Tribunal issued Procedural Order No. 4 ("**PO4**") ordering the Respondent to produce to the Claimant's counsel the totality of the documents reviewed by the Tribunal (the "**Attorney's Eyes Only**" or "**AEO**" order) and indicating that the Claimant could make a reasoned application if it sought consent to provide any of the unredacted information to any of its experts.

40. On 12 December 2022, the Claimant asked the Tribunal to order the Respondent to produce the full audio file of an exhibit submitted with the Respondent's Rejoinder and to provide certain additional information regarding a National Superintendence of Customs and Tax Administration ("**SUNAT**") Report issued in June 2006. On 13 December 2022, the Tribunal invited the Respondent to provide comments on the Claimant's request.

41. On 14 December 2022, the Claimant requested that the Tribunal reconsider its AEO order. Alternatively, the Claimant requested that the Tribunal replace the AEO order with a confidentiality order permitting disclosure of the unredacted documents to certain specified representatives of Claimant as well as the Claimant's experts, witnesses, and key service providers in this arbitration. Additionally, the Claimant argued that a review of the unredacted documents produced by the Respondent on 6 December 2022 pursuant to the Tribunal's instructions of 30 November 2022 had revealed that the Respondent had not complied with its document production obligations and requested that the Tribunal order the Respondent to rectify the deficiencies in its production.

42. On 15 December 2022, pursuant to Section 19.1 of PO1, the Tribunal and the Parties held a pre-hearing organisational meeting by videoconference. During the pre-hearing meeting,

the Parties and the Tribunal discussed, *inter alia*, the draft procedural order circulated to the Parties on 22 November 2022 and the Parties' joint statement of 12 December 2022 advising the Tribunal of any agreements reached on the open items, as well as their respective positions where no agreement was reached. On that same day, the Respondent requested an extension to provide comments on the Claimant's request of 12 December 2022, an extension which was granted by the Tribunal. The Tribunal also invited the Respondent to provide comments on the Claimant's request of 14 December 2022.

43. On 16 December 2022, the Respondent opposed the Claimant's request of 14 December 2022 but agreed to produce the full audio file of an exhibit submitted with the Respondent's Rejoinder.

44. On 20 December 2022, the Respondent provided comments on the Claimant's request that the Tribunal lift the AEO order, agreeing to the disclosure of the unredacted documents to the experts and necessary key service providers but opposing the Claimant's request to share the unredacted document with any other persons, including the Claimant's company representatives and fact witnesses. Finally, the Respondent also objected to the Claimant's attempt to seek production of additional documents.

45. On 23 December 2022, the Parties requested an extension of time to reach an agreement on a number of outstanding points regarding the organisation of the hearing. On 26 December 2022, the Parties provided their additional comments regarding draft Procedural Order No. 5. Further comments regarding the organisation of the hearing were received from the Parties on 26 and 27 December 2022.

46. On 3 January 2023 the Tribunal issued its Procedural Order No. 5 regarding the organisation of the hearing ("**PO5**"). On that same date, the Tribunal informed the Parties that it wished to reserve the morning of Day 10 of the Hearing for additional questions from the Tribunal and that key witnesses were not to be released until then in case the Tribunal wished to recall them to address further questions arising from subsequent testimony.

47. On 4 January 2023, the Tribunal issued its Procedural Order No. 6 on the Claimant's requests of 12 and 14 December 2022 ("**PO6**"). In doing so, the Tribunal first noted that the Respondent had agreed to produce the full audio file of an exhibit submitted with the Respondent's Rejoinder. The Tribunal then ordered the Respondent to provide certain additional information and documents regarding the June 2006 SUNAT Report. The Tribunal also invited the Respondent to undertake a good-faith diligent search to rectify the deficiencies identified by the Claimant regarding the Respondent's document production, and either to produce the requested documents or, if any documents specifically identified by the Claimant did not exist, to explain to the Tribunal why the documents requested did not exist in circumstances where documents of a like kind were found and produced. Finally, as to the Claimant's request that the AEO order be lifted, the Tribunal ordered that unredacted information could be disclosed to a maximum of ten identified representatives of the Claimant, in addition to the Claimant's experts, witnesses, slide presentation vendor and translation vendor.

48. On 9 January 2023, the Claimant requested leave from the Tribunal to introduce: (i) certain additional exhibits and authorities into the record, and (ii) the expert report of Peru's damages expert Ms. Isabel Kunsman, issued in the *Freeport* arbitration, for impeachment purposes pursuant to Section 24.1 of PO1.

49. On 11 January 2023, pursuant to PO6, the Respondent produced to the Claimant the documents requested in its 14 December 2022 letter and provided additional information regarding the June 2006 SUNAT Report. The Respondent further advised the results of its internal additional search regarding the documents requested by the Claimant.

50. On 12 January 2023, the Respondent requested certain clarifications regarding the Tribunal's instructions of 3 January 2023 regarding Day 10 of the Hearing and proposed that, after their examination, the Parties' witnesses be available to respond to any additional questions from the Tribunal remotely. On that same date, the Tribunal agreed with the Respondent's proposal.

51. Also on 12 January 2023, pursuant to Section 37 of PO5, the Respondent sought leave from the Tribunal to allow Mr. Felipe Isasi, the Respondent's witness called for direct

examination only, to testify remotely due to health reasons. On that same date, the Parties jointly requested certain clarifications to PO5.

52. On 16 January 2023, the Claimant opposed the Respondent's request regarding Mr. Isasi's remote examination and requested that the Tribunal order that Mr. Isasi provide in-person testimony at the Hearing or invite Respondent to withdraw its decision to call Mr. Isasi for direct testimony given the alleged health risks involved.

53. On 16 January 2023, the Tribunal invited the Claimant to indicate whether it had any comments regarding the Tribunal's communication of 12 January 2023 agreeing with the Respondent's proposal that, after their examination, the Parties' witnesses be available to respond to any additional questions from the Tribunal remotely.

54. On 16 January 2023, the Respondent provided comments on the Claimant's request of 9 January 2023. On that same date, the Claimant responded to the Respondent's comments.

55. On 18 January 2023, the Parties jointly provided additional comments on the Tribunal's decision of 12 January 2023 regarding the sequestration of witnesses after the conclusion of their testimony. On that same date, the Tribunal provided the clarifications requested by the Parties regarding PO5 and, by separate communication, informed them of its decision to allow the remote testimony of Mr. Isasi.

56. On 24 January 2023, pursuant to Section 55 of PO5, the Parties provided the Tribunal with a list and neutral description of the individuals and entities part of the relevant factual background ("*dramatis personae*"). On 25 January 2023, the Parties provided the Tribunal with their respective Chronologies of Neutrally Stated Facts.

57. On 25 January 2023, the Tribunal issued Procedural Order No. 7 granting the Claimant's request of 9 January 2023 to submit certain new documents into the record ("**PO7**").

58. On 27 January 2023, pursuant to PO7, the Claimant introduced exhibits CE-1056 to CE-1088 and legal authorities CA-354 and CA-355 into the record.

59. On 29 January 2023, the Respondent submitted a request for the Tribunal to introduce nine new exhibits to the record. The Claimant replied to the Respondent's request on 31 January 2023.

60. Also on 31 January 2023, the Claimant sought leave to introduce four additional exhibits into the record.

61. On 1 February 2023, the Claimant consented to the introduction of three of the documents identified by the Respondent in its request of 29 January 2023 and requested that the Tribunal deny the introduction into the record of the other six additional documents listed in the Respondent's request.

62. Also on 1 February 2023, pursuant to Section 44 of Procedural Order No. 5, the Parties provided their agreed lists of key individuals and translations of key terms in Spanish, English, and Japanese.

63. On 2 February 2023, the Respondent opposed the Claimant's request of 31 January 2023.

64. On 4 February 2023, the Tribunal issued Procedural Order No. 8 by which it granted the Respondent leave to introduce into the record the three documents identified in its communication of 29 January 2023 to which the Claimant had consented and rejected the Respondent's request to introduce six additional documents ("**PO8**"). By the same Order, the Tribunal granted the Claimant leave to introduce into the record the documents identified in its communication of 31 January 2023 and provided further directions to the Parties regarding the introduction into the record of additional documents concerning the Respondent's treatment of other mining companies in respect of the scope of their stabilisation agreements. On that same date, pursuant to the Tribunal's instructions in PO8, the Claimant introduced into the record exhibits CE-1089 to CE-1092.

65. On 5 February 2023, also pursuant to the Tribunal's instructions in PO8, the Respondent introduced into the record exhibits RE-352 to RE-354.[3]

[3] Exhibit Numbers RE-314 to RE-351 were reserved.

66. A hearing on jurisdiction and merits was held in Washington, DC from 6-17 February 2023 (the "**Hearing**"). The following persons were present at the Hearing:

Tribunal:	
Juliet Blanch	President
Oscar M. Garibaldi	Arbitrator
Claus von Wobeser	Arbitrator
ICSID Secretariat:	
Marisa Planells-Valero	Secretary of the Tribunal
For the Claimant:	
Dietmar W. Prager	Debevoise & Plimpton LLP
Laura Sinisterra	Debevoise & Plimpton LLP
Nawi Ukabiala	Debevoise & Plimpton LLP
Julio Rivera Rios*	Debevoise & Plimpton LLP
Sebastian Dutz	Debevoise & Plimpton LLP
Federico Fragachán	Debevoise & Plimpton LLP
Michelle Huang*	Debevoise & Plimpton LLP
Astrid Medianero Bottger*	Debevoise & Plimpton LLP
Lucia Rodrigo*	Debevoise & Plimpton LLP
Pedro Ferro*	Debevoise & Plimpton LLP
Mary Grace McEvoy	Debevoise & Plimpton LLP
Reggie Cedeno	Debevoise & Plimpton LLP
Orrin Case	Debevoise & Plimpton LLP
Gregory A. Senn	Debevoise & Plimpton LLP
Jeffrey Skeete-Somerszaul	Debevoise & Plimpton LLP
Christopher V. Tran	Debevoise & Plimpton LLP
Yoshimi Ohara	Nagashima, Ohno & Tsunematsu
Annia Hsu	Nagashima, Ohno & Tsunematsu
Ryosaku Kondo	Nagashima, Ohno & Tsunematsu
Yusuke Iwata	Nagashima, Ohno & Tsunematsu
Yuji Ibaraki	Nagashima, Ohno & Tsunematsu
Mai Umezawa	Nagashima, Ohno & Tsunematsu
Luis Carlos Rodrigo Prado	Rodrigo, Elias & Medrano
Francisco Cardenas Pantoja	Rodrigo, Elias & Medrano
Lourdes Castillo Crisostomo	Rodrigo, Elias & Medrano
José Govea	Rodrigo, Elias & Medrano
Alejandro Tafur	Rodrigo, Elias & Medrano

*No longer with the firm

For the Respondent:	
Stanimir A. Alexandrov	Stanimir A. Alexandrov, PLLC
Jennifer Haworth McCandless	Sidley Austin LLP
Marinn Carlson	Sidley Austin LLP

María Carolina Durán	Sidley Austin LLP
Courtney Hikawa	Sidley Austin LLP
Ana Martínez Valls	Sidley Austin LLP
Veronica Restrepo	Sidley Austin LLP
Angela Ting	Sidley Austin LLP
Nick Wiggins	Sidley Austin LLP
Natalia Zuleta	Sidley Austin LLP
Gavin Cunningham	Sidley Austin LLP
Kevin Dugan	Sidley Austin LLP
Ara Lee	Sidley Austin LLP
Sadie Claflin	Sidley Austin LLP
Noah Goldberg	Sidley Austin LLP
Ricardo Puccio	Estudio Navarro & Pazos Abogados S.A.C.
Oswaldo Lozano	Estudio Navarro & Pazos Abogados S.A.C.
Vanessa Del Carmen Rivas Plata Saldarriaga	Ministry of Economy and Finance, Republic of Peru
Mijail Feliciano Cienfuegos Falcon	Ministry of Economy and Finance, Republic of Peru
Edmóstines Montoya Jara	SUNAT, Republic of Peru
Isela Martínez Inche	SUNAT, Republic of Peru

Court Reporters:

Dawn Larson	B&B Reporters
Dante Rinaldi	D-R Esteno

Interpreters:

Elena Howard	English-Spanish Interpreter
Charlie Roberts	English-Spanish Interpreter
Luis Arango	English-Spanish Interpreter
Fujiko Sato	English-Japanese Interpreter
Kazuko Shimizu	English-Japanese Interpreter

67. During the Hearing, the following persons were examined:

On behalf of the Claimant:

Experts

James M. Otto	
María del Carmen Vega	
Alfredo Bullard	*Bullard Abogados*
Milan Pejnovic	*Bullard Abogados*
Pablo T. Spiller	Compass Lexecon
Carla Chavich	Compass Lexecon
Andres Barrera	Compass Lexecon
Gonzalo Urquiza	Compass Lexecon

Dhruv Shetty	Compass Lexecon
Abigail Brown	Compass Lexecon

Witnesses
Julia Torreblanca
Randy L. Davenport
Marita Chappuis Cardich
Yukio Kawaguchi
Leonel Estrada Gonzales

On behalf of the Respondent:

Experts

Steve Ralbovsky	
Francisco Eguiguren	
Rómulo Morales	
Jorge Bravo	*Estudio Picón & Asociados, Asesores Tributarios*
Jorge Picon	*Estudio Picón & Asociados, Asesores Tributarios*
Isabel Kunsman	Alix Partners
Mitchell Davidson	Alix Partners
Alex Huertas	Alix Partners

Witnesses
Felipe Isasi*
Cesar Polo
Oswaldo Tovar
Gabriela Bedoya
Haraldo Cruz
Zoraida Olano
Jorge Sarmiento

* Remote connection

68. On 6 February 2023, pursuant to the Tribunal's instructions, the Claimant filed the superseded CA-1 as HA-0001 (*i.e.* the version of the Mining Law in force at the time of the events the subject of the Claimant's claim). On 17 February 2023, at the end of the Hearing, the Tribunal identified three questions to be addressed by the Parties in their Post-Hearing Briefs.

69. On 23 February 2023, the Tribunal communicated to the Parties an additional question to be addressed in their Post-Hearing Briefs, and confirmed that, at that time, it had no further questions for the Parties.

70. On 28 February 2023, and as decided on the last day of the Hearing, the Tribunal confirmed the procedural calendar for the next steps in the proceeding and the page number and formatting to be followed by the Parties when preparing their Post-Hearing Briefs.

71. On 6 April 2023, following a number of extensions from the Tribunal, the Parties submitted their joint corrections to the Spanish and English hearing transcripts. The final hearing transcripts were transmitted by the Centre to the Parties and the Tribunal on 10 April 2023.

72. On 13 April 2023, the Parties jointly requested an extension for the submission of their First Round of Post-Hearing Briefs. On that same date, the Tribunal granted the Parties' requests.

73. The Parties filed simultaneous Post-Hearing Briefs on 17 April 2023. Together, with its First Post-Hearing Brief, the Claimant resubmitted exhibit CE-644 (in Spanish) and legal authority CA-014 (in English).

74. On 18 April 2023, the Respondent requested leave from the Tribunal to introduce a new legal authority into the record.

75. On 24 April 2023, the Claimant identified the Respondent's failure to comply with the Tribunal's instructions for the preparation of the Parties' First Post-Hearing Briefs and requested that the Tribunal order the Respondent to limit its Second Post-Hearing Brief to a maximum of 30 pages (*i.e.* 10 pages less than the 40-page limit).

76. On 27 April 2023, the Claimant opposed the Respondent's request of 18 April 2023.

77. On 28 April 2023, the Respondent opposed the Claimant's request of 24 April 2023 and submitted that the Respondent's First Post-Hearing Brief complied with the Tribunal's instructions of 28 February 2023.

78. On 10 May 2023, the Tribunal issued its Procedural Order No. 9, granting the Respondent's request of 18 April 2023 to introduce a new legal authority into the record ("**PO9**"). The Tribunal further concluded that the Respondent had failed to comply with the Tribunal's directions regarding the submission of the Parties' Post-Hearing Briefs and ordered the Respondent to refile its First Post-Hearing Brief by 19 May 2023 ensuring its compliance with the Tribunal's previous directions as clarified by PO9. In doing so, the Tribunal indicated, *inter alia*, that the number of pages permitted for the Claimant's Second Post-Hearing Brief was to be increased above 40 pages by a number of pages equal to the excess of the number of pages of the Respondent's Refiled First Post-Hearing Brief over 70 pages.

79. Also on 10 May 2023, Dr. Claus von Wobeser made a disclosure to the Parties.

80. On 15 May 2023, the Respondent provided comments regarding the Tribunal's findings in PO9, expressing its disagreement with the Tribunal's factual findings regarding the Respondent's compliance with the Tribunal's instructions of 28 February 2023. On 16 May 2023, the Tribunal invited the Claimant to comment on the Respondent's request by 19 May 2023 and invited the Respondent to provide the Tribunal only with the Word version of its original Post-Hearing Brief dated 17 April 2023 also by 19 May 2023.

81. On 18 May 2023, the Claimant provided comments regarding the Respondent's communication of 15 May 2023.

82. On 19 May 2023, pursuant to the Tribunal's instructions in PO9, the Respondent introduced legal authority RA-105 into the record. By separate communication, the Respondent submitted to the Tribunal only the Word version of the Respondent's original first Post-Hearing Brief.

83. Also on 19 May 2023, the Respondent submitted its revised First Post-Hearing Brief in accordance with the Tribunal's instructions in PO9.

84. On 2 June 2023, the Respondent sought leave to submit the final redacted transcripts and recordings from the *Freeport* arbitration hearing into the record. On 9 June 2023, the Claimant opposed the Respondent's request.

85. On 20 June 2023, the Tribunal issued its Procedural Order No. 10 rejecting the Respondent's request of 2 June 2023 ("**PO10**").

86. On 16 June 2023, the Parties submitted their Reply Post-Hearing Briefs.

87. On 16 July 2023, the Respondent requested an extension of time for the submission of their Statements of Costs, and the Claimant agreed with the Respondent's request. On 17 July 2023, the Tribunal granted the Respondent's extension request.

88. On 21 July 2023, the Parties submitted their Statements of Costs. On 24 July 2023, the Claimant submitted a corrected Statement of Costs.

89. On 28 July 2023, Ms. Marinn Carlson informed the Tribunal of her withdrawal from Respondent's legal team.

90. On 18 October 2023, the Claimant wrote to the Tribunal "seeking leave to submit into the record the receipt evidencing SMCV's payment of certain outstanding liabilities resulting from Peru's breaches of the Treaty, pursuant to Sections 16.3 and 16.4 of Procedural Order No. 1."

91. On 13 November 2023, the Respondent notified the Tribunal that it had appointed the firms Baker Botts LLP and Stanimir A. Alexandrov PLLC as the new external counsel to represent the Respondent in the proceedings.

92. On 17 November 2023, the Respondent submitted comments on the Claimant's request of 18 October 2023.

93. On 21 November 2023, the Tribunal granted the Claimant's request of 18 October 2023 to introduce the new exhibit allegedly reflecting SMCV's payment of approximately USD 26 million in outstanding liabilities. On that same date, pursuant to the Tribunal's instructions, the Claimant submitted this new exhibit as Exhibit CE-1093.

94. On 1 March 2024, the Respondent sought leave from the Tribunal to submit on the record the costs submission filed by the claimant in the *Freeport* Arbitration.

95. On 13 March 2024, the Claimant opposed the Respondent's request.

96. On 26 March 2024, the Tribunal issued Procedural Order No. 11 rejecting the Respondent's request of 1 March 2024 ("**PO11**").

97. On 2 April 2024, the Respondent requested that the Tribunal reconsider its decision on PO11. On 10 April 2024, the Claimant opposed the Respondent's request.

98. On 10 May 2024, the Tribunal issued Procedural Order No. 12 rejecting the Respondent's request of 2 April 2024 ("**PO12**").

99. On 20 May 2024, the Respondent sought leave from the Tribunal to introduce the Award issued in the *Freeport* Arbitration into the record ("***Freeport* Award**"). On 30 May 2024, the Claimant opposed the Respondent's request.

100. On 11 June 2024, the Respondent modified its request of 2 April 2024 and asked the Tribunal for leave to submit the *Freeport* Award as published on the ICSID Website. On 12 June 2024, the Claimant reiterated its opposition to the Respondent's request.

101. On 20 June 2024, the Tribunal issued Procedural Order No. 13 ("**PO13**") admitting the *Freeport* Award into the record "but only for the limited purpose of enabling the Parties to make submissions on any legal analysis and findings made by the Freeport tribunal and only to the extent such analysis and findings are of relevance to the legal issues in dispute in the present arbitration."

102. On 17 July 2024, the Respondent submitted its comments on the *Freeport* Award.

103. On 12 August 2024, the Claimant submitted its comments on the *Freeport* Award.

104. On 25 September 2024, the Claimant wrote to the Tribunal to inform it that on 20 September 2024, ICSID registered the Claimant's application for partial annulment of the *Freeport* Award under Article 52 of the ICSID Convention.

105. On 26 September 2024, the Respondent wrote to inform the Tribunal, *inter alia*, that the Claimant's application for partial annulment of the Freeport Award was limited to the

Freeport Award's rejection of the Claimant's Article 10.5 claims based on the Respondent's failure to waive the penalties and interests on the "Royalty Assessments."

106. The proceedings were closed on 25 June 2026.

II. FACTUAL BACKGROUND

107. The following section sets out a summary of the undisputed events relevant to the dispute. It is not intended as an exhaustive record of all facts relevant to the dispute. To the extent additional facts are relevant to the Tribunal's decisions, those shall be referred to in the Tribunal's reasoning. The absence of reference to particular facts or assertions, or to the evidence supporting any particular fact or assertion, should not be taken as an indication that the Tribunal did not consider those matters. The Tribunal has carefully considered all evidence and arguments submitted to it in the course of these proceedings.

1. History of the Cerro Verde Mine

108. The dispute relates to mining activities at Cerro Verde, an open-pit copper and molybdenum mine in the Arequipa region of Peru. Cerro Verde's modern history began in 1916, when the Anaconda Copper Mining Company ("**Anaconda**"), a U.S. company, commenced an initial exploration of the mine that led to it ultimately purchasing Cerro Verde's mineral rights. For four decades, Anaconda exported excavated ore for processing abroad. Starting in 1964, Anaconda conducted additional studies that resulted in the conclusion that local processing was feasible.[4]

109. The Cerro Verde mine was nationalized in 1970, following which the Government granted special mining rights to a newly formed State-owned entity, Empresa Minero del Perú ("**Minero Perú**") to extract ore from the two open pits at Cerro Verde, known as the Cerro Verde and Santa Rosa pits.[5] In October 1971, Minero Perú signed a contract with engineer firms Wright Engineers Ltd., British Smelter Constructions Ltd., and Ralph M. Parsons

[4] Claimant's Memorial, ¶¶ 32-34; Wright Engineers Ltd., Feasibility Study for the Cerro Verde Project for Empresa Minera del Perú (1 February 1972), Vol. II, p. I-1 (**CE-291**).

[5] Direct Exploitation by the State of Mining Rights in the Department of Arequipa, Supreme Decree No. 023-70-EM/DGM (15 December 1970) (**CE-287**); Establishing the Right of the State Over Expired Metal Concessions, Supreme Decree No. 012-72-EM/DGM (20 January 1972) (**CE-289**).

Co., to help secure financing to construct facilities to process the oxides at Cerro Verde,[6] which it began doing so in 1972.[7] In December 1971, Minero Perú signed a second contract with British Smelter Constructions Ltd. and Wright Engineers Ltd. to conduct a feasibility study for processing options for Cerro Verde mine, including the primary sulfides.[8]

110. On 7 February 1972, a feasibility study was published (the "**1972 Feasibility Study**"), which referred to two stages of production: first oxides, and second primary sulfides. At the time of the study, the cost of the second stage was described as "prohibitive."[9]

111. Minero Perú conducted further exploration of the primary sulfides, producing a further feasibility study on 5 March 1975 revealing that minable ore at Cerro Verde exceeded an estimated 1 billion tons with an average grade of more than 0.5% copper, and concluding that the deposit could justify building a concentrator four to six times larger than the 20,000 MT concentrator envisaged in the 1972 Feasibility Study.[10]

112. Throughout 1976, Minero Perú proceeded to construct an on-site leaching plant to process oxide.[11] On 15 July 1976, the Ministry of Energy and Mines ("**MINEM**") granted to Minero Perú three special mining rights, which are administrative titles granted to State-owned companies to carry out mining activities, namely: Cerro Verde No. 1, Cerro Verde No. 2 and Cerro Verde No. 3.[12]

113. On 13 January 1977, MINEM granted Minero Perú a special processing right, the "Beneficiation Plant Cerro Verde" to process minerals.[13] It is disputed between the Parties

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6 Wright Engineers Ltd., Copper: From Oxides to Cathodes (1 April 1978), p. 3 (**CE-296**).

7 Supreme Decree No. 027-76-EM/DGM (15 July 1976) (**CE-2**); Wright Engineers Ltd., Feasibility Study for the Cerro Verde Project for Empresa Minera del Perú (1 February 1972), Vol. I, p. 0-1 (noting that production on the stockpiled ore is scheduled to commence in 1974) (**CE-290**).

8 Wright Engineers Ltd., Feasibility Study for the Cerro Verde Project for Empresa Minera del Perú (1 February 1972), Vol. I, Introduction, p. iv (**CE-290**).

9 Claimant's Memorial, ¶ 37; Wright Engineers Ltd., Feasibility Study for the Cerro Verde Project for Empresa Minera del Perú (1 February 1972), Vol. I, pp. 0-41, 0-52 (**CE-290**).

10 Ralph M. Parsons Co., Cerro Verde Project, Stage II: Preliminary Feasibility Study (5 March 1975), pp. I-2-1 to I-2-2 (**CE-292**).

11 Supreme Decree No. 002-77-EM/DGM (13 January 1977) (**CE-295**) (noting that Minero Perú applied for a special right to process minerals through the newly completed processing plant on 8 November 1976).

12 Supreme Decree No. 027-76-EM/DGM (15 July 1976) (**CE-2**).

13 Supreme Decree No. 002-77-EM/DGM (13 January 1977) (**CE-295**).

whether this is just in relation to minerals extracted from all of Cerro Verde No. 1, Cerro Verde No. 2 and Cerro Verde No. 3 (as asserted by the Claimant)[14] or just Cerro Verde No. 1 (as asserted by the Respondent).[15]

114. In 1979, Minero Perú completed the construction of a pilot concentrator with a capacity of 100 MT/d.[16] Minero Perú continued to explore the possibility of constructing a larger concentrator in three additional feasibility studies completed in 1975, 1977 and 1980, the latter two of which considered construction of a 60,000 MT/d concentrator, but concluded that a plan of that size could not be built without an expensive new power source.[17]

115. In 1981, Minero Perú partnered with Kuhn Loeb Lehman Brothers International Inc., a financial advisory firm, to seek US$288 million in foreign investment to construct and operate a larger concentrator based on the 1980 feasibility study.[18]

116. On 19 December 1984, MINEM consolidated Minero Perú's three special mining rights into one single mining right "Cerro Verde No. 1, No. 2 and No. 3."[19]

117. In 1985, the Wright Engineers Ltd. completed another concentrator feasibility study (the "**1985 Feasibility Study**"), the "principal conclusion" of which was that Cerro Verde's primary sulfides represented "one of the most viable of the future porphyry copper projects in world inventory at the present time."[20]

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14 Claimant's Memorial, ¶ 39.

15 Tr. Day 1, 185:4-186:8, referring to Respondent's Opening Presentation, slide 22 (**RD-1**).

16 Morgan Grenfell & Co. Ltd., Cerro Verde Copper Mine: Information Memo (April 1993), p. 1.1 (**CE-321**).

17 Ralph M. Parsons Co., Feasibility Study (1977) (Excerpt) (**CE-294**); Minero Perú & Kuhn Loeb Lehmann Brothers International Inc., Cerro Verde II: Project Memorandum (October 1981), p. 39 (**CE-297**) (summarizing the findings of the 1980 feasibility study).

18 Minero Perú & Kuhn Loeb Lehman Brothers International Inc., Cerro Verde II: Project Memorandum (October 1981) (**CE-297**), p. 1.

19 MINEM, Supreme Resolution No. 332-84-EM/DGM (19 December 1984) (**CE-298**).

20 Wright Engineers Ltd., Cerro Verde—II Stage Sulphide Ore: Feasibility Study (March 1985), p. 2-4 (**CE-300**).

2. Single Unified Text of the General Mining Law and Regulations to Title Nine of the General Mining Law

118. In 1991, the Peruvian Government established a legal framework for privatization by creating the Commission to Promote Private Investment ("**COPRI**") and the Special Committee to Promote Private Investment in Production Units ("**CEPRI**").[21]

119. On 6 November 1991, Legislative Decree No. 708, the "Law for the Promotion of Investments in the Mining Sector," was enacted ("**L.D. 708**"),[22] which supplemented the existing mining legal framework, Legislative Decree No. 109 ("**L.D. 109**").[23]

120. On 20 December 1991, following a request from Minero Perú, MINEM converted Minero Perú's special mining right into a mining concession "Cerro Verde No. 1, No. 2 and No. 3") (being the "**Mining Concession**") and converted the special processing right into a beneficiation concession "Beneficiation Plant Cerro Verde" (the "**Beneficiation Concession**").[24]

121. On 3 June 1992, Peru enacted the Single Unified Text of the General Mining Law, which consolidated L.D. 708 and L.D. 109 (the "**Mining Law**").[25] The Mining Law aimed to offer a number of incentives "to promote private investment in mining activity," including the establishment of a regime for tax, currency exchange and administrative stability.[26]

122. On 6 April 1993, CEPRI submitted its plan for the privatization of Cerro Verde, which was approved by COPRI on 29 April 1993.[27]

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[21] Promotion of Private Investment in Enterprises of the State, Legislative Decree No. 674 (27 September 1991) (**CE-305**); CEPRI, General Act for the Promotion of Private Investment in the Production Units of Minero Perú (31 May 1996), pp. 1, 8 (**CE-349**).

[22] Promotion of Investment in the Mining Sector, Legislative Decree No. 708 (6 November 1991) (**CA-46**).

[23] General Mining Law, Legislative Decree No. 109 (12 June 1981) (**CA-37**).

[24] Directorial Resolution No. 126-91-EM/DGM (20 December 1991) (the "**Mining Concession**") (**CE-307**); Directorial Resolution No. 140-91-EM/DGM (20 December 1991) (the "**Beneficiation Concession**") (**CE-308**).

[25] Single Unified Text of the General Mining Law, Supreme Decree No. 014-92-EM (the "**Mining Law**") (**HA-1**).

[26] The Mining Law, Article 72 (**HA-1**).

[27] Supreme Resolution No. 142-93 (22 April 1993) (**CE-325**); CEPRI, Communication No. MP-096/93 (6 April 1993) (**CE-324**).

123. On 1 June 1993, Minero Perú created SMCV for the purposes of privatising Cerro Verde, and granted SMCV the Mining and Beneficiation Concessions, following which SMCV was formally incorporated through a public deed dated 29 August 1993, which noted that Minero Perú capitalized SMCV with S/ 277 million (about US$110 million).[28]

124. On 7 June 1993, MINEM issued the Regulations to Title Nine of the General Mining Law (the "**Mining Regulations**"), which regulated the Mining Law's provisions relating to stabilisation agreements.[29]

3. Acquisition of SMCV

125. On 4 November 1993, Cyprus Minerals Company, a U.S. company, submitted the only bid for Cerro Verde.[30] On 15 November 1993, Cyprus Minerals Company merged with Amax Inc. to form Cyprus Amax Minerals Company ("**Cyprus**").[31]

126. On 17 March 1994, Minero Perú and a Cyprus subsidiary executed the Share Purchase Agreement (the "**SPA**"), transferring 91.65% of Minero Peru's shares in SMCV to Cyprus's subsidiary.[32] The SPA committed the Government to executing the legal stability agreements with SMCV and Cyprus, and committed Cyprus to certain investments, including construction of a concentrator.[33]

127. On the same day, Peru and Cyprus entered into the "Guaranty of the Republic of Peru in favor of Cyprus Climax Metals Company," by which the Government guaranteed the execution of "any" mining stability agreement relating to SMCV's "business and

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28 SMCV Public Deed (20 August 1993), Article 3 (noting that SMCV was created on 1 June 1993) (**CE-330**); Minero Perú, Minutes of Board Meeting No. 633 (7 June 1993) (**CE-328**).

29 Regulations to Title Nine of the General Mining Law, Supreme Decree No. 024-93-EM (**CA-2 (resubmitted)**).

30 Cyprus, Cyprus Privatization Proposal (4 November 1993) (**CE-334**); CEPRI, Minutes of SMCV Privatization (3 July 1996) (**CE-351**), p. 65.

31 Letter from ProInversión and Morgan Grenfell to CEPRI (7 February 1994) (**CE-340**); CEPRI, Minutes of SMCV Privatization (3 July 1996), p. 28 (**CE-351**).

32 Share Purchase Agreement between Cyprus Climax Metals Co. and Empresa Minera del Perú S.A. (17 March 1994) (**CE-4**).

33 SPA, Article 2.1, Article 3.1(f)-(g), Appendix (G) (**CE-4**).

operations" to which SMCV was entitled within 90 days of having complied with all requirements under the Mining Law.[34]

4. The 1994 and 1998 Stability Agreements[35]

128. On 26 May 1994, Peru and SMCV signed the 1994 Stability Agreement, a 10-year mining stability agreement under Article 78 of the Mining Law (the "**1994 Stability Agreement**").[36] To meet the Mining Law's requirement of an "investment program" demonstrating a minimum of US$2 million commitment, the Government and SMCV relied on an existing Minero Perú feasibility study for small improvements to the leaching facilities.[37]

129. In December 1993 and January 1995, Cyprus engaged Fluor Daniel Wright and Bechtel Corporation, respectively, to conduct studies relating to the feasibility of expanding SMCV's leaching operations and constructing a new concentrator.[38] Cyprus presented both studies to Minero Perú in September 1995 as a consolidated study prepared by Minerals Advisory Group ("**MAG**").[39] The Fluor/MAG study found that it would be economically feasible for SMCV to construct a new leaching pad, plus associated equipment, and to expand the Solvent Extraction / Electrowinning Plant (the "**SC/EW plant**") which would increase annual production by around 35%.[40] However, the Bechtel/MAG study concluded that investing in a concentrator was not economically feasible, largely due to the lack of available water and power sources to support its operation.[41]

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34 Guaranty of the Republic of Peru in Favor of Cyprus Climax Metals (17 March 1994), Article 1.6 (**CE-341**).

35 The terms "Stability Agreement" and "Stabilization Agreement" are used interchangeably throughout the Award.

36 Agreement of Guarantees and Measures for the Promotion of Investments Between the Peruvian State and SMCV (26 May 1994) (**CE-344**).

37 1994 Stability Agreement, Article 1.3 (**CE-344**). See also Mining Law, Article 79 (**CA-1/HA-1**).

38 Minerals Advisory Group LLC, Cerro Verde Expansion Project: Summary Feasibility (September 1995), p. 2-2 (**CE-348**).

39 Minerals Advisory Group LLC, Cerro Verde Expansion Project: Summary Feasibility (September 1995), p. 2-2 (**CE-348**).

40 Minerals Advisory Group LLC, Cerro Verde Expansion Project: Summary Feasibility (September 1995), pp. 7.1-7.2, 7-8 (**CE-348)**.

41 Minerals Advisory Group LLC, Cerro Verde Expansion Project: Summary Feasibility (September 1995), p. 2-12 (**CE-348)**.

130. On 25 January 1996, SMCV submitted a feasibility study to the Directorate General of Mining ("**DGM**") in support of its application to enter into a 15-year stability agreement pursuant to Articles 82 and 83 of the Mining Law.[42] To demonstrate that it met the US$50 million minimum investment requirement under the Mining Law, SMCV submitted a revised version of the 1995 Fluor feasibility study for the improvements, upgrades and further development of the existing leaching facility and infrastructure (the "**1996 Feasibility Study**").[43]

131. On 6 May 1996, the DGM approved the 1996 Feasibility Study.[44]

132. In June 1996, ICF Kaiser completed a second study assessing the feasibility of a concentrator (the "**1996 Mill Feasibility Study**").[45] On 16 September 1996, Cyprus sent the 1996 Mill Feasibility Study to Minero Perú, advising that constructing a concentrator was "uneconomical" at the time, and exercising its right under the SPA to reduce its investment commitment. Cyprus also requested an 18-month extension to "perform additional studies and test work in an attempt to establish that it [was] economically feasible to construct a mill for processing the Cerro Verde sulphide ores," which the Government granted. [46]

133. On 30 December 1997, MINEM's Legal Department issued a memorandum with respect to the coexistence of the 1994 Stability Agreement and the pending 1998 Stability Agreements.[47]

134. On 13 February 1998, Peru and SMCV signed a Stability Agreement, which was a 15-year stability agreement under Articles 82 and 83 of the Mining Law (the "**1998 Stability Agreement**").[48]

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42 1996 Feasibility Study (**CE-9**); SMCV, Request for Stability Agreement (25 January 1996) (**CE-7**).

43 1996 Feasibility Study, Executive Summary, p. 1 (**CE-9**).

44 MINEM, Report No. 043-96-EM-DGM-DFM/DFAE (6 May 1996) (**CE-8**); MINEM, Report No. 708-97-EM/DGM/OTN (30 December 1997) (**CE-356**).

45 ICF Kaiser Engineers Inc., Feasibility Study Analysis for the Cerro Verde Project (June 1996) (**CE-350**).

46 Letter from Cyprus Climax Metals Co. to Empresa Minera del Perú, S.A. (16 September 1996), p. 2 (**CE-11**).

47 MINEM, Report No. 002-98-EM-OGAJ (6 January 1998) (**RE-23**).

48 1998 Stability Agreement (**CE-12**).

135. On 23 November 1998, MINEM certified SMCV's sworn statement that SMCV had implemented the investment program in the Feasibility Study in accordance with Article 30 of the Mining Regulations, fixing the stabilisation date of the 1998 Stability Agreement as of 6 May 1996.[49] As required by Article 33 of the Mining Regulations, on 30 November 1998, SMCV informed SUNAT and MINEM of its intent to rely on the stabilized regime under the Stability Agreement as of 1 January 1999.[50]

5. Phelps Dodge Acquisition, SMCV Additional Investments, and Assessment of Construction of the Concentrator

136. In October 1999, Phelps Dodge acquired Cyprus and its majority stake in SMCV.[51]

137. On 5 September 2000, Peru repealed the reinvestment of profits benefit in Article 72(b) of the Mining Law.[52]

138. On 30 March 2001, Minero Perú and Cyprus (now owned by Phelps Dodge) signed the Settlement Agreement, whereby Minero Perú relinquished its claim for breach of the SPA for failure to construct a concentrator, in exchange for a commitment by Phelps Dodge to invest an additional US$50 million and to further explore the feasibility of building a concentrator.[53]

139. In October 2001, SMCV agreed to invest in a hydroelectric dam in the nearby Pillones River, entering into an agreement with Empresa de Generación Eléctrica de Arequipa S.A. ("**EGASA**"), the regional State-owned energy company. SMCV ultimately finalised the

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[49] MINEM, Directorial Resolution No. 342-98-EM/DGM (23 November 1998), Preamble and Articles 1-2 (**CE-360**).

[50] SMCV Letter to SUNAT (25 November 1998) (**CE-361**); SMCV Letter to MINEM (25 November 1998) (**CE-362**).

[51] [**Morán 1**], ¶¶ 10-12.

[52] Stability Agreements with the State, Law No. 27343 (5 September 2000) (**CA-79**).

[53] Out-of-Court Settlement Agreement between Cyprus Climax Metals Co. and Empresa Minera del Perú S.A. (30 March 2001) (**CE-17**).

agreement in April 2004, contributing 40% of the US$17 million in capital costs required for the project.[54]

140. On 21 May 2002, MINEM approved SMCV's US$15 million investment to expand the processing capacity of the Beneficiation Concession (specifically by expanding Pad 2).[55]

141. On 23 September 2002, SUNAT issued Report No. 263-2002-SUNAT/K00000 with respect to the applicability of tax stability agreements (the "**2002 SUNAT Report**").[56]

142. In December 2002, SMCV completed the pre-feasibility study for the Concentrator (the "**2002 Pre-Feasibility Study for the Concentrator**").[57]

143. Beginning in late 2002 and early 2003, as increasing copper prices led to increased mining profits, some Peruvian politicians began asserting that mining companies should be more heavily taxed and pushed to assess a royalty based on a percentage of mining profits.[58]

144. In June 2003, Phelps Dodge retained Fluor Canada Ltd. to conduct a feasibility study for the construction of the Concentrator, which was eventually released in May 2004 (the "**2004 Feasibility Study for the Concentrator**").[59]

145. Between 3 and 8 July 2003, SMCV requested that the DGM confirm that it could use the profit reinvestment benefit to finance the construction of the Concentrator.[60]

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54 Empresa de Generación Eléctrica de Arequipa S.A., Final Liquidation of Work: Pillones Dam (30 May 2011), p. 1 (**CE-53**); EGASA and SMCV, Consortium Contract for the Construction of the Pillones Dam (27 April 2004), Clauses 5.1, 5.3 (**CE-430**).

55 MINEM, Directorial Resolution No. 151-2002-EM/DGM (21 May 2002) (**CE-382**); MINEM, Report No. 056-2002-EM-DGM/DPDM (18 February 2002) (**CE-380**); SMCV, Petition No. 1341243 to MINEM (30 October 2001) (**CE-376**).

56 SUNAT, Report No. 263-2002-SUNAT/K00000 (23 September 2002) (**RE-26**).

57 SMCV, Primary Sulfide Preliminary Pre-Feasibility Study (the "**2002 Pre-Feasibility Study**") (December 2002), pp. 11, 16 (**CE-928**).

58 See e.g., *Tax Avoidance in the Chilean Mining Sector?*, La República (16 May 2003) (**CE-389**); *The Hundred Days Proposal*, Arequipa al Día (5 February 2003) (**CE-387**).

59 Fluor Canada Ltd., Feasibility Study: Cerro Verde Primary Sulfide Project (May 2004) (**CE-20**).

60 SMCV, Petition No. 1418719 to MINEM (3 July 2003) (**CE-394**).

146. On 8 September 2003, the DGM responded to SMCV's enquiry, concluding that SMCV could apply to reinvest its profits into the Concentrator project.[61]

147. The DGM issued another report on 8 September 2003, which stated:

> "*About the question whether the stabilized regime would be applicable to the company, the prohibition contained in Article 8 of Supreme Decree No. 027-98-EF points out that the application of the Stabilized Regime is granted to the Cerro Verde Leaching Project and not to the company and the Regime is the one described in the aforementioned agreement.*"[62]

148. On 28 January 2004, SMCV submitted a request to MINEM to use the profit reinvestment benefit to finance the construction of the Concentrator.[63]

149. On 10 February 2004, Phelps Dodge extended an offer to Sumitomo Metal Mining to acquire an equity stake in SMCV in exchange for financing for the Concentrator.[64]

150. On 11 March 2004, the Mining Royalties Forum was held, featuring presentations from César Polo and Fernando Sánchez Albavera.[65] Mr Polo, then the MINEM Vice-Minister, explained at the forum that:

> "*Stabilization agreements are not granted per company, that is important to clarify. A company can have [a] stabilization agreement for one project and not have it for another [project], or [can] have an old activity that does not have a stabilization agreement and a new one that does. That's how it is, it is not granted for the whole company. An investment above 20 million or above 50 is made, depending on the case, and it grants the right to*

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61 MINEM, Report No. 510-2003-MEM-DGM-TNO (8 September 2003) (**CE-399**).

62 MINEM, Report No. 509-2003-MEM-DGM-TNO (8 September 2003) (**CE-398**) (see translation in Respondent's Counter-Memorial, ¶ 161).

63 SMCV, Petition No. 3616468 to MINEM (28 January 2004) (**CE-421**).

64 Letter from Phelps Dodge to Sumitomo Metal Mining (10 February 2004) (**CE-424**).

65 Audio of César Polo's Presentation, Mining Royalties Forum, Congress of the Republic (11 March 2004) (**RE-185**); Audio of Minister Fernando Sánchez Albavera's Response, Mining Royalties Forum, Congress of the Republic (11 March 2004) (**RE-183**).

stabiliz[e] for that investment, for that development, and not for the whole company."[66]

151. On 1 May 2004, Fluor released the 2004 Feasibility Study for the Concentrator.[67] The study considered four design options, and confirmed that upgrades in the power grid and the Pillones dam project had resolved the earlier energy and water limitations, rendering all four options viable at a range of commodity prices, copper smelting and refining costs, and discount rates.[68] In reaching this conclusion, the authors of the 2004 Feasibility Study had proceeded on the assumption that the 1998 Stability Agreement would apply to the Concentrator.[69]

152. On 15 June 2004, an internal meeting took place between María Chappuis Cardich ("**Ms Chappuis**"), Oswaldo Tovar ("**Mr Tovar**") and other MINEM officials.[70]

153. On 3 June 2004, the Peruvian Congress adopted the Mining Royalty Law, which was signed into law and took effect on 23 June 2004 (the "**Mining Royalty Law**").[71] The law imposed a marginal one percent royalty for every US$60 million in revenue, with a maximum of three percent for revenues in excess of US$120 million.[72]

154. Following the enactment of the Mining Royalty Law, the Government proposed several amendments related to the mechanism for calculating the royalty, including creating a floor tied to international mineral prices below which the royalty would not apply.[73] On the same

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66 Audio of César Polo's Presentation, Mining Royalties Forum, Congress of the Republic (11 March 2004) (**RE-185**), at timestamps 00:09:37 – 00:10:03 (see translation in Respondent's Rejoinder, ¶ 311).

67 Fluor Canada Ltd., Feasibility Study: Cerro Verde Primary Sulfide Project (May 2004) (**CE-20**).

68 Fluor Canada Ltd., Feasibility Study: Cerro Verde Primary Sulfide Project (May 2004), Vol. I, pp. 1, 30-31 (**CE-20**).

69 Fluor Canada Ltd., Feasibility Study: Cerro Verde Primary Sulfide Project (May 2004), Vol. IV, pp. 14-15 (**CE-20**).

70 Email from Maria Chappuis to Rosario Padilla, Jaime Chávez Riva Gálvez, Oswaldo Tovar, Luis Saldarriaga Colona, and Luis Panizo, "Meeting with Cerro Verde – New CET" (11 June 2004) (**RE-198**).

71 Congress, Draft Law No. 10443/2003-CR (28 April 2004) (**CE-431**); Mining Royalty Law No. 28258 (23 June 2004) (**CA-6**).

72 Mining Royalty Law No. 28258 (23 June 2004), Articles 2, 5 (**CA-6**).

73 Congress, Draft Law No. 10876/2003 (24 June 2004), pp. 2-3 (**CE-446**).

day as the law came into effect, the Mining Society announced that it planned to collect 5,000 signatures to file a lawsuit challenging the law's constitutionality.[74]

155. In August 2004, and possibly July 2004, meetings took place between SMCV and MINEM.[75] The content and timing of these meetings is disputed between the Parties.

156. On 27 August 2004, SMCV submitted a request to expand the Beneficiation Concession to include the Concentrator.[76] It is disputed between the Parties whether the request was to expand both the area and the capacity of the Beneficiation Concession.

157. On 3 September 2004, SMCV resubmitted to the DGM its application under the profit reinvestment program for the construction of the Concentrator, following the DGM's rejection in January on technical grounds requesting additional information.[77]

158. In September 2004, Fluor delivered an updated Feasibility Study for the Concentrator, which focused on incremental results for the 108,000 MT/d concentrator and which also took into account the new Mining Royalty Law. Fluor's analysis assumed that "no royalties will be assessed during the stability agreement" up to the end of 2013, but that "[t]he project economics include a tiered royalty structure from 1% to 3% on Net Smelter Returns starting in 2004."[78]

159. On 11 October 2004, the Boards of SMCV and Phelps Dodge conditionally approved the US$850 million investment for the construction of the Concentrator, contingent upon receiving certain approvals.[79]

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74 Miners to Take Legal Action Against Royalty, Business News Americas (24 June 2004) (**CE-447**).

75 SMCV, Justification of Request for Formal Inclusion of Benefit Concession in the Current Stability Agreement (August 2004) (**CE-453**); SMCV, Past – Present - Future (July 2004) (**CE-450**).

76 SMCV, Petition No. 1487019 to MINEM (27 August 2004) (**CE-457**).

77 SMCV, Petition No. 1488199 to MINEM (3 September 2004) (**CE-462**).

78 Fluor, SMCV Primary Sulfide Project Feasibility Study Project Update (September 2004), p. 46 (**CE-459**).

79 SMCV, Board of Directors Meeting Minutes (11 October 2004) (**CE-470**); Phelps Dodge, Form 10-K 2004 (7 March 2005), p. 66 [PDF p. 69] (**CE-901**).

160. On 26 October 2004, MINEM approved SMCV's request to expand the Beneficiation Concession and construct the Concentrator therein.[80]

161. On 30 November 2004, MINEM approved SMCV's request under the profit reinvestment program.[81] On 3 December 2004, the Ministry of Economy and Finance ("**MEF**") added its approval for the profit reinvestment program.[82]

162. On 9 December 2004, MEF and MINEM gave final approval to SMCV's request to use the profit reinvestment benefit for the construction of the Concentrator.[83]

163. In December 2004, SMCV began constructing the Concentrator.[84]

6. Challenges to SMCV's profit reinvestment benefit, disputes as to scope of stability guarantees, and incorporation of SMM Cerro Verde

164. On 17 January 2005, Congressman Javier Diez Canseco ("**Congressman Canseco**") started to request that MINEM Minister Glodomiro Sánchez Mejía ("**Minister Mejía**") provide information about the "technical and legal support and the cost-benefit analysis" supporting MINEM's approval of SMCV's profit reinvestment benefit.[85]

165. On 17 February 2005, SUNAT sent a letter to SMCV containing instructions with regard to the process of calculating royalty payments.[86]

166. On 23 February 2005, Minister Mejía responded to Congressman Canseco's request for information concerning MINEM's approval of SMCV's profit reinvestment benefit.[87]

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80 MINEM, Report No. 784-2004-MEM-DGM/PDM and Directorial Order No. 1027-2004-MEM-DGM/PDM (26 October 2004), p. 3 (**CE-476**).

81 MINEM, Report No. 841-2004-MEM/DGM/PDM (30 November 2004), p. 5 (**CE-479**).

82 MEF, Report No. 209-2004-EF/66.01 (3 December 2004), p. 4 [PDF] (**CE-22**); MEF, Official Letter No. 942-2004-EF/10 (3 December 2004) (**CE-21**).

83 MEF, Ministerial Resolution No. 510-2004-MEM/DM (9 December 2004) (**CE-23**).

84 [**Davenport 1**], ¶ 41.

85 Congressman Canseco to Minister Mejía, Official Letter No. 083-2005-JDC/CR (17 January 2005) (**CE-942**).

86 SUNAT, Letter to SMCV (17 February 2005) (**CE-482**).

87 Congressman Canseco to Minister Mejía, Official Letter No. 272-2005-MEM/DM (23 February 2005) (**CE-943**).

167. On 4 March 2005, SMCV responded to SUNAT's 17 February 2005 letter stating that the Mining Royalty Law is not applicable to SMCV due to the Stability Agreement.[88]

168. On 8 and 9 March 2005, Phelps Dodge's President, Harry Conger, ("**Mr Conger**") met with officials during the annual Prospectors & Developers Association of Canada Convention ("**PDAC**") in Canada, at which Mr Conger gave a presentation titled "Peru and Phelps Dodge: Partners in Progress."[89]

169. On 16 March 2005, Sumitomo Metal Mining, Phelps Dodge, SMCV, and others entered into the Participation Agreement to provide financing for the Concentrator investment ("**Participation Agreement**"). The Participation Agreement recognized that the Concentrator would be located "within the mining concessions owned by [SMCV]" and developed according to the plan set out in the 2004 Feasibility Study and its September 2004 update.[90]

170. On 30 March 2005, according to the Respondent, SUNAT requested MINEM's opinion on the application of the Mining Royalty Law with respect to projects for which a stability agreement had been signed.[91]

171. On 1 April 2005, the Constitutional Tribunal upheld the constitutionality of the Mining Royalty Law, concluding that royalties are not taxes but an administrative charge.[92]

172. On 14 April 2005, Felipe Isasi Cayo, MINEM's Director General of Legal Affairs, ("**Mr Isasi**") issued the April 2005 Report which analysed in detail the application of the Mining

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88 SMCV, Letter No. SMCV-AL-279/2005 to SUNAT (4 March 2005) (**CE-486**), responding to SUNAT, Letter to SMCV (17 February 2005) (**CE-482**).

89 Alicia Polo y La Borda to Oswaldo Tovar, Email "Ayuda Memoria-reuniones.doc" (with attachment) (4 March 2005) (**RE-4**); Phelps Dodge, Peru and Phelps Dodge: Partners is Progress (9 March 2005) (**CE-945**).

90 Sumitomo Metal Mining Co., LTD., Sumitomo Corporation, Summit Global Management B.V., Compañía de Minas Buenaventura S.A.A., Phelps Dodge Corporation, Cyprus Amax Minerals Company, Cyprus Metals Company, Cyprus Climax Metals Company and Sociedad Minera Cerro Verde S.A.A., Participation Agreement (16 March 2005) (**CE-29**), p. 5 [PDF].

91 MINEM, Administrative File of Note No. 153-2005-MEM/OGAJ (14 April 2005), pp. 5-6 [PDF] (**RE-175**).

92 Constitutional Tribunal, Decision, Case No. 0048-2004-PI/TC (1 April 2005), ¶¶ 48-56 (**CE-490**).

Royalty Law to companies with stability agreements in light of the Constitutional Tribunal's ruling (the "**April 2005 Report**").[93] The April 2005 Report stated:

> "*The stability granted by the Agreements on Guarantees and Measures to Promote Investment guarantee the legal regime related to tax, currency exchange and administrative matters of the investment project to which they refer. If a mining titleholder has economic administrative units or mining concessions that are not part of the project subject to stability, the regulation establishes that such titleholder must keep the accounting of the project separately. Consequently, it is not the mining titleholder (individuals or legal entity) who will be exempt or not from the payment of royalties, comprehensively as a company, but it will be the mining concessions of which it is the titleholder, depending on whether or not they are part of a project set out in a stability agreement signed prior to the enactment of Law No. 28258. Therefore, only the mining projects referred to in these agreements will be excluded from the royalty calculation basis.*"[94]

173. On 21 April 2005, Sumitomo Metal Mining and Sumitomo Corporation incorporated the Claimant, SMM Cerro Verde, in the Netherlands as the company through which they would invest in SMCV.[95]

174. In May 2005, SMCV initiated a capital increase by issuing pre-emptive subscription rights, and Phelps Dodge transferred its rights to the Claimant and to Buenaventura as set out under the Participation Agreement. SMCV subsequently issued 122,746,913 common shares, valued at US$441.7 million.[96]

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93 MINEM, Report No. 153-2005-MEM/OGAJ (14 April 2005) (**CE-494**). The Tribunal notes that the English translation of **CE-494** mistakenly refers to Report No. /33 -2005-MEM/OGAJ.

94 MINEM, Report No. 153-2005-MEM/OGAJ (14 April 2005), ¶ 17 (**CE-494**) (see translation in Respondent's Counter-Memorial, ¶ 173).

95 SMM Cerro Verde, Certificate of Good Standing (30 March 2020) (**CE-263**); SMM Cerro Verde Netherlands B.V., Deed of Incorporation (21 April 2005), pp. 18 ff [PDF] (**CE-239**).

96 SMCV, Board of Directors Meeting Minutes of 28 April 2005, p. 182 [PDF p. 1] (**CE-497**); SMCV, Financial Statements 2005-2006 (9 February 2007), p. 8 [PDF p. 12] (**CE-561**).

175. On 1 June 2005, the Claimant invested US$265 million to acquire 21% of the shares of SMCV. On the same day, the Claimant entered into a shareholders agreement with Phelps Dodge, SMCV, and others (the "**Shareholders Agreement**").[97]

176. On 8 June 2005, Minister Mejía and other MINEM officials made a presentation about the application of the Mining Royalty Law to mining companies before the Energy and Mines Congressional Committee.[98]

177. On 15 September 2005, Congressman Alejandro Oré Mora requested information from Minister Mejía with respect to the legal stability agreement for the Cerro Verde mine.[99]

178. On 16 September 2005, according to the Claimant, Congressman Canseco threatened constitutional action against Minister Mejía.[100]

179. On 19 September 2005, Congressman Canseco filed a motion before the Congress to create a congressional commission to investigate MINEM's approval of SMCV's profit reinvestment benefit.[101]

180. In a press article dated 20 September 2005, Minister Mejía was quoted as saying that SMCV would have to pay royalties on the Concentrator.[102]

181. On 22 September 2005, Mr Isasi issued a report asserting that SMCV's profit reinvestment benefit had been correctly approved (the "**September 2005 Report**").[103]

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97 SMCV, Registry Book of Stock and Transfers (June 2005) (**CE-501**); SMM Cerro Verde Netherlands B.V, Sumitomo Metal Mining Co. Ltd., Sumitomo Corporation, Summit Global Management B.V., Compañía de Minas Buenaventura S.A.A., Cyprus Climax Metals Company, Phelps Dodge Corporation and Sociedad Minera Cerro Verde S.A.A., Shareholders Agreement (1 June 2005) (**CE-502**).

98 Energy and Mines Congressional Committee, Meeting Minutes (8 June 2005) (**RE-29**).

99 Congressman Oré to Minister Mejía, Official Letter No. 3769-2005-AOM-CR (15 September 2005) (**CE-507**).

100 *Minera Cerro Verde under the Scrutiny of JDC*, La República (16 September 2005) (**CE-508**).

101 Congress, Agenda Motion No. 0366 2605 2006-DDP-EM/CR (19 September 2005) (**CE-510**).

102 Minister: Expansion of Cerro Verde Subject to Royalty Tax, Business News Americas (20 September 2005) (**CE-511**).

103 MINEM, Report No. 385-2005-MEM/OGJ (22 September 2005) (responding to **CE-507**, Official Letter No. 3769-2005-AOM-CR from Congressman Oré to Minister Mejía (15 September 2005)), p. 4 [PDF] (**CE-512**).

182. On 26 September 2005, Minister Mejía responded to Congressman Canseco's allegations, claiming that the Congressman's criticism was misdirected because MINEM was not competent to administer the Mining Royalty Law.[104] The Claimant states that this communication was not shared with SMCV at the time.

183. On 30 September 2005, SMCV entered into a master participation agreement (the "**Master Participation Agreement**") to obtain up to US $450 million in financing from interested lenders for the Concentrator.[105]

184. On 3 October 2005, Minister Mejía responded to Congressman Oré's 15 September 2005 letter requesting information about the 1998 Stability Agreement, asserting that the Concentrator was not stabilized.[106] The Claimant states that this communication was not shared with SMCV at the time.

185. On 5 October 2005, the Energy and Mines Congressional Committee created the Congressional Working Group to investigate Cerro Verde.[107]

186. On 10 October 2005, Congressman Canseco wrote to MINEM requesting information about MINEM's position with respect to Cerro Verde's obligation to pay royalties.[108]

187. On 24 October 2005, Minister Mejía responded to a request from Congressman Manuel Olaechea García, the Coordinator of the Congressional Working Group investigating Cerro Verde, for a report on the "tax benefits" granted to SMCV for the Concentrator investment, stating that SMCV had not been granted any benefits applicable to the Concentrator.[109]

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104 MINEM, Official Letter No. 1718-2005-MEM/DM (26 September 2005) (**CE-953**).

105 Sociedad Minera Cerro Verde S.A.A., Japan Bank for International Cooperation, Sumitomo Mitsui Banking Corporation, The Bank of Tokyo-Mitsubishi, Ltd., Kfw, Calyon New York Branch, The Royal Bank of Scotland Plc, The Bank of Nova Scotia, Mizuho Corporate Bank, Ltd., and Calyon New York Branch, Master Participation Agreement (30 September 2005) (**CE-513**).

106 MINEM, Official Letter No. 1725-2005-MEM/DM (3 October 2005) (**CE-515**) (responding to Official Letter No. 3769-2005-AOM-CR from Congressman Oré to Minister Mejía (15 September 2005) (**CE-507**)).

107 Energy and Mines Congressional Committee, Minutes of Session 6 (5 October 2005), pp. 2-3 (**CE-516**).

108 Congressman Canseco, Letter No. 0461-2005-JDC/CR (4 October 2005) (**RE-2**).

109 MINEM, Official Letter No. 1884-2005-MEM/DM (24 October 2005) (**CE-955**).

188. On 8 November 2005, Minister Mejía wrote to Congressman Canseco with respect to royalty payments the Government would seek from SMCV.[110] The Claimant states that this communication was not shared with SMCV at the time.

189. On 31 January 2006, SMCV presented on the Concentrator investment and the profit reinvestment benefit before the Congressional Working Group investigating Cerro Verde.[111]

190. On 13 March 2006, Congressman Olaechea sent MEF Minister, Fernando Zavala, a request for information about the "tax benefits granted" to SMCV through the approval of the profit reinvestment benefit.[112]

191. On 20 March 2006, the Congressional Working Group investigating Cerro Verde requested additional information from SMCV on the "tax benefits granted" through the profit reinvestment benefit and its impact "on the Income Tax . . . and on the Mining Canon for Arequipa."[113]

192. On 26 April 2006, SMCV obtained the remaining financing required for the Concentrator through a corporate bonds issuance program for US$90 million.[114]

193. On 3 May 2006, Mr. Isasi presented before the Congressional Working Group investigating Cerro Verde on the scope of the Stability Agreement, explaining that the Concentrator was not stabilized.[115] On the same day, there was a presentation by SUNAT National Superintendent and Minister Zavala before the Energy and Mines Congressional Committee as to the application of the Mining Royalty Law.[116]

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110 MINEM, Official Letter No. 2004-2005-MEM/DM (8 November 2005) (**CE-519**).

111 SMCV, Presentation Before the Congressional Working Group (31 January 2006) (**CE-523**).

112 Congressman Olaechea to Minister Zavala, Official Letter No. 007-2005-2006-GTCV-CEM-CR (13 March 2006) (**CE-959**).

113 Congress, Official Letter No. 005-2005-2006-GTCV-CEM-CR (dated 13 March 2006) (**CE-524**).

114 SMCV, Financial Statement 2005-2006, p. 26 [PDF p. 30] (**CE-561**).

115 MINEM, "Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project" (May 2006) (**RE-3**).

116 Energy and Mines Congressional Committee, Session Transcript (3 May 2006) (**CE-963**).

194. On 11 May 2006, SMCV replied to the Congressional Working Group's request for information on the profit reinvestment benefit.[117]

195. In June 2006, SUNAT issued an internal report on the scope of the Stability Agreement.[118]

196. On 16 June 2006, Mr Isasi sent a report to the Minister of Energy and Mines (the "**June 2006 Report**") on the scope of the Stability Agreement, concluding that the Concentrator was not stabilized because the Stability Agreement applied only to the investment project outlined in the Feasibility Study.[119]

197. On 21 June 2006, Congressman Canseco proposed a bill retroactively to repeal the Ministerial Resolution that accorded SMCV the profit reinvestment benefit for the Concentrator.[120]

198. On 23 June 2006, the Roundtable Discussions commenced, with representatives from SMCV, MEF, MINEM, local Arequipa politicians, and other stakeholders in attendance.[121]

199. On 29 June 2006, the second meeting of the Roundtable Discussions took place.[122]

200. On 3 July 2006, MEF Minister Zavala responded to Congressman Olaechea's 13 March 2006 request for information about the approval of SMCV's profit reinvestment benefit.[123]

201. On 10 July 2006, the third meeting of the Roundtable Discussions took place.[124]

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[117] SMCV, Letter No. SMCV-AL-686-2006 to Congressman Olaechea (11 May 2006) (responding to **CE-524**, Congress, Official Letter No. 005-2005-2006-GTCV-CEM-CR (13 March 2006)) (**CE-529**).

[118] SUNAT, Report on the Application of the Agreement of Guarantees and Measures for the Promotion of Investments and the Mining Royalty with respect to the Expansion of Cerro Verde's Current Operations – Primary Sulfides Project (June 2006) (**RE-179**).

[119] MINEM, Report No. 156-2006-MEM/OGJ (16 June 2006), pp. 13-14 (**CE-0534**).

[120] Congress, Draft Bill No. 14792/2005-CR (21 June 2006), pp. 4-7 (**CE-536**).

[121] Congress, ProInversión Commission, Meeting Minutes (23 June 2006) (**CE-537**).

[122] Congress, ProInversión Commission, Meeting Minutes (29 June 2006) (**RE-51**).

[123] MEF, Official Letter No. 530-2006-EF/10 (3 July 2006) (**CE-964**) (responding to Congressman Olaechea to Minister Zavala, Official Letter No. 007-2005-2006-GTCV-CEM-CR (13 March 2006) (**CE-959**)).

[124] Congressional Commission Envisions a Solution: Minera Cerro Verde Accepts Proposal to Pay 13 Million, El Heraldo (10 July 2006) (**CE-541**).

202. On 20 and 25 July 2006, Mr. Dante Martínez Palacios, a local union leader in Arequipa, filed a complaint against SMCV through SUNAT's internal complaint procedure, challenging SMCV's use of the profit reinvestment benefit and against SUNAT challenging its involvement in granting SMCV the profit reinvestment benefit.[125]

203. On 2 August 2006, the Roundtable Discussion Agreement was signed, resulting in US$125 million in contributions by SMCV to Arequipa.[126]

204. On 10 August 2006, Members of Congress proposed amending the Mining Royalty Law so that all mining companies, even those with stability agreements, are obliged to pay royalties.[127] This was unsuccessful.

205. On 21 December 2006, Peru enacted the Voluntary Contribution Program for mining companies. The target under the program was for each mining company to agree to pay 3% of its net profits for use in improving local and regional infrastructure, as well as social projects.[128]

206. On 2 January 2007, SMCV notified the DGM that it had completed construction of the Concentrator, pursuant to Article 38 of the Mining Regulations.[129]

207. In January 2007, SMCV signed a standard form agreement with the Government to contribute 3.75% of its annual net profits in contributions under the Voluntary Contribution Program.

208. On 26 February 2007, the DGM confirmed the expansion of the Beneficiation Concession to 147,000 MT/d and authorised SMCV to operate the Concentrator.[130]

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125 Dante Martínez Palacios, Complaint to SUNAT No. 016278 (25 July 2006) (**CE-1040**).

126 [**Torreblanca 1**], ¶ 55.

127 Government Promises not to Modify the Law on Mining Royalties, Gestión (10 August 2006) (**CE-546**).

128 Voluntary Contribution Program, Supreme Decree No. 071-2006-EM (21 December 2006) (**CA-131**).

129 SMCV, Petition No. 1659321 (2 January 2007) (**CE-558**).

130 MINEM, Directorial Resolution No. 056-2007-MEM/DGM (26 February 2007) (**CE-28**).

209. On 10 August 2007, SMCV and Peru executed the Voluntary Contribution Agreement, which, whilst not detailing the precise contribution to be made, resulted in SMCV committing to an additional US$140 million in contributions to Arequipa.[131]

210. On 20 September 2007, SUNAT issued a report regarding the effect of stability agreements signed under the Mining Law.[132]

211. On 12 November 2007, Mr. Martínez Palacios filed another complaint with SUNAT alleging that SMCV fraudulently applied the profit reinvestment benefit to the Concentrator.[133]

212. On 20 November 2007, SUNAT asked MINEM for a list of mining companies required to pay royalties from 2004.[134]

213. On 29 January 2008, MINEM sent SUNAT the list of mining companies required to pay royalties, together with (i) the September 2005 Report, (ii) Minister Sánchez Mejía's 8 November 2005 letter to Congressman Diez Canseco stating that the Concentrator was not covered by the 1998 Stability Agreement and (iii) the June 2006 Report.[135]

7. SMCV seeks clarification on scope of stability benefits, the 2012 Stability Agreement, and further legislative reform

214. On 30 April 2008, SUNAT requested MINEM's opinion on the application of the Stability Agreement to the Concentrator.[136]

215. On 30 May 2008, SUNAT sent an audit letter to SMCV, claiming that SMCV failed to file documents related to the payment of mining royalties for fiscal years 2006 and 2007.[137]

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131 Executed Voluntary Contribution Agreement between SMCV and Peru (10 August 2007) (**CE-560**); Voluntary Contribution Agreement between SMCV and Peru (18 January 2007) (**CE-27**).

132 SUNAT, Report No. 166-2007-SUNAT/2B0000 (20 September 2007) (**RE-27**).

133 Dante Martínez Palacios, Complaint to SUNAT (12 November 2007) (**CE-1041**).

134 SUNAT, Official Communication No. 261-2007-SUNAT/2E0000 (20 November 2007), pp. 1-2 (**CE-568**).

135 MINEM, Document No. 077-2008-MEM-DGM (29 January 2008) (**CE-573**).

136 SUNAT, Official Letter No. 015-2008-SUNAT/2J0000 (30 April 2008), p. 2 (**RE-220**).

137 SUNAT, Tax Information Letter No. 108052004279 (30 May 2008) (**CE-577**).

216. On 4 June 2008, SMCV responded to SUNAT's audit letter, stating that royalties did not apply to the Concentrator due to the Stability Agreement.[138]

217. On 31 October 2008, SUNAT dismissed Mr. Martínez Palacios' complaints.[139]

218. On 2 April 2009, Mr. Martínez Palacios filed a claim against SUNAT before the Contentious-Administrative Court, which claim was dismissed by the court.[140]

219. On 17 August 2009, SUNAT issued the first royalty assessments against SMCV, the 2006-2007 Royalty Assessments.[141] Starting with this assessment though to February 2020, SMCV was involved in a number of proceedings relating to assessments issued by SUNAT, which are summarized below starting at paragraph 229.

220. On 28 September 2011, Peru enacted the Special Mining Tax Law (the "**SMT**") and the *Gravamen Especial a la Minería* Law (the "**GEM**").[142] The SMT amended the royalty regime to change the method of calculating royalties, while the GEM was created as a voluntary payment, which would be calculated quarterly based on a company's operating profit from stabilized concessions.[143]

221. In October and December 2011, SMCV requested confirmation from the DGM and the MEF that if the company agreed to pay the GEM, it "w[ould] pay neither the Special

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138 SMCV, Letter No. SMCV-AL-1346-2008 (4 June 2008), pp. 1-2 [PDF] (**CE-578**) (responding to SUNAT, Tax Information Letter No. 108052004279 (30 May 2008) (**CE-577**)).

139 First Instance Administrative Court Decision, Judgment No. 69-2012 (16 August 2012), p. 10 [PDF] (**RE-191**).

140 Dante A. Martínez, *The Greatest Tax Fraud in the History of Peru*, Con Nuestro Perú (15 January 2011) (**CE-603**).

141 SUNAT, 2006-2007 Royalty Assessments (17 August 2009) (**CE-31**).

142 Special Mining Tax Law, Amending Law No. 28258, Law No. 29788 (28 September 2011) (**CA-179**); *Gravamen Especial a la Minería* Law, Law No. 29789 (28 September 2011) (**CA-180**); Law Establishing the Legal Framework for the *Gravamen Especial a la Minería*, Law No. 29790 (28 September 2011) (**CA-181**).

143 Special Mining Tax Law, Amending Law No. 28258, Law No. 29788 (28 September 2011) (**CA-179**), Annex; Law Establishing the Legal Framework for the *Gravamen Especial a la Minería*, Law No. 29790 (28 September 2011) (**CA-181**), Annex II.

Mining Tax nor the Mining Royalty for the concessions included in the […] [Stability] Agreement."[144]

222. On 14 October 2011, MEF issued a report in answer to MINEM's question regarding whether stabilized mining projects that pay GEM can be bound to pay royalties.[145] The report concluded that:

> "*without prejudice to its concrete application according to the specificities of each case, the new tax scheme on the mining activity establishes a [GEM] applicable by virtue of an Agreement to those engaged in mining activity for that which is covered by the stability of [a mining stabilisation agreement] […] and a general regime that considers [an SMT] and a Mining Royalty on that which is not included in the aforementioned Agreements.*"[146]

223. On 28 December 2011, the DGM replied to SMCV's requests for confirmation regarding the SMT and GEM, stating that SMCV's request "exceeds the competence [jurisdiction] of the Energy and Mining Sector," forwarding MEF's 14 October 2011 Report.[147]

224. On 28 February 2012, SMCV and Peru executed the GEM Agreement, resulting in SMCV committing to further additional contributions of over US$100 million to the Government.[148]

225. On 17 July 2012, Peru and SMCV entered into a stability agreement (the "**2012 Stability Agreement**"), concerning a US$3.57 billion investment to build within Cerro Verde's

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144 SMCV, Letter No. SMCV-VL&RG-2217-2011 (2 December 2011) (**CE-631**); SMCV, Letter No. SMCV-VL&RG-1896-2011 (7 October 2011) (**CE-628**); SMCV, Letter No. SMCV-VL&RG-1968-2011 (26 October 2011) (**CE-630**).

145 MEF, Report No. 206-2011-EF/61.01 (14 October 2011) (**CE-629**).

146 MEF, Report No. 206-2011-EF/61.01 (14 October 2011) p. 2, numeral 3 (**CE-629**) (see translation in Respondent's Counter-Memorial, ¶ 227).

147 MINEM, Official Letter No. 1333-2011-MEM/DGM (28 December 2011) (**CE-632**) (responding to SMCV, Letter No. SMCV-VL&RG-1896-2011 (7 October 2011) (**CE-628**); SMCV, Letter No. SMCV-VL&RG-1968-2011 (26 October 2011) (**CE-630**)).

148 Agreement for the Assessment of *Gravamen Especial a la Minería* Approved by Law No. 29790 (28 February 2012) (**CE-64**).

Mining and Beneficiation Concessions, among other things, a second concentration plant to expand Cerro Verde's copper concentration production, as well as to improve the existing processing facilities.[149]

226. On 12 July 2014, the Peruvian Congress enacted the 2014 Amendments to the Mining Law, incorporating a new Article 83-B to the Mining Law to provide that, for certain types of stability agreements, the stability guarantees apply

> "*exclusively to the activities […] expressly mentioned in the Investment Program contained in the Feasibility Study that is part of the stability agreement; or, the additional activities that are accomplished subsequently to the Investment Program, provided that such activities are […] linked to the purpose of the Investment Project.*"[150]

227. On 28 December 2019, Peru enacted the 2019 Amendments to the Regulations.[151]

8. SUNAT Assessments and Related Proceedings

228. Starting in August 2009 and continuing up to February 2020, SMCV was involved in a number of proceedings arising from various assessments issued by SUNAT. The Claimant and Respondent have set out undisputed details of the various administrative and judicial proceedings related to this matter at the Claimant's Memorial (Annex A) and the Respondent's Rejoinder (Annex A). Details of these proceedings are summarised briefly below.

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149 Stability Agreement between Peru and SMCV (17 July 2012) (**CE-644**).

150 Law Establishing Tax Measures, Simplification of Procedures, and Permits for Promoting and Vitalizing Investment in the Country, Law No. 30230 (12 July 2014), Article 83-B (**CA-209**).

151 Supreme Decree amending the Regulations of Title Nine of the General Mining Act, Supreme Decree No. 021-2019-EM (28 December 2019), Article 22 (**CA-246**).

a. The SUNAT Royalty Assessments

i. The 2006-2007 Royalty Assessments

229. On 17 August 2009, SUNAT issued the first royalty assessments against SMCV for royalties on the minerals processed in the Concentrator from October 2006 to December 2007.[152] In addition to royalties, SUNAT assessed penalties equivalent to 10% of the unpaid royalties, additional penalties for SMCV's failure to present certain required documents, and file royalty declarations, and interest on the unpaid royalties and penalties at the rate of 18% per annum running from the dates SUNAT claimed SMCV should have filed each monthly royalty declaration (the "**2006-2007 Royalty Assessments**").[153]

230. On 15 September 2009, SMCV requested that SUNAT reconsider the 2006-2007 Royalty Assessments.[154]

231. On 31 March 2010, SUNAT rejected SMCV's request for reconsideration of the 2006-2007 Royalty Assessments.[155]

ii. The 2008 Royalty Assessments

232. On 1 June 2010, SUNAT issued additional royalty assessments against SMCV for minerals processed in the Concentrator from January 2008 to December 2008. As before, SUNAT also assessed penalties equivalent to 10% of the unpaid royalties, additional penalties for SMCV's failure to present certain required documents, and file royalty declarations, and interest on the unpaid royalties and penalties at the rate of 18% and 14.5 % per annum running from the dates SUNAT claimed SMCV should have filed each monthly royalty declaration (the "**2008 Royalty Assessments**").[156]

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[152] SUNAT, 2006-2007 Royalty Assessments (17 August 2009) (**CE-31**).

[153] SUNAT, 2006-2007 Royalty Assessments (17 August 2009) (**CE-31**); SUNAT, Resolution No. 055-014-0001290 (2006-2007 Royalty Assessments) (31 March 2010), (**CE-38**).

[154] SMCV, Request for Reconsideration (2006-2007 Royalty Assessments) (15 September 2009) (**CE-32**).

[155] SUNAT, Resolution No. 055-014-0001290 (2006-2007 Royalty Assessments) (31 March 2010) (**CE-38**).

[156] SUNAT, 2008 Royalty Assessments (1 June 2010) (**CE-39**).

233. On 15 July 2010, SMCV requested that SUNAT reconsider the 2008 Royalty Assessments.[157]

234. On 31 January 2011, SUNAT rejected SMCV's request for reconsideration of the 2008 Royalty Assessments.[158]

iii. The 2009 Royalty Assessments

235. On 27 June 2011, SUNAT issued royalty assessments against SMCV for the minerals processed in the Concentrator from January 2009 to December 2009, as well as penalties equivalent to 10% of unpaid royalties, additional penalties for SMCV's failure to file royalty declarations, and interest on the unpaid royalties and penalties at rates of 18% and 14.4% per annum running from the dates SUNAT claimed SMCV should have filed each monthly royalty declaration (the "**2009 Royalty Assessments**").[159]

236. On 9 August 2011, SMCV requested that SUNAT reconsider the 2009 Royalty Assessments.[160]

237. On 21 December 2011, SUNAT rejected SMCV's request for reconsideration of the 2009 Royalty Assessments.[161]

iv. The Tax Tribunal Proceedings concerning the 2006-2007, 2008 and 2009 Royalty Assessments

238. On 12 May 2010, SMCV challenged SUNAT's rejection of SMCV's request for reconsideration of the 2006-2007 Royalty Assessments before the Tax Tribunal (the "**2006-2007 Royalty Case**").[162] The Tax Tribunal is empowered to review SUNAT assessments *de novo* and if challenged, the assessments are not final administrative acts or enforceable

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157 SMCV, Request for Reconsideration (2008 Royalty Assessments) (15 July 2010) (**CE-600**).

158 SUNAT, Resolution No. 055-014-0001394/SUNAT (2008 Royalty Assessments) (31 January 2011) (**CE-46**).

159 SUNAT, Royalty Assessments Nos. 052-003-0007274 to 052-003-0007285 (2009 Royalty Assessments) (27 June 2011) (**CE-54**).

160 SMCV, Request for Reconsideration (2009 Royalty Assessments) (9 August 2011) (**CE-55**).

161 SUNAT, Resolution No. 055-014-0001495/SUNAT (2009 Royalty Assessments) (21 December 2011) (**CE-58**).

162 SMCV, Challenge to Tax Tribunal (2006-2007 Royalty Assessments) (12 May 2010) (**CE-40**).

against the taxpayer until the Tax Tribunal confirms them.[163] The case was assigned to Chamber No. 10, one of the Tax Tribunal's eleven chambers, each composed of members called *vocales* who participated in the decisions. Luis Cayo Quispe was assigned to be the *vocal ponente*, that is, the *vocal* responsible for conducting the initial analysis of the case and preparing a draft resolution.

239. On 10 March 2011, SMCV challenged SUNAT's rejection of SMCV's request for reconsideration of the 2008 Royalty Assessments before the Tax Tribunal (the "**2008 Royalty Case**").[164] The case was assigned to Chamber No. 1, and to *vocal ponente* Licette Zuñiga Dulanto, who was also the presiding *vocal* of the Chamber.[165]

240. On 6 March 2013, Chamber No. 10 of the Tax Tribunal informed SMCV that the oral hearing in the 2006-2007 Royalty Case would be held on 5 April 2013.[166]

241. On 22 March 2013, Ms. Úrsula Villanueva ("**Ms Villanueva**"), the Tax Tribunal President's assistant, emailed President Olano Silva ("**President Olano**") about the 2008 Royalty Case.[167]

242. On 5 April 2013, Chamber No. 10 held an oral hearing in the 2006-2007 Royalty Case.[168]

243. On 9 April 2013, Chamber No. 1 informed SMCV that the oral hearing in the 2008 Royalty Case would be held on 2 May 2013.[169]

244. On 2 May 2013, Chamber No. 1 held an oral hearing in the 2008 Royalty Case.[170]

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163 Tax Code, Supreme Decree No. 135-99-EF (19 August 1999), Article 101(1) (**CA-4**); Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Articles 101(1), 115(c), 127, 157 (**CA-14**).

164 SMCV, Challenge to Tax Tribunal (2008 Royalty Assessments) (10 March 2011) (**CE-49**).

165 Tax Tribunal, Decision No. 08252-1-2013 (21 May 2013), p. 24 (**CE-83**).

166 Tax Tribunal, Notice of Oral Hearing No. 0286-2013-EF/TF (2006-2007 Royalty Case) (6 March 2013), p. 1 (**CE-79**).

167 Úrsula Villanueva Arias, Email to Zoraida Alicia Olano Silva (22 March 2013, 4:02 PM PET) (**CE-648**).

168 Tax Tribunal, Record of Oral Hearing No. 0286-2013-EF/TF (2006-2007 Royalty Case) (5 April 2013), p. 2 (**CE-79**).

169 Tax Tribunal, Notice of Oral Hearing No. 0411-2013-EF/TF (2008 Royalty Case) (9 April 2013) (**CE-80**).

170 Tax Tribunal, Record of Oral Hearing No. 0411-2013-EF/TF (2008 Royalty Case) (2 May 2013) (**CE-82**).

245. On 21 May 2013, Chamber No. 1 issued its resolution confirming the 2008 Royalty Assessments.[171]

246. On 22 May 2013, Mr. Carlos Moreano Valdivia, presiding *vocal* of Chamber No. 10, emailed President Olano stating that "the ideal thing was that Chamber No. 1 should have held a session on the Cerro Verde file after coordinating with us, who have [a case with] the same issue and from the same taxpayer, it was the right thing to do, as it is always done."[172]

247. On 24 May 2013, President Olano, Chamber No. 1 *vocal* Ms. Zuñiga, and Chamber No. 10 *vocal* Mr. Luis Cayo Quispe met to discuss the 2006-2007, 2008, and 2009 Royalty Cases.[173]

248. On 27 May 2013, Chamber No. 1 notified SUNAT of its resolution in the 2008 Royalty Case.[174]

249. On 30 May 2013, Chamber No. 10 issued its resolution confirming the 2006-2007 Royalty Assessments.[175]

250. On 20 June 2013, Chamber No. 1 and Chamber No. 10 notified SMCV of the resolutions confirming the 2008 and 2006-2007 Royalty Assessments.[176]

251. On 26 June 2013, SMCV submitted requests to the Tax Tribunal for waiver of penalties and interest relating to the 2006-2007 and 2008 Royalty Assessments.[177] SMCV's requests were based on Article 170 of the Peruvian Tax Code, which provides that penalties and

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171 Tax Tribunal, Decision No. 08252-1-2013 (21 May 2013) (2008 Royalty Case), p. 24 (**CE-83**); Chamber No. 1, Record of Session No. 0000070349 (21 May 2013, 11:14:45-12:18:41), p. 1 (**RE-194**).

172 Carlos Hugo Moreano Valdivia, Email to Zoraida Alicia Olano Silva (22 May 2013, 8:58 AM PET), p. 2 (**CE-652**).

173 Zoraida Alicia Olano, Email to Luis Gabriel Cayo Quispe and Licette Isabel Zuñiga Dulanto (24 May 2013, 10:23 AM PET) (**CE-655**).

174 Tax Tribunal, Official Document No. 007270-2013-EF/40.01 (27 May 2013) (**CE-85**).

175 Tax Tribunal, Decision No. 08997-10-2013 (30 May 2013) (**CE-88**).

176 SUNAT, Receipt Notice of Resolutions No. 08252-1-2013 and No. 08997-10-2013 (20 June 2013) (**CE-89**).

177 SMCV, Letter to the President of Chamber No. 1 (2008 Royalties Assessments), pp. 12-13 (26 June 2013) (**CE-90**); SMCV, Letter to the President of Chamber No. 10 (2006-2007 Royalties Assessments), pp. 12-13 (26 June 2013) (**CE-656**).

interest should be waived where interpretation of the applicable legal provisions is subject to "reasonable doubt" as a result of their imprecision, obscurity, or ambiguity.[178]

252. On 15 July 2013, the Tax Tribunal denied SMCV's request for waiver of penalties and interest relating to the 2006-2007 and 2008 Royalty Assessments.[179]

253. On 10 October 2013, SUNAT approved SMCV's requests dated 4 October 2013, under protest, to enter into a deferral and installment plan to jointly pay the 2006-2007 and 2008 Royalty Assessments.[180]

v. Court proceedings relating to the 2006-2007 and 2008 Royalty Assessments

254. On 18 September 2013, SMCV challenged the Tax Tribunal resolution confirming the 2008 Royalty Assessments before the Contentious-Administrative Court.[181]

255. On 27 September 2013, SMCV challenged the Tax Tribunal resolution confirming the 2006-2007 Royalty Assessments before the Contentious-Administrative Court.[182]

256. On 17 December 2014, the Contentious-Administrative Court annulled the 2008 Royalty Assessments.[183]

257. On 29 January 2016, the Superior Court of Justice (the "**Appellate Court**") reversed the first instance Contentious-Administrative Court's decision annulling the 2008 Royalty Assessments.[184]

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178 Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Articles 170 and 92(g) (**CA-14**); Law that Authorizes SUNAT to Enforce Rules that Facilitate the Administration of Mining Royalties, Law No. 28969 (25 January 2007), Article 12 (**CA-8**).

179 Tax Tribunal, Decision No. 11669-1-2013 (15 July 2013), p. 6 (**CE-92**); Tax Tribunal, Decision No. 11667-10-2013 (15 July 2013), p. 6 (**CE-91**).

180 SUNAT, Resolution No. 0510170003363 (10 October 2013), p. 1 (**CE-99**); SMCV, Requests Deferral and Installment Payment Plan (2006-2007 and 2008 Royalty Assessments) (4 October 2013) (**CE-664**).

181 SMCV, Administrative Court Appeal of the Tax Tribunal's Decision (2008 Royalty Assessments) (18 September 2013) (**CE-97**).

182 SMCV, Administrative Court Appeal of the Tax Tribunal's Decision (2006-2007 Royalty Assessments) (27 September 2013) (**CE-98**).

183 18th Contentious-Administrative Court, Decision No. 07650-2013-CA (2008 Royalty Assessments) (17 December 2014), p. 30 (**CE-122**).

184 Appellate Court, Decision No. 7650-2013 (2008 Royalty Assessments) (29 January 2016), p. 14 (**CE-137**).

258. On 23 February 2016, SMCV filed an appeal in cassation before the Supreme Court of Justice (the "**Supreme Court**") seeking to annul the Appellate Court's decision on the 2008 Royalty Assessments.[185]

259. On 14 April 2016, the Contentious-Administrative Court upheld the 2006-2007 Royalty Assessments.[186]

260. On 2 May 2016, SMCV appealed the Contentious Administrative Court's decision to the Appellate Court.[187]

261. On 3 January 2017, Mr. Victor Mejía Ninacóndor ("**Mr Ninacóndor**") was listed as a SUNAT representative before the Court of Appeal's hearing of SMCV's appeal of the 2006-2007 Royalty Assessments.[188] It is the Respondent's position that he did not participate in SMCV's cases before the Appellate Court.[189]

262. On 12 July 2017, the Appellate Court upheld the 2006-2007 Royalty Assessments, with one dissenting judge voting to annul the decision of the Contentious-Administrative Court.[190]

263. On 9 August 2017, SMCV filed an appeal in cassation before the Supreme Court in respect of the 2006-2007 Royalty Assessments.[191]

264. On 18 August 2017, the Supreme Court upheld the Appellate Court's decision upholding the 2008 Royalty Assessments.[192]

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185 SMCV, Appeal in Cassation to the Supreme Court of the Appellate Court Decision No. 7650-2013 (2008 Royalty Assessments) (23 February 2016) (**CE-138**).

186 20th Contentious-Administrative Court, Decision No. 07649-2013-1801-JR-CA-20 (2006-2007 Royalty Assessments) (14 April 2016), p. 31 (**CE-689**).

187 SMCV, Appellate Court Appeal of the Administrative Court Decision (2 May 2016) (**CE-144**).

188 Contentious-Administrative Court, Entry of Appearances, 2006-2007 Royalty Case (3 January 2017), p. 3 (**CE-694**).

189 Respondent's Counter-Memorial, ¶¶ 331-332.

190 Appellate Court, Decision No. 48, File No. 7649-2013-0-1801-JR -CA-23 (12 July 2017), p. 29 [PDF] (**CE-274**).

191 SMCV, Appeal in Cassation to the Supreme Court of the Appellate Court Decision (2006-2007 Royalty Assessments) (9 August 2017) (**CE-697**).

192 Supreme Court, Judgment No. 5212-2016 (2008 Royalty Assessments) (18 August 2017), p. 79 (**CE-153**).

265. On 20 November 2018, the Supreme Court upheld the Appellate Court's decision on the 2006-2007 Royalty Assessments, dismissing SMCV's appeal.[193]

266. On 27 February 2020, SMCV applied to withdraw its appeal to the Supreme Court in the 2006-2007 Royalty Case to comply with the waiver requirement under the U.S.-Peru Trade Promotion Agreement (the "**US-Peru TPA**") in connection with the *Freeport* arbitration.[194]

267. On 7 October 2020, the Supreme Court approved SMCV's withdrawal of its appeal in the 2006-2007 Royalty Case.[195]

268. On 29 December 2020, the Supreme Court notified SMCV of the justices' split votes and opinions in the 2006-2007 Royalty Case.[196] The Claimant states that two of the five justices of the Supreme Court voted to annul the Appellate Court's decision upholding the 2006-2007 Royalty Assessments and found that the Appellate Court failed to address SMCV's arguments concerning waiver of penalties and interest. The Respondent notes that as a result of SMCV's withdrawal of its appeal, the Appellate Court's decision upholding the 2006 -2007 Royalty Assessments became final.

vi. The 2009 Royalty Assessments before the Tax Tribunal and SUNAT's Royalty Assessments for 2010, 2011, 2012 and 2013

269. On 16 January 2012, SMCV challenged SUNAT's rejection of SMCV's request for reconsideration of the 2009 Royalty Assessments before the Tax Tribunal.[197]

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193 Supreme Court, Ruling No. 18174-2017 (2006-2007 Royalty Assessments) (20 November 2018), p. 35 [PDF p. 36] (**CE-739**).

194 SMCV, Withdrawal, 2006-2007 Royalty Case, File No. 18174-2017 (27 February 2020) (**CE-242**).

195 Supreme Court, Resolution Approving SMCV's Withdrawal, File No. 18174-2017 (2006-2007 Royalty Assessments) (7 October 2020) (**CE-789**).

196 Supreme Court, Sentence No. 18174-2017 (2006-2007 Royalty Assessments) (20 November 2018, notified to SMCV on 29 December 2020), p. 1 (**CE-794**).

197 SMCV, Appeal of SUNAT's rejection of Reconsideration (2009 Royalty Assessments) (13 January 2012, filed 16 January 2012) (**CE-62**).

270. Starting in April 2016, SUNAT issued the 2010-2011, Q4 2011, 2012 and 2013 Royalty Assessments, which SMCV challenged before SUNAT's Claims Division and/or the Tax Tribunal.[198]

271. On 20 June 2018, SMCV requested the recusal of Mr. Ninacóndor, *vocal* ponente of Chamber No. 1 assigned to decide the 2010-2011 Royalty Case.[199]

272. On 21 June 2018, President Olano sent a draft decision rejecting SMCV's petition for Mr. Ninacóndor's recusal to the *vocales* of the Plenary Chamber. The Claimant notes this was sent hours before the Plenary Chamber convened to discuss the issue.[200]

273. On 22 June 2018, the Tax Tribunal Plenary Chamber, by a 27-vote majority against 4 dissenting votes, rejected SMCV's request to recuse Mr. Ninacóndor in the 2010-2011 Royalty Case.[201]

274. On 9 August 2018, Chamber No. 2 of the Tax Tribunal held an oral hearing in the 2009 Royalty Case and the 2010-2011 Royalty Case.[202]

275. On 15 August 2018, Chamber No. 2 issued its resolution confirming the 2009 Royalty Assessments.[203]

276. On 28 August 2018, Chamber No. 1 issued its resolution confirming the 2010-2011 Royalty Assessments, with Mr. Ninacóndor as *vocal ponente*.[204]

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198 See Claimant's Memorial, Annex A: Administrative Proceedings, p. 1 [PDF 236]; Respondent's Rejoinder, Annex A: Administrative and Judicial Proceedings, p.1 [PDF 433].

199 SMCV, Submission Requesting the Recusal of Judge Victor Mejía Ninacóndor (20 June 2018) (**CE-180**).

200 Zoraida Alicia Olano Silva, Email to the *vocales* (21 June 2018, 11:21 AM PET) (**CE-717**); Tax Tribunal, Draft Minutes, Attachment to Email from Zoraida Alicia Olano Silva to the *vocales* (21 June 2018, 11:21 AM PET) (**CE-718**).

201 Tax Tribunal, Rejection of SMCV's Request for Recusal, Minutes of Plenary Council Meetings No. 2018-19 and 2018-20 (21 and 22 June 2018), p. 10 (**CE-181**).

202 Tax Tribunal, Notice of Oral Hearing No. 1065-2018-EF/TF (2009 Royalty Assessments) (6 July 2018) (**CE-183**); Tax Tribunal, Notice of Oral Hearing No. 1170-2018-EF/TF (2010-2011 Royalty Assessments) (18 July 2018) (**CE-185**).

203 Tax Tribunal, Decision No. 06141-2-2018 (2009 Royalty Case) (15 August 2018), p. 38 (**CE-188**).

204 Tax Tribunal Decision No. 06575-1-2018 (2010-2011 Royalty Case) (28 August 2018), pp. 41-42 (**CE-194**).

277. On 12 September 2018, Peru amended the Tax Code to require *vocales* to abstain from participating in proceedings if they had worked for SUNAT within the last 12 months and "directly and actively" participated in the SUNAT proceedings at issue before the Tax Tribunal.[205]

278. On 12 October 2018, SUNAT denied SMCV's request for reconsideration of the Q4 2011 Royalty Assessments, also declining to waive penalties and interest.[206]

279. On 11 January and 28 May 2019, SUNAT denied SMCV's requests for reconsideration of the 2012 and 2013 Royalty Assessments, respectively.[207] On 25 February 2019 and 1 July 2019, respectively, SUNAT approved SMCV's request under protest to enter into deferral and installment plans to pay the 2012 and 2013 Royalty Assessments.[208]

280. On 18 November 2019, Chamber No. 9 of the Tax Tribunal issued its resolution confirming the Q4 2011 Royalty Assessments, with Ms. Villanueva as *vocal ponente*.[209]

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205 Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Art. 100 (as amended by Legislative Decree No. 1421) (**CA-14**); Legislative Decree No. 1421, Amendments to the Tax Code (12 September 2018), Article 3 (**CA-238**).

206 SMCV, Request for Reconsideration (4Q 2011 Royalty Assessments) (15 February 2018) (**CE-175**); SUNAT, Resolution No. 0150140014441 (Q4 2011 Royalty Assessment) (12 October 2018), pp. 1-2 (**CE-198**).

207 SMCV, Request for Reconsideration (2012 Royalty Assessments) (17 May 2018) (**CE-178**); SMCV, Request for Reconsideration (2013 Royalty Assessments) (7 November 2018) (**CE-203**); SUNAT, Resolution No. 0150140014560, (2012 Royalty Assessments) (11 January 2019), p.2 (**CE-215**); SUNAT, Resolution No. 0150140014816 (2013 Royalty Assessments) (28 May 2019), p.38 (**CE-220**).

208 SMCV, Request Under Protest to Enter Into Deferral and Installment Plans (2012 Royalty Assessments) (19 February 2019) (**CE-751**); SMCV, Request Under Protest to Enter Into Deferral and Installment Plans (2013 Royalty Assessments) (25 June 2019) (**CE-763**); SUNAT, Approval of SMCV's Deferral and Installment Plans (2012 Royalty Assessments) (25 February 2019), pp. 1-2 (**CE-753**); SUNAT, Approval of SMCV's Deferral and Installment Plans (2013 Royalty Assessments) (1 July 2019), pp. 1-2 (**CE-760**).

209 Tax Tribunal, Resolution No. 10574-9-2019 (Q4 2011 Royalty Assessments) (18 November 2019) (**CE-269**).

b. The GST Tax Assessments

281. Starting in December 2009, SUNAT began issuing tax assessments against SMCV applying the non-stabilized regime to the Concentrator.[210] SUNAT also imposed penalties on SMCV equivalent to 50% of the unpaid general sales tax ("**GST**").[211]

282. SUNAT subsequently issued assessments, interest, and penalties on the same basis on 29 December 2010 (GST and GST on Non-Residents for 2006), 27 December 2011 (GST for 2007), 20 December 2012 (GST for 2008), 27 December 2013 (GST for 2009), 24 June 2014 (GST for 2010), and 29 September 2017 (GST for 2011) (collectively, the "**GST Assessments**").[212]

283. SMCV requested reconsideration of each of the GST Assessments, each of which SUNAT denied.[213] SMCV then challenged each of the GST Assessments before the Tax Tribunal, which confirmed the 2005-2007 GST Assessments between 22 August 2018 and 30 October 2018.[214] SMCV ultimately withdrew the stability-related claims from its remaining challenges in February 2020.

c. The Income Tax Assessments

284. On 27 May 2011, SUNAT issued an assessment charging SMCV with underpayment for tax for 2006 and corresponding penalties and interest, including a 50% penalty on the unpaid taxes.[215]

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[210] See Claimant's Memorial, Annex A: Administrative Proceedings, pp. 2-3 [PDF 237-238]; Respondent's Rejoinder, Annex A: Administrative and Judicial Proceedings, pp. 2-3 [PDF 434-435].

[211] SUNAT, Fine Resolutions No. 052-002-0003816 to No. 052-002-0003827 (GST for 2005) (28 December 2009) (**CE-37**).

[212] See Claimant's Memorial, Annex A: Administrative Proceedings, pp. 2-3 [PDF 237-238]; Respondent's Rejoinder, Annex A: Administrative and Judicial Proceedings, pp. 2-3 [PDF 434-435].

[213] See Claimant's Memorial, Annex A: Administrative Proceedings, pp. 2-3 [PDF 237-238]; Respondent's Rejoinder, Annex A: Administrative and Judicial Proceedings, pp. 2-3 [PDF 434-435].

[214] Tax Tribunal, Resolution No. 06365-2-2018 (GST for 2005) (22 August 2018), p.54 [PDF p.4] (**CE-193**); Tax Tribunal, Resolution No. 04802-5-2020 (GST for Non- Residents for 2005) (15 September 2020), p. 5 (**CE-788**); Tax Tribunal, Resolution No. 06366-2-2018 (GST for 2006) (22 August 2018), p. 7 (**CE-190**); Tax Tribunal, Resolution No. 08470-2-2018 (GST for 2007) (30 October 2018) (**CE-202**).

[215] SUNAT Assessment No. 052-003-0007147 (Income Tax for 2006) (27 May 2011) (**CE-51**); SUNAT Resolution No. 055-014-0001556 (Income Tax for 2006) (30 March 2012), p. 102 (**CE-69**).

285. SUNAT issued additional assessments on 28 March 2012 (Income Tax for 2007), 21 August 2013 (Income Tax for 2008), 30 October 2014 (Income Tax for 2009), 13 February 2015 (Income Tax for 2010), 31 October 2017 (Income Tax for 2011), 26 November 2019 (Income Tax for 2012), and 28 December 2020 (Income Tax for 2013) (collectively, the "**Income Tax Assessments**").[216]

286. On 13 September 2012, SUNAT issued a report addressing how to determine the payment of income tax for a mining company with signed stability agreements.[217]

287. From 2017 to 2020, under protest, SMCV filed amended income tax returns applying non-stabilized depreciation rates to its Concentrator-related assets for the 2012 and 2013 fiscal years to fully depreciate those assets under the non-stabilized rates.[218]

288. SMCV requested reconsideration for the 2006-2012 assessments, all of which were denied aside from the request to reconsider the 2012 Income Tax Assessment, which was ultimately withdrawn in February 2020.[219]

d. The Additional Income Tax imposed on SMCV

289. SUNAT also issued assessments against SMCV for Additional Income Tax ("**AIT**," and collectively, the "**AIT Assessments**"), which is levied on any form of expense deemed an indirect profit distribution at a 4.1% rate. The AIT Assessments for 2007 and 2008 were issued at the same time as the GST Assessments for 2007 and 2008, while the AIT Assessments for 2009-2013 were issued at the same time as the Income Tax Assessments.[220]

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[216] See Claimant's Memorial, Annex A: Administrative Proceedings; Respondent's Rejoinder, Annex A: Administrative and Judicial Proceedings.

[217] SUNAT, Report No. 084-2012-SUNAT/4B0000 (13 September 2012) (**CE-883**).

[218] Amended Income Tax Return for 2012 (21 December 2017) (**CE-886**); Amended Income Tax Return for 2013 (27 December 2018) (**CE-887**); Amended Income Tax Return for 2012 (12 November 2019) (**CE-888**); Amended Income Tax Return for 2013 (15 December 2020) (**CE-889**).

[219] See Claimant's Memorial, Annex A: Administrative Proceedings; Respondent's Rejoinder, Annex A: Administrative and Judicial Proceedings.

[220] See Claimant's Memorial, Annex A: Administrative Proceedings; Respondent's Rejoinder, Annex A: Administrative and Judicial Proceedings.

290. With the exception of the 2013 AIT Assessments, SMCV requested reconsideration of each of these assessments. SUNAT denied reconsideration requests for the 2008-2011 AIT Assessments, which SMCV challenged before the Tax Tribunal. The challenges were ultimately withdrawn in February 2020.[221]

e. The Temporary Tax on Net Assets Assessment imposed on SMCV

291. Beginning in December 2013, SUNAT also issued assessments against SMCV for the Temporary Tax on Net Assets ("**TTNA**," and collectively, the "**TTNA Assessments**"). The TTNA is calculated by applying a 0.4% rate on any net assets (minus depreciations) exceeding one million soles recorded in the adjusted balance sheet for 31 December of the previous year.[222]

292. On 27 December 2013, 14 August 2015, 27 July 2016 and 20 November 2019, SUNAT issued TTNA Assessments for fiscal years 2009, 2010, 2011 and 2013, respectively.[223] SUNAT also imposed penalties for SMCV's failure to file TTNA declarations.[224]

293. SMCV submitted requests for reconsideration for the 2009-2011 and 2013 TTNA Assessments, and it voluntarily self-declared and paid the 2012 TTNA amounts under protest.[225] SUNAT rejected the requests for reconsideration of the 2009-2010 TTNA Assessments, which SMCV challenged before the Tax Tribunal.[226] SMCV also challenged the 2011 TTNA Assessment before the Tax Tribunal.[227] The Tax Tribunal confirmed the

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221 See Claimant's Memorial, Annex A: Administrative Proceedings; Respondent's Rejoinder, Annex A: Administrative and Judicial Proceedings.

222 SUNAT Assessment No. 052-003-0011208 (TTNA for 2009) (27 December 2013) (**CE-103**).

223 See Claimant's Memorial, Annex A: Administrative Proceedings; Respondent's Rejoinder, Annex A: Administrative and Judicial Proceedings.

224 SUNAT Fine Resolution No. 052-002-0006004 (TTNA 2009) (27 December 2013) (**CE-104**); SUNAT Resolution No. 055-014-0001946 (TTNA 2009) (27 August 2014), p. 90 (**CE-113**); SUNAT Fine Resolution No. 052-002-0006448 (TTNA 2010) (14 August 2015) (**CE-133)**; SUNAT Resolution No. 055-014-0002356 (TTNA 2010) (29 February 2016), p. 94 (**CE-140**); SUNAT Fine Resolution No. 052-002-0006693 (TTNA 2011) (27 July 2016) (**CE-148**); SUNAT Fine Resolution No. 011-002-0022011 (TTNA 2013) (26 September 2017) (**CE-156**); SUNAT Resolution No. 0150150014218 (TTNA 2013) (28 June 2018), pp. 5-6 (**CE-724**).

225 SMCV, Tax Return for Temporary Taxes on Net Assets and Payment Receipt (21 December 2017) (**CE-162**).

226 See Claimant's Memorial, Annex A: Administrative Proceedings; Respondent's Rejoinder, Annex A: Administrative and Judicial Proceedings.

227 SMCV, Appeal to Tax Tribunal (TTNA for 2011) (27 June 2017) (**CE-695**).

fine that SUNAT imposed on the 2013 TTNA Assessments, but did not rule on any other challenges. SMCV ultimately withdrew the remaining claims in February 2020.[228]

f. The Special Mining Tax Assessments and Complementary Mining Pension Fund Assessments imposed on SMCV

294. In December 2017, SUNAT also began assessing the new taxes that had been created in tandem with the 2011 Mining Royalty Law (the "**SMT Law**"). In particular, on 29 December 2017 and 28 September 2018, SUNAT issued assessments against SMCV for, respectively, the fourth quarter of 2011 and each quarter of 2013 for the SMT (collectively, the "**SMT Assessments**").[229]

295. On 20 December 2019, SUNAT also issued an assessment charging SMCV with contributions for fiscal year 2013 to the Complementary Mining Pension Fund (the "**CMPF Assessment**"), a social security fund composed of 0.5% of employee's monthly gross compensation and 0.5% of mining companies' annual pre-tax income.[230]

296. SMCV submitted a request for reconsideration of the Q4 2011-2012 SMT Assessments, both of which were rejected.[231] SMCV also submitted a request for reconsideration of the 2013 CMPF Assessment, which it ultimately withdrew in February 2020.[232]

297. On 25 June 2019 and 13 August 2019, SMCV requested under protest to enter into deferral and installment plans to pay the 2013 and Q4 2011-2012 SMT Assessments, respectively.[233] On 1 July 2019 and 16 August 2019, SUNAT approved SMCV's deferral and installment plans.[234] On 18 August 2020, SMCV agreed with SUNAT to defer and

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228 SMCV, Appeal to Tax Tribunal (TTNA for 2011) (27 June 2017) (**CE-695**).

229 SUNAT Assessment No. 012-003-0092685 (SMT for Q4 2011-2012) (29 December 2017) (**CE-700**); SUNAT Assessment No. 012-003-0099082 (SMT for 2013) (28 September 2018) (**CE-195**).

230 SUNAT Assessment No. 0120030109172 (CMPF for 2013) (20 December 2019) (**CE-237**).

231 SUNAT Resolution No. 0150140014441 (SMT for Q4 2011-2012) (12 October 2018) (**CE-198**).

232 SMCV Withdrawal of Request for Reconsideration (CMPF 2013) (27 February 2020) (**CE-254**).

233 SMCV Request Under Protest to Enter Into Deferral and Installment Plans (SMT for 2013) (25 June 2019) (**CE-759**); SMCV Request Under Protest to Enter Into Deferral and Installment Plans (SMT for Q4 2011-12) (13 August 2019) (**CE-764**).

234 SUNAT Approval of SMCV's Deferral and Installment Plans (SMT for 2013) (1 July 2019) (**CE-760**); SUNAT Approval of SMCV's Deferral and Installment Plans (SMT for Q4 2011-12) (16 August 2019) (**CE-765**).

combine the two deferral and installment plans under a more lenient regime known as the RAF regime.[235]

g. SMCV's requests for reimbursement of GEM payments

298. On 12 January 2018, SMCV submitted reimbursement requests to SUNAT, under protest, for GEM overpayments for Q4 2012 to Q4 2013.[236]

299. On 18 December 2018, SUNAT approved SMCV's requests for reimbursement for GEM overpayments for Q4 2012 to Q4 2013 amounting to US$76 million.[237]

300. On 28 December 2018, SMCV submitted additional reimbursement requests to SUNAT, under protest, for GEM overpayments for Q4 2011 and Q1 2012 to Q3 2012.[238]

301. On 4 March 2019, SUNAT rejected SMCV's requests for reimbursement of GEM overpayments for Q4 2012 to Q4 2013 amounting to US $63.8 million.[239]

III. THE PARTIES' CLAIMS AND REQUESTS FOR RELIEF

302. In its Reply, the Claimant requests the following relief:[240]

> "*A. Declaring that Peru breached Article 3.4 of the Treaty;*
>
> *B. Declaring that Peru breached Article 3.1 of the Treaty;*
>
> *C. Ordering Peru to pay US$184 million, inclusive of the pre-Award interest amount in E below and subject to updating closer to the date of the*

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235 SUNAT Approval of RAF Regime (SMT for Q4 2011-2013) (18 August 2020) (applying interest at 40% of the statutory rate established by Article 33 of the Tax Code) (**CE-786**).

236 SMCV, Reimbursement Request (GEM Q4 2012) (12 January 2018) (**CE-705**); SMCV, Reimbursement Request (GEM Q1 2013) (12 January 2018) (**CE-706**); SMCV, Reimbursement Request (GEM Q2 2013) (12 January 2018) (**CE-707**); Reimbursement Request (GEM Q3 2013) (12 January 2018) (**CE-708**); SMCV, Reimbursement Request (GEM Q4 2013) (12 January 2018) (**CE-709**).

237 Claimant's Reply, ¶ 190.

238 SMCV, Reimbursement Request, (GEM Q4 2011) (28 December 2018) (**CE-208**); SMCV, Reimbursement Request, (GEM Q1 2012) (28 December 2018) (**CE-209**); SMCV, Reimbursement Request, (GEM Q2 2012) (28 December 2018) (**CE-210**); SMCV, Reimbursement Request, (GEM Q3 2012) (28 December 2018) (**CE-211**).

239 SUNAT Resolution No. 012-180-0018640/SUNAT (GEM Q4 2011-Q3 2012) (4 March 2019) (**CE-218**).

240 Claimant's Reply, ¶ 233.

award, to compensate SMM Cerro Verde for the damages it suffered in the form of lost dividends, net of Peruvian tax, as a result of the final and enforceable assessment of royalties, taxes, penalties, and interest in breach of the Treaty (the "Main Claim");

D. In the alternative to C., ordering Peru to pay US$141.2 million, inclusive of pre-Award interest amount in E below and subject to updating closer to the date of the award, to compensate SMM Cerro Verde for the damages it suffered in the form of lost dividends, net of Peruvian tax, as a result of Peru's: (i) arbitrary refusal to waive penalties and interest; (ii) arbitrary refusal to reimburse SMCV for the Q4 2011 to Q3 2012 GEM payments; and (iii) arbitrary calculations in the final and enforceable assessments of the 2007-2013 Income Tax, TTNA, AIT, and Complementary Mining Pension Fund Assessments (the "Alternative Claim").

E. Ordering Peru to pay annually compounding pre-award interest on SMM Cerro Verde's damages and losses at a rate equal to SMCV's cost of equity running from the date that SMCV would have made each additional dividend distribution to SMM Cerro Verde but for Peru's breaches of the Treaty to the date of the award, valued at US$21.1 million for the Main Claim and US$15.5 million for the Alternative Claim as of 1 July 2022, and subject to updating closer to the date of the award.

F. Ordering Peru to pay annually compounding post-award interest on SMM Cerro Verde's damages and losses at a rate equal to SMCV's cost of equity running from the date of the award to the date full payment of those amounts is made;

G. Ordering Peru to pay all the costs of the arbitration, as well as SMM Cerro Verde's attorneys' fees and expenses in an amount to be determined by such means as the Tribunal may direct; and

H. Ordering any other such relief as the Tribunal may deem just and appropriate in the circumstances."

303. In its Rejoinder, the Respondent "respectfully requests that the Tribunal dismiss Claimant's claims in full and award Respondent the costs and fees, including attorney's fees, that it has incurred in this arbitration."[241]

IV. LIABILITY

304. The following section summarises the Parties' respective positions with regard to the Claimant's claims.

A. THE CLAIM FOR BREACH OF ARTICLE 3.4 OF THE TREATY (UMBRELLA CLAUSE)

1. The Parties' Positions

a. Claimant's Position

i. Whether Article 3.4 of the Treaty requires the existence of an obligation of the Respondent to the Claimant

305. It is the Claimant's position that Article 3.4 of the Treaty allows it to invoke the Respondent's breaches of the Stability Agreement as self-standing breaches of the Treaty.[242]

306. The Claimant argues that Peru's obligations under the Stability Agreement clearly fall within the plain text of Article 3.4 for, *inter alia*, the following reasons: (a) the Stability Agreement clearly imposed "obligations" on the Respondent, in particular obligations to provide tax and administrative stability to SMCV during the term of the Agreement to the entire Cerro Verde Mining Unit, including the Concentrator; (b) the Stability Agreement's obligations "with regard to" the Claimant's protected investment, being its 21% shareholding in SMCV; and (c) the Claimant's shareholding in SMCV is an "investment

241 Respondent's Rejoinder, ¶ 885.

242 Claimant's Memorial, ¶¶ 296 *et seq.*; Claimant's Reply, ¶¶ 99 *et seq.*

[…] of [a] national[] of the other Contracting Party" because the Claimant is a Dutch national.[243]

307. The Claimant submits that Article 3.4 protects obligations entered into "with regard to investments" and not with regard to investors. An investor may invoke Article 3.4 in relation to obligations entered into by the Government with a local entity in which the investor is a shareholder.[244] The Claimant contends that the cases it refers to have recognised that enabling investors to bring claims based on contracts signed by locally-incorporated entities in which the investor holds shares best fulfils the purpose of protecting and promoting investment, given the practical reality that foreign investment is often structured through transactions involving locally-incorporated entities.[245]

308. The Claimant submits that the Respondent's analysis disregards the ordinary meaning of the Treaty for, *inter alia*, the following reasons:

a. The Respondent's textual analysis hangs on a counterintuitive reading of the term "obligation" as requiring a direct relationship between an obligor and an obligee. This argument is directly contradicted by the broad text of Article 3.4, which requires Peru to observe "*any* obligation" entered into "with regard to *investments*" of Dutch nationals.[246]

b. The Respondent's argument that the Claimant should not be permitted to advance rights that it did not possess under Peruvian law is likewise flawed. The analysis of

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243 Claimant's Memorial, ¶¶ 296-300.

244 Claimant's Memorial, ¶¶ 301-302, referring to: *Strabag SE v. Libya*, ICSID Case No. ARB(AF)/15/1, Award (29 June 2020), ¶¶ 137, 167, 187-188, 195-208, 245-246 (**CA-249**); *Continental Casualty Company v. Argentine Republic,* ICSID Case No. ARB/03/9, Award (5 September 2008), ¶¶ 286, 297, 303 (**CA-150**); *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award (28 September 2007) ("***Sempra v. Argentina* Award**"), ¶¶ 83, 88-95, 314 (**CA-142**); *EDF International S.A. et al. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award (11 June 2012) ("***EDF v. Argentina* Award**"), ¶¶ 169-171, 210, 890, 938 (**CA-189**); *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Decision (5 February 2016) ("***EDF v. Argentina* Decision on Annulment**"), ¶¶ 275-278 (**CA-221**); *Supervisión y Control, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award (18 January 2017) ("***Supervisión v. Costa Rica* Award**), ¶¶ 287-289 (**CA-228**).

245 Claimant's Memorial, ¶ 303, referring to: *Supervisión v. Costa Rica* Award, ¶¶ 287-289 (**CA-228**); *Sempra v. Argentina* Award, ¶¶ 310-312 (**CA-142**); *EDF v. Argentina* Decision on Annulment, ¶ 275 (**CA-221**).

246 Claimant's Reply, ¶ 100.

the "content and scope" of the obligations of the Stability Agreement, and whether they require Peru to apply stability guarantees to the Concentrator, are a matter of Peruvian law. However, the analysis of that issue is completely separate from the question as to whether the Claimant is entitled to bring claims under Article 3.4 on the basis of those "obligations." The entire purpose of the Treaty is to grant foreign investors investment protection rights and standing to enforce those rights in international arbitration, irrespective of whether those rights exist as a matter of local law.[247]

c. The Respondent's attempt to limit Article 3.4 obligations to those directly held by the investor ignores that the clause is clearly aimed at protecting an investor's *investment* from unlawful state conduct. The so-called "privity" requirement thwarts the object and purpose of the Treaty by denying foreign investors the protection of their treaty right to require Peru's compliance with obligations regarding their investment.[248]

d. There is no basis for the Respondent's attempt to introduce a temporal requirement relating to the fact that the Claimant was not an investor when the Stability Agreement was signed. By its plain terms, Article 3.4 clearly does not include a temporal limitation, and Article 10 explicitly confirms the Treaty's broad temporal scope.[249]

309. The Claimant argues that prior cases which have required "privity" as a precondition to invoke umbrella clauses such as Article 3.4 have been wrongfully decided, as this contradicts the plain text of the provision. The Claimant points out that Article 3.4 does not include any limitations or carve-outs from its scope, let alone require that the obligations be owed directly to the claimant investor. This is supported by the treaty practice of the

[247] Claimant's Reply, ¶ 101.

[248] Claimant's Reply, ¶¶ 102-103.

[249] Claimant's Reply, ¶ 104.

Contracting Parties, in which the umbrella clauses within other treaties have expressly limited their scope to obligations entered into "with investors."[250]

310. The Claimant argues that the decisions on which the Respondent relies are inapposite or wrongfully decided, or the views on privity were supported with few reasons.[251] The Claimant submits that other tribunals have explicitly rejected attempts to introduce a "privity" requirement to similarly worded clauses, acknowledging that to do so would subvert the relevant treaty's plain text, and that the Respondent's attempts to distinguish more recent decisions are unavailing.[252]

311. In the absence of a "dominant view," the Claimant states that the Tribunal must focus on the language of the particular treaty provision before it and assess the Parties' arguments on that basis. The Claimant submits that those terms make abundantly clear that the Claimant is entitled to advance claims based on the Respondent's breaches of the Stability Agreement, because the agreement (i) contained obligations entered into by Peru; (ii) these

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[250] Claimant's Memorial, ¶¶ 304-305, referring to, *inter alia*: Agreement between the Government of the Republic of Singapore and the Government of the Republic of Peru on the Promotion and Protection of Investments (27 February 2003), Article 15 (**CA-97**); Agreement on Encouragement and Reciprocal Protection of Investments between the Government of the People's Republic of China and the Government of the Kingdom of the Netherlands (26 November 2001), Article 3(4) (**CA-85**); Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Argentine Republic (20 October 1992), Article 4.1 (**CA-50**).

[251] Claimant's Reply, ¶¶ 105-108, referring to: *Greentech Energy Systems A/S, et al. v. The Italian Republic*, SCC Case No. V 2015/095, Award (23 December 2018), ¶ 467 (**CA-349**); *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability (14 December 2012) ("*Burlington Resources Inc. v. Ecuador* Decision on Liability"), ¶¶ 130, 233 (**CA-198**); *Oxus Gold v. The Republic of Uzbekistan and others*, UNCITRAL, Final Award (17 December 2015) ("***Oxus v. Uzbekistan* Award**"), ¶¶ 368, 375 (**RA-10**); *WNC Factoring Ltd. v. The Czech Republic*, PCA Case No. 2014-34, Award (22 February 2017) ("***WNC Factoring v. Czech Republic* Award**"), ¶¶ 314, 320 (**RA-7**); *Azurix Corp. v. Argentine Republic,* ICSID Case No. ARB/01/12, Award (14 July 2006) ("***Azurix v. Argentina* Award**"), ¶ 384 (**RA-9**); *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (6 February 2007) ("***Siemens v. Argentina* Award**"), ¶ 205 (**RA-11**); *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic (25 September 2007) ("***CMS v. Argentina* Decision on Annulment**"), ¶¶ 95(c), 97 (**RA-6**); *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award (5 September 2008), ¶ 297 (**CA-150**).

[252] Claimant's Memorial, ¶ 307; Claimant's Reply ¶ 108, referring to: *Strabag v. Libia* Award, ¶¶ 163-164 (**CA-249**); *Continental Casualty v. Argentina* Award, ¶ 297 (**CA-150**); *Supervisión v. Costa Rica* Award, ¶¶ 287-289 (**CA-228**).

obligations were "with regard to" the Claimant's protected investment in SMCV; and (iii) the Claimant is a Dutch national.[253]

ii. Whether the Respondent breached its obligations under Article 3.4 of the Treaty

312. It is the Claimant's position that the Respondent repeatedly breached its obligations under Article 3.4 of the Treaty, by virtue of breaching its obligations under the Stability Agreement to grant tax and administrative stability to the entire Cerro Verde Mining Unit, including the Concentrator.[254]

a) The Mining Law, the Regulations to the Mining Law, and the 1998 Stability Agreement

313. The Claimant submits that under the plain text of the Mining Law and Regulations in force until 2014, stability guarantees applied to the entire mining unit or concession(s) in which the investor made its qualifying minimum investment, without distinguishing whether the investments were included in the feasibility study, different processing methods were used within the mining unit, or otherwise.[255] The Claimant refers, *inter alia*, to the following provisions in support of its position:

a. Mining Law:[256]

i. Article 82: this provision confirmed that the law granted stability guarantees to "mining activity titleholders" for the purpose of promoting investment within an "Economic-Administrative Unit[]," and that investors might obtain stability guarantees by making significant investments within that "Economic-Administrative Unit[]." An "Economic-Administrative Unit" explicitly included not only the mining

253 Claimant's Reply, ¶ 109.

254 Claimant's Memorial, ¶¶ 308 *et seq.*

255 Claimant's Memorial, ¶¶ 309-310.

256 Claimant's Memorial, ¶ 311.

concessions, but also the processing facilities that constituted a "single production unit."

ii. Article 83: this provision provided for a minimum qualifying amount of US$50 million for existing mining companies and US$20 million for the start of activities. The provision did not distinguish between different types of mining "activities," in particular it did not distinguish between initial investments and later investments, or between leaching and flotation activities. On the contrary, according to Article 7, mining activities broadly included "exploration, exploitation, beneficiation, general work, and mining transport" that are "carried out […] through the concession system."

iii. Article 80: this provision granted "tax stability" and other benefits to the "mining activity titleholder" and thus makes clear that those benefits derived from the investor's relevant mining titles (*i.e.* the concession or concessions making up that unit).

iv. Article 84: this provision granted additional guarantees to the "mining activity titleholder" that entered into the stability agreement.

v. Article 72: this provision characterised those basic benefits as granted to the "titleholders" of "mining activity."

b. Mining Regulations:[257]

i. Article 1: this provision provided that stability guarantees are granted to "mining activity titleholders" "for the performance of their activities."

ii. Article 2: this provision provided that stability guarantees "shall apply as of right to all mining activity titleholders" (persons or entities "that perform mining activities in a concession or in concessions grouped in an

[257] Claimant's Memorial, ¶ 312.

Economic Administrative Unit, as titleholders or assignees") so long as they "[e]nter[ed] into a stability agreement." The provision then expressly confirms that stability guarantees applied on the basis of "concessions or units."

iii. Article 18: this provision confirmed that the subject of an application to execute a mining stability agreement was specific mining rights, *i.e.* concessions.

iv. Article 22: this provision provided that the stability guarantees "shall benefit the mining activity titleholder exclusively for the investments that it makes in the concessions or Economic-Administrative Units," confirming that their scope was bounded by the mining unit or concession in which the qualifying minimum investment was made.

v. Article 25: this provision made clear that stability extended to the entire mining unit or concession, rather than to a specific investment, because it acknowledged that a mining company could undertake "expansion of facilities or new investments that contractually enjoy the guarantee of legal stability."

314. Therefore, the Claimant argues that Articles 72, 80 and 84 of the Mining Law demonstrate that stability guarantees applied to entire concessions or mining units, because they confirmed that it was the "mining activity titleholder" that was entitled to tax stability and other benefits, making clear that those benefits apply to the mining company's relevant mining titles, *i.e.* its concessions. The Claimant states this interpretation is confirmed by Articles 1, 4, 5, 14 and 15 of the Mining Regulations, which likewise confirm that stability guarantees were granted to "mining activity titleholders." Further, the Claimant submits that Article 82 of the Mining Law made clear that EAUs are a necessary concept for applying stability guarantees, and both Articles 18 and 25 of the Regulations support this point.[258] As to Peru's attempt to paint various provisions of the Mining Law and

[258] Claimant's Reply, ¶¶ 37-40.

Regulations as supporting its position that stability guarantees are limited to specific "investment projects," simply because they referenced the feasibility study or the qualifying minimum investment, the Claimant argues that this misstates the purpose of these provisions.[259]

315. The Claimant submits that the Mining Law's drafters confirm that the Mining Law granted stability guarantees to the entire mining unit or concession on the basis of, *inter alia*, the following:

a. Ms. Chappuis – who co-drafted the foregoing provisions in L.D. 708 of 1991, which became Title Nine of the Mining Law – testifies that under the Mining Law, stability agreements cover "all investments" that a mining activity titleholder makes in its concession or "mining unit." She says that the definition of "economic administrative unit" was intended to be "broad and include[] the mining concessions dealt with by […] [Article 44], any beneficiation facilities or concessions, and any other assets that constitute a single production unit." She goes on to state that Article 83 was carefully drafted, without placing any limitation on the mining company's "activities" that could receive the "contractual benefit." Ms. Chappuis noted that the drafters wanted to clarify that the "stability would benefit only [the concession or] mining unit that was the target of the [qualifying minimum] investment, to the exclusion of other mining units."[260]

b. Ms. Vega – who at the request of MINEM and the Mining Society personally consolidated L.D. 708 into the Mining Law – likewise explains that the Mining Law provisions referenced above, "alone and taken together, made clear that stability guarantees extended broadly to all investments that a mining company made within the concessions or units covered by its stability agreement during the 10 or 15 years it is in force." She notes that Article 82 defined EAUs for purposes of stability as covering both mining and beneficiation concessions that constituted a single production unit (or single mining unit). She goes on to explain that the

[259] Claimant's Reply, ¶ 41.

[260] Claimant's Memorial, ¶ 314, referring to: [**Chappuis 1**], ¶¶ 21, 28, 45-46.

"broad concept of a mining unit, by ensuring that stability guarantees apply to both mining concessions and to beneficiation concessions that share fundamental inputs, avoids the difficulties associated with artificially segregating an integrated operation, or applying different tax regimes to an integrated operation."[261]

316. The Claimant argues that Peru's assertion that stability agreements "are intended to grant stability benefits only to the specific investment projects […] for which they were signed" contradicts the plain text of the Mining Law and Regulations:[262]

a. Article 88 of the Mining Law and Articles 2 and 22 of the Mining Regulations confirm that stability guarantees applied to entire concessions or mining units. Peru's assertion that stability agreements "are intended to grant stability benefits only to the specific investment projects […] for which they were signed" finds absolutely no support in the Mining Law or Mining Regulations which, until their amendments in 2014 and 2019 respectively, did not even mention the term "investment projects."[263]

i. Peru's argument that Article 83 of the Mining Law limited stability guarantees to the "investment project" is largely based on Mr. Polo's unsupported testimony, while Article 83 contained no such limitation. The Government confirmed that Article 83 of the Mining Law applied stability guarantees to concessions or mining units when a year after the adoption of the Mining Law it approved the Mining Regulations implementing the Mining Law's stability guarantee regime.[264]

ii. Articles 2 and 22 of the Regulations—which leave no doubt that stability guarantees applied to the entire concessions or EAUs in which the investor made the qualifying investment—are fatal to Peru's case, despite

[261] Claimant's Memorial, ¶ 315, referring to: [**Vega 1**], ¶¶ 34, 36, 38-40.

[262] Claimant's Reply, ¶ 25, referring to: Respondent's Counter-Memorial, ¶ 35.

[263] Claimant's Reply, ¶¶ 26-28.

[264] Claimant's Reply, ¶¶ 29-30.

Peru's attempts to downplay the importance of these provisions and ignore the express language.[265]

iii. That Article 83 of the Mining Law and Article 22 of the Regulations applied stability guarantees to concessions is further confirmed by the fact that Peru had to later amend these provisions to implement its novel and restrictive position.[266]

b. The Government had to amend the Mining Law and Mining Regulations to conform them to its restrictive "interpretation": (i) the 2014 amendment to the Mining Law, which expressly introduced a provision limiting certain stability agreements to the feasibility study's investment program, demonstrates that the 1998 version of the Law did not implicitly contain this limitation, since the amendment would have otherwise been unnecessary; (ii) MINEM's December 2019 amendments to Article 22 of the Mining Regulations confirm that the previous version of the Mining Regulations did not limit stability to the feasibility study's investment program.[267]

c. Peru's assertion that the Claimant's interpretation is "unlimited" in scope is nonsensical: (i) stability agreements are limited to the mining activities performed within a concession or mining unit, are limited by time, and limit the type of activities that a company can carry out; (ii) Peru ignores that the Government maintains control over a mining company's ability to make additional investments; and (iii) Peru's argument that granting stability guarantees to specific investment projects allows the Government to analyse the taxes it will receive is divorced from how the stability regime actually operates.[268]

317. The Claimant notes that Peru agrees that the Mining Law and Mining Regulations govern the scope of stability guarantees and that Peru does not, and cannot, contest that the Concentrator was part of SMCV's Beneficiation Concession. If it is established that the

[265] Claimant's Reply, ¶¶ 30-31.

[266] Claimant's Reply, ¶¶ 32-36.

[267] Claimant's Memorial, ¶¶ 349-351.

[268] Claimant's Reply, ¶¶ 50-53.

Mining Law and Mining Regulations applied stability guarantees to concessions, the Claimant submits there should be no dispute that the Concentrator was entitled to the stability guarantees.[269]

318. Accordingly, to achieve their intended purpose, the Claimant argues that stability guarantees must extend to an entire mining unit. The Claimant states that this is the only interpretation consistent with the Government's stated purpose of promoting private investment in the mining sector: (a) promoting private investment in mining was the Government's primary objective in adopting the landmark stability incentives that L.D. 708 introduced into the Mining Law; (b) to accomplish the purpose of promoting foreign investment, it is critical for stability guarantees to apply to entire mining unit, given the basic commercial realities of mining operations; (c) international practice confirms that stability guarantees typically apply to entire mining units.[270]

319. The Claimant alleges that Peru's interpretation undermines the Mining Law's purpose of promoting investment by creating administrative burdens and legal uncertainty on the basis of: (a) by their very nature, mining units require continuing investments over time and limiting stability guarantees to the investments in the feasibility study undermines the promotion of investment in mining resources; (b) there are many costs and assets within an integrated mining unit that cannot be allocated in any obvious and reasonable manner to a specific investment; (c) Peruvian law provided no guidance whatsoever on how to actually implement a stability regime based on individual investments, as the Mining Law and Mining Regulations were silent on how to allocate assets and costs between stabilized and non-stabilized investments within the same integrated mining unit; (d) the Government's own haphazard and erratic attempts to implement its novel interpretation against SMCV make it abundantly clear that the stability regime was never intended to operate with multiple regimes within the same unit, and that doing so is extremely difficult.[271]

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269 Claimant's Reply, ¶ 23.

270 Claimant's Memorial, ¶¶ 316-320, referring to: [**Chappuis 1**], ¶¶ 15, 23-24; [**Vega 1**], ¶ 38; **[Otto 1**], ¶¶ 15, 17-28, 32, 36; [**Morán 1**], ¶ 16.

271 Claimant's Memorial, ¶¶ 352-358.

320. With respect to the Stability Agreement, the Claimant asserts that it also required Peru to apply the stabilized regime to the entire Cerro Verde Mining Unit, including the Concentrator.[272] The Claimant makes, *inter alia*, the following submissions on this issue:

a. The Stability Agreement confirmed that stability guarantees applied to the mining and beneficiation concessions:[273]

i. As a matter of Peruvian law, a stability agreement must reflect the guarantees of the Mining Law and therefore must be interpreted to be consistent with that framework. Article 86 of the Mining Law provided that stability agreements "shall incorporate all the guarantees established" in the Mining Law.[274]

ii. Clause 3 of the Stability Agreement (titled "Mining Rights") confirmed that the stability regime's guarantees applied to all of SMCV's activities in the Cerro Verde Mining Unit. Peru's reading of Clause 3 ignores the plain terms and would render Clause 3 both superfluous and internally contradictory.[275]

iii. Clauses 9 and 10 of the Stability Agreement (reflecting the guarantees set out in the Mining Law) confirmed that stability extended to all of SMCV's activities in the Cerro Verde Mining Unit. In particular, Clauses 9 and 10 grant the stability guarantees to the "owner" of the concessions and nowhere limit these guarantees to a specific investment or processing method.[276]

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272 Claimant's Memorial, ¶¶ 328 *et seq*.

273 Claimant's Memorial, ¶ 329.

274 Claimant's Memorial, ¶ 330, referring to: [**Chappuis 1**], ¶ 26; [**Vega 1**], ¶¶ 31, 53, 55; [**Bullard 1**], ¶ 20.

275 Claimant's Memorial, ¶ 331; Claimant's Reply, ¶ 76.

276 Claimant's Memorial, ¶ 332; Claimant's Reply, ¶ 78.

iv. Peruvian law experts confirm that the Stability Agreement implemented the Mining Law and Mining Regulations to confer stability guarantees to SMCV's Mining and Beneficiation Concessions.[277]

v. Peru's interpretation of Clause 1 of the Stability Agreement, which was titled "Background Information," is incorrect. Clause 1 makes clear that the name does not define the scope of the stability guarantees, which is set forth in Clause 3, but has a merely referential character.[278]

vi. Contrary to Peru's arguments, Clauses 4, 5, 6, 7 and 8 of the Stability Agreement do not limit the effects of the Stability Agreement to an "investment project," and they have nothing to do with the scope of the Stability Agreement.[279]

vii. Peru's experts, Prof. Morales and Prof. Eguiguren, do not explain what terms of the Stability Agreement should be read "restrictively" or "narrow[ly]" because stability agreements involve public policy considerations. Their argument lacks any basis in law and contradicts their acknowledgment that the Stability Agreement must strictly implement the guarantees of the Mining Law. Any ambiguity in the Stability Agreement must be interpreted in favour of SMCV according to the principle of *contra proferentem*.[280]

b. Cerro Verde is an Integrated Mining Unit, which includes the Concentrator:[281]

i. Cerro Verde operates as a single mining unit, comprising the Mining and Beneficiation Concessions, both of which are explicitly covered by the Stability Agreement. SMCV's integrated mining, leaching, and flotation operations meet the characteristics of an "EAU" set forth in Article 82 of

277 Claimant's Memorial, ¶ 333, referring to: [**Bullard 1**], ¶¶ 15, 27; [**Vega 1**], ¶ 57; [**Chappuis 1**], ¶ 39.

278 Claimant's Reply, ¶ 77.

279 Claimant's Reply, ¶ 79.

280 Claimant's Reply, ¶ 80.

281 Claimant's Memorial, ¶ 334.

the Mining Law because they constitute a mining concession, processing plants, and other assets that share "supply," "administration," and "services."[282]

ii. MINEM specifically endorsed the Concentrator's inclusion in the Cerro Verde Mining Unit when the DGM preliminarily approved the expansion of the Beneficiation Concession to include the Concentrator in October 2004. The DGM's decision to grant SMCV's application to expand Cerro Verde's processing rights under the *existing* Beneficiation Concession, instead of a new and separate beneficiation concession, leaves no doubt that the Concentrator, as part of the Cerro Verde Mining Unit, is covered by the Stability Agreement.[283]

iii. MINEM's inclusion of the Concentrator within the existing Beneficiation Concession was entirely in line with the Government's consistent recognition of Cerro Verde as a single mining unit since the 1970s, and with its clear recognition of the need to develop a concentrator as part of Cerro Verde's integrated production unit.[284]

iv. Following the October 2004 provisional approval of the Beneficiation Concession expansion, the Government continued to confirm that SMCV's concentrator was part of the Cerro Verde Mining Unit, including: (a) MINEM recognized that the Concentrator would be part of SMCV's Mining Unit in December 2004 when it approved SMCV's use of the profit reinvestment benefit to finance the construction of the Concentrator, confirming its earlier statement to that effect in September 2003; (b) in its 2009 investment report, MINEM referred to Cerro Verde as a single production unit, and also depicted Cerro Verde as a "mining

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282 Claimant's Memorial, ¶ 335.

283 Claimant's Memorial, ¶ 336, referring to, *inter alia*: SMCV, Petition No. 1487019 to MINEM (27 August 2004) (**CE-457**); MINEM, Report No. 784-2004-MEM-DGM/PDM and Directorial Order No. 1027-2004-MEM-DGM/PDM (26 October 2004) (**CE-476**).

284 Claimant's Memorial, ¶ 337.

unit" in its official map of ongoing mining projects; (c) throughout 2009, MINEM's Supervisory Agency for Investment in Energy and Mining similarly consistently referred to the "Cerro Verde Mining Unit" in its reports; and (d) in 2009, SUNAT's webpage similarly described SMCV's operations as one "production unit."[285]

c. The Government's own conduct confirms that stability applied to the entire Cerro Verde Mining Unit:[286]

   i. Peru's conduct before the Claimant made its investment confirms that Peru understood that the Stability Agreement would apply to the entirety of SMCV's Mining Unit.[287]

   ii. The 2006 Roundtable Discussions clearly assumed that SMCV would not pay any royalties, including for the Concentrator, because the Stability Agreement applied to the entire Cerro Verde Mining Unit.[288]

   iii. The Government treated SMCV as fully stabilized with respect to the entire Cerro Verde Mining Unit during the preparation of the Voluntary Contributions and GEM programs.[289]

d. Peru explicitly confirmed that the Concentrator would be entitled to stability:[290]

   i. After receiving confirmation from Government officials, SMCV obtained approval of the beneficiation concession expansion to include the Concentrator. In the second and third quarters of 2004, SMCV representatives met with Ms. Chappuis—the Director General of Mining in charge of granting beneficiation concessions and ensuring compliance

[285] Claimant's Memorial, ¶ 338.
[286] Claimant's Memorial, ¶ 340.
[287] Claimant's Memorial, ¶ 340.
[288] Claimant's Memorial, ¶ 341.
[289] Claimant's Memorial, ¶ 342.
[290] Claimant's Reply, ¶¶ 81 *et seq*.

with stability agreements—who confirmed that the Stability Agreement applied to SMCV's entire mining unit and that SMCV could rely on the Stability Agreement's guarantees for the Concentrator investment so long as SMCV asked for, and MINEM approved, the Concentrator to be included in the stabilized Beneficiation Concession. Peru's attempts to disclaim its confirmation that SMCV was entitled to stability for the Concentrator because it would be included in the stabilized Beneficiation Concession are unpersuasive and contradicted by the evidence.[291]

ii. The Government's confirmation that the Concentrator was part of the stabilized mining unit was consistent with its prior practice toward Cerro Verde: (a) MINEM's inclusion of the Concentrator within the existing Beneficiation Concession was entirely in line with the Government's consistent recognition of Cerro Verde as a single mining unit since the 1970s; (b) during the privatisation process, Peru also emphasised the availability of stability guarantees for Cerro Verde, without distinguishing between different processing methods or specific investments; and (c) MINEM's approval of SMCV's use of the profit reinvestment benefit to finance the construction of the Concentrator confirmed the Government's position that the Concentrator was part of SMCV's stabilized mining unit.[292]

iii. SMCV, Phelps Dodge, Sumitomo Metal Mining and the Claimant's "due diligence" is irrelevant as to whether SMCV was legally entitled to stability for the Concentrator: (a) Peru's attempt to frame the question of whether, under the Stability Agreement, Peru was obligated to grant stability guarantees to the Concentrator, being a subjective question of whether SMCV "knew or should have known" about its intentions or

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[291] Claimant's Reply, ¶¶ 82-84; Claimant's Memorial, ¶¶ 112-115, referring to: [**Aquiño 1**], ¶¶ 21, 28, 30, 57, 63; [**Aquiño 2**], ¶¶ 5, 7, 11; [**Chappuis 1**], ¶¶ 51-55; [**Chappuis 2**], ¶¶ 24, 35-41; [**Davenport 1**], ¶¶ 21, 23, 35, 36, 39; [**Davenport 2**], ¶¶ 10-16; [**Kawaguchi 1**], ¶¶ 25, 28; [**Kawaguchi 2**], ¶ 12; [**Otto 1**], ¶¶ 33, 51; [**Otto 2**], ¶¶ 27-29; [**Torreblanca 1**], ¶¶ 11, 23-27; [**Torreblanca 2**], ¶¶ 12-17, 19, 22; [**Tovar 1**], ¶¶ 14, 18, 19, 22.

[292] Claimant's Reply, ¶¶ 85-88.

whether SMCV or the Claimant conducted sufficient "due diligence" on the issue is simply wrong as a matter of law and fact; (b) SMCV's initial assumption that the Concentrator would be entitled to stability guarantees was well-founded; (c) before proceeding with the Concentrator investment, SMCV representatives met multiple times with Government officials to discuss, among other issues, whether the Concentrator would be entitled to stability guarantees, during which meetings Peru confirmed that it would be; (d) Phelps Dodge made clear prior to the investment that it expected that Peru would approve the expanded beneficiation concession to apply to the Concentrator; (e) Peru's arguments that the Claimant cannot establish that it undertook adequate due diligence before its investment in 2005 about the scope of the 1998 Stabilisation Agreement are completely unfounded; (f) Peru's argument relating to the fact that SMCV entered into three separate stability agreements in 1994, 1998 and 2012 makes no sense and ignores the obvious reasons that SMCV entered into those agreements.[293]

e. Peru concedes that it applied stability guarantees to: (a) multiple investments that SMCV made in its mining unit that were not included in the 1996 Feasibility Study; and (b) SMCV's existing operations at the time it made the qualifying minimum investment for the 1998 Stability Agreement. When Peru did attempt to implement its novel position, it did so in a haphazard and erratic manner that only underscores that the stability guarantees were never intended to operate with multiple stabilisation regimes within a single concession or mining unit.[294]

321. The Claimant submits that the Respondent's novel interpretation limiting stability guarantees only to the investment program included in the Feasibility Study is entirely unsupported by the plain terms of the Mining Law and Regulations and the Stability Agreement itself, flies in the face of the Government's own practice, and undermines the

[293] Claimant's Reply, ¶¶ 89-97.

[294] Claimant's Reply, ¶¶ 47-49.

basic purposes of stability guarantees in the first place.[295] The Claimant argues that the Feasibility Study's Investment Program demonstrated an investor's eligibility to enter into a stability agreement, not the scope of that agreement on the basis of, *inter alia*, the following: (a) under the Mining Law and Mining Regulations, the feasibility study served the purpose of demonstrating an investor's eligibility by virtue of its qualifying minimum investment program; (b) Ms. Vega and Ms. Chappuis confirmed their views that the feasibility study played the important function of demonstrating an investor's eligibility for stability guarantees and the feasibility of the investment, but did not limit the guarantee's protective scope; (c) the terms of the Stability Agreement confirmed that the qualifying investment program included in the feasibility study served the critical role of demonstrating that an investor was eligible for stability guarantees to begin with; and (d) the fact that the Third Transitory Chamber of Constitutional and Social Law of the Supreme Court stated in the 2008 Royalty Case that the investment program contained in the feasibility study limited the scope of the Stability Agreement does not affect this analysis.[296]

322. The Claimant asserts that it was confirmed at the Hearing that the Stability Agreement covered the Concentrator on the basis of, *inter alia*, the following:

a. The Hearing confirmed that the Mining Law and Mining Regulations extended stability guarantees to the entire concession or mining units in which mining companies made their qualifying minimum investment. Testimony confirmed that L.D. 708, which reformed the existing mining law, was designed to attract much needed foreign investment. To do so, Peru followed the approach of other mining jurisdictions in applying stability guarantees to entire concessions or mining units. Through L.D. 708, Peru created a "clear stable, and totally predictable" investment framework that extended guarantees to entire concessions or mining units. The Hearing confirmed that the basic commercial realities of mining operations—including the need for constant investments to optimise processes, update

[295] Claimant's Memorial, ¶ 343.

[296] Claimant's Memorial, ¶¶ 344-348.

equipment, and adapt to orebody changes—require that stability guarantees apply to mining units or concessions.[297]

b. The Hearing showed that the Mining Law fully embodied the legislative purpose of investment promotion and administrative simplification, granting stability guarantees to all activities within the concessions or mining units in which a mining investor made its qualifying minimum investment. The Respondent's continued assertion that stability guarantees applied exclusively to "investment projects" finds absolutely no support under the Mining Law—especially because the term did not even exist in the Mining Law until July 2014—and is fundamentally inconsistent with its legislative purpose. At the Hearing, the Respondent attempted to leverage its witnesses and experts to support its reading of the Mining Law and Regulations, but none of this testimony withstood scrutiny, as each of the witnesses and experts conceded that they were not qualified to provide authoritative testimony.[298]

c. The testimony confirmed that the Stability Agreement applied to the Cerro Verde Mining Unit and the Concentrator. Under Article 86 of the Mining Law, stability agreements are adhesion contracts that fully "incorporate all the guarantees established in [the Mining Law and Regulations]," including the substance and scope of such guarantees. In line with the Mining Law and Regulations, Clause 3 of the Stability Agreement provided that stability guarantees applied to all of SMCV's activities in its Mining Unit, and Clause 1 further confirmed that the Stability Agreement covered the Cerro Verde Mining Unit. The Hearing confirmed that neither SMCV's qualifying investment nor the referential name of the 1998 Stability Agreement defined the scope of the stability guarantee. With respect to the 1994 Stability Agreement, the qualifying investment and the referential name of that agreement could not have determined the scope of the stability guarantees, and the context surrounding the execution of both the 1994 and 1998 Stability Agreements further demonstrates that both Agreements stabilized the entire Cerro Verde Mining Unit. The DGM issued a report clarifying the relationship between

[297] Claimant's PH Brief, ¶¶ 8-13.

[298] Claimant's PH Brief, ¶¶ 14-16.

the two agreements, cautioning that both applied to SMCV's "Economic-Administrative Unit" and that two different tax regimes could not "co-exist" within the same unit.[299]

b) The Practice of Government Organs on the Scope of Stability Agreements

323. The Claimant argues that, prior to adopting its novel interpretation, the Respondent had consistently applied stability guarantees based on mining units or concessions, both in theory and in practice.[300] In support of this, the Claimant refers to, *inter alia*, the following:

a. Mr Isasi, prior to his drafting of the novel interpretation in June 2006 that formed the basis of the SUNAT assessments, had only a year before unequivocally confirmed that stability guarantees apply on the basis of the concessions in which the qualifying minimum investment was made, not the investment itself. His April 2005 Report to the Minister of Energy and Mines explaining the application of the Royalty Law to mining investors with stability agreements contained categorical statements which left no doubt that the Government understood that the *concessions*, not the qualifying minimum *investments*, defined the scope of the stability guarantees.[301]

b. MINEM's DGM understood stability guarantees as applying to EAUs or concessions in their treatment of stabilized companies.[302]

i. Peru offers no serious response to MINEM's 2001 decisions concerning Parcoy, a mining unit in northern Peru owned by Consorcio Minero Horizonte S.A., in which both the DGM and the Mining Council (an administrative body within MINEM in charge of "standardiz[ing]

[299] Claimant's PH Brief, ¶¶ 17-29.

[300] Claimant's Memorial, ¶ 321.

[301] Claimant's Memorial, ¶¶ 322-323.

[302] Claimant's Memorial, ¶ 324.

administrative jurisprudence regarding mining issues") – confirmed that stability guarantees applied to the entire Parcoy EAU.[303]

ii. None of the examples of other mining units support Peru's position but instead confirm Peru's consistent practice of applying stability guarantees to entire concessions or mining units.[304]

c. Former MINEM officials confirm that this was the Government's understanding before it adopted the novel interpretation under political pressure, including Ms. Chappuis – referring to her tenure at MINEM from 2001 to 2004 – and Mr. Flury – referring to his tenure as Minister of Energy and Mines.[305] Peru does not rebut Mr. Flury's testimony that (as Minister of Energy and Mines) he understood the stability guarantees applied to entire concessions or mining units.[306] Further, the DGM and Mining Council's assessment of the BHP Tintaya 1995 stability agreement with Peru – that Mr. Flury signed on behalf of Peru – clearly demonstrates that the agreement covered the concession or mining unit.[307]

d. SUNAT clearly assumed that stability guarantees applied to concessions and mining units, on the basis of prior statements and assessments.[308] Peru does not rebut the examples of SUNAT's acknowledgements as late as 2012 that stability guarantees applied to concessions and mining units, including the following:[309]

i. SUNAT repeatedly referred to "concessions or mining units" or "production units" when considering whether royalties had to be paid. For example, in early 2005, SUNAT sent a form letter to SMCV referring to

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303 Claimant's Reply, ¶ 56, referring to MINEM, Resolution No. 380-2001-EM-CM (16 November 2001), p. 1 (**CE-377**).

304 Claimant's Reply, ¶ 59, referring to Mr. Camacho and Ms. Bedoya's testimony regarding, *inter alia*, Minera Milpo, Minera Barrick, and Minera Yanacocha: [**Camacho 1**], ¶ 15; [**Bedoya 1**], ¶¶ 28-29.

305 Claimant's Memorial, ¶ 325.

306 Claimant's Reply, ¶ 57.

307 Claimant's Reply, ¶ 58.

308 Claimant's Memorial, ¶ 326, referring to: SUNAT Letter to SMCV (17 February 2005), p. 1 (**CE-482**); SUNAT Report No. 261-2007-SUNAT/2F0000 (20 November 2007), p. 2 (**CE-568**); MINEM, Report No. 1169-2007-MEM-DGM (14 December 2007) (**CE-570**).

309 Claimant's Reply, ¶ 61.

it as a "holder[] of [a] mining concession[]" with instructions on how to submit certain information about its "Production Unit(s)" for purposes of determining royalty payments, thus confirming that the mining unit and concessions were the relevant item for the purposes of stability.

ii. In May 2006, Superintendent Hirsh and Minister Zavala testified before Congress and explained the process by which the "holders of mining concessions" would be assessed royalty payments. In doing so, they made clear SUNAT's view which was that stability guarantees applied to entire mining units.

iii. In December 2006, SUNAT issued special instructions to companies with stability agreements so that they could file their tax returns with respect to "each mining concession or Economic-Administrative Unit."

iv. On 20 November 2007, Mr. Marcel Gastón, SUNAT's National Intendent, asked MINEM to provide a "list of parties obligated to pay mining royalties from June 2004 to date. In response, MINEM said it would send the list "approximately in…February 2008," as MINEM needed additional time to assess the "ownership of concessions and [Economic Administrative Units]" due to changes in its database, not because it needed to assess specific "investment projects."

v. In September 2012 – three years after SUNAT had issued the first Royalty Assessment against SMCV – SUNAT confirmed in an advisory report that "mining-activity owners that have signed [stability agreements] will enjoy a stabilized tax system applicable solely to the concession or economic-administrative unit for which said agreement has been signed." When calculating payments to offset tax losses of one or more units against others, "the owner should take into account the stabilized laws to be applied to each of the concessions or economic-administrative units."

e. Peru fails to address that the Government's initial implementation of the Royalty Law confirms that stability guarantees applied to whole mining units or concessions, including by way of confirmations from senior government officials.[310]

324. The Claimant submits that Peru provides no evidence of its so-called "consistent practice" prior to SMCV's decision to proceed with the Concentrator investment. Only one of the eight examples highlighted by Peru predates the political pressure on MINEM in connection with the Royalty Law discussions: a 2002 SUNAT Report which in fact does not support Peru's position. The remaining examples provided by Peru all date from 2005-2006, which is after the decision to proceed with the Concentrator investment.[311]

325. The Claimant further argues that, at the Hearing, the Respondent failed to present a coherent position on the scope of stability guarantees or to reconcile its position with the plain terms of the Mining Law and Regulations and the Government's own prior practice:

a. In the Respondent's opening, it presented an entirely new theory: that the Mining Law and Regulations set the "outer boundaries" of stability guarantees to "concessions" or "units" but particular stability agreements limited those guarantees to the "specific Investment Project described in the feasibility study and identified in the agreement." This theory failed to withstand scrutiny at the Hearing. Whether under this new theory, or its original position that stability guarantees were limited to "investment projects," the Respondent's witnesses failed to coherently explain how Government entities would determine if a particular investment was stabilized in practice. These witnesses went so far as to suggest that the Government's determination was discretionary, an outcome that would be irreconcilable with the Respondent's express mining reform objective to eliminate administrative discretion, unpredictability, and corruption. The Respondent's counsel and witnesses were unable to defend Peru's position, which is not just administratively impracticable—it is fundamentally incompatible with the capital-

310 Claimant's Memorial, ¶ 327; Claimant's Reply, ¶ 60.

311 Claimant's Reply, ¶¶ 62-70.

intensive and integrated nature of the mining industry. The Respondent's position also cannot be reconciled with the Government's own practice of applying stability guarantees to entire concessions or mining units of other mining titleholders.[312]

b. Further to the Tribunal's questions, the documents that the Respondent fought to exclude concerning other mining titleholders are clear: both MINEM and SUNAT consistently applied stability guarantees to concessions or mining units of other title holders from the entry into force of the Mining Law until its politically motivated *volte face* against SMCV, and SUNAT continued to do so even thereafter.[313] The Respondent cannot rebut that both SUNAT and MINEM consistently applied stability guarantees to concessions or mining units of other mining titleholders, and that SUNAT's advisory opinions confirmed that stability guarantees apply to entire concessions or mining units.[314]

c. The Hearing unequivocally confirmed that the DGM explicitly assured SMCV that the Stability Agreement would cover the Concentrator provided that SMCV expanded, with the DGM's approval, the Beneficiation Concession to include the Concentrator. The DGM's confirmation to SMCV was consistent with the Government's treatment of prior additional investments and expansions under the Stability Agreement. If MINEM believed that the Stability Agreement could not cover the Concentrator, it would have required that SMCV apply for a new beneficiation concession to operate the Concentrator, which it did not. Instead, MINEM itself suggested and then approved the expansion of the existing stabilized Beneficiation Concession to include the Concentrator. The Respondent does not, and cannot, dispute that the DGM is the sole authority for determining whether the Concentrator was part of SMCV's stabilized Mining Unit, and that the DGM suggested and then approved the expansion of the stabilized Beneficiation Concession to include the Concentrator within the Stability Agreement. The Respondent's claim that SMCV never obtained "written assurance" is

312 Claimant's PH Brief, ¶¶ 34-39.

313 Claimant's PH Brief, ¶¶ 40-53.

314 Claimant's Reply PH Brief, ¶¶ 34-57.

demonstratively false—the Government expressly provided written assurance that the Concentrator was stabilized with the approval of the Beneficiation Concession expansion. SMCV and Phelps Dodge sought and obtained this certainty through MINEM's approval of the Beneficiation Concession expansion to include the Concentrator. The Hearing further confirmed that SMCV, Phelps Dodge, SMM and the Claimant conducted adequate due diligence that confirmed that the Concentrator was entitled to stability guarantees.[315]

326. In its reply post-hearing submissions, the Claimant asserts that the Respondent has failed to rebut that: (a) the Mining Law and Regulations stabilized the entire concessions or mining units; (b) the 1998 Stability Agreement Applied to the entire Cerro Verde Mining Unit; and (c) that the 1994 and 2012 Stability Agreements applied to the entire Cerro Verde Mining Unit.[316]

c) The Peruvian Supreme Court Decision in the 2008 Royalty Case

327. It is the Claimant's position that the Supreme Court Decision in the 2008 Royalty Case does not affect the Tribunal's authority to determine whether Peru breached the Stability Agreement, as the decision is not binding on this Tribunal, and in Peru.[317]

328. The Claimant submits that the fact that the Tribunal must consider and apply Peruvian law to resolve the Claimant's claims for breach of Article 3.4 of the Treaty does not change the fact that this is an international law claim. The Claimant argues that the umbrella clause gives rise to an independent cause of action under international law, separate from any claim that an investor may have under Peruvian law.[318] The Claimant makes, *inter alia*, the following arguments in support of its position:

a. Investment treaty authorities have consistently confirmed that domestic court decisions concerning obligations underlying umbrella clauses do not bind the

[315] Claimant's PH Brief, ¶¶ 54-60; Claimant's Reply PH Brief, ¶¶ 30-33.

[316] Claimant's PH Brief, ¶¶ 10-29.

[317] Claimant's Reply, ¶¶ 110 *et seq.*

[318] Claimant's Reply, ¶ 111.

Tribunal. In doing so, the authorities have recognised the distinction between umbrella clause claims, which arise under international law, and claims arising under domestic law.[319]

b. It is well established that a domestic court decision does not have any *res judicata* effect in international legal proceedings. A contrary result would undermine the contracting State's agreement to submit disputes to an international forum independent of the State's own courts.[320]

c. This proceeding is not being conducted in a Peruvian legal forum, or even a contractual forum in which Peruvian law applies, and it does not feature Peruvian law claims. Rather, it is conducted in an international treaty forum, and features claims for breach of Articles 3.4 and 3.1 of the Treaty. For the same reasons, Peru is also mistaken when it argues that "[a]bsent a denial of justice or due process violation […] the Tribunal should (and arguably, must) respect the Peruvian Supreme Court's decision." The rule that an international tribunal hearing an umbrella clause claim is not bound by domestic court decisions is not subject to such a requirement and the denial of justice decisions on which Peru relies do not suggest the contrary. Rather, the tribunals in those cases merely conclude that the claimants in those cases failed to prove denial of justice claims that they had expressly asserted.[321]

329. The Claimant also argues that the Supreme Court's decision in the 2008 Royalty Case on the scope of the Stability Agreement is not even binding in Peruvian courts or the parties

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[319] Claimant's Reply, ¶ 112, referring to: *EDF v. Argentina* Award, ¶¶ 944, 1130 (**CA-189**); *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic*, ICSID Case No. ARB/16/5, Award (14 September 2020) ("***ESPF v. Italy* Award**"), ¶ 823 (**CA-251**).

[320] Claimant's Reply, ¶ 113, referring to: *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment (5 September 2007), ¶¶ 87-88 (**CA-317**); *EDF v. Argentina* Award, ¶ 1131 (**CA-189**).

[321] Claimant's Reply, ¶¶ 114-115, referring to: *WNC Factoring v. Czech Republic* Award, ¶ 335 (**RA-7**); *CMS v. Argentina* Decision on Annulment, ¶ 95(c) (**RA-6**); *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 October 2002) ("***Mondev v. USA* Award**"), ¶ 127 (**RA-14**)*; Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award (22 June 2010) ("***Liman Caspian v. Kazakhstan* Excerpts of Award**"), ¶ 274 (**RA-15**)*; Alps Finance and Trade AG v. Slovak Republic*, UNCITRAL, Award (Redacted Version) (5 March 2011) ("***Alps Finance v. Slovak Republic* Redacted Award**"), ¶¶ 249-250 (**RA-16**).

in other Peruvian legal proceedings, either as precedent or as *res judicata*.[322] The Claimant makes, *inter alia*, the following submissions on this issue:

a. Peru cannot demonstrate "triple identity," which is required for *res judicata* under Peruvian law, which provides that preclusion only applies if the claims involve the same parties, the same object, and the same cause of action. Even if the breach of umbrella clause claims before this Tribunal were wrongly characterised as breach of contract claims, as Peru suggests, Peruvian law recognizes that breach of contract claims and breach of administrative law claims are distinct causes of action.[323]

b. Peru agrees with the Claimant that the ruling of the Supreme Court in the 2008 Royalty Case has no precedential value in Peru. As such, the decision does not provide the Peruvian courts, much less an international tribunal, with a "definitive answer" on the proper scope of the Stability Agreement. As explained by Prof. Bullard, the "nomophylactic function" of the Supreme Court "clearly does not set binding precedents for lower courts or tribunals under Peruvian law" and "in practice, Supreme Court decisions do not accomplish the goal of creating binding precedents for lower courts or tribunals."[324]

c. The record conclusively demonstrates that neither the Supreme Court, nor the Tax Tribunal, nor SUNAT accorded any binding effect to the Supreme Court decision in the 2008 Royalty Case, including in interpreting the scope of the Stability Agreement in subsequent proceedings.[325]

d. Not only is the Supreme Court's decision incapable of having any binding effect, it should also not be accorded any weight by this Tribunal. Unlike civil proceedings, the contentious administrative proceedings before the Supreme Court did not provide SMCV with an adequate evidentiary forum to make the case that the Claimant makes here or that SMCV would have been able to make to support the

322 Claimant's Reply, ¶ 116.

323 Claimant's Reply, ¶¶ 117-119.

324 Claimant's Reply, ¶¶ 120-121, referring to: [**Bullard 2**], ¶ 72.

325 Claimant's Reply, ¶ 122.

breach of contract claim in civil courts. The Supreme Court did not have before it the ample evidence submitted in this arbitration, including: (i) the evidence of due process violations tainting the Tax Tribunal resolution under review; (ii) the fact and expert witness testimony concerning Title Nine of the Mining Law and the Regulations; (iii) the full extent of the evidence concerning the Government's consistent application of stability agreements to concessions and mining units; (iv) Mr. Isasi's April and September 2005 Reports; (v) the evidence of the political pressure on Minister Sánchez Mejía resulting in MINEM's *volte-face*; or (vi) expert witness testimony concerning the purpose of stability guarantees and their presumptive scope in international practice, among other matters. Further, less than one year after the Supreme Court's decision, the President of Peru recognised that the Supreme Court was part of a "system for administering justice" that had "collapsed" and needed sweeping anti-corruption reforms.[326]

330. The Claimant submits that the testimony at the Hearing confirmed that the Supreme Court decision is entitled to no deference, confirming that domestic court decisions concerning obligations underlying umbrella clause claims do not bind this Tribunal, which should independently exercise its mandate. The Claimant states that the record conclusively demonstrates that neither the Supreme Court, nor the Tax Tribunal, nor SUNAT accorded any binding or precedential effect to the Supreme Court decision in the 2008 Royalty Case, including in subsequent proceedings. Moreover, the Claimant asserts that the Supreme Court decision was issued on the basis of an inadequate evidentiary record, and it did not, and could not, consider the evidence submitted in these proceedings.[327]

d) The Freeport Award

331. It is the Claimant's position that the Freeport Award has limited relevance to the legal issues before this Tribunal on the basis of, *inter alia*, the following reasons:

[326] Claimant's Reply, ¶ 123.

[327] Claimant's PH Brief, ¶¶ 61-65.

a. The *Freeport* Award is based on a separate treaty, the US-Peru TPA, and much of the majority's legal analysis concerns TPA provisions that are irrelevant to the Treaty, such as provisions concerning "taxation measures" and other jurisdictional requirements. Even where the TPA and the Treaty have analogous protections, as in the case of fair and equitable treatment, the standards are different, as the Respondent concedes.[328]

b. To the extent that the *Freeport* majority's legal analysis of TPA Article 10.5 could be relevant to the Tribunal's interpretation of Article 3.1, the Freeport Award offers no guidance. In the handful of paragraphs Peru identified that arguably contain legal analysis (paragraphs 894-895, 921, 954-955), the *Freeport* majority repeatedly failed to independently analyse the legal standard under the TPA.[329]

c. Other than the five paragraphs mentioned, the paragraphs relating to the Article 10.5 claims that the Respondent argues are relevant clearly pertain to factual findings and conclusions of the *Freeport* majority and fall outside the scope of PO13. The Respondent cannot portray these paragraphs as "legal analysis" simply because they concern Article 10.5. A tribunal's analysis of FET claims necessarily requires extensive factual findings because FET claims must be analysed in light of all of the factual circumstance surrounding state conduct.[330]

d. The Freeport Award has no relevance at all to the Tribunal's interpretation of Article 3.4 because there is no analogous TPA provision, as Peru explicitly recognizes.[331]

e. The sole point of the *Freeport* majority's legal analysis that is relevant here is its assessment of whether an international tribunal is bound by decisions of a domestic court on domestic law. At paragraph 722 of the Freeport Award, the majority held that the Peruvian court decisions in the 2008 Royalty Case "have no preclusive

328 Claimant's Submissions on *Freeport* Award, ¶ 4.

329 Claimant's Submissions on *Freeport* Award, ¶ 5.

330 Claimant's Submissions on *Freeport* Award, ¶¶ 6-7.

331 Claimant's Submissions on *Freeport* Award, ¶ 8.

effect on the Tribunal and the Tribunal itself has to interpret the scope of the 1998 Stability Agreement and to determine whether it was breached." The *Freeport* tribunal therefore rejected the Respondent's arguments that Freeport was barred from "relitigating an issue that was decided" by the Supreme Court, and the Tribunal should likewise reject the Respondent's similar arguments in this case.[332]

332. The Claimant submits that the *Freeport* majority's factual findings regarding the scope of the Stability Agreement and the Mining Law and Mining Regulations are outside the scope of PO13, as these are factual questions.[333]

333. In any event, the Claimant argues that the *Freeport* majority's reasoning and conclusions are unpersuasive and unsupportive:

a. The Claimant has provided this Tribunal with extensive evidence and arguments in support of its position that the Mining Law, Mining Regulations and the Stability Agreement grant stability guarantees to entire mining units or concessions. The *Freeport* majority's conclusions on scope are unpersuasive and offer no guidance to the Tribunal on this issue because their analysis contains errors, fails to consider key evidence, and frequently offers no explanation for why it decided to adopt the Respondent's views wholesale.[334]

b. The Claimant has presented extensive evidence demonstrating that until its politically motivated *volte face* against SMCV, the Respondent applied stability guarantees to entire mining units or concessions, demonstrating both the Respondent's understanding of the Mining Law and Regulations at the time it enacted them and the Respondent's change in position toward SMCV. The *Freeport* Award provides no assistance to the Tribunal's assessment of this

[332] Claimant's Submissions on *Freeport* Award, ¶ 9.

[333] Claimant's Submissions on *Freeport* Award, ¶¶ 10-14.

[334] Claimant's Submissions on *Freeport* Award, ¶ 16.

evidence due to its lack of explanation and engagement with extensive evidence to the contrary.[335]

c. The *Freeport* Award offers little guidance on the Claimant's due process claims, which the Claimant explained were based both on SUNAT's conduct and the Tax Tribunal's subsequent egregious due process violations. Despite clear testimony from the Respondent's witnesses at the Hearing conceding SUNAT's pre-determined stance, the *Freeport* majority inexplicably ignored this aspect of the challenged conduct.[336]

d. The Claimant has presented extensive documentary evidence and witness and expert testimony demonstrating why the Respondent's failure to waive penalties and interest when there was at minimum "reasonable doubt" about the 1998 Stability Agreement's scope constituted a violation of Article 3.1. The *Freeport* Award offers no guidance on this issue because the majority incorrectly stated in a brief and conclusory paragraph that it had found such claims were precluded by the TPA's taxation measure carve-out.[337]

334. The Claimant dismisses the Respondent's attempt to claim the entirety of the *Freeport* Award as not only "relevant" but binding on this Tribunal, as this argument is both outside the scope of PO13 and entirely baseless.[338] The Claimant further rejects the Respondent's claim that this Tribunal "has a duty to ensure consistency between the two cases" "to prevent severe damage to the ISDS system," which the Claimant states is simply another attempt to slide the preclusion arguments through the back door.[339]

iii. Conclusion on Article 3.4

335. For the foregoing reasons, the Claimant submits that under the Mining Law and Mining Regulations, stability guarantees applied to entire concessions or mining units in which the

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335 Claimant's Submissions on *Freeport* Award, ¶ 17.

336 Claimant's Submissions on *Freeport* Award, ¶ 18.

337 Claimant's Submissions on *Freeport* Award, ¶ 19.

338 Claimant's Submissions on *Freeport* Award, ¶¶ 20-23.

339 Claimant's Submissions on *Freeport* Award, ¶ 24.

mining company made its qualifying investment. Because the Concentrator was part of the Cerro Verde Mining Unit, and included in the stabilized Beneficiation Concession, the Claimant argues that SMCV was entitled to enjoy stability guarantees for the Concentrator during the term of the Stability Agreement. The Claimant therefore submits that the Respondent breached its obligations under the Stability Agreement, and therefore Article 3.4 of the Treaty, each time SUNAT's Royalty and Tax Assessments became binding and enforceable against SMCV. Specifically, the Claimant asserts breaches of the following: (a) Clauses 9.4, 9.5 and 9.6, and the obligation to provide tax and administrative stability to SMCV; Clause 10.1, and the obligation to exempt SMCV from the application of any new laws or regulations that "directly or indirectly, denaturalise[d] the guarantees provided" by the Stability Agreement; and (iii) Clause 10.2, and the obligation to protect SMCV from "any encumbrance or obligation that could represent reduction of its availability of cash."[340]

b. Respondent's Position

336. It is the Respondent's position that it did not violate Article 3.4 of the Treaty. It argues so on the basis of at least the following three reasons: (i) the Claimant cannot raise an umbrella clause claim in this dispute, because Article 3.4 requires the existence of an obligation owed to the Claimant, and the Claimant is not a party to the Stabilisation Agreement; (ii) whether Peru violated its obligations under the Stabilisation Agreement turns on the scope of the agreement, which is a question of Peruvian law that Peruvian courts, including the Supreme Court of Peru, have already answered; and (iii) even if the Claimant's claim were to be considered on the merits, it fails because Peru did not violate the Stabilisation Agreement.[341]

[340] Claimant's Memorial, ¶ 359; Claimant's Reply, ¶¶ 124-125.

[341] Respondent's Counter-Memorial, ¶¶ 405-408.

i. Whether Article 3.4 of the Treaty requires the existence of an obligation of the Respondent to the Claimant

337. The Respondent argues that the Claimant cannot raise an umbrella clause claim in this dispute, because Article 3.4 requires the existence of an obligation owed to the Claimant, and the Claimant is not party to the Stabilisation Agreement. As the Stabilisation Agreement is entered into between Peru (through MINEM) and SMCV – a Peruvian national – the Respondent submits that the Claimant is unable to rely on the umbrella clause.[342] The Respondent makes, *inter alia*, the following arguments in support of its position:

a. The analysis must start with Article 31(1) of the VCLT, which provides that "[a] treaty shall be interpreted in good faith [and] in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[343]

i. With respect to the ordinary meaning of Article 3.4, the Contracting Parties are required to observe certain "obligation[s]," which is the operative term of the umbrella clause. However, if there is no obligation in the first place, there is nothing to qualify. The second clause qualifies (or limits the scope of) the 'obligation[s]' covered by the provision but does not expand its scope. The Claimant entirely ignores the "entered into" phrase and wants to bring a claim before this Tribunal that it could not bring in a Peruvian court. Further, the Stabilisation Agreement was signed in February 1998, while the Claimant did not invest in SMCV until 2005. So, at the time that Peru entered into the Stabilisation Agreement, the obligations therein not only were not owed to the Claimant, but the obligations were undertaken without regard to the Claimant's (then non-existent) Dutch investment. The Claimant attempts to support its

342 Respondent's Counter-Memorial, ¶ 409.

343 Respondent's Counter-Memorial, ¶¶ 410, 411, referring to: *Burlington Resources Inc. v. Ecuador* Decision on Liability, ¶¶ 214, 217 (**CA-198**).

interpretation of Article 3.4 by contrasting it to umbrella clauses in other treaties that cover obligations "with regard to investors" instead of "with regard to investments," but this is a distinction without a difference.[344]

ii. The Respondent's interpretation is also consistent with the object and purpose of the provision and the Treaty as a whole. As the *WNC Factoring* tribunal explained, umbrella clauses "are intended to give effect to legal commitments entered into by the host [S]tate with regard to investments, not to change their scope or content."[345] Commentators generally describe the purpose of an umbrella clause as being to transform an investor's contractual rights into treaty rights, and do not state that the clauses should create or expand those contractual rights. The purpose of the Treaty is not to turn into legal obligations anything and everything that might promote foreign investment, without limits. In this case, the Treaty allows for legal persons constituted under the laws of Peru to be claimants only where such entities are "controlled, directly or indirectly, by nationals of" the Netherlands, which the Claimant has not asserted.[346]

iii. Numerous other investment treaty cases support Peru's interpretation that the umbrella clause has a privity requirement. While there is no consensus, the dominant view is that, in respect of contractual obligations, only parties entitled to enforce the obligation under the proper law of the contract may sue, even in the case of generally worded umbrella clauses.[347] The cases relied upon by the Claimant in support of its

344 Respondent's Counter-Memorial, ¶¶ 411-419; Respondent's Rejoinder, ¶¶ 687-698.

345 Respondent's Counter-Memorial, ¶ 421, referring to: *WNC Factoring v. Czech Republic* Award, ¶ 335 (**RA-7**).

346 Respondent's Counter-Memorial, ¶¶ 421-425.

347 Respondent's Counter-Memorial, ¶ 426; Respondent's Rejoinder, ¶¶ 700, 701, referring to: *WNC Factoring v. Czech Republic* Award, ¶ 325 (**RA-7**). The Respondent also referred to: *Burlington Resources Inc. v. Ecuador* Decision on Liability, ¶¶ 211, 214 (**CA-198**); *Oxus v. Uzbekistan* Award, ¶ 368 (**RA-10**); *CMS v. Argentina* Decision on Annulment, ¶ 95(b)-(c) (**RA-6**); *Azurix v. Argentina* Award, ¶ 384 (**RA-9**); *Siemens v. Argentina* Award, ¶¶ 204-205 (**RA-11**); *Consutel Group SpA In Liquidazione v. People's Democratic Republic of Algeria*, PCA Case No. 2017-33, Final Award (3 February 2020), ¶¶ 370-371 (**RA-12**); *Ioan Micula, Viorel Micula and others v. Romania* Award, ICSID Case No. ARB/05/20, Award (11 December 2013), ¶ 418 (**CA-201**).

interpretation of Article 3.4 are inapposite and unpersuasive.[348] The Respondent rejects the Claimant's attempts to undermine the various decisions which have followed the "dominant view," and the Claimant's further efforts to focus the Tribunal's attention on certain decisions which allegedly decide the privity issue in its favour are misplaced.[349]

338. The Respondent argues that the *Rasia v. Armenia* Award underscores the failure of the Claimant's umbrella clause claim, as it is undisputed that the Claimant is not a party to the Stability Agreement, and the weight of investment treaty jurisprudence holds that contract-based umbrella clause claims require privity of contract. The Respondent notes that the language of the umbrella clause in the *Rasia v. Armenia* case almost exactly tracks the text of Article 3.4 of the BIT and therefore reinforces that the "dominant view" in investment treaty jurisprudence is that umbrella clause claims based on contract breaches require privity of contract.[350]

339. The Respondent therefore submits that a textual interpretation of Article 3.4 clearly shows that the Claimant's umbrella clause claim is not covered by the provision, because the Claimant is not a party to the Stability Agreement on which it seeks to rely, and thus there is no "obligation" between Peru and the Claimant that could be enforced under this Article.[351]

ii. Whether the Respondent breached its obligations under Article 3.4 of the Treaty

340. In any event, it is the Respondent's position that the Claimant's Article 3.4 claim would nevertheless fail as Peru did not violate the Stability Agreement, as the guarantees thereunder apply only to the investment project that is specifically identified in the feasibility study.[352]

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348 Respondent's Counter-Memorial, ¶¶ 434-450.

349 Respondent's Rejoinder, ¶¶ 701-703.

350 Respondent's Reply PH Brief, ¶¶ 118-123.

351 Respondent's Counter-Memorial, ¶ 451.

352 Respondent's Counter-Memorial, ¶¶ 408, 461 *et al*; Respondent's Rejoinder, ¶¶ 97 *et al.*

a) The Mining Law, the Regulations to the Mining Law, and the 1998 Stabilisation Agreement

341. It is the Respondent's position that the Mining Law and the Mining Regulations confirm that stabilisation agreements are intended to protect only specific investment projects, and not the entire concession(s) and anything that might happen there.[353] The Respondent makes, *inter alia*, the following submissions in support of its position:

a. The Mining Law and Mining Regulations provide that stability guarantees apply to the specific investment project. Title Nine of the Mining Law shows the limited scope of stability agreements, as nothing therein indicates that stability agreements grant benefits with respect to an entire Mining Unit. Articles 79 and 83 of the Mining Law provide that mining companies are only entitled to benefit from a stability agreement if they commit to make an investment for the minimum amount of funds and over a required amount of time. That investment must be clearly defined in an "investment program," which the company must submit to MINEM for its approval. These provisions provide that "[t]he effect of the contractual benefit shall apply exclusively to the activities of the mining company in whose favour the investment is made." Nothing in Article 83 states that mining stabilisation agreements benefit all of the activities of a mining company conducted in the concession or EAU, and the provision implies that initially, stability guarantees are only granted to the investment made (*i.e.* the initial investments described in the feasibility study), notwithstanding the fact that the initial investment plan can later be supplemented with subsequent investments.[354]

b. The Claimant's interpretation of the Mining Law is mistaken and misguided, consistently ignores the plain language of the law and regulations and selectively quotes portions while failing to quote other portions which do not support its position.[355]

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353 Respondent's Counter-Memorial, ¶ 465.

354 Respondent's Counter-Memorial, ¶ 465; Respondent's Rejoinder, ¶¶ 119-123.

355 Respondent's Rejoinder, ¶¶ 101-103.

c. Article 83 of the Mining Law should be read in conjunction with Article 82 of the Mining Law. The first paragraph of Article 82 provides that the 15-year mining stabilisation agreements are made available to mining titleholders "[i]n order to promote investment and facilitate the financing of mining projects." Thus, the main purpose of mining stabilisation agreements is to encourage specific investment projects by reassuring the investor that its expected internal rate of return for a specific project will not be affected by legislative or regulatory reforms for a specific period of time. The Claimant's position that Article 82's reference to EAUs or "mining units" meant that stability was to be granted to all investments developed within a concession in which some other stabilized project had been developed is untenable. The final part of the first paragraph of Article 82 also ties the scope of the agreement to a specific investment project. The second paragraph of Article 82 does not assist the Claimant, as it refers to EAUs for the sole purpose of indicating that the qualifying production capacity to obtain a stabilisation agreement may come from one or more concessions or EAUs.[356]

d. Article 22 echoes the language of Articles 79 and 83 and provides that stability guarantees "shall benefit the mining activity titleholder exclusively for the investments that it makes in the concessions or [EAUs]." Article 2 of the Mining Regulations provides certain conditions with which mining titleholders must comply in order to apply for and sign a stabilisation agreement. Nothing in Article 2 is relevant to interpreting the scope of the stabilisation agreements under Peruvian law.[357]

e. Other provisions of the Mining Law provide further evidence that the scope of the stability agreement is limited to the investment described in the investment program, and the Mining Regulations are consistent with the Mining Law. For example, Articles 18, 19, 22 and 24 of the Mining Regulations provide that a mining title holder needs to prepare a detailed feasibility study/investment plan in order to apply for a stabilisation agreement and that the stabilisation agreement benefits the

[356] Respondent's Rejoinder, ¶¶ 108-117.

[357] Respondent's Counter-Memorial, ¶ 465; Respondent's Rejoinder, ¶¶ 126-135.

activities related to the investment project that is described in that feasibility study.[358] Articles 72, 80 and 84 of the Mining Law describe (i) the benefits covered under stabilisation agreements, and (ii) who can benefit from such benefits. As confirmed in the 2008 Supreme Court judgment, the benefits covered under those Articles should be understood "'in relation to the investment in its concession' but depending on what was included in the 'Feasibility Study'."[359] The Claimant's interpretation of Article 25 of the Mining Regulations is incorrect, as that provision simply sets out the instructions for certain tax filings in situations where expansion of facilities or new investments benefit from stabilisation agreements.[360]

f. The Claimant's reliance on the evidence of Ms. Chappuis and its expert report from Ms. Vega is unconvincing, in light of Mr. Polo's testimony about his own experience drafting the relevant provisions of the law, during which time Mr. Polo was Ms. Chappuis' superior. Mr. Polo also confirms the Respondent's reading of Article 83 of the Mining Law and Article 22 of the Regulations.[361]

g. The 2014 and 2019 amendments to the Mining Law and the Mining Regulations did not prove that prior to the amendments, stability agreements were not limited to the feasibility study's investment program but to entire concessions. The text setting out the reasons for these amendments specifically confirmed that the Mining Law granted stability benefits only to the investment project that was specifically outlined in the feasibility study that served as the basis for the agreement. The statement of reasons also notes that the 2014 amendment to Article 83 was precisely designed to improve and expand the guarantees after the government realised that the previous version of Article 83 could, to a certain extent, disincentivise additional investment in the stabilized mining projects.[362]

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358 Respondent's Rejoinder, ¶¶ 146-153.

359 Respondent's Rejoinder, ¶¶ 154-157.

360 Respondent's Rejoinder, ¶¶ 158-160.

361 Respondent's Counter-Memorial, ¶¶ 467-473.

362 Respondent's Counter-Memorial, ¶¶ 508-512; Respondent's Rejoinder, ¶¶ 140-145.

h. Peru's interpretation does not undermine the Mining Law's purpose of promoting investment: (a) Peru has the right to choose its foreign direct investment policy, and in any case, the Mining Law furthered Peru's goal to promote investment; (b) the Claimant's opinion regarding the excessive administrative burdens is irrelevant and incorrect; (c) Claimant's opinion that Peru's position will be commercially unreasonable does not advance its argument, and is incorrect.[363]

342. The Respondent submits that the Hearing showed that its interpretation of the 1998 Stabilisation Agreement is consistent with the Mining Law and Mining Regulations:

a. The testimony showed that the Mining Law provides that stabilisation agreements are applicable only to the investment project for which the agreements are entered into. The Claimant's own witness and expert testimony at the Hearing showed that, contrary to the Claimant's allegations, the Mining Law does not provide that mining stabilisation agreements grant benefits to "concessions" or to so-called "mining units." Neither Ms. Chappuis nor Ms. Vega were authors of the Mining Law, and therefore neither could claim any special powers or authority to try and interpret the law. At the Hearing, the Claimant's witnesses and experts had no choice but to admit that the concept of "mining unit" is not defined in the law, as they could not point to a single provision in the Mining Law that did so.[364]

b. The Mining Law establishes the legal framework—the maximum and minimum parameters, what Respondent's counsel at the Hearing referred to as "the outer boundaries" or limitations and ground rules—applicable to mining stabilisation agreements. The Mining Law sets the boundaries for: (i) who can apply for the benefit of mining title holders; (ii) what types of investments can benefit; (iii) where those investments should be made; and (iv) what legal regime will be stabilized (*e.g.* tax, administrative and/or currency stability).[365]

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363 Respondent's Counter-Memorial, ¶¶ 513-519; Respondent's Rejoinder, ¶¶ 161-181.

364 Respondent's PH Brief, ¶¶ 42-63.

365 Respondent's PH Brief, ¶¶ 64-65.

c. The Testimony at the Hearing also showed that the Mining Regulations provide that Stabilisation Agreements are applicable only to the investment project for which the agreements are entered into. The Respondent demonstrated that, for the purposes of 15-year stabilisation agreements, Articles 2 and 22 of the Mining Regulations cannot be read in isolation (as the Claimant attempts to do), but they must be read with reference to the language of Articles, 82, 83, 84, 85 of the Mining Law and other provisions of the Mining Regulations, in particular Articles 18, 19, 24 and 25. On this basis, SMCV had the obligation to keep separate accounts for its stabilized project, which was confirmed by the Respondent's experts at the Hearing, and not challenged by the Claimant's experts.[366]

d. The process to apply for an expansion of a concession shows that an expansion of a concession does not expand the scope of a stabilisation agreement. The process to expand is entirely unrelated to that of obtaining a stabilisation agreement; mining concessions are granted and expanded (aggregated) regardless of whether the titleholder has applied for a stabilisation agreement. Likewise, the process to obtain/expand a beneficiation concession does not, and cannot, define the scope of a stabilisation agreement. These are highly technical applications and procedures that concession titleholders must carry out to obtain/expand their concessions, and are unrelated to stabilisation agreements.[367] Further, the Claimant admits that SMCV needed to apply for or expand its beneficiation concession to build and operate the Concentrator, regardless of the status of the 1998 Stability Agreement. The Claimant cannot credibly assert that because MINEM did not deny SMCV's application for the expansion of the Beneficiation Concession, it therefore expanded the scope of the Stabilisation Agreement. The Beneficiation Concession's expansion bears no relation whatsoever with the scope of the Stabilisation Agreement. The Claimant's own witnesses conceded at the Hearing that neither the application nor the approval of the expansion of SMCV's

366 Respondent's PH Brief, ¶¶ 66-72.

367 Respondent's PH Brief, ¶¶ 73-79.

Beneficiation Concession makes reference to the extension of the 1998 Stabilisation Agreement to include the Concentrator.[368]

343. With respect to the Stability Agreement itself, the Respondent makes, *inter alia*, the following submissions:

a. Stability agreements do not need to extend to an entire mining unit in order to achieve their intended purpose. While no one disputes that promoting private investment in mining was the government's primary objective, Peru obviously did not endeavour to promote private investment at any cost whatsoever. It had a sovereign responsibility to choose and strike an appropriate balance between that goal and the program's impact on, among other things, public finances. The Claimant's argument that it is critical for stability guarantees to apply to the entire mining unit or concession, given the basic commercial realities and in order to make them sufficiently attractive for investors, is incorrect. There are often other more important factors that influence mining companies' investment decisions than possible tax benefits. Any assertion by the Claimant that its understanding of the scope of the Stabilisation Agreement was based on policy and practice of stability agreements in other countries is not credible.[369]

b. The Stabilisation Agreement provides stability guarantees to the specific investment project identified in the feasibility study, which is clear on the language of the agreement.[370] The feasibility study is a critical part of the stability framework, and it defines the scope of the investment project and is the central document around which the stability framework operates. The Mining Law provides that the stability guarantees only apply to the investment, and that an individual investment

[368] Respondent's Reply PH Brief, ¶¶ 105-117.

[369] Respondent's Counter-Memorial, ¶¶ 478-487.

[370] Respondent's Counter-Memorial, ¶¶ 488-490.

project is required to be defined in the scope by the feasibility study approved by MINEM.[371] Whether Cerro Verde is an Integrated Mining Unit is irrelevant.[372]

c. The Stabilisation Agreement did not extend to the Concentrator. The Stabilisation Agreement grants stability guarantees only to the Leaching Project, as confirmed by the language in the Stabilisation Agreement, and the Feasibility Study shows that SMCV requested a stabilisation agreement exclusively for its Leaching Project. The Concentrator was a separate and new investment, not related to the Leaching Project.[373]

d. The Stabilisation Agreement cannot apply to SMCV's alleged EAU or so-called "mining unit," because SMCV does not even have an EAU. Further, nowhere in the agreement does it state that it would be applicable to SMCV's so-called "mining unit" or EAU. Clause 3 identifies the concessions in which SMCV was going to develop the Leaching Project. Clause 3 does not implement Articles 82 and 83 of the Mining Law and Articles 2 and 22 of the Mining Regulations; it does not identify the EAU that would receive stability guarantees. Further, the Supreme Court has already ruled that Clause 3 is not relevant to determining the 1998 Stability Agreement's scope. Indeed, Clause 1.1 provides that the Agreement applied to the Leaching Project.[374]

e. SMCV, SMM, Phelps Dodge and the Claimant failed to conduct adequate due diligence on the scope of the Stabilisation Agreement: (a) SMCV did not conduct adequate diligence before it entered into the Stabilisation Agreement; (b) Phelps Dodge did not conduct adequate diligence before it invested in SMCV in 1999; (c) Phelps Dodge and SMCV did not conduct adequate diligence when deciding to make the additional investment in the Concentrator; (d) the Claimant did not conduct adequate diligence before it invested in SMCV in 2005; (e) other

371 Respondent's Counter-Memorial, ¶¶ 499-507.

372 Respondent's Counter-Memorial, ¶¶ 497-498.

373 Respondent's Rejoinder, ¶¶ 182-239.

374 Respondent's Reply PH Brief, ¶¶ 10-31.

documents demonstrate that the Claimant knew there was significant risk that the Concentrator was not covered.[375]

344. The Respondent submits that the testimony at the Hearing confirmed that the 1998 Stabilisation Agreement covered only SMCV's Leaching Project. The Respondent notes that while the Claimant had argued in its Memorial that the Concentrator was somehow envisioned in the Feasibility Study, it abandoned this argument, as it has admitted that nine studies were conducted between 1972-1998, all of which concluded that the construction of a concentrator was not feasible or was "uneconomical." It was shown at the Hearing that the resolution that approved the Feasibility Study and the signing of the Stability Agreement made clear that the granted stability was limited to the Leaching Project, and none of the contemporaneous documents contain a single reference to a "mining unit" or an EAU.[376]

345. The Respondent further submits that the testimony at the Hearing confirmed that SMCV, Phelps Dodge, SMM and the Claimant knew that the Stability Agreement did not cover the Concentrator, and that they failed to conduct adequate due diligence regarding the scope of the Stability Agreement.[377]

346. In its post-hearing briefs, the Respondent emphasised the following:

a. The text of the Stability Agreement refers exclusively to the Leaching Project and does not refer to or grant stabilisation to Cerro Verde's so-called "mining unit." A comparison between Peru's Model Stabilisation Agreement and the final version of the Stability Agreement shows (i) that the parties intentionally eliminated any reference to any "EAU"; and (ii) that the agreement was modified to apply to the project being stabilized, *i.e.* the Leaching Project.[378]

375 Respondent's Rejoinder, ¶¶ 240-285.

376 Respondent's PH Brief, ¶¶ 16-23.

377 Respondent's PH Brief, ¶¶ 87-143.

378 Respondent's PH Brief, ¶¶ 24-36.

b. With respect to the scope and purpose of each of SMCV's three stability agreements:

i. The 1994 Stability Agreement was a small, 10-year agreement for an investment of USD 2.2 million, which project was to be completed in the same concessions in which SMCV later completed the Leaching Project. The 1994 Stability Agreement does not state that any and all investments made in Cerro Verde's concessions, or any so-called "mining unit" are automatically stabilized for the duration of the Agreement. Clause 3 of the 1994 Stability Agreement does not define the scope of the Agreement, and the Claimant has not provided any evidence to support its assertion that the 1994 Stability Agreement covered Cerro Verde's "entire mining unit." Further, the Claimant has failed to provide a reasonable explanation for the co-existence of the 1994 and 1998 Stability Agreements between 1999 and 2004, which would be nonsensical if either agreement applied to the so-called "mining unit" or to any and all projects developed within SMCV's mining and beneficiation concessions.[379]

ii. The 2012 Stability Agreement concerned a USD 3.5 billion investment to build, among other things, a second concentration plant to expand Cerro Verde's copper concentrate production, as well as to improve the existing processing facilities. The 2012 Agreement does not cover SMCV's "new mining unit" but rather covers only the "Cerro Verde Unit Expansion" Project, described in the feasibility study that MINEM approved in January 2012.[380]

iii. With respect to the Stability Agreement, the Feasibility Study analysed and outlined the investment only of the Leaching Project for the purposes of that application. Since the Leaching Project was different from the project covered by the 1994 Stability Agreement, SMCV obtained and

[379] Respondent's PH Brief, ¶ 37; Respondent's Reply PH Brief, ¶¶ 41-50.

[380] Respondent's PH Brief, ¶ 37; Respondent's Reply PH Brief, ¶¶ 51-54.

maintained two independent agreements. SMCV's own conduct shows that it understood that each Stabilisation Agreement is granted for a specific investment project.[381]

b) The Practice of Government Organs on the Scope of Stability Agreements

347. The Respondent argues that it has consistently applied stability guarantees only to the specific project on which the stability agreements are based, and that Peru did not change its interpretation of the Mining Laws or the Stabilisation Agreement as a result of political pressure or for any other reason. To the contrary, the Respondent asserts that the June 2006 Report was entirely consistent with MINEM's interpretation as expressed in various sources and on numerous occasions, by way of example: (i) Mr Isasi's April 2005 Report, (ii) Minister Sánchez and Mr Isasi's June 2005 presentation before the Energy and Mines Congressional Committee, (iii) the September 2005 Report and October 2005 Letter, (iv) the November 2005 Letter and Minister Sánchez's public statements, (v) Vice Minister Mucho and Mr Isasi's May 2006 presentation before the Energy and Mines Congressional Committee, and (vi) the June 2006 Report.[382]

348. The Respondent submits that its interpretation has always been founded on the plain language of the law and the specific agreement, and there was no change in interpretation at the Ministry, let alone an abrupt *volte-face* as Claimant alleges.[383] The Respondent's silence after receiving SMCV's letter in March 2005 was not a tacit agreement with SMCV's interpretation of the 1998 Stabilisation Agreement, as there were no royalties at issue at that time. Peru further asserts that it did not confirm the Claimant's understanding of the scope of the Stabilisation Agreement in the process of issuing the 2004 Royalty Law.[384] The Respondent states that its course of conduct was clear and consistent that the Stabilisation Agreement applied only to the Leaching Project.[385]

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381 Respondent's PH Brief, ¶¶ 37-38.

382 Respondent's Counter-Memorial, ¶¶ 474-476.

383 Respondent's Counter-Memorial, ¶ 477.

384 Respondent's Counter-Memorial, ¶¶ 136-139, 164-166, 476.

385 Respondent's Counter-Memorial, ¶¶ 491-498.

349. The Respondent asserts that MINEM has consistently applied mining stabilisation agreements to specific investment projects, and that SMCV and the Claimant should have known that the Concentrator Project was not covered by the Stability Agreement.[386] The Respondent makes, *inter alia*, the following arguments in further support of this position:

a. Ever since the enactment of L.D. No. 708 in 1991, Peru has signed stabilisation agreements with respect to specific investment projects.[387]

b. The November 2001 Mining Council resolution relating to the "Parcoy" mine (owned by Consorcio Minero Horizonte S.A.) does not confirm the Claimant's case.[388]

c. Claimant's interpretation of the 2004 Mining Law is incorrect.[389]

d. MINEM did not confirm to SMCV that the Concentrator was covered. MINEM's approval of the expansion of the Beneficiation Concession did not indicate that the Stabilisation Agreement would cover the Concentrator Project, nor did its approval of SMCV's reinvestment of profits from the Leaching Project into the Concentrator Project.[390]

e. The March 2005 Meetings did not confirm the Concentrator was covered.[391]

f. The April 2005 Report from MINEM's legal affairs directorate shows that mining stabilisation agreements are granted to specific investment projects.[392]

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386 Respondent's Rejoinder, ¶¶ 286 *et seq.* The Respondent summarizes key events in support of this position in the table at pages 125-133 of its Rejoinder.

387 Respondent's Rejoinder, ¶¶ 292-298.

388 Respondent's Rejoinder, ¶¶ 299-303.

389 Respondent's Rejoinder, ¶¶ 304-313.

390 Respondent's Rejoinder, ¶¶ 314-351.

391 Respondent's Rejoinder, ¶¶ 352-361.

392 Respondent's Rejoinder, ¶¶ 362-372.

g. The June 2005 MINEM Presentation before Congress shows that stabilisation agreements are granted to specific investment projects.[393]

h. The September 2005 Report shows that mining stabilisation agreements are granted to specific investment projects.[394]

i. The October 2005 letter to Congress supports that mining stabilisation agreements are granted to specific investment projects.[395]

j. The November 2005 letter from MINEM to Congress supports that mining stabilisation agreements are granted to specific investment projects.[396]

k. The January 2006 Report from MINEM supports that mining stabilisation agreements are granted to specific investment projects.[397]

l. The May 2006 Presentation before Congress supports that mining stabilisation agreements are granted to specific investment projects.[398]

m. The June 2006 Report from MINEM's legal affairs directorate supports that mining stabilisation agreements are granted to specific investment projects.[399]

n. The June 2006 Presentation during roundtable discussions supports that mining stabilisation agreements are granted to specific investment projects.[400]

350. With respect to the voluntary contributions made by SMCV to the Government, it is the Respondent's position that SMCV made these as voluntary contributions with no promise from the Government that any such payments would exempt SMCV from paying royalties on the Concentrator project. Three agreements were entered into between 2006 and 2012

[393] Respondent's Rejoinder, ¶¶ 373-384.
[394] Respondent's Rejoinder, ¶¶ 385-390.
[395] Respondent's Rejoinder, ¶¶ 391-398.
[396] Respondent's Rejoinder, ¶¶ 399-405.
[397] Respondent's Rejoinder, ¶¶ 406-407.
[398] Respondent's Rejoinder, ¶¶ 408-423.
[399] Respondent's Rejoinder, ¶¶ 424-426.
[400] Respondent's Rejoinder, ¶¶ 427-445.

pursuant to which SMCV agreed to pay contributions to the local government of Arequipa and to Peru's National Treasury, and nothing in those agreements indicated that SMCV would be exempt from paying royalties under the Stabilisation Agreement. With respect to GEM contributions: (a) the Respondent did not confirm that SMCV did not have to pay royalties if it paid GEM contributions; (b) the fact that SMCV was labelled a "stabilized company" is irrelevant; (c) the GEM Agreement and its regulations do not support the Claimant's interpretation; and (d) it was SMCV's responsibility to assess appropriately the value of its GEM payments. If SMCV overpaid on the voluntary contributions, the Respondent submits that it could have applied for a refund of such overpayments at the relevant time, but that the Claimant is time-barred from doing so now under the 4-year statute of limitations.[401] The Respondent submits that no testimony at the Hearing supported the Claimant's allegations with respect to the voluntary contribution programs.[402]

351. The Respondent further argues that SUNAT's assessments on the Concentrator were in accordance with Peruvian law and consistent with SUNAT's position on the scope of the Stabilisation Agreement: (a) the Claimant does not dispute that SUNAT initiated audit proceedings and assessed royalties in accordance with Peruvian law; (b) SUNAT's assessments were not politically motivated; (c) SUNAT had consistently interpreted stability agreements to be limited to investment projects that gave rise to the agreements. With respect to the latter point, the Respondent submits that the 2002 SUNAT Report is consistent with SUNAT's interpretation that the scope of stabilisation agreements is limited to the investment projects that give rise to those agreements, and that stabilisation agreements concluded by other mining companies confirm this interpretation.[403]

352. With respect to the Tax Tribunal's Decisions regarding SMCV's royalty assessments, the Respondent submits that these were procedurally sound and provided due process to SMCV. The Respondent relies on, *inter alia*, the following arguments in support of this

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401 Respondent's Counter-Memorial, ¶¶ 201-237; Respondent's Rejoinder, ¶¶ 446-501.

402 Respondent's PH Brief, ¶ 168.

403 Respondent's Rejoinder, ¶¶ 502-549, referring to: SUNAT, Report No. 263-2002-SUNAT/K00000, 23 September 2002 (**RE-26**).

position: (a) the President of the Tax Tribunal did not interfere in the Tax Tribunal's review of the 2008 Royalty Assessment; (b) the Chambers of the Tax Tribunal properly deliberated the 2006-2007, 2009 and 2010 Royalty Cases; (c) the Tax Tribunal did not impair SMCV's due process rights when it allowed Mr. Ninacóndor, who had previously worked at SUNAT, to participate in adjudicating SMCV's challenge to the 2010-2011 Royalty Assessment; and (d) the Tax Tribunal acted reasonably in assigning Ms Villanueva, who had previously assisted Chamber No. 1 on the 2008 Royalty Case, to participate in adjudicating SMCV's challenge to the Q4 2011 Royalty Assessment Case.[404]

353. The Respondent asserts that it has assessed penalties and interest with respect to SMCV's Royalty and Tax Assessments in accordance with Peruvian law. The Respondent argues that SMCV was responsible for the amount of penalties and interest it incurred, and that Peru's denial of SMCV's requests for waivers were procedurally and substantively sound. Under Peruvian law, specifically Articles 92(g) and 170 of the Tax Code, a taxpayer may be able to obtain a waiver of penalties and interest on its non-payment of applicable taxes and royalties. With respect to the Claimant's requests to waive penalties and interest on the 2006-2007 and 2008 Royalty Assessments, the Respondent submits that the Tax Tribunal and the courts properly denied these on procedural grounds as SMCV filed the requests too late. The Respondent further argues that the Tax Tribunal and the courts were not obliged to review *sua sponte* SMCV's waiver requests with respect to the 2006-2007 and 2008 Royalty Assessments. With respect to the Claimant's requests to waive penalties and interest on the 2009, 2010-2011, Q4 2011, 2012 and 2013 Royalty Assessments, SUNAT and the Tax Tribunal denied these on substantive grounds, finding that the waiver was not available because the requirements of Article 170.1 of the Tax Code were not met. The Respondent submits that these requests were denied in accordance with Peruvian law, as there was no ambiguous regulation relevant to the Royalty and Tax Assessments issued against SMCV, and the Government has discretion whether to issue clarifications.[405]

354. Finally, the Respondent submits that it properly assessed tax and penalties against SMCV in light of its failure to distinguish its stabilized and non-stabilized activities. The

[404] Respondent's Rejoinder, ¶¶ 550-591.

[405] Respondent's Rejoinder, ¶¶ 592-649.

Respondent asserts that SMCV failed to provide SUNAT with adequate information about which of its assets and activities related solely to its stabilized investment, the Leaching Project, and that SMCV was obligated to keep separate accounts for its stabilized and non-stabilized projects. The Respondent points out that there were multiple allocation methods for the separation of accounts that were available to SMCV.[406]

355. In its post-hearing briefs, the Respondent argues that it has been consistent in its treatment of stabilisation agreements of other mining companies, having reviewed its treatment of other mining titleholders from 1992-2019. In its post-hearing briefs, the Respondent also notes that the Claimant has never submitted a discrimination claim in these proceedings and would not be permitted to at this late juncture.[407]

c) The Peruvian Supreme Court Decision in the 2008 Royalty Case

356. It is the Respondent's position that whether Peru has breached its obligations under the Stability Agreement is a matter of Peruvian law, which the Peruvian courts have already answered. The Respondent asserts that the Claimant cannot appeal that answer here under the guise of an Article 3.4 umbrella clause claim.[408]

357. The Respondent makes, *inter alia*, the following arguments in support of its position:

a. Absent a denial of justice or due process violation, the Tribunal should (and arguably must) respect the Peruvian Supreme Court's decision. When a definitive answer under the governing law has already been given for the precise legal questions that are being (re)posed in the treaty forum, there is no cause, nor room, for any further analysis under the umbrella clause. The question of whether Peru breached the Stability Agreement turns on the scope of the guarantees under the Agreement and the Mining Laws and Regulations, which are governed by Peruvian law. The Peruvian Supreme Court has already provided the answer: specifically, on 18 August 2017 when it issued its 80-page decision affirming the Superior Court's

406 Respondent's Rejoinder, ¶¶ 650-672.

407 Respondent's PH Brief, ¶¶ 149-167; Respondent's Reply PH Brief, ¶¶ 55-104.

408 Respondent's Counter-Memorial, ¶ 407; Respondent's Rejoinder, ¶¶ 121, 136-137.

appellate decision that SUNAT's imposition of the 2008 Royalty Assessment was legal, on the basis that the Stability Agreement was limited to the "Cerro Verde Leaching Project," and did not include the Concentrator and the "Primary Sulfides Project." It is not the Tribunal's place to substitute its opinion on this Peruvian law question for that of the Peruvian Supreme Court.[409]

b. Unless the Supreme Court's decision was "clearly improper and discreditable," the Claimant's assertion that the Supreme Court was wrong is irrelevant. It is similarly irrelevant that the Supreme Court's decision is not precedential under Peruvian law, it is binding on the Parties to the dispute. When the host State's highest court has already considered and decided an issue of domestic law, absent a denial of justice or due process issue, the Tribunal must respect that decision. SMCV had a full and thorough opportunity to argue to Peruvian administrative reviews and courts of all levels that the stability guarantees apply to the entire mining unit or concession, and SMCV took full advantage of that opportunity. While it is true that it is ultimately for the Tribunal to determine whether there has been a breach of the State's international law obligations under the umbrella clause, the Tribunal's determination turns entirely on whether there was a breach of the Stability Agreement, which has already been adjudicated at the highest levels of the Peruvian judiciary.[410]

c. None of the arguments raised in the Claimant's Reply undermines the Respondent's reasoning:

    i. While the Claimant's Article 3.4 claim is an international law claim, its content must be supplied by a domestic law obligation. Unlike, for example, an FET provision, the international law obligation imposed by Article 3.4 is simply an obligation to observe an underlying obligation, which here is governed by Peruvian law. Thus, the determinative issue is

[409] Respondent's Counter-Memorial, ¶¶ 452-455; referring to: *Mondev v. USA* Award, ¶ 127 (**RA-14**); *Liman Caspian v. Kazakhstan* Excerpts of Award, ¶ 274 (**RA-15**); *Alps Finance v. Slovak Republic* Redacted Award, ¶¶ 249-250 (**RA-16**).

[410] Respondent's Counter-Memorial, ¶¶ 456-459.

the interpretation of the Stability Agreement, in particular what the scope of the agreement is and whether SMCV is obligated to pay royalties and taxes on the Concentrator Project, which issue is governed by Peruvian law.[411]

ii. The 2008 Supreme Court Judgment and the 2006-2007 Superior Court Judgment are binding on the parties to those proceedings. These judgments are binding on SMCV under Peruvian law. SMCV cannot relitigate under Peruvian law whether it was obliged or not to pay royalties connected to the Concentrator for those years. The courts had to analyse and interpret the Mining Law, the Mining Regulations, and the Stability Agreement, and the court's *ratio decidendi* on those issues should not be ignored by this Tribunal. The Claimant's assertion that the 2008 Supreme Court judgment had no persuasive effect in Peru is incorrect.[412]

iii. The issue is not whether the Tribunal is bound by the Peruvian Supreme Court's decision *per se*, rather the Tribunal is bound to apply Peruvian law and, as with any factual determination, it is bound to decide the issue in accordance with the weight of the evidence. Here, the Tribunal is deciding an international law claim that turns on a question of Peruvian law that the highest court in Peru has already decided. Absent a denial of justice or due process issue that could taint the decision, it is hard to see how the evidence could ever be more decisive. Even if the Supreme Court's decision is not binding in other Peruvian legal proceedings, its decision is a highly persuasive source of Peruvian law which would strongly influence any decision maker adjudicating issues of Peruvian law.[413]

411 Respondent's Rejoinder, ¶¶ 710-711.

412 Respondent's Rejoinder, ¶¶ 75-85.

413 Respondent's Rejoinder, ¶¶ 713-718.

iv. There is no basis to suggest that the Tribunal should not accord the 2008 Supreme Court judgment any weight. The Claimant elected not to pursue a civil law remedy and instead chose contentious administrative proceedings. It is misleading to state that the Supreme Court did not have in front of it certain evidence, which is now before the Tribunal, as "evidence" played little if any role in its analysis as a Cassation Court. The Claimant's attempts to challenge the credibility of the court on the basis of media reports characterising the judicial system as needing anti-corruption reforms should be rejected. The Claimant does not challenge the procedural soundness of the 2008 Supreme Court judgment or the 2006-2007 Superior Court judgment.[414]

d. A cassation ruling by the Supreme Court is no ordinary decision—it aims to maintain consistency and uniformity throughout Peruvian case law and, on that basis, other courts must consider it when deciding cases that touch upon similar legal matters. Following the Supreme Court's decision on the 2007 Royalty Assessment, other adjudicatory bodies have referred to it and followed it, and there have been no other Supreme Court rulings on the interpretation of Title Nine of the Mining Law.[415]

d) The Freeport Award

358. It is the Respondent's position that the Freeport Award constitutes the most recent final and binding decision in a long string of decisions interpreting the Mining Law and Mining Regulation and confirming that the Stability Agreement did not cover the Concentrator. The Respondent notes the following: (a) SMCV through its direct shareholders, Freeport and the Claimant, sought to relitigate before two international tribunals whether the Respondent breached the Stability Agreement and, in addition, whether it breached its obligations to afford fair and equitable treatment to SMCV, (b) both international arbitrations have been called to deal with the same facts, the same measures taken by the

414 Respondent's Rejoinder, ¶¶ 86-95.

415 Respondent's PH Brief, ¶¶ 80-86.

Respondent, and the same legal claims, (c) in addition, the Claimant's quantum claims overlapped with Freeport's quantum claims, and (d) the *Freeport* tribunal issued a final, binding and enforceable decision dismissing Freeport's (and SMCV's) claims in their entirety. The Respondent submits that the *Freeport* tribunal's legal analysis and findings are critical to this case, and this Tribunal should reach findings consistent with those made by the *Freeport* tribunal.[416]

359. The Respondent makes, *inter alia*, the following submissions in support of its position on the Freeport Award:

a. The Freeport Award constitutes *res judicata*, which is widely accepted as a general principle of international law. International tribunals have generally approached this doctrine through the "triple identity" test, which requires the identity of: (i) the parties; (ii) the relief sought (object); and (iii) the cause of action between the two proceedings. Investor-State tribunals and commentators have moved away from an overly formalistic approach to the application of the triple identity test, consider a more substantive interpretation and the economic reality of the parties. In this case, the Respondent asserts that the test is met: (i) Freeport and the Claimant are in privity of interest—they are both shareholders in the same company, SMCV, which is the real party of interest in both arbitrations—and therefore identity of parties is satisfied on this basis, (ii) the two arbitrations seek the same object of relief, which is apparent from the fact that the Claimant's damages claim overlaps with Freeport's, and (iii) the two arbitrations have alleged the same cause of action, as both included claims for breach of the Stability Agreement, and while Freeport relied on a claim for minimum standard of treatment under customary international law, that did not stop Freeport and the Claimant from arguing that the same FET standard applied in both cases.[417]

b. Even if this Tribunal were to find that *res judicata* does not apply to this proceeding, the Tribunal should hold that the Claimant is, in any case, estopped from obtaining

[416] Respondent's Freeport Submissions, ¶¶ 1-3.

[417] Respondent's Freeport Submissions, ¶¶ 5-34.

a different result or remedy on the issues that have already been decided by the *Freeport* tribunal. The principle of collateral estoppel is widely accepted as a general principle of international law. To rely on this, it must be established that a question concerning a right, question, or fact was, in another proceeding: (i) distinctly put in issue, (ii) actually decided by the other tribunal, and (iii) the resolution of the question was necessary to resolve the claims before the other tribunal. In this case, the same questions of fact and law submitted to this Tribunal were submitted to the *Freeport* tribunal, which decided those questions based on the same evidence, arguments and testimony that have been submitted to this Tribunal, and those findings were definitive to dismiss Freeport's claims.[418]

c. Further, this Tribunal has an independent duty to ensure consistency of investor-State jurisprudence. Multiple investor-State tribunals have confirmed that pursuant to general principles of legal certainty, a tribunal must "pay due consideration to the relevant decisions of international tribunals."[419]

360. For the foregoing reasons, the Respondent submits that, even if the Claimant were able to assert its Article 3.4 claim, the Tribunal should nonetheless determine that the claim fails, because Peruvian courts have already held that the stability guarantees provided under the Stability Agreement were limited to the investment project that is the subject of that Agreement and it did not encompass the Concentrator. It is the Respondent's position that, absent a denial of justice or due process issue, the Tribunal must respect the Peruvian courts' resolution of that question. The Respondent submits that there can be no better evidence of how a State's highest court would rule on an issue of domestic law, than that highest court's own ruling directly answering the question.[420]

2. The Tribunal's Analysis

361. The Tribunal's analysis and conclusions of the Claimant's claim based on Article 3.4 of the Treaty are conducted in two main parts. The first part (subsection **a**), adopted by

[418] Respondent's Freeport Submissions, ¶¶ 35-37.

[419] Respondent's Freeport Submissions, ¶¶ 38-40.

[420] Respondent's Counter-Memorial, ¶ 460; Respondent's Rejoinder, ¶ 719.

unanimity, is a general discussion of the international obligation arising from Article 3.4 of the Treaty and the Respondent's objections to the application of that article in the present case. The second part (subsections **b** through the end) is a discussion of the specific obligation, alleged to arise from Article 3.4, which the Claimant claims to have been breached. This second part is generally adopted by majority. Arbitrator Garibaldi dissents from the majority's analysis and conclusions of this part (except as regards the weight given to the *Freeport* Award and otherwise as noted) for the reasons stated in his Partial Dissent.

a. The International Obligation Arising from Article 3.4 of the Treaty

362. Article 3.4 provides as follows:

> "*Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals of the other Contracting Party.*"

363. The Respondent first contends that for Article 3.4 to be applicable, there must be privity, and privity is lacking in this case because the Claimant is not a party to the Stability Agreement. In support of this submission, the Respondent refers, *inter alia*, to the decisions in *Burlington* and *Rasia*.[421] In response, the Claimant notes that whether Article 3.4 requires privity is a question of international law and not Peruvian law and therefore the Tribunal must determine that question in accordance with the rules of construction set forth in Article 31.1 of the VCLT. Interpreted under these rules, Article 3.4 protects all obligations Peru entered into with regard to investments of Dutch nationals. Accordingly, the Claimant says, its investment in SMCV is protected because Peru's obligations to SMCV under the Stability Agreement are obligations with regard to the Claimant's investment, namely its shareholding in SMCV.

364. The Tribunal is well aware that certain other tribunals, faced with treaty provisions having terms similar to those of Article 3.4 of the Treaty, have taken the view that the plain

[421] Respondent's Counter-Memorial, ¶ 409, referring to: *Burlington Resources Inc. v. Ecuador* Decision on Liability, ¶¶ 211-212, 214 (**CA-198**); Respondent's Rejoinder, ¶ 687; Respondent's Reply PH Brief, ¶¶ 120-123, referring to: *Rasia FZE and Joseph K. Borkowski v. Republic of Armenia*, ICSID Case No. ARB/18/28, Award (20 January 2023) ("***Rasia v. Armenia*, Award**"), ¶¶ 409-422 (**RA-105**).

meaning of "obligation" denotes a relationship that implies privity between an obligor and an obligee. For the reasons set forth below, the Tribunal does not agree with that position in respect of Article 3.4. In summary, this Tribunal finds that the issue is a matter of international and not domestic law and that the ordinary meaning of Article 3.4 is that any obligation entered into by Peru with regard to an investment of a Dutch national is covered by that clause, without any privity requirement.

365. As noted above (in paragraph 363), the Respondent refers, *inter alia*, to the decisions of the tribunals in *Burlington* and *Rasia*, in support of its construction of Article 3.4. However, several other tribunals have construed similar provisions in the opposite way, rejecting claims for an implied privity requirement.[422] Whilst the Tribunal takes note of the different constructions found by other tribunals, it is this Tribunal's obligation to undertake its own construction from first principles under the rules of construction set out in Article 31(1) of the VCLT.

366. Article 31(1) of the VCLT sets out the general rule for the interpretation of treaties:

> "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*"

367. Interpreted in good faith, the ordinary meaning of the terms of Article 3.4 of the Treaty does not include a privity requirement. The Tribunal finds no terms in Article 3.4 requiring that the obligation must be one entered into specifically with the investor. Article 3.4 sets forth three express requirements: (i) there must be an obligation; (ii) that obligation must have been entered into with regard to an investment; and (iii) that investment must be one of a Dutch national.

368. Had the Contracting States intended to include a requirement of privity, it would have been a simple matter to provide that the obligation must be owed "to an investor" and not "with

[422] *Strabag v. Libia* Award, ¶¶ 167-169 (**CA-249**), *Continental Casualty Co. v. Argentina,* ICSID Case No. ARB/03/9, Award (5 September 2008), ¶ 297 (**CA-0150**); *Sempra v. Argentina* Award, ¶ 314 (**CA-142**); *EDF v. Argentina* Award, ¶¶ 921-938 (**CA-189**); *Supervisión v. Costa Rica* Award, ¶¶ 287-289 (**CA-228**).

regard to" an investment. Indeed, both Contracting States included such text in treaties with other States. In the Peru-Singapore BIT, Article 15 provides that "[e]ach Contracting Party shall observe any commitment in accordance with its laws additional to those specified in this Agreement entered into by the Contracting Party, its investors *with investors* of the other Contracting Party as regards their investments"[423] and Article 3(4) of the China-Netherlands BIT provides: "[e]ach Contracting Party shall observe any commitments it may have entered into *with the investors* of the other Contracting Party with regard to their investments."[424]

369. The Tribunal finds it significant that the drafters of the Treaty chose not to include such language in Article 3.4. It is of further significance that Peru requires mining stability agreements to be signed by a local entity, a requirement that always precludes privity between the underlying investor and the State. The Tribunal does not accept the Respondent's contention that the phrase "with regard to investors" and the phrase "with regard to an investment" comprise a distinction without a difference.[425] There is a critical difference between "an investor" and "an investment." It is clear to the Tribunal that the treaty drafters intended that the obligation protected by Article 3.4 be construed broadly, applying to any obligation with regard to a Dutch investment without any requirement of privity.

370. The Tribunal finds nothing in the context of the Treaty that might suggest a different interpretation of the terms of Article 3.4. On the contrary, the Tribunal's interpretation also accords with the broad language of Article 9 of the Treaty, which allows an investor to bring claims for "any legal dispute … concerning an investment."

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423 Agreement between the Government of the Republic of Singapore and the Government of the Republic of Peru on the Promotion and Protection of Investments (27 February 2003), Article 15 (**CA-97**) (emphasis added); Claimant's Memorial, ¶ 305(a).

424 Agreement on Encouragement and Reciprocal Protection of Investments between the Government of the People's Republic of China and the Government of the Kingdom of the Netherlands (26 November 2001), Article 3(4) (**CA-85**) (emphasis added); Claimant's Memorial, ¶ 305(b).

425 Respondent's Counter-Memorial, ¶ 419.

371. On the object and purpose of the Treaty, the Tribunal finds relevant the following paragraphs from the preamble:

> "*Desiring to strengthen the traditional ties of friendship between their countries, to extend and intensify the economic relations between them particularly with respect to investments by the nationals of one Contracting Party in the territory of the other Contracting Party.*
>
> *Recognizing that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties and that fair and equitable treatment of investment is desirable...*".

372. It is clear from the quoted passage of the Preamble that the Contracting Parties intended that each Contracting Party should abide by agreed standards of treatment which would encourage the flow of capital from the other Contracting Party. It is further of note that the Preamble focusses on "investments" and not on the "investors" who will make the investments, a focus that coincides with that of Article 3.4. In other words, the Contracting Parties' focus is placed on the investments to be promoted, not on particular investors, as long as the investments are those of nationals of the other Contracting Party.

373. The same analysis applies with regard to the Respondent's submission that Article 3.4 implies a temporal requirement, in the sense that the Claimant must have been an investor at the time the Stability Agreement was signed. The Tribunal accepts the Claimant's submission that by its plain terms, Article 3.4 clearly does not include a temporal limitation.

374. Having considered the ordinary meaning to be given to the terms of the Treaty in their context and in the light of its object and purpose, the Tribunal unanimously concludes that, interpreted in good faith, this provision contains neither a privity requirement nor a temporal requirement. In support of its construction, the Tribunal accepts the Claimant's submission that investors frequently structure investments through locally incorporated

entities and a construction that recognises this reality by not requiring privity best fulfils the Treaty's purpose of protecting and promoting investment.[426]

b. The Obligations to Be Observed under Article 3.4 of the Treaty

375. The next question for the Tribunal is whether Peru owes any obligation to the Claimant and, if so, what is the nature of that obligation. The Claimant says it is owed obligations of stability for the entire mining unit or concession in which it made its qualifying minimum investment whereas Peru says the stability guaranteed is only with regard to the qualifying investment, which in this case is that which was the subject of the 1996 Feasibility Study filed pursuant to the Mining Law and attached to the Stability Agreement.

376. Before turning to the construction of the Stability Agreement, the Tribunal first considers, as a preliminary matter, the status of the Supreme Court Decision and that of the *Freeport* Award.

The 2008 Supreme Court Decision

377. The Tribunal unanimously finds that the Tribunal is not bound by the 2008 Supreme Court decision.

378. The Claimant makes three submissions with regard to the Supreme Court decision. First, domestic court decisions concerning obligations underlying umbrella clause claims do not bind the Tribunal. The Tribunal must independently exercise its mandate. Whilst the cases cited by the Respondent relate to claims for denial of justice, the Claimant has not brought a case asserting denial of justice.[427] Second, Professor Eguiguren accepted during his cross examination that this decision is not even binding or precedential in Peru on other legal proceedings involving the same parties and issues.[428] This is because it is a decision only

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[426] For completeness, the Tribunal notes that in *Rasia*, the most recent case to consider the proper construction of a provision equivalent to Article 3.4, there was an important differentiating factor in that in *Rasia* neither the investor claimant nor the entity constituting the qualifying investment under the relevant BIT was a party to the contract in question. In the present case, SMCV is an entity incorporated in Peru such that the obligation entered into by Peru is with respect to a qualifying investment.

[427] Respondent's Counter-Memorial, ¶ 456; Respondent's Rejoinder, ¶ 713; Respondent's PH Brief, ¶ 86.

[428] Tr. Day 9, 2310:14-21; 2311:7-10; and 2315:1-10.

regarding the validity of the 2008 Royalties Case and so, as explained by Professor Bullard, it is only binding "for a contentious administrative proceeding at the local level... regarding the 2008 Royalties Case."[429] Indeed, neither the Supreme Court, the Tax Tribunal, or SUNAT accorded any binding or precedential effect to this decision in subsequent proceedings. The decision would only be binding in Peru were the Respondent able to demonstrate "triple identity" which it is unable to do for any claim other than one relating to the 2008 Royalties Case.[430] Third, the Claimant says the Tribunal should not accord this decision any weight. It notes that Professor Morales, who was instructed by the Respondent, accepted that other Peruvian courts hearing claims arising out of the Stability Agreement could "[r]each a different conclusion" so long as they "justify it."[431] The Claimant contends that there are several reasons justifying this Tribunal reaching a different decision, including that the Supreme Court Decision was issued on the basis of an inadequate evidentiary record. The Supreme Court did not, and could not, consider the factual and expert evidence that was put before this Tribunal and further did not see the unredacted SUNAT documents showing the consistent application of stability guarantees to concessions and mining units for other investors.[432]

379. To counter those arguments, the Respondent makes three submissions. First, given the construction of the Stability Agreement is a question of Peruvian law, the Tribunal should respect the decision of the highest court in Peru which has already undertaken this construction exercise. The Tribunal does not sit as a "supranational court of appeal" and therefore must respect the Supreme Court decision.[433] Second, there are no reasons which would justify the Tribunal reaching a different decision. The Claimant has not made any submissions as to breach of due process and, as explained by Professor Eguiguren, this decision was reached pursuant to a cassation appeal which "is an extraordinary recourse which only operates before the Supreme Court, and not even in all cases."[434] Professor

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429 Tr. Day 8, 2185:8-10.

430 [**Morales 1**], ¶¶ 86-89; [**Eguiguren 1**], ¶¶ 100-101.

431 Tr. Day 9, 2340:8-14.

432 Claimant's PH Brief, ¶¶ 62-65; Tr. Day 9, 2340:8-14.

433 Respondent's PH Brief, ¶ 86.

434 Tr. Day 8, 2230:2-4.

Eguiguren further explains that there are two purposes for a cassation appeal, "[o]ne, is for the Supreme Court to ensure the appropriate interpretation and application of the law to the concrete case. And, secondly, to provide for uniformity in case law, or to resolve contradictions between judgments [...]"[435] Accordingly, whilst not strictly speaking binding, the Respondent contends that the Supreme Court's ruling must be taken into account in similar cases to ensure this uniformity. Whilst the Respondent accepts that a judge may depart from a cassation ruling, to do so they must provide reasons as to why that ruling does not apply. The Respondent contends that there are no justifiable reasons in this case for the Tribunal to come to a different decision from that of the Supreme Court.[436]

380. Finally, the Respondent notes that there have been no other Supreme Court rulings on the interpretation of Title Nine of the Mining Law and further notes that other adjudicatory bodies have referred to, and followed, the Supreme Court decision.[437]

381. The Tribunal, by unanimity, does not accept the Respondent's submission that it should respect the determination of the Supreme Court. It is clear that this judgement is a decision relating only to the validity of the 2008 Royalties claim and is not even binding in any judicial proceedings in Peru concerning any other matter, including any other royalty assessment. To the extent any subsequent royalty claim proceeds before the Peruvian courts, such claim will be decided *de novo* and not by reference to the Supreme Court Decision.

382. The Tribunal must therefore decide to what extent, if any, it should give any weight to the decision. The Tribunal finds that, whilst it must first undertake its own analysis of the Stability Agreement, having reached its conclusion, it should then consider carefully the analysis undertaken by the Supreme Court, even though it is not bound by it. In reaching this decision, a majority of the Tribunal finds the following to be of relevance. First, the Stability Agreement is governed by Peruvian law, not international law, and so the determination of the scope of the Stability Agreement is governed by Peruvian law.

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435 Tr. Day 8, 2230:9-15.

436 Respondent's PH Brief, ¶ 85.

437 Respondent's Rejoinder, ¶¶ 82-85.

Second, the question of the scope of the Stability Agreement, albeit only in the context of the 2008 Royalties claim, has been determined by the highest judicial body in Peru. Third, there has been no assertion from the Claimant that there was any breach of due process in the court proceedings, the Claimant's case being that the Supreme Court did not have the benefit of the full record available to this Tribunal and accordingly reached the wrong conclusion. Fourth, the Tribunal does not sit as an appellate body from the Supreme Court. Fifth, whilst the decisions reached by each domestic court which heard this issue were not reached on a unanimous basis, it is not disputed that the majority of the judges who decided on the proper meaning of the Stability Agreement reached the same conclusion as that contended for by the Respondent. Further, of those judges who did not agree that the Stability Agreement stabilized only the Leaching Project, the majority disagreed on procedural, not substantive, grounds. Taking these factors into account, a majority of the Tribunal finds an absence of cogent reasons to pay no regard to the analysis undertaken by the Supreme Court. Arbitrator Garibaldi agrees that it is proper to pay regard to the Supreme Court's analysis but disagrees on the weight that the majority attributes to that analysis and the reasons therefor.[438]

383. Accordingly, a majority of the Tribunal decides that the correct approach is first to undertake its own independent analysis of the meaning of the Stability Agreement but then, if and to the extent that it would assist the Tribunal, it will take note of the Supreme Court's approach to the construction of the Stability Agreement and its determination.

The Freeport Award

384. In PO13, the Tribunal concluded that the *Freeport* Award should be admitted to the record for limited purposes.

385. First, with regard to findings of fact, the Tribunal held as follows:

> "*15. Turning first to findings of fact, this Tribunal does not find that it would be assisted either by findings of fact or by conclusions reached based on such findings of fact, made by the Freeport tribunal in circumstances where*

[438] See Partial Dissent in Part III.

this Tribunal will not have had the benefit of (i) examining the witnesses and experts in the context of the Freeport Arbitration and (ii) reading the record in the Freeport Arbitration, including the transcript.

16. The Tribunal has already determined, in Procedural Order No. 10 ("PO10"), that the Respondent's request for admission to the record of transcripts and recordings of the Freeport hearing would give rise to very significant due process issues. The Tribunal noted that '[w]hilst the material sought to be admitted to the record may be of relevance, the Tribunal finds that any potential prejudice in such material not being admitted is clearly outweighed by the prejudice to the Claimant….if it were to be admitted.'[footnote omitted] The reasons cited by the Tribunal were, inter alia, firstly, that lengthy submissions and reply submissions would be required which would cause significant delay to the proceedings and, secondly, that ICSID Arbitration Rule 32 envisages an oral procedure before this Tribunal and not the Freeport tribunal, such that this Tribunal could not assess the credibility of the witnesses and experts in the Freeport Arbitration merely by reading the transcript without the opportunity to ask questions of each witness and expert. The Tribunal followed the same analysis in rejecting, in Procedural Order No. 11, the Respondent's request to admit to the record the Claimant's costs submissions filed in the Freeport Arbitration. 17. The same analysis applies equally to the Respondent's request for the Freeport Award to be admitted to the record for the purpose of considering the findings and conclusions of the Freeport tribunal, which the Respondent asserts to be highly relevant. The Tribunal therefore does not accept that the Freeport Award should be admitted to the record for the purposes of making submissions as to findings of fact and conclusions arising therefrom, and repeats its determination in PO10 that '[w]hilst the material sought to be admitted to the record may be of relevance, the Tribunal finds that any potential prejudice in such material not being admitted is clearly outweighed by the prejudice to the Claimant….if it were to be admitted.""

386. Accordingly, to the extent the *Freeport* tribunal's majority findings as to the scope of the Mining Law, Mining Regulations, and Stability Agreement comprise findings of fact, the Tribunal takes no account of them.

387. Second, with regard to any legal analysis undertaken by the *Freeport* tribunal, the Tribunal held as follows:

> "*18. However, the Tribunal does accept that the Freeport Award should be admitted to the record for the limited purpose of making submissions with regard to any legal analysis undertaken by the Freeport tribunal and conclusions reached. There can be no prejudice to the Claimant in the Tribunal having the benefit of another tribunal's analysis of legal issues to the extent they are relevant to the issues which this Tribunal must determine. Indeed, in any arbitration, parties typically refer to other awards in addition to academic writings in support of their submissions.*
>
> *19. The Tribunal therefore admits the Freeport Award to the record but only for the limited purpose of enabling the Parties to make submissions on any legal analysis and findings made by the Freeport tribunal and only to the extent such analysis and findings are of relevance to the legal issues in dispute in the present arbitration. In making this order, the Tribunal notes that the Freeport tribunal was required to apply the provisions of the US-Peru Trade Promotion Agreement whereas this Tribunal's task is to apply the relevant provisions of the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Peru.*"

388. Having carefully considered the Parties' respective submissions, given that the *Freeport* claim was not brought under the Treaty but instead under a different treaty, namely the U.S.-Peru TPA, which did not contain identical investor protection provisions, the Tribunal unanimously finds that the *Freeport* tribunal's legal analysis is not of assistance to the Tribunal's task. Accordingly, the Tribunal unanimously concludes that the *Freeport*

tribunal's analysis should not inform this Tribunal's analysis of the proper scope of the Stability Agreement.

389. This Tribunal notes, however, that the majority agrees with the same approach to the construction of the Stability Agreement as that followed by the *Freeport* tribunal.

Peruvian law on contractual interpretation

390. The Claimant contends that as the Stability Agreement is a civil law contract, all the Civil Code's rules on contractual interpretation apply, including the principles of autonomy of the parties, *pacta sunt servanda*, and good faith. Further, because the Stability Agreement is an adhesion contract, the Claimant contends that the principle of *contra proferentem* is also applicable. The Claimant says this follows from the fact that the adhesion contract is drafted by the State, and the obligation is upon the drafter to use contractual language that does not lend itself to ambiguous interpretations. The Claimant further contends that, given the terms of Article 86 of the Mining Law, the Stability Agreement cannot include guarantees that are more restricted or limited than those included in the regulatory framework.[439]

391. The Claimant explains that the rules of construction can be classified into two broad methods of construction, namely textual (commencing with a literal interpretation followed by a systematic interpretation) and contextual which, based on the principles of good faith and the will of the parties, includes historical and estoppel-based interpretation and functional interpretation.[440]

392. The Claimant submits that when construing the Stability Agreement, the starting point should be the text of the relevant provisions of the Stability Agreement. The exercise to be undertaken is to ascertain their literal meaning to determine the common will of the Parties pursuant to Articles 168 and 1361 of the Civil Code[441] which provide as follows:

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439 Claimant's Reply, ¶ 80.

440 [**Bullard 1**], ¶ 21.

441 [**Bullard 1**], ¶ 26.

"*Article 168.- The act of law [act-in-the law] must be interpreted according to what has been expressed therein and according to the principle of good faith.*[442]

Article 1361.- Contracts are obligatory insofar as this [what] has been expressed within them.

It is presumed that the declaration expressed in the contract follows the common will of the parties and whoever might deny that coincidence must prove it."[443]

393. Having conducted a literal interpretation, pursuant to Article 169 of the Civil Code, it is then necessary to carry out a systematic analysis of the entire Stability Agreement together with the relevant provisions of the Mining Law and Mining Regulations which enables clauses to be "interpreted by cross reference and the meaning of ambiguous clauses can be derived from the whole."[444] When undertaking this exercise, the principle of *effet utile* is applicable, and where there is ambiguity a *contra proferentem* interpretation should either confirm the conclusion or resolve any lingering doubts. The construction must avoid restricting or broadening the special legal framework applicable to the Stability Agreement, such that "the interpretation that comes closest to the provisions set out in the special legislation must be given preference over that which deviates from that legislation."[445]

394. The textual interpretation should then be supplemented by contextual interpretation.[446] Referring to Articles 168 and 1362 of the Civil Code, the Claimant contends that this enables reference to the context in which the Stability Agreement was entered into, and "based on the principles of good faith and the will of the parties—includes historical and estoppel-based interpretation and functional interpretation." Accordingly, the exercise of

442 Peruvian Civil Code, Legislative Decree No. 295, Article 168 (**CA-39**).

443 Peruvian Civil Code, Legislative Decree No. 295, Article 1361 (**CA-39**).

444 [**Bullard 1**], ¶ 33.

445 [**Bullard 1**], ¶ 34.

446 [**Bullard 1**], ¶ 41.

construction requires ascertaining the actual will of the Parties as reflected in their actions before and after the conclusion of the Stability Agreement.[447]

395. Having applied the rules of construction, the Claimant contends that the proper construction of the Stability Agreement is that the stability guarantees contained in Title Nine of the Mining Law apply to the entire mining unit or concession in which it made the minimum investment required.[448]

396. Whilst the Respondent accepts that the Stability Agreement is a civil contract, the Respondent contends that it cannot be interpreted in the same manner as if it were a private contract. The Respondent notes that the purpose of stability agreements is the promotion of foreign and domestic private investment. Given this, the Respondent contends that *contrato-ley* agreements must be viewed as being in a "special" or "intermediate" category in that they are contracts "predominately governed under public law, in which elements inherent to administrative law coalesce with elements of civil law to produce outcomes framed within the plans or policies of the State to foster growth and development of investment and the economic system."[449]

397. The Respondent next contends that, according to Peruvian legal scholarship, the scope of stability agreements is limited and must be strictly and narrowly construed.[450] The Respondent notes that in entering into a stability agreement, the State is stripped of its regulatory and legislative powers for a specified period in exchange for the ability to incentivise an investment. Equally, the investor, although limited to either accepting or not accepting the content of the stability agreement, receives a special regime of benefits upon acceptance. The investor's rights are not unlimited. Accordingly, the Respondent contends that such investor should not be granted benefits beyond those expressly provided for under the stability agreement. Indeed, it would be illogical for the State to enter into a stability

447 [**Bullard 1**], ¶ 43.

448 Claimant's Memorial, ¶ 314, referring to [**Chappuis**], ¶¶ 28, 45-46.

449 [**Eguiguren 1**], ¶ 33.

450 [**Eguiguren 1**], ¶¶ 34, 41.

agreement blindly by granting unlimited benefits to any potential investment project that a mining company decided to carry out.[451]

398. The Respondent further does not accept that the principle of *contra proferentem* should automatically apply when construing *contratos-ley*.[452] Whilst the Respondent refers to Article 1401 of the Civil Code as containing a *contra proferentem* rule, in the Respondent's submission, pursuant to Article 1361 of the Civil Code, the scope and implications of the stability granted must be construed strictly and narrowly. This is because, as explained, a stability agreement entered into pursuant to Article 86 of the Mining Law provides exceptional guarantees and benefits in the investor's favour and it is therefore essential that any construction ensures that "the State strictly complies with what is expressly enshrined and set forth under the agreement, without adopting interpretations that favor the private party with the clear intent of expanding the scope of the benefits received, or of recognizing others that do not arise from the text of the agreement or the law."[453] A stability agreement is not entered into between two parties of differing bargaining strength and equality and does not stem from parties' free will or negotiations but from the law. Whereas typically, the Respondent contends, an investor enters into a stability agreement with the effect of a limitation to or curtailment of its rights, in the present case where the stability agreement is offered pursuant to the Mining Law, the investor receives a benefit, a "special contractual regime of immutability and inviolability" which does not apply to any other person contracting with the State without accessing a stability agreement.[454]

399. The Respondent further contends that whilst stability agreements are adhesion contracts for the purposes of the guarantees provided, they are not adhesion contracts in terms of their purpose as it is up to the investor to determine the investments that qualify for stability, an exercise which the Respondent contends in the case of stability agreements

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451 [**Eguiguren 1**], ¶ 39.

452 Respondent's Rejoinder ¶ 215, referring to: [**Morales 1**], ¶¶ 43-45; [**Morales 2**], ¶¶ 62, 64, 71, 84 (emphasis added).

453 [**Eguiguren 1**], ¶ 67.

454 [**Eguiguren 1**], ¶ 64.

entered into pursuant to the Mining Law is effected by means of the investment program which is prepared by the investor.[455]

400. Therefore, the Respondent contends, *contratos-ley* must be construed on the basis that they are of a mixed nature, combining elements of a public administrative law and private civil law. Further, they must be strictly and narrowly construed as *contratos-ley* are an exception to the general rule such that any amended or repealed law has an extended application only for *contratos-ley*.[456]

401. Having carefully considered the expert evidence of both Parties, the Tribunal finds that the exercise it must follow to ascertain the proper meaning of the Stability Agreement is first to consider the literal text of the provision in question, followed by a systematic analysis of the contract as a whole, concluding with a contextual interpretation. In undertaking this exercise, a majority of the Tribunal accepts that stability agreements, being *contratos-ley*, cannot be understood as simply civil law contracts, but instead any analysis of such contracts must be carried out with an understanding that they combine elements of public administrative law as well as private civil law. As such, stability agreements must be construed with reference both to the relevant provisions of the Mining Law and Mining Regulations and with an understanding of the purpose for which they have been entered into. The Tribunal further accepts that the scope of the stability provided by the Stability Agreement cannot extend beyond that which is permitted under the Mining Law and Mining Regulations. The Tribunal notes the difference in opinion amongst the experts as to the relevance of the principle of *contra proferentem* in construing the Stability Agreement. The Tribunal finds of assistance the Supreme Court's explanation, in paragraph 170 of its Decision, of the approach it took to the construction of the Stability Agreement, namely to ascertain "an objective interpretation of those rules, in accordance with what is established in the Stability Agreement and based upon the principles good faith [sic], and interpreting those clauses based upon one another...."[457] This is the same exercise as the textual approach described above. The Supreme Court's explanation as to

455 [**Eguiguren 1**], ¶¶ 63-64.

456 [**Eguiguren 1**], ¶ 41.

457 Supreme Court, Judgment No. 5212-2016 (2008 Royalty Assessments) (18 August 2017), ¶ 170 (**CE-153**).

the rules of construction that it followed makes no reference to the doctrine of *contra proferentem* and in its analysis it made no reference to such principle. There has been no suggestion that the Supreme Court acted in error in not applying this principle nor that there was a breach of due process by the Supreme Court. A majority of the Tribunal is unpersuaded that the principle of *contra proferentem* is relevant to the construction of the Stability Agreement.

402. The Tribunal also notes that in paragraph 91 of the Supreme Court's Decision, the Supreme Court states that "a restrictive interpretation over the content of a contract-law should be avoided, since paragraph 2 of Article 62 of the Constitution states that, "through contract-laws, the government may establish assurances and grant other securities," without establishing what type of assurances and securities it may offer; furthermore, what it does deal with is optimizing that the objective for the contract-law itself be fulfilled without perverting its nature." [emphasis in the original].[458] Accordingly, it is clear that in undertaking its construction exercise, a restrictive interpretation should be avoided as should an interpretation which extends stability beyond that which is provided for under the Mining Law and Mining Regulations.

The nature of the Stability Agreement

403. The Parties are in agreement as to the following three characteristics of the Stability Agreement.

i) The applicable law

404. First, the Stability Agreement is governed by Peruvian law. Accordingly, the Tribunal must apply Peruvian law principles of contract construction, and not principles of international law, in determining the proper meaning of the Stability Agreement and specifically its scope.

[458] Supreme Court, Judgment No. 5212-2016 (2008 Royalty Assessments) (18 August 2017), ¶ 91 (**CE-153**).

ii) Contrato-Ley

405. Second, the Stability Agreement is a *contrato-ley*. This gives the Stability Agreement constitutional protection such that it cannot be modified or voided unilaterally by the State. This protection is set out in the second paragraph of Article 62 of the Constitution which provides as follows: "By means of *contratos ley*, the State may establish guarantees and grant assurances. These may not be modified by legislation, notwithstanding the protection referred to in the preceding paragraph."[459]

406. The Constitutional Court has held, with regard to *contratos-ley* that:

> "*…. it may be noted that the contrato ley is an agreement that the contracting parties may sign with the State in the cases and with respect to the matters authorized under law. Through it, the State may create guarantees and provide securities, giving both an inviolable nature. In other words, through such contrato ley agreements, the State, in exercising its ius imperium, creates guarantees and provides securities and, by signing the contrato ley agreement, is fully subject to the legal regime stipulated in the agreement and the legal provisions under whose protection the latter was signed.*"[460]

407. The Stability Agreement is therefore a civil law contract in which the State has shed its *ius imperium* and placed itself at the same level as the investor.

iii) Adhesion Contract

408. Third, pursuant to Article 86 of the Mining Law, stability agreements are adhesion contracts. This means they are offered to the investor in a standard form which has been prepared by the State. As such, they cannot be freely negotiated but are instead offered by the State to an investor effectively on a 'take it or leave it' basis. There is accordingly little

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459 Political Constitution of Perú of 1993 (with Amendments) (15 June 1905), Article 62 (**RE-170**).

460 [**Eguiguren 1**], ¶ 28 referring to: Constitutional Tribunal, Decision, Case No. 005-2003-AI/TC (3 October 2003), Legal Bases 33 (**CA-102**).

room for negotiation between the parties to a stability agreement and neither party can unilaterally modify or terminate it.

409. However, whilst the Parties agree that pursuant to Article 86 the Stability Agreement is an adhesion contract, they are not in complete agreement as to the legal effects of this classification.

The relevance of Article 86 of the Mining Law to the analysis of the legal effects of adhesion contract

410. Article 86 of the Mining Law states in relevant part as follows: "[stability agreements] *shall incorporate all the guarantees set forth in this title*." It is common ground that the effect of this is that stability agreements entered into pursuant to the Mining Law are adhesion contracts and the model stability agreements are to be prepared by the Ministry of Energy and Mines and that such stability agreements "shall incorporate all the guarantees established in this Title."

411. In its oral submissions at the Hearing, the Respondent contended that the proper construction of Article 86 was to set the outer limits of the guarantees, such that a stability agreement could provide less stability than that specified in the Mining Law. The Claimant contended that a stability agreement provided precisely the same guarantees as set out in the Mining Law and Mining Regulations, no more and no less.

412. The Tribunal, by unanimity, does not accept the Respondent's argument concerning the outer limits of the guarantees; it is persuaded by the testimony of Professor Bullard that the effect of this article is that a stability agreement cannot stabilise less than that guaranteed by the Mining Law. Article 86 states that "all" the guarantees are incorporated into a stability agreement. The word "all" is not difficult to construe; it means "everything." If the Respondent's argument were correct, the provision would have stated that the stability agreement "shall incorporate some or all, but not more than all, of the guarantees set forth in this title," or words to a similar effect. It is clear to the Tribunal that by the inclusion of the word "all" in Article 86, all the guarantees detailed in the Mining Law must (shall) be included in a stability agreement, so that the guarantees in a stability agreement cannot be

more restricted or limited (or indeed more generous) than those provided for in the regulatory framework.

413. Accordingly, the Tribunal unanimously finds that the Mining Law and the Mining Regulations set out (i) who can apply for the benefits; (ii) the type of investment that can qualify for the benefits; (iii) where within the concession the investment should be made; and (iv) the legal regime that will be stabilized. The Tribunal further finds, by unanimity, that the Stability Agreement defines how the benefits provided in the Mining Law and the Regulations apply in a particular case. Therefore, although this dispute arises out of the Stability Agreement, because the scope of the stability provided by the Stability Agreement cannot be ascertained solely by reference to its terms, the Tribunal commences its exercise with an analysis of the Mining Law and the Mining Regulations before then turning to consider the provisions of the Stability Agreement.

414. Before doing so, the Tribunal notes that in putting forward their respective cases, each Party focused on certain provisions to the exclusion of others. The Tribunal finds it necessary to undertake a rigorous and systematic review of all the relevant provisions of each of these documents. This is necessary given the lack of clarity in the statutory framework and given certain inconsistencies between the articles of the Mining Law and the Mining Regulations which make clear that it is not sufficient merely to look at individual words or provisions in isolation but that the full context of the statutory framework must be considered in ascertaining the scope of the stability guaranteed.

c. The Mining Law

The Textual Approach

415. It is common ground that the legal framework under which the Stability Agreement was entered into comprises the Mining Law and the Mining Regulations.

416. The Tribunal does not find that the Mining Law and the Mining Regulations have been drafted with particular clarity. What is clear upon analysing these documents is that the Investment Program (for an Article 78 stability agreement) and the Technical and Economic Feasibility Study (for an Article 82 stability agreement) play a significant role

in an investor's qualification for a stability agreement. The question for the Tribunal is whether this role is limited to confirming that the necessary criteria have been met so that the entire concession is stabilized, or whether the purpose of the investment program or the technical and economic feasibility study is limited to identifying the scope of the stability granted. Whilst the question may appear simple, the analysis is complex given the lack of clarity in the statutory framework.

417. Turning first to the Mining Law, ten years stability is enjoyed by investments which meet the criteria set out in Articles 78-81, and fifteen-years stability is enjoyed by investments that meet the criteria set out in Articles 82-85. The investment at the heart of this dispute was made pursuant to Articles 82-85 as can be seen from the text of the First Clause of the Stability Agreement.

418. As a preliminary point, and before turning to consider these Articles, whilst the Respondent refers to the 'investment project' being stabilized, that term cannot be found in the version of the Mining Law in existence at the relevant time. It is clear however from the text of the Mining Law that to qualify for stability and the other benefits provided in the law, an investment must be made which complies with specified criteria.

419. Article 82 must be read together with Articles 83, 84, and 85 which provide as follows:

> "*Article 82.- In order to promote investment and facilitate the financing of mining projects with an initial capacity of not less than 5,000 MT/day or expansions intended to reach a capacity of not less than 5,000 MT/day referring to one or more Economic-Administrative Units, mining activity titleholders shall enjoy tax stability that shall be guaranteed through an agreement entered into with the State for a term of fifteen years, starting from the fiscal year in which the execution of the investment or expansion, as the case may be, is accredited.*
>
> *For the purposes of the agreement referred to in the preceding paragraph, the term Economic-Administrative Unit means the set of mining concessions located within the limits set forth in Article 44 of this Law, the processing*

plants, and the other assets that constitute a single production unit due to sharing supply, administration, and services, which in each case the Directorate General of Mining will qualify.[461]

Article 83.- Mining activity titleholders who submit investment programs of not less than the equivalent in local currency of US$20,000,000.00 for the start of any mining industry activities shall have the right to enter into the agreements referred to in the preceding article.

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

As an exception, persons who make investments of not less than the equivalent in local currency of US$50,000,000.00 in State-owned companies that are subject to the privatization process pursuant to Legislative Decree No. 674 shall have the right to access these agreements.

The effect of the contractual benefit shall apply exclusively to the activities of the mining company in whose favor the investment is made.

The mining activity titleholder that enters into these agreements may, at its election, advance the stabilized contractual regime to the investment stage with a maximum of 8 consecutive fiscal years, term which shall be deducted from the one guaranteed by the agreement.[462]

Article 84.- The agreements referred to in the preceding article shall guarantee the mining activity titleholder the benefits set forth in Article 80 of this Law, as well as the right increase the annual depreciation rate of machinery, industrial equipment and other fixed assets, up to the maximum

461 Mining Law, Article 82 (**HA-1**).

462 Mining Law, Article 83 (**HA-1**).

limit of twenty percent per year as a global rate, according to the characteristics of each project.

In the case of agreements referred to in Article 82, the mining activity titleholder may, as part of the agreement, keep accounting in U.S. dollars or in the currency in which the investment was made, for which is subject to the following requirements:

a) Maintain accounting in the designated foreign currency for five (05) years as a minimum each time. After that period, he may choose to continue with the same system or change to local currency. Outstanding balances at the time of the conversion will be recorded in the original currency.

b) During the time where the accounts are kept in foreign currency, the Company shall be excluded from the comprehensive adjustment rules for inflation.

c) The agreement shall specify that the exchange rate for the conversion, in the case of taxes to be paid in local currency, should be the most favorable to the Treasury.[463]

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

463 Mining Law, Article 84 (**HA-1**).

To demonstrate the investment amount made, a sworn statement must be submitted, endorsed by an external auditor."[464]

420. These Articles provide for a stability period of fifteen years for an investment or expansion that meets the specified production and financial criteria detailed in Articles 82 and 83 and subject to a "technical-economic feasibility study" being approved by the DGM pursuant to Article 85.

421. Article 82 states that the purpose of offering stability is "to promote investment and facilitate the financing of mining projects" of a specific minimum capacity. There is no definition of "mining projects," however a majority of the Tribunal construes this term as referring to the work detailed in the technical-economic feasibility study. This is on the basis that the words "mining projects" are immediately followed by the capacity the investment or expansion must achieve. Accordingly, a majority of the Tribunal understands that the intention of Article 82 is to attract projects (investments) in the mining sector which achieve that specific production capacity. The word "projects" is written in the plural because the reference is to the projects of all potential investors, and not to the number of projects to be undertaken by an individual investor.

422. There is disagreement between the Parties as to the intention of the drafters of the Mining Law in referring to EAUs and not to a concession. Whilst it would have made more sense had Article 82 referred to the minimum production capacity as achieved in "either a concession or in one or more EAUs," as opposed to only referring to an EAU, the Tribunal does not find the omission of a reference to a concession to be significant. The purpose of referring to an EAU is clear, namely, to ensure that an investor who is investing in facilities or the expansion of facilities in more than one concession can aggregate the production in those concessions provided first that such aggregated production meets the minimum capacity and second that the EAUs in question together comprise a single production unit. It is for this reason that Article 82 includes an additional definition of an EAU. However, given that it is not in dispute that the Leaching Project met the minimum requirement provided for in Articles 82 and 83 for a fifteen-year stability agreement, a majority of the

[464] Mining Law, Article 85 (**HA-1**).

Tribunal finds that it does not need to consider further whether, or not, the Cerro Verde Concession comprised an EAU.

423. Of more relevance is that Article 82 provides that the tax stability is to be enjoyed by "mining activity title holders." On an initial review, this wording could suggest that as stability is given to the title holder, stability is to be applied to any investment carried out anywhere in such title holder's concession at any time within the stability period. However, the Tribunal unanimously finds that the intention of this provision is merely to identify the beneficiary of the stability agreement and not to detail the scope of the stability guaranteed, in other words it makes clear that the stability is provided solely to the mining activity title holder. Accordingly, the Tribunal unanimously finds that the purpose of Article 82 is to identify first the nature of the investment to be made to obtain a 15-year stability period and second the beneficiary of the stability guarantee, but that it does not identify the scope of such stability.

424. Article 82 provides that the stability period starts "from the fiscal year in which execution of the investment or expansion ….is accredited." Whilst this again illustrates the importance of identifying the investment to be made (it is the investment which triggers the commencement of the stability period), there is no clarity as to whether it is only the investment itself that is stabilized, or whether the only purpose of the investment is as a qualifying investment such that once an investor has met the preconditions of stability, the entire concession is stabilized. This does, however, emphasise the importance of the investment to the proper functioning of the stability program.

425. It is therefore unclear merely from the text of Article 82 what is the scope of the stability to be enjoyed by the investor.

426. Article 83 sets out a further requirement, namely that the investor must submit an "investment program" of not less than the equivalent in local currency of USD 20,000,000 to start "any mining industry activities..." to be entitled to the fifteen-year stability period.

427. Article 83 sets out what role this investment program plays in the stability program. It is clearly a precondition to the right to enjoy stabilisation. However, it is again unclear

whether the approval of an investment program also functions to circumscribe the scope of the stability just to the approved investment program required by Article 83 (as contended for by Peru) or whether it is merely a precondition to obtaining stability for the concession in its entirety (as contended for by the Claimant).

428. According to the Claimant, the penultimate paragraph of Article 83 is a key provision in understanding the scope of the stability granted under the Mining Law. The Claimant contends that this sentence makes clear that stability applies to all activities of the mining company which are carried out exclusively under the concession system once the investment has been made.[465]

429. The Claimant explains the word "exclusively" was inserted to make clear that stability applied only (exclusively) to mining activities thus ensuring that stability would not be given to non-mining activities, citing the testimony of Ms Vega and Ms Chappuis. Ms Vega testified that in preparing the Single Unified Text (which became the Mining Law) it was to be "based on L.D. 708's overarching principle of promoting investment, with particular emphasis on creating a coherent framework for mining stability guarantees."[466] She stated that "[t]he purpose of Article 83 was to ensure that stability guarantees would extend only to the mining unit benefitting from the company's minimum investment of at least US$20 million in new activities or of at least US$50 million in existing activities. Conversely, the limitation in Article 83 would not arise where a mining company performed all of its activities in a single mining unit, in which case the stability guarantees would cover it entirely."[467] Ms Chappuis testified that she drafted this provision together with Mr Polo and gave the same reason for the inclusion of the word "exclusively."[468]

430. The Claimant then says that the purpose of the words "in whose favour the investment is made" is to identify the mining company which is to benefit from stability, namely SMCV. The Claimant contends that the words "effect of the contractual benefit" is a reference to stability. Finally, given that the word "activities" is in the plural, the Claimant contends

[465] Claimant's Reply PH Brief, ¶¶ 12-14.

[466] [**Vega 1**], ¶ 23.

[467] [**Vega 1**], ¶ 39.

[468] Tr. Day 4, 950:10-952:17; [**Chappuis II**], ¶ 9; Claimant's Reply, ¶ 29; Claimant's PH Brief, ¶ 14.

that the proper construction of this sentence is that all activities undertaken by the investor in the concession will be stabilized.[469] The Claimant supports this construction by reference to the testimony of Ms Chappuis, the actions of the Respondent and the amendment subsequent to Article 83 of the Mining Law.

431. The Respondent's construction (as supported by Mr Polo's evidence) is to the contrary. First the Respondent says that the inclusion of the word "exclusively" meant that stability could only apply to the mining activities undertaken by the mining titleholder with regard to the qualifying investment.[470] Mr Polo testified that he was assigned by Minister Sánchez Albavera the task of proposing the new stability provisions and was personally put in charge of drafting some of the stability provisions in the Mining Law, including Article 83. His testimony is that stability was only given to the investment[471] and that it was he who specifically proposed the inclusion of the sentence in question in Article 83 "in order to make it absolutely clear that the stability regime benefited solely and exclusively the investment for which the contract had been signed."[472]

432. The Respondent also refers to the judgement of the Supreme Court which construed this provision to the effect that stability only applies to the activities of the mining company which directly (exclusively) relate to the investment the subject of the investment program.[473] The Respondent further contends that it has always acted consistently with this construction.

433. Turning first to the literal construction of the last paragraph of Article 83, a majority of the Tribunal finds that the wording of this article is ambiguous. A careful parsing of the sentence indicates that the word "exclusively" applies to the word "activities" so that the beneficiary of the stability offered is the mining company that makes the investment and that the stability applies (exclusively) to all the activities of that mining company, the activities being the mining activities as defined in the Mining Law. However, against this,

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469 Claimant's Memorial, ¶ 55(b); Claimant's Reply, ¶ 29(a).

470 Respondent's PH Brief, ¶ 55.

471 [**Polo 1**], ¶¶ 11, 12.

472 [**Polo 1**], ¶ 18.

473 Respondent's PH Brief, ¶ 82.

the words "the mining company in whose favour the investment is made" are perplexing and do not support the Claimant's construction. The investment is not made in favour of the mining company but by the mining company. In trying to make sense of these words, the alternative construction contended for by the Respondent can also be understood, in that the stability applies only (exclusively) to those activities that are funded by (which benefit from) the investment.

434. The Tribunal does not find itself assisted by the contradictory testimony of, on the one hand Ms Chappuis and Ms Vega and on the other hand Mr Polo. Without in any way suggesting that either witness was giving other than their honest recollections, it appears that there was not a shared understanding of the scope of the stability to be provided between those drafting the law. Whilst Ms Vega and Ms Chappuis may have had more day-to-day involvement in preparing the draft of the Mining Law, Mr Polo also had an important role in finalising it.[474] The Tribunal does not find it is assisted by the contradictory testimony of these individuals as to their intentions and understanding in drafting this provision.

435. The Tribunal notes that this provision was amended after the investment was made. However, the Tribunal notes Professor Eguiguren's acceptance that subsequent amendments to the Mining Law are not relevant to the interpretation of the Stability Agreement. In any event, either Party's submission could be correct. On the one hand, it could be the case that, as contended for by the Claimant, the amendment was made to change the Mining Law from stabilising the entire concession to merely stabilising the qualifying investment. On the other hand, it could equally be the case that, as contended for by the Respondent, the amendment was made solely for the purposes of clarification, namely, to clarify that stability only applied to the qualifying investment.

436. Given this ambiguity, the Tribunal considers that it is not persuaded by either construction contended for by the Parties. The Tribunal next turns to consider Articles 84 and 85 to see if they clarify the proper construction of Articles 82 and 83.

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474 Fernando Sánchez Albavera, THE CARDS ON THE TABLE (1992) **CE-311 (SPA)**.

437. The Tribunal does not find Article 84 to be of assistance in ascertaining the scope of the stability guaranteed. The Tribunal notes the reference to the stability agreements guaranteeing the "mining activity title holder" the stability benefits detailed in Article 80. However, as with the other articles, the Tribunal does not find that this reference to the mining activity title holder means that the mining activity title holder is granted stability over the entire concession. The purpose of referring to the "mining activity title holder" is to identify the beneficiary of the stability agreement and nothing more. Whilst it is also unclear what the words "according to the characteristics of each project" are intended to mean, at least where the pre-condition for stabilisation relates to a minimum financial investment and not a minimum operational capacity, the Tribunal finds that the proper construction is that the depreciation rate to be applied to machinery, industrial equipment and other fixed assets depends upon the project in which such items are being used and which rate is subject to a maximum limit of 20% per year. Whilst this tends to support a construction that it is only the project detailed in the technical-economic feasibility study, which is stabilized, this is not made expressly clear.

438. The Tribunal further notes that Article 84 also provides that an Article 82 stability agreement "may, as part of the [stability] agreement keep accounting in U.S. dollars or in the currency in which the investment was made" subject to certain specified requirements. This again highlights the centrality of the investment described in the technical-economic feasibility study to the stability program and again tends to support a construction that stability is only given to the investment and not to the concession.

439. Article 85 contains the precondition for an Article 82 stability agreement to be effective, namely the requirement to submit a "technical-economic feasibility study" which had to comply with certain requirements as to form and had to be approved by the DGM within 90 calendar days. For ease of reference, the Tribunal refers to this as the "feasibility study." The actual or deemed date of approval of this feasibility study is held to be the commencement date of stability. Whilst it is clear that the requirement to submit this feasibility study is a precondition to obtaining stability, the article does not expressly refer to the scope of the stability. It is of note, however, that the feasibility study has to be approved by MINEM which again emphasises the importance of the feasibility study with

respect to stabilisation. Article 19 of the Mining Regulations (see paragraph 481 below) sets out the information which the feasibility study must contain, and it is clear the work to be carried out as a result of the investment to be made must be set out in considerable detail.

440. The powers of the DGM are contained in Article 101, in Chapter Three of the Eleventh Title. Those that are relevant to the present issue are as follows:

> "*b) To approve the investment program with execution deadlines, that has the character of a sworn Affidavit, with respect to the tax stability agreements, of the Articles 78 and 79 of this Law.*
>
> *c) To approve the technical-economic feasibility study, which has a character of sworn Affidavit, referred to in Articles 82 and 83 of this Law.*
>
> *d) To propose the adhesion contract models that guarantee the benefits established in the Section Nine of this Law.*"[475]

441. These provisions again highlight that the investment detailed in the feasibility study plays a central role in applying for stability.

The Systematic Approach

442. The Tribunal next turns to consider the remainder of the Articles of the Mining Law that are relevant to this question (the systematic approach). "Mining activity" is defined in the sixth preamble as including "… exploration, exploitation, … beneficiation, commercialisation as well as mining transport" and the seventh preamble provides that "….[t]he practice of mining activities, except for informal exploration, prospecting and commercialisation, is carried out exclusively under the concession system, which is accessed under procedures that are matters of public policy. …." The First Title is headed "Mining activities and ways to practise them." Article 7 under Chapter 3 repeats what is said in the seventh preamble, namely that: "[t]he exploration, exploitation, beneficiation, general work and mining transport activities are carried out by national or foreign natural

[475] Mining Law, Article 101(b)-(d) (**HA-1**).

and legal persons through the concession system." Whilst the preamble and Article 7 refer to the concession system, the Tribunal does not find that the fact that mining activity is carried out "through the concession system," means that all mining activity undertaken is stabilized; it simply provides that to the extent mining activity is undertaken, it must be undertaken pursuant to the regulatory framework applying to concessions.

443. The Second Title details the four types of concessions given. For the purposes of this Award, the relevant concessions are mining and beneficiation concessions. Chapter I of the Second Title relates to Mining Concessions and Chapter II to Beneficiation Concessions.

444. The Sixth Title is titled "Obligations of Holders of Concessions." Article 44 of Chapter II of the Sixth Title contains the definition of an Economic Administrative Unit, namely that "…a title holder of more than one mining concession of the same class and nature may group them into an Economic Administrative Unit" provided they are within a specified geographic radius depending upon the element being mined. The Tribunal notes that there is an additional definition of an EAU in Article 82 but, as explained in paragraph 422 above, this is of no relevance to the exercise the Tribunal must undertake in construing the scope of the Stability Agreement. Chapter Five of the Sixth Title details the common obligations required of "mining activity titleholders."

445. The Ninth Title contains the details of the stability benefits guaranteed. It is titled "Guarantees and Measures for Promoting Investment" and Chapter I, titled "General Provisions" contains one article, Article 71, which provides that "[t]he provisions contained in this Title apply to all persons engaged in the mining activity, regardless of corporate form." The Tribunal does not find that this means all activity undertaken by a person engaged in mining activity is stabilized, it just identifies to whom the stability provisions apply.

446. Chapter II of Title Nine is titled "Basic Benefits" and the first of its articles, Article 72, provides that "[i]n order to promote private investment in mining activity," the twelve benefits "are granted to the titleholders of such activity." Again, the Tribunal does not construe this provision to mean that the stability benefits are granted to all the activities

undertaken by a mining activity title holder but to identify to whom the stability benefits are provided. The Tribunal further finds there is no significance in the words "private investment in mining activity." This provision explains the purpose of the Mining Law, namely, to attract private investment in the mining sector; it does not state that all mining activity is stabilized. Finally, it is clear that the reference to "such activity" is a reference to mining activity as defined in preamble six.

447. Article 72 concludes by providing that "[t]he State shall contractually guarantee the stability of these benefits, under the legal provisions in force at the time when the investment programs referred to in Articles 79 and 83 of this Law are approved." The Tribunal does not find that Article 72 contains any guidance as to the scope of the concession stabilisation. The Tribunal construes the reference to benefits being "granted to the title holders of such activity" as again identifying the beneficiary of the stabilisation and not providing guidance as to the scope of the stabilisation.

448. Chapter Four is titled "Tax Stability Regime" and provides different regimes depending upon the extent of the investment made.

449. Articles 78 to 81 relate to the ten-year stability program. Whilst the Claimant obtained fifteen years stability, the Tribunal finds it of assistance to review the process for obtaining a ten-year stability program.

450. Article 78 provides for tax stability of ten years for mining activity titleholders "who start or are carrying out operations greater than 350MT/day and up to 5,000MT/day, or those who make the investment provided for in Article 79 of this text….." This ten-year stability period is "counted from the fiscal year in which the execution of the investment is accredited."

451. Article 79 provides that the investment required must be of a value which is "the equivalent in local currency of US$2,000,000" and further provides that "[t]he effect of the contractual benefit shall apply exclusively to the activities of the mining company in whose favour the investment is made." The same sentence is included in Article 83 (see paragraph 433 above where the proper meaning of this wording is considered). Article 79 further makes clear

that an "investment program" must be submitted together with the application for stability (see also Article 81 below). The term "investment program" is also used in Article 83.

452. Article 80 then provides the detail of the benefits guaranteed to any mining activity titleholder who has come within the provisions of Articles 78 and 79. Whereas Article 78 details when the stability period commences, Article 80 freezes the tax regime as at the date of approval of the investment program. It is again of note that these provisions evidence the importance of the investment program with regard to the Article 78 stability process.

453. Article 81 details the process for submitting an investment program, being a sworn statement, for those mining activity title holders who are entitled to stability for ten years under Article 78. This must be approved by the DGM but there is deemed approval if approval is not given within 45 days. It is clear that again the investment program is a precondition for obtaining stability.

454. Having carefully considered the entirety of the Mining Law it seems clear to a majority of the Tribunal that, the feasibility study must have a purpose greater than that of merely a gateway to stability being guaranteed for the concession. This is because of (i) the lack of clarity in Chapter Four of the Mining Law as to the scope of the stability granted and (ii) the significant emphasis in the Mining Law (and Mining Regulations) regarding the content of the feasibility study and the role it plays in the operation of the stability program (for example triggering the fifteen-year stability period and giving rise to a right of termination). It is unclear why, if the purpose of the feasibility study was solely to act as a gateway, so much information was required to be included in it and yet there is no requirement to provide any information whatsoever in relation to any subsequent investment notwithstanding that it would automatically be granted stability under the Claimant's construction. The majority of the Tribunal finds that the better construction of the Mining Law, having undertaken a literal and systematic interpretation, is that the stability benefit applies exclusively to the investment described in the feasibility study. The majority of the Tribunal notes that it reaches the same construction as that determined by the Freeport tribunal and by the Supreme Court.

455. The Tribunal next turns to consider the Mining Regulations to assess whether they support the majority of the Tribunal's view as to the better construction of the Mining Law.

d. The Mining Regulations

The Textual Approach

456. The Mining Regulations were issued after the Mining Law was enacted to implement the Mining Law.[476]

457. The key provisions are Articles 2 and 22.

458. The first part of Article 2 provides in relevant part as follows: "[t]he provisions contained in Title Nine of the Single Unified Text shall apply as of right to all mining activity titleholders, defined as the natural or legal persons that perform mining activities in a concession or in concessions grouped in an Economic Administrative Unit, as titleholders or assignees, provided that they: …(d) Enter into a stability agreement under Articles 78 and 82 of the Single Unified Text, as from the date of approval of the corresponding Investment Program." [477]

459. Whilst it is certainly correct that this could be a reference to all mining activities that are undertaken within either a concession or an EAU, the Tribunal finds the better construction is that the reference to the concession or EAU is solely for the purpose of identifying the beneficiary of the stability, namely the mining activity title holder who performs mining activities within a concession or EAU. The Tribunal does not find that this provision, on its own, means that all those mining activities will be stabilized but just that to be deemed a mining activity title holder it is necessary that such title holder performs some mining activities in a concession or an EAU and that, to benefit from stabilisation, such mining activity title holder must comply with the requirements set out in one of Articles 2(a), (b), (c) or (d).

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[476] Regulations to Title Nine of the General Mining Law, Supreme Decree No. 024-93-EM (7 June 1993) **(CA-2 (resubmitted))**.

[477] Regulations to Title Nine of the General Mining Law, Supreme Decree No. 024-93-EM (7 June 1993) **(CA-2 (resubmitted))**.

460. Article 2 concludes with the following sentence "[w]hen the natural or legal person is the titleholder of several concessions or Economic-Administrative Units, the qualification will only take effect for those concessions or units that are supported by the declarations or by the agreement referred to in this Article." Whilst the Claimant contends that this provision supports its construction, a majority of the Tribunal does not find the Claimant's construction so compelling. A majority of the Tribunal finds that the purpose of this sentence is to clarify the position where a mining activity title holder owns more than one concession or EAU; if a title holder makes an Article 78 or Article 82 investment in one concession or EAU, this sentence makes clear that it is not entitled to claim stability in any other concession or EAU. Whilst it could be argued that this construction supports the Claimant's case that the concession in which the investment is made is stabilized in its entirety, a majority of the Tribunal does not find that this construction is self-evident, finding that the purpose of this sentence is to make it clear that stabilisation does not apply across concessions rather than to confirm that stabilisation does apply within the totality of one single concession or EAU. A majority of the Tribunal therefore does not find Article 2 provides a compelling argument in support of either Party's construction.

461. Article 22 is the other fundamental provision according to the Claimant and it provides as follows:

> "*Article 22.- The contractual guarantees shall benefit the mining activity titleholder exclusively for the investments that it makes in the concessions or Economic-Administrative Units.*
>
> *To determine the results of its operations, a mining activity titleholder that has other concessions or Economic-Administrative Units shall keep independent accounts and reflect them in separate earnings statements.*

Expenses that are not directly identifiable in each concession or Economic-Administrative Unit shall be distributed among them in proportion to the net sales of the mining substances extracted from them."[478]

462. The Claimant contends that this article makes clear any investment made in its concessions will benefit from stability, whereas the Respondent asserts that it makes clear, when read together with Article 83 of the Mining Law, that it refers only to a specific investment pursuant to the investment program approved by the Government. It is unclear whether the Spanish text is intended to cover only "investments that it makes in accordance with the investment program" or any investments "it shall make" or which "could be made" or "shall be made" at some future time within the concession but which are not detailed in or contemplated by the investment program. This is critical as it is unclear whether the stability guarantees are to be offered to all future investments or only those to be made in accordance with the investment plan that is to be filed.

463. Whilst similar to the wording used in Article 83 of the Mining Law (see paragraph 416 et seq. above), it is not precisely the same. As a majority of the Tribunal found when construing Article 83 of the Mining Law, the majority of the Tribunal does not find the wording of Article 22 to be clear; on a textual analysis it can be construed either to support the Claimant's construction or the Respondent's construction. The English translation of the words "que realice" is "that it makes." The Spanish original language is in the subjunctive, meaning "investments it shall make" or "investments which could be made" or "investments which shall be made." Whilst the Claimant contends that this makes clear all future investments made in the concession will be stabilized, a majority of the Tribunal does not accept this construction. A majority of the Tribunal finds that whilst the literal construction is unclear, the better construction is that, again, given the context, stability is only given to the investments described in the investment program or feasibility study. This construction is supported by the text of Article 24 which provides that the feasibility study or investment program "will serve as the basis to determine the investments set out in the

[478] Regulations to Title Nine of the General Mining Law, Supreme Decree No. 024-93-EM (7 June 1993) **(CA-2 (resubmitted)).**

Agreement" ("*la misma que servirá de base para determinar las inversiones materia del contrato*.")

464. Further, whilst Article 83 of the Mining Law provides that the benefit shall apply "exclusively to the activities of the mining company in whose favour investment is made," Article 22 provides that the exclusivity is "for the investments that it makes in the concessions or Economic-Administrative Units." Having carefully parsed the first sentence of Article 22, a majority of the Tribunal finds that the word "exclusively" could qualify either "the mining activity titleholder" making it clear that whatever benefit is given it is available exclusively for the investor, or "exclusively" could be intended to qualify the words "the investments," making clear that stability is provided with regard to the investments made.

465. The reference to "investments" is also of significance, making clear that stability may be given to more than one investment. One possible construction is that "investments" is inserted in the plural because it is anticipating an investor making more than one investment. This could be because the feasibility study anticipates a series of investments will be made to achieve its objective and in which case all such investments described in the feasibility study would be stabilized or it could be, as the Claimant contends, that all investments made thereafter in the concession will be stabilized irrespective of whether they are included in the feasibility study. An alternative construction is that "investments" is in the plural because the article is referring to mining activity title holders generically, such that the article is making reference to the investment of each mining activity title holder. Clearly the feasibility study is prepared in relation to an investment, and, as explained in paragraph 482 below, the feasibility study cannot be amended if the proposed amendment would, *inter alia*, change the object of the feasibility study. It is likely that any subsequent investment if not provided or at least anticipated in the feasibility study would change the object of the feasibility study. For example, in the present case, it is clear that the feasibility study is prepared exclusively, or at best, almost exclusively, in relation to the Leaching Project. A majority of the Tribunal finds that any investment with regard to the Concentrator would unarguably change the object of the Feasibility Study which forms part of the Stability Agreement.

466. It is further of relevance that Article 22 refers to investments "in the concessions or Economic-Administrative Units." The fact the Article refers to concessions and EAUs in the plural supports the construction that Article 22 refers generically to mining activity title holders, as opposed to an individual investor.

467. A majority of the Tribunal therefore does not find that the fact "investments" is in the plural is determinative of the proper construction of the scope of the Stability Agreement.

468. A majority of the Tribunal does not find that this is drafted sufficiently clearly to support the Claimant's construction and, when this provision is considered systematically, a majority of the Tribunal prefers the construction contended for by the Respondent.

469. The second paragraph of Article 22 relates to the obligation of an investor to keep independent accounts. The Tribunal accepts, as a practical matter, that allocating assets and costs between stabilized and non-stabilized investments within the same integrated mining unit will not be easy, and further notes that no guidance was provided by the Respondent. Equally, a majority of the Tribunal accepts that whilst significantly less convenient or practical to achieve such separate allocation, it is not impossible. A majority of the Tribunal therefore does not find this provision guides the Tribunal decisively towards either Party's construction.

470. The Tribunal therefore turns to consider the remaining provisions of the Mining Regulations to see if they assist in understanding the scope of the stability guaranteed.

471. Chapter One is titled "Tax, Currency Exchange and Administrative Stability" and Article 1 provides as follows: "Tax, currency exchange, and administrative stability, referred to in Article 72, paragraph a) of the Single Unified Text, are the guarantees of legal security that are granted to mining activity titleholders for the performance of their activities."[479] The Tribunal notes that this Article expressly refers to Article 72 of the Mining Law which contains the basic benefits of stability. Whilst it is correct that this Article specifies that these basic stability benefits are granted for the performance of the title holder's

[479] Regulations to Title Nine of the General Mining Law, Supreme Decree No. 024-93-EM (7 June 1993) **(CA-2 (resubmitted))**.

"activities," the Tribunal does not find that this is sufficient to provide that all of the titleholders' activities are stabilized. The reference to "activities" is clearly a reference to mining activities, the Tribunal finds that this provision could be construed either to mean that stability is granted for the performance of all the title holder's activities or as a reference to all activities that come within the scope of stabilisation.

472. Article 3 states that the purpose of tax stability is "*to give permanence to the tax regime applicable to the mining activity*." Whilst the Tribunal notes that the reference is to mining activity in the singular, it does not find that this has significant relevance.

473. Articles 4, 5 and 10 relate to the basic benefits granted under Article 72 of the Mining Law to mining activity title holders. It is correct that Articles 4 and 5 guarantee to the mining activity title holders' various benefits, however as determined when construing the equivalent provisions in the Mining Law, a majority of the Tribunal finds that the purpose of these Articles is to identify the beneficiary of the stability guaranteed as opposed to identifying its scope.

474. Article 10 contains the right not to pay income tax on undistributed income which is invested in the execution of a new investment program, which is specified to include the installation or expansion of beneficiation plants. It was pursuant to this Article that the Claimant reinvested undistributed income into the Leaching Project, and the Tribunal considers below the actions of the Parties in its contextual interpretation of the Stability Agreement.

475. A majority of the Tribunal finds that there is nothing in the text of Article 10 to suggest that the right not to pay income tax on reinvested income also guarantees that a project into which the income is reinvested is itself stabilized. Whilst this income tax benefit is granted to "mining activity titleholders," the Tribunal finds again that this is to identify the beneficiary of the stability and does not identify the scope of the stability agreement.

476. Chapter IV is headed "Municipal Taxes" and expressly provides that "[t]he concessions shall not be subject to municipal taxes." Whilst not relevant to the scope of the stability given under Article 82 of the Mining Law, a majority of the Tribunal finds it is indicative

that where required, the drafters of the Mining Law expressly provided for a specific benefit to be given to the concession. It is of note that similar wording was not used in Article 83 of the Mining Law.

477. There is no express reference to the scope of the stability in Article 14 which specifies that "[t]he agreements referred to in Articles 78 and 82 of the Single Unified Text shall guarantee the following benefits to the mining activity titleholder."[480] However, in accordance with the provisions of the Mining Law, the date of approval of the investment program fixes the date on which stabilisation commences. The Article then details the stability benefits provided and again makes no reference to the scope of the stability, merely referring to, for example, the free disposal of foreign currency generated through its exports or the free commercialisation of mineral products. It is thus not made clear whether stability applies to foreign currency generated through all exports from the concession or only to those exports generated from the investment program project.

478. Article 16 specifically refers to stability agreements provided under Article 82 of the Mining Law but again contains no specificity as to whether it applies to the entire concession or only to the investment program.

479. Article 17 again specifically refers to stability agreements obtained under Article 82 of the Mining Law and again refers to the right of the title holder to increase the annual depreciation rate of "machinery, industrial equipment and other fixed assets, up to the maximum limit of twenty percent per year as a global rate, according to the characteristics of each project..."[481] This wording follows that of Article 84 of the Mining Law, and a majority of the Tribunal construes it in the same way (see paragraphs 437 and 438 above). Whilst there is no express reference to whether that applies to all machinery, industrial equipment and other fixed assets within the concession or only those the subject of the investment program, it is of note that the provision makes clear that the DGM "will approve

[480] Regulations to Title Nine of the General Mining Law, Supreme Decree No. 024-93-EM (7 June 1993) **(CA-2 (resubmitted)).**

[481] Regulations to Title Nine of the General Mining Law, Supreme Decree No. 024-93-EM (7 June 1993) **(CA-2 (resubmitted)).**

the maximum depreciation rate when approving the Feasibility Study for the project."[482] This again tends to support the Respondent's construction that the stability benefit is only available with regard to machinery, industrial equipment and other fixed assets which are used for the project detailed in the feasibility study.

480. Article 18 details the procedure to apply for a stability agreement pursuant either to Article 78 or 82 of the Mining Law. An applicant must attach details of the concession as well as the feasibility study for the purposes of Article 82 or the investment program with the completion dates when applying for an Article 78 stability agreement. The Claimant submits that because the mining concession must be identified, this further supports its submission that the stability is granted over the entire concession, otherwise, it asks, what would be the purpose of identifying the concession itself?[483] The Respondent submits that the purpose of identifying the concession is to indicate the area within which the investment project is to be sited.[484] A majority of the Tribunal finds the Respondent's submission to be more likely.

481. Article 19 details the information which must be contained in the feasibility study and notes that the works to be performed can comprise mining work, works relating to the concentration plant, and the expansion or improvement of existing facilities or works. It is clear from the list in Article 19 that the feasibility study is intended to be a detailed document and identifies the characteristics of the investment to be made. A majority of the Tribunal finds of significance that the word "project" is used in sub paragraphs (b) and (c) of Article 19. This again tends to support the Respondent's construction that it is a specific project that is stabilized, as opposed to the entire concession. As is a majority of the Tribunal's understanding with regard to other provisions, it seems implausible to a majority of the Tribunal that such a detailed document would be required if its only purpose was to act as the gateway to obtaining stability for the entire concession, without the necessity of submitting a further feasibility study with regard to any additional investments.

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482 Id.

483 Claimant's Memorial, ¶¶ 316-320.

484 [**Eguiguren 1**], ¶ 54.

482. Article 20 then provides that the feasibility study may be amended one or more times in the course of its execution, "[…] provided that its final objective is not affected."[485] Any amendments must be approved by the DGM. This again would tend to support a construction that stability only applies to the project detailed in the feasibility study. It is difficult to see the purpose of this provision if the entire concession were to be stabilized. Indeed, there is no provision in the Mining Law or in the Mining Regulations enabling the amendment of a feasibility study to incorporate a new project. The only reference in any of the relevant documentation to the ability to amend the feasibility study is in Clause 4.2 of the Stability Agreement (see paragraph 527 below) which permits changes to the investment plan (*i.e.* the project described in the feasibility study) with regard to works pending execution, provided first that the object of the investment plan is not affected and second that a request for approval of the changes is filed with the DGM and approved. Accordingly, a majority of the Tribunal finds that the better construction of this provision is that it is only the project detailed in the feasibility study (which is an integral part of the stability agreement) which is stabilized. Any future project to be undertaken within the concession cannot be covered by the feasibility study attached to the stability agreement and a new feasibility study would need to be submitted containing all the information required as specified in Article 19. This again tends to support the Respondent's construction.

483. The content of the investment program for an Article 78 stability agreement is detailed in Article 21.

484. Article 23 relates to an Article 78 Stability Agreement. However, it is of passing relevance that pursuant to this article, the DGM must "qualify the Investment Program […] and the Technical-Economic Feasibility Study" within a specified time. Again, it can be seen how integral the feasibility study is to the operation of the stability program. Article 24 then provides that the DGM must submit to the Office of the Vice-Minister of Mines "[…] the record and the Directorial Resolution approving the Feasibility Study or Investment

[485] Regulations to Title Nine of the General Mining Law, Supreme Decree No. 024-93-EM (7 June 1993) (**CA-2 (resubmitted)**). The Spanish original reads as follows: "[…] siempre y cuando no se afecte el objeto final del mismo."

Program, as the case may be, which will serve as the basis to determine the investments set out in the agreement, in order to proceed with signing the private deed prepared in accordance with the model approved pursuant to Article 86 of the Single Unified Text of the General Mining Law." A majority of the Tribunal finds this to be persuasive in again making clear the importance of the feasibility study in ascertaining what is to be stabilized pursuant to Article 82, namely the project detailed in the feasibility study. A majority of the Tribunal finds that this tends to support the Respondent's construction. Were the Claimant's construction to be correct, Article 24 would have been drafted to provide that the feasibility study serves not as the basis to determine the investment which forms the (sole) subject of the Stability Agreement but instead only as the basis to determine the initial investment leading to the stabilisation of the entire concession, including all subsequent investments.

485. Article 25 refers to "[…] cases of expansion of facilities or new investments that contractually enjoy the guarantee of legal stability..."[486] The Article requires an investor to make available documents to "demonstrate the application of the tax regime granted to the aforementioned expansions or new investments." [487]A majority of the Tribunal finds that the reference to an expansion of facilities or a new investment tends to support the Respondent's construction.

486. Article 27 provides the deadline within which the Stability Agreement must be signed and formalised. The time permitted commences from the date of approval of the investment program. The Tribunal notes here the lack of consistency within the Mining Regulations with regard to when the words "investment program," "feasibility study" and "technical-economic feasibility study" are used. It is clear from the earlier articles that an investment program must be submitted for an Article 78 stability agreement whereas a feasibility study (including details of the quantum of the qualifying investment to be made) must be submitted when seeking an Article 82 stability agreement. The Mining Regulations do not

[486] Regulations to Title Nine of the General Mining Law, Supreme Decree No. 024-93-EM (7 June 1993) (**CA-2 (resubmitted)**).

[487] Regulations to Title Nine of the General Mining Law, Supreme Decree No. 024-93-EM (7 June 1993) (**CA-2 (resubmitted)**).

always maintain this distinction and Article 27 is an example of that. For example, both Articles 26 and 27 clearly relate to stability agreements under either Article 78 or Article 82 of the Mining Law, however whereas Article 26 refers to both an "investment program" and a "feasibility study" in the alternative, Article 27 only refers to the investment program. For this Article to be accurate, given Article 27 clearly applies also to Article 82 stability agreements, Article 27 should also refer to the feasibility study as an alternative to the investment program. Article 27 also provides that a stability agreement will automatically be terminated if the mining activity title holder does not comply with the execution of the approved investment program.

487. In the subsequently amended version of Article 27, the article makes reference to both the investment program and the feasibility study. It appears to a majority of the Tribunal that the amendment was simply to make clear what was unclear previously, namely that Article 27 did apply to an Article 82 stability agreement. This understanding of the actual construction of Article 27 is supported (i) by Article 38 which provides that "[n]on-compliance with the execution of the Feasibility Study or Investment Program […]"[488] is a ground for termination of both an Article 78 and an Article 82 and 83-A Stability Agreement, and (ii) by Articles 30 and 31 which make reference to the requirements to prove completion of the investment program or the feasibility study, whichever is applicable. It would not be logical if, on the one hand, a mining activity title holder was required to prove it had completed the work detailed in the feasibility study but that if the work was not completed within the specified time frame an Article 82 Stability Agreement would not be terminated. If that were the position, there would be no necessity to prove completion of the work. Article 33 also supports this construction providing that "[t]he effects of the contractual guarantee will apply from the year in which the Sworn Statement evidencing the execution of the investment is approved...." [489]

[488] Regulations to Title Nine of the General Mining Law, Supreme Decree No. 024-93-EM (7 June 1993) (**CA-2 (resubmitted)**).

[489] Regulations to Title Nine of the General Mining Law, Supreme Decree No. 024-93-EM (7 June 1993) (**CA-2 (resubmitted)**).

488. A majority of the Tribunal notes that the fact that Article 27 does not make reference to the feasibility study is merely an indication that the regulations have not been drafted with complete precision. Indeed, this is a useful reminder that when construing the provisions of the Stability Agreement, the Mining Law and the Mining Regulations, it is important not only to focus on the specific words used but to consider the proper construction in the context of the entire document.

489. Article 28 provides that "[t]hird parties that invest resources into the capital stock of companies that are mining activity titleholders, aimed at financing the investments guaranteed by contract shall have the same guarantees as those granted to the mining activity titleholder, in the percentage or amount that corresponds to their investment...."[490] Whilst again not dispositive, a majority of the Tribunal notes the provision is focused on the investment made and not on the concession. Further, a majority of the Tribunal does not find the reference to "investments" is of assistance to the Claimant; it is in the plural because it is referring generically to the investments of multiple companies. A majority of the Tribunal finds that this again tends to support the Respondent's construction.

490. Article 30 again applies to both Article 78 and Article 82 Stability agreements, providing in relevant part as follows:

> "*The fulfillment of the Program and, where appropriate, of the Feasibility Study, will be proven ninety calendar days after the completion of the works and the operational start-up of the Project at 80% of its projected production with a Sworn Statement endorsed by an external auditor that must detail the works and acquisitions made, as well as the amount financed with its own capital or third-party loans. In addition, financial statements must be submitted at the completion date of the project with annexes or*

[490] Regulations to Title Nine of the General Mining Law, Supreme Decree No. 024-93-EM (7 June 1993) (**CA-2 (resubmitted)**).

notes demonstrating the investments and acquisitions made and their financing."[491]

This article also provides that the Sworn Statement "may refer only to investments and expenses not foreseen in the Feasibility Study or its amendments…."[492] Again, a majority of the Tribunal finds this focus on the feasibility study tends to support the Respondent's construction. It can also be noted that again there is an inconsistency in referring to the "program"[493] and not to the "investment program" and again is a reminder of the importance of looking at the text in its wider context and not seeking to construe individual words in isolation.

491. Articles 31 and 33 relate to the sworn statement evidencing the execution of the investment which again emphasise the importance of the qualifying investment and tends to support a construction that only the investment itself is stabilized.

492. Having undertaken a literal and systematic construction of the Mining Regulations, a majority of the Tribunal finds that the better construction is that it is only the qualifying investment that is stabilized.

493. Having ascertained the proper meaning of the Mining Law and Regulations, the Tribunal turns to consider the proper meaning of the Stability Agreement.

e. The Stability Agreement

494. It is common ground that the Stability Agreement was a *pro forma* agreement with blanks to be completed by SMCV. An uncompleted *pro forma* stability agreement was added to the record from which the Tribunal could clarify which parts in the Stability Agreement had been drafted and inserted by SMCV. Whilst the purpose of an adhesion contract is that

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[491] Regulations to Title Nine of the General Mining Law, Supreme Decree No. 024-93-EM (7 June 1993) (**CA-2 (resubmitted)**).

[492] Regulations to Title Nine of the General Mining Law, Supreme Decree No. 024-93-EM (7 June 1993) (**CA-2 (resubmitted)**).

[493] The text of the article commences with the words "The fulfilment of the Program […]"

its content cannot be negotiated, it is of note that the *pro forma* elements of each of the three stability agreements entered into by SMCV in 1994, 1998 and 2012 are not identical.

495. The stability guarantee is predominantly found in the Third and Ninth Clauses of the Stability Agreement.

496. The Third Clause is titled "Mining Rights" and provides as follows: "According to what is expressed in 1.1, the Leaching Project of Cerro Verde is circumscribed to the concessions, related in EXHIBIT I, with the corresponding areas. What is provided in the above paragraph does not prevent the owner from incorporating other mining rights to the Cerro Verde Leaching Project, after approval by the General Direction of Mining."[494]

497. The Ninth Clause is titled "Of the Contractual Guarantees" and the first paragraph provides as follows: "The State hereby guarantees to the owner in accordance with articles … of the [Mining Law] and articles … of the Regulations and for the term specified in 8.1 and without prejudice to what is indicated in 8.2 and 8.3 the following: …"[495]

498. Turning first to the Third Clause, a majority of the Tribunal does not find that, considered on its own, this clause clearly identifies the scope of the stability guaranteed. There is an unhelpful inconsistency within the body of the Third Clause. On the one hand, the text appears to limit the guarantee to the "Leaching Project of Cerro Verde," whereas the clause continues by referring to the rights being "circumscribed to the concessions, related in Exhibit I, with the corresponding areas," namely the mining concession for Cerro Verde 1, 2 and 3 and the Beneficiation concession.

499. The Leaching Project of Cerro Verde is defined in the First Clause as follows: "1.1 By deed of January 25, 1996 the owner, invoking what is provided in article 82 of the [Mining Law] filed with the Ministry of Energy and Mines the pertinent applications requesting that through a contract, the guarantees of the benefits contained in articles 72, 80 and 84 of the same legal body be granted to it, in relation with the investment in its concession: Cerro

494 1998 Stability Agreement, Third Clause (**CE-12**).

495 1998 Stability Agreement, Ninth Clause (**CE-12**).

Verde No. 1, No. 2 and No. 3, hereinafter 'The leaching project of Cerro Verde.'"[496] The owner is defined in the notary's deed as SMCV.[497]

500. Whilst the title of the First Clause is "Background Information," the Tribunal does not accept the Claimant's submission that the Tribunal should not attribute any significance to the contents of this clause. The Tribunal notes that, pursuant to the Nineteenth Clause, the headings or titles of the clauses of the contract have been inserted only for convenience purposes. Accordingly, the Tribunal understands that it should not be guided by the title of the First Clause and, in construing the Stability Agreement, the Tribunal attributes equal significance to the contents of the First Clause as it does to any of the other clauses of the Stability Agreement.

501. A majority of the Tribunal finds it significant that the definition of the Leaching Project of Cerro Verde provides that the Stability Agreement does not guarantee the benefits provided by the Mining Law to the concession itself but to the "investment in its concession" [Tribunal emphasis]. Whilst it is correct that the concession named 'Cerro Verde numbers 1, 2 and 3' is referred to in Exhibit 1 of the Stability Agreement, the Leaching Project is defined not as the totality of the concession but, instead, as being limited to the investment ('investment' being in the singular) in that concession. The Claimant accepts that SMCV inserted this definition into the Stability Agreement but makes two points. First, the Claimant contends that it mirrors the language in clause 1.1 of the model stability agreement which provides: "(investment[s] in its concessions consisting of the... Economic- administrative units(s) hereinafter '... Project.'"[498] However, this is not a precise quotation. The actual text of the model agreement provides as follows:

> "*in an official letter..., dated..., the owner, invoking the provisions of article 82 (83) of the [Mining Law], I submit to the Ministry of Energy and mines the corresponding request so that, by means of an agreement, the owner will be guaranteed the benefits contained in articles 72, 80 and 84 of said*

496 1998 Stability Agreement, First Clause (**CE-12**).

497 1998 Stability Agreement, First Clause (**CE-12**).

498 Claimant's PH Brief, ¶ 23(a).

statute, in relation to (operational startup) (investment in) its concessions consisting of the... economic- administrative unit(s), hereinafter '... project'."[499]

502. It can be seen from this that the model wording mirrors the provisions of Article 82 in that stability can be given either to an investment in a concession or to an expansion of a project. Clearly therefore, an investment comprises a new project as opposed to the expansion of an existing project. A majority of the Tribunal also notes that SMCV deleted the reference to the EAU and finds that this, again, is indicative that stability was only intended to be given to the investment in the concession (the Leaching Project) and was not intended to be given to the entire concession or EAU. Accordingly, a majority of the Tribunal does not accept the Claimant's submission that the reference to "investment in" evidences that the entire concession is stabilized.

503. Second, the Claimant says that the name is included solely for referential purposes. In support of this, the Claimant points to the titles of other mining projects which obtained stabilisation of areas beyond that encompassed by the title given in the stability agreement.[500] Indeed, Ms Chappuis testified that this referential name had no importance and that "[i]f it were up to me, I would put a series of numbers."[501]

504. However, whilst it may be correct that SMCV did not intend that the title given to the project would expressly and clearly identify the scope of stabilisation, neither the Claimant's (nor SMCV's) subjective understanding is relevant to this exercise. The Tribunal accepts that there are examples on the record of stability agreements with names that could not have determined their scope.[502] However, the terminology used by SMCV is unambiguous on its face, it clearly states that SMCV requests, through the Stability Agreement, the benefits provided by Articles 72, 80 and 84 of the Mining Law in relation

499 Model Stability Agreement, Supreme Decree No. 04-94-EM (3 February 1994) (**CE-778**), p. 2.

500 Claimant's Memorial, ¶ 122, referring to: [**Chappuis 1**], ¶ 46.

501 Tr. Day 3, 856:11-13.

502 Claimant's PH Brief, ¶ 24(c).

to its investment (singular) in the concession, which investment it calls "the Leaching Project."

505. It is also of relevance that Clause 1.1. of the Stability Agreement contains no reference to the Beneficiation Concession but only to the mining concession being Cerro Verde 1, 2 and 3, whereas Exhibit 1 refers both to the mining concession and to the Beneficiation Concession. This can be contrasted with the terminology used by SMCV in the 1994 Stability Agreement which seeks stability guarantees in relation to "the concessions known as 'Cerro Verde No.1, No.2 and No. 3,' and 'Cerro Verde' Beneficiation Plant, hereinafter referred to as the 'Cerro Verde project'"; it does not seek stability in relation to "an investment in" the concessions. (The Tribunal notes that the 1994 Stability Agreement sought guarantees under Articles 72 and 80 of the Mining Law, where the qualifying requirement was an investment only of USD2 million and which only granted a 10-year stability period.) The Tribunal accepts that the work to be undertaken pursuant to the 1994 Stability Agreement did not encompass work covering the entirety of the concession, notwithstanding the qualifying investment was titled "Cerro Verde project", however, in the Tribunal's view, "Cerro Verde project" does not suggest a project being undertaken with regard to the entire concession but a project to be carried out within the Cerro Verde concession.

506. The 2012 Stability Agreement sought stability pursuant to Article 82 of the Mining Law and again uses different language to define the object of the stability guarantee, referring, this time, to "the investment and startup of the 'Cerro Verde Unit Expansion' Project, which comprises the one hundred seven (107) mining concessions indicated in Annex I of this agreement."[503] This, again, does not precisely follow the text of the model stability agreement and makes clear that the investment is being made in the "start-up" of the concentrator, being the Cerro Verde Unit Expansion Project.

507. The First Clause is clearly an important provision, it identifies the purpose of the Stability Agreement, namely stabilisation, and in circumstances where it was for SMCV to identify the subject of the agreement, a majority of the Tribunal would have expected SMCV to

[503] 2012 Stability Agreement, First Clause (**CE-644**).

ensure it identified the scope of the stability with precision, understanding that the scope was limited in accordance with the provisions of the Mining Law and Mining Regulations. Given that for the 1994 Stability Agreement, the benefits were sought in relation to the concession, had SMCV's intention and understanding for the 1998 Stability Agreement been to obtain stabilisation for the entire concession, it would have been a simple matter for SMCV to have used a consistent definition, along the lines of that used for the 1994 Stability Agreement, referring just to the concessions themselves, and not including any reference to 'an investment in' the concession.

508. Whilst accepting that the name given to the investment is not dispositive of the question of the scope of the stability granted, and further accepting that there are other stability agreements with titles that clearly do not define the investment being made, a majority of the Tribunal finds that it is indicative that the understanding of the parties to the Stability Agreement was that it was only the Leaching Project that was stabilized. Further, unlike the examples put forward by the Claimant, (i) the title "Leaching Project" makes sense in circumstances where both the description of the project in the Stability Agreement and the content of the Feasibility Study are so clearly focused solely on the Leaching Project; (ii) it was SMCV which chose the name of the project; and (iii) SMCV chose to add the words "investment in" and delete the reference to an EAU.

509. Accordingly, a majority of the Tribunal does not accept the Claimant's submission that the title "Cerro Verde Leaching Project" describes the entire mining unit and not just the leaching facilities. In these circumstances, a majority of the Tribunal finds that the wording of Article 1.1 makes clear that stability is limited to the Leaching Project which was the subject of the Feasibility Study appended to the Stability Agreement.

510. The Claimant also refers to Clause 1.4 which refers to a "unit of production of Cerro Verde." However, a majority of the Tribunal does not find that this assists the Claimant. This is because the clause refers to the promotion of private investment "in" the unit of production; it does not provide that the investment comprises the unit of production it merely identifies the geographical area within which the investment is made. The fact that Cerro Verde is referred to as a unit of production therefore does not assist the Claimant.

The Claimant also refers to a 1997 SUNAT Report referring to Cerro Verde as an EAU and a "production unit" and a presentation given by Mr Polo in which he stated that stability agreements applied to mining units such as SMCV's "Cerro Verde 1, 2, and 3." However, again the Tribunal does not find that this assists the Claimant in construing the Stability Agreement. The Tribunal has determined that the better construction of the Mining Law and Regulations is that the scope of the stability provided is not the entirety of the concession, mining unit or EAU but the investment described in the Feasibility Study which is an integral part of the Stability Agreement.

511. However, the definition in the First Clause is not determinative and the Tribunal accepts that the reference to the "investment in its concession" could be understood to mean any and all investment(s) made in the concession. The Tribunal therefore continues its review of the Stability Agreement.

512. Whilst the Third Clause refers to the definition of "the Leaching Project of Cerro Verde" it continues by referring to the rights being "circumscribed to the concessions, related in Exhibit I, with the corresponding areas." Whilst the Respondent contended that the clear meaning of these words is that the scope of the Stability Agreement is limited (circumscribed) to the Leaching Project,[504] the Claimant contends that it means the stability benefits cannot extend beyond the confines of the concession but "fills" the totality of the space comprising the concession such that the Mining and Beneficiation Concessions as detailed in Exhibit I are stabilized.[505]

513. The Tribunal finds that the meaning of "circumscribed to the concessions" is merely that the investment is to be constructed and operated within the territory of the mining and beneficiation concessions. The Tribunal does not find that the use of the word "circumscribed" means that the stability applies to the totality of the concessions.

514. The Claimant also points to the second paragraph of the Third Clause which provides that "what is provided in the above paragraph does not prevent the owner from incorporating

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504 Respondent's PH Brief, ¶ 33; Tr. Day 1, 185:4-186:8.

505 Claimant's Memorial, ¶¶ 78, 331, 333; Claimant's PH Brief, ¶ 22(a), referring to: [**Bullard 1**], ¶¶ 29-31; [**Bullard 2**], ¶¶ 26-31; Presentation of Alfredo Bullard, slide 22 (**CD-5**); Tr. Day 8, 2175:11-2177:2.

other mining rights to the Cerro Verde Leaching Project, after approval by the general direction of mining."[506] This, the Claimant says, shows that other concessions (i.e. mining rights) can be included within the Stability Agreement, thus supporting its submission. Indeed, the Claimant refers to other mining companies which relied on this construction of the second paragraph of the third clause for their request to incorporate additional concessions.[507]

515. Against this, the Respondent says this right to incorporate other mining rights is restricted to the Leaching Project such that the provision does not permit the incorporation of other mining rights related to other projects, such as the Concentrator.[508]

516. The inclusion of the word "other" implies that the original mining right in which the qualifying investment is made, namely the Concession, is stabilized which tends to support the Claimant's construction. However, whether the Claimant's or the Respondent's construction is correct depends upon the Tribunal's construction of the phrase "Cerro Verde Leaching Project." It is thus a somewhat circular point. If the Tribunal determines that the meaning of "Cerro Verde Leaching Project" is limited to the Leaching Project, then this provision is not of assistance to the Claimant. Equally, however, if the proper meaning of "Cerro Verde Leaching Project" is the entire concession then the Claimant's construction is correct. Accordingly, this provision does not assist in construing the proper meaning of the stability agreement.

517. The Claimant also contends that as Clause 3 did not contain any mechanism to incorporate additional investments within the concession, this shows that the entire concession was stabilized otherwise consent would have been needed. Equally, the Tribunal notes that it could easily be understood that any new investment within the concession had to be the subject of a new application for a new stability agreement pursuant to Articles 78 or 82 of

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506 1998 Stability Agreement, Third Clause (**CE-12**).

507 [**Bullard 1**], ¶¶ 27-31; MINEM, Resolution No. 380-2001-EM-CM (16 November 2001) (**CE-377**); Mining Council Resolution N° 224 2006-MEM/CM (17 October 2006) (**CE-1062**).

508 Respondent's PH Brief, ¶ 102.

the Mining Law. Accordingly, the Tribunal does not find this argument supports either Parties' construction.

518. The other clause in the Stability Agreement which describes the stability benefits being provided is the Ninth Clause. This clause details the benefits that are guaranteed, referring to Articles 72, 80 and 84 of the Mining Law and Articles 14, 15, 16, 17 and 22 of the Mining Regulations. As already considered with respect to the equivalent provisions in the Mining Law and Mining Regulations, whilst the guarantee is stated to be provided to the "owner" (the mining activity title holder), the Tribunal does not find that this reference, of itself, assists in ascertaining the scope of stability. As detailed in paragraph 499 above, the reference to the "owner" merely identifies SMCV as the beneficiary under the Stability Agreement. Accordingly, the Tribunal does not find such references to "owner" to be relevant when undertaking a textual analysis of the Stability Agreement.

519. Articles 9.2 A and B detail guarantees relating to foreign currency generated by its exports the "subject of the contract." However, the proper construction of these provisions depends upon ascertaining the "subject of the contract" namely what is the scope of the Stability Agreement and so does not take the exercise of construction any further.

520. A majority of the Tribunal therefore finds that a textual analysis of the Third and Ninth Clauses does not provide a clear answer as to the scope of the stability guaranteed. The Tribunal therefore turns to consider the meaning of the Third and Ninth Clauses in the context of the Stability Agreement as a whole.

521. Turning back to the First Clause, Clause 1.2 states that a "technical-economic feasibility study" has been attached to the application for stability pursuant to Article 85 of the Mining Law.

522. Further detail as to what the Feasibility Study must contain can be found in the Fourth Clause which is headed "Plan of Investments and Term of Execution" and provides for an Investment Plan to be included in the Feasibility Study. Whilst Article 85 of the Mining Law provides for a technical and economic feasibility study to be filed, there is no express reference to an investment plan in Article 85, although given that the title of the study

includes the word "economic," it makes sense that the study should include an investment plan. Indeed, the amount to be invested must be identified as it determines the length of time that stability is given.

523. Clause 1.3 details the objective of the Feasibility Study and provides, in relevant part, as follows:

> "t*he objective of the study is to evaluate the feasibility to extend the production capacity from 70,000,000 to 105,000,000 lbs. (48,000 MT) of copper cathodes per year coming from the heap leaching of the copper mineral in the facilities of Cerro Verde with recovery of 65%, that will be installed with the necessary equipment to improve the leaching of the secondary sulfides using the last technology and at the same time increase the production. The Cerro Verde expansion project is based on a volume of 171.4 million tonnes of proved and probable reserves, with a total average copper grade of 0.79%.*
>
> *Such study has included:*
>
> *Development of a new geological model that forms part of the basis of the feasibility study. A computerized model has been created of the deposits of Santa Rosa and Cerro Verde. Estimate of Mineral Reserves and two pits, one for Santa Rosa and another for Cerro Verde that were designed for large scale mining levels, preparation of mining drawings, forecast of copper production.*
>
> *Description of all the operations for the new treatment capacity, including those that form part of the leaching project and its supporting installations as well as the results of heap leaching pilot test of secondary sulphur (sic).*"[509]

[509] 1998 Stability Agreement, First Clause (**CE-12**).

524. Clause 1.3 was again drafted by SMCV (as was the Feasibility Study itself which is a lengthy document, being 223 pages in total) and both Clause 1.3 and the Feasibility Study are focused almost exclusively on the Leaching Project. Whilst the Claimant says that the Feasibility Study included "additional investments laying the groundwork for the eventual construction of the Concentrator, including the 'Mill [concentrator] Feasibility Study,'"[510] the reality is that there does not appear to be any reference in the Stability Agreement to the Concentrator and there is only one reference to it in the Feasibility Study, being a reference to a mill on page 124 of the Feasibility Study. At the time the Stability Agreement was entered into, SMCV did not anticipate, at least not with any specificity, the Concentrator. It is of course the case that investing in a concentrator at some point was in both Parties' minds. The Respondent had made clear a concentrator had to be built and SMCV wanted to do it, but only once the economics of the project were acceptable. Whilst the mill was a forerunner of the Concentrator, the actual type of concentrator and investment required was not, at that stage, considered. At the time the Stability Agreement was concluded, the only project contemplated was the Leaching plant, building the Concentrator was not feasible or economic (nine studies were conducted between 1972 and 1998 which all reached that conclusion). It is not therefore possible to say that at the time the Feasibility Study was submitted for approval, the Concentrator was in SMCV's contemplation as being a project that was to be built in the foreseeable future.

525. Accordingly, it is clear to a majority of the Tribunal that it is the Leaching Project that is the subject of the Stability Agreement and the Claimant's submission that the Feasibility Study related to the Concentrator as well as to the Leaching Project is not accepted.

526. The Second Clause confirms that the Technical Economic Feasibility Study is compliant with the requirements of Article 85 of the Mining Law.

527. As explained above in paragraph 482, the Fourth Clause refers to the Plan of Investments and the term of execution. Again, it is clear from the content of the Fourth Clause that the work proposed to be undertaken, the time the work would take to complete, and the estimated production is solely focused on the Leaching Project. The clause also provides

[510] Claimant's PH Brief, ¶ 24(a).

that changes can be made to the Investment Plan provided that the "final object" of the Investment Plan is not affected. This Investment Plan forms an integral part of the Stability Agreement and again it is clear from the text of this clause that the Investment Plan solely or at least almost exclusively relates to the Leaching Project.

528. The Fifth Clause details the total approximate investment for the Leaching Project and the Sixth Clause details the commencement of production from the Leaching Project.

529. The Seventh Clause identifies when the Investment Plan is terminated, being once the Leaching Project has been completed. Clause 7.1 details the documents that the Claimant must present to the GDM within "90 days from the termination of the execution of the investment plan of the leaching project of Cerro Verde." These include financial statements and supporting documents. Clause 7.2 then allows the GDM to raise questions on the submitted documents to the extent there is any inconsistency between the contents of the investment plan and the supporting documents filed. To the extent any such identified inconsistency is not resolved by the Claimant, the clause further provides that "the benefits of this contract would be automatically suspended." Pausing here, it is again of note that the Investment Plan is identified as being that for the Leaching Project.

530. The Eighth Clause provides that the stability is 15 years, starting from "the financial period evidencing the investment made and once the General Direction of Mining approves this." [Tribunal emphasis]. Again, it is of some relevance that the commencement of the stability period is calculated by reference to the investment that has been identified in the Investment Plan and Feasibility Study.

531. Whilst the Thirteenth Clause, titled "legal provisions applicable," makes reference to the scope of the stability guarantee provided by existing legislation, the Tribunal does not find this clause of assistance. The clause provides, in relevant part as follows: "the references to laws, legislative decrees, decree laws, supreme decrees and other legal provisions in this instrument, are understood to be complied with in accordance with the existing text at the date of approval of the feasibility study; and do not interfere, limit or reduce the rights of the owner to enjoy all the benefits provided for by the current legislation at the date of

approval of the feasibility study for the purpose of what is guaranteed with this contrac*t.*"[511] However, again this clause contains no specificity as to the scope of the benefits. It is only once the scope of the stabilisation is determined that the Thirteenth Clause can properly be understood.

532. The Sixteenth Clause provides, *inter alia*, that one cause for termination of the agreement is if there has been a breach in the execution of the Feasibility Study in the time permitted. Again, the centrality of the Feasibility Study to the Stability Agreement is clear.

533. Accordingly, a majority of the Tribunal finds that a textual analysis of the Stability Agreement supports the Respondent's construction that it is only the investment described in the Feasibility Study that is stabilized, namely the Leaching Plant.

Contextual Approach

534. The Tribunal next considers the contextual approach to the proper construction of the Stabilisation Agreement considering also the Mining Law and Mining Regulations.

535. Submissions were made by both Parties as to the context in which the Mining Law and Mining Regulations came into being which the Tribunal now turns to consider.

The background to the enactment of the Mining Law

536. It is common ground that the Mining Law was enacted to attract foreign investment at a time when Peru was experiencing significant inflation,[512] had negative international reserves, and was experiencing a security crisis as a result of terrorist activities which were creating a "very difficult situation for the mining sector."[513] Accordingly, Peru accepts that reforming the mining regime was a matter of "national interest" [514] and that the Mining Law included various incentives for investors, including tax and foreign exchange

[511] 1998 Stability Agreement, Third Clause (**CE-12**).

[512] Ms Vega testified that annual inflation in the 1990s had reached more than 7,500 percent. See Tr. Day 5, 1162:6-17.

[513] Tr. Day 5, 1163:2-7.

[514] Tr. Day 5, 1166:7-11.

stabilisation.[515] The Tribunal therefore accepts the significance for the mining industry of the Mining Law and the role played by offering stabilisation in terms of attracting inward investment.

537. It is also common ground that a number of States applied stability agreements to attract investment in the mining sector. The Claimant asserts that most of these jurisdictions applied stability agreements to entire "mining units" being a single integrated mining operation which shares supply, administration and services.[516] Indeed, Professor Otto testified that all the stabilisation schemes of which he was aware, "are granted to either the mining company or a mining unit" and further that he was "not aware of any jurisdiction, law, or agreement that grants stability to just a part of the activities performed within a mining unit."[517]

538. Indeed, this is the approach that was adopted by Chile, one of Peru's competitors for inward investment. The Claimant notes that Mr. Polo had visited Chile before the Mining Law had been drafted, as part of his preparatory work to study its Mining Law as Chile was Peru's biggest competitor at that time in terms of mining investment, before commencing drafting.[518] Mr Polo stated in his first statement that it was important for Peru that its legal regime "be no less favorable than Chile's, even more so considering the circumstances that Peru was in."[519] The Claimant says that this supports its submission that Peru drafted its Mining Law to ensure the entire integrated mining unit was stabilized given that was the approach adopted by Chile with respect to its stabilisation program. However, Mr. Polo, in his oral testimony explained that what he meant by this reference to Peru's regime being no less favourable than that of Chile was that Peru would "take what was favorable, and we would adapt it to Peru."[520] It was clear to the Tribunal that Mr. Polo did not have a

515 Tr. Day 5, 1168:3-1170:17.

516 [**Otto 1**], ¶ 31.

517 Claimant PH Brief, ¶ 13(b).

518 [**Polo 1**], ¶ 10.

519 [**Polo 1**], ¶ 10.

520 Tr. Day 5, 1174:6-8.

detailed recollection of what he had learnt during his trip to Chile and in particular of the specific details of Chile's stability program.

539. However, the Tribunal does not accept that Peru would inevitably have followed exactly the same approach of Chile and other mining jurisdictions. Whilst it is obvious that Peru wanted to ensure it was an attractive jurisdiction for investment, just because other jurisdictions offered complete stabilisation to a concession does not, of itself, prove that that was what Peru decided to do. The tax regime is just one of the many factors taken into account by investors in deciding in what jurisdiction they will invest, albeit it is an important factor. Stability, even if only regarding an individual investment and not the entire concession is still an inducement to investors. Whilst it would perhaps be more likely that Peru followed the same approach as Chile, given it was competing for investment, equally, the Tribunal accepts that Peru may have chosen alternative structures which it believed, viewed as a package, were as attractive to inward investors as that offered by Chile. Accordingly, the Tribunal does not find that this background to the enactment of the Mining Law provides assistance in understanding the scope of the stability guaranteed.

540. Professor Otto also testified that in his experience most mining jurisdictions stabilized an entire "Mining Unit" (also known as a "Mining Project," "Mining Operation," "Mine," or "Project"), which he described as a single integrated mining operation sharing supply, administration and services.[521] Indeed, Professor Otto explained that whilst working as a consultant for Peru "to prepare a comprehensive review of the overall Peruvian Mining Tax system," "including on Royalties and stabilization," his experience was that the government viewed the mining project or the mining unit as being the object of the stabilisation, not the qualifying investment. However, the Respondent says that in undertaking this work, Professor Otto only analysed other mining jurisdictions but did not consider Peru's own mining law and policies.[522] Accordingly, the Tribunal does not find Professor Otto's opinion to be of assistance with regard to the proper construction of the Mining Law.

[521] Tr. Day 7, 1895:5-8.

[522] Tr. Day 7, 1897:11-21.

541. Mr Polo also testified that it was important that Peru created a "clear, stable, and totally predictable" investment framework that extended stability guarantees to entire concessions or mining units[523] and further that it was felt necessary to streamline the process to allow administrative simplification and ensure that any possibility of administrative discretion and arbitrariness was eradicated to minimise the opportunity for corruption.[524] The Claimant asserts that on the Respondent's construction, administrative discretion would not be eradicated. This is because the Respondent accepts that discretion would be required to determine if a particular investment was or was not stabilized. The Claimant refers to the testimony of Mr Cruz who, whilst accepting that a new investment within a concession could be stabilized, explained that to determine whether or not such investment was in fact stabilized would require SUNAT, for example, to assess (i) the investment on a case-by-case basis, (ii) what the investment was for, (iii) whether it changed equipment, (iv) what the investor was buying, and (v) the investment amount.[525] Mr Polo testified on a similar basis, stating that it was possible to deviate from the investment plan so long as what was stabilized was not transformed "substantially."[526] The Claimant contends that ascertaining what is a substantial transformation creates significant uncertainty and does not eradicate administrative discretion. This, the Claimant contends, is particularly relevant given that (as was accepted by the Respondent) the basic commercial reality of mining operations is that constant investment is required to optimise processes, update equipment and adapt to orebody changes. Indeed, this, the Claimant asserts, again demonstrates why stability was provided to the entire concession and not just to the immediate project to be undertaken. The Respondent's construction is, the Claimant submits, uncommercial and "fundamentally incompatible with the capital-intensive and integrated nature of the mining industry."[527] Again the Claimant says that the Respondent's answer, namely that

523 Tr. Day 5, 1148:9-14.

524 Tr. Day 5, 1169-1:1170-2.

525 Claimant PH Brief, ¶ 37(b).

526 Tr. Day 5, 1266:5-15.

527 Claimant PH Brief, ¶ 38.

equipment renewal might be stabilized depending upon the decision of SUNAT, does not support the purpose of the Mining Law in eradicating administrative discretion.[528]

542. Whilst the Tribunal accepts that the Respondent's construction does indeed give rise to the risk of some additional administrative discretion, given the detailed content of the Feasibility Study, the Tribunal finds that the extent to which additional administrative discretion would be required to determine whether changes sought to be made to the Feasibility Study changed its object is unlikely to be significant and in any event, it is inevitable that administrative discretion will be required in verifying whether the qualifying investment has been correctly executed. It is also of note that this exercise of additional administrative discretion is of significantly lesser magnitude than the discretion that would be exercisable by the Respondent were its outer boundaries theory to be accepted by the Tribunal.

543. A majority of the Tribunal therefore does not find the background to the Mining Law and Mining Regulations to be of assistance in seeking to understand the proper meaning of the Mining Law and Mining Regulations.

The conduct of the Parties

544. The Tribunal finally turns to consider the actions of the Parties with regard to the stability guaranteed by the Mining Law and Mining Regulations. In reviewing these, it is clear that both Parties acted at times in a manner inconsistent with their positions.

545. First, the Claimant says that it was not expected to segregate the profits of its USD 2.2 million qualifying investment under the 1994 Stability Agreement.[529] However as noted in paragraph 505 above, in the 1994 Stability Agreement, SMCV sought stability in relation to "the concessions known as 'Cerro Verde No.1, No. 2 and No. 3,' and 'Cerro Verde' Beneficiation Plant, hereinafter referred to as the 'Cerro Verde project'", not stability in

[528] Claimant PH Brief, ¶ 38.

[529] Claimant PH Brief, ¶ 28.

relation to "the investment in" the concession. Therefore, it can be explained that no segregation of profits was required under the 1994 Stability Agreement.

546. Second, the Claimant contends that it received express confirmation from Peru that the Concentrator was stabilized by the Stability Agreement. It argues this in two ways.

547. First, the Claimant says in various meetings between SMCV, Phelps Dodge and officials from MINEM, confirmation was given that the Concentrator was stabilized by the Stability Agreement. However, whilst the Claimant accepts that Phelps Dodge required "a letter proving 100% in writing that [the Stability Agreement] appl[ied] to [the Concentrator] project,"[530] the Claimant further accepts that no written confirmation was received, explaining that the team from the Ministry had advised it was not necessary.[531] The evidence as to the alleged oral confirmation includes the testimony of Ms Chappuis, the then DGM officer, and the evidence of Ms Torreblanca who testified that SMCV had met with many government officials to discuss the Concentrator. However, Ms Torreblanca goes no further than to say that all of these talks were conducted on "the premise" or on the "[u]nderstanding" that the Stabilization Agreement applied to the entire Cerro Verde concession.[532] However, proceeding on a "premise" or "understanding" is not the same as receiving written confirmation. The fact that the decision to build the Concentrator was taken pursuant to an "understanding," and not upon receipt of express confirmation, can also be seen from the evidence of Mr Davenport. Whilst it would appear that SMCV believed this was the government's view, it is equally clear that the decision was taken not to wait for actual written confirmation (see 561 below), but to rely upon the receipt of the expansion of the beneficiation concession. Whilst this was SMCV's understanding, this does not mean their understanding was correct. Indeed, as Mr Davenport testified, he explained to both SMCV and Phelps Dodge that it would not be possible to get any written confirmation which explicitly stated that the Stability Agreement would cover the

530 Cerro Verde Due Diligence Report (16 June 2004), p. 6. (**CE-936**).

531 Claimant's PH Brief, ¶ 58.

532 Tr. Day 2, 384:4-11.

Concentrator.[533] Indeed, it was well understood that officials would not confirm the position in writing, believing that was because of political pressure.

548. It is further of note that there is no written summary of this asserted confirmation on the record. Whilst Ms Torreblanca testified that she had kept notes of these discussions in her notebook and had written an e-mail to Mr Davenport reporting that she had received such assurance,[534] these do not appear in the record. The Claimant explained that these documents had not been maintained pursuant to the document retention policy.[535] A majority of the Tribunal would have expected that had Ms Torreblanca made a record of receiving such an important confirmation, particularly given Phelps Dodge had made clear how important confirmation was, and in circumstances where no written confirmation was received, such internal documentation would have been carefully safeguarded, notwithstanding any general document retention policy. A majority of the Tribunal would also have expected that some form of written communication would have been sent to the DGM confirming this oral confirmation. However, no such written confirmation is on the record. Indeed, the Tribunal notes the inconsistency that some documentation is in existence, albeit privileged, from the same year (2004) notwithstanding the asserted document retention policy.

549. Whilst Ms Chappuis' testimony is clear as to her understanding of the position, this is not the understanding shared by her superior, Mr Polo and therefore is, at most, an expression of her personal view. It is undeniable that no written confirmation was provided to the Claimant and in these circumstances and notwithstanding Ms Chappuis' testimony, the majority of the Tribunal finds that the Claimant has not made its case that it received confirmation from the Respondent that the Concentrator would be covered by the Stability Agreement. At most, Ms Chappuis gave her personal view, but this was not the agreed view of all her colleagues or her superior, Mr Polo. Whilst this may be relevant to the

[533] Claimant's PH Brief, ¶ 59, referring to: Tr. Day 3, 690:9-691:7.

[534] Tr. Day 2, 511:18-514:6; 524:11-525:3.

[535] Tr. Day 2, 525:14-529:4.

Article 3.1 Treaty claim, it does not assist in the Tribunal's exercise to construe the scope of the Stability Agreement.

550. The second way in which the Claimant contends it got express approval from the Respondent is that, it says, the Government "expressly provided written assurance that the Concentrator was stabilized with the approval of the Beneficiation Concession expansion."[536]

551. A majority of the Tribunal does not find that the Claimant has made out its case that it was the Respondent's position that by expanding the Beneficiation Concession it would automatically include the Concentrator in the Stability Agreement.

552. The Claimant refers to an e-mail sent by Ms Chappuis which stated as follows: "Request for the inclusion of the Sulfides Project in SA of [Cerro Verde]…is this legal?"[537] A majority of the Tribunal finds that the content of this e-mail does not suggest that Ms Chappuis herself believed that expanding the Beneficiation Concession would automatically stabilise the Concentrator. On cross examination, Ms Chappuis explained that she had mistakenly assumed that SMCV was seeking a new stability agreement and it was for that reason that she had called a meeting to discuss whether in fact the Concentrator would legally be stabilized if the Beneficiation Concession was expanded to include it. She further stated, however, that once she understood that SMCV was only seeking confirmation that the existing Stability Agreement covered the Concentrator, she agreed the expansion of the Beneficiation Concession would automatically include the Concentrator within the scope of the Stability Agreement.[538] However, again a majority of the Tribunal finds that this was Ms Chappuis' personal opinion and not the view of the Ministry of Mining.

553. Mr Davenport explained that upon receiving the DGM's suggestion that SMCV requested an expansion of both the geography and the capacity of the Beneficiation Concession to

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536 Claimant's PH Brief, ¶ 58.

537 Email from Maria Chappuis to Rosario Padilla, Jaime Chávez Riva Gálvez, Oswaldo Tovar, Luis Saldarriaga Colona, and Luis Panizo, "Meeting with Cerro Verde – New CET," (11 June 2004) (**RE-198**).

538 Tr. Day 3, 909:13-911:13.

include the Concentrator, a "light kind of went off" as "[t]hat's exactly what [SMCV] did" in 2001.[539] The Claimant contends that the DGM (Ms Chappuis) "explicitly assured SMCV that the stability agreement would cover the concentrator provided that SMCV expanded, with the DGM's approval, the beneficiation concession to include the concentrator."[540]

554. However, the majority of the Tribunal again notes that the evidence in support of this submission is limited to oral evidence, there is no contemporaneous written documentation in support on the record. In these circumstances, notwithstanding Ms Chappuis' personal opinion, the majority of the Tribunal does not find that the Claimant has shown it received confirmation upon which it could legitimately rely that the Concentrator would be stabilized upon expansion of the Beneficiation Concession.[541]

555. The Tribunal further notes that whether or not SMCV was seeking to stabilise the Concentrator, it had either to obtain a new beneficiation concession or expand the existing beneficiation concession to operate the Concentrator. Further, neither the application for expansion of the beneficiation concession nor the approval received contained any reference to extending the Stability Agreement to include the Concentrator.

556. The Tribunal understands that MINEM's expansion approval to include SMCV's 2002 investment within the stabilized Beneficiation Concession did not mention the stability agreement but that this investment was treated as stabilized even though it was not detailed in the Feasibility Study appended to the Stability Agreement. The Tribunal further notes the inconsistent treatment with regard to the Pillones Dam investment. However, a majority of the Tribunal does not find the fact of these inconsistencies is sufficient, when weighed against the entirety of the evidence on the record as detailed above, for it to find that the Claimant received the asserted confirmation as to the stabilisation of the Concession as a result of the expansion of the Beneficiation Concession.

557. The Tribunal further notes that the Claimant has not identified a specific article in the Mining Law or Mining Regulations which provides that expansion of a beneficiation

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539 Tr. Day 2, 594:7-9.

540 Claimant PH Brief, ¶ 54.

541 Claimant PH Brief, ¶ 55.

concession automatically leads to stabilisation. The process for obtaining a beneficiation concession or the expansion of a beneficiation concession is very different to that for obtaining a stability agreement. For example, an application for a beneficiation concession is filed with the DGM and requires the completion of very different documentation. The Claimant did not challenge Mr Tovar's testimony that an application to obtain or expand a beneficiation concession is different to that seeking stabilisation.

558. In any event, it is clear that an expansion of the beneficiation concession was an administrative procedure, not subject to restrictions.[542] It is not relevant whether the process of applying for an expansion of a beneficiation concession is the same as that for applying for a new beneficiation concession. It is not in doubt that SMCV was entitled to expand the Beneficiation Concession. The issue is what was the effect of such expansion of the Beneficiation Concession with regard to stabilisation. A majority of the Tribunal is of the view that the expansion of the Beneficiation Concession was just that, only the expansion and not additionally stabilisation.

559. The Claimant identified two other examples of the Respondent's conduct which it asserts support its construction. First, the Claimant notes that SMCV previously applied the Stability Agreement to additional investments made in the Cerro Verde mining unit that had not been included in the 1996 Feasibility Study but that this was never questioned by the Government.[543] However, whilst this may indicate an incorrect application of the Mining Law and Regulations by the relevant Government organ, this is not dispositive of the correct construction of the Stability Agreement.

560. Second, the Claimant notes that in December 1997 the DGM concluded with respect to the 1994 and 1998 Stability Agreements that two different tax regimes could not coexist within the same EAU and that therefore SMCV could either opt for or waive the 1994 Stability Agreement's term. It was for this reason, the Claimant contends, that it exclusively applied the Stability Agreement as of 1 January 1999, to avoid any overlap with the 1994 Stability

542 Tr. Day 3, 879:6-14.

543 Claimant PH Brief, ¶ 28(a).

Agreement.[544] However, the Tribunal notes the content of the 6 January 1998 report from the MINEM Legal Advisory Office concluding that the two stability agreements could co-exist because the 1998 Stability Agreement related to a different investment than that stabilized by the 1994 Stability Agreement.[545] Accordingly, again a majority of the Tribunal does not find that this supports the Claimant's construction that the entire concession was stabilized, indeed it supports the Respondent's construction. The question of inconsistent treatment will be considered further with regard to the asserted breach of Article 3.1.

561. The Respondent also contends that inadequate or non-existent due diligence was undertaken by the Claimant.[546] Whilst the Claimant asserts that "no due diligence is more concrete than receiving direct assurance and formal written approval from the competent mining officials responsible for ensuring compliance with stability agreements,"[547] it is clear the Claimant did not receive "formal written approval." The Claimant relied upon the oral discussions that Phelps Dodge had with government officials which were relayed to the Claimant. Whilst Phelps Dodge may have had a close relationship with the Peruvian government, this is not the same as having legal certainty. The Tribunal explores this further with regard to the asserted breach of Article 3.1. but it does not find this testimony is dispositive that the Claimant received the assurance that it asserts it received.

562. Finally, the Tribunal refers to the content of SMCV's request to reinvest undistributed profits from the Leaching Plant into the Concentrator. In particular, the following is of note: "[g]iven that the executed stability agreement makes reference therein to the Leaching Project rather than to the Cerro Verde project, which also includes the Primary Sulfides Project, we request clarification that the investment program using Non-Distributed Profits to be submitted would be approved regardless of the fact that it is not confined to the Leaching Project."[548] This letter was signed by Ms Torreblanca. A majority

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544 Claimant PH Brief, ¶ 29.

545 Claimant's Reply PH Brief, ¶ 29(a).

546 Respondent's PH Brief, ¶¶ 91-92.

547 Claimant's PH Brief, ¶ 60(a).

548 SMCV, Petition No. 1418719 to MINEM (3 July 2003) (**CE-394**).

of the Tribunal does not accept Ms Torreblanca's testimony that the "leaching project" and the Cerro Verde "production unit" were understood to be synonymous. Had that been the case, a majority of the Tribunal finds the letter would have been drafted differently.

563. The response from MINEM stated that the Concentrator "could be eligible for [the profit reinvestment] benefit, there being no requirement that the agreement giving rise to the benefit should have previously contemplated [the concentrator] as a project."[549] Whilst SMCV's application indicates a belief on its part that only the Leaching Project had been stabilized and not also the Concentrator, MINEM's response is more ambiguous. It does not expressly provide that the Concentrator would be stabilized but nor does it say it would not.

564. SMCV issued a further letter to MINEM seeking additional clarification regarding the operation of this profit reinvestment program. MINEM's response, comprising a legal opinion and which was signed by Ms Chappuis, stated as follows: "the application of the stabilized regime is granted to the Cerro Verde Leaching Project and not to the company and the Regime is the one described in the aforementioned agreement."[550] This report again does not state clearly that the concession was stabilized, referring again to stability having been granted just to the Cerro Verde Leaching Project and not to the company itself. In her testimony, Ms Chappuis explained that the wording used had not been accurate and that what she had meant to write was that the stability applied to the Cerro Verde mining unit and not the Leaching Project. This may, or may not, be correct but, it again tends to suggest that the Respondent's construction is correct. Finally, the resolution which approved SMCV's application specifically provided that the undistributed profits to be reinvested had to be "exclusively generated by the 'Cerro Verde Leaching Project'."

The Approach to Stabilisation followed by Governmental Organs

565. The Claimant contends that Peru, as a matter of fact, applied stability guarantees to entire concessions or mining units of other investors, as opposed to just the qualifying investment,

[549] MINEM, Report No. 510-2003-MEM-DGM-TNO (8 September 2003), p. 2 (**CE-399**).

[550] MINEM, Report No. 509-2003-MEM-DGM-TNC (8 September 2003), p. 1 (**CE-398**).

whereas the Respondent says that it acted at all times consistently with its understanding of the Mining Law and the Mining Regulations. However, in the absence of any shared mutual understanding, (which a majority of the Tribunal has determined did not exist), the unilateral interpretation of the Respondent, whether or not evidenced by its actions towards third parties, cannot assist the Tribunal in its exercise of ascertaining the proper scope of the Stability Agreement.

566. The Tribunal next considers whether a government official at any time made a statement, oral or written, to indicate that the entirety of a concession or EAU would be stabilized under a stability agreement.

567. The Claimant contends that MINEM officials interpreted stabilisation as applying to the entire concession or mining unit. For example, it refers to a statement of Mr Polo in a presentation dated May 2006 that stability agreements that were entered into force before the Royalty Law was enacted precluded the application of royalties to projects. In his oral testimony, Mr Polo emphasised that what he meant by this reference to "projects" was "investment projects" not "mining units" and that stabilisation agreements only applied for this specific development, or investment project, and not to the company.[551] Whilst the Tribunal accepts that there is not complete clarity in Mr Polo's statement, it does not find that Mr Polo made any representation that an entire concession or EAU would be stabilized if an investment were made that was compliant with Articles 78 – 81 or 82 –85 of the Mining Law.

568. The Claimant also refers to the Isasi April 2005 Report which, the Claimant contends, again evidences Peru's understanding that stabilisation applied to the entire concession or unit, and not only to the qualifying investment. Paragraph 17 of this Report states as follows: "emphasis should be placed on this last aspect. The stability granted by [mining stability agreements] guarantee the legal regime related to tax, currency exchange and administrative matters of the investment project to which they refer. Consequently, it is not the mining title holder (individuals or legal entity) who will be exempt or not from the

[551] Tr. Day 5, 1319:2-7. RE-0003 (undated), see also Claimant's Reply ¶ 70, referring to Respondent's Counter-Memorial, ¶¶ 192-200. Both Parties indicate that the presentation took place in "May 2006"

payment of royalties, comprehensively as a company, but it will be the mining concessions of which it is the title holder, depending on whether or not they are part of a project set out in a stability agreement signed prior to the enactment of law number 28258. Therefore, only the mining projects referred to in these agreements will be excluded from the royalty calculation basis."[552] The Report concluded in paragraph 19 by stating: "It is the opinion of this Office of the General Counsel that the mining royalty is not applicable to the investment projects of the title holder of mining companies that prior to the royalty law came into force, had entered into [mining stabilisation agreements] in which administrative stability had been agreed upon in the terms expressed in this report.[553]

569. The content of the Isasi April 2005 Report is insufficiently clear for the Tribunal to make a finding that Mr Isasi was clearly stating, in this Report, that an entire concession was stabilized as opposed to the qualifying investment. Whilst there is reference in this Report to the "mining concessions" being stabilized, the report also refers to the "mining project" or "investment project" that is stabilized. A majority of the Tribunal finds the terminology used in the Report does not support any finding that the Respondent publicly stated that concessions in their entirety would be stabilized. On reading the entirety of the Isasi April 2005 Report, a majority of the Tribunal finds the better construction of this Report is that it states that it is only the investment described in the feasibility study that is stabilized.

570. Further, the Claimant refers to various public advisory opinions issued by SUNAT which, it contends, make clear SUNAT's understanding that a stability agreement applied to a whole concession or unit. For example, the Claimant contends that SUNAT's 2002 advisory report stated, with regard to Article 2 of the Mining Regulations, that stability "shall only be effective for those *concessions or units* that are supported... by the agreement."[554] [Emphasis in the original]. However, the Respondent says that the proper text is "Tax Stability [Agreements] ... only stabilize the applicable tax regime with respect

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

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

554 SUNAT, Report No. 263-2002-SUNAT/K00000 (23 September 2002), p. 2 (**RE-26** (resubmitted)).

to the investment activities that are the subject matter of the agreements, for their execution in a determined concession or an administrative economic unit."[555]

571. Given the difference in interpretation between the Parties, the Tribunal has considered the translation of this opinion that is on the record.[556] As a preliminary point, this opinion was issued with regard to the liability of a taxpayer to pay contributions to the National Housing Fund and was not expressly addressing the issue of liability to pay royalties. The document commences with a summary of the conclusions reached which consists of two paragraphs. The first of these paragraphs states as follows (the second being irrelevant to the present issue):

> "*1. The Tax Stability Contracts entered into pursuant to the [Mining Law] only stabilize the applicable tax regime with respect to the investment activities that are the subject matter of the agreements.*"

572. Paragraphs 2 – 5 of the analysis then provide that:

> "*2. On the other hand, Article 2(d) of the above-mentioned Regulation establishes that the provisions contained in Title Nine of the TUO of the General Mining Law automatically apply, among other parties, to all mining titleholders, defined as individuals or legal entities that engage in the mining activity in a concession or in concessions grouped into an Administrative Economic Unit, as concessionaires or assignees, provided that they enter into a stability agreement under Articles 78 and 82 of the above-referenced TUO.*
>
> *Likewise, the above-cited Article indicates that when the individual or legal entity is the mining titleholder of several concessions or Administrative Economic Units, the qualification shall only be effective for those*

[555] Respondent's Reply PH Brief, ¶ 100.

[556] The Tribunal notes that there are two slightly different English translations of this document on the record.

concessions or units that are supported, among others, by the agreement referred to by said Article.

3. Now, according to the second paragraph of article 79 and the fourth paragraph of article 83 of the [mining law], the effect of the contractual benefit shall apply exclusively to the activities of the mining company in whose favor the investment is made.

4.On the other hand, Article 22 of the TUO of General Mining Law Regulation provides that the contractual guarantees shall benefit the mining titleholder exclusively for the investments it makes in the concessions or Administrative Economic Units.

5. As can be seen in the above- mentioned provisions, the benefits granted through the Tax Stability Contracts entered into the pursuant to Title Nine of the TUO of the General Mining Law apply to the mining titleholders and, even though they temporarily stabilize the tax regime in effect as of the date of approval of the investment program, said benefits must only apply to the activities involved in the investment made in a given concession or Administrative Economic Unit that was the subject matter of the respective agreement.

In such regard, if the taxpayer engages in other activities, said activities will be subject to taxation in accordance with new developments in the regular tax laws (unless said activities also have their own stability benefit), in which case they will be taxed simultaneously with the activities for which stability exists, as long as said stability remains in effect."[557]

573. Whilst the document is not easy to understand and has a number of internal inconsistencies and contradictions, a majority of the Tribunal does not find this report can be said to be an

[557] SUNAT, Report No. 263-2002-SUNAT/K00000 (23 September 2022) p. 2 (**RE-26** (resubmitted)).

unambiguous statement from the Government that an entire concession is stabilized by a stability agreement.

574. The 2007 advisory opinion was issued after the Stability Agreement was entered into and therefore cannot be relied upon as evidence of the proper meaning of the Stability Agreement. Whilst the Claimant could have sought to rely on it as an admission by the Respondent against its interest, again a majority of the Tribunal does not find that it comprises a clear and unambiguous statement as to the scope of a stability agreement. The text provides that:

> "*the tax stability guaranteed through a [mining stabilisation agreement] benefits the titleholder of the mining activity for a period of 15 years only for the investment activities that are the subject matter of the agreements and were indicated in the Feasibility Study, taking into account the definitive amount required for its performance in a given concession or [EAU].*"[558]

575. The Tribunal also notes the content of SUNAT's Intendency Resolution dated 20 May 2009 (with regard to Tintaya), which provides in relevant part as follows: "…THE BENEFIT WILL ONLY REACH THE INVESTMENTS MADE THAT WERE FORESEEN IN THE FEASIBILITY STUDY…"[559] [Capitals in the original text]. This again does not comprise a clear statement to the effect that a stability agreement stabilises the concession and accordingly cannot be relied upon by the Claimant as an admission against the Respondent's interest.

576. The Claimant also refers to a SUNAT advisory opinion dated 13 September 2012, in which SUNAT stated that "mining-activity owners that have signed [stability agreements] will enjoy a stabilized tax system applicable solely to the concession or economic-administrative unit for which said agreement has been signed" and that, when calculating

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[558] SUNAT, Report No. 166-2007-SUNAT/2B0000 (20 September 2007) (**RE-27**).

[559] SUNAT, Intendency Resolution No. 095-014-0000747/SUNAT (20 May 2009), p. 12 (**RE-193**). The Spanish original reads as follows: "el BENEFICIO ALCANZARÁ SÓLO. A LAS INVERSIONES REALIZADAS QUE SE ENCONTRABAN PREVISTAS EN EL ESTUDIO DE FACTIBILIDAD."

tax obligations, mining title holders "should take into account the stabilized laws to be applied to each of the concessions or economic-administrative units."[560]

577. This document on its face supports the Claimant's construction. The Claimant contends that this 2012 advisory opinion was issued to address an issue that affected "mining-activity title holders that... signed stability agreements... for one or more of their concessions or economic-administrative units."[561] The Respondent, however, contends that this report did not relate to the scope of stabilisation agreements but, instead, whether it was possible for an investor to consolidate losses between EAUs and concessions for the purpose of calculating income tax and whether it was possible to apply positive balances between EAUs and concessions for the purpose of calculating general sales tax.[562]

578. Having considered the content of the entire report, a majority of the Tribunal finds that it does not comprise an admission against interest by the Respondent. This is because the question (addressing investors that had stability agreements for concessions as opposed only for investments) assumes that the concession itself is stabilized as opposed to just the qualifying investment. Whilst this indicates an entire concession could be stabilized, the issue the Tribunal has to address is whether a concession must be stabilized in its entirety in circumstances where the qualifying investment is only taking place in a part of the concession as described in the feasibility study. SUNAT's opinion does not address stability agreements stated to be for an investment within the concession.

579. The Tribunal considers in more detail Peru's approach with regard to other mining investors when it considers the Claimant's claim for breach of Article 3.1 of the Treaty. However, given that a majority of the Tribunal has found that the true construction of the Mining Law and Mining Regulations is not that the entire concession or EAU is automatically stabilized but instead that is necessary to look at the terms of the particular stability agreement in question to determine what is stabilized, and whilst the approach followed with regard to other mining companies may be relevant to claims of breach of

560 SUNAT, Report No. 084-2012-SUNAT/4B0000 (13 September 2012), footnote 4 (**CE-883**).

561 Claimant's PH Brief, ¶ 52.

562 Respondent's Reply PH Brief, ¶ 103.

Article 3.1, it does not assist the Tribunal in ascertaining the true construction of the statutory framework and the stability agreement.

580. The contextual interpretation therefore supports the Respondent's construction. Having considered the textual and contextual interpretation of the Mining Law, Mining Regulations and Stability Agreement, a majority of the Tribunal finds that the proper construction of the Stability Agreement is that it is only the Leaching Project, being the investment described in the Feasibility Study, that is stabilized.

The Supreme Court Decision

581. Finally, the Tribunal considers the Supreme Court Decision to see if it provides any further clarification on this issue.

582. In carrying out its analysis, the Supreme Court considered the general aspects of mining concession agreements, in particular their purpose, the guiding principles of the Mining Regulations, what activities comprised mining activities under the Mining Law, the general nature of mining concessions and operating concessions, the general aspects of *contratos-ley*, and legal stability agreements generally and specifically under Articles 78 and 82 of the Mining Law.

583. Having accepted that a stability agreement is a *contrato-ley*, the Supreme Court considered the role of investment projects for an Article 78 stability agreement and highlighted "how important approval of the investment program is throughout the configuration of the Stability Agreement in the mining industry" referring to the fact (i) its approval is the basis of the calculation of the term to sign and formalise the stability agreement, (ii) it establishes the "contractual effects" of the stability agreement as "they shall be subject to a termination condition" which occurs if the mining activity owner does not execute the "approved investment program" by the established deadline and (iii) non fulfilment constitutes just cause for termination of the Stability Agreement.[563] These, the Supreme Court said, enables

[563] Supreme Court, Judgment No. 5212-2016 (2008 Royalty Assessments) (18 August 2017), ¶ 123 (**CE-153**).

the clear identification of what the "functionality is of the 'approved investment Program' in the design of the entire Stability Agreement."[564]

584. The Supreme Court concluded that "for all these reasons, the Investment Program, which has a given purpose, requires prior approval from the General Mining Bureau, and any change thereto likewise requires another approval by said General Mining Bureau, to the extent that the latter is what will determine that the modifications and/or expansions done are validated and included in the investment plan. That is why express agreements have been incorporated into the Stability Agreement with that meaning, as can be seen in clause 4.2 and clause 7.2, which are determining factors for resolving this dispute."[565]

585. The Supreme Court then turned to the relevance of the Feasibility Study. Having considered the relevant provisions in the Mining Law and the Mining Regulations, the Supreme Court held that the Feasibility Study qualified "not only as a requirement for being able to sign a stability agreement, but also as a technical management instrument that is essential to consider for assessing measuring the level of investment made by the mining activity's owner." The Supreme Court continued, having considered the consequences of non-fulfilment of the Feasibility Study (namely termination of the Stability Agreement) that "this is a powerful indicator that said feasibility study does not '(…) just constitute a pre- contractual requirement to be able to sign said agreement' as the appellant alleges... but rather, on the contrary, its value is not exhausted in that submission, since it will constitute the basis for which, after its approval, a series of obligations are based for the parties that signed the Stability Agreement, as has been explained."[566]

586. The Supreme Court continues by noting that the scope of a stability agreement varies in accordance with the type of stability agreement being signed,[567] referring to the fact that the Claimant invoked the provision in Article 82 of the Mining Law before then referring to Article 84 of the Mining Law which it provides, "introduces the criteria into the configuration of the benefits that will be guaranteed to the mining activity's owner as a

[564] Supreme Court, Judgment No. 5212-2016 (2008 Royalty Assessments) (18 August 2017), ¶ 124 (**CE-153**).
[565] Supreme Court, Judgment No. 5212-2016 (2008 Royalty Assessments) (18 August 2017), ¶ 125 (**CE-153**).
[566] Supreme Court, Judgment No. 5212-2016 (2008 Royalty Assessments) (18 August 2017), ¶¶ 130, 131 (**CE-153**).
[567] Supreme Court, Judgment No. 5212-2016 (2008 Royalty Assessments) (18 August 2017), ¶ 133 (**CE-153**).

result of this Stability Agreement, of having to take into account 'each project's specific characteristics.'"[568] [Emphasis in the original]. The Supreme Court says this construction is correct because Article 83 of the Mining Law "makes it possible for various 'investment programs' to be presented, such that it is clear that when it stipulates that 'the effect of the contractual benefit falls exclusively on the mining company's activities on behalf of which the investment has been made,' it is solely alluding to the activities that are directly related to the investment made."[569]

587. The Supreme Court concludes as follows: "[t]hus, submitting said 'Technical/Economic Feasibility Study' does not merely constitute a requirement for execution of the Stability Agreement, but rather a technical management instrument that is essential and a determining factor for establishing and setting guarantees to be applied for the investment in its concession, i.e., to determine the scope of the Stability Agreement."[570]

588. In conclusion, the Supreme Court came to the same conclusion as that reached by a majority of the Tribunal. Accordingly, whilst not bound by the Supreme Court's decision, a majority of the Tribunal finds that it supports its analysis to the effect that the Stability Agreement, pursuant to the Mining Law and the Mining Regulations, stabilises the works detailed in the Feasibility Study, namely the Leaching Project.

589. Accordingly, a majority of the Tribunal finds that the proper construction of the Stability Agreement is that it is only the investment described in the Feasibility Study that is stabilized,[571] namely the Leaching Project only.

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[568] Supreme Court, Judgment No. 5212-2016 (2008 Royalty Assessments) (18 August 2017), ¶ 138 (**CE-153**).

[569] Supreme Court, Judgment No. 5212-2016 (2008 Royalty Assessments) (18 August 2017), ¶ 139 (**CE-153**).

[570] Supreme Court, Judgment No. 5212-2016 (2008 Royalty Assessments) (18 August 2017), ¶ 142 (**CE-153**).

[571] Tr. Day 9, 2351:12-19.

f. Conclusion

590. A majority of the Tribunal finds that only the Leaching Project was stabilized. Accordingly, a majority of the Tribunal finds there was no breach by the Respondent of Article 3.4 of the Treaty.

B. THE CLAIM FOR BREACH OF ARTICLE 3.1 OF THE TREATY (FAIR AND EQUITABLE TREATMENT AND NON-IMPAIRMENT)

1. Introduction

591. The Claimant contends that the Respondent breached two clauses of Article 3.1 of the Treaty: (i) the clause that requires the Respondent to ensure fair and equitable treatment to the investments of nationals of the other Contracting Party (the "**FET Clause**") and (ii) the clause that requires the Respondent not to impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal of those investments (the "**Non-Impairment Clause**"). The Respondent rejects the charge of having breached either of those clauses. The Tribunal will first summarize the Parties' positions with regard to the claims for breach of both clauses of Article 3.1 of the Treaty and will later analyze each claim separately.

592. The Tribunal's analysis and conclusions regarding the Article 3.1 claims are reached by unanimity, except as otherwise stated on specific points. The Tribunal notes that these claims do not depend on the Article 3.4 claim, nor do the analysis and conclusions of the Tribunal in respect of the Article 3.1 claim depend on those reached by the Tribunal (by majority) in respect of the Article 3.4 claim. It is well established that a State's compliance with its own law does not excuse a breach of international law, nor does its non-compliance with its own law necessarily result in such a breach. Therefore, the correct application of national law is not a sufficient defence to a claim for breach of the standards of Article 3.1 of the Treaty, nor is the incorrect application of that law a sufficient reason to conclude that either of those standards has been breached. Therefore, the Tribunal will consider the questions of Peruvian law discussed in the preceding section only to the extent that they bear on the application of the FET and non-impairment standards.

2. The Parties' Positions

a. Claimant's Position

i. Whether the Respondent violated its obligations under Article 3.1 of the Treaty

593. It is the Claimant's position that the Respondent violated its obligations under Article 3.1 of the Treaty (i) to ensure fair and equitable treatment to the Claimant's investment and (ii) not to impair by unreasonable or discriminatory measures the Claimant's use and enjoyment of its investment. Specifically, the Claimant asserts: [572]

a. Peru violated Article 3.1 each time the Royalty and Tax Assessments became final and enforceable because (i) the Government arbitrarily and unreasonably adopted its novel and restrictive interpretation of the scope of stability guarantees in response to domestic political pressure rather than for legitimate reasons; (ii) the Government's novel interpretation constituted a complete *volte face* from the Government's previous position, which the Government applied arbitrarily and haphazardly and through inconsistent and non-transparent conduct; and (iii) the Tax Tribunal proceedings upholding the Assessments were marred by serious procedural irregularities and lack of due process.

b. Peru violated Article 3.1 each time it arbitrarily failed to waive the penalties and interest assessed on the royalties and taxes, even though Peruvian law and fundamental principles of fairness and equity required the Government to do so, as SMCV's position was clearly based on a reasonable interpretation of the Mining Law and Regulations.

c. Peru violated Article 3.1 when it arbitrarily and unreasonably refused to reimburse SMCV for part of the GEM payments SMCV had made on the understanding that it would not pay Royalties and the Special Mining Tax, even though Peru had

[572] Claimant's Memorial, ¶ 360; Claimant's Reply, ¶ 126.

previously acknowledged that GEM payments were owed only when a company was not required to pay Royalties by virtue of its stability agreement.

d. Peru also breached Article 3.1 when it arbitrarily and unreasonably applied the non-stabilized regime to assets and activities that enjoyed stability even under Peru's own flawed interpretation for certain of the Tax Assessments.

e. For the same reasons, and because they impaired the Claimant's use and enjoyment of its investment, including by impairing its rights to profits and income from SMCV, each of these arbitrary and unreasonable acts and omissions also breached Peru's non-impairment obligation.

594. The Claimant argues that the Respondent must ensure fair and equitable treatment of the Claimant's investment. This obligation includes several interrelated obligations that set a standard for the host State's conduct toward covered investments, including obligations of non-arbitrariness and reasonableness, to act with reasonable consistency and transparency, and to act with procedural propriety and due process.[573] The Claimant makes, *inter alia*, the following submissions in support of its position:

a. Tribunals have confirmed that government action is arbitrary if, among other factors, it is taken "not based on legal standards but on excess of discretion, prejudice or personal preference," or based on political calculations.[574]

b. Tribunals have repeatedly confirmed that fair and equitable treatment requires the State to act with reasonable consistency and transparency in the treatment of foreign

[573] Claimant's Memorial, ¶ 361, referring to: *ESPF v. Italy* Award, ¶¶ 443-444 (**CA-251**); Rudolf Dolzer & Christoph Schreuer, *Standards of Protection, in PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (2nd ed. 2012), pp. 133-149 (**CA-197**).

[574] Claimant's Memorial, ¶ 362, referring to: *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (4 April 2016) ("***Crystallex v. Venezuela* Award**"), ¶ 578 (**CA-222**); *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (14 January 2010) (**CA-163**), ¶¶ 262-263. The Claimant also refers to the following cases: *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award (19 August 2005), ¶¶ 213, 221-233 (**CA-122**); *Crystallex v. Venezuela* Award (**CA-222**), ¶¶ 589, 598; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (22 September 2014) ("***Gold Reserve v. Venezuela* Award**"), ¶¶ 580, 590, 591 (**CA-213**).

investments, which serves the ultimate goal of enhancing legal certainty for the investor.[575]

c. Tribunals have confirmed that an absence of a fair procedure or a finding of serious procedural shortcoming in administrative or judicial proceedings violates the fair and equitable treatment obligation.[576]

d. Although each of these "strands" of fair and equitable treatment has an individual and separate meaning, "their reach may in certain circumstances overlap" and "it is the overall evaluation of the state's conduct as 'fair and equitable' that is the ultimate object of the Tribunal's examination" to determine whether the State's conduct has violated its Treaty obligations. Further, prior tribunals confirm that the obligation of fair and equitable treatment is an affirmative one, which requires the State proactively to treat investments in an "even-handed and just manner, conducive to fostering the promotion of foreign investment."[577]

595. The Claimant submits that while Peru takes great pains to portray FET as a heightened standard requiring the demonstration of "severe" or "willful" misconduct, or as a "high

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575 Claimant's Memorial, ¶ 363, referring to: *Crystallex v. Venezuela* Award (**CA-222**), ¶¶ 589, 598; *Deutsche Telekom AG v. Republic of India*, PCA Case No. 2014-10, Interim Award (13 December 2017) ("***Deutsche Telekom v. India Interim* Award**"), ¶ 387, (**CA-234**); *Gold Reserve v. Venezuela* Award, ¶ 591 (**CA-213**); *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award (19 January 2007) ("***PSEG v. Turkey* Award**"), ¶ 246 (**CA-133**); *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No. UN3467, Award (1 July 2004), ¶¶ 183-185 (**CA-108**).

576 Claimant's Memorial, ¶ 364, referring to: *Dan Cake (Portugal) S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability (24 August 2015) ("***Dan Cake v. Hungary* Decision on Jurisdiction and Liability**"), ¶¶ 117-118 (**CA-217**); *OAO Tatneft v. Ukraine*, PCA Case No. 2008-08, Award (29 July 2014) ("***OAO Tatneft v. Ukraine* Award**"), ¶ 395 (**CA-211**); *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award (19 December 2013) ("***TECO v. Guatemala* Award**"), ¶ 493 (**CA-202**); *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award (31 October 2012), ¶ 478 (**CA-195**); *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (14 January 2010), ¶¶ 299, 309, 316 (**CA-163**); *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003) ("***Tecmed v. Mexico* Award**"), ¶¶ 162-165(**CA-99**).

577 Claimant's Memorial, ¶ 365, referring to: *LG&E Energy Corp., LG&E Capital Corp. and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award (25 July 2007), ¶¶ 125-127 (**CA-139**).

bar", the cases on which Peru relies make clear that no such heightened standards are appropriate.[578]

a. Peru's attempt to stretch the fair and equitable treatment obligation into one requiring "sever[e]" conduct or showing of "willful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith" is inconsistent with the bulk of the decisions applying the FET standard, including those on which Peru relies. There is a "consensus" in arbitral jurisprudence that the "core components of FET" include "protection against conduct that is arbitrary, unreasonable, disproportionate and lacking in good faith, and the principles of due process and transparency."[579]

b. Peru's attempt to characterize arbitrariness as a "high bar" fails to detract from the fact that the Parties essentially agree on the types of conduct that may be considered "arbitrary". Other than Peru's insistence in describing the standard as a "high bar", in substance Peru's attempts to reframe the standard of what constitutes "arbitrary" conduct essentially amount to a distinction without a difference.[580]

c. Peru's argument that "consistency and transparency […] are not distinct FET elements" misses the mark. The Tribunal must take into account "the overall evaluation of the State's conduct as 'fair and equitable'" when determining whether the State's conduct has violated the Treaty with respect to a particular claim.[581]

d. Peru's argument that "inconsistencies or even disagreements among, or within [government] agencies, without something more, cannot be grounds to find a breach of the FET obligation," is both overly simplistic and once again mischaracterizes the basis for the Claimant's allegations. The Claimant's claims are not based on "mere inconsistencies" or "disagreements" arising out of the State's

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578 Claimant's Reply, ¶ 128.

579 Claimant's Reply, ¶ 129, citing *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award (25 June 2001) ("***Genin v. Estonia* Award**"), ¶ 367 (**RA-19**).

580 Claimant's Reply, ¶ 130.

581 Claimant's Reply, ¶ 131.

legitimate division of responsibilities within an existing legal framework. Rather, the claim is that, as a result of political pressure, the very same government authority – MINEM – changed its position regarding the scope of stability guarantees and subverted the existing legal framework so that the Government could collect royalties from SMCV that it had contractually committed not to assess.[582]

e. Peru's argument that "the transparency requirement 'cannot mean that [the State] has to act under complete disclosure of any aspect of its operation'" is equally irrelevant, since the Claimant's allegations are not about a lack of "complete disclosure", but rather a pervasive lack of transparency by Peruvian Government officials.[583]

f. Peru's convoluted attempts to characterize the due process component of the FET obligation as requiring a finding of denial of justice are misguided and unsupported by prior decisions. Tribunals have repeatedly concluded that, while the FET obligation includes the standard of denial of justice, it is not limited to that standard. Rather, "conduct which […] interferes with the legitimate exercise of rights," such as serious procedural shortcomings in administrative proceedings, "equally" violates the obligation. Peru's misguided attempts to frame the Claimant's administrative due process argument as a "denial of justice" in administrative proceedings are ultimately of little consequence: the Tax Tribunal's egregious procedural failures meet either standard.[584]

596. The Claimant submits that testimony at the Hearing confirmed that the Respondent acted inconsistently and non-transparently, demonstrating that the Respondent arbitrarily changed its position on the scope of SMCV's stability guarantees in the face of sustained political pressure. The Claimant states that unrebutted evidence and testimony from the Hearing show that the Government suddenly changed its position when political pressure

[582] Claimant's Reply, ¶ 132.
[583] Claimant's Reply, ¶ 133.
[584] Claimant's Reply, ¶ 134.

reached its peak. Further, the Claimant submits that it was also demonstrated at the Hearing that, again and again, the Respondent deliberately failed to inform SMCV of its novel and restrictive interpretation to induce SMCV to make hundreds of millions of dollars in additional contributions, alleging that MINEM and SUNAT never informed SMCV of the novel and restrictive approach, despite ample opportunities to do so. The Claimant submits that the Hearing further confirmed that SUNAT never consulted SMCV before preparing the June 2006 Internal Report and never informed SMCV of its existence.[585]

a) Whether the Respondent violated its obligation to ensure FET each time the Royalty and Tax Assessments became final and enforceable

597. It is the Claimant's position that the Respondent violated Article 3.1 each time the Royalty and Tax Assessments became final and enforceable. The Claimant asserts this on the basis of, *inter alia*, the following:

a. The Respondent arbitrarily adopted its novel and restrictive interpretation of the scope of stability guarantees as a result of domestic political pressure and not for legitimate reasons: (i) the Royalty Law discussions were politically charged from the outset, with stability agreements as key points of contention; (ii) when the Government granted SMCV's profit-reinvestment request in December 2004, SMCV became a specific target of ire among certain members of Congress and local politicians; (iii) this backlash was frequently directed not only at SMCV, but at MINEM, SUNAT, and the MEF, and specific Government officials; (iv) although the Government initially defended stability guarantees, it ultimately reversed course and adopted its novel and restrictive interpretations of SMCV's Stability Agreement, and the evidence shows that the Government's *volte face* resulted from the intense domestic pressure. Peru's *volte face* in the face of this sustained, targeted political pressure ultimately resulted in it upholding each of the

[585] Claimant's PH Brief, ¶¶ 66-82.

Royalty and Tax Assessments, rendering those decisions arbitrary and in breach of its fair and equitable treatment obligations.[586]

b. Peru acknowledges this political pressure campaign, though it attempts to downplay its significance. In particular, events confirm that MINEM officials faced unrelenting pressure to act against SMCV. Mr. Isasi's June 2006 Report was the culmination of a year and a half of political pressure and threats targeted at MINEM from both national and local politicians that sought to increase the revenues SMCV paid to the State for its operations at Cerro Verde. Further, in the lead up to SUNAT issuing its first Royalty Assessments, SUNAT and MEF also faced political pressure to act against SMCV. Peru's argument that there was no change in the Government's position is not credible in light of the evidence. The Parties agree that conduct is arbitrary if it is "not based on legal standards" but rather "on political calculations," or if it is "taken for reasons that are different from those put forward by the decision maker."[587]

c. Peru acted inconsistently and non-transparently with respect to its intentions regarding SMCV's Stability Agreement, including by withholding key documents setting forth the basis for the interpretation well after the investment in the Concentrator was complete: (i) Peruvian officials knew from the outset that SMCV understood that the Concentrator would be stabilized; (ii) even when certain MINEM officials began advancing the novel interpretation, the Government withheld information from SMCV; and (iii) the Government also solicited additional contributions clearly premised on the understanding that SMCV enjoyed stability for its entire mining unit.[588]

d. The Government's dealings with SMCV lacked transparency even though MINEM and other agencies had ample opportunities to share MINEM's novel position with SMCV, and while the Government induced SMCV to make further "voluntary"

[586] Claimant's Memorial, ¶¶ 367-371; Claimant's Reply, ¶ 136.

[587] Claimant's Reply, ¶ 137-143.

[588] Claimant's Memorial, ¶¶ 372-375.

payments of over US$365 million based on the premise that SMCV would not pay royalties or additional taxes. Peru's argument that SMCV "should have known" that the Government intended to deny stability guarantees to the Concentrator is irrelevant; what is relevant is whether Peru's conduct lived up to its FET obligation to be transparent. It is ludicrous for Peru to attempt to justify its non-disclosure of its new position during meetings by arguing that SMCV "should have known" because it could have watched two presentations on State TV that allegedly stated the Government's new position. MINEM officials kept the new position from SMCV as the Government sought to induce SMCV to pay hundreds of millions of dollars in "voluntary" contributions in the belief that the Concentrator was exempt from royalties. Peru does not contest that SMCV made millions of GEM payments following the Government's explicit confirmation that SMCV needed to make either GEM payments or royalties, but not both.[589]

598. On the basis of the foregoing, the Claimant submits that the Government's politically motivated *volte face* on the scope of stability guarantees, after SMCV decided to make the US$850 million investment in the Concentrator, and the Government's deliberate withholding of its novel and restrictive position from SMCV in order to extract additional hundreds of millions of dollars in "voluntary payments," constitute exactly the type of conduct that tribunals have confirmed violates the fair and equitable treatment obligation, which includes the obligation to be "transparent and consistent".[590]

599. The Claimant further submits that the Tax Tribunal committed serious due process violations, on the basis of, *inter alia*, the following:

a. The Tax Tribunal President, who was a long-time employee of the MEF (ministry for collecting taxes) and whose appointment is reconfirmed every three years, clearly intervened to resolve the challenges in favour of the Government. As the evidence establishes: (i) she instructed her own assistant to draft the resolution of the 2008 Royalty Case; (ii) the 2008 Royalty Case proceeded on a fast track to

[589] Claimant's Reply, ¶¶ 144-149.

[590] Claimant's Reply, ¶ 150.

ensure this decision was rendered first by Chamber No. 1; and (iii) the flawed resolution was then imposed on the *vocales* of Chamber No. 10 to resolve the 2006-2007 Royalty Case only nine days later.[591]

b. After refusing to recuse a conflicted decision-maker, the Tax Tribunal copied and pasted significant portions of the 2008 resolution in the 2009 and 2010-2011 Royalty Cases.[592] Peru does not contest the basic facts of its interference, but attempts to portray them as "normal, administrative activities": (i) Peru concedes that the Tax Tribunal assigned the 2010-2011 Royalty Case to *vocal* Víctor Mejía Ninacóndor, even though he had worked in the same SUNAT department that confirmed the 2010-2011 Royalty Assessments and made an entry of appearance for SUNAT before the Court of Appeals in the 2006-2007 Royalty Case; (ii) President Olano's draft resolution stated exactly how it expected the *vocales* to vote, despite the fact that the session had not yet met and the *vocales* had not yet voted; (iii) Peru does not contest that in the 2009 and 2010-2011 Royalty Cases, the Tax Tribunal copy-pasted significant parts of the flawed 2008 Royalty Case resolution, thus propagating the serious procedural defects of that resolution; and (iv) Peru does not contest that the Tax Tribunal's former assistant who drafted the 2008 Royalty Case resolution, Ms Villanueva, was promoted to *vocal* and assigned to act as the *vocal ponente* of the Q4 2011 Royalty Case.[593]

c. Peru concedes the Tax Tribunal President's interference in the 2006-2007 and 2008 Royalty Cases: (i) Peru concedes that Ms Villanueva, the Tax Tribunal President's assistant, drafted the resolution at the behest of President Olano, but asserted that this was a "routine administrative act"; (ii) Peru's assertion that President Olano's actions cannot be linked to the fact that the decision on the 2008 Royalty Assessment came before the decision on the 2006-2007 Royalty Assessment is

[591] Claimant's Memorial, ¶¶ 377-387.

[592] Claimant's Memorial, ¶¶ 388-392.

[593] Claimant's Reply, ¶¶ 157-161.

contradicted by the evidence; and (iii) Peru glosses over the fact that the Chamber No. 10 *vocales* clearly abdicated their duty to deliberate independently.[594]

600. The Claimant submits that the testimony at the Hearing confirmed the serious impropriety of the Respondent's conduct during the Tax Tribunal proceedings, and thus that the Respondent violated SMCV's due process rights:

a. The Hearing revealed that SMCV had no opportunity to be heard during SUNAT's various audit processes or its challenges before SUNAT's Claims Division. It was revealed that SMCV's requests for reconsideration of the Royalty and Tax Assessments before SUNAT's Claims Division were *fait accompli*. It was shown that SUNAT's due process violations were further exacerbated by the fact that it issued the June 2006 Internal Report outside the confines of normal administrative practice, depriving SMCV of its right to the procedural protections of audit or challenge proceedings. SUNAT's procedural irregularities in issuing the June 2006 Internal Report were also exacerbated by Ms. Bedoya's admission that SUNAT never took account of key documents that were necessary. Further, the same SUNAT officials who drafted the June 2006 Internal Report also audited and decided SMCV's requests for reconsideration in the 2006-2007 and 2008 Royalty Cases, which officials were blatantly conflicted.[595]

b. The Hearing confirmed the impropriety of President Olano's undue involvement in the Royalty Cases and also made clear that the contemporaneous evidentiary record is suspect and likely conceals the full extent of her interference.[596]

601. The Claimant therefore asserts that the Tax Tribunal and its President's repeated improper interference in the resolution of SMCV's challenges, the Tax Tribunal's repeated abdication of its duty to deliberate and resolve challenges independently, and its refusal to

[594] Claimant's Reply, ¶¶ 153-156.

[595] Claimant's PH Brief, ¶¶ 83-88.

[596] Claimant's PH Brief, ¶¶ 89-100.

recuse a blatantly conflicted decision-maker, all gave rise to serious due process violations and, accordingly, to breaches of Peru's obligation of fair and equitable treatment.[597]

b) Whether the Respondent violated its obligation to ensure FET each time it arbitrarily and unreasonably failed to waive the assessments of penalties and interest against SMCV

602. It is the Claimant's position that Peru violated its obligation to ensure FET each time it arbitrarily and unreasonably failed to waive the assessments of penalties and interest against SMCV. The Claimant also asserts that the assessments were disproportionate, as the penalties and interest amount to 112% of the overall assessments for royalties and new taxes.[598]

603. In support of its position, the Claimant relies on, *inter alia*, the following submissions:

a. The Claimant submits that Peruvian law recognizes that it is unfair and inequitable to charge penalties and interest when non-payment results from lack of clarity in the relevant rule. SMCV's non-payment arose from "reasonable doubt", rendering penalties and interest charges inapplicable. The court decisions and opinions in SMCV's favour demonstrate that there was, at a minimum, "reasonable doubt" as to the proper interpretation of the Mining Law and Regulations. SMCV's interpretation was grounded in the plain text of the Mining Law and Regulations, and was consistent with commercial logic and comparative industry practice. Further, in enacting the 2014 and 2019 amendments to the Mining Law and Regulations, the Government took the position that the prior versions of the provisions were ambiguous and imprecise. Furthermore, SMCV's interpretation was consistent with Government officials' conduct, both generally and towards SMCV.[599]

[597] Claimant's Reply, ¶ 162.

[598] Claimant's Memorial, ¶¶ 393-395; Claimant's Reply, ¶ 163.

[599] Claimant's Memorial, ¶¶ 396-401; Claimant's Reply, ¶ 167.

b. There was, at a minimum, objectively reasonable doubt as to the correct interpretation of Article 83 of the Mining Law and Article 22 of the Regulations: (i) because Government officials from MINEM, SUNAT and other Government authorities consistently took the position that the stability guarantees applied to entire concessions or mining units; (ii) because, even after the Government's *volte face*, Government entities and officials continued to take that position; (iii) because, when issuing the 2014 amendment of the Mining Law and 2019 amendment of the Regulations, Peru itself took the position that there was ambiguity in the original texts; and (iv) because (as Peru concedes): (a) a Contentious-Administrative Court adopted SMCV's position that the stability guarantees applied to the Concentrator; and (b) several Supreme Court and Appellate judges voted in SMCV's favour.[600]

c. In the 2006-2007 and 2008 Royalty Cases, the Tax Tribunal and Contentious Administrative Courts arbitrarily refused to consider the merits of SMCV's waiver request.[601] Further, the Tax Tribunal and SUNAT rejected SMCV's waiver requests for the 2009, 2010-2011, 4Q 2011, 2012 and 2013 Royalty Assessments and Tax Assessment on arbitrary and pretextual grounds.[602]

d. Peru's own conduct compounded the arbitrary, unreasonable, and inequitable nature of its failures to waive penalties and interest charges. Peru's extensive and undue delays led to a significant increase in the amounts of interest on both principal and penalties. The Government also arbitrarily applied the statutory interest rate of 14.4% instead of the much lower CPI rates for interest (around 2%) which Peruvian law requires when a challenge was pending before the Tax Tribunal for more than 12 months.[603] Peru acknowledges that the penalties and interest imposed on SMCV are "a significant portion of SMCV's total tax liability", and its application of the statutory interest rates lacks any support in law. Peru is wrong (and it is fundamentally unfair) to assert that SMCV lost its right to challenge

600 Claimant's Reply, ¶¶ 168-172.

601 Claimant's Memorial, ¶¶ 402-404.

602 Claimant's Memorial, ¶¶ 405-408.

603 Claimant's Memorial, ¶¶ 409-413.

SUNAT's decisions when it entered into deferral and instalment plans that terminated the collection procedures.[604]

e. Peru first sought arbitrarily to dismiss the waiver requests on spurious procedural grounds, and then when SUNAT and the Tax Tribunal considered the issue on the merits, the Government sought to avoid the waiver by refusing to issue a "clarification", despite being required to do so under its own laws. Peru tries to characterize its arbitrary and unlawful conduct as, at most, a mere misapplication of a provision of Peruvian law that, if proven, would not constitute a breach of FET.[605]

    i. The Government was required to issue a clarification but arbitrarily and unreasonably failed to do so: (a) Article 170 of the Tax Code provides that after the authorities determine that the relevant provisions are subject to reasonable doubt, the Government must issue the clarification but "may" fulfil that obligation through any of the means authorized by Article 179 of the Tax Code; (b) if the Government could simply withhold the clarification at will, it could arbitrarily deny taxpayers the right to a waiver of penalties and interest for reasonable doubt for no reason or for any reason; (c) even if the Government did have discretion (which it did not), the Government should have issued the clarification to waive SMCV's penalties and interest.[606]

    ii. The Government had the obligation to consider *sua sponte* SMCV's waiver but instead arbitrarily rejected SMCV's requests on spurious procedural grounds: (a) Peru's experts do not contest that Article 170 of the Tax Code is a "peremptory norm" that must be applied if its conditions are met, or that the provision does not require the taxpayer to request its application, and Peru is wrong to assert that this obligation only exists where the

[604] Claimant's Reply, ¶¶ 185-189.
[605] Claimant's Reply, ¶¶ 164-166.
[606] Claimant's Reply, ¶¶ 173-176.

Government has already issued a clarification; (b) there are several provisions establishing the Tax Tribunal's obligation to consider SMCV's waiver *sua sponte*, including Article 127 of the Tax Code; (c) Peru is wrong to state that the Contentious Administrative Court's failure to assess independently whether SMCV was entitled to a waiver was acceptable by arguing that it "is a routine, and well-founded, practice that appellate courts, generally, do not enlarge the scope of a case on appeal."[607]

iii. SUNAT and the Tax Tribunal rejected SMCV's waiver requests for the remaining assessments on arbitrary and pretextual grounds: (a) the decision is clearly wrong and easily disproven on the basis of the Tax Tribunal's own resolutions and SUNAT's own assessments against SMCV, all of which expressly relied on the Mining Law and Regulations; (b) SUNAT and the Tax Tribunal are required to issue a clarification when there is objectively reasonable doubt as to the underlying provisions, rendering Peru's conclusions that they could not issue a waiver because they did not issue a clarification entirely circular; (c) SMCV's evidence demonstrates objectively that the underlying provisions of the Mining Law and Regulations were at a minimum ambiguous, and not "irrelevant" as characterized by the Respondent.[608]

604. The Claimant further submits that testimony at the Hearing confirmed that the Respondent should have waived penalties and interest. According to the Claimant, as the Hearing made clear, the Respondent's inconsistent, arbitrary and politically motivated Royalty and Tax Assessments reflect, at the very least, objective reasonable doubt about the scope of stability guarantees under the Mining Law and Regulations.[609]

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607 Claimant's Reply, ¶¶ 177-180.

608 Claimant's Reply, ¶¶ 181-184.

609 Claimant's PH Brief, ¶¶ 101-103.

c) Whether the Respondent violated its obligations to ensure FET when it arbitrarily and unreasonably refused to reimburse SMCV's GEM overpayments

605. It is the Claimant's position that Peru violated its obligations to ensure FET when it arbitrarily and unreasonably refused to reimburse SMCV's GEM overpayments. The Claimant argues that SMCV's payments of the GEM contribution were clearly premised on the fact that, under the GEM program, SMCV was not obligated to make royalty or SMT payments because the Concentrator was stabilized, and that this was repeatedly confirmed by Government officials. The Claimant submits that Peru's refusal to reimburse SMCV in full for its GEM overpayments after it reaped a windfall from unfairly triple-charging GEM payments, royalties and SMT, and penalties and interest charges, was arbitrary and unsupported by Peruvian law.[610]

606. The Claimant submits that Peru wrongly asserts that SUNAT complied with Peruvian law when it denied SMCV's requests as untimely, and that enforcing a statute of limitations cannot give rise to a breach of FET. The Claimant's claims are not merely based on Peru "enforcing a statute of limitations", but also that Peru's failure to reimburse SMCV's GEM payments was arbitrary, grossly unfair, non-transparent and inequitable. The Claimant argues that Peru's arguments on the statute of limitations are incorrect, as under the Civil Code, the statute of limitations does not begin to run until the date the party became aware that the payment was unduly imposed – which in SMCV's case was not until 13 April 2016 at the earliest, which was the date when SMCV was notified of the 2010-2011 Royalty Assessments.[611]

607. The Claimant therefore submits that Peru's refusal to reimburse SMCV for the Q4 2011 to Q3 2012 GEM overpayments, notwithstanding its assurances that SMCV did not have to pay both GEM and Royalties and SMT, its inducement of SMCV to participate in the GEM program and its acknowledgement that SMCV was entitled to reimbursement, compounded by its continued reliance on a spurious interpretation of the statute of

610 Claimant's Memorial, ¶¶ 414-417.

611 Claimant's Reply, ¶¶ 190-196.

limitations under Peruvian law, was arbitrary, grossly unfair, non-transparent, and inequitable, and thus breached Peru's obligation to accord fair and equitable treatment.[612]

d) Whether the Respondent violated its obligation of FET by applying the non-stabilized regime to the Leaching Facility

608. It is the Claimant's position that Peru violated its obligation of FET by applying the non-stabilized regime to the Leaching Facility. In numerous Assessments, the Claimant alleges that Peru applied the non-stabilized regime to the entire SMCV Mining Unit, which included applying it to assets that were stabilized even under the Respondent's own novel and restrictive interpretation, in entire disregard of the Stability Agreement.[613]

609. The Claimant argues that Peru concedes that SUNAT applied the non-stabilized regime to the Leaching Facilities but attempts to place the blame for its conduct on SMCV, saying that SUNAT "did its best with the information that SMCV provided it" and that SMCV failed to keep separate accounting between its stabilized and non-stabilized projects. The Claimant asserts that this is incorrect for the following reasons: (i) SMCV was not required to keep separate accounts for the Leaching Facility; (ii) Peru's arguments for why SMCV should have distinguished between activities within its Concession relating to the Leaching Facility makes no sense; (iii) as SMCV provided SUNAT with all its accounting information, there was no failure to do so; (iv) SUNAT applied the non-stabilized regime indiscriminately and arbitrarily by presuming that certain assets and disbursements were related to the Concentrator, rather than proceeding on the basis of verifiable facts; and (v) SUNAT's inconsistent and haphazard application of the Stability Agreement in these tax assessments and its imposition of related penalties are just the type of arbitrary conduct that prior tribunals have concluded gives rise to a breach of a state's FET obligations.[614]

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612 Claimant's Reply, ¶ 197.

613 Claimant's Memorial, ¶ 418.

614 Claimant's Reply, ¶¶ 198-204.

ii. Whether the Respondent's arbitrary and unreasonable conduct also violated its obligation under Article 3.1 of the Treaty of non-impairment.

610. It is the Claimant's position that Peru's arbitrary and unreasonable conduct also violated its obligation of non-impairment. The Claimant argues that conduct which breaches the obligation of fair and equitable treatment will usually also breach the obligation of non-impairment because "measures found to be unfair or inequitable will usually also be unreasonable". The Claimant submits that the breaches of fair and equitable treatment were unreasonable and impaired the Claimant's operation, management, maintenance, use and enjoyment of its investment in SMCV, including its "right to profits and income" from the Concentrator.[615]

611. The Claimant notes that prior decisions from tribunals assessing both the fair and equitable and non-impairment obligations confirm that the non-impairment obligation may encompass state conduct not prohibited under the FET obligation. The Claimant argues that the non-impairment obligation also requires a demonstration that the unreasonable conduct impaired the Claimant's "use" and "enjoyment" of its investment, and Peru does not dispute that the Claimant suffered damages for each of the claims.[616]

b. Respondent's Position

612. It is the Respondent's position that it has not breached its obligations under Article 3.1 of the Treaty with respect to the fair and equitable treatment obligation. The Respondent denies that any of the measures relied upon by the Claimant in support of this claim constitutes a breach of Article 3.1.[617]

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615 Claimant's Memorial, ¶¶ 419-421.

616 Claimant's Reply, ¶¶ 205-209.

617 Respondent's Counter-Memorial, ¶¶ 521 *et seq.*; Respondent's Rejoinder, ¶¶ 720 *et seq*.

i. Whether the Respondent violated its obligations under Article 3.1 of the Treaty to ensure FET to the Claimant's investment and not to impair the Claimant's use and enjoyment of its investment

613. To prove a breach of the fair and equitable treatment provision, the Respondent asserts that the Claimant must establish that the Respondent's treatment of SMCV fell "far below international standards", proving not just general unfairness, but conduct that is "grossly unfair", a "complete lack of transparency and candor", or a flat "lack of due process" that results in a "manifest failure of […] justice".[618] The Respondent makes, *inter alia*, the following submissions on the specific standards for the concepts relevant to an assessment of fair and equitable treatment:

a. *Arbitrariness*: to prove that putatively arbitrary measures harmed the Claimant's investment, the Claimant must prove at a minimum that the measures it identifies did not serve "any apparent legitimate purpose", were "not based on legal standards," were "taken for reasons that are different from those put forward by the decision maker," or were "taken in willful disregard of due process." This provides a high bar to prove that the measures were truly "arbitrary". It is clear that State action based on political considerations alone is not inherently improper.[619]

b. *Inconsistency and non-transparency*: alleged inconsistencies or even disagreements among, or within, State agencies, without something more, cannot be grounds to find a breach of the FET obligation. Rather than starting from a premise that mere inconsistency could be a breach of the FET standard, a more appropriate test is to examine whether the claimed inconsistencies breach other accepted tenets of the FET standard. For example, the question would be whether the putative inconsistency is sufficiently egregious that it may be considered arbitrary, in bad faith, or a contravention of legitimate investment-based expectations. The Respondent does not disagree that the Tribunal can consider the Claimant's fair and equitable treatment holistically, but the fact that consistency

618 Respondent's Counter-Memorial, ¶¶ 524-527; Respondent's Rejoinder, ¶¶ 724-728.

619 Respondent's Counter-Memorial, ¶¶ 528-536; Respondent's Rejoinder, ¶¶ 729-733.

and transparency are not distinct elements is relevant, because it underscores the argument that mere inconsistency and/or some lack of transparency, on their own, do not breach a fair and equitable treatment provision.[620]

c. *Denial of justice*: the Claimant bears a heavy burden, as a denial of justice does not arise where a court makes a mistake, but where a State fails to create and maintain a system of justice that ensures that foreign investors do not face injustice and are not deprived of the right to correct an injustice. It is the lack of due process, not a disagreement with the substance of a court decision, that would constitute a denial of justice under international law. Allegations of due process violations are often treated essentially the same, and evaluated under the same standards, as procedural denial of justice claims. While the Claimant appears to disagree with the Respondent's characterisation of the claim of denial of justice, the Claimant does not appear to contest the actual standard the Tribunal must apply.[621]

a) Whether the Respondent violated its obligation to ensure FET each time the Royalty and Tax Assessments became final and enforceable

614. The Respondent denies that it breached its fair and equitable treatment obligations by imposing the Royalties and Tax Assessments on SMCV on the basis of, *inter alia*, the following grounds:

a. The Respondent did not act in an arbitrary manner in interpreting the scope of the Stabilisation Agreement. In order to succeed on this claim, the Claimant would have to prove that the Respondent's alleged change in interpretation (which the evidence shows did not happen) was: (i) "not based on legal standards" but, instead, (ii) was based "on excess of discretion, prejudice or personal preference", which the Claimant cannot demonstrate. With respect to the Isasi April 2005 Report, it was not written to redefine the scope of stability agreements, but rather to confirm MINEM's position that the new Royalty Law did not apply where a stability

620 Respondent's Counter-Memorial, ¶¶ 537-541; Respondent's Rejoinder, ¶¶ 734-740.

621 Respondent's Counter-Memorial, ¶¶ 542-548; Respondent's Rejoinder, ¶¶ 741-749.

agreement was in place. Further, in June 2005, there was a publicly televised presentation before the Energy and Mines Congressional Committee, in which it was explained that mining companies would be subject to paying royalties with respect to their investment projects that were not part of a mining stabilisation agreement. Further, the minutes from a September 2004 meeting between Phelps Dodge and SMM regarding the latter's investment noted that MINEM "did not agree to the application of the [Stabilisation Agreement] to the sulfide project". The Claimant has failed to prove that the Respondent changed its interpretation of the scope of the stability guarantees at all, let alone that it performed a *volte face* due to political pressure.[622]

b. The Respondent did not act inconsistently or non-transparently with respect to whether it would impose royalties on the Concentrator's products. The Claimant's assertions that Peruvian officials knew that SMCV understood that the Concentrator would be stabilized are not made out, and the Respondent did not withhold information about any "*volte face*" until 2008. The Claimant's allegation that contributions to GEM were premised on the understanding that SMCV enjoyed stability for its entire mining unit has no basis.[623]

c. The Tax Tribunal did not commit due process violations. The Claimant's allegations that the Tax Tribunal violated SMCV's due process rights rest entirely on unsubstantiated conspiracy theories. It should be noted that the Tax Tribunal is part of the executive branch and falls within the administration of law, not the judiciary. SMCV had the opportunity to appeal any and all decisions of the Tax Tribunal, which it did. Further, even if the Claimant's speculations were true, this would still be insufficient to meet the high standard of denial of justice at the administrative level – there were no procedural irregularities with respect to the

[622] Respondent's Counter-Memorial, ¶¶ 549-560; Respondent's Rejoinder, ¶¶ 750-758.

[623] Respondent's Counter-Memorial, ¶¶ 561-571.

2008 and 2006-2007 Royalty Assessment Cases or with respect to the 2009 and 2010-2011 Royalty Assessment Cases.[624]

615. The Respondent submits that testimony at the Hearing confirmed that all relevant Peruvian authorities—including SUNAT, MINEM and MEF—were consistent and transparent in their interpretation of the Stability Agreement.[625] The Respondent further submits that the Claimant failed to prove its conspiracy theory that the Respondent allegedly changed its interpretation regarding the scope of the Stability Agreement "for political reasons", as these claims are not supported by the documentary record nor by witness testimony.[626]

b) Whether the Respondent violated its obligation to ensure FET each time it arbitrarily and unreasonably failed to waive the assessments of penalties and interest against SMCV

616. The Respondent argues that it did not breach its FET obligations by failing to waive the assessment of penalties and interest against SMCV. For certain of the cases, SMCV failed timely to raise the issue of penalties and interest, and it was not arbitrary or unreasonable for the courts to reject those. With respect to the Claimant's arguments on "reasonable doubt", the Respondent states that this applies in two specific, codified situations (*i.e.* when there is an interpretation of a norm that has been changed as a result of a formal ruling that the prior interpretation was incorrect, and when SUNAT has inconsistently applied a rule over the course of time). The Respondent submits that "reasonable doubt" under Article 170 did not apply to SMCV's failure to pay its obligations, and the Tax Tribunal and the Contentious Administrative Courts did not arbitrarily refuse to consider the merits of SMCV's waiver requests in the 2006-2007 and 2008 Royalty Assessment Cases. The Tax Tribunal and SUNAT acted reasonably and consistently with Peruvian law in rejecting SMCV's waiver requests for penalties and interest on the 2009, 2010-20011, Q4 2011,

624 Respondent's Counter-Memorial, ¶¶ 572-595; Respondent's PH Brief, ¶¶ 169-184.

625 Respondent's PH Brief, ¶¶ 144-167.

626 Respondent's PH Brief, ¶¶ 146-148.

2012 and 2013 Royalty Assessments. The Respondent therefore asserts that it is SMCV who is responsible for the amount of interest and penalties, not Peru.[627]

c) Whether the Respondent violated its obligations to ensure FET when it arbitrarily and unreasonably refused to reimburse SMCV's GEM overpayments

617. The Respondent denies that it breached its FET obligations by refusing to refund certain of SMCV's GEM payments. The Respondent submits that the Claimant's assertion that SMCV had agreed to pay the highest amount of GEM on the understanding that it was not obliged to pay royalties is both wrong and irrelevant to the handling of GEM's refund requests. In respect of the period Q4 2011 to Q3 2012, while it may be that the Peruvian Treasury retained both the GEM payments and the Royalty Assessments, the Respondent argues that this is only because SMCV sat on its rights. The Respondent states that the statute of limitations begins running on the first January 1 after the date of the over-payment, and the Tribunal cannot find that the Respondent acted arbitrarily in violation of its FET obligations by following Peruvian law and applying the statute of limitations.[628]

d) Whether the Respondent violated its obligation of FET by applying the non-stabilized regime to the Leaching Facility

618. The Respondent denies that it breached its FET obligations by applying the non-stabilized regime to the Leaching Facility. The Respondent asserts that SUNAT did the best with the information provided, and any harm suffered by SMCV was due to SMCV's own failure to maintain and provide SUNAT with the necessary information to distinguish between activities.[629]

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627 Respondent's Counter-Memorial, ¶¶ 596-623.

628 Respondent's Counter-Memorial, ¶¶ 624-639.

629 Respondent's Counter-Memorial, ¶¶ 640-649.

ii. Whether the Respondent's arbitrary and unreasonable conduct also violated its obligation of non-impairment under Article 3.1 of the Treaty.

619. The Respondent denies that it violated its obligation of non-impairment under Article 3.1 of the Treaty. The Respondent submits that the non-impairment analysis generally involves two parts: (i) the first part focuses on the measures themselves and whether they are either unreasonable or discriminatory; (ii) if they are found to be so, then an impairment must be shown. The Respondent argues that the standard of "reasonableness" has no different meaning in this context than in the context of the "fair and equitable treatment" standard with which it is associated; actions that do not violate the FET obligation will not violate the non-impairment obligation.[630]

3. The Tribunal's Analysis on the Claim for Breach of the FET Standard

a. The International Obligations Arising from Article 3.1 of the Treaty

620. Article 3.1 of the Treaty provides as follows:

> "*[1] Each Contracting Party shall ensure fair and equitable treatment to the investments of nationals of the other Contracting Party and [2] shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals.*"

621. As noted, the Tribunal will address in this section the Claimant's claims for breach of the fair and equitable treatment standard (the **"FET Standard"**), which is contained in the first sentence [1] of Article 3.1. The Claimant's claims for breach of the non-impairment standard, which is set forth in the second sentence [2] of Article 3.1, will be addressed in the next section.

622. As an initial point, the Tribunal notes that there is no reference in this article to "fair and equitable treatment pursuant to the minimum standard under customary international law",

[630] Respondent's Counter-Memorial, ¶¶ 650-653; Respondent's Rejoinder, ¶¶ 827-829.

in contrast with the corresponding provision considered by the *Freeport* Tribunal. The Tribunal agrees with other tribunals which have considered the proper construction of "fair and equitable treatment", consistently interpreting it as more protective than the minimum standard under customary international law or at any rate not subject to the constraints or thresholds associated with that standard.

623. It is also of relevance that in the recitals detailing the purpose and object of the Treaty, the Contracting Parties emphasise that "fair and equitable treatment of investment is desirable". The Tribunal finds this emphasis on the desirability of fair and equitable treatment to be significant. Had the Contracting Parties intended to impose any particular understanding of "fair and equitable treatment" or any special meaning or limitation on the ordinary meaning of these words, they could have inserted appropriate wording to any such effect, as did the drafters of the US-Peru TPA. The fact they did not and the emphasis in the preamble to the Treaty on fair and equitable treatment indicate to the Tribunal that the Contracting Parties intended to ensure fair and equitable treatment in the ordinary sense of these words and without any special meaning or restriction.

624. The Tribunal therefore does not find cases cited which were determined pursuant to the minimum standard under customary international law to be of assistance.

625. There is little guidance as to the meaning of "fair and equitable" in the text of Article 3.1. Again, the analysis must start with Article 31(1) of the VCLT, which provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[631]

626. The words "fair" and "equitable" are in common use and their ordinary meaning is widely understood. The Claimant refers to considerations such as "arbitrary", "inconsistent", "non-transparent conduct", and "conduct that violates due process" and the Respondent refers to considerations such as "conduct that is unjust or arbitrary rising to a level that is unacceptable from an international perspective".[632]

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631 Respondent's Counter-Memorial, ¶ 410.

632 Respondent's Counter-Memorial, ¶ 524, citing *S.D. Myers, Inc. v. Government of Canada* (**RA-18**), ¶ 263.

627. Many tribunals have sought to describe what these words encompass or to detail a standard against which they can be assessed. However, as stated by the tribunal in *RWE Innogy v. Spain* "[…] reference to dictionary definitions scarcely helps [the tribunal] in interpreting the formula 'fair and equitable'. The terms '*fair*' and '*equitable*' are not in any event particularly difficult to understand as a matter of ordinary meaning: the difficulty, as is very well known, is how and where to draw the line between what is fair / unfair, equitable / inequitable, in particular in the context of a State's adoption of regulations of general application."[633]

628. The Tribunal finds that the ordinary meaning of "fair and equitable" encompasses concepts of justness, predictability, stability, legality, transparency, reasonableness, impartiality, consistency and protection of legitimate expectations. As jurisprudence has developed over time, the Tribunal finds it is now generally accepted that the considerations at the heart of the FET concept are the respect for an investor's legitimate expectations, the obligation not to act in an arbitrary, inconsistent or discriminatory manner, and the respect for transparency.[634] Other balancing considerations pertain to the State's concerns, such as regulating to protect the public interest.

629. The Tribunal does not find in the text of Article 3.1 any suggestion that to be in breach of Article 3.1, the conduct complained of needs to rise to a level that it is "unacceptable from an international perspective". The test is simply whether the conduct is unfair or inequitable considered in the light of all the relevant circumstances, including in particular the considerations set out above. As those considerations are framed in terms of well understood concepts, the Tribunal does not find it of assistance to seek to define with any more precision the standard of FET in Article 3.1.

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633 *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability, and Certain Issues of Quantum (30 December 2019) ("***RWE Innogy v. Spain* Decision on Jurisdiction, Liability, and Certain Issues of Quantum**"), ¶ 440 (**RA-34**).

634 Some examples include: *Air Canada v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/17/1 (not on the record but publicly available), Award (13 September 2021); *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award (29 July 2008) (**CA-237**); *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award (28 March 2011) (**CA-174**).

630. Finally, in undertaking its analysis of the Claimant's FET claim, the Tribunal notes that the Claimant has not made any submissions that the Respondent breached its legitimate expectations. Whilst the protection of legitimate expectations is typically at the heart of any consideration into whether there has been a breach of a state's FET obligations, the Claimant's submissions focus on the asserted arbitrariness of the Respondent's change in construction of the Stabilisation Agreement, its lack of transparency, and its breach of due process and lack of procedural fairness.

631. It is common ground that to ascertain whether there has been a breach of the FET obligation, it is necessary to consider the measures contended to comprise the breach holistically. A measure that may appear to be fair and equitable in certain circumstances may not be fair and equitable in others and it is therefore necessary to consider whether, or not, Peru's conduct is in breach of its FET obligation in the context of all the circumstances of the case.

b. Analysis of the Claimant's claims under Article 3.1 of the Treaty

632. Whilst the Tribunal (by majority) has construed the Stability Agreement in such a way that it only stabilizes the investment described in the Feasibility Study, that construction does not preclude a breach of Article 3.1.

633. It follows, though, that any breach of the FET standard of Article 3.1 cannot be predicated solely on the fact that the Respondent applied the Stability Agreement as the Tribunal (by majority) has construed it.

634. The Tribunal will now separately address the various forms of conduct that the Claimant contends breached the FET standard and will analyse the relevant considerations in respect of each.

i. Did Peru arbitrarily change its position on the scope of the stability guarantee contained in the Stability Agreement?

635. The Claimant says that the Respondent changed its treatment of stability agreements, adopting a "novel and restrictive interpretation of [their] scope" as a result of "unrelenting

political pressure to extract additional revenue from SMCV" and the mining sector in general. The Claimant further says that the Respondent deliberately withheld this new interpretation from SMCV, thereby inducing SMCV to pay an additional US$365 million by way of voluntary contributions.[635]

636. There is evidence on the record showing that certain politicians, for example Congressman Díez Canseco, did put significant pressure on the Government to charge royalties with regard to the Concentrator. However, it is less clear (i) whether the Government *in fact* changed its position with regard to the scope of stability agreements and, if it did, (ii) whether it did so because it succumbed to political pressure. The Tribunal considers it important to address the issue of political pressure at the outset. It is clear from the evidence that political pressure was brought to bear on Government officials and that it was forceful. That is not unusual in a democracy. But the efforts of politicians and others to persuade the Government to change its course are not at issue in this case, as no suggestion has been made that such efforts were wrongful or attributable to the State. The question in this case concerns the Government's response to such pressure: did the Respondent change its course as a result? This question begs a logically prior one: at the time SMCV was taking the decision to build the Concentrator, was it Peru's position that once a qualifying investment was made, then the entire EAU or concession was stabilized, or had it always been its position that only the qualifying investment was stabilized?

637. The Claimant asserts that, before the investment in the Concentrator was concluded, the Respondent had made clear, by its words and actions, that stability agreements stabilized the concession or EAU in which the investment was made, as opposed only to stabilizing the qualifying investment. To support that assertion, the Claimant adduces certain evidence, which the Tribunal turns to analyze.

[635] Claimant's PH Brief, ¶ 66.

Explicit confirmation

638. The Claimant first asserts that Peru explicitly confirmed to SMCV before it commenced construction of the Concentrator that the Concentrator would be stabilized.[636]

639. As detailed in paragraphs 320.d.i and 431 above, whilst it is correct that Ms Chappuis testified that she did provide such oral assurance to SMCV, it appears that Ms Chappuis' understanding of the scope of the Stability Agreement was not shared by the then Vice Minister of Mines, Mr Polo, to whom she reported. In the light of the inconsistent positions of these officials and in the absence of any written documentation supporting Ms Chappuis' oral assurance to SMCV, the Tribunal is unable to reach a determination that Ms Chappuis' oral assurance was attributable to the Respondent, such that it was the Respondent that explicitly confirmed to the Claimant that, if constructed, the Concentrator would be stabilized. As the Claimant has not framed its case in terms of legitimate expectations, it is unnecessary for the Tribunal to reach the questions whether SMCV reasonably relied on Ms Chappuis' statements and whether any expectations so generated were objectively reasonable.

ii. Did Peru by its words and actions represent to SMCV that the Concentrator would be stabilized?

640. The Tribunal next considers whether, before the Concentrator was built, the Respondent clearly represented by its words and/or actions that a stability agreement stabilized a concession, EAU or mining unit as opposed only to the project described in the Feasibility Study.

The reinvestment of profits pursuant to Article 72(b) of the Mining Law

641. The Claimant contends that the Respondent's grant of SMCV's application under Article 72(b) of the Mining Law to reinvest undistributed profits in building the Concentrator amounted to (i) the Respondent's actual agreement to the stabilisation of the Concentrator

[636] Claimant's PH Brief, ¶ 55.

or, alternatively, (ii) an acknowledgement by the Respondent that the Concentrator was stabilized. The Tribunal does not accept this submission.

642. Article 72(b) of the Mining Law provides as follows: "b) In order to grant mining activity the necessary international competitiveness, taxes apply only to the income distributed by mining activity titleholders. For this purpose, when distributing dividends, the mining activity titleholder shall pay the corresponding Income Tax, calculated on the amount to be distributed, without prejudice to the tax on dividends owed by the shareholders."[637]

643. The article does not expressly provide that if undistributed profits are invested in a project, the new project is entitled to stability. Indeed, there is no reference in this article to stabilisation, and the Tribunal does not accept that it implicitly provides that if undistributed income is invested in a new project, such new project will be stabilized. All Article 72(b) provides is that only distributed income will be taxed at the mining company level, without prejudice to the tax on the recipients of such distributed income. It prohibited the taxation of undistributed profits.

644. Although this provision was repealed in 2001, SMCV benefited from the stabilisation of the legal framework under the Stability Agreement, which it had entered into before that repeal. The object of the application was to invest undistributed profits from the (stabilized) Leaching Project into the construction of the Concentrator. Whilst this use of the undistributed profits was not barred by Article 72(b), nothing in that provision indicated that a grant of such use would confirm that the Concentrator would be stabilized. In the circumstances, the Tribunal need not find why the application was authorized. Most likely, it was authorized because it was not prohibited and the Concentrator would be economically beneficial to the Arequipa region and to the State.

645. Further, there is no reference to SMCV seeking the stabilisation of the Concentrator (or confirmation of any such stabilisation) in any of (i) the application itself,[638] (ii) Mr Tovar's

[637] Mining Law, Article 72(b) (**CA-1**).

[638] SMCV, Petition No. 1488199 to MINEM (3 September 2004) (**CE-462**).

report on the application,[639] or (iii) the DGM's authorisation for the reinvestment of undistributed profit into the Concentrator. The application was supported by an "Investment Program" and a GMB Report. As is made clear in the MINEM report,[640] the objective of the Investment Program was "aimed at expanding Cerro Verde's current operations, for which investments will be made in the 'Primary Sulfides Project' to build a primary sulfide concentrator plant to process an additional amount beyond the current installed and operational capacity of 108,000 MT/day of primary sulfides, which translates into an increase in capacity from 39,000 metric tons to 147,000 metric tons of copper."[641] The Investment Program therefore identifies the work to be undertaken and the cost to build the Concentrator. There is no reference to SMCV also seeking confirmation that the Concentrator would be stabilized.

646. MINEM refers in its report to the Stability Agreement, stating that one of its benefits is the right to reinvest profits pursuant to Article 72(b) of the Mining Law. However, whilst MINEM refers to the economic benefits generated by the Concentrator (such as the increase in labor requirements which will benefit the local population), there is no reference in this report (in contrast with the MEF report, discussed below) to any loss of tax income that would be suffered as a result of the Concentrator being stabilized. Indeed, there is no reference to the scope of the Stability Agreement other than to the benefit given under Article 72(b) of the Mining Law.

647. The companion MEF report[642] refers expressly to the 1998 Stability Agreement between Peru and SMCV, but only in the context of explaining that the benefit of reinvestment of profits continues to apply to this agreement because it was entered into before the enactment of Law No. 27343, which amended Article 72(b) of the Mining Law to abolish that benefit.[643] The MEF report goes on to point out that one consequence of approval of the reinvestment of profits would be the loss of income-tax revenue resulting from the non-

639 MINEM, Report No. 784-2004-MEM-DGM/PDM and Directorial Order No. 1027-2004-MEM-DGM/PDM (26 October 2004) (**CE-476**).

640 MINEM, Report No. 841-2004-MEM/DGM/PDM (30 November 2004) (**CE-479**).

641 MINEM, Report No. 841-2004-MEM/DGM/PDM (30 November 2004), p. 4 (**CE-479**).

642 MEF, Report No. 209-2004-EF/66.01 (3 December 2004) (**CE-22**).

643 MEF, Report No. 209-2004-EF/66.01 (3 December 2004), ¶ 9 (**CE-22**).

distribution of the reinvested profits, in comparison with the income tax that would be payable if those profits were distributed.[644] There is no reference in the MEF report to the Concentrator being included or not included in the scope of the Stability Agreement.

648. The Tribunal concludes that the MINEM report and the MEF report, together with the ensuing decision of Minister Mejía,[645] constitute only the Government's approval of the construction of the Concentrator with financing from the reinvestment of profits from the Leaching Project. While these documents acknowledge that the benefits conferred by the Stability Agreement continue to permit the reinvestment of undistributed profits, nothing in these documents indicates that the project to be financed by such reinvestment would or would not be included within the scope of the stabilisation.

The expansion of the Beneficiation Concession

649. As detailed in paragraph 558 above, a majority of the Tribunal has also found that the agreement to expand the Beneficiation Concession did not constitute express or explicit confirmation that the Concentrator would be stabilized. In the context of the Article 3.1 claim, the Tribunal finds there is insufficient evidence on the record to support the Claimant's submission that the authorisation it received to expand the Beneficiation Concession gave rise to any investment backed legitimate expectation that the expansion of the Beneficiation Concession to include the Concentrator would automatically stabilise the Concentrator.

iii. What is the evidence as to the Respondent's understanding of the scope of stabilisation agreements?

650. In considering what the Respondent's approach to the scope of stability agreements was at the time the Concentrator was built and whether the Respondent subsequently changed its position, the Tribunal considers the Respondent's own understanding, both internally

644 Id.

645 Ministry of Energy and Mines, Ministerial Resolution No. 510-2004-MEM/DM (9 December 2004) (CE-23).

within MEF, MINEM and SUNAT and as communicated more widely with regard to the scope of stability agreements.

Professor Otto

651. The Claimant relies on the testimony of Professor Otto, who expressed the view that the Respondent understood stability to apply to an entire concession or EAU. The Respondent submits that Professor Otto's evidence is "unreliable" and "unsubstantiated" because he accepted that his understanding was based on his analysis of the applicable regimes in countries that competed with Peru, not on Peru's own mining law and policies.[646] In view of such acceptance by Professor Otto, the Tribunal does not find his testimony to be of assistance in determining Peru's understanding of the scope of stabilisation agreements.

SUNAT Report of 23 September 2002

652. SUNAT's report of 23 September 2002 was a public document. The Claimant relies on the following statement in the report which says, in reference to Article 2 of the Mining Regulations, that stability "shall only be effective for those concessions *or units* that are supported [...] by the agreement."[647] To the contrary, the Respondent says that this report concludes "Tax Stability [Agreements] [...] only stabilize the applicable tax regime with respect to the investment activities that are the subject matter of the agreements, for their execution in a determined concession or an administrative economic unit."[648]

653. The Parties' disagreement results from their reliance on different parts of this Report. Before analyzing the document, it is important to note that the question addressed in the Report is whether, for the purposes of the contribution to the National Housing Fund (FONAVI), a Tax Stability Contract can be applied (i) to only one of the plants of the beneficiary company and (ii) for the purpose of determining the tax, only to the group of workers who might be working in that plant.[649] In other words, the analysis was undertaken

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646 Respondent's Reply PH Brief, ¶ 77; Tr. Day 7, 1924:10-1925:5

647 SUNAT, Report No. 263-2002-SUNAT/K00000 (23 September 2022), ¶ 2 (**RE-26**) (emphasis by the Tribunal).

648 Respondent's Reply PH Brief, ¶ 100; SUNAT, Report No. 263-2002-SUNAT/K00000 (23 September 2022), Conclusions, ¶ 1 (**RE-26**).

649 SUNAT, Report No. 263-2002-SUNAT/K00000 (23 September 2022), Subject Matter (**RE-26**).

with regard to the application of a specific tax to a mining company with a stabilisation agreement; it was not prepared for the purposes of ascertaining generally the scope of a stability agreement. It is also fair to say that, as is the case with the relevant provisions of the Mining Law and Regulations, this report is not drafted with the greatest clarity.

654. In reaching its conclusion, SUNAT summarises the relevant statutory provisions. It is correct that SUNAT, when referring to Article 2(d) of the Mining Regulations states as follows (in numbered paragraph 2):

> "*2. […] Likewise, [Article 2(d) of the Mining Regulations] indicates that when the individual or legal entity is the mining titleholder of several concessions or Administrative Economic Units, the qualification* ***shall only be effective for those concessions or units that are supported, among others, by the agreement*** *referred to by said Article*." [emphasis in the original.]

655. This sentence, read on its own, goes beyond a mere recitation of the provisions of Article 2(d) and would tend to indicate that SUNAT was of the understanding that stabilisation applied to the entire concession or unit.

656. The Report then continues by considering the following provisions: (i) the second paragraph of Article 79 of the Mining Law; (ii) the fourth paragraph of Article 83 of the Mining Law; and (iii) Article 22 of the Mining Regulations. Paragraph 3 of the report provides that, according to the second paragraph of Article 79 and the fourth paragraph of Article 83 of the Mining Law, the effect of the contractual benefit shall extend exclusively to the *activities* of the mining enterprise to whose benefit the investment shall be made.[650] Paragraph 4 of the report states that Article 22 of the Regulations provides that the contractual guarantees shall benefit the mining title-holder exclusively for the *investments* it shall make in the concessions or Economic-Administrative Units.[651]

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650 SUNAT, Report No. 263-2002-SUNAT/K00000 (23 September 2022), ¶ 3 (**RE-26**).

651 SUNAT, Report No. 263-2002-SUNAT/K00000 (23 September 2022), ¶ 4 (**RE-26**).

657. Paragraph 5 of the report draws the following consequence from the provisions it discussed in the preceding paragraphs. The original Spanish text reads as follows:

> "*5. Como puede apreciarse de las normas glosadas, los beneficios conferidos mediante los Contratos de Estabilidad Tributaria suscritos al amparo del Título Noveno del TUO de la Ley General de Minería recaen en el titular de la actividad minera y, si bien estabilizan temporalmente el régimen tributario vigente a la fecha de aprobación del programa de inversión, dichos beneficios sólo deben aplicarse a las actividades vinculadas a la inversión desarrollada en determinada concesión o Unidad Económica Administrativa, que hayan sido objeto del respectivo contrato.*
>
> *En tal sentido, en caso que el contribuyente desarrolle otras actividades, éstas se encontrarán sujetas a tributación según evolucione el ordenamiento fiscal común – salvo que también gocen de estabilidad – y tributarán simultáneamente con las actividades respecto de las cuales exista estabilidad, mientras ésta mantenga su vigencia.*"[652]

658. The translation of paragraph 5 made available to the Tribunal is not completely accurate. With the necessary clarifications between brackets, it is as follows:

> "*5. As can be seen in the above-mentioned provisions, the benefits granted through the Tax Stability Contracts entered into pursuant to Title Nine of the [Mining Law] apply to the mining title holders and, even though they temporarily stabilized the tax regime in effect as of the date of approval of the investment program, said benefits ~~must~~ [shall] only apply to the activities ~~involved in~~ [linked to] the investment [developed] in [the given] concession or administrative economic unit, that [shall have been] the subject matter of the respective agreement.*
>
> *In such regard, if the taxpayer [develops] other activities, [said activities] shall be subject to taxation in accordance with ~~new developments in~~ [the*

[652] SUNAT, Report No. 263-2002-SUNAT/K00000 (23 September 2022), ¶ 5 (**RE-26**).

> *evolution of the tax provisions in place] [–] unless said activities also have their own stability benefit [–], ~~in which case they~~ [and] will be taxed simultaneously with the activities for which stability exists, [as long as] said stability remains in effect*." [Tribunal emphasis]

659. The relative clause "*que hayan sido objeto del respectivo contrato*" (that shall have been the subject matter of the respective contract) cannot refer to the "investment", as the translation has it, because the verb is in the plural. The most natural reading of the Spanish text is that "*que hayan sido objeto del respectivo contrato*" (that shall have been the subject matter of the respective contract) refers to "*actividades*" or, more precisely, to "*las actividades vinculadas a la inversión desarrollada en determinada concesión o Unidad Económica Administrativa"* (the activities linked to ('vinculadas a') the investment developed in the given concession or Economic Administrative Unit)". However, there is an ambiguity in this text. The requirement is for the activities (plural) to be linked to the investment (singular). This could mean either that only those activities undertaken with regard to the initial investment are stabilized or that any other investment carried out in the concession or EAU referred to in the stabilisation contract is also stabilized.

660. Paragraph 6 of the Report notes that the preceding interpretation is corroborated by Article 25 of the Regulations, which provides that in the case of expansion of facilities or new investments entitled to the stability benefit, the mining title-holder shall maintain available to the tax authority the annexes showing the application of the tax regime to such expansions or new investments.[653] This paragraph indicates SUNAT's understanding that the stabilized tax regime can be extended to expanded facilities and new investments, in which case the mining title-holder is required to maintain the appropriate documentation and make it available to the tax authority.

661. In its conclusions, SUNAT then states as follows:

> Original: "*1. Los Contratos de Estabilidad Tributaria suscritos al amparo del Título Noveno del TUO de la Ley General de Minería estabilizan*

[653] SUNAT, Report No. 263-2002-SUNAT/K00000 (23 September 2002), ¶ 6 (**RE-26**).

únicamente el régimen tributario aplicable respecto de las actividades de inversión que son materia de los contratos, para su ejecución en determinada concesión o Unidad Económica Administrativa."[654]

Translation: "*1. Tax Stability Contracts entered into pursuant to Title Nine of the TUO of the [Mining Law] only stabilize the applicable tax regime with respect to the investment activities that are the subject matter of the agreements, [to be carried out in a given concession or Economic Administrative Unit]*." [Tribunal emphasis]

662. The SUNAT report is not well drafted. Whilst paragraph 2 links stability to the concessions or EAUs covered by the agreement, paragraph 5 is ambiguous, and the reference in paragraph 1 of the conclusions to "investment activities" which are "the subject matter of the agreements" suggest the opposite construction. Taking into account the SUNAT Report as a whole, the Tribunal is unable to reach a determination as to SUNAT's understanding as at the date of this Report (23 September 2002).

663. The Tribunal notes Ms Bedoya's testimony that at the time this Report was prepared, SUNAT's understanding was that only a project or investment would be stabilized.[655] However, at the time this Report was prepared, Ms Bedoya was not employed by SUNAT; she only commenced working for SUNAT (initially as an Adjudicating Auditor in the Claims Division of the Arequipa Regional Intendency of SUNAT) in 2006. Therefore, Ms Bedoya cannot provide direct testimony as to the contemporaneous understanding of SUNAT in 2002. Given the oral testimony of Mr Cruz (see below) and the comments made by the head of SUNAT to the Congressional Committee (see below), it seems unlikely that Ms. Bedoya's testimony is correct, although it may reflect her personal view. In any event, any internal view developed by SUNAT and not reflected in public statements would have been unknown to a third party and hence could not have affected its understanding of the correct application of the Mining Law and Regulations.

654 SUNAT, Report No. 263-2002-SUNAT/K00000 (23 September 2002), Conclusions, ¶ 1 (**RE-26**).

655 Bedoya 2, ¶ 26.

MINEM Report dated September 2003

664. The Respondent also refers to a report issued by MINEM dated 8 September 2003, in which MINEM stated "the application of the Stabilized Regime [was] granted to the Cerro Verde Leaching Project and not to the company and the Regime is the one described in the aforementioned agreement."[656] The Respondent says that this is clearly consistent with its current position. Although the Report does distinguish between the Leaching Project and the "Project of Exploitation of Primary Sulfides" (being the Flotation Project) for which the Concentrator was developed, and contains no reference to the concession, it begs the question of what MINEM understood at the time to be the scope of the "Cerro Verde Leaching Project." Therefore, this Report does not clearly reveal MINEM's understanding in 2003 of the scope of the stability benefit.

March 2004 Mining Royalties Forum

665. In March 2004, Mr Polo gave a presentation at a Mining Royalties Forum on behalf of MINEM.[657] The Claimant says that SMCV was not advised that this Forum was taking place nor was it invited to attend. The Claimant accepts that, in his presentation, Mr Polo stated that "a company can have a stabilisation agreement for one project and not have it for another."[658] However, the Claimant notes that Mr Polo did not state that stability guarantees applied to "investment projects", only to "projects" and says that when the Government referred to a "project", it was referring to a "mining unit". In this regard, the Claimant points to the slides accompanying Mr Polo's presentation[659] and, in particular, to slide 10, which listed stability agreements with reference to their "mining units" and which included "Cerro Verde 1, 2 and 3". There was no reference to investment projects, investment, qualifying project, or the Leaching Project.

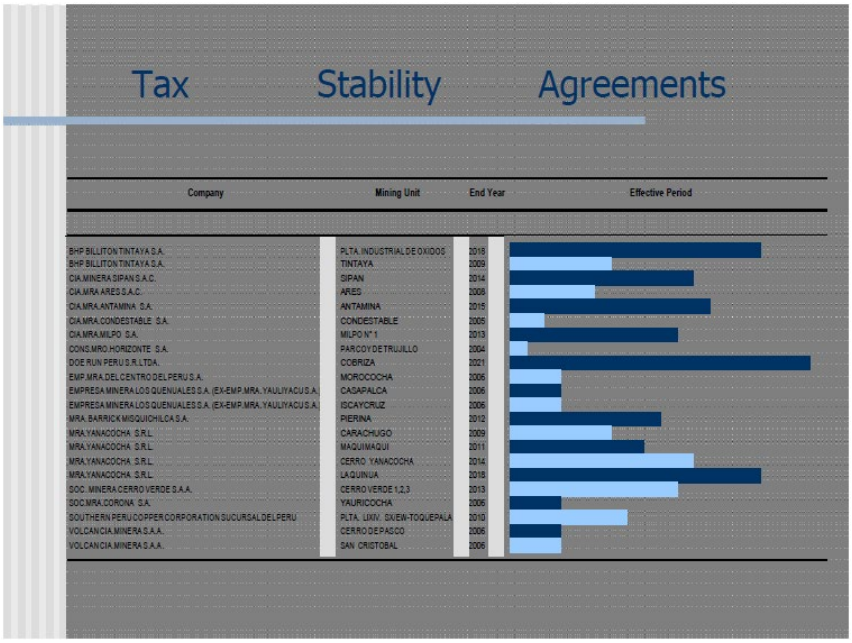
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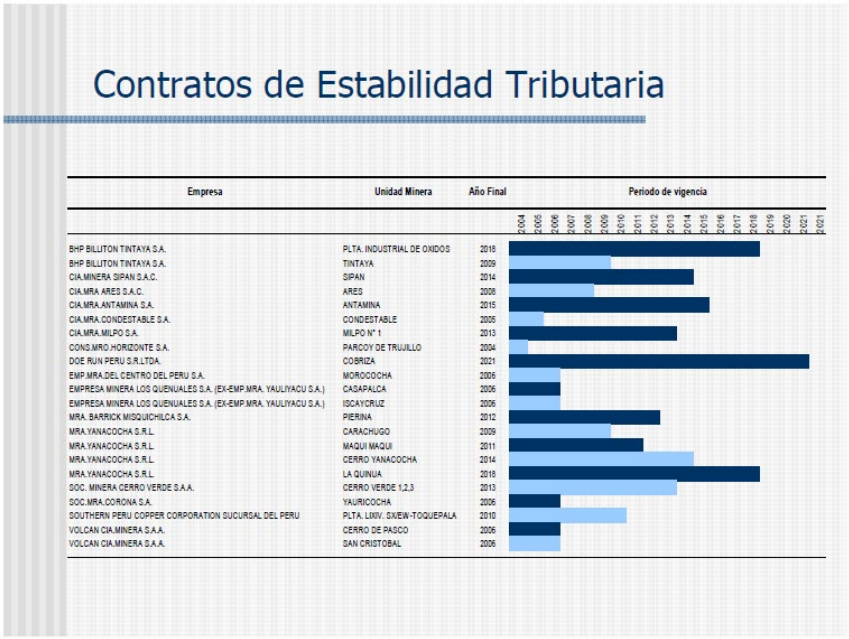
656 MINEM, Report No. 509-2003-MEM-DGM-TNC (8 September 2003), ¶ 4 (**CE-398**).

657 The audio recording and transcript of this conference is at Audio of César Polo's Presentation, Mining Royalties Forum, Congress of the Republic (11 March 2004) (excerpts) (**RE-185**).

658 Audio of César Polo's Presentation, Mining Royalties Forum, Congress of the Republic (11 March 2004) (excerpts) (**RE-185**) at time stamp 00:09:37-00:10:03; Respondent's Rejoinder, ¶ 311.

659 "Evaluación de Aplicación de Regalías Mineras" (11 March 2004), slide 10 (**CE-19**).





666. The Claimant therefore contends that to the extent the Claimant should have been put on notice of Peru's interpretation, the understanding the Claimant would have attained would have been that stability guarantees were applied to a mining unit or concession, not to a specific project within a concession.

667. During his oral testimony, Mr Polo stated that the slide was to be understood in the context of the presentation as a whole. He explained that slide 10 was a "simplified slide for being able to make a presentation to the members of Congress about who is being affected, what's being affected. This [sic] a quicker and, perhaps, lighter way of explaining Stability Agreements. But in my oral statement, which you've read, in part, and which I have here, perhaps it says the same thing I say clearly. This doesn't mean that it applies to the Company. It applies to the specific investment project, the specific investment, and I repeat it several times."[660] He further explained that by this reference to "projects" he was referring to "investment projects" not "mining units."[661]

668. The Respondent also points to the audio recording, noting that Mr Polo stated:

> "*Stabilization agreements are not granted per company, that is important to clarify. A company can have [a] stabilization agreement for one project and not have it for another [project] or [can] have an old activity that does not have a stabilization agreement and a new one that does. That's how it is, it is not granted for the whole company. An investment above 20 million or above 50 is made, depending on the case, and it grants the right to stabilization for that investment, for that development, not for the whole company.*"[662]

669. Whilst the Tribunal takes note of Mr Polo's explanation that slide 10 was simplified for the purposes of an explanation to Congress, the Tribunal does not accept the Respondent's contention that it would have been clear to SMCV from the presentation slides that only the initial qualifying investment would be stabilized. Further, even had SMCV listened to the audio of Mr Polo's presentation, the Tribunal does not accept that this extract makes clear that only the initial project would be stabilized. The Tribunal accepts that this is one possible construction of Mr Polo's presentation but finds that the Claimant's understanding is equally plausible. It is, of course, clear and uncontested that a stabilisation agreement

660 Tr. Day 5, 1318:17-1319:7.

661 Tr. Day 5, 1315:21-1316:4.

662 Audio of César Polo's Presentation, Mining Royalties Forum, Congress of the Republic (11 March 2004) (excerpts) (**RE-185**).

does not stabilize all activities undertaken by the company which makes the initial investment, irrespective of where such activity takes place. However, this is not what the Claimant argues. The Claimant asserts that the concession, not SMCV, is stabilized. Had Mr Polo said, for example, that a company can have a stabilisation agreement for one project within a concession or EAU but not for another project within the same concession or EAU, such a statement would have clearly supported the Respondent's construction. As for Mr Polo's statement that "[a] company can have [a] stabilisation agreement for one project and not have it for another", it does not say that only the qualifying project is stabilized, as the "another" (the project not stabilized) may be a project undertaken outside the concession or EAU referred to in the stabilisation agreement.

670. Accordingly, the Tribunal finds that the content of Mr Polo's presentation does not support either Party's case.

Discussions with Ms Chappuis in 2004

671. Ms Chappuis testifies that throughout 2004 she met with Ms Torreblanca and Mr Davenport to discuss the scope of the Stability Agreement and advised them that the entire concession was stabilized. Ms Torreblanca testified that it had been made clear that Phelps Dodge "needed" written assurance that the Concentrator would be stabilized.[663] Ms Chappuis testified that she understood the importance to SMCV of receiving this confirmation but that she had emphasised to SMCV it did not need anything in writing because the scope of the Stability Agreement was clear.[664] She accepted, however, that Mr Polo had a different understanding, although there is no evidence on the record that she communicated this difference of opinion to SMCV. Ms Chappuis' testimony concerning what transpired at the meeting with Ms Torreblanca is confirmed by the latter's testimony.[665]

672. There is nothing in the record or the cross-examination of the witness to suggest that Ms Chappuis, who at the time of testifying was not employed by either Party, was being

663 Tr. Day 2, 504:18-505:8.

664 Chappuis 1, ¶ 52.

665 Torreblanca 1, ¶¶ 24-25.

untruthful. The Tribunal regards her testimony as credible, particularly on what was discussed at her meeting with Ms Torreblanca and in reporting the witness' belief, based on her involvement in drafting the Mining Law, that the entire concession was stabilized. This being said, the Tribunal notes that Ms Chappuis was testifying with respect to her personal understanding, recognizing that it was not shared by her superior, Mr Polo and further that she refused to give SMCV the written confirmation it was seeking, even though she understood the importance of such confirmation to SMCV. Whilst in light of all the circumstances, the Tribunal considers that Ms Chappuis' refusal to provide such written confirmation may have had more to do with the political sensitivity of the issue than any doubts about the interpretation she has espoused, the fact is that she did not, and would not, provide written confirmation.

673. Construction of the Concentrator commenced in December 2004.

Letter dated 4 March 2005 from SMCV to Mr Cruz and subsequent meeting

674. On 4 March 2005, Mr Linares wrote to Mr Cruz (SUNAT's Regional Intendent for Arequipa) setting out SMCV's understanding that royalties would not be "applicable to Cerro Verde" as a result of the Stability Agreement.[666] This may have been in response to a communication from SUNAT advising mining companies within the Arequipa jurisdiction how to pay royalties following adoption of the Royalty Law. After Mr. Cruz had received this letter, he met with Ms Torreblanca. Ms Torreblanca testified that during the meeting she "explained that the Stability Agreement covered the entire Cerro Verde Mining Unit – *i.e.* its Mining and Beneficiation Concessions – and that SMCV was not obliged to pay royalties during the term of the Agreement. SUNAT did not mention the issue of royalties again for several years so I understood that Intendant Cruz had agreed with my explanation."[667] Mr Cruz testified that this description of the meeting is incorrect. He states that it was not for SUNAT to determine who is to pay royalties; its role is "only to process and collect those payments" and accordingly he was not in a position to give

666 SMCV, Letter No. SMCV-AL-279/2005 to SUNAT (4 March 2005) (**CE-486**).

667 Torreblanca 1, ¶ 32.

such a confirmation.[668] Mr Cruz also noted that at the time of this meeting, construction of the Concentrator had only just commenced.[669]

675. The Tribunal notes that Mr. Linares' letter did not expressly mention the Concentrator (confirmation being sought in relation to "Cerro Verde"), although Ms Torreblanca testified that she explained at the meeting that SMCV was referring to the entire Cerro Verde Mining Unit. The Tribunal further notes that Ms Torreblanca's testimony is not that precise as to whether she specifically mentioned the Concentrator that was being built, although she did refer to the Beneficiation Concession, the expansion of which allowed the Concentrator to be built. The Tribunal considers this meeting further in the section dealing with transparency but does not find that this supports the Claimant's case that at this point the Respondent was proceeding on the basis that the Concentrator was stabilized.

March 2005 Prospectors & Developers Association of Canada ("PDAC") Conference

676. In March 2005, a PDAC Conference took place which was attended by Mr Conger. There is testimony to the effect that during this conference, on 8 March 2005, a lunch took place during which there was a conversation between Mr Conger and certain representatives from MINEM.[670] Mr Tovar has testified that Mr Polo advised Mr Conger during this lunch that royalties would have to be paid with regard to the Concentrator.[671] The Claimant asserts that Mr Tovar's evidence is unreliable, partially because it is inconsistent and partially because his oral testimony (that Mr Polo made that statement) is unsupported by Mr Polo himself.

677. In the Respondent's first post hearing brief, the Respondent says it was Mr Tovar who made the statement to Mr Conger and not Mr Polo.[672]

678. It is regrettable that Mr Conger did not himself testify with regard to this meeting and was not called to be examined at the Hearing. However, Mr Tovar's testimony that Mr Conger

668 Cruz 1, ¶¶ 9-10.
669 Cruz 1, ¶ 12.
670 Tovar 1, ¶ 54.
671 Tr. Day 6, 1455:17-1456:21.
672 Respondent's PH Brief, ¶ 144.

"stayed silent"[673] on hearing this statement seems implausible considering (i) that Mr Conger believed that the concentrator was stabilized and (ii) how important stabilisation of the Concentrator was to Phelps Dodge. The Tribunal is also troubled by the inconsistency in the Respondent's evidence as to whether the alleged statement was made by Mr Tovar or Mr Polo.

679. The Respondent contends that a second meeting took place during the conference at which, according to the testimony of Mr Tovar, Mr Conger was again advised of the Government's position that the Concentrator would not be stabilized. Mr Tovar testified that Mr Conger was "kind of upset, very worried" upon hearing this.[674] It would, of course, be natural for Mr Conger to have had this reaction given his apparent belief that the Concentrator would be stabilized and in light of the significant investment required to build the Concentrator. It is of note that there are no communications either internally within Phelps Dodge or SMCV or between the two entities as to the implications of the alleged advice received by Mr Conger. If the advice was received, given its significance, it would have been Mr Conger's natural and expected reaction to have immediately raised this issue internally. Equally, the Tribunal has already commented on the dearth of contemporaneous documentation adduced by the Claimant, for example the lack of contemporaneous communications discussing other significant events, such as the assurance from Ms Chappuis that the Concentrator would be stabilized. Accordingly, the Tribunal does not attach great significance to this lack of contemporaneous communication.

680. The Tribunal also questions Mr Tovar's testimony in light of the presentation given by Mr Conger the following day. Mr Tovar testified that this presentation was "to promote Peru as a mining destination" and that Mr Conger explained that Phelps Dodge had had "extensive interaction with the Government" to "obtain[] certainty of Stability Contract."[675] In concluding his presentation, Mr Conger noted that the "Stability contract provides certainty to make $850 million investment decision" (as detailed in a bullet point

673 Tr. Day 6, 1461:3-6, 1490:12-14.

674 Tr. Day 6, 1486:5-11, 1487:13-16, 1490:1-4.

675 Tr. Day 6, 1454:3-15, 1472:20-1473:17, 1475:2-13.

on slide 16).[676] The Tribunal finds this is clearly a reference to the Concentrator and indicates at least Mr Conger's understanding at that time that the Concentrator was stabilized, an understanding that is at odds with the alleged advice to the contrary that, according to Mr. Tovar, Mr. Conger had received the day before. Nor does the Tribunal find credible Mr Tovar's evidence that (i) he did not understand that Mr Conger was referring to the Concentrator in this bullet point; (ii) he understood Mr. Conger to be referring instead to the fact that SMCV was permitted to reinvest profits from the Leaching Project into the construction of the Concentrator; and (iii) he believed that Mr Conger's reference to stabilisation was a reference to that permission to reinvest profits. This testimony is not credible because the right to reinvest profits has not been described as stabilisation.

The Decision of the Constitutional Tribunal, 1 April 2005

681. On 1 April 2005 the Constitutional Tribunal held that a mining royalty was not a tax.[677] This caused some consternation and was used as justification by those politicians seeking to raise more money from mining companies in their arguments that stability agreements could not apply to the obligation to pay royalties.

Isasi Report dated 14 April 2005.[678]

682. The Claimant places significant emphasis on the Isasi April 2005 Report. Mr Isasi was the then General Director of the General Legal Advisory Office of MINEM.

683. The purpose of the Isasi April 2005 Report is described in paragraph 3 as issuing a legal opinion on "the application or not of the Mining Royalty Law to mining concessionaires that have entered into stability agreements with the State."[679] By way of background, this report was prepared after the Constitutional Court had held that royalties were not a tax

676 Phelps Dodge, *Peru and Phelps Dodge: Partners is Progress* (9 March 2005), slide 16 (**CE-945**).

677 Constitutional Tribunal, Decision, Case No. 0048-2004-PI/TC (1 April 2005) (**CE-490**).

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

679 MINEM, Report No. 153-2005-MEM/OGAJ (14 April 2005), ¶ 3 (**CE-494**).

and SUNAT had therefore stated it was not authorized to ascertain the level of royalties due.

684. Having considered the nature of stabilisation agreements as *contratos-ley*, and noting that a royalty is not a tax (paragraph 11), paragraphs 17 to 21 of the Report state as follows (to bring the English text closer to the original Spanish, the Tribunal has amended the following record translation in red and inserted clarifying phrases between brackets):

> "*17. Emphasis should be placed on this last aspect [namely that stability agreements are* contratos-ley*]: The stability granted by [Mining Stability agreements] guarantee the legal regime related to tax, currency exchange and administrative matters of the investment project to which they refer. If a mining titleholder has economic administrative units or mining concessions that are not part of the project subject to stability, the regulation establishes that such titleholder must keep the accounting of the project separately. [a footnote refers to Article 22 of the Mining Regulations]. Consequently, it is not the mining titleholder (individual~~s~~ or legal entity) who will be exempt or not from the payment of royalties, comprehensively as a company, but it will be the mining concessions of which it is the titleholder, depending on whether or not they are part of a project ~~set out in~~ [that is the subject matter of] a stability agreement signed prior to the enactment of Law No. 28258. Therefore, only the mining projects referred to in these agreements will be excluded from the royalty calculation basis.*
>
> *18. The royalty is fully applicable to the titleholders or investors that only have the so-called Stability Agreements governed by Legislative Decree No. 662 whose stipulations do not include Administrative Stability clauses in the terms described above.*

IV. CONCLUSION

19. It is the opinion of this office of the General Counsel that the mining royalty is not applicable to the investment projects of the titleholder of mining companies that prior to the royalty law came into force, had entered into [Mining Stability agreements] in which Administrative Stability had been agreed upon in the terms expressed in this report.

20. The royalty is fully applicable to the titleholders or investors that only have the so-called Stability Agreements governed by Legislative Decree No. 662, whose stipulations do not include Administrative Stability clauses in the terms described above.

21. However, since the doubts in this matter have been raised by the contradictory public statements of the members of the Constitutional Tribunal and by the Constitutional Tribunal's judgment itself, we believe that the Constitutional Tribunal would do well to formally clarify its judgment, either ex officio or at the request of the congressional attorney or the legal representative of the plaintiffs."[680]

685. This Report was not provided to SMCV contemporaneously. Whilst Mr Isasi was not cross-examined with regard to this report, he did provide oral direct testimony explaining that in preparing the Report he understood that only the qualifying investment as described in the feasibility study would be stabilized.

686. The Tribunal again does not find this Report to be well drafted. It does not clearly convey Mr Isasi's professed contemporaneous understanding. Both Parties focus on the content of paragraph 17.

a. The first sentence of paragraph 17 says that the stability granted by stability agreements guarantees the legal regime on tax, currency exchange, and administrative matters "of the investment project" to which they refer. The meaning

[680] MINEM, Report No. 153-2005-MEM/OGAJ (14 April 2005), ¶¶ 17-21 (**CE-494**).

of this sentence depends on the way the term "investment project" is being used. If it means "individual (or qualifying) investment project", then the statement means that stability is granted to the qualifying investment and not to the concession or EAU. If "investment project" is used in a wider sense, to refer to the mining project as a whole, then the opposite conclusion may be reached.

b. The second sentence says that if a mining titleholder has concessions or EAUs "that are not part of the project subject to stability," then it has to maintain the accounting "of the project" separately. To the extent the reference to a "project" is intended to refer to a single project, clearly concessions and EAUs cannot form a "part" of such individual mining project; on the contrary, an individual mining project is part of a concession or EAU, in the sense that it can only be developed within one or the other.[681] However, if "project" is understood in a wider sense, it can coherently be said that *other* concessions or EAUs of the title holder "are not part of the project subject to stability."[682]

c. The third sentence says that it is not the mining title-holder who is (or is not) exempt from the payment of royalties; the exemption applies (or not) to the *concessions* the mining title holder holds, depending on whether or not they are *part of* ("*integran*") a project that is the subject matter of a stability contract entered into before Law No. 28258 took effect. Again, this sentence is unclear. The reference to concessions being a part of a project again suggests a wider meaning to "project" than a single qualifying project, but equally the reference to the project (singular) being the "subject matter" of the stability contract suggests the narrower meaning was intended.

d. The final sentence in paragraph 17 says that only the "mining projects" (plural) to which the stabilisation agreements refer can be excluded from the base for

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

682 The footnote to this sentence refers to Article 22 of the Mining Regulations. A majority of the Tribunal has held (see paragraph 469 above), that Article 22 of the Mining Regulations is ambiguous and could be understood to support either Party's construction, including as to the meaning of "mining project." Arbitrator Garibaldi has dissented on this point.

calculating the royalty. This sentence again raises the question of what "mining projects" mean. Whilst this report is not as clear as would be desirable, on the whole it suggests that at the time Mr Isasi was using the term "mining project" in a broader sense.

687. Paragraph 18 explains that the royalty is fully applicable if the stabilisation contract does not include a guarantee of administrative stability (as distinguished from tax and currency exchange stability). This conclusion follows from the Constitutional Court's ruling that the royalty is not a tax but an administrative charge.

688. The question before the Tribunal is what legal position is conveyed by Mr Isasi's April 2005 Report. Whatever Mr. Isasi's personal opinion was in April 2005, the Report is insufficiently clearly drafted for the Tribunal to reach a finding that the Report made clear Mr Isasi's expressed view that the benefit of stability applied only to the individual qualifying project, as distinguished from a wider sense of "project" that embraced the concession or EAU referred to in the stabilisation agreement.

689. On 3 June 2005, Mr Isasi emailed a draft "final presentation: to Minister Mejía titled 'Mining Royalties: Proposals for Modifying the Law and the Effects of the Judgment of the Constitutional Tribunal'." Mr Isasi stated that this represented the agreement of Messrs Isasi, Tovar, and one other MINEM official. Whilst there is some reference to the protection of investors (see for example slides 27 and 32), the key slides are Nos. 28 and 33. Slide No. 28 explains the concept of "*contratos-ley*" (not that of stabilisation agreements) as a contract whereby the State undertakes to grant guarantees and assurances for a specified investment.[683] This slide says nothing about stabilisation agreements and, in any case, it begs the question of whether the "specified investment" is the initial investment or any investment in the concession or EAU. Slide No. 33 says that mining title-holders having signed contracts with administrative stability must exclude from the basis for calculation of the royalty the value of the concentrates extracted for the stabilized

[683] MINEM, Mining Royalties: Proposals for Modifying the Law and Effects of the Judgement of the Constitutional Tribunal, attached to email from Felipe Isasi to Glodomiro Sanchez (3 June 2005), slide 28 (**CE-948**).

project.[684] There is no detail as to the meaning of "stabilized project" and so it is uncertain whether the reference in Slide No. 33 was intended to refer to the initial or qualifying project or to all projects undertaken within the concession. In any case, the slides prepared for a presentation, which by their nature are intended to convey ideas summarily and shorn of nuances and details, can hardly be taken as conclusive evidence of the position of the three officials in question as of June 2005.

A meeting of the Energy and Mines Congressional Committee on 8 June 2005.

690. Shortly thereafter, on 8 June 2005, Mr. Isasi and the then Minister of Mines, Minister Mejía, spoke at a meeting of the Energy and Mines Congressional Committee. The Respondent says that the meeting was publicly televised,[685] so that SMCV should have been aware of what was discussed.

691. Minister Mejía advised the Congressional Committee of the background to the introduction of mining royalties and explained how the royalty was calculated and the various stages of mining processes. Minister Mejía described the ruling of the Constitutional Tribunal and then explained that a stability agreement stabilizes "the investments that are the subject matter of the contract."[686] The Minister later stated: "who pays royalties? All mining titleholders pay royalties, but not for all of their projects. The mining titleholders that before the Mining Royalty Law entered into law-contracts with administrative stability, will exclude from the royalty calculation basis, the value of concentrates or equivalents, derived from the stabilized project."[687] [Tribunal emphasis]

692. One member of Congress asked what agency is ultimately responsible for determining which mining companies are subject to payment of royalties and which ones are not. Mr Isasi responded as follows:

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

685 Energy and Mines Congressional Committee, Meeting Minutes (8 June 2005) (**RE-29**).

686 Energy and Mines Congressional Committee, Meeting Minutes (8 June 2005) p. 25 (**RE-29**).

687 Energy and Mines Congressional Committee, Meeting Minutes (8 June 2005), p. 26 (**RE-29**).

"*With all due respect, Mr Congressman, it must not be confused who is the obliged subject, which is the company, with how much it has to pay; that is, the obliged subject is a mining company but when determining how much it must pay, the tax administration has to determine what is the reference basis, and to determine the reference basis, it must determine which are the stabilized mining projects and which are the non-stabilized projects.*

The non-stabilized mining projects pay royalties, the stabilized projects do not pay royalties. Stabilized, of course, before the royalty law because there are stability contracts that were entered in after[wards], where it has been expressly indicated that royalties must be paid."[688] [Tribunal emphasis]

693. Congressman Oré then asked whether an analysis had been carried out detailing "what type of tax stability, administrative stability, which are the contracts, how the contract modalities are that all the mining companies have entered into, regardless of the interpretation of what the Constitutional Tribunal says." Minister Mejía answered as follows:

"*We have explained, throughout the presentation, which are [the] projects that have administrative stability. At the Ministry of Energy and Mines the agreements that have that name receive the name of [stability agreements].*

Reviewing the agreements, because that report was requested from us by SUNAT and [MEF], we have found that this list of 27 companies are the ones that have chosen the [stability agreements]". [689] [Tribunal emphasis]

694. The Claimant argues, in reference to this meeting, that Minister Mejía "repeatedly confirmed that the royalty would be calculated based on concessions and that companies would be entitled to stability for the 'mining projects' for which they had signed stability agreements". [690] Nevertheless, the Tribunal has not found in Minister Mejía's statements

688 Energy and Mines Congressional Committee, Meeting Minutes (8 June 2005), p. 29 (**RE-29**).

689 *Id.*

690 Claimant's Reply, p. 132 at sub para xiv.

any reference that the royalty would be calculated based on concessions. As for Minister Mejía's statement that mining companies would be entitled to stability for the "mining projects" for which they had signed stability agreements, the Tribunal observes that, as discussed in connection with Mr Isasi's April 2005 Report, the term "mining project" is ambiguous, as it can be used to refer to an individual mining project (such as the qualifying project) or to the project as a whole. The most that can be said on this evidence is that Minister Mejía's statements at this meeting do not support either interpretation and hence do not reflect an unequivocal position regarding the scope of a stabilisation agreement. Mr Isasi also used the same ambiguous term "project", without any context indicating in which sense he was using it.

695. The Claimant also notes that the slide presentation prepared for this meeting differs in certain significant aspects from that prepared for a congressional presentation eleven months later (see paragraph 718 below) as can be seen from the following comparison:

Draft June 2005 Presentation	**May 2006 Presentation**
Slide 28 "Consequently, whoever enters into a *contrato-ley* with the State, is protected from modifications subsequent to the stabilized legal regime."	Slide 14 "Consequently, whoever enters into a *contrato-ley* with the State, ~~is protected from~~ **protects its investment against** modifications subsequent to the stabilized legal regime."[719]
Slide 31 "Consequently, a *Contrato-Ley* with Administrative Stability prior to the Royalty Law does protect against this new obligation."	Slide 18 "Consequently, a *Contrato-Ley* with Administrative Stability prior to the Royalty Law ~~does~~ protects against this new obligation **the investments set out in the contract**."[720]
Slide 29 ". . . in [the Constitutional Tribunal's decision] there is no express exception regarding mining projects protected by *Contratos-Ley* executed prior to the enactment of the Royalty Law."	[Slide Deleted]

696. The Claimant argues that differences between the two presentations demonstrate a change of position between June 2005 and May 2006 in respect of the scope of the stabilisation.[691] The implications of the changes are not, however, entirely clear, as they could be based on a more mundane reason. The May 2006 version of the slides makes clearer that the stabilisation protects the "investment" or "the investments set out in the contract" as distinguished from protecting the person entering into a stabilisation agreement. Such a clarification was important to avoid the implication that stabilisation benefits the titleholder for all its investments, as distinguished from those investments covered by the scope of the stabilisation agreement, whatever that scope may be.

697. The Tribunal concludes that the statements made by Minister Mejía and Mr Isasi at the June 2005 meeting are too ambiguous to afford reliable evidence on their respective positions at the time on the scope of stabilisation agreements. What is clear from the evidence is that, up to this point, there was no certainty or uniformity of position within the MINEM or the SUNAT concerning that subject.

Minister Mejía statement to the press on 20 September 2005

698. On 20 September 2005, a press release was issued in which Minister Mejía was quoted as stating that SMCV would have to pay royalties on the Concentrator on the grounds that this project was not covered by the Stabilisation Agreement.[692] This document, of which SMCV cannot have been unaware, appears to be the first clear and unambiguous statement of MINEM's position on the issue of the scope of the Stabilisation Agreement, which coincides with that which the Respondent now espouses.

Isasi Report dated 22 September 2005

699. On 22 September 2005, Mr Isasi prepared a further report for the then Minister of Mines and Energy, Minister Mejía, specifically on the scope of the Stability Agreement. In that Report, Mr. Isasi advised that stability is granted only to the investment for the Leaching

691 Claimant's Reply, p. 138 at sub para xxxiv.

692 Minister: Expansion of Cerro Verde Subject to Royalty Tax, Business News Americas (20 September 2005) (**CE-511**).

Project and that the Stability Agreement was entered into in accordance with the relevant regulations.[693] This document was again not made available to SMCV at the time it was prepared.

Correspondence written by Minister Mejía

700. On 3 October 2005 Minister Mejía wrote to Congressman Oré advising him that the Stability Agreement only applied to the Leaching Project and not the Concentrator, on the basis that SMCV had not applied for a stability agreement for the Concentrator.[694]

701. On 24 October 2005 Minister Mejía wrote to Congressman Olaechea advising that SMCV had not requested or been granted any stability benefits regarding the Concentrator.[695]

702. On 8 November 2005, Minister Mejía wrote to Congressman Canseco and again confirmed that the Stabilisation Agreement applied only to the Leaching Project.[696]

703. None of these pieces of correspondence, which set forth a consistent position of the Minister, was made available to SMCV at the time.

Isasi 16 January 2006 Report

704. On 16 January 2006, Mr Isasi sent an internal report to Minister Mejía, with the subject matter being "Determination of who is obligated to pay the mining royalty" explaining that the General Mining Bureau provided "necessary technical support" to SUNAT to enable it to perform its duties in relation to the payment of the mining royalty by providing on a monthly basis a "list of mine titleholders with their respective production units".[697] [Tribunal emphasis].

705. This is an important and somewhat odd communication from Mr Isasi. If SUNAT was only being provided with information as to each mining title holder and its "respective

693 MINEM, Report No. 385-2005-MEM/OGJ (22 September 2005) (**CE-512**).
694 MINEM, Official Letter No. 1725-2005-MEM/DM (3 October 2005) (**CE-515**).
695 MINEM, Official Letter No. 1884-2005-MEM/DM (24 October 2005) (**CE-955**).
696 MINEM, Official Letter No. 2004-2005-MEM/DM (8 November 2005) (**CE-519**).
697 MINEM, Report No. 015-2006-MEM/OGJ (16 January 2006) (**CE-957**).

production units", SUNAT would have proceeded under the assumption that stability was granted to a production unit and not just to a qualifying investment. In this regard, the Tribunal refers to the unchallenged evidence of Mr. Ramero Aquiño who explained that "[t]he Mining and Beneficiation Concession […] operate as an integrated unit, so they form one single Mining Unit. All elements of the Mining Unit also share all key infrastructure for transportation, services, administration, labor, power, and water."[698].On the basis of this evidence, the Tribunal accepts that a "unit" or "production unit" would have included not just the Leaching Plant but also the Concentrator.

706. This understanding of what may have been meant by a "unit" or "production unit" could explain why, whilst from September 2005 there appears to have been a reasonably consistent understanding within MINEM as to the scope of the Stabilisation Agreement (although as we shall see Mr Tovar seems to have had a different understanding[699]), the same was not the case with SUNAT. As discussed below, a congressional meeting on 3 May 2006 revealed lingering uncertainties as to the proper scope of stabilisation agreements.

3 May 2006 Congressional Meeting

707. At the session of the Energy and Mines Congressional Committee of 3 May 2006, attended by the head of SUNAT as well as by Mr Isasi and Mr Tovar (the then DGM[700]) amongst others, a discussion was held as to which mining companies should pay royalties.[701] The Respondent says that SMCV should have understood that the Concentrator would not be stabilized as a result of statements made during this meeting. Although an audio recording and a transcript of the meeting were produced, there is no evidence on the record that the audio was publicly broadcast or any transcript published. In any event, the Tribunal does not find it clear from the statements made at this meeting that only the qualifying investment would be stabilized.

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698 Aquiño 1, ¶ 63.

699 See ¶ 709 below.

700 Mr. Tovar replaced Ms Chappuis as DGM and held the position from 4 January 2004 to end October 2006.

701 Audio of the Session of the Energy and Mines Commission, Congress of the Republic (3 May 2006) (**RE-88**).

708. During the course of this meeting, the head of SUNAT endeavored to explain to the Congressional Committee the difference between tax stability and administrative stability, noting that SUNAT did not have the same extensive powers with regard to administrative stability as they did with regard to tax stability. It is clear from this discussion that the decision of the Constitutional Tribunal that royalties were not a tax had caused considerable uncertainty as to who was responsible for calculating and collecting royalties. The head of SUNAT sought to make clear to the Congressional Committee that ultimate responsibility for royalties lay with MEF although MEF had then authorized SUNAT "to perform all duties associated with payment of the mining royalty".[702]

709. The transcript of this meeting shows that, whilst Mr. Isasi clearly maintained his view that only the specific project detailed in the feasibility study was stabilized, the head of SUNAT, the Minister of Economy, and Mr Tovar were of a different understanding, referring not to a specific project which was stabilized but to concessions, units, or production units. The Vice-Minister of Mines referred to concessions, projects, and stabilized projects. Whilst this discussion related to the liability to pay royalties, this liability is inextricably linked with the scope of a stabilisation agreement as stability protected a mining company from having to pay royalties.

710. Considering first the points made by the head of SUNAT (with Tribunal emphasis), she commenced by explaining that SUNAT had created a software for the mining companies to facilitate the filing of returns and the making of payments which, she explained, is done "per concession", as a company can have various concessions. SUNAT had been working on it since November 2004. The head of SUNAT then explained that mining companies will "know which units they will declare and pay the royalty on. […] This is information that, in turn, is provided to us by [MINEM] and it mentions for us… for us the production units, specifically for purposes of the monthly declaration."[703] The Tribunal understands

[702] Audio of the Session of the Energy and Mines Commission, Congress of the Republic (3 May 2006), pp. 7-8 (**RE-88**).

[703] Audio of the Session of the Energy and Mines Commission, Congress of the Republic (3 May 2006), p. 3 (**RE-88**).

from this statement that this software did not permit the filing of returns for different projects within a concession.

711. The head of SUNAT explained that letters were sent to all mining companies and that this "[was] publicize[d] […] through mass media" which generated "a very strong reaction in the sector."[704] She then explained to the Congressional Committee that, as royalties had been determined by the Constitutional Tribunal not to be taxes, SUNAT believed it did not have jurisdiction to issue an opinion as to the scope of stability agreements with regard to liability for royalties. Accordingly, she explained that between March 2005 and January 2006, SUNAT consulted both the Ministry of Economy and MINEM on the scope of stability agreements.

712. The head of SUNAT then summarised for the Congressional Committee the approximate number of companies that would be likely to pay royalties, referring to them as "mining concession holders" and then noted that he was unable to say how many of these 174 companies would actually pay royalties because they were waiting for these companies to "download the information for their concessions being exploited to determine the monthly payment for mining royalties." Further, she explained that of these companies, 15 had signed stabilisation agreements, of which 5 companies did not pay royalties as they were "subject to agreements that do not pay mining royalties". She then referred to some of the different mining companies, including the Ares mining company which, although it had three production units, only paid for two, noting that "they pay per agreement". She then referred to the mining company Southern, noting that "now we also see the extractive units do not have an agreement". Finally, the head of SUNAT stated that the mining company Volcan was paying royalties per concession. [Tribunal emphasis]

713. The Minister of Economy noted that "there are companies that also had agreements, but in some units the contract had expired. For those units they must begin to pay." [Tribunal emphasis]

[704] Audio of the Session of the Energy and Mines Commission, Congress of the Republic (3 May 2006), p. 4 (**RE-88**).

714. Mr Tovar then addressed the Committee, confirming that the information provided by MINEM related to "all units in operation". [Tribunal emphasis]

715. It is clear to the Tribunal from these comments that, at the time, the Minister of Economy, the head of SUNAT, and Mr Tovar were all proceeding on an assumption that stability was given to a concession or, at a minimum, a unit or a production unit. The comments made by the Vice Minister of Mines were more ambivalent but along the same lines. He explained that MINEM "shall provide SUNAT […] for each year, the following information: the debtors, specifying the respective tax ID number, current mining concessions under exploitation, identifying the debtor and geographic location at the district, province, departmental div[ision] […] for such concessions, for each mining concession, its size, and the area contained in each district." He continued by saying that "[a]ll mining titleholders pay royalties, but not for all of their projects. The mining titleholders that before the Mining Royalty Law entered into *contratos-ley* with administrative stability, will exclude from the royalty calculation basis the value of concentrates or equivalent, derived from the stabilized project." The Vice Minister therefore refers both to concessions and to projects.

716. By contrast, Mr. Isasi maintained his understanding that only the qualifying investment was stabilized, emphasizing that:

> "*[t]he only thing [a stability agreement] does is to provide guarantees to a specific investment project which has been described in a feasibility study and integrated into an agreement. Therefore, we could come to the conclusion that, in reality, all mining companies are required to declare and pay. However, with respect to mining titleholders which had stabilization agreements prior to the Mining Royalties Law, the only thing they must do is to exclude the concentrates extracted from the project that was stabilized from the basis of calculation of the royalty; but, the other projects, the other concessions, those must pay their mining royalties.*"[705]

[705] Audio of the Session of the Energy and Mines Commission, Congress of the Republic (3 May 2006), p. 22 (**RE-88**).

He continued by saying:

> "*[b]ut a mining titleholder that is exploring and exploiting is a debtor. Clearly, all are debtors. All of those who are exploiting, who are extracting, are debtors. Within those debtors, some have administrative stability, which consists of the fact that one of their projects, one of their 10 projects that they may have stabilized, does not count for payment to the royalty, but they must pay royalties on their other projects, correct?*."

717. As can be seen from the discussion at this committee meeting, whilst Mr Isasi remained emphatic as to the limited scope of stability agreements, this understanding does not appear to have been shared by the head of SUNAT or the other participants from MINEM and MEF.

Mr Isasi's 5 May 2006 Presentation to the Congressional Cerro Verde Working Group

718. In a separate presentation on the same day to the Cerro Verde Working Group in Congress, Mr Isasi gave a slide presentation.[706] As can be seen from the slides, Mr Isasi discussed Cerro Verde specifically at the meeting, explaining that the reinvestment of profits from the Leaching Project was in accordance with the law. He then considered whether profits from the Concentrator could be reinvested with a tax benefit. The first bullet of slide 8 states that "[s]tability is given to the investment project clearly delineated by the Feasibility Study and agreed upon in the Contract. It is not granted to the company generally or to the Concession (Art. 24 of the [Mining Regulations])". Slide 9 then states that the Concentrator was not provided for in the Leaching Project, there was no request to incorporate it in the Leaching Project, and therefore it was not part of the stabilized project under the stability agreement and any profits generated by the Concentrator could not be reinvested with a tax benefit. Mr Isasi then repeated that the Concentrator was not part of the Leaching Project and therefore did not benefit from stabilisation and hence would have to pay royalties.

[706] MINEM, "Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project" (May 2006) (**RE-3**).

There was therefore no divergence from the views Mr Isasi had previously expressed in his 22 September 2005 Report or his 16 January 2006 Report.

Isasi 16 June 2006 Report

719. In his June 2006 Report, Mr Isasi stated that stability guarantees are "granted to an investment project clearly delimited by the Feasibility Study and agreed to in the agreement."[707] This view, which is consistent with those Mr Isasi had expressed since his Report of 22 September 2005, cannot fairly be described as a change of position in respect of those stated in his April 2005 Report because, as already explained, that Report did not clearly convey his views on the scope of a stabilisation agreement.

June 2006 SUNAT Internal Report

720. In June 2006 (somewhat strangely the report is only dated "June 2006"), an internal report concerning Cerro Verde was issued by Ms Bedoya, a lawyer in SUNAT's Claims Division in Arequipa, and Mr Guillen (the "**June 2006 SUNAT Internal Report**").[708] The report notes (at page 4) that SUNAT has "found out about the SMCV's position on this matter, which is aimed at considering said investment as part of the [Stability Agreement]" and then analyses the relevant provisions of the Mining Law, Mining Regulations and the Stability Agreement before concluding that:

> "*[T]he investment that gave rise to the signing of the [Stability Agreement] […] is the Cerro Verde Leaching Project, which is limited to the [EAU] that consists of concessions 1, 2, and 3, and the Cerro Verde Beneficiation Plant.*
>
> *It is worth mentioning that the effect of the guarantees is granted to the project that is the object of the agreement, not to the concessions where the investment is made, as can be observed in the case of the company [Southern], where there is an ore concentration plant and the 'Electrowon*

[707] MINEM, Report No. 156-2006-MEM/OGJ (16 June 2006), p. 13 (**CE-534**).

[708] SUNAT, Report on the Application of the Agreement of Guarantees and Measures for the Promotion of Investments and the Mining Royalty with respect to the Expansion of Cerro Verde's Current Operations – Primary Sulfides Project (June 2006) (**RE-179**. See also the evidence of Ms Bedoya that it was an internal report Tr. Day 6, 1529:3-4, 1521:46.

Leaching Project' in the same concession with the Electrowon Leaching Project enjoying tax stability under the terms of [its stability agreement]."[709]

721. The Report then refers to a letter from MINEM containing a Ministerial Resolution approving the Concentrator expansion to be paid out of undistributed profits exclusively generated by the Leaching Project before observing "the decision of [MINEM] corroborates our position of not treating the [Concentrator] as part of SMCV's guarantees agreement, as it would otherwise not have been necessary to expressly limit said benefit to the profits generated by the Leaching Project."[710] The Tribunal notes that this paragraph does not assist the Respondent because even on the Claimant's case, it was necessary to limit the profits to those generated from the Leaching Project because by then it was the only stabilized project that had generated undistributed profits and it was necessary to make clear that SMCV could not use undistributed profits from any other operations.

722. The Report then concludes that the benefit of the Stability Agreement was limited to the Leaching Project.

723. The Tribunal notes Mr Cruz's testimony that in 2005 there was uncertainty within SUNAT as to the scope of the Stability Agreement (see paragraph 837 below) and further notes the statement by the Head of SUNAT to the Congressional Committee in May 2006 that between March 2005 and January 2006, the agency was trying to understand the scope of stability agreements. It therefore appears to the Tribunal that this June 2006 SUNAT Internal Report was the basis for SUNAT reaching its determination as to the scope of the Stability Agreement by adhering to the position that the MINEM was contemporaneously espousing. The Tribunal considers the significance of this report and its relevance to the claim at paragraphs 720 to 722 above.

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[709] *Id.,* pp. 6-7 (**RE-179**).

[710] SUNAT, Report on the Application of the Agreement of Guarantees and Measures for the Promotion of Investments and the Mining Royalty with respect to the Expansion of Cerro Verde's Current Operations – Primary Sulfides Project (June 2006), p.7 (**RE-179**).

August 2006 Roundtable Meetings

724. The fact that SMCV was permitted to reinvest its undistributed profits, untaxed, into the construction of the Concentrator caused significant unrest, which was the focus of the 2006 Roundtable Discussions on 23 June 2006, 29 June 2006, and finally 10 July 2006 at which members of Congress also attended. The Arequipa leaders sought the repeal of the profit reinvestment benefit and an order that SMCV pay royalties on both the Leaching Project and the Concentrator.

725. There is a dispute between the Parties as to what was said during those Roundtable Discussions and whether or not SMCV was informed that it would be obliged to pay royalties with regard to the Concentrator. The Respondent asserts that during the Roundtable Discussions on 23 June 2006, MINEM made clear its decision that the Concentrator would not be stabilized, citing the testimony of Mr Isasi and Mr Tovar.[711] Whilst Ms Torreblanca was present during some of the Roundtable Discussions, and testifies that no such statement was made, she was not present at the discussions on 23 June 2006, SMCV being represented by Mr Benavente, SMCV's Manager of Corporate Affairs, who did not testify in these proceedings.

726. Turning to the discussions on 23 June 2006, which the Respondent appears to identify as the relevant date when the statement was made, the Claimant says that there is no contemporaneous evidence by the Respondent to support their assertion that this statement was made. The Claimant submits that given the controversy as to whether SMCV should be paying royalties, the minutes and the press coverage would inevitably have referred to any such statement, but no such reference was made. In addition, in the wake of that meeting, local political leaders demanded the payment of the royalties on the Concentrator and on 10 July 2006, shortly after the last of these discussions, a congressman who had been present at this meeting commented that SMCV "was legally exempt from paying royalties."[712] This, the Claimant says, makes clear that no statement to the effect contended

[711] Isasi 1, ¶¶ 64-67; Isasi 2, ¶¶ 85 – 86; Tovar 1, ¶¶ 65-67; and Tovar 2, ¶¶ 78 and 102-105.

[712] Congressional Commission Envisions a Solution: Minera Cerro Verde Accepts Proposal to Pay 13 Million, El Heraldo (10 July 2006) (**CE-541**).

for by the Respondent could have been made. If such a statement had been made, no one participating at these Roundtable Discussions could have left the discussions believing that the Concentrator was stabilized.

727. The Respondent says that a slide presentation was given on 23 June 2006 and a copy given to Mr Benavente, SMCV's Manager of Corporate Affairs. There was no evidence from Mr. Benavente and the only evidence adduced by the Respondent is Mr Tovar's witness statement as Mr Isasi explains that he "[does] not remember exactly what was discussed in each of [the Roundtable Discussions]."[713] However, Mr Tovar does not identify (i) which MINEM official gave the presentation; (ii) who made the statements that the Concentrator would not be stabilized and that stability is only given to the qualifying investment and not to the concession; or (iii) to whom those statements were made. In his first statement, Mr Tovar states that "[….] MINEM officials gave a presentation in which they explained the tax regime applicable to Cerro Verde's projects and put forward the legal reasons why MINEM found that the company had to pay royalties in relation to the Concentrator."[714] In footnote 92 of this first statement, Mr Tovar states that the presentation given was prepared based upon the presentation given on 3 May 2006 "with slight modifications to include points that would be relevant to the discussion that would take place during the Round Table." The document cited is RE-0107, a slide presentation which was attached to Mr Tovar's first witness statement. Mr Tovar added no explanation, however, as to the author and provenance of this document. In his second witness statement, Mr Tovar adds that on the morning of 22 June 2006, he received from Mr Isasi an email attaching the 3 May 2006 presentation and the most recent version of the June 2006 Report and later that day he received from Mr Isasi a revised version of the presentation with further slides added.[715] Mr Tovar further states that it was "common practice for us to bring at least 10 copies each time we made a presentation. So I probably printed out the presentation that Dr Isasi sent me that day and brought them to the June 23 session." Whilst it would appear from this that the author of the slide presentation asserted to have been given during the

[713] Isasi 1, ¶ 65.

[714] Tovar 1 ¶ 66.

[715] Email from Felipe Isasi to Oswaldo Tovar, "cerro verde: I have added a couple of slides of the royalty presentation…," (June 22, 2006) (**RE-0197**).

Roundtable Discussions was Mr Isasi, the Tribunal is concerned that Mr Isasi makes no reference to preparing this presentation in either of his statements. It is also of concern that what was said at these Roundtable Discussions has not been addressed by Mr Isasi in either of his witness statements, even though he addresses at some length the presentations he prepared to give to Congress.

728. The Respondent further points to an *amicus* brief presented by a local activist, a Mr Domínguez,[716] in which brief he had included the slides which he said he had received at the Roundtable Discussions and which states that stability is only given to the qualifying investment and not to the concession. Mr Domínguez further states in his brief that during the roundtable discussion, it was stated that the Concentrator would not be stabilized. The Claimant did not comment on Mr Domínguez's *amicus* brief.

729. Given the contradictory nature of the evidence adduced by the Parties, the Tribunal is unable to make any positive finding as to what the officials who participated in the Roundtable Discussions understood to be the scope of the Stabilisation Agreement. Further, the Tribunal is unable to find that the Respondent made clear to SMCV during these Roundtable Discussions that the Concentrator would not be stabilized. The Tribunal considers this issue further below (in paragraph 838) with regard to the question whether the Respondent acted in a transparent manner.

2 August 2006 Voluntary Agreement

730. After some discussion, and after various proposals had been made and rejected, SMCV entered into an agreement with the Government (represented by the Premier Minister Del Castillo, the Minister of Energy and Mines Valdivia Romero and various Arequipa politicians: (i) to finance and prepare feasibility studies for the construction of a potable water treatment plant and a wastewater treatment plant; (ii) to pay for the construction of the potable water treatment plant; and (iii) to cover Arequipa's budget deficit in investment expenses for local communities from June 2006 to May 2007.[717] The Claimant estimates

[716] FREDICON's *Amicus* in Dante Martínez's Complaint to SUNAT (12 November 2007) (**RE-233**).

[717] Agreements of the Roundtable Discussion Between the Committee of the Struggle for the Defense of the Interests of Arequipa and SMCV (2 August 2006) (**CE-544**).

that in fulfilment of this agreement SMCV invested in excess of USD125 million in Arequipa.

731. There is nothing in this agreement with regard to SMCV's liability to pay royalties on either the Leaching Project or the Concentrator. Accordingly, SMCV's entry into this agreement is of no assistance to the Tribunal in ascertaining Peru's understanding of the scope of the Stability Agreement. The Tribunal considers further below (in paragraph 840) the Claimant's assertion that the making of this agreement evidences the Respondent's failure to act transparently and in good faith.

The Voluntary Contribution Program/Mining Program of Solidarity with the People

732. At the same time, the Respondent was looking to initiate a similar voluntary contribution initiative nationally. At President García's request, the Mining Society hired a Peruvian consulting firm, APOYO Consultoría ("**APOYO**") to design a system that would allow the Government to increase revenue collection whilst respecting the stability agreements in force.[718] The program designed by APOYO calculated contributions from stabilized and non-stabilized entities differently. For stabilized companies, the voluntary contribution was calculated as 3% of their net profits. Non-stabilized companies were entitled to deduct their royalty payments from the voluntary contribution. The Claimant says that SMCV was always included in the group of stabilized mining companies and this was not questioned by the Government.[719] The Respondent says, first, that APOYO's classification is irrelevant and second, that it is not representative of the Respondent's view at the time, namely that investment projects not companies were stabilized.

733. A standard form contract to enroll in the Mining Program of Solidarity with the People (the "**PMSP**") was drafted and the Respondent notes that Clause 3.1.2 made provision for companies to deduct a percentage of royalty payments from its voluntary contributions.[720]

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[718] Castagnola, ¶ 3.

[719] Castagnola, ¶¶ 23, 43.

[720] Voluntary Contribution Program, Supreme Decree No. 071-2006-EM (21 December 2006) (**CA-131**).

This clause, the Respondent says, would have been otiose if the company itself had been stabilized as deductions could only be made in respect of non-stabilized projects.

734. The Tribunal finds that there is no wording in the standard form contract regarding the scope of a stability contract or otherwise suggesting that a stability agreement stabilized only the qualifying investment or additional authorized investments in the same concession or EAU. The Tribunal therefore regards this agreement as providing no help on the issue of the Respondent's understanding of the scope of the Stabilisation Agreement. The Tribunal considers further below whether the content of the discussions on the PMSP support the Claimant's assertion of lack of transparency.

18 January 2007

735. On 18 January 2007, SMCV signed its agreement to contribute 3.75% of its annual net profits as voluntary contributions, this being the maximum amount under the PMSP.[721] On 10 August 2007, SMCV signed the Voluntary Contribution Agreement.[722] The term of this agreement was one year but it was to be automatically renewed for a maximum of four years, save in specified circumstances. Again, there is no reference in this agreement to the scope of SMCV's Stability Agreement or the extent of its liability to pay royalties. This voluntary contribution is specified to be non-tax deductible but Clause 3.1.2 of the Voluntary Contribution Agreement (which is a standard form document) provides that companies paying a mining royalty may make a deduction of a specified percentage from their voluntary contribution.

736. The Claimant says that between 2007 and 2010, SMCV contributed about USD 140 million in voluntary contributions making it the second-largest contributor nationally in the PMSP. The Claimant also says that, notwithstanding Premier Del Castillo's promise that SMCV could deduct from its voluntary contributions the contributions made directly to Arequipa, in fact no such deduction was permitted. Accordingly, SMCV's voluntary payments were made in addition to the contributions referred to in paragraph 730 above.

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721 Voluntary Contribution Agreement between SMCV and Peru (18 January 2007) (**CE-27).**

722 Executed Voluntary Contribution Agreement between SMCV and Peru (10 August 2007) (**CE-560**).

2 January 2007

737. On 2 January 2007, SMCV notified the DGM that it had completed construction of the Concentrator, pursuant to Article 38 of the Mining Regulations.[723]

738. The Respondent also refers to two other SUNAT advisory opinions, issued in 2007 and 2012, which it says supports its submission that it has always been consistent in its application of the scope of stability agreements.

SUNAT 2007 advisory opinion

739. In contrast with the SUNAT opinion of 23 September 2002, which the Tribunal has found to be ambiguous and inconclusive, in 2007 SUNAT issued an advisory opinion that unequivocably adopted the position which by then MINEM was espousing. The 2007 opinion stated: "The tax stability guaranteed through an agreement signed with the State under Title Nine of the Single Unified Text of the General Mining Law benefits the titleholder of the mining activity for a period of 15 years only for the investment activities that are the subject matter of the agreements and were indicated in the Feasibility Study, taking into account the definitive amount required for its performance in a given concession or Administrative Economic Unit."[724]

SUNAT advisory opinion dated 13 September 2012

740. This advisory opinion provided that "mining-activity owners that have signed [stabilisation agreements] will enjoy a stabilized tax system applicable solely to the concession or economic-administrative unit for which said agreement has been signed" and that, when

[723] SMCV, Petition No. 1659321 (2 January 2007) (**CE-558**).

[724] SUNAT, Report No. 166-2007-SUNAT/2B0000, *available at* https://www.sunat.gob.pe/legislacion/oficios/2007/oficios/i1662007.htm (20 September 2007) (**RE-27**) ("La estabilidad tributaria garantizada mediante contrato suscrito con el Estado al amparo del Título Noveno del Texto Único Ordenado de la Ley General de Minería, beneficia al titular de la actividad minera por el plazo de 15 años sólo por las inversiones realizadas que se encontraban previstas en el Estudio de Factibilidad, teniendo en cuenta el monto definitivo que demandó para su ejecución en determinada concesión o Unidad Económico-Administrativa.").

calculating tax obligations, mining title holders "should take into account the stabilized laws to be applied to each of the concessions or economic-administrative units."[725]

741. This statement on its face supports the view that stabilisation applied to the entire concession or EAU. The Claimant contends that this 2012 Advisory Opinion was issued to address an issue that affected "mining-activity [titleholders] that [...] signed [stability] agreements [...] for one or more of their concessions or economic-administrative units."[726] To the contrary, the Respondent argues that this Report did not relate generally to the scope of all stabilisation agreements but, instead, was limited to answering the question of whether it was possible for an investor to consolidate losses between EAUs and concessions for the purpose of calculating income tax and whether it was possible to apply positive balances between EAUs and concessions for the purpose of calculating general sales tax.

742. Having considered the content of the entire Report, the Tribunal notes that the subject matter of the report refers to "investors with stability agreements for concessions or EAUs". The questions to be addressed relate to the ability for a taxpayer to set off taxes between its Concessions or EAUs where it has more than one Concession or EAU. It appears from the content of this Report that SUNAT was prepared to entertain the question whether taxpayers with stabilisation agreements were allowed to set off balances across concessions or EAUs. If SUNAT believed at that point that stabilisation applied only to a qualifying investment, it appears to the Tribunal that the question should have been formulated as set-off of balances between stabilized and non-stabilized projects within the same concession or EAU, as well as the set-off of the resulting balances with those of other concessions. Accordingly, this Report appears to deviate from the position that SUNAT had adopted earlier, in agreement with MINEM's.

725 SUNAT, Report No. 084-2012-SUNAT/4B0000 (13 September 2012) (**CE-883**).

726 Claimant's PH Brief, ¶ 52.

iv. What was the Respondent's understanding on the scope of the stability benefit (i) in December 2004 when the investment was committed and construction of the Concentrator commenced and (ii) on 2 January 2007 when construction of the Concentrator was completed?

743. On the basis of the above analysis, it appears to the Tribunal that at the time SMCV was considering whether to build the Concentrator, there was not a consistently held view within the Respondent's organs as to the scope of a stability agreement. Within MINEM, Mr Isasi, Minister Mejía and Mr Polo took the view that only the qualifying investment would be stabilized whereas Ms Chappuis held the opposite view. (Mr. Flury has testified that he had shared the same view as Ms. Chappuis during his tenure as Minister of Mines.)[727] SUNAT did not adopt a clear and uniform understanding until June 2006, although it continued to show some inconsistency in its approach as late as 2012. The Tribunal concludes that the evidence shows, at a minimum, that when the investment was made, the Respondent's key agencies had not shown a solid, uniform, consistent interpretation of the scope of stabilisation agreements coinciding with the Respondent's present position, and this was still the case at the time construction was completed.

v. Did the Respondent make an arbitrary volte face in its understanding of the scope of the stability benefit?

744. As noted, the Claimant's contention that the Respondent arbitrarily changed its position on the scope of a stabilisation agreement raises two separate issues: (i) whether there was such a change of position and (ii) whether the change was arbitrary. On the first issue, the Tribunal finds from the evidence detailed above that in an initial period (from about 1992 to 2006) there was uncertainty, confusion, ambiguity, and inconsistency between various Government organs and individual officials within organs on how the legal framework determined the scope of a stabilisation agreement. Some officials, for example Mr Isasi and Mr Polo, took the view that the Stabilisation Agreement stabilized only the initial qualifying investment, and others such as Ms Chappuis maintained the contrary view. By contrast, after about mid-2006 (with some minor later departures) the position of the

[727] Flury 1, ¶ 39, and Flury 2, ¶¶ 12-14.

Government organs coalesced, almost uniformly, around the understanding that stabilisation extends only to the qualifying investment. For convenience and at the risk of some inaccuracy, the Tribunal will refer to this position as the "**Post-2006 Position**". As the Respondent's pre-2006 position was not clear or univocal, its post-2006 position cannot be accurately described as a *volte face*, as the Claimant does, nor can it be described as a uniform, consistent position throughout the whole period, as the Respondent does. The fact is that the Post-2006 Position was a consciously articulated position different from the uncertainty and wavering that had prevailed before then.

745. The second issue is whether this variation over time in the Respondent's view of the scope of a stabilisation agreement was arbitrary.

746. In considering whether the change in the Respondent's position from pre-2006 to post-2006 could be held to be arbitrary, the Tribunal follows Professor Schreuer's definition of arbitrariness, namely that "[a]rbitrariness is usually understood as a willful disregard of due process of law which shocks, or at least surprises, a sense of judicial propriety. It is associated with a lack of rationality and a failure to provide a reasonable basis for the decision."[728] This can be understood as a decision taken without a rational basis, one that departs from established legal standards or one involving a disregard for due process. It is also summarised as conduct that is based on mere discretion, prejudice, personal preference, or lacks a rational relationship to a legitimate governmental purpose. The Tribunal is also persuaded by the reasoning of the tribunal in *EDF*,[729] which identified the following categories of measures that could be considered to be arbitrary: "[…] a measure that inflicts damage on the investor without serving any legitimate purpose; […] a measure that is not based on legal standards but on discretion, prejudice or personal preference; […] a measure taken for reasons that are different from those put forward by the decision maker; […] a measure taken in willful disregard of due process and proper procedure."

747. The Tribunal observes, at the outset, that a breach of internal law is neither a necessary nor a sufficient condition for a breach of international law. By the same token, a change in the

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728 Christoph Schreuer, Fair and Equitable Treatment in International Investment Law (working paper, 2005), p.14.

729 *EDF (Services) Limited v. Romania,* ICSID Case No. ARB/05/13, Award (8 October 2009), ¶ 303 (**RA-21**).

interpretation of an applicable provision of internal law does not by itself amount to a breach of the FET standard – other considerations must be taken into account, such as the objectively reasonable expectations that the earlier interpretation may have generated, or whether the change resulted from an excess of discretion, prejudice, and other forms of arbitrariness. In this respect, the Tribunal considers that the political pressure suffered by MINEM in 2006 is not enough to disqualify the Respondent's new position as arbitrary, as political pressure, generated inside or outside the Government, is a normal feature in the formulation of State policy.

748. As a first point, the Tribunal notes that the coalescence in approach to the scope of stabilisation agreements amongst the various Government organs took place after the investment had been committed and construction of the Concentrator had commenced. Nevertheless, the Tribunal will not consider the issue whether the Claimant derived objectively reasonable expectations from the Respondent's pre-2006 position, as the Claimant has not framed its claim for breach of the FET standard on a theory of frustration of legitimate expectations. In the present context, the Claimant submits that the Respondent's change of position around 2006 on the interpretation of the scope of the stability benefit was arbitrary. That is the immediate issue before the Tribunal. In later sections of this Award, the Tribunal considers, *inter alia*, whether the Respondent's actions breached the FET standard for different reasons.

749. The Tribunal concludes that the Respondent's change over time in the way its various organs interpreted the scope of the stability benefit cannot be considered arbitrary conduct, for two reasons. First, the Tribunal finds no evidence that the Respondent's Post-2006 Position lacked a rational basis. It is not said, nor could it be, that a decision to raise additional funds which could be invested in those regions where mining was taking place was an irrational decision or that it lacked a rational relationship to a governmental purpose. Nor could it be said that the Respondent's decision to choose, in the end, one of the two competing interpretations of the legal framework was based on mere discretion or personal preference, or that it shocks, or at least surprises, a sense of juridical propriety, especially since the interpretation it chose happens to coincide with the one upheld by the majority of the Tribunal.

750. Second, the Respondent's change of position itself cannot be considered arbitrary. The Tribunal has already noted that political pressure alone does not render a complying Government measure arbitrary. Nor is it arbitrary *per se* for a Government to take time to coalesce around a decision or to consider different views or priorities expressed by different organs before making a decision, as these are normal features of government decision-making. None of these types of conduct, by itself, shocks or surprises a sense of juridical propriety.

751. For the reasons and in light of the evidence discussed above, the Tribunal finds that (i) the Respondent did change its position in mid-2006 on the scope of the stability benefit, when various State organs which until then had held uncertain, ambivalent, or contradictory positions coalesced, with some minor later wavering, in a single interpretation of the legal framework on which the Respondent is relying in this proceeding and (ii) that neither the Respondent's Post-2006 Position nor the fact of the change of position can be considered arbitrary. The Tribunal considers below whether in its treatment of SMCV the Respondent acted with a lack of transparency or with a lack of due process.

vi. The Respondent's treatment of stability agreements of other mining title holders

Introduction

752. The Claimant contends that the Respondent applied the stabilisation agreements of other mining title holders to entire concessions or mining units, a contention that the Respondent denies. In support of its contention, the Claimant adduces certain instances of treatment, to be examined below, involving Consorcio Minero Horizonte, BHP Billiton Tintaya S.A., Compañía Minera Milpo S.A.A., Compañía Minera Yanacocha S.A., and Southern Peru Copper Corporation.

753. This aspect of the dispute raises two distinct issues in respect of the scope of the stability benefit: (i) whether, in dealing with those other mining companies, agencies of the Respondent made statements revealing an understanding of the scope of that benefit that differs from the interpretation the Respondent puts forward in this proceeding, and (ii)

whether the Respondent in fact treated those other companies in a manner different from the treatment of SMCV which has given rise to the Claimant's claims. The first issue concerns stability and consistency in the interpretation and application of the law, which are relevant considerations in a comprehensive analysis under the FET clause of Article 3.1 of the Treaty. The second issue relates in particular to a claim of discriminatory impairment under the non-impairment clause of the same provision.

754. In the following subsections, the Tribunal will examine the factual allegations on which the Claimant based its claim of disparate treatment of other mining companies. The legal consequences of the established facts will be considered, as appropriate, as part of the FET and impairment analyses.

755. The Respondent generally argues, citing the testimony of Mr Cruz, that SUNAT's audits do not review all the taxpayer's activities; they typically focus on a handful of critical issues, and based on the review of those issues, the auditors decide whether to issue an assessment. Therefore, the Respondent submits, the fact that the Tax Administration does not review a specific issue or fact does not mean that the taxpayer's payment of royalties has been correctly calculated or that its approach is validated.[730] The Tribunal is not persuaded by this argument. When the issue is whether a State treated investors differently by applying to them different interpretations of the same internal law, it is no excuse for the State that it acted without checking whether in fact it was applying to the investors different interpretations of the same law. A breach of the FET standard or the non-impairment standard under the Treaty is an objective wrong; it does not require any fault or other particular state of mind on the part of the State.[731]

756. The Tribunal notes that, to make a proper determination of how the Respondent treated other mining title holders having a stabilisation agreement, it would be necessary to review all the relevant circumstances, in particular the specific elements of the qualifying investment; the concessions or EAUs covered by the agreement; any investments made in

730 Tr. Day 6, 1601: 11-22.

731 See ARSIWA, Article 12; J. Crawford, *STATE RESPONSIBILITY: THE GENERAL PART*, Cambridge 2014, pp. 60-62 at p. 61 ("Once more, it should be stressed, state responsibility is predicated on a principle of 'objective liability'.")

those concessions or EAUs other than the qualifying investment; and whether those other investments were treated as covered by the stabilisation benefit. Regrettably, the record does not contain all the relevant evidence on these factual matters. Therefore, the Tribunal is constrained to conduct its examination on the more limited set of relevant materials that have been placed in evidence.

Consorcio Minero Horizonte

757. The first instance of treatment of another mining company invoked by the Claimant comprises a decision of the DGM followed by a decision of the Mining Council in respect of the Parcoy Mining Unit of Consorcio Minero Horizonte. Both decisions were issued in 2001, five years before the Peruvian mining authorities generally coalesced around the interpretation that the Respondent has put forward in this proceeding.[732]

758. The Mining Council's decision, which is on the record, sets forth the antecedents of the matter at issue.[733] Consorcio Minero Horizonte had requested the incorporation of other mining rights to the "Parcoy Project covered by a Stability Agreement."[734] As explained later in the resolution, the purpose of the request was to extend to those other mining rights the benefits conferred by the stabilisation agreement.[735] The DGM had rejected that request, and the company appealed to the Mining Council.

759. The decision on appeal could be broken down into two relevant parts. In the first part, which concerned the scope of the stability benefit, the DGM relied on a legal report by its Directorate of Mining Promotion and Development, which included the following conclusions:

> "*1. - The contractual guarantees will benefit the owner of the mining activity exclusively for the investments made [in subjunctive in the original – may*

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732 Claimant's Memorial, ¶ 324. MINEM, Resolution No. 380-2001-EM-CM (16 November 2001) (**CE-377**). This is the resolution of the Mining Council, on appeal from the resolution of the DGM. The decision of the DGM, dated 28 June 2001, is not on the record but its substance is summarized in the first whereas clauses of the Mining Council resolution.

733 MINEM, Resolution No. 380-2001-EM-CM (16 November 2001) (**CE-377**).

734 MINEM, Resolution No. 380-2001-EM-CM (16 November 2001) introductory paragraph (**CE-377**).

735 MINEM, Resolution No. 380-2001-EM-CM (16 November 2001) second whereas clause (**CE-377**).

or should be made] in the concessions or Economic Administrative Units indicated in Annex I of the Stability Agreement; […] 3. - The tax stability [is applicable to] the Parcoy EAU, which is where the investments of the Parcoy Project were made, with the company being able to include mining rights that correspond to said EAU and that were not included in Annex I of the Stability Agreement; […]"[736]

760. The second part of the DGM's decision concerned the petitioner's request to incorporate other mining rights to the EAU benefitted by the stability agreement. Although the DGM had acknowledged the principle that the company was allowed to incorporate other mining rights to the EAU subject to the stability agreement, it denied the company's application, notably on the ground that: "4. - The inclusion of other mining rights located outside the perimeter of the Parcoy EAU in the Stability Agreement is not appropriate."[737] Consorcio Minero Horizonte appealed to the Mining Council, arguing that the mining rights it was seeking to include in the Parcoy EAU, although contained in other EAUs, constituted together a single production unit. Those other mining rights, it argued, were annexed to the Parcoy Project and were part of its production unit located in the same province.[738]

761. The Mining Council (i) confirmed the DGM's interpretation on the scope of the stabilisation but (ii) annulled the DGM's resolution to deny the incorporation of other mining rights to the Parcoy EAU. On the first issue, the Mining Council explained:

"*According to the clauses of the Agreement on Guarantees and Measures for the Promotion of Investments, signed by the appellant with the State, the following are subject to the Stability Agreement: 1. The concessions created in the Parcoy EAU and the Parcoy Plant beneficiation concession, which comprise the Parcoy Project, are subject to the Stability Agreement; and 2.*

[736] MINEM, Resolution No. 380-2001-EM-CM (16 November 2001) first whereas clause (**CE-377**).

[737] MINEM, Resolution No. 380-2001-EM-CM (16 November 2001) first whereas clause (**CE-377**).

[738] MINEM., Resolution No. 380-2001-EM-CM (16 November 2001) second whereas clause (**CE-377**).

The possibility of incorporating other mining rights to the Parcoy Project, that is, to the Parcoy EAU, is contemplated."[739]

762. On the second issue, that is, the mining company's request to incorporate other mining rights to the EAU that was covered by the stabilisation guarantee, the Mining Council pointed out that under Article 44 of the TUO of the General Mining Law the inclusion of other mining rights in an EAU was subject to a proximity requirement, which varied depending on the type of mineral at issue – five kilometers in the case of auriferous ore. On this basis, the Mining Council ruled that the DGM breached the law by denying the mining company's request to expand the EAU without first ascertaining the distance between it and the other mining rights which the petitioner had sought to incorporate in it. Consequently, the Mining Council vacated the DGM resolution and remanded the case to the DGM for further proceedings in accord with the Mining Council's resolution.[740]

763. The decisions of the DGM and the Mining Council discussed above demonstrate that, in 2001, these MINEM entities understood the Mining Law and the Regulations, as well as the standard-form stabilisation agreement, as applying the benefit of stability to the concessions or EAUs referred to in the agreement, as distinguished from the initial, qualifying project. This understanding is explicit and unambiguous in both the decision of the Mining Council and the summary of the DGM's decision. Besides, if these entities had understood the benefit to apply only to the qualifying project, the issue of expanding the EAU to include other mining rights *so that they would also be covered by the stabilisation* would not have arisen. Alternatively, if the issue had arisen only as a question of under what conditions may an EAU be expanded, it would not have been explicitly treated as a case of a concomitant expansion of the activities benefitted by stabilisation. The Tribunal therefore finds that in this instance two arms of the MINEM understood the applicable legal framework in a manner consistent with the Claimant's position.

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739 MINEM, Resolution No. 380-2001-EM-CM (16 November 2001) ninth whereas clause (**CE-377**) (emphasis added by the Tribunal).

740 MINEM, Resolution No. 380-2001-EM-CM (16 November 2001) (**CE-377**).

BHP Billiton Tintaya S.A.

764. The second instance of treatment of another mining company on which the Claimant relies concerns the Tintaya Project of BHP Billiton Tintaya SA ("**Tintaya**").[741] In December 1995 Tintaya entered into a stabilisation agreement with the State having a duration of fifteen years. Clause 1.1 of the agreement provided that stability was sought "in relation to the [petitioner's] investment in its concessions: [24 mining concessions were then listed] and the Tintaya Beneficiation Concession, referred to hereinafter as the 'Tintaya Project'."[742] The agreement refers to investment in listed mining and beneficiation concessions, without reference to any EAU, although it appears that by 2002 at least the mining concessions had been grouped into a Tintaya EAU. Clause 1.3 of the agreement refers to a feasibility study concerning an investment in the Tintaya mine, the development of the Chabuca sulphur deposits, and the expansion of the sulphur plant.[743]

765. In 2002, Tintaya requested a second stabilisation agreement covering a new beneficiation concession in the "Copper Oxides Project." The application for that second agreement was granted, and the Minister of Energy and Mines, Mr Hans Flury, who approved and signed Tintaya's new stability agreement, testified that he "clearly understood that [its] scope … would apply" to the entire beneficiation concession because "the Mining Law extended [stability] to entire concessions or production units."[744]

766. After the feasibility study for the Oxides Project was approved and the application for the stabilisation agreement was submitted to the Vice Minister of Mines for approval and formalization of the agreement, Tintaya requested that the concessions to which the new agreement would apply include also (i) all the concessions of the Tintaya EAU and (ii) the Tintaya beneficiation concession (Sulphides Plant).[745] This request apparently sought to

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741 Claimant's Reply, ¶¶ 57-58, 82-83.

742 Compañía Magma Tintaya Sociedad Anónima Stability Agreement (29 December 1995), Clause 1.1 (**CE-914**).

743 *Id*., Clause 1.3.

744 Flury 1 ¶¶ 33-38.

745 MINEM, Report No. 019-2003-DGM-DPDM/L (20 January 2003), p. 1 (**CE-882**).

extend the stabilisation benefit derived from the 1995 agreement, due to expire in 2009, until the expiry of the new stabilisation agreement.

767. The MINEM rejected Tintaya's request to include in the new agreement those concessions that were included in the 1995 agreement. The DGM rejected Tintaya's request on the grounds that the concessions covered by the Tintaya EAU were still "the subject of a stability agreement in effect until 2009" and hence "c[ould not] be included" in the new agreement, which covered a different EAU (the Oxides EAU).[746] A few months later, the Mining Council dismissed Tintaya's appeal. The DGM resolution, which is on the record only in Spanish,[747] relied on a report from the Director of Mining Promotion and Development, which is on the record.[748] This report and the resolution of the Mining Council provide indications of how these agencies understood the scope of stabilisation agreements in 2003.

768. The MINEM report first noted that by allowing concessions to be grouped into EAUs by proximity, *i.e.* location within a prescribed radius, the law created multiple possibilities, allowing a company "to generate projects and investment programs [which] can give rise to stability agreements that are independent of each other."[749] The report then recalls that Article 22 of the Mining Regulations provides that stability applies "exclusively for the investments made in the concessions or [EAUs]…"[750] and that Article 83 of the Mining Law provides that stability "will accrue exclusively to the activities of the company in favor of which the investment is made."[751] The report concludes that "there is no legal basis for granting [Tintaya's] request that the concessions that are part of its Tintaya EAU and the

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746 MINEM, Report No. 019-2003-DGM-DPDM/L (20 January 2003) (**CE-882**); Mining Council, Resolution No. 182-2003-EM/CM (9 June 2003) (**CE-932**).

747 MINEM, Directorial Resolution No. 314-2002-EM/DGM (14 November 2002) (**CE-931**).

748 MINEM, Report No. 019-2003-DGM-DPDM/L (20 January 2003) (**CE-882**). The content of the DGM's resolution is summarized in the resolution of the Mining Council, which confirms the DGM's reliance on the cited report.

749 MINEM, Report No. 019-2003-DGM-DPDM/L (20 January 2003), p.2 (**CE-882**).

750 MINEM, Report No. 019-2003-DGM-DPDM/L (20 January 2003), p.2 (**CE-882**). In the original Spanish text of the report, as well as the original text of Article 22 of the Regulations, the verb is in the subjunctive mood.

751 MINEM, Report No. 019-2003-DGM-DPDM/L (20 January 2003), p.2 (**CE-882**). This is an accurate translation of the way the Spanish text of the report paraphrases Article 22 ("*se efectúa*"), but the actual text of Article 22 uses the verb in the subjunctive mood ("*se efectúe*").

'Tintaya' beneficiation concession (Sulfides [*sic*] Plant) which are also the subject of a stability agreement in effect until 2009, also be part of the stability agreement that will be signed for the investments in the Copper Oxides Project, since for the purposes of these contracts the oxides plant constitutes a unit unrelated to the aforementioned concessions, and the two contracts must be maintained while identifying their results in separate fashion, in accordance with the Law".[752]

769. This reasoning adopted by the DGM suggests that in 2003 this agency understood the stability benefit as applying to the investments that the mining titleholder may or should make in the concessions or EAUs listed in the agreement, not only to the qualifying project. As noted before, this was the view that Minister Flury had espoused in 2002. The DGM considered that the request should be denied because the new agreement would apply to the Oxides EAU, which was *unrelated* to the EAU involved in the earlier agreement – not because stability under the new agreement would be circumscribed to the new qualifying project.

770. On appeal, the Mining Council, by majority,[753] dismissed the appeal on a line of reasoning very similar to the DGM's, with certain nuances or a shift of emphasis. It said:

> "*That in the present case the investment made by BHP Tintaya S.A. has been for the oxides project, supported by its Feasibility Study, wherefore the contractual benefit shall fall exclusively on the activities [arising from] the investment made in the oxides project. The concessions that make up the Tintaya Economic-Administrative Unit and the "Tintaya" sulfide beneficiation concession, which were not the subject of the oxide project investment [on which the investment of the oxides project has not fallen], have been enjoying a Tax Stability Agreement since 1995 for a term of 15*

[752] MINEM, Report No. 019-2003-DGM-DPDM/L (20 January 2003) (**CE-882**).

[753] Two members voted to vacate the DGM resolution on the ground that it had omitted resolving on the request for inclusion of another concession ("Industrial Oxides Plant") in the scope of the new agreement.

years, which expires in 2009; therefore, they cannot be included in the Tax Stability Agreement of the oxide project."[754]

771. In the quoted paragraph, the majority of the Mining Council emphasises two points: (i) the contractual benefit applies exclusively to the activities arising out of the investment "made" (perhaps more accurately, at that time, "to be made") in the oxides project, supported by the respective feasibility study, and (ii) the concessions which Tintaya asks to include in the new agreement have benefitted from a stabilisation agreement which will remain in force until 2009. The first point stresses that at least initially there must be a physical, territorial connection between the qualifying project for the new agreement and the concessions or EAUs in which the protected investments are to be carried out. The second point appears to be that once a concession or EAU is covered by a stabilisation agreement, it cannot be covered by a later one as long as the earlier one is in effect. The first point suggests that the qualifying project plays a determinant role in identifying the concessions or EAUs that will be covered by the agreement, which is something to be expected given the need for such identification to be a part of the agreement. The second point appears to accept that by tying up all the listed concessions and EAUs, a stability agreement applies the stability benefit to those concessions and EAUs, not merely to the qualifying project.

772. In summary, the DGM decision and that of the Mining Council (the latter with some ambiguities) reflect that in 2003 these bodies did not understand the scope of the benefit of stability to be limited to the activities arising out of the qualifying project. On the contrary, they generally appeared to understand that the benefit of stability was attached to the investments that may be made in the concessions or EAUs identified in the agreement. It is easy to see that if those agencies had understood the stability to be circumscribed to the qualifying project, Tintaya's request would have been rejected on simpler and more straightforward grounds.[755]

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[754] Mining Council, Resolution No. 182-2003-EM/CM (9 June 2003), p. 4 (**CE-932**). The first sentence is translated by the Tribunal, as it is not included in the English version of **CE-932** available in the record. The phrase between brackets is inserted in the second sentence by the Tribunal to clarify the English translation in the record.

[755] If (i) stability applies only to the qualifying project and (ii) under the stabilisation agreement the qualifying project is to be built in concession C_1 only, then there is no point in including other concessions in that stabilisation

773. It is worth noting, as an afterword, that in 2009 SUNAT resolved another matter involving Tintaya applying the interpretation that it had adopted since mid-2006. In 2008, Tintaya sought to consolidate the year-end financial results of its activities covered by two separate stabilisation agreements, one of which had come into effect in the course of the fiscal year. In a May 2009 Resolution, SUNAT ruled that (i) consolidation of financial results was possible but (ii) only after separately establishing the results for the activities subject to each stabilisation agreement and applying the various stabilized rates or the common tax regime depending on when the agreement came into effect.[756] The reasoning on which this decision was based includes the following key statement: "THE BENEFIT [OF STABILITY] WILL ONLY REACH THE INVESTMENTS MADE THAT WERE FORESEEN IN THE FEASIBILITY STUDY, taking into account the final amount that execution may require."[757] This statement reflects the position that SUNAT had adopted in mid-2006.

Compañía Minera Milpo S.A.A.

774. The third instance of treatment of another mining company invoked by the Claimant concerns SUNAT's tax treatment of the revenues from what is described as the El Porvenir Mining Unit of Compañía Minera Milpo S.A.A. ("Milpo").[758] On 27 November 2007, Milpo and the State entered into a 10-year stabilisation agreement concerning the expansion of the El Porvenir Mine to increase its capacity to produce concentrates of zinc, lead, and copper.[759] The project, called "El Porvenir Mine Expansion Project," was circumscribed to 84 concessions listed in Annex I to the agreement.[760] Among other benefits, the agreement guaranteed a 20% income-tax rate for the term of the agreement.[761] Although no evidence has been adduced on whether the 84 concessions were formally

agreement, *whether or not those concessions are related to C_1 and whether or not they are covered by other stabilization agreements*.

756 SUNAT, Intendency Resolution No. 095-014-0000747/SUNAT (20 May 2009) (excerpts) (**RE-193**).

757 SUNAT, Intendency Resolution No. 095-014-0000747/SUNAT (20 May 2009) (excerpts), section 4.1.4.3, p. 108 (**RE-193**).

758 Claimant's Reply, ¶ 59(b).

759 Compañía Minera Milpo S.A.A.-El Porvenir Stability Agreement (27 November 2002), Clause 1 (**CE-927**).

760 Compañía Minera Milpo S.A.A.-El Porvenir Stability Agreement (27 November 2002), Clause 3 (**CE-927**).

761 Compañía Minera Milpo S.A.A.-El Porvenir Stability Agreement (27 November 2002), Clause 9.3.1 (**CE-927**).

grouped into an EAU, it is a fact, as shown below, that SUNAT later referred to the stabilized portion of Milpo's operations as the "El Porvenir Mining Unit" and the non-stabilized portion as the "Other Units." It appears that Milpo held title to multiple geographically separated mining "units", whether they were formally designated as EAUs or simply existing as separate mining operations.[762]

775. In December 2005, SUNAT issued various income-tax assessments and penalties regarding Milpo's income in certain periods of 2003. Milpo appealed from those assessments and penalties to SUNAT. In June 2009, SUNAT upheld the appeal in part by annulling several penalty resolutions and adjusting other tax assessments.[763] The contested assessments and penalties and the reasons for reversing or upholding them are not relevant to the present discussion.

776. What is relevant is that, in reassessing Milpo's income tax for the 2003 period, SUNAT classified Milpo's income items into two separate categories: (i) "El Porvenir Unit" and (ii) "Other Units," adding a consolidated total.[764] The following is the relevant chart:[765]

ASSESSMENT OF TAXABLE INCOME SUPPORT

SUPPORT		THIRD CATEGORY INCOME TAX		
		UNIT: "EL PORVENIR"	UNIT: "OTHERS"	CONSOLIDATED
Profit or (Loss) before Income Tax according to Annual Income Tax Payment Return		[redacted]	[redacted]	[redacted]
(+) Additions to determine the Taxable Income				
(-) Deductions to determine Taxable Income				
Net Income or (Loss) for the fiscal year		[redacted]	[redacted]	[redacted]
Compensable Tax Loss from previous fiscal years				
Net Taxable Income or (Net Offsettable Loss)		[redacted]	[redacted]	[redacted]
Profit-Sharing				
Net Income or (Loss) for the Fiscal Year before Profit-Sharing and Income Tax		[redacted]	[redacted]	[redacted]
	TOTAL OBJECTIONS	[redacted]	[redacted]	[redacted]
	TOTAL TAXABLE NET INCOME BEFORE PROFIT-SHARING AND TAX	[redacted]	[redacted]	[redacted]
	Profit-Sharing (According to Taxpayer)	[redacted]	[redacted]	[redacted]
	TOTAL TAXABLE NET INCOME BEFORE TAX	[redacted]	[redacted]	[redacted]
	Reinvestment (Article 72, Para. b) of S.D. No. 014-92-EM)	[redacted]	[redacted]	[redacted]
		[redacted]	[redacted]	[redacted]
	Applicable Rate	[redacted]	[redacted]	
	INCOME TAX S/.	[redacted]	[redacted]	[redacted]

[762] The Claimant asserts that "Milpo has several geographically separated mining units", Claimant's PH Brief, ¶ 47(a). The Respondent avers that, in addition to the El Porvenir Mine Expansion Project, Milpo owns the Cerro Lindo Project, for which it was a stabilisation agreement, and the geographically separated Chapi mine, for which it has none. Respondent's PH Brief, ¶ 152.

[763] SUNAT, Intendency Resolution No. 0150140008402 (30 June 2009) p. 30/31 (**CE-1068**).

[764] The SUNAT document says nothing about the 2003 income (if any) generated by the Cerro Lindo Project, nor does it state which stabilized tax rate would have applied to income from this operation.

[765] SUNAT Assessment No. 012-003-0008216 (28 November 2005) p. 3 (**CE-1090**).

777. As the chart shows, the tax rate applied to income from the "El Porvenir Unit" was [redacted]. In the report accompanying the SUNAT resolution, a footnote to "El Porvenir Unit" states: "This mining unit has a tax stability agreement with the State, according to which the rules of the Income Tax in force in the 2001 fiscal year were stabilized, with this stability governing from the 2003 fiscal year, so the 20% rate in force in the 2002 taxable year applies […]"[766] The rate applied to "Other Units" was [redacted].

778. The Claimant argues that in reassessing the income tax owed by Milpo for tax year 2003, the SUNAT applied the stabilized 20% tax rate to the entire income resulting from the "El Porvenir Unit", without distinguishing between income produced by stabilized and non-stabilized projects within that unit. This assertion appears to be correct. It is to be noted that the SUNAT resolution was issued in June 2009, about three years after SUNAT had firmly endorsed the view that the benefit of stability applied only to the activities in the qualifying project, not to those in the concessions or EAUs covered by the stabilisation agreement. Unless the SUNAT resolution were construed as a repudiation of that view, an inference that the Tribunal considers implausible, it appears to be a case of simple inconsistency with the position that SUNAT had adopted since mid-2006. It was inconsistent with that position to have applied the stabilized 20% rate to the income from the entire "El Porvenir Unit", without ascertaining or attempting to ascertain (or requiring the taxpayer to specify) which portion of that income came from the qualifying project and which portion came from other activities in the covered concessions. The Tribunal concludes that the SUNAT resolution reveals, if not an understanding of the scope of stability at odds with SUNAT's by then established interpretation, at least an inconsistency in applying that interpretation, in contrast with the way the same interpretation has been applied to SMCV in the assessments at issue in the present case.

779. The Respondent contends that the SUNAT resolution did not consider the scope of Milpo's stability agreements.[767] That observation, though correct as a matter of fact, misses the point. After correcting the errors made by the first-level assessments, SUNAT saw fit to recalculate Milpo's tax liability. In doing so, consistency (as a relevant consideration of the

[766] SUNAT, Intendency Resolution No. 0150140008402 (30 June 2009) p. 22/31, fn. 24 (**CE-1068**).

[767] Respondent's PH Brief, ¶¶ 153-154.

FET analysis) required the SUNAT to apply the stabilized 20% tax rate only to the income from the qualifying project, according to the agency's 3-year-old understanding of the law, lest that understanding be applied differently to other taxpayers, as in fact it occurred later with SMCV. Nor is it an excuse, as already noted, that the SUNAT chose not to review certain aspects of Milpo's tax returns. Agency omissions or shortcuts do not excuse such lack of consistency for the purposes of the FET analysis.

Compañía Minera Yanacocha S.A.

780. The Claimant also invokes the SUNAT's treatment of income related to investments covered by certain stabilisation agreements which Compañía Minera Yanacocha S.A. ("**Yanacocha**") had entered into with the State. The Parties disagree on the facts and the inferences to be drawn from them. The Tribunal will first ascertain the facts and draw its own conclusions therefrom.

781. On 19 May 1994, Yanacocha and the State signed a 15-year stabilisation agreement for a gold and silver investment project in the EAU Chaupiloma Sur, to be named "Yanacocha-Carachugo Sur Project."[768] The EAU Chaupiloma Sur comprised three concessions: Chaupiloma Tres, Chaupiloma Cuatro, and Chaupiloma Cinco.[769] On 16 September 1998, Yanacocha and the State entered into a second 15-year stabilisation agreement for a gold mining and treatment investment project in the EAU Carachugo Sur, to be called the "Cerro Yanacocha Project."[770] The EAU Carachugo Sur comprised two concessions, Chaupiloma Uno and Chaupiloma Dos, and a portion of a third, Chaupiloma Tres.[771] On 25 July 2003, Yanacocha and the State signed a third stabilisation agreement for the exploitation of a gold mining and leaching project, to be named "La Quinua Project," "in its existing mining concessions."[772] Annex I to this agreement lists 22 mining concessions, including a portion

768 Compañía Minera Yanacocha S.A.-Carachugo Sur Stability Agreement (19 May 1994) Clause 1 (**CE-911**).

769 Compañía Minera Yanacocha S.A.-Carachugo Sur Stability Agreement (19 May 1994) Annex I (**CE-911**).

770 Minera Yanacocha - Cerro Yanacocha Stability Agreement (16 September 1998) Clause 1 (**CE-919**).

771 Minera Yanacocha - Cerro Yanacocha Stability Agreement (16 September 1998) Annex I (**CE-919**).

772 Agreement of Guarantees and Measures for the Promotion of Investments, Compañía Minera Yanacocha S.R.L - Project La Quinua Stabilization Agreement (25 July 2003), Clause 1 (**RE-189**).

of Chaupiloma Dos.[773] A footnote to the reference to Chaupiloma Dos explains that "[it] does not include the area corresponding to the Cerro Yanacocha Project (210 hectares)."[774] A chart provided by the Respondent summarises this information:[775]

Project	Date of Agreement	Concessions	Name of EAU
Yanacocha–Carachugo Sur	1994	Chaupiloma Tres; Chaupiloma Cuatro; Chaupiloma Cinco	Chaupiloma Sur
Cerro Yanacocha	1998	Chaupiloma Uno; Chaupiloma Dos; Parte del Derecho of Chaupiloma Tres	Carachugo Sur
La Quinua	2003	Chaupiloma Dos; Chaupiloma Once; Chaupiloma Trece	Quinua

782. The Parties disagree on the extent and significance of the fact that two concessions (Chaupiloma Dos and Chaupiloma Tres) appear in Annex I of two separate stabilisation agreements. The Claimant argues that each agreement covered different portions of the concession at issue;[776] the Respondent that the overlap precludes the inference that the stability benefit extended to an entire concession.[777] The Tribunal first observes that in Annex I to the 2003 agreement it is expressly stated that the portion of the Chaupiloma Dos concession included in the agreement *excludes* an area of 210 hectares corresponding to the Cerro Yanacocha Project. It is plain, therefore, that in approving the 2003 agreement MINEM resolved the overlap by reducing to 210 hectares the area of Chaupiloma Dos allocated to the Carachugo Sur EAU by the 1998 agreement and by allocating the balance of the area to the new 2003 agreement. As for Chaupiloma Tres, the 1998 agreement merely states that it covers a portion of that concession, without specifying the area of that portion or explicitly addressing the overlap created by the reference to the entire concession in the 1994 agreement. On the state of the record, it is impossible to know for sure how MINEM understood or intended to deal with this situation. It is possible that in 1998 MINEM

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773 Agreement of Guarantees and Measures for the Promotion of Investments, Compañía Minera Yanacocha S.R.L - Project La Quinua Stabilization Agreement (25 July 2003), Annex 1 (**RE-189**).

774 Id.

775 Respondent's PH Brief, ¶ 155. The Respondent alleges that Yanacocha and the State entered into a fourth stabilisation agreement, concerning the Maqui-Maqui Project, for which there is no evidence on the record, and which does not appear to be relevant to the Claimant's allegations of disparate treatment.

776 Claimant's PH Brief, ¶ 48(c).

777 Respondent's PH Brief, ¶ 156.

considered that a concession could be allocated to more than one EAU or that it thought unnecessary to address this issue in the 1998 agreement, in contrast with what it did in the 2003 agreement. It should be recalled that the 2003 agreement was signed after the DGM and the Mining Council had taken the view, in the Consorcio Horizonte case already discussed, that a stabilisation agreement could not encompass a concession or EAU that was covered by a stabilisation agreement still in effect.

783. Against this background, the Claimant contends that in assessments issued from 2005 to 2008, covering tax years 2002 and 2003, SUNAT applied each stability agreement to each respective mining unit (not each investment project) and independently calculated taxable income for each mining unit, a contention that the Respondent rejects. The Tribunal will then examine the various SUNAT resolutions at issue.

784. In December 2006, SUNAT issued a series of assessments against Tintaya for adjustments in the prepayment of income tax for the year 2002.[778] The statement of the legal basis for the assessments said: "The calculation of taxes, which includes income tax pre-payments payable by the mining titleholder, must be done separately for each economic administrative unit for which it has entered into a tax stability agreement, statement which is based on [the TOU of the Mining Law and the Regulations]".[779]

785. Even though the assessments were issued in December 2006, six months after the SUNAT adopted the view that stability applied only to the qualifying project, Annex 4 to the assessments explained the basis for assessments as follows:

> "*The division of income for each Project has been requested in order to determine the taxable base of the pre-payments, considering that in accordance with the provisions of Article 22 of the Regulations of the Single Unified Text of the General Mining Law, mining activity titleholders* must

[778] SUNAT Assessments Nos. 092-003-0001498 to 092-003-0001505 (27 December 2006) (**CE-1063**).

[779] SUNAT Assessments Nos. 092-003-0001498 to 092-003-0001505 (27 December 2006) Annex 1, p. 1/9 (**CE-1063**). The same statement appears in Annex 1 to a similar series of assessments issued in December 2007 in respect of tax year 2004: SUNAT, Tax Assessments Nos. 092-003-0001931 to 092-003-0001942 (28 December 2006), Annex 1, p. 1/8 (**CE-1064**), and in Annex 1 to an additional assessment of December 2007 in respect of tax year 2003: SUNAT, Tax Assessment No. 092-003-0001919 (28 December 2007) Annex 1, p. 1/7 (**CE-1065**).

> calculate and reflect the results obtained for each concession or EAU. Considering that the Mining Law allows each concession or EAU to either stabilize a tax regime or not, a titleholder can be subject to several tax regimes at the same time, for the concessions it holds. *In 2002, the taxpayer holds the* [redacted] *Project, which produces copper concentrate, and the* [redacted] *Project, which produces copper cathodes. The first project has a stabilized tax regime as of 07.20.98 according to the Agreement on Guarantees and Measures for the Promotion of Investments signed with the Peruvian State, and the* [redacted] *Project is subject to the general regime, since no agreement has been signed to stabilize its tax regime.* Considering that each project has a different tax regime, the mining titleholder must determine the taxes, such as pre-payments, separately, i.e. for each project. *Therefore we are proceeding to determine pre-payments for each project.*"[780]

786. The first set of italicized sentences is clearly consistent with an understanding that the stability applied to the results obtained for each concession or EAU. As for the ambiguous word "project" used in the last italicized sentence, it cannot have been meant to refer to the qualifying project only, because in such a case (i) this sentence would have been inconsistent with the first set of italicized sentences and (ii) SUNAT would have directed the title-holder to calculate the results not for each concession or EAU but for the qualifying project and, separately, for any other individual project within that concession of EAU. The Tribunal concludes from this analysis that SUNAT's Post 2006 Position had not yet percolated to the assessors in December of that year.[781]

787. Two years later, in December 2008, SUNAT changed the way it described the legal framework. It did so in resolving various appeals lodged by Tintaya against assessments for tax years 2002 and 2003.[782] One of the issues on appeal was whether the taxpayer could

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[780] SUNAT Assessments Nos. 092-003-0001498 to 092-003-0001505 (27 December 2006) Annex 4 (**CE-1063**) (emphasis added).

[781] The same is true of assessments issued in December 2007. See footnote 778.

[782] SUNAT Intendency Resolution No. 0150140007925 (30 December 2008) (**CE-1067**).

consolidate its tax liability for payment purposes after it separately calculated the tax liability corresponding to each concession or EAU under the tax regime applicable to it. SUNAT agreed that the tax had to be calculated separately depending on the tax regime applicable to the operation, and then the results could be consolidated for the purposes of the declaration and payment of the tax owed.[783] In doing so, SUNAT changed the description of the legal regime, in comparison with the description contained in the assessments made two years earlier:

> "*Thus, the tax assessment must be done according to the tax regime applicable to each* investment*, which relates to the regulations in force on the date of approval of the investment program, if applicable, on the date of approval of the technical-economic feasibility study and, likewise,* that the aforementioned regime applies exclusively to the project that enjoys the benefit*; therefore, the mining activity titleholders that make investments in various projects, when entering into the respective tax stability agreements, can guarantee* a different tax regime for each project, depending on the year in which the investment program was entered into*; in other words, it is possible for the same tax debtor to be subject to different tax regimes,* depending on each of its projects."[784]

788. Even though another portion of the same document points out that in the same case the net taxable income in the preceding fiscal year "is determined *for each EAU or project*," a fair reading of the December 2008 document leads to the conclusion that at the time it was issued, the SUNAT's description of the legal framework did reflect the interpretation on which the agency had settled in mid-2006. The same appears to be the case for SUNAT assessments and resolutions adopted after December 2008.[785]

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783 SUNAT Intendency Resolution No. 0150140007925 (30 December 2008) (**CE-1067**).

784 SUNAT Intendency Resolution No. 0150140007925 (30 December 2008) p. 54/105 (**CE-1067**) (emphasis added).

785 *See* SUNAT, Intendency Resolution No. 095-014-0000747/SUNAT (20 May 2009) (excerpts) (**RE-193**), cited in Respondent's PH Brief, ¶ 162.

789. In any case, the Tribunal should take into consideration not only what SUNAT *said* in describing the legal framework, but what it *did* in assessing Tintaya's tax liability. In this respect, the Tribunal observes that the taxes for years 2002 and 2003 were assessed separately by blocks designated by the project name assigned in the respective stabilisation agreement, *i.e.* "[redacted]," "[redacted]," and "[redacted]."[786] It does not appear that any effort was made to distinguish, within each block, between income generated by the qualifying project and any income resulting from any other activities carried out in the same concessions or EAUs covered by the respective agreement. At the same time, it is not clear from the evidence whether all the income attributed to each "project" derived from the qualifying project or included income from other activities carried out in the same concessions or EAUs.

790. In this respect, the Claimant contends that, after entering into the stabilisation agreements, Yanacocha made various additional investments in its mining units, and SUNAT treated those investments as stabilized even though they did not form part of the qualifying investment.[787] It argues in particular that, seven years after signing the Maqui Maqui stability agreement, Yanacocha purchased fixed assets in the sum of USD [redacted], an investment which had not been contemplated in the underlying feasibility study.[788] The evidence shows that in December 2004 the SUNAT assessed Yanacocha's tax liability for tax year 2001 in respect of stabilized investments in Carachugo, Maqui Maqui, Cerro Yanacocha, and La Quinua.[789] It also shows that in the case of Maqui Maqui, new investments in machinery and equipment were recorded for approximately USD [redacted] in 2001 and USD [redacted] in 2000.[790] The Claimant avers that those new investments were not contemplated in the underlying feasibility study.[791] This averment cannot be verified, however, because the record contains neither the stabilisation agreement

786 SUNAT Intendency Resolution No. 0150140003988 (31 August 2005) (**CE-1061**); SUNAT Intendency Resolution No. 0150140007925 (30 December 2008) p. 55/105 (**CE-1067**).

787 SUNAT Assessment No. 012-003-0005518 (9 December 2004) (**CE-1089**).

788 Claimant's PH Brief, ¶ 48(b), citing SUNAT Assessment No. 012-003-0005518 (9 December 2004) (**CE-1089**) and SUNAT Assessment No. 012-003-0010598 (31 October 2006) (**CE-1092**).

789 SUNAT Assessment No. 012-003-0005518 (9 December 2004) pp. 1-8/21 (**CE-1089**).

790 SUNAT Assessment No. 012-003-0005518 (9 December 2004) pp. 10-15/21 (**CE-1089**).

791 Claimant's PH Brief, ¶ 48(b).

for Maqui Maqui nor the corresponding feasibility study. In sum, the Claimant has failed to prove its assertion concerning the treatment of new investments in Maqui Maqui.

791. The Tribunal concludes that (i) for approximately six months after SUNAT had settled on the view that stability applies only to the qualifying investment, its assessors continued to describe the applicable framework in a manner consistent with the view that stability applied to the concessions or EAUs covered by the respective agreement; (ii) two years later, however, SUNAT changed its description of the framework to accord, on a fair reading, with the interpretation adopted in mid-2006, and (iii) no conclusive evidence has been produced that in respect of tax years 2002 and 2003 SUNAT actually applied stabilized rates to income from investments other than those in the qualifying projects. Therefore, while there appears to have been a change within SUNAT in the way the legal framework was understood, it is not proven that in fact SUNAT treated Yanacocha, in respect of the tax years in question, differently from the way it later treated SMCV.

Southern Peru Copper Corporation

792. The fifth and final instance of treatment of other mining companies which the Claimant alleges to have differed from that afforded to SMCV concerns Southern Peru Copper Corporation ("**Southern Peru**"). It is undisputed that in 1994 Southern Peru and the State entered into a 15-year stabilisation agreement in connection with a copper leaching-electrowinning project (the "**Electrowon Leaching Project**") to be built near Southern Peru's Toquepala mine. The Parties differ, however, on which concessions or EAUs were involved in the stabilized operation and what inferences are to be drawn therefrom on the scope of the stabilisation.

793. The 1994 stabilisation agreement provides that the benefits of stability were requested "in relation to the investment in the development and installation of the Leaching mining project, by means of which the copper ore processing capacity will be expanded at its concessions consisting of the Toquepala and Cuajone Economic-Administrative Units, hereinafter 'Leaching-Electrowon Project'".[792] It further explains that the Electrowon

[792] Southern Peru Copper Stability Agreement (12 July 1994) Clause 1.1 (**CE-912**).

Leaching Project comprises the construction of an electrowon-leaching plant to be built near the Toquepala mine,[793] and includes the following provision:

> "*The title-holder shall act as the title-holder of the Beneficiation Concessions 'Toquepala SX/EW Leaching Plant' and 'Cuajone SX Leaching Plant', the obtaining of which is in process, for the development of the Leaching-Electrowon Project [which is the] object of the benefits established in the present Contract, wherefore article 22 of the Regulations of the Title Ninth of the Single Ordered Text of the General Mining Law, approved by Supreme Decree No. 024-93-EM, shall be applicable*."[794]

794. Clause Three of the 1994 agreement states that the Leaching-Electrowon Project is circumscribed to the Toquepala and Cuajone EAUs, which comprise the concessions listed in Annex I, without prejudice to the title-holder's right to incorporate other mining rights to the Leaching-Electrowon Project with approval from the DGM.[795]

795. In May 2004, Southern Peru requested that five new EAUs be incorporated to those covered by the 1994 agreement, for the purpose of extending the regime of guarantees of that agreement to those new EAUs and the concessions included in them.[796] It appears that the new EAUs were intended to replace the old Toquepala and Cuajone EAUs in the regime of the agreement.[797] It also appears that a MINEM subordinate agency had approved the creation of the new EAUs and also the retirement (archiving) of the old EAUs, but the approval of the DGM therefor was not recorded.[798] The DGM rejected Southern Peru's request for incorporation of the new EAUs, on grounds that are not central to the present discussion.[799] In October 2006, the Mining Council dismissed Southern Peru's appeal from

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793 Southern Peru Copper Stability Agreement (12 July 1994) Clause 1.3 (**CE-912**).

794 Southern Peru Copper Stability Agreement (12 July 1994) Clause 1.4 (**CE-912**) [Tribunal's translation].

795 Southern Peru Copper Stability Agreement (12 July 1994) Clause 3 (**CE-912**). While Annex I does not appear to be on the record, the concessions comprising the Toquepala EAU and those comprising the Cuajone EAU are listed in Mining Council Resolution No. 224 2006-MEM/CM (17 October 2006) (**CE-1062**).

796 Mining Council Resolution No. 224 2006-MEM/CM (17 October 2006), p. 1 (**CE-1062**).

797 Mining Council Resolution No. 224 2006-MEM/CM (17 October 2006), p. 5 (**CE-1062**).

798 *Id*.

799 Mining Council Resolution No. 224 2006-MEM/CM (17 October 2006), p. 1 (**CE-1062**).

the DGM resolution, on the grounds that (i) the modification of the Southern Peru's EAUs required the approval of the DGM, which was not obtained, and (ii) the approval of the DGM was also required for the incorporation of the new EAUs to the regime of the 1994 agreement, and even so the law and the contract only authorize the addition, not the subtraction, of additional rights.[800] This failed attempt to change the EAUs covered by the 1994 agreement is relevant to the present discussion only to the extent that the Mining Council's decision might reveal how it understood the scope of stability at that time.

796. Against this background, the Claimant alleges that MINEM applied stability guarantees to the entirety of the mining unit of the Electrowon Leaching Project.[801] It argues that the 1994 stabilisation agreement covered (i) several mining concessions, which together formed two Article 44 EAUs (the Toquepala and Cuajone EAUs) and (ii) two new beneficiation concessions.[802] It adds that the Toquepala and Cuajone EAUs together with the two new beneficiation concessions formed an Article 82 EAU, a type of EAU which does not require formal DGM approval.[803] The Claimant contends that Southern Peru applied the stabilized regime to this entire unit and, in particular, it did not pay royalties for the "mining unit" covered by the agreement.[804] The Claimant further argues that the Mining Council endorsed this approach in its October 2006 decision by stating that "*the benefits granted by the [1994 agreement] are applicable to the 'TOQUEPALA' and 'CUAJONE' Economic-Administrative Units, with the concessions listed in Annex I of the Agreement*, among which the owner may include other mining concessions, subject to approval by the [DGM]."[805] The Claimant interpolates in this quotation (between brackets) a reference to the new beneficiation concessions,[806] a point to be discussed below.

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800 Mining Council Resolution No. 224 2006-MEM/CM (17 October 2006), pp. 5-6 (**CE-1062**).

801 Claimant's Reply PH Brief, ¶ 55.

802 *Id*. Article 44 of the Mining Law authorizes the titleholder to group together concessions of the same class and nature, subject to certain proximity requirements and prior approval of the DGM (**RE-22**).

803 Claimant's Reply PH Brief, ¶ 56(b).

804 Claimant's Reply PH Brief, ¶ 55; Tr. Day 1, 68:10-16 (Claimant's Opening Statement).

805 Mining Council Resolution No. 224 2006-MEM/CM (17 October 2006), p.5 (**CE-1062**) (emphasis added).

806 Claimant's PH Brief, ¶ 42(c).

797. The Respondent objects to the Claimant's arguments on several grounds. For clarity, the Tribunal will examine each objection and related issues, and state its overall conclusions at the end.

798. The Respondent first denies that Southern Peru had a distinct EAU for the Electrowon Leaching Project, because under Article 44 of the Mining Law any such EAU had to be approved by the DGM.[807] The Claimant replies that the EAU for the Electrowon Leaching Project was an Article 82 EAU, which required no such approval. The Tribunal has been provided with no elements to resolve this issue, other than the texts of Articles 44 and 82 of the Mining Law. The Tribunal observes that Article 44 is a general rule establishing conditions for the grouping of concessions into EAUs, whilst Article 82 is a special rule defining an EAU for the purposes of a 15-year stabilisation agreement. The second paragraph of Article 82 states:

> "*For the purposes of the agreement referred to in the preceding paragraph, the term Economic-Administrative Unit means the set of mining concessions located within the limits set forth in Article 44 of this Law, the processing plants, and the other assets that constitute a single production unit due to sharing supply, administration, and services, which in each case the Directorate General of Mining will qualify.*"[808]

799. It follows from this text that, for the purposes of a 15-year stabilisation agreement, an EUA can be formed with mining concessions located within the proximity limits set forth in Article 44, beneficiation plants, and other assets that constitute a single production unit by reason of common supplies, administration, and services. The Article requires that the single production unit be "*calificada*" ("qualified") by the DGM, which does not appear to be the same as the prior DGM approval required by Article 44. The record does not show whether or how the DGM has qualified (or accepted) as a single production unit the Toquepala and Cuajone concessions (which provide the mineral dumps to be processed) and the beneficiation concessions (which provide the right to process them). This being

807 Respondent's PH Brief, ¶ 165.

808 Mining Law, Article 82 (**HA-1**).

said, the Tribunal finds it implausible that Southern Peru has been able to carry out the Leaching-Electrowon Project, a fact that seems accepted by both Parties, without the regulator's understanding that it was doing so as a single production unit.

800. Neither does the Tribunal find in the record one or more DGM resolutions giving final approval to the beneficiation concessions referred to as being "in process" in the 1994 agreement and incorporating them to the mining rights covered by that agreement. Nevertheless, it looks utterly implausible that Southern Peru should have been allowed to carry out the stabilized Leaching-Electrowon Project without the necessary beneficiation rights. In any event, the Tribunal notes that a fair reading of the 1994 agreement shows that it also included the two new beneficiation concessions in process, to which it referred expressly. In sum, in light of the paltry state of the record on this matter, the Tribunal is prepared to assume, as a matter of common sense, that the beneficiation concessions are included in the scope of the 1994 agreement, because otherwise the Electrowon Leaching Project could not have been carried out, which both Parties seems to accept it was.

801. Second, the Respondent points out that Southern Peru continued to extract primary sulphides from Toquepala and Cuajone, which it processed in concentrators under separate beneficiation concessions, one for each mine.[809] These concentrators, which were not stabilized, coexisted with the stabilized leaching-electrowon activities within the same Cuajone and Toquepala EAUs, whence the Respondent infers that the Cuajone and Toquepala EAUs themselves could not have been stabilized, as distinguished from specific projects within them.[810] As the Claimant notes, however, the Cuajone and Toquepala EAUs comprised only *mining* concessions, which means that no beneficiation activities could be carried out without separate beneficiation concessions.[811] Therefore, the stabilisation of the Toquepala and Cuajone EAUs for the purposes of processing their ore dumps by leaching and electrowinning under new beneficiation concessions is not inconsistent with the

[809] Respondent's PH Brief, ¶ 166.

[810] Id.

[811] Claimant's Reply PH Brief, ¶ 56(a).

processing of primary sulphides from the same mines in non-stabilized beneficiation concessions distinct from those involved in the Electrowon Leaching Project.

802. Third, the Respondent dismisses the Mining Council's statement that "the benefits granted by the [1994 agreement] are applicable [*es applicable*] to the 'Toquepala' and 'Cuajone' Economic Administrative Units," with the argument that the Mining Council was simply pointing out to the location of the "stabilized project."[812] As the Claimant correctly points out, this argument ignores the plain text of the Mining Council's statement, which refers to the scope of the application of the benefit and not the location of the stabilized activities.

803. The preceding discussion raises two distinct issues: (i) whether Southern Peru did indeed treat what it claims to be the leaching-electrowon EAU as stabilized and that treatment was accepted, or at least not questioned, by the Government, and (ii) whether the October 2006 Mining Council resolution reflected an understanding of the scope of the stability and, in such case, which was that understanding.

804. On the first issue, the Claimant asserts that Southern Peru and MINEM applied stability guarantees to the entire leaching-electrowon EAU.[813] The Respondent denies the existence of that EAU, as already discussed, but does not appear to deny the Claimant's assertion as applied to the alleged EAU. The Parties have not produced relevant evidence on the taxes that Southern Peru paid in respect of the investments made in what the Claimant regards as its leaching-electrowon EAU. Nor does the Tribunal have access to evidence whether the investments for which stabilized taxes were paid correspond or not to the qualifying project for the 1994 agreement. Therefore, the Tribunal is not in a position to make a finding on whether in fact the stability guarantees of the 1994 agreement have been applied to the entire concessions or EAU covered by that agreement.

805. On the second issue, the Tribunal has carefully reviewed the 2006 Mining Council resolution to determine how the Council understood, at that time, the scope of stabilisation under the applicable legal framework. As already discussed, the Council stated that "the

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812 Mining Council Resolution No. 224 2006-MEM/CM (17 October 2006), p.5 (**CE-1062**); Respondent's PH Brief, ¶ 167.

813 Claimant's Reply PH Brief, ¶ 55.

benefits granted by the [stability agreement] are *applicable to the "TOQUEPALA" and "CUAJONE" Economic- Administrative Units, with the concessions listed in Annex 1 of the [stability agreement]*, among which the Owner may include other mining concessions, subject to approval by the [DGM]."[814] Whilst this statement does not expressly endorse Southern Peru's position on the application of stability guarantees, as the Claimant argues, this statement does indicate that in October 2006 the Mining Council understood the legal framework as applying the benefit of stability to the EAUs named in the agreement and the concessions of which they were composed.

Concluding Observations

806. In the preceding subsections, the Tribunal has examined the Claimant's claim that the Respondent treated other mining companies in accordance with an understanding of the scope of the stability guarantee that was at odds with the one it applied to SMCV and now defends in this proceeding. As examples of such disparate treatment, the Claimant has proffered certain events related to Consorcio Minero Horizonte, BHP Billiton Tintaya S.A., Compañía Minera Milpo S.A.A., Compañía Minera Yanacocha S.A., and Southern Peru Copper corporation.

807. As a first observation, the Tribunal regrets that its examination of those events has been hindered by insufficient information and evidence of relevant facts. Whilst the burden of proof of allegations of this kind generally rests on the Claimant, the Tribunal notes that the Claimant was not in the best position to produce information and evidence on legal and tax matters concerning the business of competitors, whilst the Respondent, which must be presumed to be in possession of such information and evidence as supervisor and regulator of those activities, has been economical in releasing them. As a consequence, the Tribunal has had to focus on the key documents provided to it, while drawing limited, judicious inferences about the context and other surrounding relevant facts.

808. The Tribunal also observes that the documents in question, as many other contemporaneous documents produced in this case, do not expressly and clearly analyze the scope of stability.

[814] Mining Council Resolution No. 224 2006-MEM/CM (17 October 2006), p.5 (**CE-1062**) (emphasis by the Tribunal).

The Tribunal has had to infer from the terms of each document the way in which the authors understood at the time, rightly or wrongly, the scope of stability. This lack of clarity is in itself an indication that until mid-2006 (the time that the various agencies settled on the interpretation that the Respondent has put forward in this case), and in some cases even later, the agencies' understanding of this issue was uncertain, ambiguous or wavering or it differed from the one firmly adopted later. At the same time, this uncertainty and wavering in the period at issue precludes a finding that, in that period, the agencies had clearly and uniformly adopted an interpretation that was later changed by the interpretation that gave rise to the Claimant's claims.

809. In particular and with the stated caveats, the Tribunal has concluded that (i) in 2001, in the case of Consorcio Minero Horizonte, the DGM and the Mining Council understood that stability applied to the concessions or EAUs;[815] (ii) in 2003, in the case of BHP Billiton Tintaya S.A., the DGM and (with some qualifications and uncertainty the Mining Council) had the same understanding;[816] (iii) in 2009, in the case of Compañía Minera Milpo S.A.A., SUNAT appears to have applied an understanding of the legal framework that was inconsistent with the position the agency had adopted in mid-2006;[817] (iv) in 2006, in the case of Compañía Minera Yanacocha S.A., SUNAT assessors continued to make statements suggesting that stability applied to the concessions or EAUs covered by the stabilisation agreement, but two years later SUNAT changed those statements to reflect the position adopted in mid-2006;[818] and (v) in October 2006, in the case of Southern Peru Copper Corporation, the Mining Council also made statements reflecting an understanding that stability applied to the concessions or EAUs.

810. In particular, the record is not complete with regard to the way the authorities actually applied the stability benefit in the cases analysed above. The Tribunal finds, by majority, that there is no evidence on the record that in any of these cases, the authorities actually applied the stability benefit to investments or activities of other mining companies that (i)

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815 Supra, ¶ 763.

816 Supra, ¶¶ 771-773.

817 Supra, ¶ 778.

818 Supra, ¶ 787.

were not included in the qualifying project but (ii) were carried out by the titleholder in the concessions or EAUs named in the stabilisation agreement. Accordingly, the Tribunal is unable to make any findings in this regard. Arbitrator Garibaldi disagrees on this point. He considers that (i) there is evidence of such differential treatment at least in the case of Compañía Minera Milpo S.A.A.; (ii) such evidence would have warranted a full analysis of that case under the discrimination standard; and (iii) given the gaps in the evidence available in the record, further consideration should have been given to the burden of proof on the issue of the treatment of other mining companies.

The Respondent's treatment of SMCV

811. The Claimant contends that the Respondent treated as stabilized two investments that SMCV made in the same concessions covered by the 1994 Stabilisation Agreement, even though those investments were not contemplated in the qualifying investment program.[819] The Respondent does not deny the treatment alleged but argues that it was not intentional. It says that SUNAT's audits are not comprehensive over all a taxpayer's activities and SUNAT's choice not to audit those particular investments does not mean that the agency had determined they were properly stabilized under the 1994 agreement.[820]

812. The facts related to the first investment, established by unrebutted testimony, are as follows. In 2001, SMCV made an additional USD 10 million investment within the same concessions named in the 1994 Stabilisation Agreement. This investment was not contemplated in the Feasibility Study. The investment consisted of additional mine equipment and modifications to the electrowinning plant and leaching facilities for the purpose of optimizing the process. The result was an increase of copper-cathodes production from 195 to 230 MT/d. In assessing its tax liability, SMCV treated this new investment as stabilized under the 1994 Agreement, and neither SUNAT nor the Tax Tribunal questioned such treatment.[821]

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819 Claimant's PH Brief, ¶ 56.

820 Respondent's PH Brief, ¶ 151, and Tr. Day 6, 1601:11-22 (Cruz).

821 Davenport I, ¶¶ 21-22; Davenport II, ¶ 9(c).

813. The facts related to the second investment, also established by unrebutted testimony, are the following. In 2002, SMCV invested USD 15 million in expanding Pad 2 of its leaching facility. To accommodate this investment, SMCV requested and obtained from the DGM an expansion of the geographic area of the Beneficiation Concession and an expansion of its capacity from 31,000 MT/d to 39,000 MT/d. As in the previous case, this investment was treated as stabilized, even though it had not been contemplated in the Feasibility Study.[822]

814. As noted above, the Respondent does not contest the facts just described, wherefore the Tribunal finds them sufficiently established. The Respondent argues, however, that its failure to reverse assessments based on treating those new investments as stabilized was inadvertent, because it did not audit this aspect of SMCV's tax assessments. The Tribunal finds this excuse unavailing. As already explained, as a violation of Article 3.1 of the Treaty does not require a particular state of mind, failing to audit an investment is no excuse for treating the investor according to different interpretations of the same internal law, consistency being one of the relevant considerations that bear on the FET analysis.

815. As in the case of the treatment of other mining companies, the treatment of SMCV's 2001 and 2002 investments raises two questions: (i) whether it reveals the Respondent's contemporary understanding of the scope of the stability guarantee, and (ii) whether in fact the treatment of those investments differed from the treatment later afforded to the Concentrator. On the first issue, the Tribunal considers that the Respondent's failure, inadvertent or not, to question the treatment of the new investments as stabilized does not by itself permit an inference on the way SUNAT understood the legal framework at the times it reviewed the respective assessments. Such an inference would have required something more than the Respondent's passive conduct on this matter. This conclusion does not detract from the Tribunal's findings, based on other evidence, that SUNAT and other agencies wavered in their understanding of the scope of stabilisation until they coalesced around the interpretation the Respondent now advocates.

[822] Davenport I, ¶ 23; Tr. Day 2, 522:2-5 (Torreblanca); Tr. Day 2, 590:2-11 (Davenport).

816. On the second issue, however, it is plain that the Respondent did treat SMCV's new 2001 and 2002 investments differently from the way it later treated the investment in the Concentrator. This inconsistency in the treatment of SMCV is relevant in at least two respects. First, it must be considered as an element of the FET analysis. Second, the Respondent's silent acquiescence to treating the 2001 and 2002 investments as stabilized is one of the grounds relied upon by SMCV in believing that the same principle would apply to the Concentrator. In particular, Mr. Davenport testified at the Hearing that when in 2004 the DGM suggested that SMCV request an expansion of the geography and capacity of the Beneficiation Concession to include the Concentrator, "the light kind of went off" because that is exactly what SMCV had done when it expanded the mill.[823] Whilst this belief on the part of SMCV would also be relevant to the FET analysis, as an element of the investor's expectations in the time leading to the investment, it bears repeating that the Claimant has not based its case on a breach of its legitimate expectations.

817. Even though these actions by the Respondent could have been understood by SMCV as supporting its understanding that the entire concession was stabilized, the Tribunal notes that these actions took place at a time that, as accepted by Mr Cruz, SUNAT was unclear as to the proper scope of a stabilisation agreement. Whilst SUNAT's conduct in respect of SMCV's 2001 and 2002 investments suggests that it considered the entire concession to be stabilized, the Tribunal considers this to be indicative of the confusion and inconsistency of understanding between the various Government organs at the time. The Tribunal does not find this conduct to reflect an excess of discretion, prejudice or political calculation on the part of the Respondent in breach of Article 3.1 of the Treaty.

818. The Tribunal next considers whether the Respondent lacked transparency in its communications and dealings with the Claimant with regard to its approach to the scope of the Stabilisation Agreement.

[823] Tr. Day 2, 594:4-9 (Davenport).

vii. Did Peru act with a lack of transparency with regard to its construction of the Mining Law, Mining Regulations and the Stability Agreement?

819. The Claimant asserts that the Respondent withheld from SMCV its "novel and restrictive interpretation" of the Mining Law, Mining Regulations, and the Stability Agreement. In reply, the Respondent contends that, whilst it was under no obligation to provide SMCV with every individual piece of relevant communication, it was always transparent as to the scope of the stability guaranteed under the Stability Agreement and never sought to hide its understanding from SMCV.

820. The issue to be explored in this subsection is whether and to what extent any Government official advised SMCV as to the scope of its Stability Agreement and, in particular, whether SMCV was made aware of the absence of an agreed approach across all Government organs before June 2006 or (with regard to the GEM payments) of the more restrictive position adopted after June 2006. In previous sections, the Tribunal has considered the content of the statements made to SMCV as well as other public and internal statements by Government officials. The Tribunal further considers below the communications between the Respondent and SMCV. In considering the question of transparency, the Tribunal first addresses the position in 2004 when construction of the Concentrator commenced and then the later period, post-June 2006, when the GEM payments were made.

Decision to Construct the Concentrator - 2004

821. As already determined supra, at the time the decision was taken to build the Concentrator, there was considerable uncertainty as to the proper scope of stabilisation agreements. There were a number of conflicting terms used, such as "project", "investment project", "unit", and "mining unit" which had no clearly understood or uniform meaning. As more fully discussed above, the Tribunal has found that, prior to June 2006, there was no consistent understanding as to the scope of stabilisation agreements across MINEM, MEF and SUNAT.

822. Ms Chappuis was made aware by SMCV of its understanding as to the scope of its Stabilisation Agreement and how important this issue was for SMCV, in deciding whether

to construct the Concentrator, to ascertain whether it would be stabilized. Whilst Ms Chappuis believed SMCV's understanding to be correct, she was also aware that her superior, Mr Polo, had a contrary view. Yet she advised SMCV that it was unnecessary to receive a letter from MINEM to confirm that the Concentrator would be stabilized and she did not disclose to SMCV the fact that her understanding of the law was not held unanimously within MINEM.

823. The Claimant took the decision to rely solely on the oral representations from Ms Chappuis to SMCV. The only other comfort the Claimant received was confirmation from Phelps Dodge that it had been advised the Concentrator would be stabilized. Mr Kawaguchi testified that:

> "*Sumitomo Metal Mining confirmed through Phelps Dodge that the Peruvian MINEM has the Stability Agreement apply to the Concentrator. [SMM] did not directly contact the Peruvian Government to confirm this, because we thought that any direct contact would cause confusion, and, therefore, we confirmed the position of the Peruvian Government from Phelps Dodge because we thought that that was the most appropriate way to go about it.*"[824]

> "*[O]ur counterparts at Phelps Dodge and SMCV made clear that while they would need to carefully review the final text of the royalty law, their view was that the Stability Agreement would preclude the application of any royalty law to the new investment. We were reassured by Phelps Dodge's view.*"[825]

824. Whilst it is correct that Ms Chappuis did not disclose that within the Government there were views contrary to her own as to the scope of the Stabilisation Agreement, the facts that (i) she was the head of DGM but not the Minister and (ii) her declining to provide written confirmation on which the Claimant could rely, should have raised some concern

[824] Tr. Day 4, 984:3-12.

[825] Kawaguchi I, ¶ 25.

within the Claimant. The Claimant cannot have been unaware that there was considerable political sensitivity regarding stabilisation of mining projects and that certain sectors harboured negative attitudes towards mining companies, asserting that they were not paying their fair share to the State and to the local communities. It must have been clear to the Claimant that there was a risk the Concentrator would not receive stability benefits, and this is no doubt why written confirmation was deemed to be so important. Nevertheless, SMCV elected to proceed with building the Concentrator, which was clearly a commercially attractive business proposition for SMCV, notwithstanding its failure to obtain written confirmation from the relevant authorities that the Concentrator was stabilized.

825. In this context, the question arises as to the extent of the pre-construction due diligence conducted by the Claimant and SMCV to understand the scope of the Stabilisation Agreement. Although there is scant evidence of the due diligence adduced by the Claimant, it is unclear whether more extensive due diligence would have been of assistance, given the uncertainty within MINEM, MEF and SUNAT about the scope of stabilisation agreements at the time SMCV was weighing whether to build the Concentrator. It was only after several years of administrative appeals and a final judgement of the Supreme Court that the scope of the Stabilisation Agreement was established as a matter of Peruvian law.

826. The question for the Tribunal is whether the failure of Ms Chappuis and other Government officials to alert SMCV that the scope of a stabilisation agreement was a controversial and unsettled matter at the time SMCV took the decision to build the Concentrator amounts to a failure of transparency of sufficient entity to amount to unfair and inequitable treatment.

827. In principle, transparency does not require the State proactively to ensure that an investor understands the legal environment in which it undertakes its commercial enterprise. It is up to the investor or prospective investor to acquire reasonably sufficient knowledge on its own. This does not mean, however, that a State has no transparency obligation to ensure that investors have the means to acquire an understanding of the law as it stands, particularly when the issues concern the State's own understanding of that law. Further, when a State creates the conditions for an investor to misunderstand the State's

interpretation of the law and the State is aware of such misunderstanding, basic fairness requires that the State correct the investor's misunderstanding before the latter suffers a detriment. It is clear from the evidence that Ms Chappuis, whose conduct was attributable to the Respondent, was in no doubt as to SMCV's different understanding regarding the status of the Concentrator yet took no steps to correct such belief, which brought significant economic benefits for Peru.

828. In most FET analyses, questions related to the investor's understanding of the applicable legal framework and reliance on oral representations by government officials are presented as part of a legitimate-expectations analysis. The key question in such a context is whether the investor relied on such understanding and oral representations and whether such reliance was objectively reasonable in the circumstances. As the Claimant has framed its FET case in terms of transparency, as well as other considerations not including legitimate expectations, the question must be analysed here under considerations of transparency.

829. The transparency at issue is that of the Respondent's conduct. As noted, at the time SMCV weighed building the Concentrator, there was considerable uncertainty within the Government as to the scope of the Stabilisation Agreement. This was not communicated to SMCV. As a matter of transparency, does this failure to communicate the Government's uncertainty as to the scope of the Stabilisation Agreement reach the level of a breach of FET? The Tribunal must assess this lack of transparency in light of all the circumstances, including its likely impact on the decision to invest. In that regard, the Tribunal recalls that (i) SMCV considered important to obtain written confirmation that the Concentrator would be stabilized; (ii) SMCV failed to obtain such written confirmation; and (iii) SMCV decided to build the Concentrator all the same. More generally, the evidence does not show that SMCV would have decided against building the Concentrator if it had been advised of the Government's uncertainty as to whether it would be stabilized. In light of all the circumstances, then, the Tribunal finds that the Respondent's failure to communicate to SMCV its uncertainty on the scope of the Stabilisation Agreement was not of such a magnitude as to amount to lack of transparency in breach of the FET standard.

830. The Tribunal next considers the position after construction of the Concentrator had been commenced.

The position post 2004

PDAC March 2005

831. First, the Tribunal has found that the Respondent failed to correct Mr Conger when he made it clear at the PDAC in March 2005 that SMCV was proceeding on the assumption that the Concentrator would be stabilized.

March 2005 communications with Mr Cruz

832. The second event has been detailed in paragraph 674 above. Whilst it is unclear to what extent SMCV, and Ms Torreblanca in particular, made clear that SMCV's specific concern related to whether the Concentrator would be stabilized, Mr Cruz (SUNAT's Regional Intendent for Arequipa) testified that whilst Peru's (and his) position had always been that a stability agreement only stabilized the qualifying investment and notwithstanding that he knew that SMCV had the opposite understanding, he chose to stay silent and did not correct SMCV's position.[826]

833. The Respondent says that SUNAT had no power to establish or interpret the scope of the Stabilisation Agreement.[827] The Tribunal cannot accept this argument, because it was SUNAT, indeed Ms Bedoya from the SUNAT Claims Division in Arequipa, the same regional office of which Mr Cruz was the Intendent, was one of the authors of the June 2006 SUNAT Internal Report which determined within SUNAT that the Stabilisation Agreement was limited to the Leaching Project. The Respondent further says that had SMCV wanted confirmation of its interpretation, it should have required written confirmation which, the Respondent says, SMCV never obtained.[828] In light of the

[826] Tr. Day 6, 1666:22-1669:19.

[827] Respondent's Counter-Memorial, ¶ 165, and Cruz I, ¶¶ 13 and 20.

[828] Respondent's Counter-Memorial, ¶ 562.

exchange described above, the Tribunal does not accept that, in good faith, the possibility of a further bureaucratic procedure excused Mr Cruz' reticence.

834. Mr Cruz conceded in his oral testimony that, at that time, he was aware of the significant quantum of investment SMCV was proposing to make in the Concentrator.[829] The Claimant submits that the Respondent was motivated not to advise the Claimant that it had misunderstood the application of the Stabilisation Agreement because it did not want SMCV to scale down or cancel the construction of the Concentrator, as doing so would have caused a significant economic loss to Peru. This conduct, was, the Claimant says, "to say the least, utterly unfair."[830] The Tribunal regards the Claimant's inference as reasonable.

835. Mr Cruz's initial explanation for his failure to correct SMCV's misapprehension was that "there was no [audit] procedure being considered" and "there was no apparent obligation at that time for Cerro Verde to pay royalties."[831] The Tribunal does not accept these statements as valid excuses. As the Claimant has pointed out, in March 2005 no audit procedure was being considered and there was no reason therefor; SMCV was not obligated to pay royalties because the Concentrator had not even commenced operations. Yet the absence of such an obligation and such an audit procedure did not prevent Ms Bedoya and Mr Guillen from issuing their June 2006 Internal Report, in which they considered this very issue, namely whether the Concentrator was stabilized.

836. Whilst it unclear to what extent Ms Torreblanca pressed specifically for confirmation that the Concentrator, once operating, was stabilized, Mr Cruz has accepted that he was aware that this was SMCV's understanding (see paragraph 832 above). On this basis, the Tribunal finds Mr Cruz's failure to correct what he perceived to be SMCV's incorrect understanding to be of significant concern in circumstances in which the Respondent stood to gain significantly from the construction of the Concentrator. As the Concentrator would not be finished until January 2007, it is conceivable that the size and capacity of the Concentrator

829 Tr. Day 6, 1667:7-16.

830 Claimant's PH Brief, ¶ 75(b).

831 Tr. Day 6, 1590:2-13 and 1675:14-20 (Tribunal's emphasis).

could have been reduced in March 2005 to reduce its cost and the royalties to be paid on its production.

837. It is further notable that, in the course of his testimony, Mr Cruz appeared to amend his evidence, saying that at the relevant time he "didn't have [the legal position] clear".[832] This statement contradicted his earlier statement that Peru (and Mr Cruz)'s position had "always been … that stability agreements only cover the initial Investment Project…".[833] Even if Mr Cruz's amended testimony were correct and, at the relevant time, there was a lack of certainty within SUNAT as to the scope of a stabilisation agreement, the Tribunal finds that SUNAT should have, as a matter of good faith, made SMCV aware of this lack of certainty. Indeed, after SUNAT had reached its decision as to the scope of the Stabilisation Agreement, as detailed in the 2006 SUNAT Internal Report, the Tribunal further finds that, given its awareness of SMCV's contrary understanding, acting in good faith it should have ensured SMCV was then made aware of the correct position with regard to the Concentrator. The Tribunal accepts that, as the 2006 SUNAT Internal Report was an internal report, the Respondent was not obligated to provide a copy of it to SMCV, but that does not validate the Respondent's failure to advise SMCV of conclusions of the Report in circumstances where it was aware of SMCV's understanding.

Roundtable Discussions

838. The third event regards the roundtable discussions. Having carefully considered the evidence, the Tribunal finds that it is more likely than not that, notwithstanding MINEM's awareness that SMCV believed the Concentrator to be stabilized, MINEM refrained from correcting SMCV and advising it of the true position. As direct evidence is lacking, however, the Tribunal is not in a position to make a positive finding to that effect.

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832 Tr. Day 6, 1675:1-2. See also the evidence of Ms Bedoya that it was an internal report: Tr. Day 6, 1529:3-4 and 1521:4-6.

833 Tr. Day 6, 1666:22-1669:19.

2 August 2006 Voluntary Agreement

839. Fourth, the Claimant says that it agreed to enter into the 2 August 2006 Voluntary Agreement on the understanding that "there would no longer be any questions regarding the fact that SMCV would not have to pay royalties during the term of the Stability Agreement."[834] Ms Torreblanca further testified that the then Premier Del Castillo confirmed that SMCV "could deduct these contributions from any program of 'voluntary contributions' created by the García administration."[835] The Respondent denies that it had concealed from SMCV that the Concentrator would not be stabilized but further says that "SMCV very likely would have made the contributions regardless of its 'understanding' on royalties, as part of its internationally recognized responsibility as a mining company to secure and maintain a social license from the communities affected by its activities."[836] However, to the extent there was any error, the Respondent says it was SMCV's error.

840. The Claimant adduced no evidence that SMCV would not have agreed to make these voluntary payments without being satisfied as to whether the Concentrator would benefit from stabilisation. Equally, the Respondent's argument to the contrary is no more than speculation and cannot carry any weight. In the absence of any evidence from the Claimant as to its intentions, the Tribunal is unable to reach any determination as to the Claimant's motivations or as to what was, or was not, said at the relevant meetings.

Voluntary Contribution Program

841. Fifth, the Tribunal reiterates its finding that there is no evidence that Government officials positively represented to SMCV that it should make contributions pursuant to the Voluntary Contribution Program *because the Concentrator was stabilized*. However, it is also clear to the Tribunal that the Respondent made no attempt to ensure that SMCV understood that it would be liable to pay royalties on the Concentrator and therefore the requested voluntary contributions would be payable in addition to those royalties. The Tribunal accepts that a statement made by APOYO that Cerro Verde would be stabilized

834 Torreblanca 1, ¶ 55.

835 Torreblanca 1, ¶ 56.

836 Respondent's Counter-Memorial, ¶ 204.

in its entirety cannot be attributed to the Respondent, but it is equally clear to the Tribunal that the Respondent must have realized that SCMV was proceeding under the impression that the Concentrator would be stabilized. The Respondent failed to correct that mistaken belief. SMCV made the payments in that belief without obtaining confirmation as to the status of the Concentrator.

September 2011, the GEM Program

842. As the final example of the Respondent's failure to act in a transparent manner towards SMCV, the Claimant cites the implementation of the GEM Program.

843. Political pressure continued with regard to the mining companies and in March 2011 (and in anticipation of a new Government) the Mining Society re-engaged APOYO to prepare a new version of the PMSP which would amend the royalty regime, create a new special mining tax and establish a new type of voluntary contribution, the GEM. APOYO again divided the Mining Society member companies into three groups, (i) those that had stabilisation agreements in force prior to the 2004 Royalty Law and did not have to pay royalties at all; (ii) those that had stabilisation agreements which entered into force after the 2004 Royalty Law; and (iii) those without stabilisation agreements.[837] Again, the Claimant says that APOYO always considered SMCV to be part of the group of stabilized mining companies that did not have to pay royalties at all and that APOYO presented SCMV to the Government in this way. For example, in calculations presented to a meeting attended by, *inter alia*, the Prime Minister, the Minister of Economy and Finance and the Minister of Energy and Mines, SMCV was referred to as a company which did not have to pay any royalties and no participant at this meeting questioned this assumption.[838]

[837] Santa Maria, ¶¶ 19-32.

[838] Santa Maria, ¶¶ 38, 41 and 45.

	2007	2008	2009	2010
TRIBUTOS Y APORTES				
Regalias	0	0	0	0
Regalias a las ventas	0	0	0	0
Nuevas regalias	0	0	0	0
Aporte al Fondo Voluntario	48,674	29,496	27,608	
GEM	97,377	75,867	79,782	176,287
Aporte al Fondo Obligatorio (en base a Ut. Neta)	935,715	694,653	883,460	

844. The Respondent again says that the fact that an industry consultant decides to classify SMCV as stabilized has no legal significance. The question for the Tribunal is not, however, the attribution of APOYO's classification to the State but, as a matter of transparency, the State's knowledge of such classification and its failure to correct it.

845. On 28 September 2011, the Government enacted Laws No. 29788–29790 which amended the royalty regime and created the special mining tax (the "**SMT**") and the GEM. Pursuant to Law No. 29790, the GEM was a voluntary payment: (i) "applying to the quarterly operating profit of entities engaged in mining activity…" (Article 2.2); (ii) to be calculated quarterly (Article 3(a)); (iii) that royalty payments could be deducted (Article 3(b)); (iv) it was tax deductible (Article 3(c)); and (v) SUNAT were responsible for collecting and administering it (Article 4).[839] [Tribunal emphasis]. Entities engaged in mining activity are defined in Annex 1 as "holders of the mining concessions and their assignees who engage in activities of exploitation of metallic mineral resources……..". The GEM is therefore calculated on the operating profit of a holder of a mining concession. It therefore appears that the calculation was based on a mining concession's operating profits.

846. The Claimant therefore says that the system operated as follows:

	Non-stabilized Mining Companies	**Mining companies stabilized after the 2004 Royalty Law**	**Mining companies stabilized before the 2004 Royalty Law (SMCV)**

[839] Law Establishing the Legal Framework for the *Gravamen Especial a la Minería*, Law No. 29790 (28 September 2011) (**CA-181**).

Royalties	Yes, at marginal rates of 1% to 12% based on the company's operating profit (2011 Royalty Regime)	Yes, at rates of 1% to 3% based on the company's sales (2004 Royalty Regime)	No
SMT	Yes, at marginal rates of 2% to 8.40% based on the company's operating profit	No	No
GEM	No	Yes, at marginal rates of 4% to 13.12% of the company's operating profit, minus royalty payments	Yes, at marginal rates of 4% to 13.12% of the company's operating profit

847. The Claimant says it was not surprised to be asked by the Government to participate in the GEM given its participation in the Voluntary Contribution Program and given its view that it had no liability to pay royalties. By this time, however, SMCV had received the 2006-2007, 2008 and 2009 Royalty Assessments. As a consequence, on 7 October 2011 Ms Torreblanca wrote to MINEM requesting "urgent confirmation of the scope of the [Stability] Agreement for the application of the [GEM]" noting SMCV's understanding that if it signed a GEM agreement it would be subject "exclusively … to the [GEM] with respect to the operating profits from the sale of metallic minerals… from the 'Cerro Verde Nos. 1, 2 and 3' mining concession and the 'Cerro Verde Beneficiation Plant' beneficiation concession, which are the subject of the [Stability Agreement]." SMCV also noted its view that "as long as the [Stability] Agreement is in force (i.e. until December 31, 2013) neither mining royalties… nor special mining tax… would apply" to the Mining and Beneficiation Concessions.[840].

848. As Ms Torreblanca explained in an internal email dated 11 October 2011, she followed this letter up by meeting with the MEF Vice Minister, SUNAT functionary Camacho and Dr Pando from the MINEM Legal Office. Ms Torreblanca advised that she had explained "the level of certainty FCX and Cerro Verde need before GEM agreement is signed in order to avoid a similar situation in the future" and that they had assured her they understood SMCV's position and "reassured that no one wants Cerro Verde nor any other company to pay double. The laws are clear, companies should either pay GEM or IEM + royalties, not

[840] SMCV, Letter No. SMCV-VL&RG-1896-2011 (7 October 2011) (**CE-628**).

both." She explains she asked for written confirmation and the Vice Minister "stated that such response was a task of Energy and Mines, not MEF's." She therefore explained she would "follow-up on the letter we sent on Friday, [7 October 2011] and share MEF's message with [GDM], attorneys and Minister of E and Mines, if needed."[841]

849. On 13 October 2011 the then Minister of Energy and Mines Herrera Descalzi forwarded Ms Torreblanca's 7 October 2011 letter to the Minister of Economy and Finance, Jorge del Castillo Rubio, and requested an opinion from MEF about: (*i*) the scope of Clause 1 of the Model GEM Agreement and whether the reference to Stability Agreements entered into under the Mining Law "must literally be" confined to the "name of the mining project that enjoys the stabilized legal regime," and "not other economic operations that may be connected or related;" and (*ii*) whether stabilized mining projects can be subject to GEM, SMT, and Royalties.[842] Pausing here, the Tribunal agrees with the Claimant that it is somewhat astonishing that even in 2011, and notwithstanding the certainty expressed by Mr Isasi, Mr Polo and Mr Mejía in 2006, MINEM is expressing uncertainty as to the proper scope of stabilisation agreements in the context of the GEM Law. Equally, given the reference in Article 1.2 of the GEM Law to the calculation being based on the operating profits of concessions, MINEM's confusion is understandable.

850. The MEF confirmed the following day that it had "no jurisdiction to determine the content of [the Stabilisation Agreement], or to name them or to define their scope and content" but continued to say that GEM applied to "those engaged in mining activity for that which is covered by the stability of a [stabilisation agreement] and a general regime that considers a [SMT] and a Mining Royalty on that which is not included in the aforementioned Agreements."[843]

851. Mr. Shinno, on behalf of MINEM, responded to SMCV on 28 December 2011 advising that SMCV's request for clarification "exceed[ed] the competence of the Energy and

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841 Emails exchanged between Julia Torreblanca, et al. (11 October 2011, 1:05 AM PET) (**CE-1052**); see also emails exchanged between Julia Torreblanca, et al. (12 October 2011, 1:26 PM PET) (**CE-1050**) and emails exchanged between Julia Torreblanca, et al. (12 October 2011, 2:15 PM PET) (**CE-1049**); and Torreblanca 1, ¶¶ 85-89.

842 MINEM, Official Letter No. 096-2011-EM/DM (13 October 2011) (**CE-986**).

843 MEF, Report No. 206-2011-EF/61.01 (14 October 2011) (**CE-629-**Respondent's Corrections).

Mining Sector" but attached an MEF report.[844] The question addressed by this MEF report was whether (i) "the reference to the [stabilisation agreements] entered into under the [Mining Law], should be contained verbatim in the description of the 'Agreement' Item, i.e., the name of the mining project that enjoys the stabilized legal regime, and not other economic transactions that may be considered connected or related" and (ii) "mining projects" that are stabilized have to pay GEM as well as SMT and royalties. The report stated that MEF had no jurisdiction to opine on the first question, but stated with regard to the second question that companies would pay GEM with regard to "those engaged in mining activity for that which is covered by the [stability agreement] in accordance with the [Mining Law]" and SMT and royalties "on that which is not included in the aforementioned Agreements".[845] As the Respondent says, this report does not consider the terms of the Stabilisation Agreement and indeed it expressly refers to the stabilisation of "mining projects" and not concessions. Whilst SMCV contends that by referring to a "mining project" the Government is referring to a concession or EAU, the Tribunal considers that SMCV should not have placed reliance on its own construction of this ambiguous term without seeking further clarification as to what the Government meant by "mining project."

852. SMCV also wrote to the Minister of Economy and Finance stating that whilst it was willing to sign a GEM agreement it sought "absolute clarity regarding the scope of the GEM and the inapplicability of the Special Mining Tax… and the Mining Royalties to the concessions for which the GEM would be paid".[846] SMCV referred to three letters sent to the GMB and further noted that it had received confirmation verbally by several authorities that upon signing a GEM Agreement, it would not also have to pay the SMT or royalties. However, SMCV received no written response.

853. The Claimant also invokes the text of the GEM Agreement noting that it refers to payment of GEM based on profits from "the concessions" included in the Stabilisation Agreement. However, there is a contradiction between the wording of the GEM Law (which refers to

844 MINEM, Official Letter No. 1333-2011-MEM/DGM (28 December 2011) (**CE-632**).

845 MEF, Report No. 206-2011-EF/61.01 (14 October 2011) (**CE-629**).

846 SMCV, Letter No. SMCV-VL&RG-2217-2011 (2 December 2011) (**CE-631**).

"projects") and the GEM Agreement (which refers to "concessions"). As has been noted with regard to a number of statutory and other provisions, these are frequently not drafted felicitously, with contradictory text appearing in laws, supporting regulations, and model agreements.

854. Although SMCV had received no written confirmation that its understanding was correct, the Claimant says that on 28 February 2012, based on the oral confirmations SMCV had received and the MEF opinion, SMCV entered into the GEM Agreement[847] (based on the GEM Model Agreement[848]). The Claimant says that pursuant to the express wording of Article 2(1) of its GEM Agreement, SMCV agreed to pay GEM for the totality of its concession, including the Concentrator, which confirmed its understanding that the Concentrator was also stabilized. This text is based on the model agreement and does indeed provide that GEM will be calculated on the quarterly operating profit of the Concession.

855. The Claimant says that SMCV has paid more than USD 100 million in GEM payments.

856. The Tribunal accepts that SMCV sought clarification as to the position and notes that the Respondent refrained from providing specific written clarification, either by not responding at all in writing or by dissembling as to what its position was. Ms Torreblanca testifies that she received a number of oral confirmations from senior officials and referred expressly to receiving such oral confirmations in her letters seeking written confirmation, and that SMCV was not advised in writing that its understanding was incorrect. The Tribunal further notes the express wording of the GEM Agreement makes clear that the GEM payments will be calculated on the basis of the operating profit from the entire concession which includes the Concentrator, notwithstanding that the GEM Law refers to projects and not concessions.

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847 Agreement for the Assessment of *Gravamen Especial a la Minería* Approved by Law No. 29790 (28 February 2012) (**CE-64**).

848 Regulations for the Law Establishing GEM Legal Framework, Supreme Decree No. 173-2011-EF (29 September 2011) (**CA-182**).

857. The Tribunal again finds that the Respondent was clearly aware that SMCV agreed to enter into the GEM Agreement on the basis of its understanding that the Concentrator was stabilized, indeed Ms Torreblanca advised the Respondent that it received a number of oral confirmations from various senior officials to this effect. Yet the Respondent failed to ensure that SMCV's misapprehension was corrected notwithstanding the multiple opportunities the Respondent had to do so. The Tribunal does not find it sufficient that SMCV had received royalty assessments by this time. It is clear that SMCV was receiving mixed messages from different Government organs and was doing its best to obtain clarification of the correct position, only to find that each of SMCV's communications was ignored. Whilst it is fair to say that these mixed messages should have raised questions within the Claimant, the Tribunal finds that SMCV did its best to understand the position.

858. Having considered carefully each of the examples detailed above, it is difficult to accept that the Respondent's failure to correct SMCV's misapprehension was other than a deliberate action, certainly by the time the GEM Agreement was entered into. The Respondent cannot argue that it was unaware of SMCV's incorrect understanding given the number of examples on the record where SMCV explained its position in writing and in meetings with a number of senior officials from different ministries. It is clear that none of the officials approached were willing to explain to SMCV that the Concentrator would not be stabilized, even though SMCV made clear it had received oral assurances that its understanding was correct. The gain to the Respondent was significant (it received over USD 100 million from SMCV in GEM payments alone). It is correct that public statements were made that the Concentrator would not be stabilized (see for example the press release dated 20 September 2005 citing Minister Mejía that the Concentrator would not be stabilized), but this must be balanced against the Respondent's failure (as detailed in the preceding paragraphs) to correct SMCV's patent misunderstanding that the Concentrator would be stabilized. As SMCV was the second largest contributor to the Voluntary Contribution Program, it appears to the Tribunal exceedingly unlikely that the Government was unaware that SMCV was making GEM payments on the basis of its belief that the Concentrator would be stabilized and thus no royalties would be assessed on its operations. Given the very significant sums of money being paid, it must have been obvious to the Respondent that SMCV was acting under the assumption that the Concentrator would be

stabilized and was therefore not deducting the royalty payments it would otherwise have been entitled to deduct.

859. In considering whether the Respondent failed to act transparently once construction of the Concentrator had commenced, it is of course necessary to consider whether SMCV should have proceeded with the payment of the voluntary contributions or the GEM payments in the absence of the written clarification as to the scope of the Stability Agreement that it was so urgently seeking. This is particularly the case given the significant and very emotive publicity generated by the question of stabilisation agreements and their relationship with the obligation to pay royalties.

860. The Respondent argues that SMCV should have requested an advisory opinion under Article 93 of the Tax Code. The Tribunal does not accept this argument. First, as the relevant authorities themselves were not certain or in agreement as to the proper construction of a stabilisation agreement, it seems to the Tribunal both unrealistic and unfair to suggest that it was for SCMV to ascertain the proper scope of its stabilisation agreement. The responsibility to ascertain what the Government understood to be the correct position should not have rested solely (or even partially) on SMCV, especially because the Respondent was aware of SMCV's allegedly incorrect understanding and the significant adverse consequences for SMCV if, indeed, its understanding was incorrect. Second, and in any event, the Tribunal accepts that SMCV did not have standing to request an advisory opinion. The Claimant in its First Post Hearing Brief states as follows: "Individual taxpayers such as SMCV, cannot request an advisory opinion; only labor organizations, trade groups, or government entities can file such requests. These organisations have full discretion to determine whether and when to endorse an individual taxpayer's request."[849] This was not controverted by the Respondent. Third, advisory opinions are limited to a general substantive scope and would not have covered a specific question such as whether SMCV's Concentrator would be stabilized.[850] Fourth, there is no requirement as to the time period within which such a request has to be answered and

[849] Claimant's PH Brief, ¶ 81(a).

[850] Claimant's PH Brief, ¶ 81(b).

therefore SMCV could not have been certain of receiving an answer within a sensible time frame.

861. Whilst the Tribunal accepts that a State is not required to provide all relevant documentation to an investor, a State should not fail to provide an investor with relevant information correcting such investor's misapprehension as to the law in circumstances where it actually knows the investor's understanding is incorrect and that the investor is relying on such misapprehension in the making of the investment.

862. The questions for the Tribunal are: (i) the extent to which the Respondent failed in its obligation of transparency as to its intentions and in fact allowed SMCV to pay the voluntary and GEM payments without ensuring it was aware of the correct interpretation of the law and (ii) the extent to which the Claimant failed in its obligation to conduct due diligence and satisfy itself of the correct operation of the law or turned a "blind eye" to the correct legal analysis.

863. The Tribunal has found that the Respondent did not breach its transparency obligations by failing to advise SMCV, before the decision to build the Concentrator was made, that the Government was uncertain as to the scope of the Stabilisation Agreement. Likewise, the Tribunal finds that the Respondent's failure to advise SMCV at the time the voluntary contributions were requested and made that the Concentrator was not stabilized, was not sufficiently severe, in the circumstances, to constitute a breach of the Respondent's transparency obligations.

864. Conversely, the Tribunal finds that, considering all the circumstances, the Respondent's failure to ensure that SMCV understood that the Concentrator was not stabilized at the time the GEM Agreement was being negotiated breaches the transparency required by the FET standard. SMCV had sought confirmation on numerous occasions as to the status of the Concentrator, but this was not provided. SMCV had made clear to all the relevant institutions its understanding that the Concentrator was stabilized and yet this understanding was not corrected. Finally, SMCV had alerted all relevant Government bodies of the nature of the oral advice it had received. Although the Respondent had every opportunity to correct SMCV's misapprehension and correct the oral statements made by

its officials, it failed so to do. Indeed, it took no action to ensure that SMCV understood that the Concentrator was not stabilized even after it started to receive the very significant GEM payments from SMCV. In these circumstances, the Tribunal finds that SMCV could not be accused of having deliberately closed its eyes to potential issues. In sum, the Respondent's failure to correct SMCV's misunderstanding as to the scope of the Stability Agreement when it was fully aware that, as a result of this misapprehension, it would receive very significant sums of money by way of GEM payments "affirmatively misled" the Claimant into making the GEM payments in the mistaken belief that the Concentrator would be stabilized.

865. The Tribunal finds that the Respondent's breach of its transparency obligation with regard to the negotiation of the GEM Agreement could not be said to be reasonable or to have any legitimate purpose. It was clearly a revenue-raising action based on knowledge that SMCV believed that Concentrator was stabilized, knowledge that it would not be, and failure to correct SMCV's mistaken belief.

viii. Were SMCV's due process rights violated by the actions of SUNAT and the Tax Tribunal operations?

SUNAT

866. The Claimant asserts that its due process rights were violated by SUNAT during both the audit processes and SMCV's challenges before the SUNAT Claims Division. In support of this submission, the Claimant first contends that the June 2006 SUNAT Internal Report predetermined that the Stability Agreement did not apply to the Concentrator, depriving SMCV of its right to independent and impartial decision-makers.

867. During her oral testimony, Ms Bedoya confirmed that this Internal Report definitively established SUNAT's position that the Concentrator was not stabilized. This meant that any request by SMCV for reconsideration of the royalty and tax assessments before the

SUNAT Claims Division was futile because "SUNAT had already considered the matter in the 2006 Report, therefore, the answer [to each request] would be the same".[851]

868. At the time Ms Bedoya prepared this Internal Report she was working in the Claims Division, and the Report was prepared before the audit stage process on SMCV had even been launched. The Report was prepared and issued outside the confines of SUNAT's normal administrative practice. The Claimant says that this meant that SMCV had no opportunity to be heard either at the audit stage (a stage which Ms Bedoya confirmed was intended to give taxpayers an opportunity to be heard to protect them from being "defenseless"[852]) or at the Claims Division stage. This meant that SUNAT's decision was reached without SMCV being given any opportunity to be heard.

869. The Claimant also says that when this Internal Report was prepared, the officials did not have all the necessary documents to review. For example, the Claimant says there is no evidence that SUNAT saw or considered (i) key documents to enable it to understand the company's operations, (ii) the treatment given to the 2002 expansion of the Beneficiation Concession, or (iii) its practice with regard to the application of stabilisation to other mining companies.

870. Finally, Ms Bedoya confirmed in her oral testimony that the same officials who drafted the June 2006 Internal Report (Ms Bedoya and Mr Guillen) then acted as auditors in assessing SMCV's liabilities or its subsequent requests for reconsideration. Mr Guillen was one of the auditors who made SMCV's royalty assessment for 2006, 2007 and 2008, and Ms Bedoya testified that she was the sole auditor who ruled on SMCV's challenge to those same assessments.

871. The Claimant contends that, pursuant to Article 97.2 of the Law on General Administrative Procedure, Ms Bedoya should have recused herself on the ground that she had previously expressed her opinion on the scope of the Stability Agreement. This article provides as follows:

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851 Tr. Day 6, 1515:8-21, 1526:14-20, 1530:3-9 and 1532:5-11.

852 Tr. Day 6, 1526:19-22.

"*Grounds for Abstention*

Any authority who has decision-making power or whose opinions on the merits of the procedure may influence the direction of the resolution must refrain from participating in matters over which it has jurisdiction in the following cases:

[…]

If he/she has intervened as an advisor, expert or witness in the same procedure, or if as an authority he/she has previously expressed his/her opinion thereon, so that it could be understood that he/she has ruled on the matter, except for the rectification of errors or the decision on the appeal for reconsideration."[853]

872. The Claimant concludes that, as Ms Bedoya had previously expressed her opinion regarding the scope of the Stabilisation Agreement, her failure to recuse herself violated SMCV's due process rights.

873. Whilst the Claimant explained in its First Post Hearing Brief its concerns arising from the content of Ms Bedoya's oral testimony, the Respondent failed to respond to these concerns in either of its written post hearing briefs.

874. The Tribunal finds the manner in which SUNAT carried out the audit and Claims Division procedures with regard to SMCV's Concentrator to be of considerable concern. SUNAT's decision that the Concentrator was not stabilized was taken in an *ad hoc* internal report. That Internal Report was not just one factor or one step in reaching that decision, it comprised the decision itself. SMCV was clearly deprived of any opportunity to be heard before the decision was reached, both in the audit procedure and the subsequent review by the Claims Division.

[853] Single Unified Text of the Law of General Administrative Procedure, Supreme Decree No. 006-2017-JUS (1 June 2017) (**CA-231**).

875. Ms Bedoya accepted that the Internal Report was not carried out as a part of any administrative procedure.[854] As for the procedure that was to have been followed, Mr Cruz testified that the verification and audit procedures are carried out "in order to respect the rights of the taxpayers themselves".[855] [Tribunal emphasis] Whilst the Tribunal has not been advised what documents were reviewed by Ms Bedoya and Mr Guillen in preparing the June 2006 Internal Report, the Respondent accepts that the proper procedure was not followed and that SMCV was given no opportunity to address SUNAT before the latter reached its determination. In no circumstances can it be said that SMCV's rights as a taxpayer were respected.

876. It further appears to the Tribunal that the participation of Ms. Bedoya and Mr Guillen in the procedures concerning SMCV's liability constituted a breach of Article 97.2 of the Law on General Administrative Procedure. It is unarguable that Ms Bedoya and Mr Guillen expressed their opinion on whether or not the Concentrator was stabilized; indeed this was more than an expression of an opinion, as the Internal Report established "SUNAT['s] […] position on the tax situation of the Concentrator".[856] In these circumstances, the Tribunal finds it unarguable that both Ms Bedoya and Mr Guillen should have recused themselves from the audit procedure and, in the case of Ms Bedoya, when ruling on the challenges to the assessments.

877. The Tribunal accepts that whilst the standard for due process in an administrative process may not be as high as that in judicial proceedings, fundamental elements of due process, such as the right to be heard by an impartial, non-conflicted adjudicator before the decision is made, with reasoned decisions and a lack of arbitrariness are still due in the exercise of administrative adjudicatory functions. In this regard, the Tribunal finds that the process by which SUNAT reached its determination that the Concentrator was not stabilized fell short of that which is to be expected to comply with a State's FET obligations.

854 Tr. Day 6, 1521:4-6.

855 Cruz 2, ¶ 11.

856 Tr. Day 6, 1515:8-21.

878. The Tribunal considers below whether the conduct of SUNAT and the Tax Tribunal reached the level of being in breach of the Respondent's FET obligations.

The Tax Tribunal's determination of the challenges to the 2006-2007 and 2008 Royalty Assessments

879. The Claimant further contends that the Tax Tribunal violated SMCV's due process rights when ruling on SMCV's challenges to the rejection by the SUNAT Claims Division of SMCV's requests for reconsideration of the 2006-2007 and 2008 Royalty Assessments. The Claimant argues that such violation resulted from the wrongful interference of the President of the Tax Tribunal, President Olano.

880. The first royalty case filed in the Tax Tribunal was that relating to the 2006-2007 period; the 2008 Royalty Case was filed subsequently. President Olano testified that "it was the first time [the Tax Tribunal] saw a case of that nature, that type of controversy" and it was important to ensure that the Tax Tribunal would be "very careful, because we were going to see other cases further on".[857] The Claimant asserts that President Olano interfered in the determination of these royalty challenges because, as she accepted in her oral testimony "large sums of money were involved".[858] The Claimant notes, that President Olano reported directly to the MEF, and contends that the reason for President Olano's involvement was to ensure that the cases were decided in favour of the Government given the amount of money at stake. The Claimant says that the decision in the first royalty case that was decided would create a rebuttable presumption of correctness, so that if a subsequent Chamber hearing a similar case did not reach the same conclusion, the matter would be escalated to the Plenary Chamber, which resolves conflicting resolutions and issues binding precedents for all similar cases.

881. The Claimant further contends that Chamber No. 10, which was assigned to resolve the 2006-2007 Royalty Case "likely came to an initial conclusion that was unfavorable to the Government."[859] This assertion is based on the fact that no preliminary draft decision was

[857] Tr. Day 7, 1739:19-1740:3.

[858] Tr. Day 7, 1740:11-13.

[859] Claimant's PH Brief, ¶ 92.

produced in these proceedings by the Respondent. This, the Claimant says, is unusual as generally preliminary drafts are prepared by the relevant *vocal* (member) of the Chamber before the Chamber holds the oral hearing. Indeed, Mr Sarmiento, a *vocal* of Chamber No. 10, confirmed that "there must have been a pre-existing draft" of the 2006-2007 royalty case resolution.

882. President Olano instructed her administrative assistant, Ms Villanueva, to assist Chamber No. 1 as a temporary law clerk as a result of staff shortages, [860] and because the Chamber No. 1 *vocal* asked for her temporary support "given her background and her preparation as a professional in resolving especially complex files."[861] The Claimant asserts that as a result of this decision, Ms Villanueva drafted the 2008 Royalty Case Resolution thus enabling President Olano to interfere in the Royalty Cases on the merits. No documentation was produced showing that the *vocal ponente* (pre-opining member) of Chamber No. 1, Ms Zuñiga, was suffering from a lack of resources or that she had requested assistance. Whilst President Olano said that the most likely reason no such documentation was produced was that coordination with the *vocales* was often made either over the phone or in person, she also acknowledged that she had not produced the entirety of her emails and other documents for review by the Respondent's lawyers, having removed emails related to "health or with personal issues."[862]

883. President Olano explained that she had appointed Ms Villanueva as "*asesor suplente*" (substitute advisor or law clerk), but she admitted that the position of "*asesor suplente*" did not formally exist.[863] The Tribunal notes that pursuant to the Manual for Organisations and Functions of the Tax Tribunal, President Olano was permitted to marshal resources as required.[864] Nevertheless, given that (i) there was no express provision in the Manual for appointing "substitute law clerks"; (ii) the position of law clerk involves different responsibilities from those of an administrative assistant; (iii) there was no prior record of

860 Olano 1, ¶ 46.

861 Tr. Day 6, 1693:18-1694:1

862 Tr. Day 7, 1752:8-13.

863 Tr. Day 6, 1691:12-18.

864 Tr. Day 6, 1694:10-14.

Ms Villanueva acting as a law clerk;[865] and (iv) the importance of determining whether or not royalties were payable on the Concentrator, particularly given the sums involved, the Tribunal is concerned about the propriety of President Olano seconding her personal assistant to Chamber No. 1.

884. It is not disputed that President Olano instructed Ms Villanueva to evaluate the "arguments of both sides, as well as the main clauses of the stability agreement". The Claimant says that it is clear from an email exchange that President Olano agreed to discuss the merits of the claim with Ms Villanueva.

From: Olano Silva, Zoraida Alicia
Sent: Friday, March 22, 2013 5:57 PM
To: Villanueva Arias, Úrsula
Subject: RE: Cerro Verde

Ok, thank you.

From: Villanueva Arias, Úrsula
Sent: Friday, March 22, 2013 04:02 p.m.
To: Olano Silva, Zoraida Alicia
Subject: Cerro Verde

Zoraida:

I am sending you the arguments of both sides, as well as the main clauses of the stability agreement. There are good arguments for both sides. I am more or less leaning to one side.
Please read the arguments when you can and we can talk about it. I'll continue working on this.
Ursula [866]

885. Whilst President Olano explained in her oral testimony that she could not be involved in discussing the merits of this case, and that Ms Villanueva was aware of this, Ms Villanueva's email clearly invites President Olano to "read the arguments" and "talk about" them together. This exchange casts doubts on President Olano's assertion that she had no involvement in the SMCV Royalty Cases.

886. President Olano's oral testimony that she could not be involved in discussing the merits of the case is also inconsistent with the Respondent's Counter-Memorial. Paragraph 579 states:

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[865] Tr. Day 6, 1711:9-13.

[866] Email from Úrsula Villanueva Arias to Zoraida Alicia Olano Silva (March 22, 2013, 4:02 PM PET) (**CE-648**).

"*Ms. Villanueva merely asked her boss, the President of the Tax Tribunal and an experienced tax attorney, to discuss a case with her. There is nothing unusual about that, particularly given that this challenge was proceeding at the same time as the 2006-2007 Royalty Assessment case and, as President Olano Silva explains, she needed to ensure there was consistent application of law, as was her job (if the Chambers came to different conclusions, President Olano Silva would have had to call the plenary chamber to resolve the difference). In addition, Ms. Villanueva explicitly stated that she saw 'good arguments for both sides,' and that while she was 'more or less leaning to one side,' she would 'continue working on' it. This shows both that Ms. Villanueva was objective (she is weighing the arguments of both sides) and that she was not sent to assist Chamber No. 1 with a particular outcome in mind; if that were the case, Ms. Villanueva would not have needed to consult with the President. Claimant also disingenuously emphasizes the fact that this consultation was sought 'before' the hearing. But that is exactly what every law clerk does (and should do) in preparing for a hearing; there is nothing nefarious about it.*"

887. In sum, the Tribunal wonders why Ms Villanueva would have sent her quoted email to President Olano if Ms Villanueva was aware that (i) President Olano was not permitted to engage in the merits of the royalties' claim, and (ii) did not want to do so. The Tribunal has found no satisfactory answer to this question.

888. President Olano further testified that Ms Villanueva should have "discuss[ed] the arguments of the case with the [*vocales*]".[867] The Tribunal notes, however, that if that had been President Olano's wish, her reply to Ms Villanueva would surely have said so. During her oral testimony, President Olano said that she "[didn't] know"[868] why Ms Villanueva sent the email to her, suggesting that maybe it was because Ms Villanueva wanted to inform President Olano that "she was working on [the file]" and that her response was mainly to

[867] Tr. Day 7, 1748:7-14.

[868] Tr. Day 7, 1756:15-1757:8.

acknowledge that message.[869] The Tribunal agrees with the Claimant that this explanation does not seem plausible given the terms of the email exchange and the lack of any document from Ms Zuñiga requesting assistance in preparing a draft resolution. Having carefully considered this episode, the Tribunal finds it more likely that, given the content of President Olano's response, she did, indeed, wish to discuss the merits of the case with her administrative assistant. Indeed, President Olano accepted that she had, the previous day, met with Ms Villanueva and asked her "to exhaustively review [the] file… to look closely at the arguments from both Parties" and to ensure that the resolution was "well-supported".[870]

889. Although, as noted, President Olano also testified that Ms Villanueva should have discussed the arguments of the case with the *vocales*, there is no evidence on the record of any discussion between Ms Villanueva and the *vocales* of Chamber No. 1. It is also of relevance that when Ms Villanueva wrote to Ms Bedoya, *ex parte*, requesting additional information, she referred to herself as "Assistant to the President" not as a substitute clerk to Chamber No. 1.[871]

890. The Claimant further asserts that President Olano fast-tracked the resolution of the 2008 Royalty Case by assigning it to Chamber No. 1 to ensure (i) that it was the first to be determined notwithstanding that it was not the first that was filed and (ii) that it was determined on the basis of the draft resolution prepared by Ms Villanueva. Whilst there is no direct evidence supporting these assertions, President Olano accepted that there was no coordination between Chambers No. 10 and No. 1 even though it was usual practice for Chambers to coordinate if they were considering similar cases. In this case, however, coordination took place only after Chamber No. 1 had issued its resolution. Whilst the evidence shows that Mr Moreano, one of the Chamber No. 10 *vocales*, was concerned about this lack of co-ordination, asserting that this was not "the right thing to do",[872] the

869 Tr. Day 7, 1761:16-1762:6.

870 Tr. Day 7, 1763:11-1764:1.

871 Email from Úrsula Villanueva Arias to Gabriela Bedoya of SUNAT (24 April 2013, 2:37 PM PET) (**CE-81**). Ms. Villanueva's signature identifies her position as "*Asesor de Presidencia*" or Assistant to the President, not "substitute law clerk".

872 Email from Carlos Hugo Moreano Valdivia to Zoraida Alicia Olano Silva (22 May 2013, 11:09 AM PET) (**CE-992**).

Tribunal does not find any evidence that the Chamber No. 1 *vocales* acted other than independently, in accordance with their professional obligations. However, what is clear from the record is that (i) Chamber No. 1 issued its resolution which was based on the draft resolution prepared by Ms Villanueva and (ii) Chamber No. 10 was then left with the alternative of either also adopting Ms Villanueva's draft or adopting a different decision, which would have required the convening of a Plenary Chamber to resolve the conflict between the two Chambers. The Tribunal also notes that there is no explanation why Chamber No. 1 acted so quickly to issue its resolution on the 2008 Royalty Case before Chamber No. 10 was ready to issue its resolution on the 2006-2007 Royalty Cases, notwithstanding that Chamber No. 1 had received the 2006-2007 Royalty Cases nine months before Chamber No. 10 received the 2008 Royalty Case.

891. The record further shows that there was a meeting between Mr Cayo, the *vocal ponente* in Chamber No. 10 which was hearing the 2006-2007 Royalty Case and Ms Zuñiga, the *vocal ponente* of Chamber No. 1, after Chamber No. 1 had issued its resolution.[873] Whilst the purpose of this meeting could not have been to coordinate between the two Chambers (because Chamber No. 1 had already issued its resolution), Ms Zuñiga (the *vocal ponente* for Chamber No. 1) states in an email that she "spoke with [Mr Cayo] before the session" and they were "in agreement to confirm and it seemed to us that the terms of the resolution were quite clear and would not provoke discussion, so we agreed that after the session I would send them a copy of the draft to coordinate any adjustments, which I did yesterday immediately after the session."[874] As President Olano confirmed that she wanted all of SMCV's cases to be "resolved in the same manner",[875] the Tribunal finds that the likely purpose of this meeting between Ms Zuñiga and Mr Cayo was a discussion on whether Chamber No. 10 would adopt the approach followed by Chamber No. 1. The Respondent did not produce any evidence reflecting Chamber No. 10's deliberations after receiving Ms Villanueva's draft resolution; all that was provided was a record of the *vocales*' votes.[876]

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873 Email from Luis Gabriel Cayo Quispe to Zoraida Alicia Olano Silva and Licette Isabel Zuñiga Dulanto (24 May 2013, 8:31 AM PET) (**CE-654**); Email from Zoraida Alicia Olano Silva to Luis Gabriel Cayo Quispe and Licette Isabel Zuñiga Dulanto (24 May 2013, 10:23 AM PET) (**CE-655**).

874 Email from Licette Isabel Zuñiga Dulanto to Zoraida Alicia Olano Silva (22 May 2013, 9:55 AM PET) (**CE-652**).

875 Tr. Day 7, 1835:3-14.

876 Chamber No. 10, Deliberation Session Minutes No. 0000070458 (30 May 2013) (**RE-195**).

However, given the content of Ms Zuñiga's email, it is clear that, to the extent a draft resolution had been prepared for Chamber No. 10, such a draft resolution was discarded, and instead Chamber No. 10 issued a resolution that was virtually identical to that issued by Chamber No. 1 in the 2008 Royalty Case. It is of note that Mr Sarmiento, a Chamber No. 10 *vocal*, denied that the similarity between the resolution issued by Chamber No. 10 and that issued by Chamber No. 1 meant there had been no independent analysis undertaken by the Chamber No. 10 *vocales*. He explained that approximately two months before receiving the Chamber No. 1 resolution, the Chamber No. 10 *vocales* had already heard oral submissions from SUNAT and SMCV and had already formed the same opinion as that reached by Chamber No. 1.

892. The Tribunal finds that whilst it appears Chamber No. 10 copied Ms Villanueva's draft resolution as issued by Chamber No. 1, rather than draft its own resolution, this fact alone does not support the inference, urged by the Claimant, that there was no independent deliberation within Chamber No. 10 prior to issuing this resolution. Indeed, the Tribunal understands that in the event of agreement on two similar issues, there would be some efficiencies in the second Chamber using as a basis for their own resolution a previous resolution which had been issued regarding the same question. It therefore seems to the Tribunal that, whilst there was interference by President Olano in respect of the assessment of royalties undertaken by Chambers Nos. 1 and 10, there is no sufficient evidence which would support a finding that President Olano did, in fact, influence the decisions reached by these two Chambers. Indeed, the Tribunal notes that *vocales* were prepared to express dissents to President Olano, as can be seen by the content of the email sent by Mr Moreano[877] and by the fact that votes of the Plenary Chamber were not always unanimous (see paragraph 273 above).

893. In reaching this decision, the Tribunal does not rely on the testimony of Mr Estrada. Whilst the Tribunal has no reason to doubt his credibility, it was clear from his oral testimony that

[877] Email from Carlos Hugo Moreano Valdivia to Zoraida Alicia Olano Silva (May 22, 2013, 11:09 AM PET) (**CE-992**).

he had no direct knowledge of the process by which Chambers Nos. 1 and 10 reached their respective determinations with regard to the royalty cases assigned to them.

2009 and 2010-2011 and Q4 2011 Royalty Assessments

894. The Claimant says that further due process violations were committed by the Tax Tribunal with regard to subsequent Royalty Assessments.

895. The 2010-2011 Royalty Case was determined by Chamber No. 10. SMCV challenged this decision in March 2017. In May 2018, this case was reassigned to Chamber No. 1 whose *vocal ponente* was Mr Mejía, who had only joined the chamber as a *vocal* four days earlier. The Claimant raises two concerns. First, the Claimant says that two of the Chamber No. 1 *vocales* had already determined the 2008 Royalty Case and therefore had predetermined views. Second, the Claimant says that Mr Mejía had (i) previously worked in the SUNAT department that had confirmed the 2010-2011 royalties that Chamber No. 1 was to consider and (ii) that he had also represented SUNAT against SMCV before the Court of Appeals in the 2006-2007 Royalty Case. The Claimant notes that whilst Mr Mejía refused to recuse himself, less than one month later the Respondent amended its Tax Code to require vocals to abstain from participating in proceedings if they had worked for SUNAT within the previous twelve months and "directly and actively" participated in the SUNAT proceedings at issue before the Tax Tribunal.[878] Whilst the Claimant accepts that this amendment did not apply to Mr Mejía, the Claimant says this effectively confirmed that as a matter of due process, Mr Mejía should have recused himself.

896. The Claimant further refers to the testimony of Prof. Hernández that Mr Mejía's participation "violated SMCV's right to due process, since there were justified doubts about his impartiality and independence."[879]

897. Finally, the Claimant contends that the manner in which President Olano dealt with SMCV's request that Mr Mejía be recused was in breach of the Tax Tribunal's rules of procedure and that she pushed through a decision which was baseless. In particular, instead

878 Amendments to the Tax Code, Legislative Decree No. 1421 (12 September 2018) (**CA-238**).

879 Hernández, ¶ 244.

of immediately convening the Plenary Chamber to determine the request, she instead directed her staff to prepare "draft minutes" of the content of the deliberation, even though it had not yet taken place. It is unclear from the record whether President Olano instructed her team as to what conclusion to reach, or even what they were instructed to prepare. The only document on the record is an email President Olano sent to the *vocales* before the Plenary Chamber session took place, attaching a draft of the minutes for the plenary session including the decision reached, asking them "please let me know if you agree".[880] Certain *vocales* disagreed with the draft minutes and the matter therefore proceeded to a session of the Plenary Chamber. At the end of the discussion, the Plenary Chamber agreed to reject SMCV's request for Mr. Mejía's recusal. The Claimant says that it is not possible to know how the Plenary Chamber would have voted had they not received the draft minutes which made clear the result President Olano sought. The testimony of Prof. Hernández is that this exercise was not a "serious deliberative exercise."[881]

898. The Respondent answers that assigning the 2008 Royalty Case to a Chamber that had already previously considered this issue made sense "from both an administrative efficiency perspective and a consistency-of-law perspective".[882] The Respondent further contends, based on President Olano's testimony that Mr Mejía performed no work on any matter related to SMCV event though others in the same department may have done so, that under the applicable law there was no basis for him to be recused.[883] The Claimant replies that the Respondent cites no contemporaneous evidence to support her testimony and further notes that Mr Mejía failed to make any disclosure at all regarding the 2006-2007 Royalty Case, either that he had, or had not, participated in discussion on it.[884]

899. The Respondent says that President Olano did not interfere in the Plenary Chamber decision to reject SMCV's recusal request. The Respondent explains that pursuant to the law, the Plenary Chamber had to decide the recusal request within three days and the

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880 Email from Zoraida Alicia Olano Silva to the *vocales* (21 June 2018, 11:21 AM PET) (**CE-717**).

881 Hernández, ¶¶ 228-231.

882 Respondent's Counter-Memorial, ¶ 587.

883 Respondent's Counter-Memorial, ¶ 588.

884 Claimant's Reply, ¶ 158(b).

normal procedure is for the President to send to the members of the Plenary Chamber a draft preliminary resolution based on a study of the report prepared by a member of the Plenary Chamber together with the relevant background information to enable the members to be properly prepared for the discussion. The Respondent says this is why the Plenary Chamber is able to determine such requests within the statutory three-day timeframe.

900. The Claimant next notes that the 2009 and 2010-2011 Royalty Cases were again copied in significant part from the 2008 Royalty Case resolution. The Claimant says this again shows that no proper deliberation was undertaken by the *vocales* in the relevant Chambers.

901. The Claimant also refers to the fact that the Q4 2011 Royalty Case was assigned to Chamber No. 9, whose *vocal ponente* was Ms Villanueva. The Claimant says that this assignment, again, meant that SMCV was denied the opportunity to have its case properly heard and decided by an impartial decision maker. In reply, the Respondent argues that if it were required to ensure that no official could ever determine a case if it had been involved in a previous case with the same issues it would be "nonsensical" and "ignore[ ] the realities of administrative practice, which often involves government officials adjudicating issues between repeat parties."[885] In response, the Claimant says that there is a difference in this case because Ms Villanueva actually drafted the 2008 resolution.

902. Finally, whilst the Respondent accepts that Chamber No. 2 took a considerably long time to decide the 2009 Royalty Case (five years), it contends that the cause of this delay was not that it was a claim brought by SMCV but that the Tax Tribunal was overwhelmed with cases.

903. Given the sums in question, even in the absence of documentation evidencing that President Olano was successful in influencing the decisions reached by Chambers Nos.1 and 10, the Tribunal finds of serious concern the manner in which each of the Royalty Cases were assessed, starting from the manner in which the June 2006 Internal Report was prepared by Ms Bedoya and Mr Guillen. The Tribunal accepts that the calculation and collection of royalties is administrative in nature. It also accepts that, as the tribunal

[885] Respondent's Counter-Memorial, ¶ 594.

concluded in *Glencore v. Colombia*, "the decision-maker is often the investigator, the accuser, and the adjudicator and a related officer (who may be the senior officer of the decision-maker) is often the one who rules on appeal. Due process does not require strict separation of these functions […]." [886] However, due process does require that these activities be undertaken in accordance with the applicable procedural requirements and fundamental principles of procedural fairness, such as the right to be heard by an impartial adjudicator. A breach of those requirements and principles may constitute a breach of a State's fair and equitable treatment obligations.

904. As can be seen from the above analysis, the initial determination by the SUNAT Claims Division that the Concentrator was not stabilized and the subsequent actions of President Olano were not performed in accordance with the relevant procedures. It is not possible to ascertain from the documents produced by the Respondent whether, had due process been followed, any different result would have ensued. It is clear to the Tribunal, however, that SMCV was not given a proper hearing.

905. The Tribunal accepts that it would be completely impractical if officials that have been involved in a case were prevented from working in any subsequent case involving the same issues. The Tribunal further accepts that there is justification for the Tax Tribunal to issue consistent decisions with regard to the same or similar issues. Due process concerns primarily arise with regard to the preparation of the June 2006 Internal Report and with the procedure by which the 2008 and 2006-2007 Royalty Cases were decided. There were clear breaches of SUNAT and the Tax Tribunal's procedures and fundamental principles of fairness depriving SMCV of a fair hearing (i) at the time of the June 2006 Report when the decision was first made that the Concentrator would not be stabilized and that royalties thereon would be due and (ii) when the first challenges reached the Tax Tribunal. These actions amount to a clear interference with SMCV's legitimate exercise of its rights. The question for the Tribunal is whether this breach reaches the level of a breach of the State's FET obligation to afford due process.

[886] *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award (27 August 2019) (**CA-245**), ¶ 1319.

906. In this regard, the Tribunal finds that for this breach of due process to reach the level of a breach of the State's FET obligation, it must comprise conduct that offends juridical propriety or is grossly unfair, unjust or idiosyncratic.[887] Whilst it is clear that there were a number of serious shortcomings in the actions of SUNAT and the Tax Tribunal, a majority of the Tribunal does not find these actions could be said to offend juridical propriety. Whilst certain conduct was clearly unfair and unjust, a majority of the Tribunal does not find the overall conduct of SUNAT and the Tax Tribunal reaches the level of being grossly unfair or unjust; the process did not fundamentally fail the basic standards of justice. Failings of process in themselves do not comprise a breach of due process. The failings must be of such a nature that they reach the level of being a gross breach. It is the same with the actions of the Tax Tribunal. Whilst there are clearly questions to be asked as to some of the actions of President Olano and it is not always evident that the Tax Tribunal followed its proper procedures at all times, there is no suggestion that the *vocales* in Chamber No. 10 were other than independent or prevented from reaching opposing views from that first reached by Chamber No. 1. Having considered all the actions of SUNAT and the Tax Tribunal, a majority of the Tribunal does not find that the actions of the Tax Tribunal reached the threshold of a fundamental failure of a basic standard of justice.

907. Arbitrator Garibaldi dissents from the determinations made, by majority, in the preceding paragraph 906. He considers that (i) taken together, the actions of the Tax Tribunal described in the preceding paragraphs deprived SMCV of its right to a fair and impartial adjudication of the appeals lodged against the SUNAT assessments; (ii) there is sufficient evidence that the process of adjudication of those appeals was calculated to produce a predetermined result; and (iii) the conduct of the Tax Tribunal at issue and its result amount to a gross violation of due process which offends a sense of juridical propriety.

908. A majority of the Tribunal therefore does not find that as a result of the failings in due process by SUNAT and the Tax Tribunal, the Respondent was in breach of its FET obligations.

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[887] *Elettronica Sicula S.p.A. (ELSI)*, Judgment, ICJ Reports 1989 (**RA-23**); *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004) (**RA-20**), ¶ 98.

ix. Whether the Respondent violated its obligation to ensure FET each time it arbitrarily and unreasonably failed to waive the assessments of penalties and interests against SMCV.

909. The Claimant says that the Respondent's failure to waive the penalty and interest imposed resulted in a windfall to Peru at SMCV's expense and was arbitrary, being in violation of fundamental notions of fairness and equity under Peruvian law. The sums ultimately paid by SMCV amounted to 112% of the overall assessments for royalties and new taxes.

910. The Parties accept that in certain circumstances interest and penalties can be waived, referring to Articles 92(g) and 170 of the Tax Code which provide as follows:

Article 170. INAPPROPRIATENESS OF THE ASSESSMENT OF INTEREST, CONSUMER PRICE INDEX AND PENALTIES	Article 92 (g). RIGHTS OF SUBJECTS [ADMINISTRADOS]
The assessment of interest, restatement for inflation based on the Consumer Price Index or the assessment of penalties is not applicable if: 1. As a result of the misinterpretation of a provision, no amount of the tax debt related to said interpretation had been paid until the clarification thereof, provided the clarifying provision expressly states that this paragraph is applicable. To this end, the clarification may be made by means of a Law or provision of a similar rank, a Supreme Degree	Subjects [administrados] are entitled, *inter alia*, to: […] g) Request the non-application of interest and penalties in cases of reasonable doubt or dual criteria in accordance with the provisions of Article 170;

endorsed by the Ministry of Economy and Finance, a superintendency resolution or a provision of a similar rank or a Tax Tribunal resolution as referred to in Article 154. The interest that it is inappropriate to assess is that accrued from the day following the due date of the tax obligation up until ten (10) business days following the publication of the clarification in the Official Gazette El Peruano. Regarding penalties, penalties relating to offenses originating in the misinterpretation of the provision until the above-mentioned term will not be assessed. The restatement for inflation based on the Consumer Price Index that is inappropriate to apply is the one referred to in Article 33 of this Code or Article 151 of the appropriate General Customs Law up to ten (10) business days following publication of the clarification in the Official Gazette El Peruano. 2. The Tax Administration has had a duplication of criteria in the application of the provision and only with respect to the facts produced, while the previous criterion was in force.	

911. It is also common ground that these provisions apply in the case of royalties pursuant to Article 12 of Law No. 28969.

912. The Parties disagree on how these provisions ought to be interpreted. The Claimant says that if a taxpayer's failure to pay is as a result of "reasonable doubt" as to the correct interpretation of the relevant rule, which doubt exists at the time payment should have been made, interest and penalties should be waived. The Claimant argues that "reasonable doubt" exists where the underlying provision is ambiguous, imprecise or obscure leading to more than one reasonable interpretation[888] and where different branches of the State hold diverging views. Further, if there is reasonable doubt, an official clarification must be given and published, it is not discretionary. Finally, the Claimant says this right cannot be waived.

913. The Respondent accepts that "reasonable doubt" can be a basis for seeking waiver of penalties and interest but says such "reasonable doubt" only arises in two specific scenarios. The first is when an interpretation of a norm has been changed as a result of a formal ruling that the prior interpretation was incorrect. The clarification must expressly provide it is issued for the purposes of Article 170 of the Tax Code, and it must have been published in the El Peruano. The second scenario is when SUNAT has inconsistently applied a rule over a certain period. With regard to the first scenario, the Respondent says that the publishing of an official clarification is not mandatory. The Respondent further says this right to seek a waiver can be waived.

914. The Parties' experts were of conflicting opinions, and no case law or academic writing was adduced to support either Party's analysis. The question for the Tribunal is, then, was the Respondent's failure to waive these penalties and interest arbitrary and unreasonable such that it comprises a breach of its FET obligations? On a careful analysis of the two articles in question, the Tribunal understands that they perform different functions: Article 170 prescribes that the application of interest and penalties *is not authorized or applicable* ("*no procede*") in certain specified circumstances, while Article 92(g) gives the taxpayer the

888 Hernández 1, ¶¶ 93, 97-98.

right to request the non-application of interest and penalties in cases of reasonable doubt or duality of criteria according to what is provided in Article 170. These functions and the content of these two articles must be analysed separately.

915. Article 170 is not framed in terms of the rights or obligations of a particular person or entity but as a general rule specifying exceptions or limitations to the general rules of Articles 164 to 169 of the Tax Code which authorize the imposition of interest and penalties. Such exceptions or limitations are created by specifying two sets of circumstances in which the application of interest and penalties "*no procede*", *i.e.* is not applicable, not permitted, or not lawful. Since Article 166 of the Code entrusts the application of interest and penalties to the Tax Administration, the exceptions of Article 170 are, in effect, limitations on the general power to apply interest and penalties that Articles 164 to 169 of the Tax Code confer on the Tax Administration. It follows that the Tax Administration is not permitted to apply interest or penalties in the circumstances contemplated by Article 170 and, to the extent it does so, it is acting unlawfully. Nothing in Article 170 indicates that the restrictions it contemplates apply only at the request of the affected taxpayer.

916. The two sets of circumstances contemplated by Article 170 in which the Tax Administration is not authorized to apply interest or penalties are the following:

a. *Paragraph 1: Misinterpretation of a norm that is subsequently clarified*. The conditions for this limitation are as follows: (i) the taxpayer must have misinterpreted a norm; (ii) as a result of that misinterpretation, the taxpayer must have failed to pay any amount of the tax debt related to such interpretation until the norm shall have been clarified; (iii) the subsequent norm that clarified the misinterpreted norm must have stated expressly that this paragraph is applicable. This paragraph specifies also the type or rank of norms that may validly clarify the misinterpreted norm. It also provides that the interest and penalties not to be applied are those that accrued or were incurred between the day following the due date of the tax obligation and ten days after the publication of the clarifying norm in the Official Gazette.

b. *Paragraph 2: Duality of criteria in the interpretation of a norm*. This limitation applies when the Tax Administration has applied dual criteria in interpreting a norm, but only in respect of facts that occurred while the prior criterion was in effect. The context of Article 170 indicates that the taxpayer must have failed to pay the tax obligation while the prior criterion was being applied.

917. The third subparagraph of paragraph 1 of Article 170 is worth quoting again:

> "*The interest that it is inappropriate to assess is that accrued from the day following the due date of the tax obligation up until ten (10) business days following the publication of the clarification in the Official Gazette* El Peruano. *Regarding penalties, penalties relating to offenses originating in the misinterpretation of the provision until the above-mentioned term will not be assessed. The restatement for inflation based on the Consumer Price Index that is inappropriate to apply is the one referred to in Article 33 of this Code or Article 151 of the appropriate General Customs Law up to ten (10) business days following publication of the clarification in the Official Gazette* El Peruano."

918. This subparagraph makes clear that the period in which interest and penalties are *not* to be imposed runs from the day following the due date of the tax obligation through the tenth working day following the official publication of the clarifying norm. This plainly implies that when the non-payment of the obligation is based on an interpretation of a norm that the Tax Administration considers erroneous, interest and penalties *cannot be imposed* within a period that commences with the due date of the obligation and ends ten days after a clarifying norm is officially published. On that date, the period is closed, the limitation of paragraph 1 is exhausted, and the Tax Administration's power to impose interest and penalties reacquires effects. Thereafter, interest accrues prospectively and penalties may be imposed for subsequent infractions to the norm.

919. Put differently, it follows from the text of paragraph 1 of Article 170, interpreted in good faith, that where the Tax Administration considers that the norm on which the taxpayer actually based its non-payment of a tax was misinterpreted, the Tax Administration is not

permitted to impose interest and penalties on the taxpayer's liability unless and until that norm is clarified (obviously, against the taxpayer's interpretation) in the manner specified in the paragraph, and then only prospectively, starting ten working days after the official publication of the clarifying norm. The contrary interpretation, that the Government could impose interest and penalties on the taxpayer for as long as it chooses not to clarify the contested norm, would give the Government the power to nullify this limitation (depriving this provision of any useful effect) simply by refusing or omitting to clarify the norm it considers to have been misinterpreted. If this were an accurate statement of Peruvian law, a proposition which the Tribunal would struggle to accept, relying on such interpretation would be inconsistent with the Respondent's obligation to afford the Claimant fair and equitable treatment and with the principle of good faith governing the performance of the Respondent's obligations under the Treaty.

920. As noted, Article 92(g) gives a taxpayer a *right*, in consonance with the Title of Article 92 ("*Derechos de los Administrados*," "Rights of Subjects [to the Administration])." It is a right to request the non-application of interest and penalties "in cases of reasonable doubt or conflicting criteria in accordance with the provisions of Article 170." The Tribunal observes that the concept of "reasonable doubt" differs from that of "misinterpretation of a norm" contemplated in paragraph 1 of Article 170 (an issue to be addressed more fully below), while "conflicting criteria" more closely approximates the circumstances contemplated in subparagraph 2. In any event, Article 92(g) qualifies "reasonable doubt or conflicting criteria" by the phrase "according to what is provided in Article 170." The most natural reading of this phrase is that Article 92(g) confers on a taxpayer the right to request the non-application of interest and penalties in either of the two sets of circumstances contemplated by the two subparagraphs of Article 170.

921. This does not mean that the exceptions of Article 170 are conditioned on a taxpayer's request under Article 92(g). As noted, the two provisions perform different functions: Article 170 prescribes two sets of circumstances in which the Tax Administration is barred from imposing interest and penalties, while Article 92(g) gives a taxpayer a separate right to request the non-imposition of interest and penalties in either of the same sets of circumstances. For example, if a taxpayer failed to pay a tax assessment on the basis of an

interpretation of a norm that the Tax Administration considers incorrect, and the Administration (unlawfully) imposes interest and penalties even though no clarifying norm has been issued, the taxpayer has a separate right under Article 92(g) to request the non-imposition (or reversal) of such interest and penalties. And if a clarifying norm has in fact been issued as contemplated by paragraph 1, the taxpayer has a separate right under Article 92(g) to request that interest and penalties not be applied until after ten days shall have elapsed from the official publication of the clarifying norm or, if applied, that they be reversed.

922. Given there are two different provisions, it is necessary to consider the Claimant's case with regard to each provision.

Article 170(1)

923. The Claimant argues, in effect, that, at best, SMCV misinterpreted certain rules and on that basis, it declined to pay the assessed royalties and other taxes, and as a consequence the Claimant was entitled under Article 170(1) to an automatic waiver of interest and penalties. The Claimant says that "[o]nce the authorities objectively determine that, based on verifiable facts, there is uncertainty about the correct interpretation of the relevant legal provision, the State must issue, through any of its authorized bodies, the 'clarifying rule' described in Article 170 that confirms that paragraph 1 of Article 170 applies."[889] This clarifying rule can be issued by legislation or by certain acts of certain organs of the Administration (Supreme Decree countersigned by the MEF, the Plenary Chamber of the Tax Tribunal, or SUNAT), but in any case the Government is required to publish the clarifying rule in the Official Gazette.

924. The Respondent disagrees, focusing on the word "may" to say that this is not a mandatory obligation. The Respondent says this provision is not relevant as no clarification has been published pursuant to the requirements detailed in Article 170(1). The publication requirement is not a mere formality nor a capricious requirement but instead provides a

[889] Hernández 1, ¶ 101.

taxpayer with certainty as to when interest or penalties will be waived.[890] The Respondent further says that there is no obligation on the State to issue a clarifying provision; there is no express obligation in Article 170, and the use of the word "may" makes clear it is a matter of discretion. The Respondent notes that Prof. Hernández does not cite any source in support of this submission that the State is obliged to issue a clarifying provision. Further, the Respondent says that were the Claimant's construction to be correct, it would make no sense given that, pursuant to the Tax Code, the tax authority has sanctioning authority according to which it is for the tax authority to assess the penalties to be applied where a taxpayer defaults on its obligation. The Respondent asserts that none of SUNAT, the Tax Tribunal or the Contentious Administrative Courts found any doubt as to the correct interpretation of the Mining Law so that there was no room for a clarifying provision. Finally, the Respondent says a clarifying provision can only be issued by SUNAT and the Tax Tribunal, and therefore the courts could not have issued a clarifying provision *sua sponte*.

925. The Tribunal finds that the word "may" in Article 170 more likely applies to the manner in which the clarification is to be made; the word is not relevant to the question whether the Government is obligated, as a matter of Peruvian law, to issue and publish a clarifying rule. However, the Tribunal has not been provided with sufficient basis to answer this question and in any case finds it unnecessary to do so. It notes that, whether or not the Government is legally *obligated* to issue and publish a clarifying rule, it is in its interest to do so, because, for the reasons already stated, it is barred from imposing interest and penalties on a taxpayer invoking what the Government considers a misinterpretation of the law unless and until it does issue and publish a rule correcting such misinterpretation. It is clear that when the non-payment is based on what the Government regards as a misinterpretation of the law, the Government cannot impose interest and penalties for the time being on the pretext that (i) the taxpayer's interpretation is wrong or (ii) the Government has chosen not to issue a clarifying rule.

[890] Bravo and Picón 1, ¶ 76.

926. As for the second subparagraph of Article 170, the Tribunal has found that until June 2006 SUNAT had uncertain, wavering views on the question whether SMCV was required to pay royalties in respect of the Concentrator. But, by the time that royalties first became due and the assessments were made, there was no longer any uncertainty within SUNAT as to what it believed was the proper application of the law. Therefore, the Tribunal finds that paragraph 2 of Article 170 did not constitute a separate bar to the imposition of interest or penalties on SMCV in respect of post-2006 assessments.

Article 92(g)

927. The Tribunal has also found that Article 92(g) gives a taxpayer the right to request the non-application of interest and penalties in cases of reasonable doubt or duality of criteria in accordance with Article 170. The Tribunal has noted a certain discrepancy between the concept of "reasonable doubt" appearing in Article 92(g) and that of "misinterpretation" of the relevant legal provisions, which appears in Article 170, paragraph 1. The concept of "reasonable doubt" appears to refer to the state of mind of the taxpayer, while the concept of "misinterpretation" of a norm appears to reflect the point of view of the Tax Administration. The Tribunal does not consider this discrepancy to be significant, because a good-faith reading of these provisions requires that the taxpayer's interpretation of the contested rules or its doubts about the correct interpretation be objectively reasonable.

928. The Claimant says that SMCV had such a reasonable doubt. It does not allege, for these purposes, that SMCV's interpretation was "correct" but that the language of the law was objectively ambiguous. To support this conclusion, the Claimant advances four arguments:

a. First, the Claimant's own construction was reinforced by the conduct and statements of various Government officials.

b. Second, the Claimant's construction was the same as that of certain court decisions and opinions, including those of: (i) the Contentious-Administrative Court's decision in the 2008 Royalty Case;[891] (ii) the dissenting Appellate Court judge in

[891] 18TH Contentious-Administrative Court, Decision No. 07650-2013-CA, 2008 Royalty Assessment (17 December 2014) (**CE-122**).

the 2006-2007 Royalty Case;[892] and (iii) the two Supreme Court justices who voted in favour of SMCV's construction in the 2006 -2007 Royalty Case.[893]

c. Third, the Claimant says that its construction was "grounded in the plain text of the Mining Law and Regulations and was consistent with commercial logic and comparative industry practice".[894]

d. Fourth, the Claimant says that it is clear that the Government accepted that the provisions in question were unclear as it modified them in the 2014 and 2019 amendments to the Mining Law and Mining Regulations. In this regard, the Claimant refers to certain statements of legislative intent, to be discussed in some detail in the next paragraphs.

929. The Claimant refers to the statement by Congress that in amending Article 83-B of the Mining Law, Congress's motivation was to "establish a clearer regulatory framework in accordance with the principle of legal certainty in favor of the investor."[895] The Claimant further cites the Statement of Legislative Intent accompanying the 2019 amendments to Article 22 of the Mining Regulations, which states as follows:

> "*1. The literalness of the text of the first paragraph of Article 22 could misleadingly lead one to consider that the contractual guarantees benefit the owner of the mining activity for any investment it makes in the concessions or EAUs, in which case, for example, tax stability would favor all the concessions or EAUs as a whole, without considering the provisions of Articles 79, 83, 83-B of the [Mining Law].*
>
> *2. In turn, the text of the second paragraph of Article 22 of the Regulations could lead to inferring that, in order to determine the results of its operations, the owner of the mining activity must keep independent*

892 Appellate Court, Decision No. 48, File No. 7649-2013 (12 July 2017) (**CE-274**).

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

894 Claimant's Memorial, ¶ 399.

895 Congress, Draft Bill Law No. 30230 (**CE-823**), p. 11.

accounts and reflect them in separate results only when it has other concessions or EAUs".[896]

930. The Claimant notes that MINEM stated that the purpose of the amendment was to "reduce the risk that would be entailed" by any incorrect understanding of the Mining Law and Regulations and would "contribute to clarifying what emerges from" the rules contained in the Mining Law and Regulations "as well as what is expressed at the administrative and judicial level on the effect of the contractual benefit".[897]

931. The Claimant next contends that whether or not it should have raised its request for a waiver during the initial challenge proceedings (a point addressed below) is irrelevant. The Respondent is wrong to say that as SMCV did not raise the question of waiver, SMCV lost its right to make this waiver request. As a matter of Peruvian law, the right to a waiver of penalties and interest cannot itself be waived. This is because SUNAT, the Tax Tribunal and the Peruvian courts are all obliged to consider the issue *sua sponte* not only for reasons of equity but for two reasons of law: (i) that Article 170 of the Tax Code is a peremptory norm,[898] and (ii) that SUNAT, the Tax Tribunal and the Judicial Branch have a general duty to resolve *sua sponte* all issues arising from the case pursuant to Articles 127 and 129 of the Tax Code and Article 5.4 of the Law on General Administrative Procedure.

932. The Claimant argues that questions of penalties and interest are issues raised by the case file and therefore should have been considered *sua sponte* by SUNAT, the Tax Tribunal and the courts. This, it says, is consistent with the practice of the Tax Tribunal and SUNAT. However, neither the first instance court nor the Appellate Court considered whether the Tax Tribunal should have considered the issue irrespective of whether or not SMCV had raised it, nor did the Appellate Court nor the Supreme Court consider the judiciary's own powers to grant a waiver of interest and penalties.

933. The Claimant says that the Tax Tribunal and Contentious Administrative Courts arbitrarily and without reason rejected SMCV's requests for a waiver of the penalties and interest in

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896 Supreme Decree No. 021-2019-EM (28 December 2019) (**CA-246**), p. 18.

897 Supreme Decree No. 021-2019-EM (28 December 2019) (**CA-246**), pp. 18-19.

898 Hernández 1, ¶¶ 99-100.

the 2006-2007 and 2008 Royalties Cases on the grounds that SMCV had failed to raise the waiver request during the initial challenge proceedings but only after it received the decision. The Claimant points out, however, that SMCV sought a waiver as soon as it received notification of the decisions on these cases and that it cannot have been expected to seek a waiver before it received such notification.

934. Turning to the 2006-2007 Royalty Case, the First Instance Court held that because SMCV had not raised the issue of a waiver before the Tax Tribunal, it had waived its rights. The Appellate Court did the same, this time its reasoning comprising three sentences, and again it did not address whether the Tax Tribunal had jurisdiction to consider this issue *sua sponte*. In the Supreme Court, the two dissenting judges noted that the Appellate Court had not "addressed claimant's request" to waive penalties and interest, and concluded that the Appellate Court's ruling "does not contain arguments that resolve the abovementioned wrongs invoked in the appeal, and therefore the challenged ruling fails to satisfy the requirement of judicial motivation which violates due process in its expression regarding due motivation" and as a result should be annulled.[899] The Tribunal notes that section 5 of Article 139 of the Constitution guarantees parties to a dispute a response from the judge that is adequately sustained in arguments that, based on the facts that have been proved in the process and the law applicable to the case, logically and reasonably justify the decision made, and that, additionally, are congruent with the request for relief and allegations made by the parties within the dispute.

935. With regard to the 2008 Royalty Case, the Claimant says that when the Appellate Court reversed the decision of the First Instance Court, which had been in favour of SMCV, it did not consider whether SMCV had waived its rights and whether either the Tax Tribunal or the Appellate Court itself should have considered the question of waiver *sua sponte*. The Appellate Court's reasoning comprised just one sentence. The Supreme Court upheld the Appellate Court's decision without again considering whether it should have determined the question of waiver *sua sponte* and further held that although the Appellate Court's one

[899] Supreme Court, Decision No. 18174-2017 (2006/07 Royalty Assessments) (20 November 2018) (**CE-739**), pp. 47-48.

sentence ruling was "succinct", that one sentence did state "the minimum grounds supporting its ruling".[900]

936. With regard to the 2009, 2010–2011, 4Q 2011, 2012 and 2013 Royalty Assessments, again SUNAT and the Tax Tribunal rejected SMCV's application for waiver of penalty and interest. With regard to the 2009, 2010–2011 and 4Q 2011 Royalty Assessments, the Tax Tribunal argued there was no "reasonable doubt" because the dispute related to the scope of the Stability Agreement and not to any ambiguity, imprecision, or obscurity in the Mining Law. However, the Claimant says that SUNAT, the Tax Tribunal and SMCV all based their arguments on the proper construction of the Mining Law, not on the Stability Agreement. Indeed, the Claimant notes that SUNAT's assessments list the Mining Law and Regulations as their "support and legal basis".[901] Additionally, because the Stability Agreement is an adhesion contract, any argument relating to the scope of this Stability Agreement is necessarily a dispute about the Mining Law. Finally, the Claimant says that SUNAT and the Tax Tribunal were wrong to dismiss as irrelevant to the objective question of reasonable doubt (i) the public statements from government officials referred to by SMCV, (ii) the Contentious-Administrative Court's decision agreeing with SMCV's interpretation in the 2008 Royalty Case, and (iii) the fact of SMCV's voluntary and GEM contributions. These were all evidence of both the government and SMCV's understanding of the scope of the Stability Agreement and therefore evidenced SMCV's objective reasonable doubt.

937. Finally, the Claimant concludes that if a reasonable doubt does exist, the State cannot deny a waiver on the ground that it has failed to issue a clarification, pointing out that otherwise the State could prevent taxpayers from exercising their rights to a waiver without justification and there would be no objective criteria for its application because it would depend entirely on the State's will.[902]

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900 Supreme Court, Decision No. 5212-2016, 2008 Royalty Assessment (18 August 2017) (**CE-153**), p. 37, ¶ 46.

901 SUNAT 2009 Royalty Assessments (27 June 2011) (**CE-54**), Annex No. 1.

902 Hernández 1, ¶ 102.

938. The Respondent contends that there can only be "reasonable doubt" in two specific scenarios. The first scenario is when an interpretation of a norm has been changed as a result of a formal ruling that the prior interpretation was incorrect and the clarification must expressly provide it is issued for the purposes of Article 170 of the Tax Code and it must have been published in the El Peruano. This has not happened. The second scenario is when SUNAT has inconsistently applied a rule over time, which again the Respondent says is not the case and the Claimant has not proved otherwise.

939. The Respondent says that there was no ambiguity as to the meaning of the Mining Law and Mining Regulations and submits that the fact that relevant provisions were amended, for example to make a law "clearer", does not mean the law was unclear to begin with, as was determined by the Peruvian courts. The "stated goal of creating a 'clearer regulatory framework' was not referring to any specific amendment […] but rather was referring generally to the 'various proposed changes to the [Mining Law]'".[903] Specifically with regard to the Statement of Legislative Intent accompanying the amendment to Article 22 of the Mining Regulations, the Respondent says that all it meant was that the provision could be misleading if read on its own without recourse to Articles 79, 83 and 83-B of the Mining Law. In response, the Claimant notes that these provisions are irrelevant to assessing "reasonable doubt" in the period before 2014.

940. The Respondent does not accept that under Peruvian law there is an obligation on the Tax Tribunal or Contentious Administrative Courts to consider the waiver of penalties and interest *sua sponte*. The Respondent notes that SMCV did not file its request for waiver with the Tax Tribunal until after the Tax Tribunal had issued its decisions upholding SUNAT's assessments. The Respondent refers to Article 147 of the Tax Code which requires appellants to raise at the outset of their complaints all issues they wish the Tax Tribunal to consider. As SCMV did not raise its objections with regard to penalties and interest at the time it filed its appeals, that failure was a waiver of its rights with regard to penalties and interest. The Respondent accepts that had an official clarification been issued, the position would have been different, but clarification is not mandatory, as is clear from

[903] Respondent's Counter-Memorial, ¶ 606.

the use of the word "may" the power is permissive and not mandatory. Therefore, the Tax Tribunal was not obliged to consider the question of waiver.

941. The Respondent further says that it is "a routine, and well-founded, practice that appellate courts, generally, do not enlarge the scope of a case on appeal."[904] The Respondent contends that it is not arbitrary for a court of appeals not to consider an issue that had not been appealed; appellate courts merely review a lower court or tribunal's decision and do not decide a case in the first instance. The Respondent says that SUNAT and the Tax Tribunal are not required to consider, in every case brought before them, whether there may have been an incorrect interpretation as a result of reasonable doubt as to the meaning of a regulation. In addition, Article 127 of the Tax Code merely empowers SUNAT or the Tax Tribunal to reconsider issues but it is not mandatory, and Article 129 does not require the deciding entity to consider whether to issue a clarifying provision in all cases particularly where it was not requested by the taxpayer and, in this case, the regulation was clear for SUNAT and the Tax Tribunal.

942. Finally, the Respondent says that a clarifying provision can only be issued by SUNAT and the Tax Tribunal, and therefore the courts could not have issued it *sua sponte*. SUNAT and the Tax Tribunal are not required to consider, in every case brought before them, whether there may have been an incorrect interpretation as a result of reasonable doubt as to the meaning of a regulation.

943. The Respondent next says that SUNAT has not inconsistently applied a rule over a period of time, and the Claimant has not proved otherwise.

944. Turning first to the decision of the Contentious-Administrative Court with regard to the 2008 Royalty Assessment Case, the Respondent notes that because this decision was issued on 17 December 2014, after SMCV had filed its tax returns for all the fiscal years at issue in this case, it could not have formed a basis for a reasonable doubt. In response, the Claimant notes that the issue is not the Claimant's subjective belief but the objective understanding of the ambiguity of a rule. The decision is therefore relevant. Whilst the

[904] Respondent's Counter-Memorial, ¶ 612.

Respondent further says that as it was overturned by a higher court, it is irrelevant, the Claimant again submits that whether or not the decision was "correct" is not the question. The issue is merely that the determination of the Contentious-Administrative Court demonstrates the ambiguity of the law.

945. With regard to the 2006-2007 Royalty Assessments, the Respondent says, first, that SMCV breached Article 147 of the Tax Code by failing to file its request for a waiver until after the Tax Tribunal had issued its decisions upholding SUNAT's Assessments. Pursuant to Article 147, SMCV should have raised its objections with regard to interest and penalties at the time it filed its appeals against the Assessments. Accordingly, SMCV waived its rights to waiver of the interest and penalties. Further, Superior Court Judge Reyes dissented because he disagreed with the majority's approach to the construction of the relevant provisions, but he did not consider the merits and so his opinion cannot support any submissions as to reasonable doubt as to the correct construction of the Mining Law. Again, the Respondent says that the two dissenting Supreme Court justices dissented on the basis of disagreements with the Appellate Court's approach and again did not consider the merits. Accordingly, the Respondent says that the approach taken by these judges does not support any submission that there was reasonable doubt as to the meaning of the Mining Law regarding the scope of the Stability Agreement. In any event, a dissent or a court decision that has been overturned on appeal cannot create doubt about the status of the law. In response, the Claimant contends that the Justices' dissenting opinions all turned on the proper interpretation of the Mining Law and Regulations, with Judge Reyes Ramos stating that the "case basically boils down to a dispute surrounding two clashing interpretations on the same piece of legislation."[905] In addition, Supreme Court Justices Martinez Maravi and Rueda Fernández both reached the decision that the lower court's judgement should be reversed because it "omitted a decision on the issue that the stability was granted to the beneficiation concession and that, because of that, with the incorporation of the Sulfides Plant […] the extension of the guarantee operating as a matter of law".[906]

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[905] Appellate Court, Decision No. 48, File No. 7649-2013 (12 July 2017) (**CE-274**), p. 36, ¶ 8.5.

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

946. According to the Respondent, SUNAT rejected SMCV's request for waiver of penalties and interest with regard to the 2010-2011 Royalty Assessment on the basis, partially, that any alleged ambiguity, even if there was one, had not been the subject of formal clarification. In fact, the Respondent says, SUNAT found that "reasonable doubt" under Article 170 is not the same as "ambiguity in the rule" in the colloquial sense: reasonable doubt only applies to waive interest and penalties in two scenarios and given that, with regard to this resolution, SUNAT was referring to the first scenario, as there had been no official clarification, Article 170(1) by its terms could not apply. Finally, the Tax Tribunal considered and rejected any argument that there were inconsistent SUNAT or Tax Tribunal decisions that could give rise to a finding of "reasonable doubt". Therefore, the Respondent contends, the Tax Tribunal properly considered SMCV's arguments, applied the law, and correctly determined that application of Article 170 was inappropriate.

947. With regard to the 2009, 2010–2011, Q4 for 2011, 2012 and 2013 Royalty Assessments, the Respondent again says that as no official clarification was published and there was no inconsistency in the approach taken by SUNAT or the Tax Tribunal, there was no arbitrary or unreasonable conduct by the Respondent. The fact of SMCV made voluntary payments and GEM contributions is irrelevant as they could not have established the existence either of an official clarification or inconsistent SUNAT or Tax Tribunal decisions.

948. With regard to the subsequent Royalty Assessments, the Respondent argues that the Tax Tribunal asserted that there was no reasonable doubt for the following reasons. First, the issue related to the scope of the Stability Agreement and not to any doubt as to the meaning of the Mining Law. Second, statements from Government officials could not support a finding of reasonable doubt not least because SMCV had failed to "establish[] institutional positions for the entities that said persons represented".[907] Third, the Contentious-Administrative Court decision which agreed with SMCV's interpretation could not be relevant as it could not "clarify" the rule to trigger the application of the waiver provision. Fourth, the fact SMCV had made extensive voluntary and GEM payments was irrelevant.

[907] Tax Tribunal, Decision No. 06575-1-2018 (28 August 2018) (**CE-194**), p. 39.

949. Having carefully considered the Parties' submissions, the Tribunal finds that there was objectively a reasonable doubt as to the proper construction of the Mining Law and Mining Regulations with regard to the scope of stabilisation agreements and that, accordingly, SMCV had the right under Article 92(g) to request the non-application of the interests and penalties at issue. This is clear from the evidence cited above (as summarised in paragraph 743) as to the inconsistent and contradictory understanding of the scope of stabilisation agreements both within and between SUNAT, MINEM and MEF. It is also apparent from the amendments made to the Mining Law and Article 22 of the Mining Regulations and the accompanying Statements of Legislative Intent, which show that clarification was thought necessary. The Statement of Legislative Intent quoted at paragraph 929 makes clear Congress's concern as to the ambiguities therein and the risk of misunderstanding the relevant provisions contained in the Mining Law and Mining Regulations. Finally, whilst those Justices who provided dissents may not have reached a "correct" conclusion, the Tribunal does not find that to be the relevant question. The point is that they did not reach the same conclusion as the Supreme Court and that supports an argument that there is ambiguity in the drafting of the Mining Law and Mining Regulations. The Tribunal also finds that the two dissenting Justices did consider the proper construction of the Mining Law and Mining Regulations, although the main object of their dissent was the particular approach followed by the majority with regard to the construction of the Mining Law and Mining Regulations. The Tribunal further finds that the fact of their dissents provides further support for the proposition that the correct construction was not clear but required a careful application of Peruvian law on legislative and contract construction. Finally, it is clear from the analysis undertaken by this Tribunal on the Article 3.4 claim, and the fact it was unable to reach a unanimous decision, that there was no clear and unambiguous construction of the relevant provisions of the Mining Law and Regulations. All these circumstances give rise to an objectively reasonable doubt on the part of SMCV as to the scope of the Stability Agreement pursuant to the Mining Law and Regulations.

950. The Tribunal also agrees with the Claimant that the analysis of the Tax Tribunal and the Courts was undertaken with regard to the proper application of the Mining Law and Mining Regulations with regard to the Stability Agreement. Accordingly, the Tribunal does not accept the statement by the Tax Tribunal with regard to SMCV's challenge of the 2009

Royalty Assessment that "this dispute did not originate in a doubt arising from the interpretation of the scope of Article 83 of the [Mining Law] or Article 22 of its Regulations, but in the verification of the scope of the agreement executed, in other words, to establish what was agreed to therein".[908]

951. The Tribunal also finds that Article 170 is a peremptory norm that circumscribes the scope of the Tax Administration's power to impose interest and penalties by creating exceptions to or limitations on that power. For this reason alone, the Tax Administration had the duty to abide by the legal restrictions to its general power to impose interest and penalties, without relying on a taxpayer's request under Article 92(g).

952. Further, the Tribunal finds that, under the applicable rules, the Tax Tribunal had the power to consider the waiver or non-application of interest and penalties *sua sponte*. Article 127 of the Tax Code, titled "Power of Re-Examination", provides as follows:[909]

> "***Article 127.- POWER OF RE-EXAMINATION***
>
> *The decision-making body is empowered to conduct a full re-examination of the issues of the disputed case, subject matter, whether such issues have been raised by the interested parties or not, and new verifications shall be conducted where relevant.*" [Tribunal emphasis]

953. Further, Article 129 of the Tax Code, headed "Content of the Decisions", provides:[910]

> "***Article 129.- CONTENT OF THE DECISIONS***
>
> *Decisions shall set out the points of fact and points of law on which they are based and shall rule on all the questions raised by the interested party and any others* [other questions] *raised by the case file, failing which, the final paragraph of Article 150 shall be applicable.*" [Tribunal emphasis]

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908 Tax Tribunal, Chamber 2, Decision No. 06141-2-2018 (15 August 2018) (**CE-188**), p. 31.

909 Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Article 127 (**CA-14**).

910 Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Article 129 (**CA-14**).

954. It is clear from the full text of Article 127 of the Tax Code that it encompasses questions related to penalties and interest. Further, Articles 127 and 129 of the Tax Code make clear that SUNAT and the Tax Tribunal are empowered to consider all the questions raised by the interested parties and all those raised by the case file, without excluding the applicability of interests and penalties.[911]

955. This analysis is also supported by Article 5.4 of the Law on General Administrative Procedure,[912] which regulates the content of decisions by administrative agencies

> "*5.4. The content must cover all questions of fact and law raised by the subjects, and may involve others not proposed by them that may been sua sponte identified, provided the administrative authority grants them a period of no less than (5) days for them to present their position and, where appropriate, provide any evidence they deem relevant.*" [Tribunal emphasis]

956. The question of penalties and interest imposed on SMCV is undoubtedly an issue arising out of (raised by) the case file such that whether or not the waiver was raised by SMCV in its first challenge is irrelevant. Further, whether or not the Tax Tribunal and the Courts were legally *obligated* to consider the question of waiver of interest and penalties *sua sponte*, they clearly had the discretion so to do. Given the very significant sums demanded by way of interest and penalties, it is inconceivable that the Tax Tribunal or the Courts could consider it was not appropriate to exercise their discretion to conduct a full re-examination of the issues in circumstances where they had that power.

957. In support of this finding, the Tribunal notes the following extract from a judgment of the Constitutional Tribunal dated 21 March 2005. Paragraphs 10 and 11 said as follows:

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911 The Respondent relies on Article 147 of the Tax Code, which provides that in an appeal to the Tax Tribunal, the appellant may not address aspects it did not contest in its claim against SUNAT, unless they were added by SUNAT in resolving the claim. See Respondent's Counter-Memorial, ¶ 612. The Tribunal considers this rule to be inapplicable to the dispute over interest and penalties, because in its view, interest and penalties are not self-standing but are accessory to the tax claim, which is the basis of the appeal, as they arise only because of and in connection with such claim.

912 Law of Administrative Procedure No. 27444 (25 January 2019), Article 5.4 (**CA-18**).

"*10. […] it is necessary to take into account that the prolonged duration of the process - due to its complexity-, would consequently result in the person who requested the protection of a right ending up in a situation that cause more economic damage than if he had not taken any action, due to the application of delay interest. This result would not be constitutional under the criterion of reasonableness and the exercise of effective judicial protection, which not only implies access to the judicial apparatus, to a motivated pronouncement and to the execution of its rulings on its own terms, but also that a timely pronouncement by the judges is important; even more so when it involves processes that, such as constitutional protection, deserve urgent protection.*

Likewise, in order to make this decision, it is necessary to consider that one of the motivations of the appellant for taking action was the mistaken comparison that, due to confusion, it made of the minimum income tax to the IEAN.

11. In the opinion of the Tribunal, it is the unique nature of the case that makes it possible to make this distinction. Although, among other reasons, the Constitutional Tribunal has indicated that the IEAN was not confiscatory, due to having a small rate, for its short period of validity, for the amortizations allowed and for the possibility of being used as a credit against the income tax, which guaranteed that the taxpayer is not saturated with the weight of the tax, this safeguard could be distorted if, due to the passage of time, as a consequence of a judicial process, the taxpayer not only has to pay a correctly assessed main debt, but also a large sum of interest for late payment, not caused by the taxpayer's negligence or bad faith, but ironically, by exercising their right of action.

12. Consequently, in this specific case, the Constitutional Tribunal despite considering the petition to be unfounded, so that the main debt should be collected, it does not protect the payment of interest for late payment".[913]

958. In the above case, SUNAT was ordered to "abstain from considering the amount of delay interest from the filing of the administrative appeals […]".[914] In the Tribunal's view, this precedent supports a finding that the Tax Tribunal and the courts should have exercised their discretion to waive the accrual of the penalties and interest on the unpaid royalties. The Constitutional Tribunal's judgment is precisely on point.

959. Finally, and in any event, SMCV did raise the issue of waiver before the Tax Tribunal albeit after receiving the initial SUNAT assessment, and it further asked both the first instance and the appellate courts to rule on whether the Tax Tribunal should have considered the issue *sua sponte*. The Tribunal notes that the courts failed to issue any ruling on this issue as identified by the two dissenting Supreme Court justices.[915] The waiver of interest and penalties in these circumstances is a matter which should have been considered by the Tax Tribunal and by each of the courts which heard SMCV's challenge.

960. The Tribunal accepts that it is not its function to act as an appellate court from the decisions of the Tax Tribunal and national courts but points out that it is not assuming any such role. In this proceeding, the Tribunal is called upon to adjudicate the issue, arising under the Treaty and general international law, whether the Respondent's imposition of, or failure to waive, the interest and penalties on the unpaid royalties was a measure that breached its FET obligation, in particular by reason of arbitrariness. The Tribunal finds that the Respondent's actions were arbitrary. The Tribunal does not accept that the decisions taken not to waive any of these sums was based upon legal standards, but was instead the exercise of discretion which inflicted damage on SMCV without any apparent legitimate purpose; indeed it appears likely to the Tribunal that the sole purpose of the refusal to waive these

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913 Constitutional Tribunal, Decision, Case No. 1255-2003-AA/TC (21 March 2005) (**CA-118**), pp. 6-7.

914 Constitutional Tribunal, Decision, Case No. 1255-2003-AA/TC (21 March 2005) (**CA-118**), p. 7. See also Constitutional Tribunal, Decision, Case No. 3591-2004-AA/TC (24 January 2005) (**CA 115**).

915 Supreme Court, Decision No. 18174-2017, 2006/07 Royalty Assessments (20 November 2018), (**CE-739**), p. 47, ¶¶ 2.15-2.17.

penalties and interest was to raise additional funds from SMCV. Penalties and interest are typically imposed, for good public-policy reasons, where a taxpayer refuses, without good reason, to pay taxes which have been found to be due. Equally, Peruvian law provides for the State to waive penalties and interest in certain circumstances, including where there is uncertainty as to a taxpayer's liability under the applicable legislation. There are again good public policy reasons for this exception to the general rule. However, this discretion to waive penalties and interest must be exercised rationally and consistently. In the present case, the Tribunal does not find that this principle has been applied rationally and consistently to SMCV. Even if it were the case that under Peruvian law there was no right to request a waiver until the State chose itself to issue a clarifying statement (an analysis that the Tribunal does not accept), it is clear to the Tribunal that there was an obligation on the Peruvian national courts to consider the question of waiver *sua sponte* and a discretion to waive the obligation to pay these sums. In circumstances where (i) the sums required to be paid were considerable; (ii) the Tribunal has found there was considerable uncertainty within the Government organs as to the scope of stabilisation agreements; (iii) the Mining Regulations were amended, *inter alia*, to ensure clarity as to the scope of stability agreements; (iv) there is no evidence that the Tax Tribunal and national courts did consider the question of waiver *sua sponte*; and (v) the law provided the authorities with discretion not to impose penalties and interest, the Tribunal finds that in failing to exercise this discretion to waive those sums, even to consider doing so, and in failing to provide any substantive reason for refusing a waiver, the Respondent acted arbitrarily and in breach of its FET obligations.

961. On the basis of the preceding discussion and as a general conclusion, the Tribunal finds that, in the circumstances of this case, the Respondent's imposition of interest and penalties on SMCV in respect of the SUNAT assessments was arbitrary on two independent grounds: (i) failure to abide by the restrictions imposed by the first paragraph of Article 170 of the Tax Code and (ii) failure to waive such penalties and interest under Article 92(g) of the Tax Code.

The delays in rendering the Royalty Assessments

962. The Claimant also says that the Government compounded its arbitrary conduct because SUNAT's excessive delays in rendering assessments and the Tax Tribunal's delays in addressing SMCV's administrative challenges significantly increased the punitive interest charges. SUNAT did not issue any royalty assessments between June 2011 and April 2016. SUNAT then issued the 2010–2011 Royalty Assessment on 13 April 2016, more than five years after what would have been the date of SMCV's tax and royalty returns for that year and just before the expiration of the six-year statute of limitations. This included penalties of 10% of the unpaid royalties and additional penalties for SMCV's failure to file royalty declarations, as well as penalties for breach of Article 22 of the Mining Regulations (a matter addressed at paragraphs 1021 to 1034 below). SUNAT also charged interest on these unpaid royalties and penalties at 14.4% per year running from the dates on which SUNAT asserted each monthly royalty declaration should have been filed. By this time, the penalties and interest charges already amounted to over USD 76.6 million, nearly one-half of the total assessments.

963. The Claimant further notes that the 2009 Royalty Case was pending before the Tax Tribunal for over six years before it was resolved. Indeed, certain of SMCV's tax challenges remained pending before the Tax Tribunal for nearly a decade without resolution. In all these cases, the delays resulted in significant interest charges.

964. The Respondent answers that the significant quantum of the interest and penalties assessed is the result of SMCV taking so long to pay its outstanding tax. Had SMCV paid its tax upon receiving the assessment, it would not have had interest and penalties to pay, and had its challenges been successful, it would have been refunded the overpaid tax together with interest. SMCV should have been aware of SUNAT's interpretation of the Stability Agreement but took the risk of challenging the assessments. That should not be a liability for the Respondent. The reason for the delays was that the volume of cases before the Tax Tribunal was "extraordinarily high."[916]

[916] Respondent's Counter-Memorial, ¶ 619.

965. The Tribunal accepts the Claimant's submission that the delays in determining the Royalty Assessments were significant, especially in light of two facts: (i) that the sums which were accruing as a consequence of the delay were so high and (ii) the interest and penalties accrued from the date when, according to SUNAT, the returns should have been filed and not the date (many years later) when the assessments were actually issued. Whilst the Respondent refers to the extraordinarily high number of cases before the Tax Tribunal, the Tribunal notes that SUNAT moved more quickly when its action appears to have favoured the Respondent. Examples include the determination reached by Chamber No. 1 regarding the 2008 Royalty Assessment and the rapid acceptance (one and two business days respectively) of SMCV's request, under protest, to enter into payment instalment plans (see paragraph 990 below).

966. The Tribunal also notes that Article 12 of Law No. 28969 provides that it is not appropriate to apply interest and penalties "when the obligation to pay the mining royalty was breached due to causes of an objective nature attributable to [MINEM] or to SUNAT."[917] It is unarguable that the delays in the Royalty Assessments being issued were attributable to SUNAT and the delays in the challenges being heard were attributable to the Tax Tribunal.

967. For all the foregoing reasons, the Tribunal finds that the delays constituted arbitrary conduct.

The appropriate tax rate

968. The Claimant also says that the Government acted arbitrarily in refusing to adjust the applicable interest rate following the Tax Tribunal's delays, even though it was obligated to do so under Peruvian law. The Government applied the statutory interest of 14.4% instead of the CPI rate for interest, which was around 2%. The Claimant argues that Article 33 of the Tax Code required SUNAT to apply the CPI rate once the Tax Tribunal failed to resolve a challenge within twelve months (as required by Article 150 of the Tax Code) and that the delay was attributable to the Tax Tribunal. As the Claimant points out, even though

[917] Law that Authorizes SUNAT to Implement Provisions that Facilitate the Administration of Royalties, Law No. 28969 (25 January 2007) (**CA-8**).

the Tax Tribunal took significantly longer than twelve months, SUNAT continued to apply the higher statutory interest rate for the full duration of the Tax Tribunal proceedings.

969. The Respondent contends that a mining royalty is not a tax for the purposes of Article 33 of the Tax Code. Under Peruvian law, the Mining Royalty Law and Mining Royalty Regulations take precedence over the Tax Code, and these mandate the application of monthly interest equivalent to the default interest rate for unpaid royalties as a mining royalty is treated as an economic consideration paid for the right to explore mineral resources.[918] Further, pursuant to Article 74 of the Constitution, tax provisions may not be extended to persons or cases other than as identified by the law. As there is no express reference to Article 33 of the Tax Code in Article 3 of Law No. 28969, it cannot apply to royalties.

970. In reply, the Claimant submits that the CPI rule applies to royalty proceedings because they are subject to the same procedural rules as tax proceedings. The purpose of this rule is to ensure that taxpayers are not punished for delays attributable to the Tax Tribunal and that the Government is not rewarded for inefficiencies of the Tax Tribunal. The Claimant refers to the Constitutional Court's determination, in 2005, that "in *any* Tax Tribunal proceeding"[919] taxpayers have the right to have any case heard by the Tax Tribunal within a reasonable time (and this therefore includes challenges to Royalty Assessments which are a type of Tax Tribunal proceeding) and ordered that CPI should apply for any delay exceeding the 12 month deadline.[920] The Claimant explains that the challenges which accrued the higher interest rate were all pending before the Tax Tribunal for more than 12 months.

971. The Claimant further says that Article 74 of the Constitution applies only to taxes and not royalties. Therefore, there is no prohibition on SUNAT applying Article 33 of the Tax Code to SMCV's Royalty Assessments.

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[918] Mining Royalty Law No. 28258 (24 June 2004) (**CA-6**), Article 2.

[919] Hernández 2, ¶ 97 (emphasis in original).

[920] Constitutional Tribunal, Decision, Case No. 1255-2003-AA/TC (21 March 2005) (**CA-118**); see also Constitutional Tribunal, Decision, Case No. 3591-2004-AA/TC (24 January 2005) (**CA-115**).

972. The Claimant therefore concludes that the Respondent was rewarded for its delay and this violated SMCV's right to obtain a decision within a reasonable time and meant that SMCV had to bear the adverse effects of SUNAT's failures.

973. In considering whether or not the Respondent's actions in refusing to apply the CPI rate was arbitrary in nature, the Tribunal first turns to the question whether or not Articles 32 and 33 of the Tax Code apply to royalties. These Articles provide as follows:[921]

> "*(32) The amount of the tax not paid by the deadlines mentioned in Article 29 will accrue interest equivalent to the Statutory interest Rate (TIM), which may not exceed 10% (ten percent) above the average monthly market lending rate in national currency (TAMN) published by the Superintendence of Banking and Insurance on the last business day of the previous month.*
>
> *(32)* Paragraph replaced by Article 4 of Law No. 27335, published on July 31, 2000.
>
> (The second paragraph was repealed by Article 14 of Legislative Decree No. 953, published on February 5, 2004)
>
> *(33) SUNAT will set the TIM for the taxes that it administers or that it is responsible for collecting. In cases of taxes administered by Local Governments, the TIM will be set by Municipal Ordinance, which may not be greater than that established by SUNAT. In the case of taxes administered by other Entities, the TIM will be the one established by SUNAT, unless a different one is established by a Resolution by the Ministry of Economy and Finance.*
>
> *(33)* Paragraph superseded by Article 14 of Legislative Decree No. 953, published on February 5, 2004.

[921] Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Article 33 (**CA-14**).

(34) Statutory interest will be assessed on a daily basis from the day following the due date until the payment date inclusive, multiplying the amount of the unpaid tax by the current daily TIM ["Statutory interest rate"]. The current daily TIM is the result of dividing the current TIM by thirty (30).

(34) Paragraph superseded by Article 3 of Legislative Decree No. 969, published on December 24, 2006.

(35) The assessment of Statutory interest will be suspended as of the expiration of the maximum deadlines set forth in Articles 142, 150, 152 and 156 until the resolution is issued completing the claim procedure vis-à-vis the Tax Administration or the appeal procedure before the Tax Tribunal is issued or the compliance resolution is issued by the Tax Administration, provided the expiration of the deadline, without the claim or appealing having been resolved or the compliance resolution having been issued, is owing to a cause attributable to said decision-issuing bodies.

(35) (Fourth paragraph of Article 33, as amended by Article 3 of Legislative Decree No. 1263, published on 12/10/2016, and in force since 12/11/2016)."

974. It is common ground that the effect of these articles is that the CPI rate should be applied for any period exceeding twelve months that the Tax Tribunal takes in resolving an appeal before it. It is also common ground that the Constitutional Court determined that royalties are not a tax. The question before the Tribunal is, however, whether Articles 32 to 35 of the Tax Code apply also to royalties, even though they are not taxes.

975. As a first point, Article 33 does not refer merely to taxes; it provides that "SUNAT [shall] set the TIM for the taxes that it administers *or that it is responsible for collecting*" and refers to "appeal procedures[s] before the Tax Tribunal".[922] The appeals that SMCV lodged with the Tax Tribunal in respect of the royalty assessments were clearly appeal procedures

[922] Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Article 33 (**CA-14**) (emphasis added.).

before the Tax Tribunal, and the Respondent does not contend otherwise. In fact, Articles 6.1 and 7 of the Mining Royalty Law provide that it is for SUNAT to administer the calculation and payment of royalties and that it is for SUNAT to establish the form and terms for payments. Challenges to decisions made by SUNAT lie before the Tax Tribunal. Therefore, on a plain reading of the relevant provisions, it seems clear that Article 33 applies to any appeal proceedings before the Tax Tribunal, including challenges to royalty assessments.

976. Nevertheless, the Respondent invokes various articles in the Royalty Law Regulations. Article 7.3 of these Regulations provides that unpaid royalty will bear "a monthly interest, which will be equivalent to the Statutory Interest Rate for tax obligations administered or collected by SUNAT." Article 7.4 states that the interest will be assessed daily in accordance with "[t]he daily interest rate in force" which is determined by "dividing the monthly interest rate by thirty […]". Article 8 provides with regard to penalties that the applicable penalty is 10% of the unpaid amount and that the penalty will also accrue interest at the same rate. Article 9 empowers SUNAT to "exercise the functions associated with the payment of the mining royalty, including the recording, reception and processing of the returns, audits, debt determination, compliance control, collection, enforcement, resolution of contentious and non-contentious procedures, and administration of offenses and penalties." Finally, the third paragraph of the "Final Provisions" provides: "[f]or the determination *ex officio*, SUNAT as the entity in charge of the inspection may apply the valuation methods set forth in the Income Tax legislation".[923]

977. The Tribunal accepts that the provisions of the Mining Royalty Law and Regulations cited by the Respondent specify the interest and penalties to be applied to unpaid royalties. However, do these provisions apply even when the Tax Tribunal has delayed issuing a resolution on royalties by more than twelve months? Put differently, does Article 33 of the Tax Code apply in the case of such delays even though the Mining Royalty Law and Regulations contain no express reference to this article? The Tribunal considers that Article 33 does apply to such cases of delay, for the reasons that follow.

[923] Royalty Law Regulations, Supreme Decree No. 157-2004-EF (15 November 2004) (**CA-7**).

978. First, Article 74 of the Constitution states:

> "*Taxes shall be created, amended or repealed, or exemptions shall be established, exclusively by law or by legislative decree in a case of delegation of powers, with the exception of customs duties and fees, which shall be regulated by supreme decree.*
>
> *Local governments may create, modify, and eliminate taxes and charges, or create the corresponding exemptions, within their respective areas of authority and subject to the limits defined by law. In exercising its power of taxation, the State shall respect the principle of the legal reserve as well as principles concerning equality and respect for basic human rights. No tax shall have the effect of confiscation.*
>
> *Emergency decrees shall not contain any tax provisions. Laws regulating annual taxes shall enter into force on January 1, of the year after the promulgation thereof. Budget laws shall not contain any tax provisions.*
>
> *Any tax laws enacted in violation of the provisions of the present Article shall be null and void.*"[924]

The Tribunal agrees with the Claimant that this article applies only to taxes. It is contained in Chapter IV of the Constitution, which is headed "Tax and Budget System" and by its own terms refers only to taxes. As royalties are not taxes, as the Constitutional Court has ruled and both Parties accept, Article 74 cannot be a bar to the application of Article 33 to royalties.

979. Second, Article 33 by its terms is not limited to challenges involving taxes. Article 9 of the Mining Royalty Law and Regulations entrusts all functions associated with the payment of the mining royalty, including "debt determination, compliance control, collection, enforcement, resolution of contentious and non-contentious procedures, and administration

[924] Political Constitution of Peru (1993) (**CA-53**).

of offenses and penalties",[925] to SUNAT, which amounts to turning to SUNAT all procedural aspects of the collection and enforcement of the mining royalties. The Tribunal sees no reason why only Article 33 of the Tax Code should be excluded from this broad reference. Indeed, in their first expert report, Bravo and Picon state that Section (g) of the Second Final Complementary Provision of Law No. 28969 (the law that authorizes SUNAT to enforce rules that facilitate the administration of Mining Royalties) provides that "mining royalties, penalties and default interest applicable under the norms regulating mining royalties should be understood as tax debt."[926] Whilst this provision is not in the record, this evidence was not challenged.

980. Also relevant are the provisions of Articles 4 and 5 of Law No. 28969.[927] Article 4 provides that the decision-making bodies regarding mining royalties are (i) SUNAT which is to resolve contentious proceedings in the first instance, and (ii) the Tax Court which resolves contentious procedures on appeal. Article 5 details the powers of the Tax Court, including the power to hear in the last administrative instance appeals filed against resolutions issued by SUNAT regarding files related to mining royalties.

981. Third, contrary to the Respondent's argument,[928] Law No. 28969 does not expressly exclude the application of Article 33 of the Tax Code, although it is correct that it does not expressly refer to that provision. It is true that Article 3(a) of Law 28969 lists the Tax Code provisions that "Facilitate the Administration of the Mining Royalties" and that Article 33 is not included in that list. But Article 33 is not a provision that would be included in a list concerning the facilitation of the administration of mining royalties; it is a provision that provides a remedy to a Government debtor in specific circumstances. Article 3(b) of Law 28969 provides that "[o]ther legal provisions approved for the implementation of the provisions indicated in Subdivision a) will be equally applicable to the mining royalties, as long as they do not oppose the provisions of this [norm] and those of the mining

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925 Royalty Law Regulations, Supreme Decree No. 157-2004-EF (15 November 2004) (**CA-7**).

926 Bravo and Picón 1, ¶ 133.

927 Law No. 28969, Law that Authorizes SUNAT to Implement Provisions that Facilitate the Administration of Royalties (25 January 2007) (**CA-8**).

928 Bravo and Picón 1, ¶ 134.

royalties."[929] Further, Article 12 of Law 28969 provides that the application of interest and penalties is not permitted ("*no procede*") in cases in which the mining royalty is unpaid "due to causes of an objective nature attributable to the [MINEM] or to SUNAT," a provision that reflects the same principle as does Article 33 of the Tax Code.

982. Fourth, the Tribunal takes comfort in the statements made by the Constitutional Court in its 21 March 2005 ruling, the relevant portions of which are quoted above (see paragraph 957 above). It is clear that a process whereby a taxpayer is "saturated with the weight of the tax" such that "due to the passage of time, as a consequence of a judicial process, the taxpayer not only has to pay a correctly assessed main debt, but also a large sum of interest for late payment, not caused by the taxpayer's negligence or bad faith, but ironically, by exercising their right of action" would equally be deemed unconstitutional with regard to the late payment of royalties.[930]

983. The Tribunal understands the Respondent's rationale in reducing the interest rate where the delay is not as a result of actions of the taxpayer but that of the relevant Government organs. This objective is clearly articulated by the Constitutional Court in its 21 March 2005 ruling (see paragraph 957 above) and is predicated on fairness to the taxpayer. The Tribunal finds there can be no legitimate purpose in refusing to apply the CPI rate in accordance with Peruvian legislation in circumstances where there is no suggestion by the Respondent that the delay was other than the responsibility of SUNAT and the Tax Tribunal. The only answer to the failure to apply the CPI rate after the expiration of twelve months is that the decision was based on discretion, prejudice or personal preference with the objective of increasing revenue from SMCV.

984. As already noted, the Tribunal's function is not to sit as a court of appeal for the decisions of national courts, as no claim for denial of justice has been made, but to adjudicate, under the Treaty and general international law, whether the Respondent's actions in placing on SMCV the financial burden of the considerable delays of SUNAT and the Tax Tribunal in

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[929] Law No. 28969, Law that Authorizes SUNAT to Implement Provisions that Facilitate the Administration of Royalties (25 January 2007) (**CA-8**).

[930] Constitutional Tribunal, Decision, Case No. 1255-2003-AA/TC (21 March 2005) (**CA-118**), p. 7.

resolving SMCV's challenges to the mining royalty assessments were arbitrary and unreasonable and inconsistent with basic principles of fairness.

985. For all the reasons detailed above, the Tribunal finds that the Respondent's actions in failing to apply the CPI rate from twelve months after each assessment was challenged by SMCV was arbitrary.

Did SMCV waive its right to challenge the tax rate applied?

986. The Tribunal recalls that in October 2018 SUNAT issued coercive collection resolutions for the 2009 and 2010-2011 Royalty Assessments. As a consequence, SMCV had seven business days to pay the sums due, failing which SUNAT could register SMCV as a delinquent debtor in the Risks Centers and order attachment measures against SMCV. In response SMCV asked SUNAT to suspend the collection procedures and recalculate the debt applying Article 33 of the Tax Code. As this was denied, SMCV entered into a deferment and instalment plan with the understanding that SMCV would then have the right to request SUNAT to terminate the coercive collection procedure and reduce the applicable statutory interest rate pursuant to Article 92(n) of the Tax Code.[931]

987. Article 92(n) is part of Article 92 which is headed "Rights of Subjects" and provides that a taxpayer can request such an agreement pursuant to the provisions of Article 36. Article 36 provides that where there is a deferral and instalment agreement, the interest rate to be charged cannot "be less than eighty percent (80%) nor greater than the Statutory interest rate referred to in Article 33".[932]

988. SMCV then applied within two months (which was the deadline specified in the Tax Code) for the interest rate to be recalculated pursuant to Article 33. SUNAT then terminated the Coercive Collection Proceedings and as a result the Tax Tribunal held that it no longer had jurisdiction to hear the claim.

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931 Hernández 1, ¶¶ 44, 154-158.

932 Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Article 36 (**CA-14**).

989. The Respondent says that Peruvian law prohibits the Tax Tribunal from considering claims with respect to assessments for which the related collection proceedings have concluded, even if the coercive collection proceedings were concluded by an agreement made under protest.[933] It explains, citing Article 119(3)(b)(5) of the Tax Code, that the complaints were rendered moot by the conclusion of the instalment and deferral agreement since it was no longer necessary to enforce the debt.[934] The Respondent says this provision required the Tax Enforcement Officer to terminate the coercive collection proceedings, lift the attachments, and order the filing of the proceedings. These actions had the effect of rendering SMCV's complaint about the interest rates void. Finally, the Respondent says that although a taxpayer may challenge the interest rate being applied in the appeal process before the Tax Tribunal, SMCV failed to do, lodging its complaint instead during the enforcement proceedings. Even then, SMCV could have sought redress at a judicial level, but the Tax Tribunal lost its jurisdiction over the complaint upon the conclusion of the instalment and deferral agreement.

990. The Claimant does not accept that SMCV waived its right to challenge SUNAT's decisions with regard to the applicable interest rate as a result of entering into deferral and instalment plans that had the effect of terminating the collection proceedings. The Claimant says that the Tax Tribunal should not have disregarded the fact that SMCV had paid under protest. The reason for SMCV to enter into these plans, which were entered into under protest, was to avoid SUNAT's "coercive collection measures, such as being registered as a delinquent debtor".[935] The Claimant points out that when SMCV challenged SUNAT's calculations before the Tax Tribunal, SUNAT terminated the collection procedures within two business days in the 2009 Royalty Case and one business day in the 2010- 2011 Royalty Case. The Claimant further says that for SMCV to avail itself of the deferral and instalment plan under protest it must still be entitled to challenge SUNAT's interest rate calculations. Any other conclusion would be inequitable. Accordingly, it asserts that the Tax Tribunal's refusal to

933 Bravo and Picón 1, ¶¶ 137-138.

934 Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013) (**CA-14**).

935 Claimant's Reply, ¶ 189(a).

consider SMCV's challenges with regard to interest rates was "arbitrary and grossly unfair".[936]

991. Article 119 of the Tax Code provides in relevant part as follows:[937]

> "*b) The Coercive Enforcer must terminate the procedure, lift the attachments and order the filing [archiving] of the proceedings, when:*
>
> *1. A claim or appeal had been filed in a timely manner against the Assessment Resolution or the Fine Resolution that contains the tax debt placed in collection, or the Resolution that declares the installment plan forfeit, provided the installment payments continue to be paid.*
>
> *2. The debt has been extinguished by any of the means mentioned in Article 27.*
>
> *3. The time-bar of the debt placed in collection is declared.*
>
> *4. The action is continued against a person other than the one obliged to pay.*
>
> *5. There is a resolution granting a deferral and/or installment payments.*
>
> *6. Payment Orders or resolutions that are the subject of collection have been declared void, revoked or superseded after the Coercive Execution Resolution has been served.*
>
> *7. When the obliged person has been declared bankrupt.*
>
> *8. When a law or regulation with force of law expressly provides therefor.*
>
> *9. When the tax debtor has filed a claim or appeal after the deadlines set forth for the filing of said appeals have expired, complying with the*

[936] Claimant's Reply, ¶ 189(c).

[937] Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Article 119 (**CA-14**).

submission of the respective Surety Bond in accordance with the provisions of Articles 137 or 146."

992. It is clear that Article 119(b)(5) requires the Coercive Enforcer to terminate the Coercive Collection Procedure if an instalment and deferment payment has been granted. There is no exception if the agreement is reached under protest. Accordingly, the Tribunal accepts that the Coercive Collection Procedure had to be terminated when the instalment and deferment payment was agreed. However, Article 119 does not specify that this renders the entire Tax Tribunal procedure moot, it merely says that the Coercive Collection Procedure must be terminated.

993. The Respondent says that the Tax Tribunal could not decide the complaints because the object of the dispute no longer existed as it was no longer at the enforcement stage. It relies on a decision of the Plenary Chamber of the Tax Tribunal which appears on the record as RE-280.[938] In fact, that decision does not support the Respondent's argument. In that case, the collection agent proceeded with a coercive collection proceeding even though the tax assessment had been notified to the wrong domicile. A coercive collection proceeding normally forecloses an appeal to the Tax Tribunal. The question presented was whether the taxpayer could file a *recurso de queja* (an extraordinary appeal filed directly with the Tax Tribunal when the ordinary appeal is not available) seeking the Tax Tribunal's review of the improper notice. The Plenary Chamber agreed that such a *recurso* would be available in those circumstances, notwithstanding the commencement of the coercive collection proceeding. If anything, this decision preserved the Tax Tribunal's jurisdiction to review a flaw in the procedure, even though the coercive collection proceeding would have normally closed the taxpayer's opportunity to seek such review.

994. The Tribunal finds that, whilst the Tax Resolution referred to by the Respondent terminated the enforcement proceeding, it did not render moot SMCV's pending claim concerning interest rates. In fairness, it was incumbent upon the tax authorities or the Tax Tribunal, as the case may be, to resolve that claim, instead of dismissing it as waived by the closure of

938 Tax Tribunal, Resolution No. 01380-1-2006 (15 March 2006) (**RE-280**).

the enforcement proceeding. At a minimum, SMCV was not barred from applying to the Tax Tribunal for a variation of the interest rate.

995. In any event, whatever the intricacies of the procedures devised at the SUNAT and the Tax Tribunal levels, it is a matter of basic fairness and due process that SMCV had to have a right to be heard on its challenge to the interest rate that was applied, especially taking into account that the payment agreement was entered under protest. SMCV did file a timely challenge of the interest rate, but the challenge was not heard because the Coercive Collection Procedure was terminated, a step that deprived both the officer in charge of that procedure and the Tax Tribunal of jurisdiction. In fairness, SMCV should not have been required to search for extraordinary remedies to obtain a relief to which it was unquestionably entitled under Article 36 of the Tax Code. The Tribunal finds that SUNAT breached Article 36 in the substance and deprived SMCV of due process in its attempt to redress that violation.

996. Again, the Tribunal finds no legitimate purpose for this action of the Tax Tribunal; it seems clearly a measure that is not based on legal standards but on discretion and prejudice. The Tribunal therefore holds that the Respondent's failure to hear SMCV's application for a variation of the interest rate was a further breach of SMCV's due process rights.

Mitigation

997. The Respondent also contends that SMCV failed to mitigate its damages. It says that if SMCV had paid the royalties assessed against it at the time payment fell due, it would not have incurred the accrual of penalties and interest. The Respondent rejects the Claimant's explanation of the reasons why SMCV did not make such payments, calling those arguments "unsubstantiated".[939] The Claimant, however, says that it was not required under Peruvian law to pay assessments and penalties before challenging them and that there was no such common practise of paying upfront, not least because the Government may take a long time to issue reimbursements or may even refuse to do so altogether as was the case with respect to certain of SMCV's GEM payments. In any event, SMCV in fact paid

[939] Respondent's Rejoinder, ¶¶ 804-805.

several Income Tax and GST Assessments upfront to receive discounts on certain penalties and prevent interest from accruing and it also entered into deferral and instalment plans for all its Royalty Assessments except for Q4 2011 which it paid directly. It also entered into deferral and instalment plans for all the SMT assessments.

998. A majority of the Tribunal does not accept that SMCV can be faulted for any failure to pay the royalties assessed when due, because it was not required to do so while its challenges were pending and because there was objectively a reasonable doubt as to its liability for royalties with regard to the Concentrator.

999. Finally, the Tribunal finds that the penalties and interest imposed by the Respondent are clearly disproportionate to SMCV's failure to pay the assessed royalties, in light of the following circumstances:

a. The Tribunal has found that SMCV had reasonable grounds to believe that it had no obligation to pay royalties on the Concentrator and pursuant to Articles 92(g) and 170(1) of the Tax Code it was entitled to the non-application of interest and penalties on the Royalty Assessments.

b. The Tribunal has also found that the imposition of interest and penalties was inconsistent with Article 170(1) of the Tax Code and the Tax Administration, and the Contentious-Administrative Courts should have so decided *sua sponte* in recognition of the legal limits of the Tax Administration's general powers to impose interest and penalties.

c. Even if the interest and penalties had been lawfully applied, the Tribunal has further found that after twelve months from the date when each decision on each challenge was issued, pursuant to Article 33 of the Tax Code the Respondent should have reduced the interest rate accruing from the statutory rate to the CPI rate.

d. The Tribunal has also found that SMCV did not waive its rights to challenge the interest rate applied by entering into deferment and instalment plans, and SMCV did not fail to mitigate its loss by not paying any of the principal sums due at the time of challenging the Assessments.

e. Finally, the Tribunal accepts the Claimant's submission that the loss to SMCV was compounded by the considerable delays by SUNAT and the Tax Tribunal which SMCV was helpless to avoid.

1000. In conclusion, the Tribunal finds that the Respondent was in breach of its FET obligation, *inter alia* by imposing and failing to waive the penalties and interest accrued on the unpaid royalties and by failing to apply the CPI rate after twelve months from the date when each challenge was raised.

x. Did the Respondent violate its obligations to ensure FET by arbitrarily and unreasonably refusing to reimburse SMCV's GEM overpayments?

1001. The Claimant claims that the Respondent also breached its FET obligation when it refused to reimburse SMCV's GEM overpayments for Q4 2011 to Q3 2012 with respect to the Concentrator.

1002. The Claimant says that it paid the GEM payments on the premise that royalties would not be charged on the Concentrator. As was confirmed repeatedly by Government officials, GEM payments would not be charged as well as royalties and SMT. This is not contentious, as shown by the fact the Respondent has reimbursed SMCV for the GEM overpayments relating to Q4 2012 to Q4 2013. However, the Respondent has refused to reimburse the GEM overpayments for Q4 2011 to Q3 2012, asserting that the request was time barred by the Tax Code. The Claimant says that even if the claim were time barred, the Respondent's refusal to make such reimbursement is "arbitrary, grossly unfair, nontransparent and inequitable" because the Respondent had "induced and accepted" these payments by assuring SMCV it would not have to pay GEM and royalties.[940] The Claimant notes in this regard that the Respondent did not issue any new royalty assessments for four years after SMCV had entered into the GEM Agreement.

1003. The Respondent says that the request was made out of time because under Articles 43 (last paragraph) and 44.5 of the Tax Code, a taxpayer has four years to request a refund for overpayment as from the first of January of the year the payment was made. It adds that,

[940] Claimant's Reply, ¶ 193.

as SMCV made the GEM payments in question in 2012, the limitation period commenced running on 1 January 2013 and expired on 1January 2017. SMCV did not seek a refund until December 2018, when it was out of time.

1004. In reply, the Claimant says that the relevant time period is five years as detailed in the Civil Code on the basis that a royalty payment is not a tax. This five-year period commences on the date on which the party became aware that the payment had been unduly imposed which, for SMCV, was 13 April 2016 (at the earliest), the date on which SUNAT notified SMCV of the relevant Royalty Assessments. Therefore, the requests for reimbursement were made within the relevant time period as they were made on 28 December 2018 and the limitation period expired on 13 April 2021.

1005. The Claimant also explains that SMCV could not have been aware that its GEM payments were "undue" until it became aware that the payment was excessive and this only occurred upon receipt of the Royalty Assessments.

1006. The Respondent argues that GEM payments are subject to the limitation period stated in the Tax Code for the following reasons. First, the GEM Agreement says it is governed "in accordance with the legal framework approved by [the GEM Law] and the Regulations thereof". Second, Article 5 of the GEM Law provides that provisions of Law No 28969 apply. Third, Law No. 28969 provides for the applicability of Article 43 of the Tax Code. Accordingly, the GEM Agreement is governed by special provisions from the Tax Code that pre-empt the application of the Civil Code, so that it is the limitation period in Article 43 of the Tax Code which applies to overpaid GEM payments.

1007. Finally, the Respondent contends that even were the Civil Code limitation period to apply, the date of commencement of the time period is the date on which the party seeking reimbursement is aware of the undue payment.[941] By the time SMCV signed the GEM Agreement it was already aware the Concentrator was not stabilized as it had received the 2006-2007, 2008 and 2009 Royalty Assessments, and therefore even under the Civil Code, SMCV's time period had expired on 29 February 2017, 31 May 2017, 31 August 2017 and

[941] Respondent's Rejoinder, ¶ 497.

31 November 2017, that is five years after the date on which each GEM payment was made. This is so because by the time each payment was made, SMCV had received Royalty Assessments which made clear the basis on which the royalties were assessed, the first such assessment having been issued in July 2011, and so SMCV would have been aware it was making an overpayment. Thus, the Respondent acted in accordance with Peruvian law and paid those requests that were made timely.

1008. The Tribunal first notes that the Claimant did not provide any explanation for why it sought a refund of the Q4 2011–Q3 2012 GEM overpayments approximately one year after it requested a refund of the Q4 2012–Q4 2013 payments. The Tribunal further notes that, in principle, it is not arbitrary for a State to apply a statutory time period. Because SMCV successfully applied for reimbursement of the Q4 2012– Q4 2013 GEM payments, it was clearly aware of the right to seek such a reimbursement, and the Respondent did not refuse to make such repayments. The Respondent cannot be held accountable for any failure by SMCV to apply for a refund within the requisite time period, whatever the reason for the failure to comply with the limitation period.

1009. However, the Tribunal must consider whether the Respondent applied the correct limitation period. SMCV was not seeking a reimbursement of royalties paid but instead GEM payments. It is common ground that GEM payments were not payable in addition to royalty payments. Accordingly, the refund is not sought in respect of a royalty. The next question is whether the GEM is a tax, as the Respondent contends.

1010. The GEM is defined in the GEM Law[942] as "TAX" and it is specified to be "an original public resource arising from the extraction of non-renewable natural resources" which is applicable to mining companies and based on stability agreements.[943] The whole framework of the GEM Law is that the GEM operates as a tax.

[942] Law Establishing the Legal Framework for the *Gravamen Especial a la Minería*, Law No. 29790 (28 September 2011), Article 1.1 (**CA-181**).

[943] Law Establishing the Legal Framework for the *Gravamen Especial a la Minería*, Law No. 29790 (28 September 2011), Article 2.1 (**CA-181**).

1011. The GEM Agreement also refers to the GEM as "TAX" (see the definition in Clause 2.1).[944] Whilst it is correct that GEM payments are specified to be a voluntary payment, it becomes a mandatory payment after the signing of a corresponding agreement with the Government. Further, there is no indication in the GEM Agreement that the Parties understand it to operate other than as a tax, albeit a tax which is only payable in specified circumstances, namely if royalties are not due. It is difficult therefore to accept an argument to the effect the Tax Code provisions on limitation periods are inapplicable. Indeed, the Parties here make almost precisely the reverse of the arguments they made with regard to the applicability of Article 33 of the Tax Code with regard to the interest rate due on late payment of royalties. Whereas the Claimant contends that the Tax Code applies with regard to interest on royalties and the Respondent opposed that contention, here the Claimant contends that the Tax Code is inapplicable to GEM payments, and the Respondent argues to the contrary.

1012. The Tribunal finds no reason to come to any different conclusions from that it reached with regard to the applicability of Article 33 of the Tax Code to unpaid royalties. Both the GEM Law and the Mining Royalty Law refer in similar terms to the applicability of the Tax Code and to the role of SUNAT in administering and collecting the relevant payments. Accordingly, consistently with its decision with regard to the applicable interest rate, the Tribunal finds that the Tax Code applies and therefore the limitation period for seeking reimbursement of GEM payments paid in error is four years.

1013. The next question is: when did this limitation period start to run? Article 44(5) states as follows: "From January First (1st) following the date on which the payment that was undue or excessive was made or became such, in the case of the action referred to in the last paragraph of the previous article."[945]

1014. The action referred to in the last paragraph of Article 43 is the action to request a reimbursement, to which the same provision assigns a limitation period of four years.

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944 Agreement for the Assessment of *Gravamen Especial a la Minería* Approved by Law No. 29790 (28 February 2012) (**CE-64**).

945 Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Article 44(5) (**CA-14**).

1015. It is clear from Article 44(5) that the limitation period starts to run from either (i) the date on which the payment was made for an undue amount or in excess of what was due, or (ii) the date on which the payment became undue or excessive. The Tribunal does not accept the Respondent's submission that this is the date on which each GEM payment was made, on the ground that SMCV should have understood that it did not need to make any GEM payments because royalties would be payable. This argument may have been valid had the Respondent ensured that SMCV was aware that royalties would be payable in respect of the Concentrator, which is not what happened. In fact, SMCV had received oral assurances to the contrary, and had sought and failed to obtain written confirmation of those assurances. In these circumstances, it cannot be the case that the GEM payment became undue on the date it was paid. Only when SMCV received the 2010-2011 Royalty Assessments, namely 13 April 2016 (which was the first Royalty Assessment after signing the GEM Agreement) would it have become aware that, as a matter of fact, SUNAT was intending to demand that royalties be paid with respect to the Concentrator. Before that time, as explained above, SMCV had received conflicting communications and indeed the length of time between its first GEM payment and the receipt of a Royalty Assessment on the Concentrator (four years) would have allayed concerns that royalties might be applied on the Concentrator.

1016. The Tribunal therefore finds that the correct application of Article 43 of the Tax Code to the circumstances of the case is that the limitation period started to run on the first day of January in the year following the date on which the payment became undue. The earliest date would be the date on which SMCV received the Royalty Assessments for the period in which it had made the Q4 2011 – Q3 2012 GEM overpayments, at which point the GEM payments clearly became undue. Accordingly, the time commenced to run on 1 January 2017, which was the first day in January of the year after the date on which the Tribunal finds that the GEM payments became undue (the 2010-2011 Royalty Assessments were dated 13 April 2016).[946] Accordingly, the four-year limitation period would have expired on 1 January 2021.

[946] SUNAT 2010/11 Royalty Assessment (13 April 2016) (**CE-142A and B**).

1017. The request for the reimbursement of the GEM was made on 28 December 2018 and therefore it was not time barred. Accordingly, SMCV was wrongfully denied reimbursement of GEM payments in relation to the Concentrator.

1018. Based on the aforesaid analysis, the Tribunal finds that the Respondent's failure to reimburse to SMCV the GEM payments was not based on legal standards nor was it for a legitimate purpose but was instead arbitrary and in breach of the Respondent's FET obligation.

xi. Whether the Respondent violated its obligation of FET by applying the non-stabilized regime to the Leaching Facility.

1019. The Claimant explains that (i) in the 2010 and 2011 Income Tax Assessments, the Respondent applied non-stabilized depreciation rates to some assets against which it had previously applied stabilized depreciation rates and (ii) in the 2012 and 2013 Income Tax Assessments, the Respondent applied non stabilized depreciation rates to all the assets which SMCV had first started using in 2007, again including some of the same leaching facility' assets it had treated as stabilized in previous fiscal years. Further, in the 2007-2013 Income Tax Assessments, SUNAT denied SMCV's income-tax deductions for the employee profit sharing contribution ("**PTU**"), expenses incurred in prior years and recreational expenses, as well as deductions for payments that SMCV recorded using the classification system applicable under the Stability Agreement. It did so on a blanket basis, without attempting to identify which deductions related to the Concentrator. Finally, SUNAT assessed the following taxes against the entire Cerro Verde Mining Unit, namely: 2009-2013 TTNA; 2007-2013 AIT; and 2013 CMPF.

1020. The Respondent accepts that it took the actions just described but says it was left with no choice because, in breach of Article 22 of the Mining Regulations, SMCV had failed to provide separate accounts for the stabilized Leaching Plant and the remainder of the non-stabilized projects. SUNAT appropriately assessed taxes on all assets and activities that SMCV had failed to establish were solely related to the Leaching Project according to the non-stabilized regime. Accordingly, SUNAT's audit and assessments against SMCV were "well-founded, a legitimate exercise of its administrative powers, and executed in

accordance with Peruvian law."[947] The Respondent submits that SUNAT gave SMCV "multiple opportunities"[948] to establish which assets and activities were solely related to the Leaching Project, but it failed and the onus was on SMCV to confirm which assets and activities related to the Leaching Project,[949] in the absence of which, the standard, non-stabilized rates and rules applied by default to SMCV's "unsegregated assets and activities".[950] The Respondent emphasises that it is the taxpayer's duty to provide SUNAT with information necessary to assess taxes and, the Respondent contends, this includes the information necessary to show which assets and activities benefitted from the stabilized regime.

1021. The first paragraph of Article 22 of the Mining Regulations provides that stabilisation guarantees are applicable to "investments" which the Respondent contends means the qualifying investment. Therefore, the only plausible construction of the second paragraph is that taxpayers are obligated to keep "independent accounts" of its stabilized investment projects separate from its non-stabilized projects.[951] The Respondent says that the Government has consistently applied this construction, referring to resolutions of the Tax Tribunal,[952] MINEM in the 14 April 2005 Isasi Report,[953] and SUNAT[954] .

1022. Accordingly, the Respondent concludes, as SMCV breached Peruvian law by failing to keep accounts of its stabilized and non-stabilized activities separately, SUNAT, consistently with Peruvian law, levied penalties against SMCV.

1023. Finally, the Respondent rejects the Claimant's assertion that it should have defined a method for mining companies to keep separate accounts for different projects. First, the taxation principles of certainty and predictability do not apply to accounting methods to

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947 Respondent's Rejoinder, ¶ 502.

948 Respondent's Rejoinder, ¶¶ 652, 655-656; fn. 1324.

949 Bravo and Picón 2, ¶¶ 103-105.

950 Respondent's Rejoinder, ¶ 656.

951 Regulations to Title Nine of the General Mining Law, Supreme Decree No. 024-93-EM (7 June 1993) (**CA-2 (resubmitted)**). Bravo and Picón 2, ¶¶ 49-50.

952 Respondent's Rejoinder, fn. 1356.

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

954 Tax Tribunal, Resolution No. 18397-10-2013 (11 December 2013) (**RE-86**).

keep separate accounts as those methods are not related to the creation of a specific tax, but are instead secondary aspects of a tax, which are not required to be expressly specified in law.[955] In any event, Peruvian law does contain official guidance on accounting allocation methods, for example: (i) transfer pricing; (ii) non-controlled comparable pricing; (iii) retail pricing; (iv) incremental costing; (v) profit splitting; (vi) residual profit splitting; and (vii) transactional net margin as well as other methods. These methods are referred to expressly in certain provisions of the Income Tax Law. Further, Mr Ralbovsky referred to two further methods, (i) the relative value method and (ii) the tonnage method.[956] Whilst the Respondent is not asserting that these multiple methods "comprised the applicable legal framework to separate the accounting of stabilized and non-stabilized projects", it contends that "[t]ax regulations cannot, and do not, provide procedures for every possible tax situation. Nevertheless, taxpayers may draw on available accounting principles and methods to comply with tax obligations (e.g. the obligation to keep separate accounts), including the methods that Drs. Bravo and Picón gave as examples".[957]

1024. Finally, the Respondent says that it is irrelevant that Article 22 was amended. First, the version in force at the relevant time did include guidance on how to allocate costs from separate projects into separate accounts as can be seen from the third paragraph of the article. The 2019 amendment simply "expanded on the guidance that was already there by explaining how to allocate expenses between different investment activities if there are no net sales linked to such activities, or in case it is not possible to distribute them in proportion to the activities that receive the contractual benefit and those which do not."[958] In any event, even if the guidance was somehow "deficient", that does not excuse SMCV's failure to prepare separate accounts because even a reasonable taxpayer, let alone a sophisticated investor like SMCV, should have performed due diligence to identify suitable allocation methods, of which there were many. The fact that substantial effort may have been required

[955] Bravo and Picón 2, ¶¶ 80-82, 85.

[956] Ralbovsky 1, ¶ 20 and Ralbovsky 2, ¶ 89.

[957] Respondent's Rejoinder, ¶ 669.

[958] Respondent's Rejoinder, ¶ 672.

to do this is not relevant, as SMCV could have sought the assistance of an appropriate mining tax or tax accounting method specialist.

1025. In reply, the Claimant says that Article 22 did not require it to keep separate accounts for the Leaching Facility. The correct construction is that Article 22 only obliges a company to maintain separate accounts where it had multiple concessions or EAUs which were subject to different legal regimes. Therefore, the relevant tax laws and regulations did not require any particular method of tracking assets.

1026. The Claimant further explains that were it to be required to provide separate accounts within a concession or EAU, it would have been necessary for Peruvian law to provide guidance as to how to prepare such separate accounts, but Peruvian law contains no such guidance. The reasons it would be necessary are as follows. First, under the fundamental taxation principles of certainty and predictability, "*[e]very* material aspect of a tax – including how it must be calculated – must be clearly and expressly defined in law."[959] Second, that is why Article 22 was amended providing detailed accounting guidance as to how to prepare separate accounts; before the amendments were made to Article 22, there was no such detailed guidance available. Third, the methods proposed by the Respondent would have created serious implementation issues. For example, the sales criteria could not apply to investments as investments do not necessarily generate sales. Further, the transfer pricing methods did not exist under SMCV's stabilized regime and in any event are not intended to apply to divide the accounting within a single company but instead are designed to establish arm's length pricing for goods and servicing between companies. Finally, the GST allocation methods were unsuitable because they were designed to assign goods and services between joint-venture partners.

1027. Further, the Claimant says that SMCV provided SUNAT with all its accounting information as can be seen by the fact that SUNAT was able to issue the Royalty and SMT assessments for the Concentrator.

[959] Hernández 2, ¶ 17, citing Law of Administrative Procedure No. 27444 (25 January 2019), Article IV, section 1.1 (**CA-18**).

1028. The Claimant says that Mr Choque did not testify that the SUNAT applied the stabilized regime as far as it could. What he actually testified was that SUNAT arbitrarily applied the non-stabilized regime to some of the PTU payments but not others and made no effort to identify the workers for whom it had rejected PTU payments and no effort to explain how it had determined which PTU payments were not entitled to stability.

1029. Finally, the Claimant says that were it correct, as Peru contends, that the applicable legal framework provided the method required to divide SMCV's accounting, then SUNAT should itself have undertaken this exercise as it had all SMCV's accounting information. The Claimant refers to Professor Hernandez's expert opinion where he says that "SUNAT can only assess taxes based on verifiable facts, not presumptions."[960] Instead of doing this, however, SUNAT "opted for the easiest, most arbitrary and lucrative option: to illegally presume that SMCV's entire operations and assets were not stabilized and tax SMCV for its entire mining unit".[961] Peru accepts that SMCV was entitled to stabilized depreciation rates or deductions for assets related to its leaching facilities. Peru applied the non-stabilized regime "indiscriminately and arbitrarily by *presuming* that certain assets and disbursements were all related to the Concentrator, instead of proceeding on the basis of *verifiable facts*",[962] in circumstances where there was a regulatory gap because Peru had failed to give any official guidance as to how to allocate such costs and expenses.

1030. Article 22 of the Mining Regulations provides as follows:[963]

> "*Article 22.- The contractual guarantees shall benefit the mining activity titleholder exclusively for the investments that it makes in the concessions or Economic-Administrative Units.*

960 Hernández 2, ¶ 20.

961 Claimant's Reply, ¶ 202(d).

962 Claimant's Reply, ¶ 203.

963 Regulations to Title Nine of the General Mining Law, Supreme Decree No. 024-93-EM (7 June 1993) (**CA-2 (resubmitted)**).

To determine the results of its operations, a mining activity titleholder that has other concessions or Economic-Administrative Units shall keep independent accounts and reflect them in separate earnings statements.

Expenses that are not directly identifiable in each concession or Economic-Administrative Unit shall be distributed among them in proportion to the net sales of the mining substances extracted from them."

1031. The first paragraph of Article 22 of the Mining Regulations has been discussed in Section A of this Award by the majority of the Tribunal and in the Partial Dissenting Opinion by Arbitrator Garibaldi. The majority has concluded that the first paragraph is ambiguous and cannot support either Party's construction as to the scope of a stability agreement (see paragraphs 463-468 above); Arbitrator Garibaldi has concluded that the first paragraph clearly supports the construction advanced by the Claimant.[964] Thus, all three members of the Tribunal concur in rejecting the Respondent's submission that the first paragraph clearly refers only to the investment in the qualifying project within the listed concession or EAU. The Tribunal further considers, unanimously, that (i) the issue being examined at present is not governed by the first paragraph of Article 22 but by the second and third paragraphs and (ii) the second and third paragraphs must be interpreted in accordance with their terms.

1032. The second paragraph of Article 22 provides, expressly and unambiguously, that a mining titleholder is obligated to maintain separate accounting only where it holds "other concessions or Economic Administrative Units", that is, other concessions or EAUs not referred to in the applicable stabilisation agreement. In this case, it has not been suggested that SMCV holds any concession or EAU other than those listed in the Stabilisation Agreement and, in fact, the present issue relates to the accounting or accountings for the Leaching Facility and the Concentrator, which are to be found within the same concession Accordingly, it is unarguable that SMCV was *not* obligated to provide separate accounts for the assets and activities of the Leaching Facility and of the Concentrator. Therefore, the

964 Partial Dissent, ¶ 71.

third paragraph of Article 22, which provides a rule for the attribution of expenses among different concessions or EAUs, is not applicable to the present case.

1033. The Tribunal notes that in 2019 Article 22 was amended to specify that where there was a stabilized project and a non-stabilized project within the same concession or EAU separate accounting was obligatory. The Tribunal considers that a comparison between the original and the amended texts and the fact that the amendment was considered necessary support the Tribunal's interpretation of the original text:[965]

> ***Amended Article 22.-*** "*The contractual guarantees benefit the mining activity titleholder exclusively for the investments set out in the agreement that it implements in the concessions or Economic-Administrative Units.*
>
> *To determine the results of its operations, the mining activity titleholder engaging in activities related to the aforementioned investments, in any [of] the concession(s) or Economic-Administrative Unit(s) it has, must keep independent accounts for each one of those activities and reflect them in separate earnings statements.*
>
> *Expenses that are not directly identifiable with the aforementioned activities or with activities that do not enjoy the contractual benefit are distributed among them in proportion to the net sales of the mining substances that are extracted from the concession(s) or Economic-Administrative Unit(s).*
>
> *If there are not net sales linked to any of the aforementioned activities, said expenses will be distributed, in the first place, in proportion to the expenses clearly identifiable with each one of the activities that enjoy the contractual benefit and those do not enjoy said benefit.*

[965] Regulations to Title Nine of the General Mining Law, Supreme Decree No. 024-93-EM (7 June 1993) (**CA-2 (resubmitted)**).)

In the cases in which the aforesaid proportionality cannot be established, the expenses that are not directly identifiable with the aforementioned activities will be distributed among them on the basis of criteria that reflect reasonably the use and/or consumption of the goods or services acquired, such as units produced, man-hours, measurement of space used, inter alia.

The mining activity titleholder must provide, when requested by the National Superintendence of Customs and Tax Administration, a technical report issued by a competent professional containing at least the methodology used for the distribution made by him in accordance with the provisions in the preceding paragraph and the support therefor."

1034. In these circumstances, the Tribunal finds there was no breach of Article 22 by SMCV when it submitted all the relevant and necessary information with its tax returns and that it was appropriate for SMCV to expect that SUNAT would act consistently and in good faith when it prepared SMCV's tax assessments. Accordingly, no penalties should have been applied. Further, it is clear that by assessing certain assets as stabilized in one tax year and yet subsequently assessing the same assets as not stabilized in the subsequent tax year, SUNAT acted in an inconsistent and arbitrary manner.

Considered holistically, is Peru in breach of its FET obligation under Article 3.1?

1035. Having analysed each asserted breach by the Respondent separately, the Tribunal now considers whether the actions of the Respondent, considered holistically, comprise a breach of Article 3.1 of the Treaty.

1036. To summarize the above analysis, the Tribunal has found as follows.

1037. First, on the application of royalties in respect of the Concentrator:

a. The Tribunal has found no evidence of any *volte face* or arbitrary treatment of the Stability Agreement by the Respondent in its construction and application of the Mining Law and Mining Regulations, whether or not there was political pressure applied.

b. Instead, the Tribunal has found clear evidence that, until Government agencies such as MINEM, MEF, and SUNAT coalesced around the interpretation of the law that the Respondent now advocates, they understood the scope of the stabilisation benefit in varying and inconsistent ways. Indeed, ambiguous, contradictory, or equivocal positions on this issue prevailed within MINEM until Mr. Isasi's June 2006 Report, and uncertain or ambivalent positions on the same issue remained within SUNAT until the completion of SUNAT's June 2006 Internal Report, which was not prepared in accordance with SUNAT's authorized procedures, and occasionally later.

c. The Tribunal has found by majority that there is insufficient evidence in the record – largely because of the Respondent's inadequate document production – that with regard to the scope of the stability benefit, the Respondent in fact treated other mining companies differently from the way it treated SMCV in the matter of the Concentrator. Arbitrator Garibaldi disagrees with this finding for the reasons stated in paragraph 810.

d. The Tribunal has found, however, that the Respondent did not question the stabilisation treatment given to certain SMCV investments which were not part of the qualifying project.

e. The Tribunal has concluded that the findings referred to in subparagraphs b. and d. above do not amount to arbitrary conduct or otherwise rise to the level of unfair and inequitable treatment. Therefore, the Tribunal finds that the Respondent is not in breach of the FET clause of Article 3.1 of the Treaty in applying royalties with regard to the Concentrator.[966]

1038. Second, the Tribunal has found there was no breach by the Respondent of its transparency obligations with regard to the voluntary payments sought from SMCV.

[966] In joining this decision, Arbitrator Garibaldi notes in particular that the Claimant has not made a case based on frustration of objectively reasonable ("legitimate") expectations.

1039. Third, the Tribunal has found that the Respondent did not act towards SMCV in a manner that was transparent with regard to the GEM payments. It failed to correct SMCV's misapprehension that the Concentrator would be stabilized, notwithstanding that SMCV clearly communicated its misapprehension to the Respondent on multiple occasions. Further, the Respondent acted in a manner which appeared designed to encourage SMCV into making the voluntary contributions (although the Tribunal has found that in this regard there was no breach by the Respondent of its FET obligation) and to pay the GEM payments in full knowledge that SMCV was making those payments in the belief the Concentrator was stabilized. This is of particular concern given the Respondent stood to gain so significantly in financial terms from the building of the Concentrator and from the voluntary contributions and the GEM payments.

1040. Fourth, the Tribunal has found that there were clear breaches of SUNAT's and the Tax Tribunal's procedures:

a. SUNAT did not give SMCV any right to be heard, let alone a fair hearing, before reaching the decision that the Concentrator would not be stabilized.

b. The manner in which the Tax Tribunal upheld the first two Royalty Assessments (for the years 2006 and 2007-2008) and specifically the actions of President Olano, did not follow the Tax Tribunal's proper procedures. However, the Tribunal has found, by majority, that whilst there is evidence of inappropriate involvement by President Olano, there is no evidence that the decisions reached by the Tax Tribunal would have been different had proper process been followed.

c. The Tribunal has concluded, by majority, that the procedural breaches referred to above are not of sufficient magnitude to constitute a breach of FET. Arbitrator Garibaldi has dissented from this conclusion, for the reasons stated in his Partial Dissent.

1041. Fifth, the Tribunal has found that the Respondent's actions in imposing interest and penalties on the royalty assessments made against SMCV in violation of Article 170 of the Tax Code and by not attending to its request under Article 92(g) of the Tax Code that such

interest and penalties not be imposed (*i.e.* "waived"), were in breach of fundamental principles of fairness and equity and arbitrary.

1042. Sixth, the Tribunal has found that the Respondent compounded its arbitrary actions as a result of the very lengthy delays in rendering a number of the Royalty Assessments.

1043. Seventh, the Tribunal has found that the Respondent acted in an arbitrary manner when it refused to reduce the interest rate charged on outstanding payments to the CPI rate.

1044. Eighth, the Tribunal has found that the Respondent acted in an arbitrary manner when it refused to allow SMCV to challenge the interest rates imposed.

1045. Ninth, the Tribunal has found that the Respondent acted in an arbitrary manner when it refused to reimburse the GEM payments wrongfully paid by SMCV.

1046. Tenth, the Tribunal has found that the Respondent acted in an arbitrary manner when it wrongly applied Article 22 of the Mining Regulations when assessing SMCV's tax returns and applied the non-stabilized regime to assets it had previously treated as stabilized.

1047. Given the incomplete record, the Tribunal has concluded, by majority, that it was unable to make any findings concerning the Respondent's alleged inconsistent application of the Mining Law and Mining Regulations as between SMCV and other mining activity title holders.

1048. Considered holistically, the Tribunal finds that the above considerations evidence a failure by the Respondent to act with transparency, procedural propriety, non-arbitrariness, and due process which failure adversely affected the Claimant's investment. Accordingly, the Tribunal finds that the Respondent is in breach of its obligation under the FET clause of Article 3.1 of the Treaty. The Tribunal considers below the quantum of loss incurred by the Claimant as a result.

c. Conclusion

1049. The Tribunal holds that the Respondent breached its obligations to grant the Claimant fair and equitable treatment pursuant to Article 3.1 of the Treaty.

4. The Tribunal's Analysis on the Claim for Breach of the Non-Impairment Standard

1050. The Claimant contends that the Respondent also breached Article 3.1 of the Treaty by impairing, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal of SMCV's investment.

1051. Given the Tribunal's finding that the Respondent breached its obligation to grant fair and equitable treatment under Article 3.1, it is not necessary for the Tribunal to consider whether the Respondent also violated its obligation of non-impairment under Article 3.1 of the Treaty with respect to those elements of the claim which the Tribunal has determined were in violation of the Respondent's FET obligations under the Treaty. However, the Tribunal must consider whether those measures complained of and which a majority of the Tribunal has found not to be in breach of FET, nevertheless comprised an impairment of the Claimant's operation, management, maintenance, use, enjoyment or disposal of its investment in SMCV, including its right to profit and income from the Concentrator.

1052. The Tribunal finds that for there to be a valid claim for impairment, the measure of which the Claimant complains (i) must have been unreasonable or discriminatory and (ii) must have caused an impairment (of any of the kinds specified in the Impairment Clause) in the Claimant's investment in SMCV. The Tribunal further accepts that the obligation of non-impairment may encompass State conduct that is not in breach of the FET obligation.

1053. In terms of damages claimed, the Claimant calculates its damages on two alternative bases (see below). The main claim includes damages arising from the Respondent's asserted breach of its Treaty obligations by levying royalties on the Concentrator, the alternative claim excludes those losses. The Tribunal has concluded that the levying of royalties did not breach the Respondent's FET obligations. However, the Tribunal has awarded the Claimant all damages calculated pursuant to its alternative claim (see below). Accordingly, with respect to the analysis for the breach of the Respondent's non-impairment obligation, it is only the loss claimed with regard to the levying of royalties that need be considered by the Tribunal.

1054. In the absence of any finding of discriminatory conduct or bad faith on the part of the Respondent and given the finding by a majority of the Tribunal that this levying was carried out in accordance with national law, a majority of the Tribunal finds that in levying royalties in respect of the Concentrator the Respondent did not act in an unreasonable or discriminatory manner. Accordingly, a majority of the Tribunal finds there is no breach by the Respondent of its non-impairment obligation with respect to this head of claim.[967]

V. DAMAGES

1. The Parties' Positions

a. Claimant's Position

1055. The Claimant submits that, under international law, it is entitled to full reparation for the harm caused by Peru's violations of its Treaty obligations. The Claimant states that customary international law requires full reparation for damages resulting from breach of an international obligation. The purpose of damages is straightforward: to restore the victim to the position it would have been in had the wrongdoer never breached that obligation. Further, it is well established that a claimant is entitled to recovery even if the specific amount of damages cannot be quantified with certainty. On the facts of this case, the Claimant submits that the requirement of full reparation can be satisfied by: (i) calculating the cash flows that SMCV has lost as a result of Peru's unlawful Assessments; and (ii) the percentage of those cash flows that would have flowed to the Claimant in the form of dividends by virtue of its 21% equity interest in SMCV.[968]

1056. The Claimant asserts that it is the soundest assumption that SMCV would have distributed all of the disputed payments resulting from the Respondent's breaches as dividends,

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[967] Arbitrator Garibaldi dissents from the preceding decision on the claim for breach of the Non-Impairment Clause. The reasons therefor, more fully explained in his Partial Dissent, are: (i) a lack of finding of bad faith does not imply that the measure in question was reasonable, nor does a finding of unreasonableness depend on a finding of bad faith; (ii) a measure is not reasonable just because it was carried out in accordance with national law, as compliance with national law does not imply compliance with obligations under the Treaty; and (iii) while it is true that the Tribunal has not made a finding of discriminatory conduct, the key point is that a full discrimination analysis has not been conducted, notwithstanding evidence of at least one instance in which another mining company was treated differently in the application of the stability benefit.

[968] Claimant's Memorial, ¶¶ 422-427.

following the timing of SMCV's actual dividend payment history.[969] The Claimant's experts have calculated that the Claimant would have likely received an additional USD 184 million in dividends from SMCV but for the unlawful Assessments (the "**Main Claim**").[970]

1057. Alternatively, even if the Stability Agreement did not apply to the entire Cerro Verde Mining Unit, the Claimant claims to have suffered USD 141.2 million in damages due to the Respondent's other breaches of the Treaty, including its arbitrary failure to waive penalties and interest (the "**Alternative Claim**").[971]

1058. The Claimant submits that SMCV's cost of equity is the appropriate rate to be applied as the discount rate and to be awarded for pre-award interest.[972] It argues for that rate on the grounds that (i) it is the rate the Claimant would have required as consideration for accepting delayed dividends; (ii) this rate most closely corresponds to reality; and (iii) it is supported by prior investment treaty jurisprudence.[973]

1059. The Claimant argues that the Respondent's mitigation defence is both untimely and has no basis in law or fact.[974]

b. Respondent's Position

1060. The Respondent submits that SMCV failed to mitigate its damages by not taking reasonable steps to avoid accruing penalties and interest. The Respondent argues that SMCV knew of SUNAT's position regardless of the scope of the 1998 Stability Agreement at the latest when SMCV received its first Royalty Assessment and first Tax Assessment for each type of tax that applied to the Concentrator. Despite knowing this, SMCV failed to make any mitigating payments under protest and then to challenge the decisions. The Respondent notes that if SMCV had taken these steps, even if it had failed in its challenges, the quantum

969 Claimant's PH Brief, ¶ 106; Claimant's Reply, ¶¶ 216-219.

970 Compass Lexecon 2, Table 7 (calculated to 1 July 2022, the "**Valuation Date**").

971 Compass Lexecon 2, Table 7 (again calculated to the Valuation Date).

972 Claimant's Reply, ¶¶ 220-230.

973 Claimant's PH Brief, ¶ 107.

974 Claimant's PH Brief, ¶ 105.

of the Main Claim would have decreased by USD 114.3 million and its Alternative Claim would have decreased by USD 102.2 million.[975]

1061. The Respondent asserts that the Claimant's calculation of damages for each of its alternative claims is inflated. In general: (a) the Claimant has calculated its damages assuming either that all of the Assessments, including penalties and interest, and unrefunded GEM payments violate the Treaty; (b) there is a discrepancy in the amounts that the Claimant claims in its requests for relief, particularly with respect to pre-award interest; and (c) the Claimant's damages are duplicative of those requested by SMCV's majority shareholder (Freeport).[976]

1062. With respect to specific defects in the Claimant's calculations, the Respondent asserts: (a) the Claimant improperly included unpaid obligations in its damages calculation; (b) the Claimant assumed (without evidentiary support) that, in the but-for scenario, SMCV would have distributed as dividends 100% of the assessments actually imposed; (c) the Claimant improperly used SMCV's cost of equity as its pre-award interest rate and its discount rate; and (d) there are the following additional errors in the Claimant's calculations: (i) making certain tax adjustments with regard to the application of the non-stabilized regime to certain leaching project activities; (ii) an improper calculation of the short-term interest by ending the interest accrual on the dividend distribution date instead of the date the distribution is declared;[977] and (iii) an error in the calculation of the cash flows relating to payments for additional income tax for the tax year 2011.[978]

1063. Correcting for all of the calculation errors, the Respondent submits that the damages for the Main Claim are reduced from US$ 178.5 million to US$ 159.2 million, and for the Alternative Claim from US$ 134.5 million to US$ 122.4 million. It is the Respondent's case that these figures are the maximum that Claimant should be awarded.[979]

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975 AlixPartners 2, ¶¶ 38-44.

976 Respondent's Counter-Memorial, ¶¶ 655-662.

977 This element of the Claimant's claim was withdrawn in the second report from Compass Lexecon, ¶ 9.

978 Respondent's Counter-Memorial, ¶¶ 659, 693. The Claimant corrected this in the second report from Compass Lexecon, ¶ 9.

979 Respondent's Counter-Memorial, ¶¶ 694-697.

1064. The Respondent also submits that the Claimant's approach leaves open questions such as what damages would be appropriate if the Tribunal were to find liability on some limited basis that did not correspond with either the Main or the Alternative Claims.

2. The Tribunal's Analysis

1065. With regard to the claimed breaches of the Treaty resulting from the levying of royalties on the Concentrator, the Tribunal has made the following findings, for the reasons specified for each finding in the earlier sections of this Award:

a. By majority, that by levying royalties on the Concentrator the Respondent did not breach Article 3.4 of the Treaty;

b. By unanimity, that by levying royalties on the Concentrator the Respondent did not breach the FET Clause of Article 3.1 of the Treaty;[980] and

c. By majority, that by levying royalties on the Concentrator the Respondent did not breach the Non-Impairment Clause of Article 3.1 of the Treaty.

1066. Accordingly, the Claimant's Main Claim for damages, which is predicated on a breach of the Treaty by levying royalties on the Concentrator, must fail.

1067. However, the Tribunal has found that the Respondent breached the FET Clause of Article 3.1 in the circumstances described in detail in Section B, *inter alia* by refusing to waive the penalties and interest on the unpaid royalties, failing to reimburse SMCV its GEM overpayments, and incorrectly calculating SMCV's tax payments without reference to the fact that the Leaching Facility was stabilized. The Tribunal accepts that the Claimant is entitled to full reparation for the harm caused by the Respondent's breach of those Treaty obligations. To determine the quantum of damages to be paid by the Respondent, the Tribunal must determine the position the Claimant would have been in had the Respondent not committed such breaches.

[980] Arbitrator Garibaldi concurs in this finding for the reasons stated in his Partial Dissent.

1068. The Claimant's Alternative Claim on damages has been calculated on the basis that if the assessment of royalties and certain taxes against SMCV did not breach the Respondent's Treaty obligations, nevertheless the Respondent did breach the Treaty by (i) failing to reimburse SMCV for all GEM payments related to the Concentrator; (ii) failing to waive penalties and statutory interest; and (iii) incorrectly calculating certain tax assessments by failing to exclude SMCV's Leaching Facilities from the relevant calculations. The Claimant has assessed its damages under this Alternative Claim as USD 141.2 million, inclusive of pre-Award interest, up to the Valuation Date.[981] These damages are calculated as detailed in the following table:

Table 1: Damages to Claimant as of July 1, 2022

USD Million	Main Claim	Alternative Claim
SMCV Nominal Net Losses (Net of Mitigation Factors)	**809.2**	**625.9**
Nominal Additional Dividends to Shareholders	**773.7**	**598.2**
Nominal Additional Dividends to Claimant (21%)	**162.5**	**125.6**
Pre-Award Interest / Discount	21.5	15.6
Damages to Claimant as of July 1, 2022	**184.0**	**141.2**

1069. The Claimant quantifies such damages by first calculating the cash flows that SMCV has lost and then calculating the percentage of those cash flows that would have flowed to the Claimant in the form of dividends, net of the dividend tax, by virtue of the Claimant's 21% equity interest in SMCV. The present value of the damages is calculated by updating the Claimant's historical losses and discounting its future losses at a rate equal to SMCV's cost of equity, compounded annually.

1070. The Tribunal notes that there is general agreement between the Parties as to the methodology adopted by the Claimant,[982] subject to certain points which the Tribunal considers below. The Tribunal first addresses the question whether SMCV would have

[981] Compass Lexecon 2, ¶ 5, Table 1; ¶ 36, Table 6; ¶ 67, Table 7.

[982] The Respondent stated that it did not "resist" the approach followed by the Claimant in calculating the quantum of its damages. Respondent's Counter-Memorial, ¶ 28.

distributed as dividends, from 2018, all the disputed payments resulting from Peru's breaches of Article 3.1 of the Treaty.

a. The Claimant's Lost Dividends

i. Claimant's Position

1071. The Claimant contends that SMCV would have distributed additional dividends to the Claimant and its other shareholders comprising the totality of the disputed payments as set out in the following table:

Table 1: Damages to Claimant as of July 1, 2022

USD Million	Main Claim	Alternative Claim
SMCV Nominal Net Losses (Net of Mitigation Factors)	809.2	625.9
Nominal Additional Dividends to Shareholders	773.7	598.2
Nominal Additional Dividends to Claimant (21%)	162.5	125.6
Pre-Award Interest / Discount	21.5	15.6
Damages to Claimant as of July 1, 2022	184.0	141.2

1072. The Claimant refers to SMCV's dividend distribution history which, it says,

> "*reflects a well-established practice of distributing available cash holdings as dividends, except during years in which the company was accumulating cash for major capital investments. SMCV consistently distributed dividends from 2005 to 2010, except in 2006 when it was carrying out its investment to construct the Concentrator. SMCV suspended dividend payments from 2011 to 2017 due to the expansion of the Concentrator and the construction of a second concentrator. SMCV resumed dividend distribution in April 2018 and April 2019. SMCV suspended dividend payments in 2020 due to the COVID-19 pandemic and resumed dividend distributions in April 2021.*"[983]

[983] Compass Lexecon 1, ¶ 91; see also Compass Lexecon 2, ¶ 7.

This proves, the Claimant says, that there are no limitations preventing SMCV from distributing available cash as dividends.

1073. The dividend policy[984] states that SMCV "[a]ims at using the company's profits to allow the continuous growth of Cerro Verde and compliance with all its obligations, including its financial obligations, before a distribution of dividends takes place". The Claimant says that, given SMCV is distributing dividends, it is reasonable to assume that all obligations have been met. Further, Article 50 of the Amended and Restated Corporate By-Laws provides "Dividends may only be declared as a result of profits that are actually obtained or from reserves in cash that are freely disposable, provided that the Company's net equity is not less than its paid in capital stock. Interim dividends may also be paid."[985]

1074. The Claimant notes that the Respondent has not identified any provision of Peruvian law that would have prevented SMCV from distributing dividends nor has it identified any special circumstances that would have required SMCV to maintain cash reserves larger than those it already maintains. The Claimant therefore concludes that SMCV would have distributed the lost cash flows as dividends following (i) its own policy and (ii) the timing of dividend distributions, namely in April of each year.

ii. Respondent's Position

1075. The Respondent contends that, in the absence of evidentiary support, it cannot be assumed that in the but-for scenario, SMCV would have almost immediately distributed 100% of the disputed payments as dividends to the shareholders, noting that SMCV had failed to make any dividend distribution in "more than half of the last 16 years".[986] The Respondent further notes that the Claimant has not adduced any evidence as to SMCV's dividend policy, instead relying solely on (i) historical data as to payments of dividends and (ii) Article 50 of SMCV's Amended and Restated Corporate By-Laws, which merely provides for the ability to declare dividends. However, there is a reference to an approved "dividend

984 SMCV, Dividend Distribution Policy (12 December 2003) (**CE-934**).

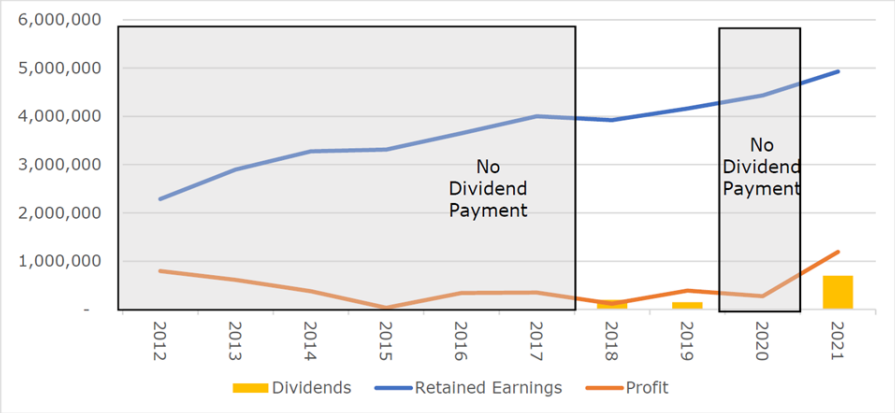
985 SMCV, Amended and Restated Corporate By-Laws (2005) (**CE-480**).

986 Respondent's Counter-Memorial, ¶ 674.

distribution policy" in section 2.1(c)(ii) of the Participation Agreement[987] which the Claimant has not adduced. The Respondent therefore says that it cannot be assumed that all available cash holdings would have been distributed.

1076. The Respondent further explains that SMCV distributed far less in dividends than the available retained earnings balance which, the Respondent says, indicates that SMCV management instead chose to retain most of its profit in the form of cash which led to its retained earnings balance growing significantly in the relevant period, as can be seen from the following table:

Table 11. Chart Showing SMCV's Retained Earnings, Profit, and Dividends ($US thousands)



1077. The Respondent therefore says that as SMCV chose on a number of years not to distribute all its retained earnings as dividends, the Claimant has not met its burden of showing that SMCV would have distributed all of the disputed payments immediately at the next actual dividend distribution date.

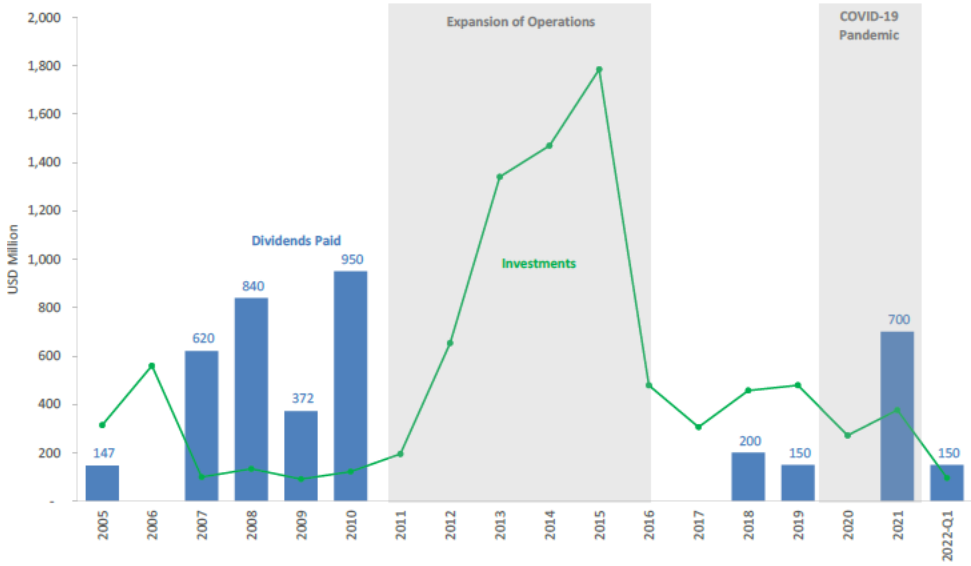
iii. The Tribunal's Analysis

1078. The Tribunal accepts the Claimant's submission that SMCV would have distributed all its lost cash flows as dividends. First, Ms Torreblanca testified that this is what SMCV would

[987] Participation Agreement among Sumitomo Metal Mining Co., LTD., Sumitomo Corporation, Summit Global Management B.V., Compañía de Minas Buenaventura S.A.A., Phelps Dodge Corporation, Cyprus Amax Minerals Company, Cyprus Metals Company, Cyprus Climax Metals Company, and Sociedad Minera Cerro Verde S.A.A. (16 March 2005) (**CE-29**).

have done.[988] Second, the following table details SMCV's history of dividend payments and investments. Whilst it is correct that SMCV did not distribute dividends every year, the Tribunal finds that the Claimant's submission explaining why dividends were not distributed in those years (construction, expansion of concentrators, or the COVID-19 pandemic) is reasonable and persuasive.

Figure 1: SMCV's History of Dividend Payments and Investments (2006-2022)



1079. Third, the Respondent has adduced no evidence to the contrary; specifically, there is no evidence to suggest that the sums which should have been paid to SMCV would not have been distributed in their entirety by SMCV to its shareholders.

1080. The ascertainment of a but-for scenario is of course not a precise science; the Tribunal is tasked to ascertain what SMCV would have done with reasonable certainty.[989] The Tribunal finds there is sufficient evidence for it to draw a just and reasonable inference that in the but-for scenario, SMCV would have distributed all the disputed payments by way of dividends to its shareholders.[990] The Tribunal further finds such dividend distributions

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988 Torreblanca 2, ¶ 49.

989 *Gemplus S.A., SLP, S.A., Gemplus Industrial S.A. de C.V. v. United Mexican States*, ICSID Cases Nos. ARB(AF)/04/3 and ARB(AF)/04/4, Award (16 June 2010) (**CA-168**), ¶¶ 13-82.

990 *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Compensation, Judgment, ICJ. Reports 2018, citing *Story Parchment Company v. Paterson Parchment Paper Company* (United States Reports, 1931, Vol. 282). The Tribunal notes that whilst this decision was not on the record, it is publicly available.

would have been made on the first day of April in each year, in keeping with the policy that SMCV applied in 2018, 2019, 2021 and 2022 (as detailed in the Compass Lexecon table above).

1081. The Claimant claims these dividend distributions on the basis of its 21% ownership interest in SMCV and net of the dividend taxes that would have applied to its dividend distributions. The Claimant calculates the present value of these additional dividends from the date of the assumed dividend payment at a rate that reflects SMCV's cost of equity compounded annually.

b. Quantum of Damages

1082. In calculating SMCV's lost cash flows for the Alternative Claim, the Claimant: (a) calculates the quantum of payments made by SMCV as a result of the assessment of penalties and statutory interest; (b) calculates the overpayment made by SMCV as a result of the Respondent's failure to distinguish between stabilized and non-stabilized activities on TTNA Assessments, CMPF Assessments, AIT Assessments and Income Tax Assessments; (c) calculates the GEM overpayments that have not been reimbursed; (d) deducts the mitigating effect of SMCV adopting a non-stabilized depreciation schedule for disputed assets using SMCV's cost of equity (the "**Depreciation Mitigation**"); and (e) deducts any tax savings that SMCV has realized or will realize as a result of the payments listed in (a) – (c).

1083. The Claimant calculates both interest on the Claimant's historical losses and discounts its future losses on the basis of SMCV's cost of equity. The total nominal lost cash flows asserted by the Claimant are USD 625.9 million as detailed in the following table.

Table 5: Alternative Claim – SMCV Nominal Lost Cash Flows

USD Million	Nominal Payments						
	Nominal Penalties and Interest	Nominal Unreimbused GEM Overpayments	Nominal Corrections	Total Nominal Payments	Nominal Mitigation	Nominal Tax Savings	Nominal Net Losses
	[a]	[b]	[c]	[d] = [a] + [b] + [c]	[e]	[f]	[g] = [d] + [e] + [f]
Royalties	400.7	-	-	400.7	-	(36.2)	364.6
Special Mining Tax	56.0	-	-	56.0	-	(2.9)	53.1
Income Tax	128.7	-	6.8	135.4	-	-	135.4
Employee Profit Sharing	-	-	1.6	1.6	-	(0.4)	1.2
Temporary Tax on Net Assets	22.0	-	8.6	30.6	-	(3.2)	27.4
Additional Income Tax	3.8	-	1.1	4.9	-	-	4.9
Complementary Mining Pension Fund	3.3	-	0.7	4.0	-	(0.3)	3.7
General Sales Tax	1.6	-	-	1.6	-	-	1.6
GEM Unreimbursed (Reimbursed)	-	63.8	-	63.8	-	(23.9)	39.9
Total SMCV	**616.0**	**63.8**	**18.8**	**698.6**	**-**	**(66.9)**	**631.7**
- Depreciation Mitigation	-	-	-	-	(5.8)	-	(5.8)
Total SMCV Net of Mitigation Factors	**616.0**	**63.8**	**18.8**	**698.6**	**(5.8)**	**(66.9)**	**625.9**

Note: Nominal Payments include Installment Interest, RAF Interest and bank fees; Outstanding Liabilities with Statutory Interest up to July 1, 2022. Table shows nominal amounts (i.e., does not include pre-award interest or discount). Source: Compass Lexecon Updated Damage Valuation Model (Annex No. 1).

1084. The Claimant says that its damages are therefore as set out in the following table.[991]

Table 6: Alternative Claim – Damages to Claimant as of July 1, 2022

USD Million	SMCV						Shareholders				
	Nominal Payments	Nominal Mitigation	Nominal Tax Savings	Nominal Net Losses	Interest on Short-Term Deposits	Nominal Lost Cash Flows	Dividend Payment Date	Nominal Additional Dividends*	Nominal Additional Dividends to Claimant (21%)	Pre-Award Interest/ Discount to Jul 1, 2022	Damages to Claimant as of Jul 1, 2022
	[a]	[b]	[c]	[d] = [a] + [b] + [c]	[e]	[f] = [d] + [e]	[g]	[h] = [f] x (1 - Dividend Tax)	[i] = [h] × 21%	[j] = [i] x Cost of Equity	[k] = [i] + [j]
2012	0.4	-	-	0.4	0.0	0.4	Apr-18	0.4	0.1	0.0	0.1
2013	10.5	-	-	10.5	0.2	10.7	Apr-18	10.3	2.2	0.7	2.9
2014	51.0	-	(6.2)	44.8	0.6	45.4	Apr-18	43.5	9.1	3.1	12.2
2015	20.9	-	(3.4)	17.5	0.2	17.7	Apr-18	16.5	3.5	1.2	4.6
2016	18.8	-	(3.4)	15.3	0.1	15.5	Apr-18	14.4	3.0	1.0	4.1
2017	61.2	-	(3.0)	58.2	0.2	58.4	Apr-18	55.5	11.6	3.9	15.6
2018	32.0	(0.4)	(1.5)	30.1	0.2	30.3	Apr-19	28.8	6.0	1.4	7.4
2019	181.1	-	(34.6)	146.5	1.6	148.1	Apr-21	140.7	29.6	2.4	31.9
2020	84.3	-	(10.8)	73.5	0.2	73.7	Apr-21	70.0	14.7	1.2	15.9
2021	236.6	-	(3.6)	232.9	0.5	233.4	Apr-22	221.7	46.6	0.6	47.1
Jan 2022 -Jun 2022	-	-	-	-	-	-	Apr-23	-	-	-	-
Outstanding Liabilities	1.9	-	(0.4)	1.5	0.0	1.5	Apr-23	1.4	0.3	(0.0)	0.3
Jul 2022 - 2026**	-	(5.4)	-	(5.4)	(0.0)	(5.4)	Apr-22 - Apr-27	(5.1)	(1.1)	0.1	(0.9)
Total	**698.6**	**(5.8)**	**(66.9)**	**625.9**	**3.8**	**629.8**		**598.2**	**125.6**	**15.6**	**141.2**

*Note: *Additional Dividends net of the dividend tax. The dividend tax rate was 4.1% until 2014, 6.8% between 2015 and 2016, and 5.0% from 2017 until the date of this Report. **Jul 2022-2026 amounts include impact of expected Depreciation Mitigation. Source: Compass Lexecon Updated Damage Valuation Model (Annex No. 1).*

1085. It is common ground, and the Tribunal accepts, that the Claimant held a 21% ownership in SMCV. The Respondent does not dispute that to the extent the Tribunal finds that the Claimant should be awarded damages, the proper measure of damages is 21% of the sums the Tribunal finds SMCV would have distributed in dividends to its shareholders. The Respondent does not, however, accept the Claimant's calculation of its lost cash flows.

1086. The Respondent calculates the damages for the Alternative Claim to be USD 122.4 million. The adjustments made by the Respondent to the Claimant's calculation comprise: (i)

[991] This calculation takes into account the two corrections referred to in footnotes 10 and 11 of Compass Lexecon 2.

excluding damages for liabilities not yet paid by SMCV; (ii) excluding tax corrections; (iii) making adjustments for whether or not the lost cash flows would have been distributed as dividends; (iv) inserting the correct pre-award interest rate; and (v) adjusting for the correct calculation of the Depreciation Mitigation discount.[992] These adjustments are shown in the following table:

Table 1. Impact of AlixPartners' Corrections on Compass Lexecon's Damage Calculation – Standalone

USD Million, %		Main Claim	Alternative Claim
Compass Lexecon	**Damages**	**178.52**	**134.55**
A. "Outstanding Liabilities"	Damages	**172.6**	**134.3**
	Change in Damages	(5.9)	(0.3)
	% Change	-3.3%	-0.2%
B. "Tax Correction"	Damages	**178.5**	**129.1**
	Change in Damages	-	(5.4)
	% Change	-	-4.0%
C. "Dividend Declaration"	Damages	**178.46**	**134.50**
	Change in Damages	(0.06)	(0.05)
	% Change	-0.03%	-0.04%
D. "Pre-Award Interest"	Damages	**163.4**	**127.2**
	Change in Damages	(15.1)	(7.4)
	% Change	-8.5%	-5.5%
E. "Depreciation Mitigation Discount"	Damages	**175.7**	**134.5**
	Change in Damages	(2.8)	(0.1)
	% Change	-1.6%	-0.1%
F. "AIT Cash Flows"	Damages	**178.50**	**134.54**
	Change in Damages	(0.01)	(0.01)
	% Change	-0.01%	-0.01%

Table 2. Impact of AlixPartners' Corrections on Compass Lexecon's Damage Calculation - Combined

USD Million, %		Main Claim	Alternative Claim
Compass Lexecon	**Damages**	**178.5**	**134.5**
AlixPartners' Corrections (A, B, C, D, E and F)	**Damages**	**159.2**	**122.4**
	Change in Damages	(19.3)	(12.1)
	% Change	-10.8%	-9.0%

1087. The Tribunal therefore considers the outstanding issues between the Parties.

Penalties and Statutory Interest

1088. Turning first to penalties and statutory interest, the Claimant says that the payments amounted to USD 616.6 million.

[992] The Claimant accepted two corrections made by the Respondent in its first expert report, namely (i) the payment date for the 2011 AIT Assessment and (ii) the exclusion of short-term interest from the date of the but-for cash flows until the actual dividend date.

1089. The Tribunal has found that none of the penalties or statutory interest should have been charged and therefore this sum should have been reimbursed in full to SMCV. The Respondent does not take issue with the quantum claimed by the Claimant as having been paid by SMCV in penalties and interest.

1090. Accordingly, the Tribunal finds that SMCV should not have been required to pay the sum of USD 616.6 million in interest and penalties and this sum should have been remitted by SMCV to its shareholders by way of dividend distribution.

1091. The Tribunal therefore accepts the Claimant's calculation with regard to penalties and interest as detailed in the Compass Lexecon Second Report.

Corrections to Certain Tax Assessments

1092. The Claimant says that the Respondent calculated the 2013 CMPF Assessments, 2007 - 2013 AIT Assessments and 2009 - 2013 TTNA Assessments based on SMCV's entire mining unit without making a distinction between stabilized and non-stabilized activities as it did for royalties and SMT. The same occurred with certain adjustments made by the Respondent to SMCV's taxable income in the 2007- 2013 Income Tax Assessments.

1093. The Claimant says it has recalculated SUNAT's incorrect assessment of taxes by using the same methodology that SUNAT used for royalties and SMT, where it excluded the Leaching Facility based on the proportion of concentrate sales to total sales. Regarding royalties it says the methodology was as follows:

> "*a) Until September 2011, based on the value of concentrate sales (i.e., minerals SMCV processed in the Concentrator).*
>
> *b) Starting in October 2011, based on the operating profit SUNAT attributed to the Concentrator, estimating the Concentrator's operating profit as sales of concentrates net of costs SUNAT attributed to the Concentrator.*"[993]

[993] Compass Lexecon 1, ¶ 34.

1094. Regarding SMT, again the Claimant says SUNAT "estimated the operating profit attributable to the Concentrator based on the sales of concentrates SMCV processed in the Concentrator, net of costs attributed to the Concentrator."[994]

1095. On this basis, the Claimant says that SUNAT overcharged SMCV by USD 18.9 million for CMPF, AIT, TTNA assessments and Income Tax Assessments, together with the related penalties and interest.

1096. The Respondent opposes the Claimant's use of the same methodology as that used by SUNAT, noting that each of these four taxes has a different assessment base: the CMPF and the Income Tax assessment were both calculated on the basis of taxable income whereas the AIT is a 4.1% levy on any form of non-deductible expenses that indirectly benefit shareholders and is not subject to a dividend tax, and the TTNA is a 0.4% levy on net assets exceeding PEN 1,000,000. The Respondent says that applying sales-based ratios to recalculate taxes with varying tax bases is not the approach followed by SUNAT and it excludes these sale-based corrections made by the Claimant.

1097. In response, the Claimant first says that the Respondent's exclusion of the sale-based corrections is overstated as it includes the related penalties and interest and results in Leaching Facility related activities being taxed. The Claimant further repeats its claim that the Tribunal should follow the same criterion that SUNAT used to assess SMT and Royalties post 2011.

1098. The Tribunal accepts that to reject these adjustments sought by the Claimant would have the effect that the Claimant would be paying a non-stabilized tax rate on its stabilized activities, namely activities relating to the Leaching Facility. This cannot be correct and the Tribunal has already found that there can be no criticism of SMCV for the manner in which it completed its tax returns, as it was not in breach of Article 22 of the Mining Regulations.

[994] Compass Lexecon 1, ¶ 44.

1099. The Tribunal further finds that the correct method of ascertaining the quantum of the tax assessments is to apply the same criterion that SUNAT used to assess SMT and Royalties post 2011.

1100. The Tribunal therefore accepts the Claimant's calculation with regard to the entirety of the incorrect Tax Assessments as detailed in the Compass Lexecon Second Report.

Unrecovered and overpaid GEM payments

1101. The amount of unrecovered overpaid GEM payments for Q3 to Q4 2012 is PEN 150 million. The Claimant says that this amount should have been reimbursed on 4 March 2019, which was the date on which the Respondent denied SMCV's reimbursement request. The Claimant has applied the Respondent's reimbursement interest rate of 0.5% to make a PEN amount of 211.0 million which converts to USD 63.8 million at the exchange rate prevailing on 4 March 2019.

1102. The Tribunal has found that these sums should have been reimbursed to SMCV. The Tribunal accepts that the appropriate date when these sums should have been reimbursed is 4 March 2019 and that the reimbursement interest rate is correct.

1103. The Tribunal therefore accepts the Claimant's calculation with regard to unrecovered and overpaid GEM payments as detailed in the Compass Lexecon second report.

Outstanding Liabilities

1104. The Claimant includes in its damages the sum of USD 33 million in respect of unpaid Outstanding Liabilities as of 1 July 2022.[995]

1105. The Respondent contends that the Claimant cannot recover damages in respect of amounts that SMCV has never paid to the Respondent.[996]

[995] Compass Lexecon 2, ¶ 14 and Appendix C; CE-0905 ; CE-1036; CE-1026 and CE-1037.

[996] Respondent's Rejoinder, ¶ 845.

1106. These outstanding obligations appear to comprise SMCV's liabilities for two items: (i) the PTU, calculated as a contribution of 8% of SMCV's taxable income, and (ii) GST for 2006 for services provided by non-residents and the related accrued interest as of 1 July 2022.

1107. The Claimant calculates the Outstanding Liabilities element of its damages claim on the assumption these were paid in full as of 1 July 2022.

1108. It appears to be common ground, and the Tribunal so finds, that SMCV is under a legal obligation to pay these outstanding sums to the Respondent. It is also not disputed that SMCV is subject to compulsory collection processes in Peru until these outstanding liabilities are discharged in full. Whilst the Claimant has not provided any assurance as to its own intentions, or as to SMCV's intentions, to pay these outstanding liabilities irrespective of whether the Claimant is successful in this arbitration, the Claimant explains that between the filing of the Claimant's Memorial and its Reply, SMCV has paid to the Respondent USD 12.5 million of the outstanding PTU liabilities, reducing the total claimed for all Outstanding Liabilities from USD 40.4 million to USD 33 million. This has been calculated by incorporating the additional payments made by SMCV (which are set out in detail in Appendix C of Compass Lexecon 2) and calculating the interest on the outstanding amount up to 1 July 2022). The Claimant subsequently submitted that a further sum of approximately USD 26 million was paid by SMCV to the local Arequipa Government for outstanding PTU liabilities[997] and that this payment was evidenced by a bank confirmation.[998] The Respondent did not object to this new evidence being added to the record[999] but noted that to the extent this payment had been made, it still left, even on the Claimant's own case, approximately USD 6.2 million outstanding in PTU liabilities.

1109. The question for the Tribunal is whether these sums (paid or unpaid) should be treated as a loss for which the Claimant should be compensated. The Tribunal accepts that tribunals can and do award damages in respect of future losses,[1000] but they do so only in those

[997] Letter dated 18 October 2023 from the Claimant to the Tribunal.

[998] PTU Payment Receipt (9 August 2023) (**CE-1093-SPA**).

[999] Letter dated 17 November 2023 from the Respondent to the Tribunal.

[1000] *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Award (18 August 2008) (**CA-149**); *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v.*

circumstances where such tribunal is confident that the damage claimed will be incurred by the Claimant, even if not till some future point.

1110. In this respect, the Respondent argues that to determine whether these outstanding liabilities should be included in any award of damages the Tribunal must reach a finding that SMCV will actually pay the outstanding obligations. The Respondent says that given these outstanding obligations have been accruing for some considerable time, some since 2006, the Tribunal should draw an adverse inference that these will not be paid by SMCV and so the Tribunal should not treat these sums as an actual loss to SMCV and hence to the Claimant.

1111. The Tribunal accepts that the Claimant bears the burden of proof that the Outstanding Liabilities comprise an actual loss suffered by the Claimant. There is nothing on the record to indicate that SMCV will not pay the Outstanding Liabilities save for the fact that the sums still claimed have not been paid to date. Equally, there is no express confirmation on the record that SMCV will pay the Outstanding Liabilities. The Tribunal notes that as SMCV is not a party to this arbitration, SMCV's obligation to discharge liabilities that are enforceable under Peruvian law is not contingent on the Tribunal's award. Therefore, SMCV will remain under a legal obligation to pay the outstanding liabilities irrespective of the Tribunal's award and will be subject to compulsory collection processes in Peru.

1112. The Respondent has not challenged the Claimant's assertion that SMCV has been making partial payments of the Outstanding Liabilities, such that only approximately USD 6.2 million remains unpaid. The Respondent's case rests on its submission that as SMCV has not yet paid the sums still claimed to the Respondent, the Claimant has suffered no loss. The Tribunal finds that the fact of the partial payments indicates an intention on the part of SMCV to make full payment of the Outstanding Liabilities. Were SMCV not to have that intention, it would make no commercial sense for it to make any payments. In any event,

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Nicaragua), Compensation, Judgment, ICJ Reports 2018 (16 December 2015) (**CA-219**); *Crystallex International Corporation Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (4 April 2016) (**CA-222**); *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (22 September 2014) (**CA-213**). The Tribunal also refers to *Factory at Chorzów (Germany v. Poland)*, 1928 P.C.I.J., Ser. A, No. 17, Claim for Indemnity – The Merits, Judgement No. 13 (13 September 1928) (**CA-26**) in which the PCIJ ruled that existing unpaid liabilities to third parties are a proper component of damages.

even if SMCV failed to discharge this obligation, the Respondent could resort to compulsory collection and SMCV appears to have sufficient assets to cover that debt in such a case.

1113. Having considered carefully the Parties' respective submissions, the Tribunal finds, on balance, that the Outstanding Liabilities will be paid, in full, by SMCV to avoid compulsory collection procedures. Whilst the calculation prepared by the Claimant includes sums not then paid but since paid, the Tribunal finds that this does not change the overall damages claimed by the Claimant under the head of Outstanding Liabilities as this claim is for the totality of sums payable by SMCV, whether yet paid or unpaid. Accordingly, the Tribunal accepts that the full amount of the Outstanding Liabilities should be included in the Claimant's damages calculation, notwithstanding that this sum has not yet been paid in full by the Claimant.

1114. The Tribunal therefore accepts the Claimant's calculation with regard to Outstanding Liabilities as detailed in the Compass Lexecon Second Report.

Depreciation Mitigation

1115. Both Parties accept that a deduction should be applied related to the depreciation of SMCV's assets, however they disagree as to the correct rate to be applied to mitigate the effect of SMCV adopting a non-stabilized depreciation schedule for disputed assets.

1116. The Claimant, in its tax-depreciation schedule, applies non-stabilized depreciation rates to assets related to the Concentrator beginning in the fiscal year 2012. This depreciation schedule results in increased income tax and PTU obligations between 2006 and 2013, but also lower income tax and PTU obligations afterwards. This is the Depreciation Mitigation. The Claimant discounts future Depreciation Mitigation at the cost of equity to reflect its value as of the Valuation Date on the basis that SMCV's ability to deduct future depreciation is linked to its capacity to generate income, which originates from its mining operations in Peru and therefore is subject to mining operating risks. In its Second Report, Compass Lexecon states that SMCV's cost of equity is 7.3% in 2022, having determined SMCV's cost of equity in 2019 to be 7.9%.

1117. The Claimant says that adopting the statutory rate would mean the risk associated with SMCV's ability to generate income and depreciate the disputed assets in future tax declarations would not be recognised. Even if the statutory reimbursement rate were to be used, the correct rate should be 0.5% per month, which the Claimant submits is the rate for overpayments resulting from SUNAT assessments.[1001]

1118. The Respondent does not accept that future depreciation mitigation should be discounted at SMCV's cost of equity. It says the appropriate rate is SUNAT's statutory rate for tax reimbursements. This is because the Claimant is only exposed to "the uncertainty in SMCV's ability to depreciate the disputed assets as assumed by Compass Lexecon, not the uncertainty in SMCV's operations."[1002] Therefore, the Respondent says, the risk profile of the cash flows related to the depreciation offset is significantly lower than SMCV's risk profile such that a more appropriate discount rate is the statutory rate published by SUNAT for refunds of incorrectly calculated tax payments, being a simple rate of 0.25% per month since 1 April 2020.

1119. The Tribunal agrees with the Claimant that the statutory rate is not an appropriate discount rate to apply. The Tribunal accepts that there is a correlation between the generation of income and the future income tax or PTU liabilities which are to be reduced with depreciation deductions. This would not be properly reflected by the application of the statutory rate. Accordingly, the Tribunal holds that the appropriate rate for the calculation of the Depreciation Mitigation is SMCV's cost of equity.

Duplication by the application of a discount rate and pre-award interest

1120. Whilst the Respondent contends that there is duplication in the amount the Claimant claims for pre-award interest, having considered carefully the content of the Claimant's Memorial and its Request for Relief, the Tribunal finds there is no duplication. Tables 2 and 3 of the Claimant's Memorial refer to "Pre-Award Interest/Discount" amounts, not pre-award interest amounts. The Tribunal accepts that a discount has been applied to future dividends

[1001] Claimant's Reply, ¶ 230; and CER-6, Spiller-Chavich 2, ¶ 51, n. 62 which refers to the Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Article 38(a) (**CA-14**).

[1002] AlixPartners 1, ¶¶ 104-105.

to avoid overcompensating the Claimant and that this does not comprise pre-award interest. The Tribunal further accepts that the damages figures in paragraphs 461(C) and 461(D) of the Request for Relief are inclusive of the pre-award interest figures that the Claimant has quantified separately in paragraph 461(E). Accordingly, the Tribunal finds no duplication in the Claimant's calculation of the discount rate and pre-award interest.

Mitigation

1121. The Respondent says that SMCV failed to mitigate its damages but instead, "engaged in 'unreasonable conduct' that 'increas[ed] the size of its claim' by failing timely to pay either its obligations or SUNAT's assessments of those obligations, resulting in significant penalties and interest."[1003]

1122. The Tribunal accepts that, as a general principle, parties are required to take steps to mitigate damages. Nevertheless, a majority of the Tribunal has held in paragraph 998above that SMCV did not fail to mitigate damages by failing to pay the royalties assessed before challenging the assessments. These costs are not "self-inflicted extra costs".[1004] Accordingly, a majority of the Tribunal rejects the Respondent's argument that the Claimant failed to mitigate its losses.

Freeport Award

1123. Finally, with regard to the Respondent's submission that any damages awarded would be duplicative of the claim brought by Freeport, the Tribunal notes that Freeport was unsuccessful and, as a consequence, there is no duplication in damages. In any event, the Tribunal awards only the loss incurred by the Claimant's 21% interest in SMCV. Accordingly, the Tribunal is confident that there is no risk of double payment or double recovery.

[1003] Respondent's Rejoinder, ¶ 841.

[1004] Respondent's Rejoinder, ¶ 841.

c. Pre-award Interest

i. Claimant's Position

1124. The Claimant says the Respondent's breach of Article 3.1 effectively caused the Claimant to suffer delays in receiving dividend distributions from its investment in SMCV. The Claimant therefore applies its calculation of SMCV's cost of equity as its pre-award interest rate on the basis that it represents the minimum rate required by investors to invest in a project similar to Cerro Verde[1005] The Claimant says that this is the rate that it would have required willingly to accept a delay in dividend distributions from SMCV. Indeed, the Claimant says, this is "money [the Claimant] was forced to retain in SMCV's 'pocket' and should, therefore, accumulate interest at the rate of return that [the Claimant] would have required to retain monies in SMCV."[1006] The Claimant next says that using the risk-free rate sought by the Respondent would mean the Claimant would be under-compensated and Peru would receive a windfall as the statutory rate is below Peru's own cost of borrowing. Finally, the Claimant does not accept that the risk-free interest rate relates to a short-term investment, noting that SMCV began making the disputed payments almost a decade ago.

1125. The Claimant bases its calculation of the cost of equity on the capital asset pricing model which have two rate inputs: (i) the risk-free rate (the Claimant uses the 12-month average yield on 10-year US Treasury Bonds); and (ii) the market (equity) risk premium (Professor Damodaran's market risk premiums for the US market). The Claimant calculates SMCV's cost of equity as 8.6% in 2018, 7.9% in 2019, 5.7% in 2020, 6.7% in 2021 and 7.3% in 2022.[1007] The pre-award interest claimed totals USD 15.6 million as of the Valuation Date.

ii. Respondent's Position

1126. The Respondent contends that using SMCV's cost of equity would put the Claimant in a better position than had SUNAT not been in breach. The Respondent says that the Claimant has failed to adduce any evidence that: (i) it would have reinvested in SMCV; (ii) it had

[1005] Compass Lexecon 1, ¶ 97.

[1006] Claimant's Reply, ¶ 223.

[1007] Compass Lexecon 2, ¶ 28, fn. 33.

been reinvesting capital back into SMCV and was earning SMCV's cost of equity during this period; (iii) that there was a similar project in which it could have invested and that was its intention; (iv) it made an additional investment during this period that generated a return in line with its cost of equity; or (v) it had to borrow additional funds because of the alleged measures or that it would have kept the funds on deposit rather than distributed them as dividends to Sumitomo. This is of particular relevance given that the Claimant is not a business operating entity, it only holds the 21% equity interest in SMCV on behalf of Sumitomo. Further, the Respondent notes that there is no evidence that the Claimant was prevented by (i) the Royalty and Tax Assessments, (ii) the Respondent's failure to waive penalties and interest and (iii) the Respondent's refusal to reimburse GEM payments from raising capital to invest in such project, whether through equity or debt. Finally, the Respondent says that equity risk premium is a long-term rate and should not be used to calculate returns over a short period such as that of the pre-award interest.

1127. The Respondent therefore says the Claimant is trying to "sneak consequential damages in through a back door (*i.e.*, interest), without ever actually proving those consequential damages."[1008] The Respondent therefore contends that the appropriate rate or interest for both the pre-and post-award interest rates should be a risk-free rate such as a one-year U.S. Treasury bill rate compounded annually, which would compensate the Claimant for the time value of money.

iii. Tribunal Analysis

1128. The Tribunal agrees with the Claimant that the appropriate rate for pre-award interest is SMCV's cost of equity.

1129. The Respondent does not deny that the Claimant is a supplier of capital for the Cerro Verde project. The Tribunal finds that by supplying capital, it expected (and was entitled to expect) to receive certain cash flows, the delay for which must be appropriately compensated. The Claimant must be placed in the position it would have been in had the

[1008] Respondent's Rejoinder, ¶ 860.

breach not occurred. The question for the Tribunal is what the appropriate rate of interest is to compensate the Claimant for this delay.

1130. The Tribunal accepts the Claimant's submissions that the pre-award interest rate should not be less than the Respondent's cost of borrowing. The imposition of a lower rate would have the effect that the Claimant would, in effect, be forced to lend to the Respondent the damages awarded. Such an approach could be argued as creating an incentive for a State to breach its treaty obligations to enable it effectively to "borrow money" at a lower rate from investors rather than seeking to access funds lawfully at a commercial rate.[1009]

1131. The Tribunal does not find it to be contentious that the Claimant should be awarded the lost investment income it could have realized had it been paid timely. In ascertaining the appropriate rate, the Tribunal makes the following findings. First, the Tribunal does not accept that the US risk-free rate would put the Claimant in the position it would have been had the Respondent not breached its Treaty obligations, not least given that it is below the Respondent's cost of borrowing. Second, the Tribunal does not accept that the Respondent's own statutory rate of interest published by SUNAT for refunds of incorrectly calculated tax payments should be applied. The damages awarded are US dollar denominated and this is an international arbitration. Third, the Respondent's borrowing rate is not an appropriate rate in circumstances where the Claimant would not willingly have loaned any sums to the Respondent, indeed, its position has, to date, been that of a forced lender.

1132. Whilst the Claimant has adduced no evidence to support its submission that it would have reinvested the dividends back into SMCV or into another commercial project, the Tribunal finds compelling the Claimant's submission that it would have demanded a rate equivalent to SMCV's costs of equity willingly to accept a delay in dividend distribution

1133. The Parties refer to the decision of the tribunal in *Conoco Phillips* which ordered pre-award interest at the cost of equity of the shareholders' investment. In this case, the tribunal held that "the appropriate rate [for pre-award interest] must be set at a level at which the investor

[1009] Claimant's Reply, ¶ 225.

expects to retain a profit, by keeping the amount corresponding to the dividends within the Projects."[1010] In that case, the tribunal found "as a matter of fact, [the dividends in question] remained part of the Project's resources and were undoubtedly used in support of the Projects' operation."[1011] [Tribunal emphasis]. Whilst the record does not permit the Tribunal to go as far as make a finding of fact that the dividends paid by SMCV remained part of the Cerro Verde resources, it is certainly correct (as acknowledged by the Respondent) that dividends were paid regularly save when there was a major expansion to be invested in and, in deciding the quantum of dividends to pay, SMCV's management determined the cash it needed to retain for its operations such that profits were retained by SMCV and reinvested in the Cerro Verde project.[1012]

1134. The Tribunal therefore finds that, in the absence of any evidence from the Claimant as to alternative projects into which it would have invested the funds in question, SMCV's cost of equity is the appropriate rate of interest for pre-award interest on the damages awarded.

Conclusion on quantum of damages

1135. Turning to the Claimant's schedule of damages, the Tribunal sets out below the Claimant's schedule of damages as of 1 July 2022.

Table 7: Damages to Claimant as of July 1, 2022

USD Million	Main Claim	Alternative Claim
SMCV Nominal Net Losses (Net of Mitigation Factors)	809.2	625.9
Nominal Additional Dividends to Shareholders	773.7	598.2
Nominal Additional Dividends to Claimant (21%)	162.5	125.6
Pre-Award Interest / Discount	21.5	15.6
Damages to Claimant as of July 1, 2022	184.0	141.2

[1010] *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V., and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Award (8 March 2019) (**CA-242**), ¶ 818.

[1011] *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V., and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Award (8 March 2019) (**CA-242**), ¶ 811.

[1012] Claimant's PH Brief, ¶ 106.

1136. The Tribunal accepts the Alternative Claim figures for SMCV's Nominal Net Losses in the sum of USD 625.9 million.

1137. The Tribunal further accepts that this means that the nominal additional dividends awarded to the Claimant as at 1 July 2022 by way of damages is USD 141.2 million.

1138. The Tribunal finds that pre-award interest should be based on SMCV's cost of equity as of 2022, being 7.3%, compounded annually. Pre-Award interest is therefore to accrue from 1 July 2022 to the date of this Award at the rate of 7.3% compounded annually.

d. Post-award Interest

1139. The Tribunal finds that post-award interest should accrue at the same rate as the pre-award interest, namely 7.3% compounded annually.

VI. COSTS

A. CLAIMANT'S COST SUBMISSIONS

1140. In its submission on costs dated 24 July 2023, the Claimant argues that the Respondent should bear the total arbitration costs incurred by the Claimant, including legal fees and expenses totaling USD 36,354,419.27, broken down as follows:

Total Attorney's Fees and Administrative Costs (USD)	31,623,813.37
Total Witness Fees and Expenses (USD)	490,716.51
Total Expert Fees and Expenses (USD)	3,564,889.39
Advances on Costs Paid to ICSID	675,000.00[1013]

1013 Of this amount, USD 25,000 was paid as a lodging fee. Additional advance payments were received from the Claimant on 6 November 2024 (USD 250,000) and on 8 June 2026 (USD 125,000).

B. RESPONDENT'S COST SUBMISSIONS

1141. In its submission on cost dated 21 July 2023, the Respondent submits that the Claimant should bear all the costs and expenses of these proceedings, including the Respondent's legal fees and expenses totaling USD 3,639,725.66, broken down as follows:

Total Attorney's Fees and Administrative Costs (USD)	2,245,840.65
Total Witness Fees and Expenses (USD)	7,691.68
Total Expert Fees and Expenses (USD)	736,193.33
Advances on Costs Paid to ICSID	650,000.00[1014]

C. THE TRIBUNAL'S DECISION ON COSTS

1142. Article 61(2) of the ICSID Convention provides:

> "*In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.*"

1143. This provision gives the Tribunal discretion to allocate all costs of the arbitration, including attorney's fees and other costs, between the Parties as it deems appropriate.

1144. As a preliminary point, whilst the Claimant was successful in the majority of its claim, as it is being awarded 76% of its total claim, it has not been awarded its claim for all royalties levied on the Concentrator. Accordingly, whilst the Tribunal views the Claimant as the successful party and hence entitled to its reasonable costs, the Tribunal finds that this lack

[1014] Additional advance payments were received from the Respondent on 22 November 2024 (USD 250,000) and on 23 June 2026 (USD 125,000).

of total success should be taken into consideration when assessing the quantum of costs to be awarded to the Claimant.

1145. The Tribunal turns first to the Claimant's reasonable costs. The Tribunal finds troubling the level of the Claimant's legal costs which are approximately fifteen times those of the Respondent. This is in circumstances where the same counsel represented the Claimant in this arbitration and the claimant in the *Freeport* arbitration. Given both arbitrations mostly arose as a result of the same factual matrix and further that there were a number of common witnesses and experts between the two arbitrations, the Tribunal finds that there would have been some duplication in the work undertaken on the *Freeport* arbitration and the present arbitration. Equally, the Tribunal accepts that this was a highly complex case and the Claimant bore the burden of proof. In these circumstances and in the exercise of is discretion, the Tribunal finds the Claimant's reasonable costs should be capped at USD10 million.

1146. The Tribunal next considers whether any discount should be applied to the Claimant's reasonable costs to reflect the fact it was not successful in the entirety of its claim . Having carefully considered this and in the exercise of its discretion, the Tribunal determines that the Claimant should be awarded 76% of its reasonable costs representing the fact the Claimant has been awarded 76% of its total claim. Accordingly, the Tribunal awards the Claimant its legal and other costs in the sum of USD 7,600,000.

1147. The costs of the arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to (in USD):

Tribunal's fees and expenses	
Ms. Juliet Blanch	USD 553,785.22
Mr. Oscar Garibaldi	USD 464,242.13
Dr. Claus von Wobeser	USD 418,048.82
ICSID's administrative fees	USD 324,000.00
Direct expenses	USD 342,772.29
Total	**USD 2,102,848.46**

1148. The above costs have been paid out of the advances made by the Parties in equal parts and the investment income generated from those advances.[1015] The Tribunal determines that the Respondent should pay 76% of the costs of the arbitration and the Claimant should bear 24 % of the costs of the arbitration. As a result, the Claimant's share of the costs of arbitration amounts to USD 504,683.63 and the Respondent's share amounts to USD 1,598,164.83.

1149. Accordingly, the Tribunal orders the Respondent to pay the Claimant USD 546,740.60 for the expended portion of the Claimant's advances to ICSID and USD 7,600,000 to cover its reasonable legal fees and expenses.

VII. AWARD

1150. For the reasons set forth above, the Tribunal decides and declares as follows:

(1) By majority, that Peru is not in breach of Article 3.4 of the Treaty;

(2) By unanimity, that Peru is in breach of the FET Clause of Article 3.1 of the Treaty;

(3) By majority, that Peru is not in breach of the Non-Impairment Clause of Article 3.1 of the Treaty;

(4) By unanimity, that Peru is ordered to pay SMM Cerro Verde the sum of USD 141.2 million to compensate SMM Cerro Verde for the damages it suffered in the form of lost dividends, net of Peruvian tax, as a result of Peru's: (i) arbitrary refusal to waive penalties and interest; (ii) arbitrary refusal to reimburse SMCV for the Q4 2011 to Q3 2012 GEM payments; and (iii) arbitrary calculations in the final and enforceable assessments of the 2007-2013 Income Tax, TTNA, AIT and CMPF Assessments as calculated to 1 July 2022;

[1015] The remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

(5) By unanimity, that Peru is ordered to pay pre-Award interest at the rate of 7.3% compounded annually from 1 July 2022 to the date hereof;

(6) By unanimity, that Peru is ordered to pay annually compounding post-award interest on SMM Cerro Verde's damages and losses at the rate of 7.3% compounded annually from the date of the Award to the date full payment of those amounts is made; and

(7) By unanimity, that Peru is ordered to pay the Claimant USD 546,740.60 for the expended portion of the Claimant's advances to ICSID and USD 7,600,000 to cover its reasonable legal fees and expenses.

[signed]

Mr. Oscar M. Garibaldi
Arbitrator
Subject to the attached dissenting opinion

Date: 31 August 2026

Dr. Claus von Wobeser
Arbitrator

Date:

Ms. Juliet Blanch
President of the Tribunal

Date:

[signed]

Mr. Oscar M. Garibaldi
Arbitrator
Subject to the attached dissenting opinion

Date:

Dr. Claus von Wobeser
Arbitrator

Date: 31 August 2026

Ms. Juliet Blanch
President of the Tribunal

Date:

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Arbitrator
Subject to the attached dissenting opinion

Date:

Dr. Claus von Wobeser
Arbitrator

Date:

[signed]

Ms. Juliet Blanch
President of the Tribunal

Date: 31 August 2026

ICSID Case No. ARB/20/14

between

SMM CERRO VERDE NETHERLANDS B.V.

and

REPUBLIC OF PERU

PARTIAL DISSENT

Mr. Oscar M. Garibaldi
Arbitrator

31 August 2026

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PARTIAL DISSENT

OF ARBITRATOR OSCAR M. GARIBALDI

SMM CERRO VERDE V. REPUBLIC OF PERU

I. INTRODUCTION

1. Whenever I consider it necessary to dissent, in whole or in part, from a decision of a tribunal of which I am a member, I feel bound to explain to my colleagues, the parties, and the profession at large the reasons for my dissent.

2. I dissent in part in this case not only from the *conclusions* reached by my colleagues of the Tribunal (henceforth, the Majority) on certain matters in dispute but, especially, from the *reasons* on which the Majority reached those conclusions. I regard a dissenting opinion as an opportunity to state a critical view of important points of law or fact on which the tribunal has reached no agreement. If we are to make progress in our search for better solutions to serious issues of law, fact, or method, we should be ready to criticize the decisions of others and the grounds on which those decisions are based, as well as to open our minds to countercriticism. That is why it is not always enough, in my view, for a dissenting arbitrator merely to state an alternative position. I believe that if the point of disagreement is sufficiently important, the dissenter should explain, respectfully, what he or she sees as flaws in the majority's position, so that others may assess the relative strength of the opposing reasons. This is the approach I follow in all my dissents, including the present one.

3. I should make it clear that I hold my colleagues in the highest regard, personally and professionally. My criticism of their views is always directed *ad sententias et argumenta*, never *ad homines.*

II. THE SCOPE OF THE PARTIAL DISSENT

4. This Partial Dissent concerns primarily certain aspects of the Majority's analysis and conclusions on the Claimant's claim for breach of Article 3.4 of the Treaty. For the sake of completeness, I also note here other, more limited, disagreements with the Majority concerning the claim for breach of Article 3.1 of the Treaty.

A. ON THE CLAIM FOR BREACH OF ARTICLE 3.4 OF THE TREATY

5. In the Award, the analysis and conclusions concerning the claim for breach of Article 3.4 of the Treaty are divided into several parts. As I concur in some of those parts and dissent from others, a more detailed explanation is in order.

6. Section IV.A.2. of the Award states the Tribunal's analysis and conclusions on the Claimant's claim for breach of Article 3.4. That section is divided into various subsections. My position in respect of each subsection is as follows:

   a. Section IV.A.2.a., headed "***The International Obligation Arising from Article 3.4 of the Treaty***": I fully endorse the Tribunal's analysis and conclusions set forth in this subsection; hence the decision in this respect is unanimous.

   b. Section IV.A.2.b., headed ***"The Obligations To Be Observed under Article 3.4 of the Treaty"***: This section contains discussions on various topics:

      i. A general discussion of the value or weight to be attributed in this case to the 2008 decision adopted by one chamber of the Peruvian Supreme Court in respect of the royalty assessments for 2008 (henceforth, the **SC Decision**).[1] I agree with certain aspects of that discussion, *i.e*. the Tribunal's unanimous rejection of the claim that it is bound by the SC Decision or otherwise required to follow it. I disagree, however, with (a) the Majority's reasons for rejecting that claim; (b) the Majority's discussion of the weight (if any) to be given to the SC Decision in resolving the Article 3.4 claim; and (c) some of the reasons on which the Majority bases its attribution of weight. I also disagree with the way the Majority later treats the SC Decision, first as direct authority for rejecting the application of the

[1] Unless otherwise explained, capitalized terms and abbreviations used in this Partial Dissent have the same meaning as in the Award.

contra proferentem rule of construction[2] and, second, as confirmation of the Majority's conclusions on the scope of the stabilisation benefit.[3]

ii. A general discussion of the weight (if any) to be given to the *Freeport* Award.[4] I agree with this general discussion and the conclusion, hence reached by unanimity, "that the Freeport tribunal's analysis should not inform this Tribunal's analysis of the proper scope of the Stability Agreement."[5] I disagree, however, with the added gratuitous comment "that the majority agrees with the same approach to the construction of the Stability Agreement as that followed by the *Freeport* tribunal."[6] If the Majority reached its conclusions independently of the *Freeport* Award, as it professes to have done, it is of dubious relevance that the Majority's approach coincided with that followed by the majority of the *Freeport* tribunal.

iii. A general discussion of the rules of Peruvian law on contract interpretation and the classification of the Stabilisation Agreement as a *contrato-ley* (contract-law). Under Peruvian law, a contract-law is a kind of contract which is not subject to unilateral modification by the State party.[7] I generally agree with the discussion concerning contracts-law, which is largely non-controversial. I do disagree, however, with the Majority's decision to deny the application of the Civil Code *contra proferentem* rule of construction to what is undeniably a contract of adhesion. The Majority accepts the view that the Stabilisation Agreement, which is admittedly both a contract-law and an adhesion contract, must be understood within a legal framework that combines civil law and administrative law.[8] While it is

[2] Award, ¶ 401; see *infra*, ¶ 8.
[3] Award, ¶¶ 581-589; see *infra*, ¶ 17.
[4] Award, ¶¶ 384-389.
[5] Award, ¶ 388.
[6] Award, ¶ 389.
[7] Award, ¶¶ 405-407.
[8] Award, ¶ 401.

obvious (and non-controversial) that the Stabilisation Agreement must be interpreted by reference to the legal framework within which it was concluded (*i.e*. the Mining Law and the Mining Regulations), *it does not follow* that such framework would exclude applying the *contra proferentem* rule to a contract-law the substantive terms of which are dictated by the State party. In an attempt to bridge this logical gap, the Majority resorts to relying on the Supreme Court's *not using* that rule in its own analysis of the Stabilisation Agreement.[9] Thus the Majority contradicts its own approach to the SC Decision (*i.e*. that SC Decision should be considered *after* the Majority carries out its own analysis)[10] by directly relying *a priori* on a dubious inference from what the Supreme Court *did not do*.

iv. A general discussion of the Respondent's "outer limits" theory, according to which (a) the Mining Law and the Regulations determine the outer limits of the benefits to be conferred through stabilisation agreements but (b) the parties to a particular stabilisation agreement may elect to reduce the scope of those benefits.[11] I fully agree with the Tribunal's decision (which is therefore unanimous) to reject that theory, for the reasons stated in the Award, notably the plain text of Article 86 of the Mining Law.[12]

c. The remainder of Section IV.A.2. of the Award is, broadly speaking, an analysis of the Mining Law, the Regulations, and the Stabilisation Agreement aimed at ascertaining whether the stabilisation benefit is limited to the qualifying project or extends to other authorized projects built in the concessions or EAUs referred to in the Stabilisation Agreement. The Majority also considers circumstances relevant to the enactment of the Mining Law, the conduct of the Parties, the way various State organs interpreted the Law and the Regulations, and the confirmation it finds in the SC Decision. I disagree with critical aspects of the Majority's analysis and

[9] Award, ¶ 401.
[10] Award, ¶ 382.
[11] Award, ¶¶ 410-413.
[12] *Id*.

with its conclusions, for the reasons to be explained at some length in Section IV of this Partial Dissent. In my view, the key provisions of the Mining Law and the Regulations, which dictate the content of the Stabilisation Agreement, support the conclusion that the stabilisation benefit extends also to authorized projects built in the designated concessions or EAUs at any time within the designated period of the benefit.

7. In this Partial Dissent I shall discuss in more detail the two main issues in which I disagree with the Majority: (i) the weight (if any) to be accorded to the SC Decision (Section III) and (ii) the Majority's interpretation of the Mining Law, the Regulations, and the Stabilisation Agreement to determine whether the stabilisation benefit applies only in respect of the qualifying project or also of authorized projects built in the same concessions or EAUs (Section IV). In both cases I shall explain why, in my view, the Majority reaches the wrong conclusions through the wrong reasoning.

8. As a consequence, I dissent from the Majority's decision rejecting the Claimant's claim for breach of Article 3.4 of the Treaty. I would have made a finding that the Respondent breached that provision and, consequently, I would have determined that the compensation awarded should take into account the damages sustained by the Claimant from SMCV's being forced to pay royalties on the output of the Concentrator.

B. ON THE CLAIM FOR BREACH OF ARTICLE 3.1 OF THE TREATY

9. Under Article 3.1 of the Treaty, a Contracting State is obligated (i) to ensure fair and equitable treatment to the investments of nationals of the other Contracting Party (the "**FET Clause**") and (ii) not to impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal of those investments (the "**Non-Impairment Clause**").

10. **The Claim for Breach of the FET Clause**. I generally concur in the Tribunal's analysis and conclusions regarding the claim for breach of the FET Clause, with the following precisions and exceptions:

a. I agree with the conclusion that the application of royalties to the Concentrator did not breach the FET Clause. This conclusion is independent of my view that such an application resulted from a misinterpretation of the Mining Law and the Mining Regulations, because an incorrect application of internal law is not enough, without more, to breach the FET standard. As for the other pleaded grounds for a breach of the standard, I note that, whilst in some circumstances the State may breach the standard through a change of position to the detriment of the investor, in this case there is no conclusive evidence of the alleged *volte face*, as the initial position of the *face* was not univocal but characterised by confusion, inconsistency, ambivalence, and imprecision. I also note, in this regard, that the Claimant did not present a case for breach of objectively reasonable ("legitimate") expectations.

b. With regard to the GEM payments (but not the voluntary payments), I agree that the Respondent breached the transparency required by the FET standard by failing to alert SMCV that the Concentrator would not be treated as stabilised.

c. I cannot accept the Majority's view that the procedural breaches found in the conduct of SUNAT and the Tax Tribunal are not of sufficient magnitude to constitute a breach of the FET standard. The Majority's view is surprising. The Tribunal has unanimously found that SUNAT did not give SMCV any right to be heard, let alone a fair hearing, before reaching the decision that the Concentrator would not be stabilised. In my view, that conduct, added to the irregularities the Tribunal found in the conduct of the Tax Tribunal, deprived SMCV of its right to a fair and impartial adjudication of the royalty assessments as well as the appeals lodged against them. Indeed, there is sufficient evidence that the process of adjudication of those appeals was calculated to produce a predetermined result. I conclude that the conduct of SUNAT and the Tax Tribunal amounts to a gross violation of due process which offends a sense of juridical propriety. Accordingly, I dissent from this aspect of the Majority's decision.

d. I agree with the Tribunal's remaining findings of breach of the FET standard, resulting from the imposition of interest and penalties; very lengthy delays in the

assessments; interest rates charged and refusal to allow SMCV to challenge such rates; failure to reimburse GEM payments improperly received; wrongful application of Article 22 of the Mining Regulations when assessing SMCV's tax returns; and application of the non-stabilised regime to assets it had previously treated as stabilised.

11. **The Claim for Breach of the Non-Impairment Clause**. The Majority divides the claim for breach of the Non-Impairment Clause into two parts: (i) a claim based on the Respondent's actions other than the imposition of royalties on the Concentrator and (ii) a claim based on the imposition of such royalties.

a. The Majority rejects the first part of the claim on the ground that the Tribunal has found the same conduct to breach the FET Clause and is awarding compensation therefor.[13]

b. More important, the Majority rejects the second part of the claim upon a finding that "in levying royalties in respect of the Concentrator the Respondent did not act in an unreasonable or discriminatory manner."[14] No reasons are offered therefor other than (i) there has been no "finding of discriminatory conduct or bad faith on the part of the Respondent" and (ii) "the levying [of royalties] was carried out in accordance with national law."[15] These reasons are plainly insufficient, however, to support the Majority's conclusion. First, the lack of a finding of bad faith does not imply that the measure in question was reasonable, nor does a finding of unreasonableness depend upon a finding of bad faith. Bad faith and unreasonableness are different standards; whilst a measure taken in bad faith may well be considered unreasonable, not every measure has to be taken in bad faith to be unreasonable. Second, a measure cannot be considered reasonable only because it was carried out in accordance with national law, as compliance with national law

[13] Award, ¶ 1053. Although it is a common practice among arbitral tribunals to reject or to leave undecided alternative claims for breach of other treaty provisions when a finding of breach would not have affected the calculation of damages, the possibility of partial annulment or set aside of an award calls into question the wisdom of that practice.

[14] Award, ¶ 1054.

[15] Award, ¶ 1054.

does not imply compliance with obligations under the Treaty. The reasonableness of a measure must be determined under the substantive standard laid down by the Treaty, not by its conformity with internal law. Accordingly, the meaning of "reasonable" must be determined under the rules of the VCLT and that meaning must be applied to the conduct at issue, none of which has been done. Third, while it is true that the Tribunal has not made a finding of discriminatory conduct, the key point is that a full discrimination analysis has not been conducted, notwithstanding evidence of at least one instance in which another mining company was treated differently in the application of the stability benefit in respect of the levying of royalties. For these reasons, I dissent from the Majority's rejection of the claim that by imposing royalties on the Concentrator the Respondent breached the Non-Impairment Clause.

12. In the remainder of this Partial Dissent, I elaborate on my views on (i) the relevance of the SC Decision and (ii) the scope of the stability benefit.

III. THE RELEVANCE OF THE SUPREME COURT DECISION

A. THE QUESTION OF DEFERENCE

13. The Tribunal unanimously finds that it "is not bound" by the SC Decision,[16] and unanimously *rejects* the Respondent's submission that the Tribunal "should respect" the Supreme Court's determination.[17] I join these determinations, in the understanding that the Tribunal uses the word "respect" in the sense of "obey or comply with," as suggested by the context formed by the preceding summary of the Respondent's submission.[18] As explained below, I do maintain that the Tribunal *should respect* the SC Decision – not in the sense of following it blindly, but in the sense of examining it carefully and critically as potential evidence of the position of Peruvian law on the matter that was decided. The key qualification is that the Tribunal should consider the SC Decision *critically*, assessing the

[16] Award, ¶ 377.
[17] Award, ¶ 381.
[18] Award, ¶¶ 379-380.

worth of its conclusions by the soundness of the reasons offered to support them, instead of taking those conclusions at face value.

14. While I agree with the Tribunal's conclusions that it is not legally bound by the SC Decision and is not otherwise required to follow it, I find the Majority's supporting reasoning inapposite and insufficient. The Majority offers only one reason: that the SC Decision relates "only to the validity of the 2008 Royalties Claim and is not even binding in any judicial proceedings in Peru concerning any other matter, including any other royalty assessment."[19] This statement, while true, cannot provide a supporting reason because, as discussed below, the issue whether or not the SC Decision is binding on the Tribunal – which is adjudicating a treaty-based claim – cannot depend on the domestic legal effects of that decision. The Majority's supporting reasoning overlooks that the powers and duties of an international tribunal faced with a request to obey or follow a domestic court decision are matters of international law, not domestic law.

15. As I consider the Majority' reasoning inadequate to support the conclusion that the Tribunal is not bound to apply or to follow the SC Decision, in the remaining of this subsection I undertake to supply the reasons that, in my view, do justify such conclusion.

16. For present purposes, it is not necessary to draw a sharp distinction between (i) a claim that the Tribunal is legally obligated to apply the SC Decision (*regardless of its merits*) from (ii) a claim that the Tribunal should, as a matter of comity, practice, or other non-legal obligation, follow the SC Decision *regardless of its merits or without examining them*. Both types of claims are often referred to as claims of "deference" (in the strict sense of the word) owed by an international tribunal to a domestic court decision, a usage I shall adopt.[20] Such claims of deference must be distinguished from the more modest claim that,

[19] Award, ¶ 381.

[20] Strictly speaking, "deference" means "submission to the acknowledged superior claims, skill, judgment, or other qualities, of another." *Oxford English Dictionary, Compact Ed.*, vol. I, "Deference" (meaning 2, 1 being obsolete). "Deference" comes from the Latin verb *deferre* (from the preposition "*de*" meaning "from" and the verb "*ferre*" meaning "to carry"), which literally means "to carry to another place" ("*in alium locum ferre*"). Bayerische Akademie der Wissenschaften, *Thesaurus Linguae Latinae*, "Defero" (online ed. 5,1:313). Therefore, in the context of decision making, "to defer" or to "show or pay deference" strictly means to yield to someone else's decision, either because the yielding decision-maker believes that the other decision-maker has a superior claim to knowledge or wisdom or

while an international tribunal is not required to pay deference in that sense, it may or should give *weight* (or a measure of weight) to a domestic court decision. The question of the weight to be attributed to the SC Decision is to be discussed in subsection B.

17. In my view, there are at least two insurmountable legal obstacles to claims that the Tribunal should defer, in the sense discussed above, to the SC Decision. First, nothing in the Treaty or the ICSID Convention or any suppletory rule of customary international law restricts the adjudicatory powers of the Tribunal by requiring it to pay any such deference.[21] Second, the legal framework within which the Tribunal carries out its adjudicatory functions presupposes that the Tribunal will exercise independent judgment at all times.[22] These considerations are particularly compelling in the adjudication of claims under umbrella clauses such as Article 3.4 of the Treaty. Suppose that the obligation in question is governed by domestic law and the existence and scope of that obligation are decided by a domestic court, especially the court of last resort. In these circumstances, if the international tribunal is required to follow the decision of the domestic court, which is an organ of the State party to the dispute, that party will be in sole control of the existence and scope of its own international obligation under the umbrella clause, a result inconsistent with the adjudicatory function of the international tribunal and the principle that a State may not invoke its own internal law in derogation of its international obligations.[23]

18. For the sake of completeness, I add a brief discussion of a variant of the "deference" theory: the claim that a treaty-based international tribunal is not permitted to review a domestic

judgment or because the yielding is institutionally required (*e.g.* deference to the binding precedent of a higher court). In other words, in keeping with the root of the term, "to defer" means to transfer to another the decision (or the content of the decision) or to manifest a disposition to do so. In this strict sense, "deference" implies an *uncritical* attitude of the yielding decision-maker in respect of the content of the other's decision – whether an existing decision or one still to be made. To have such an uncritical attitude means to refrain from second-guessing the merits of that decision, that is, from considering whether that decision is right or wrong or sustained or not by sound reasons.

[21] On the claim that such deference is required by customary international law, see Appendix I to this Partial Dissent.

[22] ICSID Convention (1 April 2006), Article 14(1) (**CA-22**): "Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, *who may be relied upon to exercise independent judgment*;" Article 40(2): "[a]rbitrators appointed from outside the Panel of Arbitrators shall possess the qualities stated in paragraph (1) of Article 14;" Article 42(2): "[t]he Tribunal may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law." On the requirement of independent judgment in general, see C. Schreuer (with L. Malintoppi, A. Reinisch and A Sinclair), *The ICSID Convention: A Commentary* (2nd ed.), pp. 511-514.

[23] Vienna Convention on the Law of Treaties (23 May 1969), Article 27 (**CA-49**).

court decision except under the customary rules on denial of justice and, absent a claim for denial of justice, the tribunal is bound to apply the domestic court decision without questioning its merits.[24] Although this theory does not appear to have been specifically invoked in this case and is not addressed in the Award, it is relevant in the present context because it is sometimes advanced as underlying or justifying the deference theories previously discussed.

19. In the context of a treaty-based international arbitration, the "denial of justice" theory holds that the tribunal must unquestioningly apply a domestic court decision, including one of the highest court, unless (i) a claim for denial of justice has been made, in which case (ii) the tribunal must review the domestic decision under the customary rules on denial of justice. In my view, this theory is unsound for the reasons that follow, which are also applicable, *mutatis mutandis*, to the broader theories of deference:

    a. Neither the Treaty nor the Convention restricts a tribunal's duty to exercise independent judgment or its powers of adjudication by imposing a particular standard of review to be observed in examining decisions of national courts.

    b. As a matter of general international law, the conduct of any State organ is attributable to the State, whether the organ exercises legislative, executive, judicial, or any other function,[25] and any act that is attributable to the State breaches an obligation of the State when it is not in conformity with that obligation.[26]

    c. The obligations at issue in this case are imposed by the Treaty. The relevant obligations apply to each State Party, without any distinction based on which organ of the State is responsible for the conduct at issue. Nor does the Treaty establish

[24] This theory was discussed at considerable length and dismissed in *Infinito Gold Ltd. v. Republic of Costa Rica* ICSID Case ARB/14/5) (Kaufmann-Kohler, Hanotiau, Stern), Award with Separate Opinion on Jurisdiction and on the Merits by Brigitte Stern (3 June 2021), ¶ 359 (**RA-5**).

[25] Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001), Article 4 and Commentary (**CA-304**): "The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State."

[26] Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001), Article 12.

different levels of responsibility for breach of those obligations depending on which State organ might commit the breach. In other words, the Treaty does not treat the conduct of State courts differently from that of other State organs.

d. The customary doctrine of denial of justice is a set of rules of customary international law which notably include (i) a requirement that an international tribunal apply a more demanding standard of review to the decisions of national courts concerning the interpretation of their own laws and (ii) a requirement that non-futile domestic remedies be exhausted, so that the national judiciary have an opportunity to correct any errors of the legislative and administrative authorities and those of the lower courts. These elements are interrelated; the more demanding standard of review is said to be justified by the requirement of exhaustion of domestic remedies (which usually implies multi-tier review by domestic courts), because a denial-of-justice review puts in issue the conduct of the State's judicial system as a whole.[27]

e. There is no legal basis, however, for importing the customary standard of denial of justice into the review of a national court decision made by an international tribunal adjudicating a claim under the Treaty. The Treaty is *lex specialis* in respect of the rules of customary international law on the minimum standard of treatment of aliens, diplomatic protection, and denial of justice.

f. In fact, such an importation of the customary standard of denial of justice would be inconsistent with the object and purpose of the Treaty. A fundamental aspect of such object and purpose, in fact a key part of the *raison d'être* of the Treaty, is to create obligations that supersede and replace (within the ambit of application of the

[27] See *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, (July 8, 2016), (**RA-29**) ¶¶ 498-99.

Treaty) the customary regime of diplomatic protection, including the minimum standard of treatment and the customary rules on denial of justice.[28]

g. Further, the customary rules on denial of justice, which include the requirement of exhaustion of domestic remedies, are incompatible with the system of investor-State resolution of disputes adopted by the Treaty. As noted, the requirement of exhaustion of domestic remedies creates the conditions for the decision at issue to be taken by the State's judiciary as a whole, which in turn is said to justify requiring the international tribunal to apply a more exacting standard of review. By contrast, under the dispute-resolution regime of the Treaty (and other similar ones) an investor has direct access to international arbitration without exhausting domestic remedies. Therefore, the dispute-resolution regime of the Treaty neither requires nor presupposes that any wrong committed by a judicial organ should be committed by the judiciary as a whole, a fact that removes the traditional justification for applying the denial-of-justice standard of review.

h. Importing the customary doctrine of denial of justice is also incompatible with the object and purpose of the Treaty in another sense. The customary rules on denial of justice are based on the assumption that the State judiciary can be expected to act towards an alien in an impartial manner, independently of the political organs of the State. Accordingly, by requiring that the decisions of State courts be subject to a demanding standard of review, the customary rules place on the alien much of the risk that the State judiciary's actual conduct might fall short of that assumption. By contrast, the Treaty and other treaties of the same kind are based on different principles: investors have direct access to arbitration without the need to exhaust domestic remedies; hence investors do not bear the risk that their claims will be first submitted to a judiciary whose conduct may fall short of the ideal. The demand that the doctrine of denial of justice be imported into the regime of the Treaty

[28] Circumstances which would constitute a denial of justice under customary international law may be relevant to establish a breach of the Treaty, but considering such circumstances *under the standards of the Treaty* is not the same as importing the customary standard. That is why it is not strictly correct to say, as is sometimes said, that the FET standard "includes" denial of justice.

amounts, then, to a claim for reallocating to the investor much of the risk that State courts might fail to act independently and impartially.

i. As already noted in a slightly different context, the preceding considerations are especially true in a case involving a claim for breach of the umbrella clause of the Treaty. Since in most cases (as in the present one) the State's obligation subject to the umbrella clause is undertaken under the State's own law, a State court decision on the content of that obligation may indirectly determine the outcome of the claim for breach of the umbrella clause. This situation places the State court, a State organ, in the position of *judex in causa sua*. Therefore, anything short of full review of the State court decision by the international tribunal will in effect put the State, through its judicial organ, in control of the issue whether the State has breached the Treaty. Such an outcome would be at odds with the international tribunal's function as the adjudicator of that issue and with the principle that a State may not invoke its own law in derogation of its treaty obligations.[29]

20. I conclude that these are compelling reasons for rejecting any claim that the Tribunal is legally bound to apply the SC Decision, or is somehow obligated by other considerations to follow that decision regardless of or without considering its merits, or is required to apply that decision because no claim of denial of justice has been made against it. These are the reasons – not the one reason set forth in the Award – that lead me to join my colleagues in rejecting the Respondent's claim that the Tribunal is bound to apply or to follow the SC Decision.

B. THE QUESTION OF WEIGHT

1. The Majority's Attribution of Weight to the Supreme Court Decision

21. After rejecting the claim that the Tribunal is bound to apply or to follow the SC Decision, the Majority turns to the question of whether and to what extent the Tribunal should give any *weight* to that decision.[30] In this subsection B, I discuss the Majority's conception of

[29] Vienna Convention on the Law of Treaties (23 May 1969), Article 27 (**CA-49**).
[30] Award, ¶ 382.

attribution of weight, the reasoning on which it is based, and the way in which its approach is actually implemented, and explain why I disagree with all aspects of the Majority's analysis and conclusions.

22. The Majority's analysis on the issue of weight consists of two parts, to be discussed separately. In the first part, the Majority "finds an absence of cogent reasons to pay no regard to the analysis undertaken by the Supreme Court."[31] This finding is based on five considerations, to be discussed presently. In the second part of the analysis, the Majority decides "that the correct approach is [for the Tribunal] first to undertake its own independent analysis of the meaning of the Stability Agreement but then, if and to the extent that it would assist the Tribunal, it will take note of the Supreme Court's approach to the construction of the Stability Agreement and its determination."[32] Much later in the Award, after its independent analysis has been completed, the Majority turns to the SC Decision "to see if it provides any further clarification on this issue."[33] After summarizing the Supreme Court's conclusions and some highlights of its reasoning,[34] the Majority concludes, not surprisingly, that "the Supreme Court came to the same conclusion as that reached by a majority of the Tribunal."[35] The Majority then finds that the SC Decision "*supports its analysis* to the effect that the Stability Agreement, pursuant to the Mining Law and the Mining Regulations, stabilise the works detailed in the Feasibility Study, namely the Leaching Project."[36]

23. The first part of the Majority's analysis (that there are no cogent reasons to ignore the Supreme Court Decision) is unobjectionable as a conclusion, although not all of the five considerations cited in support are valid or apposite:

[31] Award, ¶ 382.

[32] Award, ¶ 383.

[33] Award, ¶ 581.

[34] Award, ¶¶ 582-587.

[35] Award, ¶ 588. The conclusion is not surprising, because even before considering the Supreme Court Decision in any depth, the Tribunal was aware of its conclusions through the Parties' submissions.

[36] Award, ¶ 588.

a. The first two considerations are (i) that Peruvian law governs the Stabilisation Agreement and hence the scope of it and (ii) that the highest judicial body in Peru has determined that scope in the context of the 2008 Royalties Claim.[37] These are indeed good reasons for the Tribunal's not ignoring what the Supreme Court said in analysing the same issue. But it should be borne in mind that they are not reasons – let alone good reasons – for accepting the SC Decision uncritically, without a careful analysis of the grounds on which its conclusions are based.

b. The third consideration is that the Claimant has not asserted any breach of due process in Supreme Court proceedings, although it did allege that the Supreme Court did not have the benefit of the full record available to the Tribunal.[38] A serious claim of breach of due process might indeed have given support to an argument for disregarding the SC Decision, but the absence of such a claim does not cover the decision with a mantle of infallibility or other special authority.[39] Absent a claim for breach of due process, what matters in this case is the soundness of the decision itself, that is, the cogency of the reasons supporting the conclusions reached.

c. The fourth consideration is the trite observation that the Tribunal does not sit as an appellate body from the decisions of the Supreme Court.[40] This type of argument, which is nearly *de rigueur* in investment disputes, is misplaced for two principal reasons.

    i. First, for all its popularity, this argument is both a red herring and a straw man, as I am not aware of anyone seriously contending that an international tribunal is in the position of an appellate body from the decisions of domestic courts. An appellate body would sit as an organ of the domestic

[37] Award, ¶ 382.

[38] *Id.*

[39] A sufficiently serious breach of due process is one of the grounds for disregarding a domestic court decision under the customary rules on denial of justice which, as already discussed, do not apply to the claim for breach of Article 3.4 of the Treaty. See *supra*, ¶ 18.

[40] Award, ¶ 382.

legal system, ruling exclusively on the basis of domestic law, and granting or denying the remedies provided by that law. In a treaty-based arbitration, the tribunal sits as an organ of the international legal order, applying international law (which may require consideration of domestic law), and granting or denying the remedies provided by the applicable treaty and general international law.

ii. Second, this argument does *not* support the conclusion that the Tribunal should pay regard to the SC Decision. Quite to the contrary, this argument tends to undermine that conclusion: whilst an appellate body *must* pay regard to the decision under appeal (how can it review that decision otherwise?), a non-appellate body may well choose to ignore another body's decision bearing on the same issue. Therefore, the non-appellate-body argument has nothing to do with the conclusion, which I have endorsed, that the Tribunal should not ignore the SC Decision.

d. The fifth and last consideration is that (i) the majority of the Peruvian judges who considered the issue reached the same conclusion and (ii) the majority of those who dissented did so on procedural grounds.[41] As in the case of the first and second considerations, these are valid reasons for not ignoring the domestic court decisions, as long as the review of those decisions is not done simply by counting heads but by a critical examination of the reasoning on which the conclusions were based.

24. I conclude that the first part of the Majority's analysis (that the Tribunal should not ignore the SC Decision) is sound, in the sense that its conclusion is supported by three good reasons out of the five being offered.

25. I now turn to the second part of the Majority's discussion, which contains the Majority's decision on the "*weight*" to be attributed to the SC Decision. In fact, the Majority's discussion is only indirectly an attribution of weight, because it is centred on a process –

[41] *Id.*

the way the Majority is prepared to approach the SC Decision. As the Majority explains it, the correct approach is, first, "to undertake its own independent analysis" of the scope of the stabilisation benefit and, second, "if and to the extent that it would assist the Tribunal," to "take note of the Supreme Court's approach to the construction of the Stability Agreement and its determination."[42] According to this approach, the SC Decision plays only an *a posteriori* role in the Majority's reasoning, *i.e*. it enters into the reasoning only after the Majority's own independent analysis. If that is so, then the *a posteriori* consideration of the SC Decision can only have one of two possible effects on the Majority's overall reasoning: either (i) to *confirm* (or support) the Majority's independent analysis or (ii) to *disconfirm* (or refute or undermine) that analysis.

26. As it happens, the Majority has found that the SC Decision supports the Majority's own analysis of the scope of the stabilisation benefit. Query whether the Majority would have abandoned or modified its independent analysis if the SC Decision had gone the opposite way. As the Majority does not make this point clear (the Majority said it would look at the SC Decision only to the extent that it should assist the Tribunal), it is doubtful that the weight the Majority attributes to the SC Decision is anything other than that of *a posteriori* confirmation or support.

27. The Majority and I agree that the Tribunal should not ignore the SC Decision, even though that decision is not binding and the Tribunal is not required to follow it. But it is odd that the Majority relegates consideration of the decision to an *a posteriori* role. I would think that considering the decision *a priori*, that is, as potential evidence of the position under Peruvian law and hence as one of the normal elements of the Tribunal's comprehensive analysis of the issue, would be more consistent with the three valid reasons given by the Majority for not ignoring the decision. I also note that the Majority offers no reasons to justify its *a posteriori* approach or to explain how its analysis would have been affected if the SC Decision had not supported it.

[42] Award, ¶ 383.

28. More important, the Majority's examination of the SC Decision appears to have been limited to a summary of its conclusions and a few conclusory arguments.[43] The Award contains no critical examination of the SC Decision, in the sense of a careful analysis and evaluation of the reasons supporting the Court's conclusions. I reiterate my view that the worth of a non-binding decision of a court or tribunal does not depend on the face value of its conclusions; it depends on the cogency of the reasons that are offered to support that decision or any intermediate conclusions leading thereto. Accordingly, the weight of the SC Decision in a tribunal's *a priori* or *a posteriori* analysis of the same issues cannot be measured by its support or absence of support for the tribunal's analysis; it can only be measured by the soundness of the reasons on which that decision is based.

2. A Critical Examination of the Supreme Court Decision

29. In this subsection, I set forth my own critical analysis of the SC Decision, an analysis conducted in the course of my own examination of the scope of the stabilisation benefit. By "critical analysis" I mean an examination of the SC Decision that does not take its conclusions or reasoning at face value, but explores the reasoning in depth, assessing its validity and strength especially in the light of the legal texts on which it purports to be based and the logical validity of the deductions it contains. I offer this critical analysis as (i) an example of the type of critical analysis that I consider necessary when examining a domestic court decision, and (ii) a justification for my conclusion that the key determinations of the SC Decision are entitled to no weight.

30. As already noted, the SC Decision reached the conclusion that the stabilisation benefit provided by the 1998 Stabilisation Agreement applied exclusively to the activities directly related to the qualifying project for which the Feasibility Study had been prepared, *i.e*. the Cerro Verde Leaching Project, and hence not to those related to the Concentrator.[44] For ease of exposition, I shall refer to this conclusion as the **Exclusivity Conclusion (**or **Exclusivity Thesis**). Primarily on the basis of this conclusion, the Court dismissed the cassation appeal brought by SMCV and let stand the decision of the intermediate court of

[43] See Award, ¶¶ 582-587 and compare them with the analysis in subsection 2 below.
[44] SC Decision, ¶¶ 142, 154, 156 (**CE-153**).

appeal, which had upheld the administrative acts that imposed royalties, interest, and penalties on SMCV in respect of fiscal year 2008.[45]

31. SMCV had appealed from the decision of the intermediate court on two sets of grounds: (i) procedural grounds (that the decision had not been properly supported by reasons, in violation of due process) and (ii) substantive grounds (that the decision was wrong as a matter of law). The Supreme Court first rejected the procedural grounds for the appeal, finding that the court below had given sufficient reasons. As the Court then turned to the substantive grounds for the appeal, it is unnecessary to dwell on the Court's analysis of the procedural grounds.

32. The portion of the SC Decision devoted to the substantive grounds for the appeal can be divided, for the purposes of this discussion, into three parts: (i) a lengthy background discussion describing general concepts of mining law, such as mining concessions and beneficiation concessions, contracts-law, and stabilisation agreements of different types; (ii) a multi-part argument purporting to lead to the Exclusivity Conclusion; and (iii) a discussion, based largely on the preceding argument, addressing and dismissing SMCV's specific arguments against the substance of the decision under appeal. In what follows, I shall focus on the second part of the Court's substantive discussion, with appropriate references to statements made in the third part in elaboration of arguments first advanced in the second part.

33. The argument which the Court offers in support of its Exclusivity Conclusion consists of a series of steps, each of which contains a premise or group of premises (including intermediate conclusions then offered as premises) ending with the Exclusivity Conclusion, which the Court purports to derive from the conjunction of all those premises. I shall proceed to summarize each step of the Court's reasoning and to comment on the

[45] The intermediate court of appeal was the Superior Court of Justice of Lima, Sixth Chamber Specialized in Contentious-Administrative Matters with Sub-Specialization in Taxation and Custom Matters. See, SC Decision, p. 11 (**CE-153**). The grounds for the decision of the intermediate appellate court are summarized in the first part of the SC Decision, which rejects SMCV's argument that those grounds were insufficient to support the conclusion. See also, SC Decision, pp. 11-14 (**CE-153**). The intermediate court of appeals had reversed the decision of the 18th Court on Contentious-Administrative Matters with Sub-Specialization in Taxation and Custom Matters, which had been favourable in part to SMCV. SC Decision, p. 11 (**CE-153**).

extent to which it may serve as a valid premise for the conclusion that the Court purports to derive from the whole.

34. The first step of the Court's argument concerns the investment programme that the Mining Law and the Regulations require as a precondition to signing a stabilisation agreement. The Court describes the regulation of such investment programme in some detail and reaches the partial conclusion that the investments that contractually benefit from legal stability are treated differently from those that do not.[46] This partial conclusion is of course correct, but it says nothing about the universe of investments that benefit from legal stability.

35. The second step refers to the approval of the investment programme. The Court points out that such approval has the effect of starting the time for signing the stabilisation agreement and executing it as a public deed.[47] The Court also says that the approval is also the basis for establishing "the effects of the contract," because the stabilisation agreement is subject to resolution if the approved investment programme is not duly performed.[48] The Court goes on to elaborate on this latter point. It says that, apart from the investment programme being a requirement for signing the stabilisation agreement, the approved investment programme has a "functionality […] in the design of the whole Stabilization Agreement" because it is the basis for "a series of effects for the parties" to a stabilisation agreement.[49] It is true that the investment programme is a condition to a "series of effects for the parties to stabilisation agreement." But this statement does not address, let alone specify, the universe of investments subject to stability.

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[46] SC Decision, ¶¶ 120-122 (**CE-153**), citing: The Mining Law, Articles 78, 79, 81, 86 (**HA-1**); Regulations to Title Nine of the General Mining Law, Supreme Decree No. 024-93-EM (7 June 1993), Articles 21, 23, 24, 25, 26 (**CA-2** (**resubmitted**)).

[47] SC Decision, ¶ 123 (**CE-153**), citing: Regulations to Title Nine of the General Mining Law, Supreme Decree No. 024-93-EM (7 June 1993), Articles 27, 38 (**CA-2** (**resubmitted**)).

[48] SC Decision, ¶ 123 (**CE-153**), citing: Regulations to Title Nine of the General Mining Law, Supreme Decree No. 024-93-EM (7 June 1993), Articles 27, 38 (**CA-2** (**resubmitted**)).

[49] SC Decision, ¶ 124 (**CE-153**), citing: Regulations to Title Nine of the General Mining Law, Supreme Decree No. 024-93-EM (7 June 1993), Articles 33, 38. Notably, Article 33 of the Regulation provided, as a general rule, that the effects of the "contractual guaranty" shall commence in the fiscal year in which a sworn declaration of completion of the investment were approved.

36. The third step concerns the Feasibility Study. The Court summarizes the legal provisions that regulate (i) the information to be included in the Study, (ii) the submission, approval, and potential modifications of the Study, and (iii) the paperwork that the beneficiary of a stabilisation agreement must keep to be shown to the tax authorities.[50] The Court places special emphasis on Article 24 of the Regulations, which states, among other things, that the resolution approving the feasibility study or investment programme "*servirá de base para determinar las inversiones materia del contrato, a efecto de que se proceda a la suscripción de la minuta preparada de acuerdo al modelo aprobado de conformidad con el Artículo 86 del Texto Único Ordenado de la Ley General de Minería*" ("shall serve as a basis to determine the investments that are the matter of the contract *for the purpose of the subscription of the minute [for the stabilisation agreement] in accord with the model approved in conformity with Article 86 of the General Mining Law*.")[51] The Court's emphasis on this provision is odd, for it seems to assume that "*inversiones materia del contrato*" (investments that are the matter of the contract) refers exclusively to the qualifying investment. This is a *petitio principii*, because it assumes precisely what is to be demonstrated. In fact, the reference to "*inversiones*" (investments), notably stated in the plural, could also embrace investments that may be made in the future in the same concessions or EAUs under the contractual guarantee of stability, if that is indeed the scope of the guarantee. In fact, Article 24 of the Regulations, just as the other provisions

[50] SC Decision, ¶¶ 126-129 (**CE-153**), citing: The Mining Law, Articles 82, 83, 85; Regulations to Title Nine of the General Mining Law, Supreme Decree No. 024-93-EM (7 June 1993), Articles 18, 19, 20, 23, 24 (**CA-2** (**resubmitted**)).

[51] SC Decision, ¶ 128, (**CE-153**), citing Reglamento del Título Noveno de la Ley General de Minería, Decreto Supremo No. 024-93-EM (7 de junio de 1993), Artículo 24 (**CA-2** (**nueva presentación**)); Regulations to Title Nine of the General Mining Law, Supreme Decree No. 024-93-EM (7 June 1993), Article 24 (**CA-2** (**resubmitted**)). The Spanish original of Article 24 reads as follows: "*[l]a Dirección General de Minería deberá elevar al Despacho del Viceministro de Minas, los actuados y la Resolución Directoral por la que se aprueba el Estudio de Factibilidad o Programa de Inversión según sea el caso, la misma que servirá de base para determinar las inversiones materia del contrato, a efecto de que se proceda a la suscripción de la minuta preparada de acuerdo al modelo aprobado de conformidad con el Artículo 86 del Texto Único Ordenado de la Ley General de Minería.*" Reglamento del Título Noveno de la Ley General de Minería, Decreto Supremo No. 024-93-EM (7 de junio de 1993), Artículo 24 (**CA-2** (**nueva presentación**)).The record translation reads as follows: "[t]he Directorate General of Mining shall submit to the Office of the Vice- Minister of Mines the record and the Directorial Resolution approving the Feasibility Study or Investment Program, as the case may be, which will serve as the basis to determine the investments set out in the agreement, in order to proceed with signing the private deed prepared in accordance with the model approved pursuant to Article 86 of the Single Unified Text of the General Mining Law." Regulations to Title Nine of the General Mining Law, Supreme Decree No. 024-93-EM (7 June 1993), Article 24 (**CA-2 (resubmitted)**).

previously discussed by the Court, says nothing about the universe of investments subject to stability, and hence cannot support the Court's Exclusivity Thesis.

37. The third step continues with the Court reaching two partial conclusions, one of which reiterates the conclusion reached in the second step. The new partial conclusion is that the cited legal provisions "*califican al Estudio de Factibilidad Técnico-Económico no solo como un requisito para acceder a la suscripción del Convenio de Estabilidad Jurídica sino como un instrumento técnico de gestión que es esencial tener en cuenta para evaluar y medir el grado de inversión realizado por el titular de la actividad minera*."[52] Literally translated, the quoted statement says that the provisions it has cited "qualify [or characterize] the feasibility study not only as a requirement for the subscription of the stability agreement but as a *technical instrument of management* that must be taken into account to evaluate and measure the degree of investment made by the mining title-holder."[53] Then the Court reiterates its earlier conclusion that the value of the Feasibility Study is not exhausted with that of a requirement for the subscription of the Stabilisation Agreement because, after it is approved, it will serve as a basis for a series of obligations of the parties to that agreement.[54]

38. I note, however, that to label the Feasibility Study a "technical instrument of management" or to point out that *certain* obligations of the parties to the stability agreement revolve around the investment which is the object of the approved feasibility study adds nothing to the legal provisions of the Mining Law and the Regulations that regulate such study and determine the content of such obligations – *and none of those provisions says that stability applies only to the qualifying investment*. Up to this point, the Court has offered no valid reason in support of its Exclusivity Conclusion.

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[52] SC Decision, ¶ 130 (**CE-153**).

[53] My translation. The record translation is: "qualify the Technical/Economic Feasibility Study not only as a requirement for being able to sign a Stability Agreement, but also as a technical management instrument that is essential to consider for assessing measuring the level of investment made by the mining activity's owner." SC Decision ¶ 130 **(CE-153)**.

[54] SC Decision, ¶ 131 (**CE-153**).

39. In the fourth and last step in its argument, the Court puts forth three textual arguments, based respectively on Articles 84, 83 and 85 of the Mining Law, which purport to connect the qualifying investment with the Court's Exclusivity Thesis. These three textual arguments will be examined separately.

a. The Argument Based on Article 84 of the Mining Law

40. The first textual argument offered by the Court in the last step of its reasoning is based on Article 84 of the Mining Law, which states as follows:

> "*Los contratos a que se refiere el artículo anterior* [those concerning major qualifying projects]*, garantizarán al titular de actividad minera, los beneficios señalados en el Artículo 80 de la presente Ley, así como la facultad de ampliar la tasa anual de depreciación de las maquinarias, equipos industriales y demás activos fijos hasta el límite máximo del veinte por ciento anual como tasa global* ***de acuerdo a las características propias de cada Proyecto***."[55]
>
> Record translation: "The agreements referred to in the preceding article shall guarantee the mining activity titleholder the benefits set forth in Article 80 of this Law, as well as the right to increase the annual depreciation rate of machinery, industrial equipment and other fixed assets, up to the maximum limit of twenty percent per year as a global rate, according to the characteristics of each project."[56]

41. Article 84 of the Mining Law, quoted above in its original text and in the English translation available in the record, provides that in the case of mining companies presenting major qualifying projects, such as the one at issue in this case, the stabilisation agreements shall guarantee all of the benefits that Article 80 grants to companies presenting minor qualifying projects and, *in addition*, the right to increase the annual depreciation rate of fixed assets

[55] SC Decision, ¶ 137, (**CE-153**), citing the Mining Law, Article 84 (**HA-1**) (underlined in the original).

[56] The Mining Law, Article 84 (**HA-1**) (Underlined to match the original as quoted in the Decision.) Note that the punctuation of the translation does not correspond to that of the original; in the translation the phrase "up to the maximum limit of twenty percent per year as a global rate" is set off by commas, which are not present in the original.

up to 20%, "according to the characteristics of each project." Yet the Court asserts that Article 84 "introduces in the configuration of the benefits that shall be guaranteed to the title-holder of the mining activity as an effect of the Stability Agreement the criterion to be taken into account of the 'characteristics of each project'."[57] The clear implication of this sentence is that *in the case of the major contracts referred to in Article 84*, all the benefits specified in Article 80, including that of legal stability, depend on the characteristics of each (qualifying) project. This implication is confirmed by a later passage of the SC Decision. There the Court says that Article 84 "provides that the Stability Agreements guarantee to the mining-activity titleholder the benefits set forth in Article 80 of that law 'according to the characteristics of each project'."[58] The Court continues: "That is to say, the characteristics of each [investment] project contemplated by the feasibility study are what would determine the enjoyment of the benefits set forth in Article 80 of the TUO of the General Mining Law."[59]

42. Article 84, however, does not say any such thing. Article 84 consists of one sentence with a verb and two direct objects, clearly separated by the phrase *"así como"* (as well). The first direct object (the benefits of Article 80) is distinct from the second direct object (the right to an increase in the annual depreciation rate). The phrase "according to the characteristics of each project," which is placed at the end of the sentence, plainly modifies the second direct object, not the first. The Court's argument relies on combining the first direct object with the qualifying phrase applied to the second, a step that is inconsistent with a plain, grammatical reading of the Spanish text of Article 84 and amounts to a highly questionable manoeuvre in a court's reasoning.[60]

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[57] SC Decision, ¶ 138 (**CE-153**).

[58] SC Decision, ¶ 156 (**CE-153**):"*[E]l artículo 84o. del TUO de la Ley General de Minería […] es el que dispone que los Convenios de Estabilidad garantizan al titular de la actividad minera los beneficios señalados en el artículo 80o. de esa ley, 'de acuerdo a las características propias de cada Proyecto'*."

[59] SC Decision, ¶ 156 (**CE-153**): "*Es decir, son las características propias de cada proyecto [de inversión] que contempla el Estudio de Factibilidad lo que determinaría el goce de los beneficios señalados en el artículo 80o. del TUO de la ley General de Minería."*

[60] The Court's argument on Article 84 would also lead to the anomalous (if not absurd) result that mining companies making major qualifying investments would be treated worse than companies making minor qualifying investments. Following the logic of the Court's argument, the benefits conferred by Article 80 to companies making minor

43. Accordingly, Article 84 affords no basis for arguing that the benefits of Article 80, including legal stability, are "configured" depending on the characteristics of the qualifying project or that those characteristics determine the enjoyment of those benefits. In sum, the Court's argument based on Article 84 is textually baseless and hence cannot support the Exclusivity Thesis.

b. The Argument Based on Article 83 of the Mining Law

44. The Court's second textual argument is based on the first and fourth paragraphs of Article 83 of the Mining Law. The first paragraph refers to "*programas de inversión*" (investment programmes) in the plural, from which the Court infers that a mining title-holder may present multiple investment programmes.[61] The fourth paragraph states: "*El efecto del beneficio contractual recaerá exclusivamente en las actividades de la empresa minera en favor de la cual se efectúe la inversión*,"[62] which may be literally translated as "The effect of the contractual benefit shall fall exclusively on the activities of the mining enterprise in whose [the enterprise's] favour the investment shall [or should] be made."[63] Based on these two paragraphs, the Court argues that, because it is possible to present multiple investment programs, the fourth paragraph "*alude únicamente a las actividades que tienen relación directa con la inversión efectuada*" ("solely refers to the activities that have a direct relationship with the investment made").[64] As discussed below, this argument is a *non sequitur*.

45. As an initial observation, there is a small but important misquotation in the Court's transcription of the fourth paragraph of Article 83. The Court's quotation says: "*a favor*

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investments, including legal stability, would not be "configured" by the qualifying investment, as Article 80 contains no reference to the characteristics of the qualifying project.

[61] SC Decision, ¶ 139 (**CE-153**). This inference by the Court is questionable; as the first paragraph refers to mining titleholders in the plural, it is not surprising that it refers also in the plural to the investment projects they may present. Nevertheless, the Court appears to accept that a given titleholder may present multiple investment projects, even after the approval of the qualifying project and the execution of the respective stability agreement. See *infra*, ¶ 65.

[62] The Mining Law, Article 83, ¶ 4 (**HA-1**).

[63] My translation. The Mining Law, Article 83, ¶ 4 (**HA-1**). The record translation is: "The effect of the contractual benefit shall apply exclusively to the activities of the mining company in whose favor the investment is made." This translation fails to convey the precise reference of "whose" (which the Spanish text makes clear is the enterprise) and the difference in meaning between the Spanish subjunctive "*se efectúe*" and the English indicative "is made." *Id.*

[64] SC Decision, ¶ 139 (**CE-153**).

de la cual se efectúa la inversión" (in favour of which the investment is made or, better, is being made), instead of "*en favor de la cual se efectúe la inversión*" (in favour of which the investment shall or should be made). In the actual text of the law, the verb "*efectuar*" is conjugated in the subjunctive, which does not refer to an investment currently being made (as does the present tense in the Court's misquotation) but to an investment to be made or that may be made in the future.

46. Second, and more important, the Court concludes that the fourth paragraph refers solely to the activities of the mining enterprise that are "directly related to the investment made," by which the Court appears to mean the investment in the qualifying project. This conclusion, however, is a *non sequitur*, because it *does not follow from the actual text of the provision*. Paragraph four refers to the "contractual benefit," which does imply the existence of a stabilisation agreement concluded after the approval of a qualifying project. But from these facts it cannot be inferred that the contractual benefit applies solely to the activities directly related to the qualifying project, as the Court purports to do. What paragraph four says is that the benefits at issue, including legal stability, fall exclusively on the "activities of the mining enterprise" in whose (the enterprise's) favour the qualifying investment shall be made. Literally, this reference includes all the activities of that particular enterprise, not just those directly related to the qualifying investment, which means that it excludes activities carried out by affiliates or other enterprises.[65] Even before considering the implications of the generic reference to "activities of the mining enterprise," in the plural, and the absence of any reference to "activities directly related to the qualifying investment," it is manifest that the Court's conclusion cannot be inferred from the actual text of this provision.

47. In a later passage, the Court offers a somewhat different textual argument for the same conclusion. Based on the meaning of "*exclusivamente*" (exclusively), which is not in doubt, the Court says that in Article 83 the legislator provided that the contractual benefit

[65] This provision was clarified by Article 22 of the Regulations, which provided that the contractual guaranties "shall benefit the mining activity titleholder exclusively for the investments that shall [should] make in the concessions or Economic-Administrative Units." Reglamento del Título Noveno de la Ley General de Minería, Decreto Supremo No. 024-93-EM (7 de junio de 1993), Artículo 22 (**CA-2** (**nueva presentación**)) (my translation). See discussion *infra*, ¶¶ 69-72.

would fall exclusively on "'the activities of the mining enterprise in favour of which the investment shall be made' and not so for any of the activities of the mining enterprise."[66] The Court goes on to conclude that "the reach of the contractual benefit extends only to the *activities* related to the investment as a function of what is provided in the Feasibility Study."[67] Again, this is not what paragraph four of Article 83 says. In the original Spanish text, the phrase "*en favor de la cual se efectúe la inversión*" ("in favour of which the investment shall be made") refers to the *enterprise* ("*la cual*"), not to to the *activities* of the enterprise (which would have required a different article and pronoun: "*las cuales*"). Therefore, what the fourth paragraph of Article 83 says is that the benefits shall fall exclusively on the activities of the mining enterprise – as long as this is the enterprise in whose favour the approved investment shall be made. The Court's argument is based on an ungrammatical reading of paragraph four, in which the reference of the qualifying phrase ("in favour of which the investment shall be made") is inexplicably switched from "enterprise" to "activities." This is not a valid textual argument and hence cannot support the Exclusivity Thesis.

c. The Argument Based on Article 85 of the Mining Law

48. The Court's third textual argument is purportedly based on Article 85 of the Mining Law. The Court transcribes this provision with some passages underlined, as follows:

> "*Los titulares de la actividad minera, comprendidos en los alcances de los Artículos 82 y 83 de la presente Ley, para gozar de los beneficios garantizados, presentarán un estudio de factibilidad técnico-económico, que tendrá carácter de declaración jurada y deberá ser aprobado por la Dirección General de Minería en un plazo máximo de noventa días naturales; transcurridos estos y de no haber pronunciamiento por dicha Dirección, se dará automáticamente por aprobado en este último día, que*

[66] SC Decision, ¶ 167 (**CE-153**): "*Es el propio legislador quien previno que el efecto del beneficio contractual recaería ['únicamente' o 'excluyendo a cualquier otra'] a 'las actividades de la empresa minera a favor de la cual se efectúe la inversión' y no así para cualquiera de las actividades de la empresa minera.*"

[67] SC Decision, ¶ 167 (**CE-153**): "*En definitiva, los alcances del beneficio contractual se extienden 'únicamente' a aquellas actividades relacionadas con la inversión en función de lo previsto por el Estudio de Factibilidad.*"

> *será el que rija para los efectos de fijar la fecha de la estabilidad del régimen tributario y de las garantías que fueron aplicables a partir de la indicada fecha*."[68]
>
> Literal translation: "The mining activity titleholders that fall within the scope of Articles 82 and 83 of the present Law, to enjoy the guaranteed benefits, shall submit a study of technical-economic feasibility, which shall have the nature of a sworn statement and must be approved by the Directorate-General of Mining within a maximum term of ninety calendar days; that term elapse without pronouncement by said Directorate, it shall automatically be deemed approved on this last day, which shall be the one that applies for the effects of fixing the date of the stability of the tax regime and of the guaranties that were applicable as from the indicated date."[69]

49. Although the Court quotes Article 85 plainly in support of its Exclusivity Thesis, it does not comment on the effects of this provision other than by underlining those three passages. The underlined passages, strung together, may suggest to a hasty or inattentive reader that the feasibility study (referred to in the first underlined passage) after approval (second underlined passage) "applies for the effects of fixing […] the stability of the tax regime and the [applicable] guaranties" (third underlined passage). But Article 85 says nothing of the kind. The last underlined passage refers only to the *date* as of which the legal regime is stabilized, and the other guaranties start to apply. Therefore, the text of Article 85, including the underlined passages, does not have any bearing on the question of the universe of investments subject to legal stability.

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[68] SC Decision, ¶ 141 (**CE-153**), citing the Mining Law, Article 85 (**HA-1**) (underlining by the Court).

[69] My literal translation with underlined passages corresponding to those underlined by the Court. SC Decision, ¶ 141 (**CE-153**), the record translation is: "[t]o enjoy the guaranteed benefits, mining activity titleholders that fall within the scope of Articles 82 and 83 of this Law shall submit a technical-economic feasibility study, which shall have the nature of a sworn statement and must be approved by the Directorate General of Mining within a maximum term of ninety calendar days. If the Directorate General of Mining does not issue any statement, it shall automatically be approved on this last day, which will be the one that applies for purposes of fixing the date of the tax regime stability and the guarantees that were applicable as of the indicated date." Mining Law, Article 85 (**HA-1**). The record translation divides the text into two sentences, making even clearer that the second underlined passage is not related to the earlier underlined passages.

50. The Court concludes its argument with the following statement:

> "*De este modo, la presentación del aludido 'Estudio de Factibilidad Técnico-Económico' no constituye simplemente un requisito para la celebración del Convenio de Estabilidad Jurídica sino un instrumento técnico de gestión que es esencial y determinante para, además, establecer y fijar las garantías a aplicarse por la inversión en su concesión, esto es, para determinar los alcances del Convenio de Estabilidad.*"[70]
>
> Literal translation: "Thus, the submission of the aforesaid 'Technical-Economic Feasibility Study' does not constitute simply a requirement for the execution of the Legal Stability Agreement but a technical instrument of management that is essential and determinative to establish and set, in addition, the guaranties to be applied for the investment in its concession, that is, to determine the scope of the Stability Agreement."[71]

51. In the quoted passage, the Court reaches the conclusion that the feasibility study determines the scope of the stability agreement, which means that it determines the scope of the stability by limiting it to the qualifying investment – what I have called the Exclusivity Conclusion. This conclusion is purportedly derived from the premises and arguments discussed above ("*de este modo*") but, for the reasons already given, those premises and arguments are not sufficient, individually or in conjunction, to support the Court's conclusion. The Exclusivity Conclusion simply does not follow from the Court's reasoning.

52. As the Court's conclusion does not derive from a valid argument, it is entitled to no weight as evidence of the position of Peruvian law on the scope of the stabilisation benefit. Let us now turn to the way the Majority's analyses the same issue.

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[70] SC Decision, ¶ 142 (**CE-153**).

[71] My literal translation. The record translation is: "[t]hus, submitting said 'Technical/Economic Feasibility Study' does not merely constitute a requirement for execution of the Stability Agreement, but rather a technical management instrument that is essential and a determining factor for establishing and setting guarantees to be applied for the investment in its concession, i.e., to determine the scope of the Stability Agreement." SC Decision, ¶ 142 (**CE-153**),

IV. THE SCOPE OF THE STABILITY BENEFIT

A. INTRODUCTION

53. The Majority takes the view that the stability benefit applies only to the activities related to the qualifying project. It reaches this conclusion on the basis of a lengthy, detailed discussion of the provisions of the Mining Law, the Regulations, and the Stabilisation Agreement, supplemented by a second lengthy discussion on the background of the enactment of the Mining Law, the conduct of the parties to the Stabilisation Agreement, and statements by government bodies. In this Part IV, I examine critically the reasons offered by the Majority in support of its conclusions. I do not propose to do so at a length comparable to that of the Majority's discussion; I intend to focus on the main provisions of the three named instruments, the key points of disagreement, and the main flaws I perceive in the Majority's reasoning.

54. My analysis follows, in a more summary fashion, the Majority's analysis. I discuss the Majority's reasoning on (i) the relevant provisions of the Mining Law, the Regulations, and the Stabilisation Agreement and, more briefly, (ii) other non-textual elements that the Majority takes into account. The discussion shows that the Majority relies for its conclusions on two principal lines of argument. The first is that the key provisions of the three examined instruments are unclear and/or ambiguous (henceforth, the **Unclarity Argument**) and therefore are not useful to ascertain the scope of the stability benefit. In the face of such perceived lack of clarity, the Majority advances its second argument: that since the qualifying project and the related Feasibility Study play a *central role* in the legislative and regulatory scheme, the stability must be limited to the qualifying project (henceforth, the **Centrality Argument**). As I shall endeavour to demonstrate, (i) the Unclarity Argument is misapplied to the key relevant provisions of the legislative framework, because the Majority did not pay sufficient attention to what those provisions actually say, as distinguished from the competing constructions advocated by the Parties and (ii) the Centrality Argument fails in any case, because it involves a logical fallacy.

B. THE MAJORITY'S ANALYSIS

1. The Mining Law

55. The Majority analyses certain key articles of the Mining Law, reaching the overall conclusion that they are unclear and, in the case of the most relevant one (Article 83), that it is ambiguous.[72] As we shall see, this conclusion is the basis for the Majority's decision to move on from the legal texts and to rely instead on the Centrality Argument.[73]

56. It is true, of course, that the Mining Law, the Regulations, the Stabilisation Agreement and many of the other documents discussed by the Majority are not as clear and definite as would be ideal. Legal instruments such as those at issue in this case are usually drafted by politicians or civil servants, who may or may not have legal training and who rarely have training as grammarians or logicians. As perfect clarity can seldom be expected in such circumstances, when it comes to ascertaining the meaning of a given legal text, a tribunal should endeavour to do the best it can, in good faith, in the light of its knowledge of the language in which the text was written, the grammar of that language, the rules of logic, and any applicable rules of construction.

57. The Majority starts from Article 82 of the Mining Law. This article states in general that the qualifying project for a 15-year stabilisation contract must be a new project with an initial capacity of 5,000 MT/day or an expansion of an existing project aimed at achieving a capacity of not less than 5,000 MT/day. I agree with the Majority that "the purpose of Article 82 is to identify first the nature of the investment to be made to obtain a 15-year stability period and second the beneficiary of the stability guarantee" and that this article "does not identify the scope of such stability."[74] In light of this conclusion, any discussion about the meaning of the first sentence of Article 82 is of little consequence.[75]

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[72] Award, ¶¶ 416, 454.

[73] Award, ¶ 454.

[74] Award, ¶ 423. I also agree with the Majority that, in light of the Mining Law as a whole, the omission of "concessions" in Article 82 is not significant.

[75] The Mining Law, Article 82 (**HA-1**) , *in limine*: "[i]n order to promote investment and facilitate the financing of mining projects with an initial capacity of not less than 5,000 MT/day or expansions intended to reach a capacity of

58. Article 83 sets forth in more detail the value of each alternative form of qualifying project. The relevant provision is the fourth paragraph, which states: "*El efecto del beneficio contractual recaerá exclusivamente en las actividades de la empresa minera en favor de la cual se efectúe la inversión*" ("The effect of the contractual benefit shall fall exclusively on the activities of the mining enterprise in whose favour the investment shall [should] be made").[76] This wording is not an inadvertent error; Article 79 includes an identical provision with regard to the effects of 10-year stabilisation contracts.[77] Nor is this wording "perplexing," as the Majority calls it. The Majority correctly points out that "the word 'exclusively' applies to the word 'activities' so that the beneficiary of the stability offered is the mining company that makes the investment and that the stability applies (exclusively) to all the activities of that mining company, the activities being the mining activities as defined in the Mining Law."[78] Yet, the Majority finds it "perplexing" that the mining enterprise be identified as that in whose favour the investment shall (or should) be made, because the investment is made *by* the mining company.[79] The Majority adds, *without*

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not less than 5,000 MT/day referring to one or more Economic- Administrative Units, mining activity titleholders shall enjoy tax stability that shall be guaranteed through an agreement entered into with the State for a term of fifteen years, starting from the fiscal year in which the execution of the investment or expansion, as the case may be, is accredited. For the purposes of the agreement referred to in the preceding paragraph, the term Economic-Administrative Unit means the set of mining concessions located within the limits set forth in Article 44 of this Law, the processing plants, and the other assets that constitute a single production unit due to sharing supply, administration, and services, which in each case the Directorate General of Mining will qualify." The Majority points out that a 15-year stability guarantee would facilitate the financing of the qualifying project. This is correct, but by the same token the guarantee would also facilitate the financing of subsequent projects in the same concession or EAU, as one purpose of the stability benefit is "to promote investment." Article 82 also states that the stability period is counted from the fiscal year in which the (qualifying) investment or the expansion, as the case may be, is certified. The Majority argues that this provision "emphasise[s] the importance of the investment to the proper functioning of the stability programme," a statement that offers the first hint of what would become the Centrality Argument.

[76] The Mining Law, Article 83 ¶ 4 (**HA-1**). The literal translation that follows is mine. The record translation is "[t]he effect of the contractual benefit shall apply exclusively to the activities of the mining company in whose favor the investment is made." The main difference between the two translations is that mine is faithful to the subjunctive mood used in the Spanish text "*se efectúe*." This verb refers not to an investment that is made or being made, but to one that may be, should be, or is to be made in the future.

[77] The Mining Law, Article 79 ¶ 3 (**HA-1**): "Mining activity titleholders who submit investment programs for the equivalent in local currency of US$2,000,000.00 shall be entitled to enter into the agreements referred to in the preceding article. The effect of the contractual benefit shall apply exclusively to the activities of the mining company in whose favor the investment is made. Mining activity titleholders who enter into these agreements may, at their election, advance the stabilized contractual regime to the investment stage for a maximum of three consecutive fiscal years, the term of which shall be deducted from the one guaranteed by the agreement."

[78] Award, ¶ 433.

[79] Award, ¶ 433.

explanation, that the quoted phrase does not support the Claimant's interpretation. In the end, the Majority declares Article 83 ambiguous and moves on without ascertaining the effects of the only provision of the Mining Law that directly addresses the scope of the stabilisation benefit.

59. In fact, the Majority's perplexity is not justified. The fundamental idea conveyed by the text of the fourth paragraph of Article 83 is that the "contractual benefit" falls on or applies exclusively to the "activities" (all the activities, not some of them) of the mining enterprise. Which mining enterprise? The text expressly identifies it, but even if it had failed to do so, it could refer only to the mining enterprise that is a party to the stabilisation agreement, because it is only *that* mining enterprise that can receive the "contractual benefit" referred to in the text. But what to make of the express reference to the mining enterprise "in favour of whom the investment shall [should] be made."? "The investment" is a generic term that is not necessarily limited to the qualifying investment, and no such qualification appears anywhere in the text. On the contrary, the subjunctive mood of "*se efectúe*" (shall/should be made) indicates an investment that may be carried out in the future, as opposed to a single qualifying investment that is being made at present, as the indicative mood of the verb in the record translation might suggest. Finally, while it is true that in direct speech we would normally say that the mining enterprise shall (should) carry out the investment, the drafters chose to use a passive-reflexive construction ("*se efectúe*"), exceedingly common in Spanish, which does not say who performs the action but for whom or by whom the action is performed. There is nothing strange or perplexing in any of this.

60. On the contrary, there is no basis for the Respondent's argument, which the Majority says "can also be understood," that "the stability applies only (exclusively) to those activities that are funded by (which benefit from) the investment."[80] The argument can be understood, in the sense that it is not gobbledygook, *but it has no merit, because that is not what the fourth paragraph of Article 83 says*. The Majority appears to have given equal

[80] Award, ¶ 433.

weight to this non-argument, because it concludes that Article 83 is ambiguous and moves on.

61. The Majority says that Article 84 is of no help in ascertaining the scope of the stability benefit.[81] I agree with that conclusion but disagree with the Majority's unsupported assertion that the last sentence tends, though not clearly, to support the Respondent's position.[82] That sentence confers on the titleholder who has entered into a 15-year stabilisation agreement the additional benefit of increasing the annual rate of depreciation for certain fixed assets up to a certain limit "according to the characteristics of each project."[83] The Majority's unsupported observation that this phrase tends to support the Respondent's position (though not clearly) is based on the tacit assumption, devoid of any textual basis or other explanation, that "each project" means "each qualifying project." On the contrary, "each project" is not limited to the qualifying project; it may refer also to any subsequent project. In spite of its unsupported and unexplained observation, the Majority passes over this provision on grounds of lack of clarity.

62. The Majority also notes that Article 84 allows the mining title-holder to request that the stabilisation agreement authorise it to keep its accounts in USD or the currency of the investment, subject to certain specified requirements.[84] Although this provision has nothing to do with the scope of the stability benefit, the Majority uses it as an opportunity to spell out its Centrality Argument: "This again highlights the centrality of the investment described in the technical-economic feasibility study to the stability programme and again tends to support a construction that stability is only given to the investment and not to the concession." This argument is addressed in detail in Part IV.C of this Partial Dissent.[85]

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[81] Award, ¶ 437.

[82] Award, ¶ 437.

[83] The Mining Law, Article 84 (**HA-1**): "[t]he agreements referred to in the preceding article shall guarantee the mining activity titleholder the benefits set forth in Article 80 of this Law, as well as the right to increase the annual depreciation rate of machinery, industrial equipment and other fixed assets, up to the maximum limit of twenty percent per year as a global rate, according to the characteristics of each project."

[84] Award, ¶ 438.

[85] See *infra*, ¶¶ 82 *et seq*.

63. The Majority's discussion of the remaining provisions of the Mining Law follows the same pattern. None of those provisions is found to be of assistance in determining the scope of the stability benefit, although in a few places the Majority refers to the content of the provisions as contributing to the premise of the Centrality Argument.[86] I agree with the Majority that those remaining provisions of the Mining Law do not address the scope of the stability benefit and, putting aside the Centrality Argument (to be addressed later), they are irrelevant to the issue at hand.

64. In concluding its examination of the Mining Law, the Majority states that "the feasibility study must have a purpose greater than that of merely a gateway to stability being guaranteed for the concession."[87] This is so, the Majority says, "because of (i) the lack of clarity in Chapter Four of the Mining Law as to the scope of the stability granted and (ii) the significant emphasis in the Mining Law (and Mining Regulations) regarding the content of the feasibility study and the role it plays in the operation of the stability programme."[88] On the basis of these two arguments, which I have called the Unclarity Argument and the Centrality Argument, the Majority concludes "that the stability benefit applies exclusively to the investment described in the feasibility study."[89] Before analysing those arguments and the conclusion, let us turn to the Majority's discussion of the Mining Regulations.

2. The Mining Regulations

65. The Majority correctly observes that, as regards the issue being discussed, the key provisions of the Mining Regulations are Articles 2 and 22. Yet, the Majority concludes that neither of these provisions is clear enough to establish, by itself, the scope of the stability benefit. As explained below, this conclusion reveals an inadequate understanding of what the original texts say.

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[86] For example, the Majority remarks that the feasibility study for the qualifying project plays a central role in the application for the stability benefit, Award, ¶ 441; that the provisions of Articles 78 and 79 "evidence the importance of the investment programme with regard to the Article 78 stability process," Award, ¶ 452; and that Article 81 makes clear that "the investment programme is a precondition for obtaining stability." Award, ¶ 453.

[87] Award, ¶ 454.

[88] *Id.*

[89] *Id.*

66. Article 2 consists of two parts. The first part states that the provisions of Title Nine of the Mining Law (concerning promotion of investments) apply as of right to all mining activity titleholders, "defined as the natural or legal persons that perform mining activities in a concession or in concessions grouped in an Economic Administrative Unit, as titleholders or assignees" as long as they fall within certain alternative categories, one of which is to enter into a stabilisation agreement under Article 78 or 82 of the Mining Law.[90] I agree with the Majority that this part of Article 2, by itself, does not provide that the stability benefit extends to all the activities carried out by the mining company in the relevant concession or EAU. The second part, however, is more on point.

67. The second part of Article 2 provides as follows:

> "*Cuando la persona natural o jurídica sea titular de varias concesiones o Unidades Económico-Administrativas, la calificación sólo surtirá efecto para aquellas concesiones o unidades que estén sustentadas por las declaraciones o por el contrato a que se refiere el presente artículo.*"[91]
>
> Literal translation: "When the natural or legal person is [should be] titleholder of various concessions or EAUs, the qualification [for the contractual benefit] shall only take effect for those concessions or units that are supported by the declarations or the contract referred to in the present article."[92]

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[90] Regulations to Title Nine of the General Mining Law, Supreme Decree No. 024-93-EM (7 June 1993), Article 2, first part, introductory paragraph and subparagraph d) (**CA-2** (**resubmitted**)): "[t]he provisions contained in Title Nine of the Single Unified Text shall apply as of right to all mining activity titleholders, defined as the natural or legal persons that perform mining activities in a concession or in concessions grouped in an Economic Administrative Unit, as titleholders or assignees, provided that they: d) [e]nter into a stability agreement under Articles 78 and 82 of the Single Unified Text, as from the date of approval of the corresponding Investment Program." Paragraph d) ends with the phrase "as from the date of approval of the corresponding Investment Program," a phrase amended in 2019 to add "or of the respective Technical-Economic Feasibility Study."

[91] Reglamento del Título Noveno de la Ley General de Minería, Decreto Supremo No. 024-93-EM (7 de junio de 1993), Artículo 2, *in fine* (**CA-2** (**nueva presentación**)).

[92] My literal translation. The record translation is: "When the natural or legal person is the titleholder of several concessions or Economic-Administrative Units, the qualification will only take effect for those concessions or units that are supported by the declarations or by the agreement referred to in this Article." There is no major difference between my translation and that in the record, but mine points out that the first verb is in the subjunctive in the original

68. This provision says, in effect, that the provisions of Title Nine of the Mining Law (including the stability benefit) apply only in respect of the concessions or EAUs referred to in the respective declaration or stabilisation agreement – not in respect of other concessions or EAUs that the same mining company might have. So far, I believe that the Majority and I are in agreement.[93] But the Majority overlooks an important implication: if the stability benefit applies *in respect of those specified concessions or EAUs*, it applies in respect of the approved investments that may take place in them within the stability period. The same implication is reinforced by what the provision does *not* say. It does not say that the stability benefit applies only in respect of the qualifying project or that it does not apply in respect of other projects that may be built in the same concession or EAU. If the stability benefit had been meant to apply only in respect of the qualifying project, the second part of Article 2 could have said so, *instead of uselessly excluding other concessions or EAUs from the reach of the benefit*. Such an exclusion would have been redundant, because it is beyond question that the qualifying project would have to be built in the designated concession or EAU, not in any other. I conclude, then, that the second part of Article 2 does suggest that the stability benefit applies to all the activities that may be carried out in the designated concession or EAU, not just those of the qualifying project.

69. Article 22 of the Regulations directly addresses the scope of the contractual benefits. The first two sentences read as follows:

> "*Las garantías contractuales, beneficiarán al titular de la actividad minera exclusivamente por las inversiones que realice en las concesiones o Unidades Económico-Administrativas.*
>
> *Para determinar los resultados de sus operaciones el titular de actividad minera que tuviera otras concesiones o Unidades Económico-*

and that "qualification" refers to the qualification for the contractual benefit. Regulations to Title Nine of the General Mining Law, Supreme Decree No. 024-93-EM (7 June 1993), Article 2, *in fine* (**CA-2** (**resubmitted**))

[93] See Award, ¶ 460.

> *Administrativas deberá llevar cuentas independientes y reflejarlas en resultados separados*."[94]
>
> Literal translation: "The contractual guarantees shall benefit the mining activity titleholder exclusively for the investments that it shall [should] make in the concessions or EAUs.
>
> To determine the results of its operations, the mining activity titleholder that should have other concessions or EAUs shall keep independent accounts and reflect them [the accounts] in separate results [earning statements]."[95]

70. The Majority finds that Article 22 is not clear, and that on a textual analysis it can support either Party's position.[96] Yet shortly afterwards, citing the "context" provided by Article 24, the Majority opts for construing Article 22 as limiting stability "only […] to the investments described in the investment programme or feasibility study."[97] Let us analyse in detail the text that the Majority finds unclear.

71. The first sentence of Article 22 says that "[t]he contractual guarantees shall benefit the *mining activity titleholder exclusively* for the *investments* that it *shall [should] make* in the *concessions or EAUs*." The italicized elements of the sentence should be analysed separately.

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[94] Reglamento del Título Noveno de la Ley General de Minería, Decreto Supremo No. 024-93-EM (7 de junio de 1993), Artículo 22 (**CA-2** (**nueva presentación**)).Regulations to Title Nine of the General Mining Law, Supreme Decree No. 024-93-EM (7 June 1993), Article 22, last part (**CA-2** (**resubmitted**)).

[95] My literal translation. The record translation is: "[t]he contractual guarantees shall benefit the mining activity titleholder exclusively for the investments that it makes in the concessions or Economic-Administrative Units. To determine the results of its operations, a mining activity titleholder that has other concessions or Economic-Administrative Units shall keep independent accounts and reflect them in separate earnings statements." Regulations to Title Nine of the General Mining Law, Supreme Decree No. 024-93-EM (7 June 1993), Article 22 (**CA-2** (**resubmitted**)). The main difference between the two translations is that mine uses the best way to render the Spanish subjunctive mood into modern English (shall, should), instead of using the indicative mood, which fails to convey the peculiar indeterminacy of the subjunctive mood.

[96] Award, ¶ 463.

[97] *Id.*

a. First, the sentence refers to "the mining activity titleholder," in singular, *not* to mining activity titleholders, in plural. There is no basis whatsoever for the Majority's speculation that Article 22 could refer to mining titleholders generally and to the investment of each one separately.[98] On the contrary, the actual text leaves no possible doubt that it is referring to *each* mining activity titleholder (singular) and to its investments (plural) in its concessions or EAUs.

b. Second, the adverb "exclusively" is placed *before* the complement "for the investments it shall [should] make in the concessions or EAUs." In a construction like this one, the placement of "exclusively" normally indicates that it modifies what follows, not what preceded it. Consequently, on a normal reading of the sentence, "exclusively" means that the benefits apply exclusively to the investments potentially to be made in the titleholder's concessions or EAUs, as distinguished from investments elsewhere. The Majority speculates that "exclusively" could also refer to the mining activity titleholder,[99] but such a construction, apart from being unnatural, would leave the adverb without much of a useful effect, since there is no question that the contractual benefit applies to the titleholder (the party to the contract) for the investments potentially to be made in its own concessions or EAUs.

c. Third, the sentence uses the word "investments," in plural; it does not use "investment" and much less "qualifying investment." Therefore, this word "investments" refers to a plurality of investments potentially to be made in the titleholders' concessions or EAUs. As noted, the Majority's speculations to the contrary have no basis.[100]

d. Fourth, the verb "*realice*" is in the subjunctive mood, which means that it does not refer to investments already made or being made, but to a plurality of investments

[98] Award, ¶ 465.

[99] Award, ¶ 464.

[100] See Award, ¶ 465. It is to be noted that the Majority's various "possible constructions" are aimed at explaining away the use of the plural "investments," and none of them contemplates the possibility that the stability benefit might cover potential multiple investments in the concessions or EAUs.

that are to be made, or may be made, or shall or should be made in the future, all of these being imperfect renditions in English of the peculiar indefiniteness of the Spanish subjunctive mood, not dissimilar to the old English subjunctive.

e. Fifth, that the sentence refers to "concessions or EAUs" does not point to a plurality of titleholders, as the Majority speculates,[101] because nothing prevents a single titleholder from having more than one concession or more than one EAU.

f. In summary, this provision was obviously drafted to provide a legal solution to a class of cases, *i.e.* cases in which a single mining titleholder has one or more concessions or EAUs and has obtained a contractual stability benefit referring to one or more of such concessions or EAUs. The solution provided is that such benefit applies exclusively to the investments (plural) that such titleholder is potentially to make in the concessions of EAUs referred to in the stabilisation agreement.

72. The second sentence of Article 22 says that if a mining activity titleholder has other concessions or EAUs (*i.e.* other than those referred to in the stabilisation agreement), in order to determine the results of its operations it must keep independent accounts and reflect them in separate earning statements. The Majority takes the view that this provision offers no guidance on the question of the scope of the stability benefit.[102] As in the case of the second part of Article 2, however, the Majority overlooks that the second sentence of Article 22 carries a clear implication on the scope of that benefit, not only by what it says but also by what it does not say. To facilitate the explanation, let us distinguish (i) the concessions and EAUs specified in the stabilisation contract (the **Contract Concessions/EAUs**) from (ii) any other concessions or EAUs that the mining titleholder might have. If the benefit had been meant to apply only to the activities related to the qualifying project (as the Majority concludes), the second sentence of Article 22 would have required independent accounts for any and all activities other than those of the

[101] Award, ¶ 466.
[102] Award, ¶ 469.

qualifying project. By requiring independent accounts for *other* concessions and EAUs, and saying nothing about activities (not related to the qualifying project) *within* the Contract Concessions/AEUs, the provision suggests that the effects of the stability extend to all activities performed in the Contract Concessions/AEUs, whether or not they relate to the qualifying project.

73. The remaining provisions of the Mining Regulations are of little or no relevance to the question of the scope of the stability benefit. The Majority discusses them in detail, often conceding their irrelevance, but attempts to draw support from two aspects of some of them: (i) offhand terms or phrases appearing in certain articles, and (ii) the subject matter of other articles as proof of the centrality of the feasibility study and the qualifying project in the regulatory scheme.[103] Here I shall comment only on the most elaborate of the Majority's arguments based on offhand references in provisions otherwise unrelated to the scope of the stability benefit; the Centrality Argument will be addressed later.

74. It may be recalled that Article 84 of the Mining Law granted the additional benefit of increasing the annual depreciation rate of fixed assets up to a certain limit "according to the characteristics of each project." Article 17 of the Regulations charges the Directorate-General of Mining (DGM) with fixing the maximum annual depreciation rate at the time of approving the feasibility study "of the project."[104] The Majority argues that this is a reference to the feasibility study for the qualifying project.[105] But that is not necessarily so. If the stability benefit applies to later projects, most likely they will require their own feasibility studies and would provide the DGM with a concomitant opportunity to approve the maximum annual depreciation rate for the fixed assets of those later projects. The Majority's argument is, in fact, a *petitio principii*.

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[103] See Award, ¶¶ 481, 484, 489, 491.

[104] Reglamento del Título Noveno de la Ley General de Minería, Decreto Supremo No. 024-93-EM (7 de junio de 1993), Artículo 17, segundo párrafo (**CA-2** (**nueva presentación**)) (my translation); Regulations to Title Nine of the General Mining Law, Supreme Decree No. 024-93-EM (7 June 1993), Article 17, second paragraph (**CA-2** (**resubmitted**)) ("for the project").

[105] Award, ¶ 479.

75. Article 20 provides that the feasibility study may be modified one or more times in the course of being elaborated, as long as its final object is not affected. The Majority finds difficult to understand the purpose of this provision if the entire concession is stabilised.[106] I fail to see the difficulty. The characteristics of the qualifying project may vary during the elaboration of the feasibility study, depending on market conditions, available financing, etc., and it stands to reason that the feasibility study may be modified accordingly until it is finally approved. It also stands to reason that the final objective of the feasibility study should not change, as the regulator has already examined and approved the earlier version(s) of the study. It is true that no provision authorises an amendment to the feasibility study to incorporate a new project, but that is hardly relevant. A new project, conceived perhaps many years later, need not require an amendment of the original feasibility study; it may require a new feasibility study and a new set of approvals. Article 20 has nothing to do with the scope of the stability benefit.

76. Article 24 specifies the procedure culminating in the execution of the stabilisation agreement by public deed. The article refers to the DGM resolution approving the feasibility study or investment programme, which resolution "serves as a basis for determining the investments [that are] subject matter of the contract."[107] The Majority argues that this phrase tends to support the Respondent's position, and relies on it to tilt in the same direction the construction of Article 22.[108] In fact, this offhand reference in an unrelated provision does not purport to control, nor can it control, the scope of the stability benefit. I have already noted that (i) there is no textual basis for concluding that the reference in Article 24 to "investments" (plural) is a reference exclusively to the qualifying investment and (ii) any assumption to the contrary amounts to a *petitio principii*. It is undisputed that the stabilisation agreement regulates in detail the characteristics, execution,

[106] Award, ¶ 482.

[107] The original text says: "*para determinar las inversiones materia del contrato*" (literally: "to determine the investments [that are] subject matter of the contract"). Reglamento del Título Noveno de la Ley General de Minería, Decreto Supremo No. 024-93-EM (7 de junio de 1993), Artículo 24 (**CA-2** (**nueva presentación**)). The record translation says: "to determine the investments set out in the agreement." Regulations to Title Nine of the General Mining Law, Supreme Decree No. 024-93-EM (7 June 1993), Article 24 (**CA-2** (**resubmitted**)). It is not the same thing to be the subject matter of the contract and to be set out in the agreement. This is another instance of a translation that is not accurate enough for the purposes of the current dispute.

[108] Award, ¶¶ 463.

and legal consequences of the qualifying project. In that sense that project is, first and foremost, subject matter of the agreement. But nothing in this casual reference precludes the possibility of subsequent investments in the same concessions or EAUs or prejudges the issue whether such potential investments are covered by the stability benefit.

77. Article 25 deals with certain tax filing and record-keeping obligations of the mining title holder "in cases of expansion of facilities or new investments that contractually enjoy the guarantee of legal stability."[109] The Majority states, without explanation, that "the reference to an expansion of facilities or a new investment tends to support the Respondent's construction."[110] This statement tacitly assumes that only qualifying projects may consist of expansion of facilities or new investments, which amounts to another assumption of what is to be demonstrated (a *petitio principii*). In fact, while a given qualifying project could consist of expansion of existing facilities or a new project, the same is true of a subsequent project such as the Concentrator. Depending on how the Mining Law and the Regulations are interpreted, both projects may "enjoy the guarantee of legal stability." Accordingly, no inference on the scope of the stability benefit can be drawn from this offhand reference in Article 25, which is not concerned with that issue.

78. The remaining provisions discussed by the Majority are plainly irrelevant to the scope of the stability benefit or are cited because they touch on the feasibility study or the qualifying project and hence augment the premise for the Majority's Centrality Argument.

3. The Stabilisation Agreement

79. The Majority conducts a textual analysis of the Stabilisation Agreement and comes to the conclusion "that it is only the investment described in the Feasibility Study that is stabilised, namely the Leaching Plant."[111] That conclusion rests on a very feeble base, however, because (i) the key provisions dealing with the scope of the stability benefit (Clauses Third and Ninth) are found not to provide a clear answer; (ii) Clause First, which

[109] Regulations to Title Nine of the General Mining Law, Supreme Decree No. 024-93-EM (7 June 1993), Article 25 (**CA-2** (**resubmitted**)). The quotation is taken from the record translation, which is accurate on this point.
[110] Award, ¶ 485.
[111] Award, ¶ 533.

defines the project and names it, is merely found to indicate, though not conclusively, that the parties to the Agreement understood stability to apply only to the qualifying project; and (iii) the remaining provisions of the Agreement, to which the Majority turns for context, are either irrelevant or, not surprisingly, relevant only to indicate the "centrality" of the qualifying project in the Stabilisation Agreement. Apart from resting on a feeble base, the Majority's textual analysis fails, because it is based on the unstated assumption that the Stabilisation Agreement can override the scope of the stability benefit established in the Mining Law and the Regulations, an assumption that contradicts the Tribunal's unanimous rejection of the Respondent's "outer limits" theory.[112]

80. The Majority correctly notes that "[t]he stability guarantee is predominantly found in the Third and Ninth Clauses of the Stability Agreement."[113] Yet, after examining the texts of these clauses, the Majority "finds that a textual analysis of the Third and Ninth Clauses does not provide a clear answer as to the scope of the stability guaranteed," wherefore it "turns to consider the meaning of the Third and Ninth Clauses in the context of the Stability Agreement as a whole."[114]

81. This search for contextual clues leads the Majority to a detailed discussion of the remaining provisions of the Agreement, with meagre results:

a. In the First Clause, the project is named "The Leaching Project of Cerro Verde." The majority admits that the choice of name is not dispositive of the question of the scope of the stability granted, and further admits that there are other stabilisation agreements in which the names given to the projects do not clearly define the investment to be made. Nevertheless, the Majority takes the name chosen in this case as "indicative that the understanding of the parties to the Stability Agreement was that it was only the Leaching Project that was stabilised."[115] This conclusion clearly implies that the "understanding of the Parties" (based on the choice of

[112] Award, ¶¶ 410-413; see *supra*, ¶ 6.b.iv
[113] Award, ¶ 495.
[114] Award, ¶ 520.
[115] Award, ¶ 508.

name), is somehow relevant to (though not dispositive of) the question of the scope of the stability benefit.

b. The provisions of the Fourth, Fifth, Seventh, Eighth and Sixteenth Clauses refer in various ways to the Leaching Project, the Investment Plan, or the Feasibility Study. The Majority cites these provisions as evidence of the "centrality" of the qualifying project to the Stabilisation Agreement, thus bringing its Centrality Argument to the construction of the Agreement.[116]

c. The remaining provisions of the Stabilisation Agreement are found not to be relevant.

82. Any analysis of the Stabilisation Agreement aimed at ascertaining the scope of the stability guarantee runs into an insurmountable barrier: the Stabilisation Agreement is a contract of adhesion, whose terms are not only dictated by the State party but also mandated by the applicable law and regulations. Article 86 of the Mining Law provides: "The agreements that guarantee the benefits set forth in this Title are adhesion contracts, and their models shall be prepared by the Ministry of Energy and Mines. Said agreements shall incorporate all the guarantees established in this Title."[117] The Respondent argued that the law and the regulations established only the outer limits of the scope of the guarantees, which allowed the parties to the stabilisation agreement to agree to a reduced scope.[118] The Tribunal unanimously rejected that theory.[119]

83. It follows that the scope of the guarantees set forth in the Stabilisation Agreement is strictly determined by the Mining Law and the Regulations, not by any agreement of the parties that might reduce that scope in a particular case. Therefore, the problem of ascertaining

[116] Award, ¶¶ 527-530, 532.

[117] My literal translation. The Mining Law, Article 86 (**HA-1**). The record translation is: "The agreements that guarantee the benefits set forth in this Title are adhesion contracts, and their models will be prepared by the Ministry of Energy and Mines. These agreements shall incorporate all the guarantees established in this Title." The record translation uses "will" instead of "shall" and "These" instead of "Said." The use of "shall be prepared" ("*serán elaborados*") is important because the original text indicates that the preparation of the models is an obligation of the Ministry of Energy and Mines.

[118] Award, ¶¶ 410-413.

[119] Award, ¶¶ 410-413.

the scope of the guarantees set forth in the Stabilisation Agreement is the *same* problem as ascertaining the scope of the guarantees under the Mining Law and the Regulations, a problem already addressed. Any attempt to find the scope of the guarantees through an independent analysis of the text of the Stabilisation Agreement or the inferred intent of the parties thereto is both otiose and inconsistent with the legal framework.

84. For the sake of completeness, I should state my own view that the name of the project described in the Stabilisation Agreement is inconsequential. I agree, of course, that the Agreement describes the qualifying project and particularizes to that project the legal regime of the Mining Law and Regulations. I also agree that the Agreement does not describe the Concentrator, however much the building of a concentrator had long been in the contemplation of both parties. But none of this has any bearing on the scope of the stability guarantee, a scope which is determined by the legal framework. If I am right that the legal framework extends the guarantee to all authorized projects built in the same concessions or EAUs within the stability period, those projects will benefit from stability regardless of the way the Stabilisation Agreement deals with the qualifying project. Conversely, if the Majority is right that the legal framework limits the guarantee to the activities of the qualifying project, a later authorized project will not benefit from stability, but any such conclusion will follow from the scope of the benefit as established by the legal framework, not by the Stabilisation Agreement.

4. Other Considerations

85. The Majority also discusses, at great length, the background of the enactment of the Mining Law and the conduct of SMCV and State organs in respect of their understanding of the scope of the stability benefit. While I agree with some of the Majority's observations and disagree with others, I find it unnecessary to dwell on these subjects, because they are secondary considerations to ascertaining the relevant content of the Mining Law and the Regulations.

86. The background of the Mining Law is indeed a relevant consideration, but it is secondary to a proper analysis of the text. The Majority examines the Parties' arguments and evidence

on this subject[120] and concludes that it affords no help to the task of ascertaining the scope of the stability guarantees.[121] I generally agree that the evidence on this subject is insufficiently conclusive to affect the textual analysis of the Mining Law.

87. The conduct of SMCV and State organs following the signing of the Stabilisation Agreement is not relevant as evidence of the intended scope of the stability guarantees because, as noted, that scope was established by law. Conversely, statements by SMCV or State officials may be relevant if they are admissions against interest, that is, if they contradict the positions that the Claimant or the Respondent, as the case may be, have taken in this proceeding. Even so, a contradictory statement must be sufficiently clear and unambiguous and to be sufficiently established by the evidence to undermine the respective Party's position.[122] While I do not necessarily agree with the Majority's analysis of each statement adduced as evidence, my general assessment is that most of those statements are insufficiently clear and others are insufficiently proven. Therefore, I conclude that, for the purposes of the Article 3.4 claim, they add little or nothing to a properly conducted analysis of the legal texts.

C. THE TWO FUNDAMENTAL FLAWS IN THE MAJORITY'S ANALYSIS

88. In the preceding Section IV.B, I have criticised several aspects of the Majority's textual analysis of the key provisions of the Mining Law and the Mining Regulations. To conclude this Section IV, I shall address more particularly two arguments of the Majority which, in my view, amount to fundamental flaws in its textual and contextual analysis. These flaws are fundamental in two respects: (i) they concern the key provisions bearing on the question of the scope of the stability benefit and hence the very foundations of the Majority's analysis and conclusions, and (ii) they concern the structure of the Majority's reasoning, its approach to the textual analysis, and the method it adopts to perform it.

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[120] Award, ¶¶ 536-543.

[121] Award, ¶¶ 539-540, 543.

[122] For example, an official statement that merely restates a provision of the Mining Law or the Mining Regulations without elaboration can hardly be cited as evidence of the agency's support for one or another of the competing interpretations of that provision.

89. The first fundamental flaw is what I have called the Unclarity Argument. In my view, the Majority pays insufficient attention to the original Spanish text of the provision it analyses, the way it is grammatically constructed, the particular meaning of the subjunctive mood, the way the gender and number of words (such as articles and adjectives) and the conjugation of verbs clarify to which other parts of the sentence they refer, and, in general, to the normal, ordinary reading of the text. A proper textual analysis is not exhausted with reviewing the competing constructions put forth by the opposing parties, nor does the existence of such opposing constructions prove that the legal text is unclear or ambiguous.

90. I respectfully suggest that one of the critical defects of the Majority's analysis is a certain reluctance to delve into the intricacies of Spanish grammar and syntax, stopping well short of finding out which construction is right and which one is wrong. Indeed, I see a tendency to avoid taking sides on the textual controversies by cutting the analysis short, finding the text unclear or ambiguous, and moving on. The end result, I further suggest, is that the Majority's textual analysis is not based on what the key legal texts say, but on professed uncertainty about what they say. In other words, the Majority's textual analysis collapses into a perceived lack of clarity of the texts and, consequently, a need to seek an answer to the problem of the scope of the stability benefit elsewhere – eventually, in a purported inference from the overall legislative scheme. Thus, the Unclarity Argument is not an argument for a particular interpretation of the key legal texts; it is an argument for the absence of such a result. As such, the Unclarity Argument is insufficient, by itself, to support the Majority' decision on the scope of the stability benefit.

91. To provide the support not found in the textual analysis, the Majority constructs a contextual argument, which I have called the Centrality Argument. This argument takes the form of a logical deduction (or entailment) from a set of uncontested factual premises which are based on the general content of the Mining Law and the Mining Regulations. It is uncontested that the legislative scheme requires a specified type of qualifying project as a necessary condition for the stability guarantees. The Mining Law and the Regulations regulate in detail the need for a feasibility study for such a project, the required content of the study, its approval by the regulator, the requirement that the project be carried out, the

effects of completion on the stability period, etc. The Majority collectively refers to these requirements and details concerning the qualifying project as the "centrality" of that project and the corresponding feasibility study in the overall legislative scheme. This "centrality" is the factual premise for the Centrality Argument.

92. From this premise the Majority deduces the conclusion that the scope of the stability guarantee must be limited to the activities related to the qualifying project.[123] The form of the argument is, then, the following: *if (i) the qualifying project is a necessary condition for the stability benefit and (ii) the requirements and legal effects of the qualifying project, and not those of any other, are regulated in detail, then it follows (iii) that the stability benefit applies only to the activities of the qualifying project.* Or, in a more logically clear form:

> *If*
> *(1) the qualifying project is a necessary condition for any project to be stabilised (equivalent: if any project is stabilised, then there must be a qualifying project) and*
> *(2) the qualifying project is regulated in detail and*
> *(3) no project other that the qualifying project is regulated in detail,*
> *then*
> *(4) the qualifying project is stabilised and no project other than the qualifying project is stabilised.*

93. This argument, however, is a logically invalid entailment, a *non sequitur*. The conclusion (4) simply does not follow from the premises (1) to (3). A set of statements *A* truth-functionally entails a statement *B* if and only if there are no possible assignments of truth values in which *A* is true and *B* is false.[124] In the purported entailment, it is *possible* that the statements (1) – (3) be true and the conclusion (4) be false. (If someone claims that the statement (4) cannot be false, that person is committing another logical fallacy, *i.e*. a *petitio*

[123] For example, Award, ¶¶ 424, 438, 439, 441, 452, 453, 454, 481, 484, 489, 491, 530, 532.
[124] *E.g*, H. Leblanc and W. A. Wisdom, Deductive Logic (2nd ed.), p. 34.

principii, assuming what is to be proved.) Therefore, it cannot be said that statement (4) is entailed by (or follows, or derives from) statements (1) - (3). A semi-formal proof is attached as Appendix II.

94. This point can be illustrated by a couple of examples. Assume a jurisdiction in which a person may become a member of the bar on two conditions: (i) obtaining an approved law degree and (ii) passing the bar exam. Suppose that a biography of George P. states, with profuse citation of documents, that George obtained such a law degree graduating first in his class, and then describes in great detail his success in law school and how his legal studies enhanced his ability to think analytically. Assuming those statements to be true, can we logically deduce from them that George passed the bar exam and became a member of the bar? No, because the truth of his obtaining a law degree and that degree having a great influence on his thinking is not inconsistent with his having failed to pass the bar exam or his never having sat for it.

95. Another example: suppose that there is very prestigious preparatory school which requires a difficult entrance examination and a six-year course of rigorous studies. Assume further that Amanda C. passed the entrance examination with the highest marks in the history of the school and later wrote a book describing in detail how studying in the school was central to the formation of her character. Can we logically deduce from these statements that Amanda graduated from the school? No, because the truth of those statements is perfectly consistent with her not having graduated at all.

96. The Majority is misled, I believe, by a rhetorical question it poses: "It is unclear why, if the purpose of the feasibility study was solely to act as a gateway, so much information was required to be included in it and yet there is no requirement to provide any information whatsoever in relation to any subsequent investment notwithstanding that it would automatically be granted stability under the Claimant's construction."[125] This seemingly common-sense rhetorical question has a simple, common-sense answer: the required amount of information was required to be included in the feasibility study for the qualifying

[125] Award, ¶ 454.

project precisely because the approval and execution of the qualifying project were the key preconditions to the contractual grant of stability. The legislative scheme made the stability benefit available on two general conditions: (i) a qualifying project meeting certain requirements of capacity and value and (ii) regulatory approval of such a project and actual execution as approved. For this purpose, the legal framework quite properly required sufficient information about the qualifying project and regulated the consequences of failure to execute it. Subsequent projects were not subject to the same requirements in the legal framework for the stability programme simply because, in contrast with the qualifying project, those other projects were *not necessary* for the programme but only *contingent*, as they might or might not be submitted for approval in the future depending on the subsequent decisions of the mining company. If and when the company wished to carry out another mining project in the same concessions or EAU during the stability period, it would have to satisfy the generally applicable requirements and obtain the generally required approvals, as SMCV did in the case of its Concentrator.[126]

97. Since the Centrality Argument is a logically invalid form of reasoning and the Unclarity Argument does not lead to any particular interpretation of the legal framework, I conclude that the two key arguments offered by the Majority to support its conclusions provide no such support.

D. CONCLUSION

98. For the reasons stated, I cannot agree with the Majority's conclusions on the scope of the stability guarantee or the reasoning on which they are based.

[126] See, *e.g.*, Fluor Canada Ltd., Feasibility Study: Cerro Verde Primary Sulfide Project (May 2004), E**x. CE-20**, and TR. Day 1, P.262:20-263:4.

IV. GENERAL CONCLUSION

99. To the extent set forth in the preceding sections, I dissent from the Majority's decisions regarding the Claimant's claim based on Article 3.4 of the Treaty and from the Majority's reasoning supporting those decisions. In my view, (i) the scope of the stability guaranteed by the Mining Law, the Mining Regulations, and the Stabilisation Agreement included not only the activities related to the qualifying project but also those related to other authorised projects constructed in the same concessions or EAUs during the stabilisation period; (ii) the Concentrator was one such project; (iii) by imposing royalties on the activities of the Concentrator, the Respondent breached its guarantee of administrative stability under the Stabilisation Agreement and the underlying legal framework, and by doing so it breached Article 3.4 of the Treaty.

100. If this conclusion had been accepted, the *quantum* of compensation would have had to be increased to account for the loss sustained by the Claimant as a result of SMCV's being forced to pay royalties on the output of the Concentrator. Accordingly, my dissent should be understood consequentially to include the reduction in the *quantum* of compensation and other ancillary results.

101. For the sake of completeness, I note that I also dissent from certain aspects of the Majority's reasoning and conclusions regarding the claim for breach of Article 3.1 of the Treaty, as specified in Section II.B. of this Partial Dissent.

[signed]

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Oscar M. Garibaldi
Arbitrator

31 August 2026

APPENDIX I

THE QUESTION WHETHER CUSTOMARY INTERNATIONAL LAW REQUIRES INTERNATIONAL TRIBUNALS TO DEFER TO THE DECISIONS OF HIGH NATIONAL COURTS

1. The claim that an ICSID tribunal ought to defer (in any sense of the term) to national courts in general or to the highest national court in particular cannot be accepted without a valid legal basis. As neither the Treaty, nor the Convention, nor the Arbitration Rules provide any such exception to the powers and duties of ICSID tribunals or their obligation to exercise independent judgment, the proponents of a claim of deference must identify a rule of customary international law capable of overriding that treaty obligation, in the sense of creating an exception to its content.

2. In this Appendix we shall examine the claim that an arbitral tribunal (including an ICSID tribunal) owes deference to the decisions of national courts (or to the highest national court) in the sense that the tribunal is legally obligated to apply those decisions without question or that it is somehow required by comity, practice, or other non-binding considerations, to follow those decisions regardless of or without examining their merits. That claim is sometimes grounded on certain statements of the PCIJ in the early *Serbian Loans* and *Brazilian Loans* cases and more recent statements of the ICJ in the *Diallo* case. As we shall see, however, none of those statements stands for the proposition that a tribunal ought to follow a national court decision without a critical examination of its content.

3. In the *Serbian Loans* case, the PCIJ determined that, while certain loans taken by Serbia were subject to Serbian law, the clauses regarding the form of repayment were governed by French law. The issue was whether a French law that invalidated stipulations in gold applied also to international contracts, such as the Serbian loans, when the payment was to be made in France. The PCIJ noted that the French courts had construed that law as not applying to international contracts and decided to follow that construction, observing that it was a case concerning public policy, without any legal provision directly related to the issue, and the construction was "reasonable."[1]

4. The *Brazilian Loans* case involved the same French law, this time applied to the repayment provisions of loans taken by Brazil. The Court adopted the same construction of the French law, and in so doing it made the following statements:

> "[In applying municipal law] the Court must pay utmost regard to the decisions of the municipal courts of a country, for it is with the aid of their jurisprudence that *it* will be enabled *to decide what are the rules* which, in actual fact, are applied in the country the law of which is recognized as applicable in a given case. [. . .] Of course, the Court will endeavor to make a *just appreciation of the jurisprudence* of municipal courts. If this is

[1] *Certain Serbian Loans* (France v. Serbia), Judgment No. 14, P.C.I.J., Series A, No. 20, pp. 46-47.

> uncertain or divided, it will rest with the Court *to select the interpretation which it considers most in conformity with the law*."[2]

5. None of these statements of the PCIJ speaks of the duty of an international tribunal to pay uncritical deference to the decisions of national courts. The Court reserved for itself the role of *deciding* (with the aid of national jurisprudence) what the national rules are, *justly appreciating* that jurisprudence, *selecting* if needed the interpretation it *considers* to be most in conformity with the law, and determining whether the national jurisprudence reaches a *reasonable result*. The terms "defer" and "deference" are not used.

6. In the *Diallo* case,[3] the ICJ introduced an important qualification to those statements of its predecessor. It was a case of diplomatic protection. Guinea claimed that the Democratic Republic of the Congo (DRC) had committed certain violations of international law upon the person of Mr. Ahmadou Sadio Diallo, a Guinean national. One of the claims was that by expelling Mr. Diallo from the country, Congo had violated Article 13 of the International Covenant on Civil and Political Rights and Article 12.4 of the African Charter on Human and Peoples' Rights. These provisions require, *inter alia*, that a decision to expel an alien be taken "in accordance with law." The issue before the Court that is relevant to this discussion was whether, under Congolese law, the decision to expel Mr. Diallo had been properly taken by the Prime Minister or should have been taken instead by the President. Guinea relied on a 1983 legislative order, which conferred on the President the power to expel an alien. The DRC explained, however, that under the 1994 Constitution the powers conferred on the President by prior legislative provisions were deemed transferred to the Prime Minister, and cited Article 80(2) of the new constitution vesting regulatory powers on the Prime Minister. The Court accepted the DRC's explanation of its own law and concluded that the Prime Minister's signature did not prevent the order from being "in accordance with law." The Court went on to rule, however, that the order had failed to comply with Congolese law for other reasons.[4]

7. In accepting the DRC's explanation about the state of its own law, the Court made the following pronouncement:

> "The Court recalls that it is for each State, *in the first instance*, to interpret its own domestic law. The Court does not, *in principle*, have the power to substitute its own interpretation for that of the national authorities, especially when that interpretation is given by the highest national courts [citing the *Serbian Loans* and *Brazilian Loans* cases]. *Exceptionally, where a State puts forward a manifestly incorrect interpretation of its domestic law, particularly for gaining an advantage in a pending case, it is for the Court to adopt what it finds to be the proper interpretation*."[5]

8. The Court continued:

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[2] *Brazilian Loans* (France v. Brazil), Judgment No. 15, 1929 P.C.I.J. Series A, No. 21, p. 124 (emphasis added).
[3] *Ahmadou Sadio Diallo* (Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Report 2010, p. 639.
[4] *Id*., ¶¶ 64-72.
[5] *Id*., ¶ 70 (emphasis added).

> "The DRC's interpretation of its Constitution, from which it follows that Article 80(2) produces certain effects on the laws already in force on the date when that Constitution was adopted, does not seem manifestly incorrect. It has not been contested that this interpretation corresponded, at the time in question, to the general practice of constitutional authorities. The DRC has included in the case file, in this connection, a number of other expulsion decrees issued at the same time and all signed by the Prime Minister. Consequently, although it would be possible in theory to discuss the validity of that interpretation, it is certainly not for the Court to adopt a different interpretation of Congolese domestic law for the purposes of the decision of this case."[6]

9. As the transcribed passages show, the *Diallo* decision cannot be cited for the proposition that an international tribunal must defer (in the sense discussed above, *i.e*. uncritically) to the decisions of the highest national courts or to a State's interpretation of its own law. On the contrary, the Court made clear that when it finds such an interpretation manifestly incorrect (something that can be established only through critical examination), then the Court must formulate what it considers to be the proper interpretation. This is confirmed by what the Court actually did in this case, by examining Article 80(2) of the 1994 Constitution, the contemporaneous general practice of constitutional authorities, and other contemporaneous expulsion orders signed by the Prime Minister to determine whether the DRC's interpretation was manifestly incorrect or not. Notice also that the Court did not use the term 'defer' or 'deference'."

10. Another important aspect of the *Diallo* decision is the reference to a State putting forward a manifestly incorrect interpretation of its domestic law "*particularly for gaining an advantage in a pending case.*" This is a partial recognition of a problem that neither the PCIJ nor the ICJ encountered in the cases discussed above. There is a fundamental difference in terms of magnitude and due process between (i) a point of domestic law on some mundane issue such as those involved in those cases and (ii) an interpretation made by a State to gain an advantage in a pending case or a decision of a domestic court, as *judex in causa sua*, that would effectively control the entire issue of international responsibility placed in the hands of the international tribunal.

11. In the *Diallo* case, the ICJ adopted the "manifestly incorrect" standard of review for interpretations of national law put forward by States, especially by their highest courts, which is essentially the same substantive standard of review applicable under the customary rule on denial of justice. This is hardly surprising, because this was a case of diplomatic protection, subject to the customary rule of exhaustion of domestic remedies. In fact, the DRC contested jurisdiction on the ground that such remedies had not been exhausted, but the Court rejected that objection, finding that the DRC had not proved the existence of remedies to be exhausted.[7] As discussed in the body of the Partial Dissent, the theory that a tribunal is not permitted to review a national court decision unless that

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[6] Id., ¶ 71.
[7] *Diallo* case, Preliminary Objections, Judgment, ICJ Reports 2007, pp. 42-48.

decision is the subject of a claim of denial of justice (and then only under the standards of that doctrine) has no application in a treaty-based arbitration like the present case.

APPENDIX II

LOGICAL TEST OF THE CENTRALITY ARGUMENT

The argument to be tested is the following:

> *If*
>
> *(1) the Qualifying Project is a necessary condition for any project to be stabilised (equivalent: if any project is stabilised, then there must be a Qualifying Project) and*
>
> *(2) the Qualifying Project is Regulated-in-Detail [this predicate stands for all the factual details concerning the regulation of the qualifying project] and*
>
> *(3) no project other that the Qualifying Project project is Regulated-in-Detail,*
>
> *then*
>
> *(4) the Qualifying Project is stabilised and no project other than the Qualifying Project is stabilised.*

This argument can be rendered in a semi-formal way as follows:

Premises:

(1) For any thing, if that thing is a Project and is Stabilised, then there is at least one thing that is a Project and is a Qualifying Project.

(2) There is at least one thing that is a Project and is a Qualifying Project and is Regulated-in-Detail.

(3) It is not the case that (there is a thing that is a Project and is Regulated-in-Detail and is not a Qualifying Project).

Conclusion:

(4) (There is at least one thing that is a Project and a Qualifying Project and is Stabilised) **and** (it is not the case that there is a thing that is a Project and is Stabilised and is not a Qualifying Project).

This argument is logically invalid if the premises (1) – (3) are true and the conclusion (4) is false. To test this, we check if there is a possible truth-value assignment in which the premises

are true and the conclusion is false, that is, whether the assumed falsity of the conclusion is logically consistent with the assumed truth of the premises.

Accordingly, let us assume as true that there is at least one Project P, other than the Qualifying Project, that is Stabilised. In semi-formal terms, we express this in the form of the following statement:

(5) There is at least a thing that is a Project and is Stabilised and is not a Qualifying Project.

Statement (5) is the negation of the second term of the conjunction in statement (4). Consequently, if statement (5) is true, as we assume to test the argument, conclusion (4) is false. Then we compare statement (5) (which renders (4) false) with the premises, to determine if they are consistent.

Statement (5) does not contradict premise (1) because the Qualifying Project still exists and satisfies the necessary condition for any Project to be stabilised.

Statement (5) does not contradict premise (2) because the Qualifying Project is still Regulated-in-Detail.

Statement (5) does not contradict premise (3) because the Project referred to in (5) is neither a Qualifying Project nor is it Regulated-in-Detail. Notice that neither the Mining Law nor the Mining Regulations say that any Project must be Regulated-in-Detail to be Stabilised. If they had said so, the argument at issue would have been different and the one being tested would have not been needed.

Therefore, there is one truth-value assignment in which the premises (1) – (3) are true but the conclusion (4) is false. Therefore, the purported entailment is invalid.