

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

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

Claimant

— v. —

REPUBLIC OF PERU

Respondent

ICSID Case No. ARB/20/08

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**CLAIMANT'S MEMORIAL**

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## ABBREVIATED TERMS

|                             |   |
|-----------------------------|---|
| 1972 Feasibility Study      | Wright Engineers Ltd., Feasibility Study for the Cerro Verde Project for Empresa Minera del Perú (1 February 1972)      |
| 1994 Stability Agreement    | Agreement of Guarantees and Measures for the Promotion of Investments Between the Peruvian State and SMCV (26 May 1994) |
| 1996 Feasibility Study      | Fluor Daniel Wright Ltd., Cerro Verde Expansion Project: Leach Feasibility Study (1996)                                 |
| 1996 Mill Feasibility Study | ICF Kaiser Engineers Inc., Feasibility Study Analysis for the Cerro Verde Project (1 June 1996)                         |
| 1998 Mill Feasibility Study | Bateman Engineering Inc., Primary Sulfide Ore Mill Expansion: Feasibility Study (16 March 1998)                         |
| 2004 Feasibility Study      | Fluor Canada Ltd., Feasibility Study: Cerro Verde Primary Sulfide Project (May 2004)                                    |
| ADUSELA                     | Arequipa Association of Electric Service Users  |
| AIT                         | Additional Income Tax   |
| Anaconda                    | Anaconda Copper Mining Company  |
| APOYO                       | Apoyo Consultoría   |
| BITs                        | Bilateral Investment Treaties   |
| Buenaventura                | Compañía de Minas Buenaventura S.A.A.   |
| CEPRI                       | Special Committee to Promote Private Investment in Production Units   |
| CMPF                        | Complementary Mining Pension Fund Tax   |
| COPRI                       | Commission to Promote Private Investment  |
| CPI                         | Consumer Price Index  |
| Cyprus                      | Cyprus Amax Minerals Company  |
| DGM                         | Directorate General of Mining   |
| EGASA                       | Empresa de Generación Arequipa S.A.   |
| EIS                         | Environmental Impact Study  |
| Freeport                    | Freeport-McMoRan Inc.   |
| GEM                         | <i>Gravamen Especial a la Minería</i>   |
| GEM Agreement               | Agreement for the Assessment of <i>Gravamen Especial a la Minería</i> Approved by Law No. 29790 (28 February 2012)      |
| GST                         | General Sales Tax   |
| HPGR                        | High-Pressure Grinding Rolls  |
| ICSID Convention            | Convention on the Settlement of Investment Disputes Between States and Nationals of Other States                        |
| L.D. 109                    | General Mining Law, Legislative Decree No. 109 (12 June 1981)   |

|                                 |  |
|---------------------------------|--|
| L.D. 662                        | Legal Stability Regime for Foreign Investment by Recognizing Certain Guarantees, Legislative Decree No. 662 (29 August 1991)   |
| L.D. 708                        | Promotion of Investment in the Mining Sector, Legislative Decree No. 708 (6 November 1991)   |
| L.D. 757                        | Framework Law for Private Investment Growth, Legislative Decree No. 757 (13 November 1991)   |
| MAG                             | Minerals Advisory Group  |
| Master Participation Agreement  | Master Participation Agreement Among Societed Minera Cerro Verde S.A.A. and Lenders (30 September 2005)  |
| MDT                             | Municipal Development Tax  |
| MEF                             | Ministry of Economy and Finance  |
| MINEM                           | Ministry of Energy and Mines   |
| Minero Perú                     | Empresa Minero del Perú S.A.   |
| Mining Law                      | Single Unified Text of the General Mining Law, Supreme Decree No. 014-92-EM (3 June 1992)  |
| Mining Society                  | National Society of Mining and Petroleum Engineers   |
| MT/d                            | Metric Tons per Day  |
| OSINERGMIN                      | MINEM's Supervisory Agency for Investment in Energy and Mining   |
| Participation Agreement         | Participation Agreement Among Sumitomo Metal Mining Co., Ltd., Sumitomo Corporation, Summit Global Management B.V., Compañía de Minas Buenaventura S.A.A., Phelps Dodge Corporation, Cyprus Amax Minerals Company, Cyprus Metals Company, Cyprus Climax Metals Company, and Societed Minera Cerro Verde S.A.A. (16 March 2005) |
| Phelps Dodge                    | Phelps Dodge Mining Corporation  |
| PMSP                            | Mining Program of Solidarity with the People   |
| PTU                             | Profit-Sharing Obligation  |
| RAF Plan                        | <i>Régimen de aplazamiento y/o fraccionamiento de las deudas tributarias administradas por la SUNAT</i>  |
| Regulations                     | Regulations of Title Nine of the General Mining Law, Supreme Decree No. 024-93-EM  |
| Roundtable Discussion Agreement | Agreements of the Roundtable Discussion Between the Committee of the Struggle for the Defense of the Interests of Arequipa and SMCV (2 August 2006)  |
| SABC                            | Semi-Autonomous Ball Crushing  |
| SBS                             | Peruvian Superintendence of Banking, Insurance and Private Pensions Funds  |
| Settlement Agreement            | Out-of-Court Settlement Between Cyprus Climax Metals Co. and Empresa Minera del Perú S.A. (30 March 2001)  |
| Share Purchase Agreement        | Share Purchase Agreement Between Empresa Minera del Perú S.A. and Cyprus Climax Metals Co. (17 March 1994)   |

|                                  |   |
|----------------------------------|---|
| SMCV                             | Sociedad Minera Cerro Verde S.A.A.  |
| SMM Cerro Verde                  | SMM Cerro Verde Netherlands B.V.  |
| SMT                              | Special Mining Tax  |
| Stability Agreement              | Contract of Guarantees and Investment Promotion Measures Between the Peruvian State and Sociedad Minera Cerro Verde S.A. (26 February 1998) |
| Sumitomo Metal Mining            | Sumitomo Metal Mining Co., Ltd.   |
| SUNAT                            | National Superintendence of Customs and Tax Administration  |
| SX/EW                            | Solvent Extraction and Electrowinning   |
| TPA                              | United States-Peru Trade Promotion Agreement  |
| TTNA                             | Temporary Tax on Net Assets   |
| Voluntary Contribution Agreement | Voluntary Contribution Agreement (18 January 2007)  |

1. Claimant Freeport-McMoRan Inc. (“Freeport”), on its own behalf and on behalf of Sociedad Minera Cerro Verde S.A.A. (“SMCV”), respectfully submits this Memorial pursuant to Rule 31 of the ICSID Rules of Procedure for Arbitration Proceedings and Sections 14, 15, and 17 of Procedural Order No. 1 dated 17 June 2021, in support of its claim under the United States-Peru Trade Promotion Agreement (the “TPA”).

## I. INTRODUCTION

2. This dispute arises from Peru’s arbitrary failure to honor the stability guarantees it granted to Sociedad Minera Cerro Verde S.A.A. (“SMCV”), which operates the Cerro Verde mine in Arequipa, one of the largest copper mines in the world.

3. The Government of Peru operated Cerro Verde for more than two decades after it had nationalized the mine in 1970. But the Government lacked the means to unlock the full economic potential of Cerro Verde. Most of Cerro Verde’s deposits are made up of a form of copper ore known as primary sulfides, which require processing through a “concentrator”—a processing facility that requires significant upfront investment. The Government long recognized that it needed to build a concentrator, but on its own it could neither afford the cost nor obtain sufficient financing.

4. In the early 1990s, Peru decided to unlock the vast primary sulfide deposits at Cerro Verde by privatizing the mine. To attract foreign investment, Peru touted its newly adopted legal framework for mining stability agreements (the “Mining Law”), which offered investors administrative, tax, and exchange-control stability guarantees, among others, for the mining units in which they invested.

5. Peru knew that these guarantees were essential to attract investment from foreign mining companies. At the time, as a result of decades of severe inflation, erratic GDP growth, and political instability, including threats of violence from domestic militant groups, investor confidence in Peru was at rock bottom. Given these risks, no prudent investor would have taken on the significant up-front costs associated with mining operations without clear stability guarantees.

6. Induced by Peru’s promises of stability, Cyprus Amax Minerals Company (“Cyprus”), a major U.S. mining company, agreed to acquire SMCV and make significant investments in Cerro Verde’s existing operations. In exchange for these investments, Peru entered into a fifteen-year mining stability agreement with SMCV in 1998 (the “Stability Agreement”). In the Stability Agreement, Peru guaranteed SMCV tax and administrative stability, as well as other guarantees and benefits until 31 December 2013, pursuant to the Mining Law and its implementing Regulations (the “Regulations”). The stability guarantees applied to all of SMCV’s activities within the Cerro Verde Mining Unit, which was made up of two concessions: the Mining Concession, under which SMCV extracted the minerals, and the Beneficiation Concession, under which SMCV processed the minerals.

During this time, the Government continued to push Cyprus to move ahead with the development of a concentrator, which had been one of the conditions of Cyprus's successful bid, even after initial feasibility studies for the project had failed.

7. Soon after conclusion of the Stability Agreement, Freeport's predecessor in interest, Phelps Dodge Mining Corporation ("Phelps Dodge"), acquired Cyprus and with it the Cerro Verde mine. In reliance on the stability guarantees, Phelps Dodge and SMCV decided to invest in the construction of a concentrator to process primary sulfides (the "Concentrator")—the objective that the Government had sought for decades. At a total cost of US\$850 million, the Concentrator was at that time one of the largest mining investments in Peru's history. It also was the world's first installation to use a high-pressure grinding rolls ("HPGR") technology to process copper ore.

8. The Concentrator expanded Cerro Verde's operating capacity by 108,000 metric tons per day ("MT/d"), to 147,000 MT/d. By enabling the processing of primary sulfides, it expanded the mine's useful operating life by at least twenty more years. It also conferred enormous economic benefits on Peru by more than tripling SMCV's yearly average tax payments and creating thousands of jobs in Arequipa.

9. When Phelps Dodge and SMCV announced their decision to construct the Concentrator, Peru's President celebrated the Concentrator as a "new investment conquest" and vouched that "we will fulfill our responsibility to maintain economic and legal stability." Similarly, Peru's Ministry of Energy and Mines ("MINEM") assured SMCV that in accordance with the Stability Agreement and Peru's Mining Law, the stability guarantees would apply to the Concentrator. MINEM also formally approved inclusion of the Concentrator within SMCV's existing Beneficiation Concession, further confirming that it was part of the stabilized Beneficiation Concession and Cerro Verde Mining Unit. These assurances that Peru would comply with its obligations under the Stability Agreement were particularly important given that in June 2004, the Government had enacted a Royalty Law imposing a surcharge on mining profits. The new Royalty Law did not apply to mining companies with stability agreements while those agreements remained in force—a point that the Government, seeking to restore investor confidence, repeatedly confirmed.

10. Yet once Phelps Dodge and SMCV had committed to the US\$850 million investment and commenced construction on the Concentrator, the Government abruptly reversed course. In the face of mounting political pressure, the Government found it politically inconvenient to honor the stability guarantees it had granted. Unable to annul or formally amend the Stability Agreement unilaterally, MINEM sought to avoid the Stability Agreement's coverage of the Concentrator by developing, behind closed doors, a novel and restrictive "interpretation."

11. In an internal memo written in June 2006, MINEM took the position that under the Mining Law, stability guarantees were limited only to the initial investment program set forth in the

feasibility study submitted to secure those guarantees. MINEM's memo asserted that, as a result, SMCV was not entitled to apply the stabilized regime to the Concentrator operations even though it was within SMCV's stabilized Mining Unit. This new "interpretation" of the scope of stability guarantees not only flew in the face of the plain text of the Mining Law and Regulations, but it contradicted the Government's prior assurances to SMCV and its own practice in implementing stability guarantees.

12. Yet the Government did not share the memo setting out its new and restrictive interpretation with SMCV. Instead, the Government made every effort to extract from SMCV additional contributions on the understanding that the Concentrator would be stabilized and SMCV would not make any royalty payments for the remaining term of the Stability Agreement—even though MINEM's own internal legal memo contradicted that understanding. Based on that understanding, the Government induced SMCV to commit to a total of approximately US\$265 million in additional "voluntary" contributions in lieu of royalty payments.

13. After SMCV committed to make these significant contributions, MINEM provided the legal memo laying out its novel interpretation to the National Superintendence of Customs and Tax Administration ("SUNAT"), the Peruvian tax agency. SUNAT, which had recently come under fire from local activists for honoring SMCV's Stability Agreement, immediately started an audit of SMCV. Relying on MINEM's novel interpretation, SUNAT then began to issue assessments against SMCV for royalties that it had allegedly failed to pay on the minerals processed in the Concentrator, as well as assessments for exorbitant penalties and interest that would soon exceed the value of the alleged royalty debt (the "Royalty Assessments").

14. In total, SUNAT's Royalty Assessments resulted in US\$688.5 million in liabilities (as of the date of this filing)—of which US\$400.7 million consisted of penalties and interest. SUNAT also issued assessments for taxes that should not have applied under the stabilized regime (the "Tax Assessments"), resulting in an additional US\$519.1 million in liabilities (as of the date of this filing), of which US\$215.9 million consisted of penalties and interest.

15. SMCV promptly challenged the Assessments, first before SUNAT and then before the Tax Tribunal, the body within Peru's Ministry of Economy and Finance ("MEF") that serves as the final administrative appeal for royalty and tax matters. But instead of providing relief, the Tax Tribunal exacerbated Peru's arbitrary treatment of SMCV. The Tax Tribunal president, a long-term MEF official who has no authority to resolve individual cases, instructed her assistant to draft the Tax Tribunal's resolution in SMCV's challenge to SUNAT's 2008 Royalty Assessment. The draft upheld SUNAT's 2008 Royalty Assessment, relying on the restrictive "interpretation" set forth in the legal memo that MINEM had provided to SUNAT. In disregard of the most basic notions of due process, the Tax Tribunal president then ensured that her assistant's draft became the final decision issued by

the Tax Tribunal Chamber assigned to hear that case, *and* that the separate Chamber assigned to decide the 2006-07 Royalty Assessments would adopt a copy-paste version of that resolution.

16. The Tax Tribunal's due process failures did not end there. In SMCV's challenge to the 2010-2011 Royalty Assessments, the Tax Tribunal appointed a clearly conflicted former SUNAT employee—who had acted on SUNAT's behalf *against* SMCV in proceedings on SMCV's challenge to the 2006-2007 Royalty Assessments—to take charge of that decision. The Tax Tribunal also appointed the president's former assistant, who at the president's instructions had drafted the first resolution regarding the 2008 Royalty Assessments, as the *vocal ponente* in SMCV's challenge to the Q4 2011 Royalty Assessments. In each of SMCV's successive challenges, the Tax Tribunal sided with the Government—often by simply copy-pasting segments of the flawed resolution in the 2008 Royalty Assessment challenge.

17. What is more, the Tax Tribunal and other Peruvian authorities also arbitrarily refused to waive the exorbitant penalties and interest on the Royalty and Tax Assessments, although SMCV was clearly entitled to such a waiver under Peruvian law because its position was based, at a minimum, on a reasonable interpretation of the relevant provisions of the Mining Law and its Regulations. The Tax Tribunal first attempted to sidestep the waiver requirement on spurious procedural grounds, and then, in later cases, resorted to flimsy, unsupported, and irrelevant arguments that were contradicted even by the Tax Tribunal's own decisions on the merits of SMCV's challenges.

18. The Government also arbitrarily failed to reimburse SMCV for part of its GEM payments, which were an *additional* type of voluntary contribution calculated as a percentage of its operating profits between 2011 and 2013 due to its exemption from royalties. SMCV had agreed to make GEM payments on the understanding that such payments were in lieu of royalties, only for the Government to turn around and begin assessing royalties for the same years once SMCV made GEM payments totaling over US\$100 million. The Government itself acknowledged that SMCV was entitled to a reimbursement of the GEM payments and, in fact, refunded part of those payments. But the Government still, on spurious procedural grounds, refused to reimburse SMCV for the remaining US\$63.8 million in GEM payments and interest.

19. Peru's conduct toward Freeport and SMCV violated the Stability Agreement and Article 10.5 of the TPA with respect to each of the Royalty and Tax Assessments listed in Annex A.

20. *First*, Article 10.16 of the TPA provides that Freeport may submit claims of breach of the Stability Agreement on SMCV's behalf in this proceeding because that Agreement constitutes an "investment agreement" for purposes of the TPA. Peru violated the Stability Agreement each time the unlawful 2009, 2010-2011, Q4 2011, 2012, and 2013 Royalty Assessments and the Tax Assessments became final and enforceable against SMCV, because once Peru effectively applied each of those Assessments, it breached its obligations under Clauses 9.4, 9.5, 9.6, 10.1, and 10.2 of the Agreement.

Each Assessment was based on the Government's restrictive interpretation of the scope of the stability guarantees, which (i) lacked any support in the plain terms of the Mining Law and Regulations, which extend stability guarantees to concessions and mining units and do not limit them to individual investments; (ii) contradicted the investment promotion purpose of the stability regime by creating legal uncertainty and discouraging further investment; (iii) contradicted the Government's previous position on the scope of stability guarantees; and (iv) contradicted the Government's own previous assurances that the Concentrator would be covered by the Stability Agreement because it forms part of SMCV's Beneficiation Concession.

21. Instead, the Government's interpretation was based on a gross distortion of the requirement of the Mining Law that, to *qualify* for stability guarantees, the investor must submit a feasibility study containing an investment program that meets the minimum investment threshold. In stark recognition that the existing Mining Law and Regulations could not be reconciled with Peru's desired interpretation, the Government had to amend the relevant provisions of the Mining Law and Regulations in 2014 and 2019 respectively to limit the scope of stability guarantees, in future cases, to the initial investment program set forth in the feasibility study submitted to obtain the stability agreement.

22. *Second*, under Article 10.5 of the Treaty, Peru agreed to "accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security." Peru breached Article 10.5 each time the unlawful 2009, 2010-2011, Q4 2011, 2012, and 2013 Royalty Assessments became final and enforceable against SMCV, because it upheld and enforced these Assessments in contravention of Freeport and SMCV's legitimate expectations and as a result of arbitrary, inconsistent, and non-transparent Government conduct that also failed to provide due process. The Government arbitrarily adopted its novel and restrictive interpretation in response to significant domestic political pressure to obtain additional contributions from mining companies, and from SMCV in particular. Peru's interpretation was a complete *volte-face* from its previous position, including from specific representations Government officials had made to SMCV regarding the scope of its stability guarantees. The Government thereby thwarted Freeport and SMCV's legitimate expectation that the Government would honor the stability guarantees on which they and their predecessors-in-interest had relied in investing in the Concentrator. Further, after the Government developed that novel and restrictive interpretation, it not only failed to share that interpretation with SMCV, but it solicited hundreds of millions of dollars in additional "voluntary" contributions that were premised on the understanding that by virtue of the Stability Agreement, SMCV would not pay *any* royalties until the end of 2013.

23. Moreover, the Tax Tribunal proceedings upholding the Assessments were replete with due process violations, including the undue interference by the Tax Tribunal president to resolve challenges in favor of SUNAT; *ex parte* communications with SUNAT's representative in the

proceedings; copy-pasting of the decision drafted by the president's assistant across cases that were supposed to be decided individually; and assigning a blatantly-conflicted former SUNAT employee to sit as the primary decision-maker. Peru likewise violated Article 10.5 because the final and enforceable 2006-2007 and 2008 Royalty Assessments resulted directly from serious due process violations by the Tax Tribunal.

24. *Third*, Peru violated Article 10.5 each time it arbitrarily failed to waive the penalties and interest assessed on each of the Royalty and Tax Assessments. Under both Peruvian law and international principles of fairness and equity, Peru was required to waive its exorbitant assessments of penalties and interest because SMCV's position was, at the very minimum, based on a reasonable interpretation of the relevant provisions of the Mining Law and its Regulations. Instead, the Tax Tribunal, and the contentious administrative courts to which SMCV appealed the 2006-2007 and 2008 Royalty Assessments, arbitrarily refused to consider the issue, asserting that SMCV's request was "untimely," even though Peruvian law required them to consider the issue *irrespective* of when or whether SMCV raised it.

25. For subsequent Assessments, both SUNAT and the Tax Tribunal arbitrarily denied SMCV's waiver based on flimsy, unsupported, and irrelevant arguments that had no basis in the relevant legal provisions. Peru also increased the harm to SMCV through its excessive delays, which significantly increased the interest charges, and its arbitrary failure to adjust the applicable interest rate in light of those delays, even though it was required to do so under Peruvian law.

26. *Fourth*, Peru violated Article 10.5 when it arbitrarily and unreasonably refused to reimburse SMCV for part of the GEM payments Peru had induced SMCV to make on the understanding that SMCV would not pay royalties while the Stability Agreement remained in force. When SMCV entered into the GEM Agreement, Peruvian officials repeatedly confirmed that the Government could not collect GEM at the same time it collected royalties and Special Mining Tax ("SMT") payments. The amount of SMCV's GEM payments—calculated based on the *entirety* of its operating profits—likewise reflected this assumption. The Government itself acknowledged that charging GEM and royalties at the same time was inappropriate, and so it reimbursed part of SMCV's GEM payments. Yet Peru arbitrarily withheld the remainder of SMCV's GEM payments on spurious grounds. So Peru managed to collect GEM in lieu of royalties, *and* actual royalties, *and* the SMT, *and* penalties and interest, all for the same period.

27. Peru's breaches of the TPA resulted in significant loss and damage to Freeport and SMCV. Accordingly, as compensation for the harm resulting from Peru's unlawful conduct, Freeport seeks damages of US\$909 million as of the date of this Memorial, an amount that will have increased by the date of the Award, plus post-Award interest.

## II. PARTIES

28. The Claimant, Freeport-McMoRan Inc. (“Freeport” or “Claimant”), is an entity incorporated in the State of Delaware in the United States.<sup>1</sup> Freeport indirectly owns 53.56% of the shares of Sociedad Minera Cerro Verde S.A.A. (“SMCV”), a company constituted under the laws of the Republic of Peru.<sup>2</sup> SMCV operates Cerro Verde, an open-pit mine in the Arequipa region of Peru. Cerro Verde is one of the two largest copper mines in Peru and one of the ten largest in the world, with an average processing output of 393,100 MT/d as of 2019.<sup>3</sup> For the past two decades, Freeport or its predecessors have also indirectly controlled SMCV by virtue of their majority ownership.<sup>4</sup> As set out in Claimant’s Notice of Arbitration, Freeport is an “investor” and SMCV is a “covered investment” within the meaning of Articles 10.28 and 1.3 of the TPA.<sup>5</sup>

29. The Respondent, the Republic of Peru (“Peru” or “Respondent”), is a Contracting Party to the TPA and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “ICSID Convention”).<sup>6</sup>

## III. FACTUAL BACKGROUND

### A. FOR DECADES, PROCESSING PRIMARY SULFIDES AT CERRO VERDE REMAINED AN ELUSIVE GOAL

#### 1. The Cerro Verde Deposits Include Oxides, Secondary Sulfides, and Primary Sulfides

30. Cerro Verde’s mineral deposits, which consist of copper and molybdenum ores embedded in porphyry, were formed between 60 and 80 million years ago.<sup>7</sup> As a result of millions of years of exposure to air and water on the rock closest to the surface, Cerro Verde’s deposits today contain four commingled zones: (i) a “leach cap,” where weathering has substantially depleted the copper and molybdenum in the surrounding rock; (ii) “oxides,” where the rock is mainly oxidized;

<sup>1</sup> See **Ex. CE-263**, Certificate of Good Standing Freeport (18 February 2020).

<sup>2</sup> See **Ex. CE-265**, Freeport-McMoRan Inc., Sociedad Minera Cerro Verde S.A.A. Corporate Organizational Chart (21 February 2020); **Ex. CE-366**, SMCV, Certificate of Transition to Open Public Limited Company (11 January 2000) (certifying SMCV’s change from *sociedad anónima* to *sociedad anónima abierta*).

<sup>3</sup> See Freeport-McMoRan, South America, <https://www.fcx.com/operations/south-america#CVPeru>.

<sup>4</sup> See **Ex. CE-4**, Share Purchase Agreement between Cyprus Climax Metals Company and Empresa Minera del Peru S.A. (17 March 1994), pp. 1-2, 8 (the state-owned company Empresa Minera del Perú S.A. sold 91.65% of its SMCV shares to Cyprus Climax Metals Company, which then assigned its rights under the 1994 Share Purchase Agreement to Cyprus Amax Mineral Company); **Ex. CE-265**, Freeport-McMoRan Inc., Sociedad Minera Cerro Verde S.A.A. Corporate Organizational Chart (21 February 2020) (Freeport’s predecessor, Phelps Dodge Corporation, acquired Cyprus and with it a majority of SMCV).

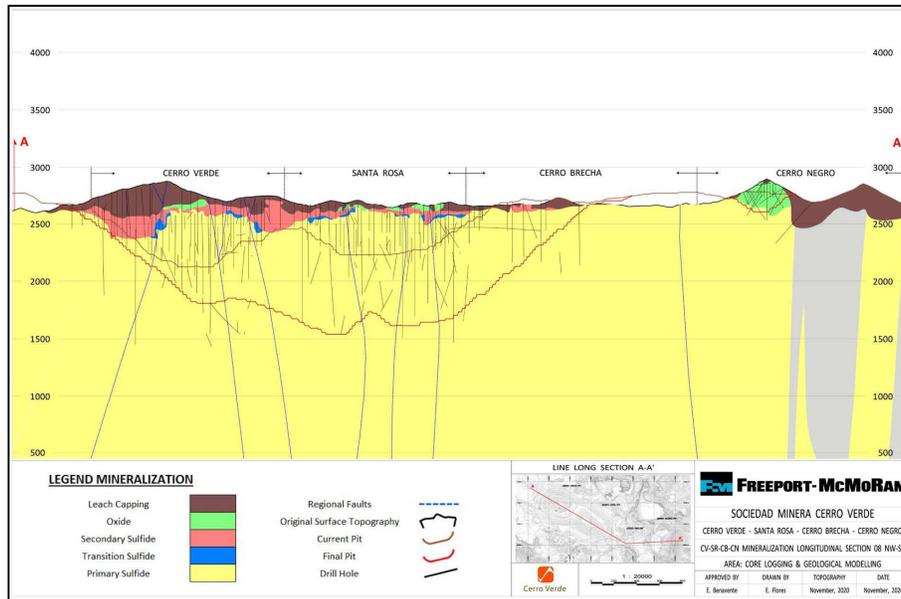
<sup>5</sup> See Notice of Arbitration ¶¶ 90-98.

<sup>6</sup> **CA-10**, United States-Peru Trade Promotion Agreement (1 February 2009) (“TPA”); **Ex. CE-3**, ICSID, Peru Member State Entry, available at <https://icsid.worldbank.org/en/Pages/about/MembershipStateDetails.aspx?state=ST109#> (showing that the ICSID Convention entered into force for Peru on 8 September 1993).

<sup>7</sup> **CWS-1**, Witness Statement of Ramiro Aquino (27 August 2021) (“Aquino”) ¶ 14.

(iii) “secondary sulfides,” where the rock is partly oxidized; and (iv) “primary sulfides,” which have the same chemical composition as when the deposits formed.<sup>8</sup> The figure below shows the four zones at Cerro Verde.<sup>9</sup>

**Figure 1: Cerro Verde’s Mineral Deposits**



31. For most of Cerro Verde’s history, mining operations have focused exclusively on the oxides and secondary sulfides, which generally sit on top of the primary sulfides, while the much larger primary sulfide deposits—which required a significantly more costly and complicated processing method—went untapped.<sup>10</sup>

**2. After Decades of Private Operation, the Government Nationalized Cerro Verde in 1970, and Began Local Processing of Oxide Ores**

32. 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.<sup>11</sup> For over four decades of its operation, Anaconda exported excavated ore for processing abroad.<sup>12</sup> Beginning in 1964, Anaconda conducted

<sup>8</sup> Aquino ¶ 15.

<sup>9</sup> For a technical explanation of the graphic, see Aquino § II.A.

<sup>10</sup> Aquino ¶¶ 18, 41-44.

<sup>11</sup> See Ex. CE-291, Wright Engineers Ltd., Feasibility Study for the Cerro Verde Project for Empresa Minera del Perú (1 February 1972), Vol. II, p. I-1.

<sup>12</sup> See Ex. CE-291, Wright Engineers Ltd., Feasibility Study for the Cerro Verde Project for Empresa Minera del Perú (1 February 1972), Vol. II, pp. I-1 to I-2.

additional studies that resulted in the conclusion that local processing was feasible.<sup>13</sup> However by that point, the government of General Juan Velasco Alvarado, installed by a military coup in 1968, had already begun nationalizing large sectors of the Peruvian economy.<sup>14</sup> After Anaconda refused to meet the Government's demand of handing over a majority stake in Cerro Verde, the Government seized control of the mine at the end of 1970.<sup>15</sup>

33. In 1970 and 1972, the Government granted special mining rights to a newly created State-owned company, Empresa Minera del Perú S.A. ("Minero Perú"), to extract ore from the two open pits at Cerro Verde.<sup>16</sup> These open pits were known as Cerro Verde and Santa Rosa, and the Ministry of Energy and Mines ("MINEM") referred to them together as the "Economic and Administrative Unit known as Cerro Verde."<sup>17</sup> On 3 October 1971, Minero Perú signed a contract with engineering firms Wright Engineers Ltd., British Smelter Constructions Ltd., and Ralph M. Parsons Co., to help secure financing to construct facilities to process the oxides at Cerro Verde.<sup>18</sup> On 27 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 the entirety of the "Cerro Verde Economic and Administrative Unit," including the primary sulfides.<sup>19</sup>

34. In 1972, Minero Perú began excavating ore from both the Cerro Verde and Santa Rosa pits and stockpiling the ore on the assumption that Minero Perú would eventually be able to process it on site.<sup>20</sup>

35. On 7 February 1972, the engineering firms submitted their feasibility study (the "1972 Feasibility Study"), which estimated that the Cerro Verde deposit contained about 71 million MT of minable ore, with an average grade of about 1.2% copper.<sup>21</sup> The 1972 Feasibility Study

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<sup>13</sup> See **Ex. CE-291**, Wright Engineers Ltd., Feasibility Study for the Cerro Verde Project for Empresa Minera del Perú (1 February 1972), Vol. II, p. I-2.

<sup>14</sup> See **Ex. CE-285**, H.J. Maidenberg, *Anaconda Turns to Ore in Peru*, N.Y. TIMES (26 October 1970).

<sup>15</sup> **Ex. CE-286**, Robert Walker, *Copper Price Cut by Phelps Dodge*, N.Y. TIMES (1 December 1970).

<sup>16</sup> **Ex. CE-287**, Direct Exploitation by the State of Mining Rights in the Department of Arequipa, Supreme Decree No. 023-70-EM/DGM (15 December 1970); **Ex. CE-289**, Establishing the Right of the State Over Expired Metal Concessions, Supreme Decree No. 012-72-EM/DGM (20 January 1972).

<sup>17</sup> **Ex. CE-287**, Direct Exploitation by the State of Mining Rights in the Department of Arequipa, Supreme Decree No. 023-70-EM/DGM (15 December 1970); **Ex. CE-289**, Direct Exploitation by the State of Mining Rights in the Department of Arequipa, Supreme Decree No. 023-70-EM/DGM (15 December 1970).

<sup>18</sup> See **Ex. CE-296**, Wright Engineers Ltd., *Copper: From Oxides to Cathodes* (April 1978), p. 3.

<sup>19</sup> See **Ex. CE-290**, Wright Engineers Ltd., Feasibility Study for the Cerro Verde Project for Empresa Minera del Perú (1 February 1972), Vol. I, Introduction, p. iv.

<sup>20</sup> **Ex. CE-2**, Supreme Decree No. 027-76-EM/DGM (9 July 1976); **Ex. CE-290**, 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).

<sup>21</sup> See **Ex. CE-290**, Wright Engineers Ltd., Feasibility Study for the Cerro Verde Project for Empresa Minera del Perú (1 February 1972), Vol. I, p. 0-2 (estimating 39.3 million MT of sulfide ore of 1.09% copper, 26 million MT of oxidized ore of 1.195% copper, and 5.3 million MT of mixed ore of 1.736% copper, for a

explored developing the mine in two stages—first the oxide ore near the surface, and then primary sulfides:<sup>22</sup>

- (a) For the first stage, the 1972 Feasibility Study recommended building leaching facilities, including a solvent extraction and electrowinning (“SX/EW”) plant with the capacity to process 10,000 MT/d of oxide ore.<sup>23</sup> Leaching involves using chemicals to dissolve copper out of the surrounding rock, and then extracting a solution rich in copper content from the leach solution through a process called solvent extraction.<sup>24</sup> Then in a process known as electrowinning, an electric current is passed through the resulting copper-rich solution to form cathodes of 99.999% pure copper.<sup>25</sup>
- (b) For the second stage, the 1972 Feasibility Study proposed building a concentrator (also called a flotation plant or mill) with a capacity of 20,000 MT/d to process the primary sulfides, which cannot be efficiently processed through leaching.<sup>26</sup> A concentrator operates by mixing crushed ore with an alkaline solution and aerating it with a metal arm, which causes particles high in copper content to rise to the surface as froth.<sup>27</sup> These particles are separated, dried, and sold to smelters as copper concentrate, which consists of approximately 25% copper.<sup>28</sup> However, at the time, the cost of this second stage was prohibitive.<sup>29</sup>

36. Minero Perú conducted further exploration of the primary sulfides, revealing that minable ore at Cerro Verde exceeded an estimated 1 billion tons with an average grade of more than 0.5% copper.<sup>30</sup> A 1975 feasibility study then concluded that the enormous primary sulfide deposit could justify building a concentrator four to six times larger than the 20,000 MT/d concentrator

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total average grade of 1.176% copper); *see also* **Ex. CE-291**, Wright Engineers Ltd., Feasibility Study for the Cerro Verde Project for Empresa Minera del Perú (1 February 1972), Vol. II, p. I-11.

<sup>22</sup> **Ex. CE-291**, Wright Engineers Ltd., Feasibility Study for the Cerro Verde Project for Empresa Minera del Perú (1 February 1972), Vol. II, pp. VII-1 to VII-8.

<sup>23</sup> **Ex. CE-291**, Wright Engineers Ltd., Feasibility Study for the Cerro Verde Project for Empresa Minera del Perú (1 February 1972), Vol. II, pp. VII-4 to VII-6.

<sup>24</sup> Aquino ¶¶ 35-40.

<sup>25</sup> Aquino ¶¶ 12, 35-40.

<sup>26</sup> *See* **Ex. CE-291**, Wright Engineers Ltd., Feasibility Study for the Cerro Verde Project for Empresa Minera del Perú (1 February 1972), Vol. II, pp. VII-7 to VII-8.

<sup>27</sup> Aquino ¶¶ 41-45.

<sup>28</sup> Aquino ¶¶ 41-45.

<sup>29</sup> *See* **Ex. CE-290**, 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 (estimating total capital costs of concentrator plus second electrowinning plant at US\$88 million plus US\$10 million in annual operating costs).

<sup>30</sup> *See* **Ex. CE-292**, Ralph M. Parsons Co., Cerro Verde Project, Stage II: Preliminary Feasibility Study (5 March 1975), p. I-2-1 to I-2-2 (estimating mineral reserves of more than 1 billion MT at more than 0.5% copper grade).

envisioned in the 1972 Feasibility Study.<sup>31</sup> But even accounting for the larger deposit, the US\$1.1 billion capital investment necessary to construct a concentrator remained unreachable.<sup>32</sup>

37. With the plans for a concentrator for primary sulfides stalled because of the lack of funds, Minerero Perú proceeded to construct an on-site leaching plant to process oxide ore throughout 1976.<sup>33</sup> The plant encompassed a primary and secondary crusher, three leaching pads (Pads 1, 2, and 3), and an SX/EW plant.<sup>34</sup> On 15 July 1976, MINEM granted Minerero Perú's request to expand its two special mining rights within the "Cerro Verde Mining Unit" to cover three mining areas called, respectively, "Cerro Verde No. 1," "Cerro Verde No. 2," and "Cerro Verde No. 3."<sup>35</sup> On 13 January 1977, MINEM granted an additional special right to Minerero Perú, designated the "Beneficiation Plant Cerro Verde," to process the minerals that it extracted from Cerro Verde No. 1, Cerro Verde No. 2, and Cerro Verde No. 3.<sup>36</sup> This processing right encompassed the 465 hectares around the leaching facilities, which were still under construction at the time.<sup>37</sup>

38. Minerero Perú's leaching plant at Cerro Verde went online on 1 April 1977, with a capacity to produce 33,000 MT per year of copper cathodes from oxide ore.<sup>38</sup>

### 3. Despite Repeated Efforts, the Government Remained Unable to Process the Primary Sulfides

39. From the outset, Minerero Perú constructed the leaching facilities intending that they would eventually be accompanied by a concentrator to process the sulfide ores. For example, an April 1978 site plan includes the footprint of a "Future Sulfide Plant."<sup>39</sup> Minerero Perú also constructed a pilot concentrator with a capacity of 100 MT/d, which it completed in 1979.<sup>40</sup> Minerero Perú used this

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<sup>31</sup> **Ex. CE-292**, Ralph M. Parsons Co., Cerro Verde Project, Stage II: Preliminary Feasibility Study (5 March 1975), vol. I, p. 1-2-3.

<sup>32</sup> **Ex. CE-292**, Ralph M. Parsons Co., Cerro Verde Project, Stage II: Preliminary Feasibility Study (5 March 1975), vol. I, p. 1-2-6.

<sup>33</sup> *See* **Ex. CE-295**, Supreme Decree No. 002-77-EM/DGM (13 January 1977) (noting that Minerero Perú applied for a special right to process minerals through the newly completed processing plant on 8 November 1976).

<sup>34</sup> *See* **Ex. CE-296**, Wright Engineers Ltd., Copper: From Oxides to Cathodes (April 1978), p. [29] (showing the mine site plan).

<sup>35</sup> **Ex. CE-2**, Supreme Decree No. 027-76-EM/DGM (9 July 1976).

<sup>36</sup> *See* **Ex. CE-295**, Supreme Decree No. 002-77-EM/DGM (13 January 1977).

<sup>37</sup> *See* **Ex. CE-295**, Supreme Decree No. 002-77-EM/DGM (13 January 1977); **Ex. CE-308**, Directorial Resolution No. 140-91-EM/DGM (20 December 1991) (noting that the Cerro Verde Beneficiation Plant spans an area of 465 hectares); **Ex. CE-297**, Minerero Perú & Kuhn Loeb Lehmann Brothers International Inc., Cerro Verde II: Project Memorandum (October 1981), p. 1 ("Between 1974 and 1977, mining and processing facilities were constructed for the purpose of exploiting the copper oxide ore body").

<sup>38</sup> *See* **Ex. CE-296**, Wright Engineers Ltd., Copper: From Oxides to Cathodes (April 1978), p. 2.

<sup>39</sup> *See* **Ex. CE-296**, Wright Engineers Ltd., Copper: From Oxides to Cathodes (April 1978), p. 7.29 (showing the future sulfide plant in the mine site plan).

<sup>40</sup> *See* **Ex. CE-321**, Morgan Grenfell & Co. Ltd., Cerro Verde Copper Mine: Information Memo (April 1993), p. 1.1.

concentrator primarily to test the efficiency of the flotation process on Cerro Verde’s primary sulfides, which Minero Perú knew it would eventually have to process in order to extend the life of the mine beyond exhaustion of the oxide and secondary sulfide reserves.<sup>41</sup> 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 plant of that size could not be built without an expensive new power source.<sup>42</sup> By 1981, Minero Perú had expanded the capacity of the pilot concentrator to 3,000 MT/d—large enough to produce small quantities of concentrate as proof of concept, but far too small to significantly extend the mine’s life.<sup>43</sup>

40. In 1981, Minero Perú partnered with Kuhn Loeb Lehmann 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.<sup>44</sup> In December 1984, at Minero Perú’s request, MINEM consolidated the three special mining rights into a single mining right covering 7,455 hectares, including both pits, which was entitled “Cerro Verde No. 1, No. 2, and No. 3.”<sup>45</sup>

41. In 1985, Wright Engineers Ltd. completed another concentrator feasibility study. The study’s “principal conclusion” 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.”<sup>46</sup> However, despite these promising studies, the Government failed to secure financing to construct and operate a large concentrator.<sup>47</sup>

42. By the mid-1980s, the need for a concentrator had become critical as Minero Perú began to exhaust the oxide ore that it could feasibly process by leaching at then-prevailing copper prices.<sup>48</sup> Even though secondary sulfides could also be processed by leaching—and Minero Perú had

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<sup>41</sup> See, e.g., **Ex. CE-300**, Wright Engineers Ltd., Cerro Verde—II Stage Sulfide Ore: Feasibility Study (March 1985), p. 1-1 (“The reserves of leachable oxide and mixed sulphide material are near to the point of exhaustion and copper production will of necessity originate from other sources, one of which is the sulphide zone.”).

<sup>42</sup> See **Ex. CE-294**, Ralph M. Parsons Co., Feasibility Study (1977) (Excerpt); **Ex. CE-297**, Minero Perú & Kuhn Loeb Lehmann Brothers International Inc., Cerro Verde II: Project Memorandum (October 1981), p. 39 (summarizing the findings of the 1980 feasibility study).

<sup>43</sup> See **Ex. CE-457**, SMCV, Petition No. 1487019 to MINEM (27 August 2004), p. 2; Aquino ¶ 31.

<sup>44</sup> **Ex. CE-297**, Minero Perú & Kuhn Loeb Lehmann Brothers International Inc., Cerro Verde II: Project Memorandum (October 1981), p. 1.

<sup>45</sup> See **Ex. CE-298**, MINEM, Supreme Resolution No. 332-84-EM/DGM (19 December 1984).

<sup>46</sup> **Ex. CE-300**, Wright Engineers Ltd., Cerro Verde—II Stage Sulfide Ore: Feasibility Study (March 1985), p. 2-4.

<sup>47</sup> See **Ex. CE-313**, Minero Perú, Feasibility Study (1 April 1992), p. 1 (“Stage II was to be initiated, consisting of the exploitation and beneficiation of the secondary and primary sulfides at a scale of 20,000 MT/D. In spite of the efforts made, this project did not materialize due to lack of financing.”).

<sup>48</sup> **Ex. CE-351**, CEPRI, Minutes for SMCV (3 July 1996), p. 2 (“The copper oxide reserves were practically exhausted in 1985, the year when the leaching of the oxide/sulfides mixtures and secondary sulfide ores began. It was no surprise that, owing due to poor recoveries from secondary sulfides, 1984 was the last

begun to do so in 1985—they were largely intermingled with primary sulfides in Cerro Verde’s ore deposit, and it was generally not economical for Minero Perú to extract mixed blocks of secondary and primary sulfides in the absence of a concentrator that could process the primary sulfides.<sup>49</sup>

**B. IN THE EARLY 1990S, PERU EMBARKED ON ECONOMIC REFORMS DESIGNED TO END ECONOMIC TURMOIL AND ATTRACT FOREIGN INVESTMENT**

43. In the mid- to late 1980s, Peru entered into a period of severe economic turmoil that deterred foreign investment.<sup>50</sup> Annual inflation exceeded 60% throughout the 1980s, at times exceeding 50% per *month* between 1988 and 1990 and reaching nearly 7,500% in 1990.<sup>51</sup> Real GDP growth was erratic, with the economy contracting by 17% between 1988 and 1990.<sup>52</sup> Given its long-term, capital-intensive structure, the mining industry was particularly hard hit as a result of these developments.<sup>53</sup> Threats of violence from the Shining Path and Túpac Amaru Revolutionary Movement militant groups further impacted mineral production, given the physical vulnerability of mines and their importance to the Peruvian economy.<sup>54</sup>

44. Following the election of President Alberto Fujimori in 1990, the Government implemented a broad economic reform agenda geared toward attracting foreign investment, which it viewed as essential to Peru’s economic development.<sup>55</sup> Among others, in August 1991, pursuant to Congress’s delegation of legislative powers, President Fujimori enacted Legislative Decree No. 662 (“L.D. 662”) which approved a “Legal Stability Regime for Foreign Investment,” which set forth a number of guarantees meant to attract foreign investment such as tax stability, stability in foreign exchange, and protection of private property.<sup>56</sup> In November 1991, President Fujimori set out these investor protections in greater detail in Legislative Decree No. 757 (“L.D. 757”), the “Framework

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year it reached the projected production level of 33,000 metric tons/year of copper cathodes.”); **CWS-11**, Witness Statement of Milagros Silva-Santiseban Concha (27 August 2021) (“Silva”) ¶ 14.

<sup>49</sup> Aquino ¶ 59; see **Ex. CE-351**, CEPRI, Minutes for SMCV (3 July 1996), pp. 2-3.

<sup>50</sup> See **CER-5**, Expert Report of María del Carmen Vega (“Vega”) ¶ 22.

<sup>51</sup> See World Bank, Inflation, Consumer Prices (Annual %)—Peru, <https://perma.cc/N5KC-RUGA>; Central Reserve Bank of Peru, Price Index for Metropolitan Lima (Monthly %), 1988-1990, <https://perma.cc/3AQ7-UNFH>.

<sup>52</sup> See World Bank, GDP Growth (Annual %)—Peru, <https://perma.cc/JZD6-YZZJ>.

<sup>53</sup> **Ex. CE-681**, Kevin Ross & Juan Alonso Peschiera, Explaining the Peruvian Growth Miracle, PERU: STAYING THE COURSE OF ECONOMIC SUCCESS (International Monetary Fund, Alejandro Santos and Alejandro Werner eds. 2015), p. 39, Figure 3.2.

<sup>54</sup> **Ex. CE-301**, Roger Atwood, *Peru’s Andean Mines Take Up Arms Against Shining Path Guerrillas*, REUTERS (23 July 1989) (reporting that Peru’s mines “bear a growing resemblance to military camps as mining firms arm themselves against attacks by Maoist guerrillas”).

<sup>55</sup> See generally **Ex. CE-681**, Kevin Ross & Melesse Tashu, *Investment Dynamics in Peru*, PERU: STAYING THE COURSE OF ECONOMIC SUCCESS (International Monetary Fund, Alejandro Santos and Alejandro Werner eds. 2015), pp. 40-42, 51-53; Silva ¶¶ 8-9.

<sup>56</sup> **Ex. CE-304**, Legal Stability Regime for Foreign Investment by Recognizing Certain Guarantees, Legislative Decree No. 662 (29 August 1991) (“L.D. 662”); see also **Ex. CE-815**, CONITE, *Peru Welcomes Investors* (detailing benefits of L.D. 662).

Law for Private Investment Growth.”<sup>57</sup> Both laws authorized the Government to extend stability guarantees to investors from any sector through contracts known as “legal stability agreements.”<sup>58</sup>

45. Peru also entered into approximately twenty-five bilateral investment treaties (“BITs”) with other States between 1991 and 1996 to afford additional protections to foreign investors under international law.<sup>59</sup>

### **C. PERU ACTIVELY PURSUED FOREIGN INVESTMENT IN THE MINING SECTOR, SPECIFICALLY AT CERRO VERDE**

#### **1. Peru Adopted Legislative Reforms to Encourage Private Investment**

46. In addition to the legal stability regime and the BITs described above, the Government also enacted important reforms specific to the mining sector, which at the time was operating at far less than its full capacity.<sup>60</sup> In 1991, the Government established a legal framework for privatization by creating the Commission to Promote Private Investment (“COPRI”) to coordinate the sale of State-owned assets, and the Special Committee to Promote Private Investment in Production Units (“CEPRI”), a committee within Mineró Perú, to organize the auction of Mineró Perú’s holdings.<sup>61</sup> Between 1991 and 1993, the Government also enacted broad legislative reforms designed to attract foreign investment in the mining sector, including by creating a framework for mining investors to obtain tax and administrative stability for their mining units or concessions.<sup>62</sup>

##### **i. Legislative Decree No. 708**

47. The most important of Peru’s legislative reforms for the mining sector was Legislative Decree No. 708, the “Law for the Promotion of Investments in the Mining Sector” (“L.D. 708”), adopted on 6 November 1991.<sup>63</sup> L.D. 708 supplemented the existing legal framework

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<sup>57</sup> **Ex. CE-306**, Framework Law for Private Investment Growth, Legislative Decree No. 757 (13 November 1991) (“L.D. 757”).

<sup>58</sup> **Ex. CE-304**, L.D. 662; **Ex. CE-306**, L.D. 757.

<sup>59</sup> *See, e.g.*, **Ex. CE-813**, MEF, List of Agreements and Conventions on Investment Promotion, <https://perma.cc/5GVE-SR77>.

<sup>60</sup> **Ex. CE-320**, *Peru*, 320 MINING JOURNAL 1, 1 (22 January 1993) (noting that the State sought investment “so that the minerals industry can achieve its full economic potential”).

<sup>61</sup> **Ex. CE-305**, Promotion of Private Investment in Enterprises of the State, Legislative Decree No. 674 (27 September 1991); **Ex. CE-349**, CEPRI, General Act for the Promotion of Private Investment in the Production Units of Mineró Perú (31 May 1996), pp. 1, 8; *see also* **Ex. CE-325**, Supreme Resolution No. 142-93 (22 April 1993); Silva ¶¶ 5, 9.

<sup>62</sup> *See generally* Vega § II; **CWS-3**, Witness Statement of Marita Chappuis Cardich (27 August 2021) (“Chappuis”) § II.

<sup>63</sup> **CA-46**, Promotion of Investment in the Mining Sector, Legislative Decree No. 708 (6 November 1991) (“L.D. 708”).

for mining, Legislative Decree No. 109 (“L.D. 109”), by strengthening investment incentives for mining companies, including guarantees of tax and administrative stability.<sup>64</sup>

48. María Chappuis Cardich, a witness in these proceedings, served as an engineering advisor to the Vice-Minister of Mines at the time L.D. 708 was being prepared.<sup>65</sup> Ms. Chappuis, along with a colleague, drafted the stability provisions of L.D. 708 at the direction of the then-Minister of Energy and Mines, Fernando Sánchez Albavera, who spearheaded the drafting process at MINEM.<sup>66</sup> Ms. Chappuis testifies that the Government incorporated the draft into Title Nine of the Mining Law without any substantive modifications.<sup>67</sup>

49. Min. Sánchez Albavera also solicited input from the National Society of Mining, Petroleum, and Energy (the “Mining Society”) to ensure that the bill would “encourage investment in the mining sector.”<sup>68</sup> Hans Flury Royle, the Minister of Energy and Mines from July 2003 to February 2004, also testifies as a witness in these proceedings.<sup>69</sup> At the time L.D. 708 was being drafted, Mr. Flury was the Mining Society’s Director and member of its Legal Committee, and testifies that he provided input to MINEM in that capacity in response to Minister Sánchez Albavera’s request for the Society’s assistance.<sup>70</sup>

## ii. The Single Unified Text of the General Mining Law

50. L.D. 708, in its Ninth Transitory Provision, specifically authorized MINEM to consolidate Peru’s general mining law into a single unified text (*texto único ordenado*, or TUO, in Spanish).<sup>71</sup> The Mining Society, at the request of MINEM, hired Peruvian lawyer María del Carmen Vega to lead the effort to create this single unified text.<sup>72</sup> Ms. Vega, a lawyer with more than thirty years of experience in Peruvian investment law who testifies as an expert witness in these proceedings, testifies that this required her to closely review and interpret L.D. 708’s content and scope to merge its provisions with those of L.D. 109.<sup>73</sup> The Government published the Single Unified

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<sup>64</sup> Compare **CA-37**, General Mining Law, Legislative Decree No. 109 (12 June 1981) (“L.D. 109”) with **CA-46**, L.D. 708.

<sup>65</sup> Chappuis § II.B.

<sup>66</sup> Chappuis § II.

<sup>67</sup> Chappuis ¶ 18 (citing **Ex. CE-11**, Fernando Sánchez Albavera, *THE CARDS ON THE TABLE* (1992), p. 84).

<sup>68</sup> **CWS-7**, Witness Statement of Hans Flury (27 August 2021) (“Flury”), ¶¶ 12, 13.

<sup>69</sup> Flury ¶¶ 6-7.

<sup>70</sup> Flury ¶¶ 6-7, 12-14.

<sup>71</sup> **CA-46**, L.D. 708, Ninth Transitory Provision.

<sup>72</sup> Vega ¶¶ 5, 23.

<sup>73</sup> Vega ¶ 24.

Text of the General Mining Law (the “Mining Law”), which hewed closely to Ms. Vega’s draft, on 3 June 1992.<sup>74</sup>

51. As published, Title Nine of the Mining Law offered a number of incentives “to promote private investment in mining activity,” key among them being the establishment of a regime for “[t]ax, currency exchange and administrative stability.”<sup>75</sup> Other incentives included exemption from income tax on undistributed profits; free repatriation of profits; and the ability to reinvest profits in the same mining unit. The stability guarantees were implemented through two different types of agreements: 10-year and 15-year stability agreements.

52. Articles 78 through 81 of the Mining Law set forth the **10-year stability regime** available to all concession holders that met certain criteria.

- (a) Articles 78 and 79 set forth the **eligibility requirements** for a 10-year stability agreement. Specifically, they granted concession holders a right to enter into a 10-year stability agreement if (i) they invested in operations that would reach a capacity between 350 and 5,000 MT/d, or (ii) they submitted an investment program with a minimum commitment of US\$2 million.
- (b) Article 80 set out the **guarantees** to which the holder of a 10-year stability agreement would be entitled. These included tax stability, free repatriation of currency, nondiscrimination in foreign exchange, and free commercialization of mineral products.
- (c) Article 81 required the mining titleholder to submit an **investment program** to the Directorate General of Mining (the “DGM”) in order to be entitled to these guarantees. The investment program was deemed automatically approved in 45 days if the DGM did not approve it during that time period.

53. Articles 82 through 85 of the Mining Law established a broader **15-year stability regime** available to concession holders that met certain additional criteria.

- (a) Articles 82 and 83 set out the **eligibility requirements** for a 15-year agreement. Specifically, they granted concession holders a right to enter into a 15-year stability agreement if (i) they invested in projects or extensions “referring to one or more Economic-Administrative Units” that would reach an operational capacity of not less than 5,000 MT/d, and (ii) they submitted an investment plan with a minimum commitment of US\$20 million to “start” a mining activity or US\$50 million for an

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<sup>74</sup> CA-1, Single Unified Text of the General Mining Law, Supreme Decree No. 014-92-EM (as amended) (3 June 1992) (“Mining Law”); Vega ¶ 26.

<sup>75</sup> CA-1, Mining Law, Art. 72.

existing mine. Article 82 defined “Economic-Administrative Unit” for its purposes as “the processing plants and the other assets that constitute a single production unit due to sharing supply, administration, and services.”

- (b) Article 83 confirmed the **scope** of the stability guarantees; namely, that “[t]he effect of the contractual benefit shall apply exclusively to the activities of the mining company in whose favor the investment is made.”
- (c) Article 84 set forth the **benefits** to which the holder of a 15-year stability agreement would be entitled, which included all of the benefits of Article 80 (under the 10-year stability regime), plus an annual depreciation rate of up to 20% on certain fixed assets and the right to keep accounting in foreign currency.
- (d) Article 85 required submission of a **feasibility study** as part of the application for a 15-year stability agreement to demonstrate that the investor met the required minimum investment commitment of US\$20 million or US\$50 million. Specifically, it provided that, to obtain a stability agreement under Articles 82 and 83, concessionaires “shall submit a technical and economic feasibility study” to the DGM. If the DGM did not approve the study within 90 days, it would be automatically approved. It further provided that after making the investment, the investor had to file an auditor-endorsed sworn statement to “demonstrate the investment amount made,” confirming that it complied with the minimum investment commitment.

54. Finally, Article 86 imposed a requirement of **uniformity** on stability agreements, by providing that all mining stability agreements must “incorporate all the guarantees established” by the relevant provisions of Title Nine of the Mining Law.

### iii. The Mining Regulations

55. In 1993, MINEM issued regulations to Title Nine of the Mining Law (the “Regulations”) to supplement the legal framework for mining incentives.<sup>76</sup>

56. Several provisions of the Regulations clarified that stability benefits were granted to an investor with respect to one or more concessions or a “mining unit”—a group of concessions and facilities that constitute an Economic Administrative Unit.

- (a) Article 2 of the Regulations explained that both the eligibility for stability benefits and the scope of those benefits is determined by the concession holder’s investments in the concession or relevant mining unit. As to **eligibility**, Article 2 stated that the

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<sup>76</sup> **CA-2**, Regulations to Title Nine of the General Mining Law, Supreme Decree No. 024-93-EM (“Regulations”).

benefits “apply as of right to all mining activity titleholders . . . that perform mining activities in a concession or in concessions grouped in an Economic Administrative Unit” and have entered into a stability agreement. As to **scope**, Article 2 explained that when titleholders have multiple “concessions or Economic Administrative Units,” the benefits “will only take effect for those concessions or units that are supported” by the stability agreement.

- (b) Article 18 effectively required the application for a stability agreement to define the **concessions or mining unit** to which stability would apply, by including the “[n]ame of the mining rights set out in the application.”
- (c) Article 22 confirmed that stability guarantees are **limited** to the concessions or EAUs in which the investor made the qualifying minimum investment. In particular, Article 22 provided that the guarantees in a stability agreement “will benefit the mining activity titleholder exclusively for the investments that it makes in the concessions or Economic Administrative Units.” It further provided that “a mining activity titleholder that has other concessions or Economic Administrative Units shall keep independent accounts and reflect them in separate earning statements.”

57. The Regulations tied the beginning of the **stabilization period** to the completion of the initial investment program or feasibility study set forth in the application for a stability agreement:

- (a) Article 30 implemented the second paragraph of Article 85 of the Mining Law by requiring that the mining titleholder submit to the DGM a sworn statement confirming fulfillment of the investment program or feasibility study set forth in the titleholder’s application for a stability agreement.
- (b) Article 33 provided that the contractual guarantees of stability would apply from the year in which the sworn statement under Article 30 was approved, except that the mining titleholder could elect to have the guaranteed regime begin January 1 of the following year.

## 2. **Peru’s Stabilization Commitments Were the Central Feature of Its Legislative Reform and Critical to Attracting Foreign Investment in the Mining Sector**

58. The Government’s principal intent behind the Mining Law and its Regulations was to establish generous stability benefits—guaranteed under the law and implemented by contract—that would spur investment.<sup>77</sup> Minister Sánchez Albavera observed in his contemporaneous account of the Mining Law that it would have been “naive”

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<sup>77</sup> Chappuis ¶¶ 14-15; Flury ¶ 15; Vega ¶ 23.

to claim that those who invest in long-term projects, such as mining, were confident that the tax regime would not undergo major alterations when the deposits entered production. A country that had shown, at least in the last ten years, to be subject to the ups and downs of the economic pendulum could not claim international credibility. It could then hardly attempt to fail to include a guarantee of tax stability in the mining reform. . . . Granting [stability] guarantees constitutes an important incentive for mining companies by not altering the criteria that guided investment decisions, since their recovery is long-term.<sup>78</sup>

59. Mr. Flury similarly testifies that based on his experience advising Minister Sánchez Albavera in connection with L.D. 708, Mr. Albavera emphasized that “he wanted to implement a legal framework that was as attractive or more attractive than that of other countries with mining potential,” and particularly that “the stability regime was indispensable for attracting investment.”<sup>79</sup>

### 3. Investment in Cerro Verde Was One of Peru’s Top Priorities for Privatization

60. With this legal framework in place, Peru turned to privatizing Minero Perú’s mining assets. Cerro Verde was Minero Perú’s “priority” for privatization among its mining units.<sup>80</sup> Milagros Silva, who served as Secretary-General of Minero Perú and of CEPRI, from 1992 to 1996, testifies that this was because it was “very clear” to the President of Minero Perú, as well as other officials, that Minero Perú could not develop Cerro Verde’s primary sulfides—at this point an existential imperative for the life of the mine—without major private investment.<sup>81</sup>

61. Peru’s efforts to attract bids for Cerro Verde and other mines included advertising to foreign investors in trade publications and at industry roadshows, and the new stabilization regime featured heavily in these overtures.<sup>82</sup> Ms. Silva testifies that prospective mining investors with whom she spoke at roadshows in Miami and Colombia were especially keen to understand the stability

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<sup>78</sup> **Ex. CE-311**, Fernando Sánchez Albavera, *THE CARDS ON THE TABLE* (1992), pp. 77-78, 81.

<sup>79</sup> Flury ¶¶ 15-16; *see also* Chappuis ¶ 16 (explaining that Minister Albavera sought input on L.D. 708 from engineers and industry representatives to ensure that it would have the practical effect of promoting investment).

<sup>80</sup> **Ex. CE-351**, CEPRI, Minutes for SMCV (3 July 1996), p. 5 (“This need was clearly identified as the main objective for promoting private investment in the Cerro Verde Production Unit and in this vein it was that the Special Committee, in coordination with the COPRI, that decided to prioritize it vis-à-vis the other promotions to be carried out with the Production Units. Cerro Verde’s operating problem was grave, since to offset the low cathode production, the small pilot concentrator plant was expanded, whose capacity in 1985 was 287 metric tons/day, to 1,000 metric tons/day in October 1987; to 1,500 metric tons/day in mid-1989; to 2,500 metric tons/day at the end of 1990; and to 3,000 metric tons/day from 1990 to 1992.”); *see also* **Ex. CE-311**, Fernando Sánchez Albavera, *THE CARDS ON THE TABLE* (1992), p. 103 (“Within this orientation, the expansion and modernization of the Cerro Verde operating unit had a special priority, which after the depletion of copper oxides benefited secondary sulfide ores.”).

<sup>81</sup> Silva ¶ 15. *See also* **Ex. CE-351**, CEPRI, Minutes for SMCV (3 July 1996), p. 4.

<sup>82</sup> *See* Silva § II; *see, e.g.*, **Ex. CE-320**, *Peru*, 320 *MINING JOURNAL* 1, 12 (22 January 1993), pp. 11-13 (noting that Peru’s new legal stabilization regime “contains basic regulations concerning taxation in order to protect investors from arbitrary changes of rules” and “was designed to foster international investment interest”).

guarantees when deciding whether to participate in privatization auctions of Minero Perú's mines.<sup>83</sup> Ms. Vega likewise explains that the stability guarantees of L.D. 708 "sought to break the vicious cycle of economic underdevelopment and low investment by giving mining companies the assurances they needed to invest in Peru's critical mining sector."<sup>84</sup>

62. The Government's goals with respect to developing Cerro Verde also drove its privatization approach. In its outreach to foreign investors, Minero Perú made clear that it would only entertain proposals that committed to developing Cerro Verde's primary sulfides, noting that "[f]urther exploitation of the resource base at Cerro Verde requires the construction of a sulphide flotation plant" at a "preferred" capacity of 40,000 MT/d.<sup>85</sup> Ms. Silva also testifies that because Minero Perú thought that no reasonable investor would be willing to make the substantial capital investment required to build a large concentrator unless it were also entitled to the ore that the concentrator would process, it insisted on selling both the mining and beneficiation rights together as a "single mining unit."<sup>86</sup> Ms. Silva testifies that CEPRI thought that this approach was the only way to attract foreign investment in Cerro Verde.<sup>87</sup>

63. On 16 December 1991, Minero Perú requested that MINEM convert its special mining rights into a single mining concession "Cerro Verde 1, 2, and 3" (the "Mining Concession") and a single beneficiation concession "Beneficiation Plant Cerro Verde" (the "Beneficiation Concession") spanning 7,455 and 465 hectares, respectively, which MINEM executed four days later.<sup>88</sup> Ms. Silva, acting as CEPRI's Secretary-General, oversaw the legal aspects of CEPRI's privatization plan for Cerro Verde.<sup>89</sup> CEPRI submitted this plan on 6 April 1993, and COPRI approved it on 29 April 1993.<sup>90</sup>

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<sup>83</sup> Silva ¶ 11 (discussing **Ex. CE-815**, CONITE, *Peru Welcomes Investors*, p. 9).

<sup>84</sup> Vega ¶ 22; *see also Ex. CE-320, Peru*, 320 MINING JOURNAL 1, p. 1 (22 January 1993) (stressing the need for foreign investment to develop Peru's mining sector in light of the "serious challenges" facing the mining industry in Peru, including "chronically insufficient investment, resulting in the inability to fund essential new capital projects.").

<sup>85</sup> *See Ex. CE-321*, Morgan Grenfell & Co. Ltd., Cerro Verde Copper Mine: Information Memo (April 1993), pp. 1.1, 1.3, 5.3; *see also Ex. CE-320, Peru*, 320 MINING JOURNAL 1 (22 January 1993), pp. 11, 14-15 ("exploitation of the primary sulphides will play an increasing role during any expansion at Cerro Verde").

<sup>86</sup> Silva ¶ 19.

<sup>87</sup> Silva ¶ 19.

<sup>88</sup> **Ex. CE-307**, Directorial Resolution No. 126-91-EM/DGM (20 December 1991) (Mining Concession) (citing Minero Perú, Official Letter No. 113.211/171/91 (16 December 1991)); **Ex. CE-308**, Directorial Resolution No. 140-91-EM/DGM (20 December 1991) (Beneficiation Concession) (same); Silva ¶ 16.

<sup>89</sup> Silva ¶ 5.

<sup>90</sup> *See Ex. CE-325*, Supreme Resolution No. 142-93 (22 April 1993); **Ex. CE-324**, CEPRI, Communication No. MP-096.93 (6 April 1993); Silva ¶¶ 17-18.

64. On 1 June 1993, Minero Perú created SMCV for the purposes of privatizing Cerro Verde; it then formally incorporated SMCV through a public deed dated 20 August 1993.<sup>91</sup> The public deed noted that Minero Perú capitalized SMCV with S/ 277 million (about US\$110 million<sup>92</sup>) and granted to SMCV “the mining and beneficiation concessions and the assets that constitute the ‘Cerro Verde’ Mining Unit.”<sup>93</sup> The public deed thus made clear that the Mining and Beneficiation Concessions, together with their supporting assets, constituted a mining unit (the “Cerro Verde Mining Unit” or the “Mining Unit”).

65. Minero Perú contacted around 200 companies as potential investors in its public auction for Cerro Verde, including Amax Exploration Inc., Compañía de Minas Buenaventura S.A.A. (“Buenaventura”), Cyprus Exploration and Development Company, Phelps Dodge, and Sumitomo Metal Mining Co., Ltd. (“Sumitomo Metal Mining”).<sup>94</sup> Yet despite Cerro Verde’s potential, the political climate in Peru continued to deter potential investors.<sup>95</sup> Minero Perú well understood these concerns, and sought to head them off by emphasizing the availability of stability guarantees, including by sending investors draft “Heads of Agreement” that highlighted the availability of mining stability agreements.<sup>96</sup> Minero Perú’s English-language information memorandum to prospective bidders in Cerro Verde also advertised “stability contracts” for mining companies “which guarantee the investor the maintenance of the existing tax, administrative and exchange control treatment of the investment,” and assured potential investors that “[s]tability contracts have been respected by succeeding governments.”<sup>97</sup> In September 1993, Minero Perú also produced a bilingual primer on stability agreements for mining companies, emphasizing the Government’s “honourable tradition of respecting mining contracts” and “scrupulously respecting their fulfilment.”<sup>98</sup>

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<sup>91</sup> **Ex. CE-330**, SMCV Public Deed (20 August 1993), Art. 3 (noting that SMCV was created on 1 June 1993); **Ex. CE-328**, Minero Perú, Minutes of Board Meeting No. 633 (7 June 1993) (same).

<sup>92</sup> All U.S. dollar conversions of Peruvian *soles* are calculated according to the accounting exchange rates of Peru’s Superintendence of Banking, Insurance and Private Pensions Funds available at [https://www.sbs.gob.pe/app/pp/seriesHistoricas2/paso2\\_TipodeCambio.aspx?cod=5&paso=2&secu=03](https://www.sbs.gob.pe/app/pp/seriesHistoricas2/paso2_TipodeCambio.aspx?cod=5&paso=2&secu=03).

<sup>93</sup> **Ex. CE-330**, SMCV Public Deed (20 August 1993), Clause 1.1; *see also* **Ex. CE-329**, Minero Perú, Minutes of Board Meeting No. 634 (22 June 1993), pp. 274-275 (approving the transfer of the Mining and Beneficiation Concessions to SMCV); Silva ¶ 18.

<sup>94</sup> *See* **Ex. CE-322**, COPRI and Minero Perú, List of Companies Contacted (April 1993); Silva ¶ 22.

<sup>95</sup> *See, e.g.*, **Ex. CE-318**, Phelps Dodge, Cerro Verde Evaluation (1993) [Excerpt], p. 1.1, 1-4 (noting that Cerro Verde had “potential for significant expansion” and a “major upside in project economics,” but noting major downside risks related to “the political climate worsen[ing] resulting in strikes and increased terrorism” and Peru’s relatively poor ranking for country risk).

<sup>96</sup> Silva ¶ 23 (citing **Ex. CE-332**, International Public Competitive Bidding for the Sale of SMCV S.A.: Heads of Agreement (26 October 1993)).

<sup>97</sup> **Ex. CE-321**, Morgan Grenfell & Co. Ltd., Cerro Verde Copper Mine: Information Memorandum (April 1993), p. 9.17.

<sup>98</sup> **Ex. CE-331**, Minero Perú, Stability Contracts (7 September 1993), § 3.0.

## D. CYPRUS ACQUIRED SMCV AND OBTAINED A 15-YEAR STABILITY AGREEMENT

### 1. Share Purchase Agreement

66. On 4 November 1993, Cyprus Minerals Company, a U.S. company, ultimately submitted the only bid for Cerro Verde.<sup>99</sup> On 15 November 1993, Cyprus Minerals Company merged with Amax Inc. to form Cyprus Amax Minerals Company (together with its wholly owned subsidiaries, “Cyprus”).<sup>100</sup> At the time, Cyprus was the second-largest producer of copper in the United States, operating several large mines with similar geology to Cerro Verde.<sup>101</sup> Cyprus also had successfully constructed concentrators at its Sierrita and Twin Buttes mines in Arizona, and its proposal contemplated construction of a similar plant at Cerro Verde.<sup>102</sup> Mineró Perú’s evaluation of Cyprus’s proposal recognized that it achieved the “main objectives to be achieved of promoting private investment in Cerro Verde,” including “[f]ully mining the copper reserves contained in both the primary and secondary sulfides; in other words, development of the second stage of Cerro Verde.”<sup>103</sup>

67. On 17 March 1994, Mineró Perú and a subsidiary of Cyprus executed an agreement (the “Share Purchase Agreement”) under which Mineró Perú sold 91.65% of its shares in SMCV to the Cyprus subsidiary.<sup>104</sup> The Share Purchase Agreement committed the Government to executing mining and legal stability agreements with SMCV and Cyprus, and committed Cyprus to certain investments, including construction of a concentrator. In particular:

- (a) **Article I** defined key terms relating to SMCV’s integrated operations, making clear that Cerro Verde was being sold as a single production unit. It defined “Cerro Verde Business” as “the mining and processing business and operations and all related activities, including, but not limited to, exploration, evaluation, construction, development and sales” and “*Unidad Cerro Verde*” as “the mining and beneficiation concessions previously known collectively as *Unidad de Producción Cerro Verde* . . . and all properties and facilities owned, operated or used in connection with the owning, developing, constructing and operating of a copper mine and marketing the products produced.”

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<sup>99</sup> **Ex. CE-334**, Cyprus, Cyprus Privatization Proposal (4 November 1993); **Ex. CE-351**, CEPRI, Minutes of SMCV Privatization (3 July 1996), p. 65; Silva ¶ 24.

<sup>100</sup> *See* **Ex. CE-340**, Letter from ProInversión and Morgan Grenfell to CEPRI of 7 February 1994; **Ex. CE-351**, CEPRI, Minutes of SMCV Privatization (3 July 1996), p. 28.

<sup>101</sup> **Ex. CE-340**, Letter from ProInversión and Morgan Grenfell to CEPRI of 7 February 1994.

<sup>102</sup> **Ex. CE-334**, Cyprus, Cyprus Privatization Proposal (4 November 1993), p. 9; **Ex. CE-340**, Letter from ProInversión and Morgan Grenfell to CEPRI of 7 February 1994.

<sup>103</sup> **Ex. CE-333**, CEPRI, Evaluation of Proposal from Cyprus Minerals Company (November 1993), p. 5; *see also* Silva ¶¶ 15, 22 (explaining that a concentrator was “required” to efficiently process primary sulfides).

<sup>104</sup> *See* **Ex. CE-4**, Share Purchase Agreement Between Cyprus Climax Metals Co. and Empresa Minera del Peru S.A. (17 March 1994) (“Share Purchase Agreement”), Art. 2.1; Silva ¶ 30.

- (b) **Article II** effected the purchase and sale of approximately 208 million shares of SMCV stock for US\$34 million.
- (c) **Article III** ensured Cyprus’s ability to access stability guarantees, among others. In particular, Article 3.1(f) committed the Government to executing legal stability agreements with Cyprus and SMCV pursuant to L.D. 662 and L.D. 757, and Article 3.1(g) committed the Government to executing a mining stability agreement with SMCV pursuant to Articles 78 and 79 of the Mining Law. **Appendix H** included an indicative model of the mining stability agreement.
- (d) **Article IV** contained Cyprus’s investment commitment, including the commitment to build a concentrator. It committed Cyprus to investing US\$316 million in four phases set out in **Appendix G**. Phases 1 to 3 involved improvements to the leaching and SX/EW circuits. Phase 4 called for “completion of construction and commissioning of a grinding and conventional copper/molybdenum flotation circuit”—*i.e.*, a concentrator—with a capacity of 28,000 MT/d, plus related improvements.<sup>105</sup>
- (e) **Article IV** also allowed Cyprus to reduce its investment commitment, under certain conditions, if the investment proved infeasible. Specifically, it required Cyprus to complete a feasibility study of the planned investment within 18 months. If any of the investments proved uneconomical under the feasibility study, Cyprus had to complete a new feasibility study within a year. If the second feasibility study reached the same result, Cyprus would be able to reduce its investment commitment without penalty.

68. On the same day, the Government and Cyprus signed a Guaranty Agreement—a requirement under Article 3.1(h) of the Share Purchase Agreement—by which the Government guaranteed the execution of “any” mining stability agreement relating to SMCV’s “business and operations” to which SMCV was entitled within 90 days of having complied with all requirements under the Mining Law.<sup>106</sup>

69. As Ms. Silva’s contemporaneous meeting minutes confirm, Cyprus viewed the stability guarantees as a “prerequisite” to its purchase of SMCV.<sup>107</sup> Ms. Silva also testifies that

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<sup>105</sup> See also **Ex. CE-4**, Share Purchase Agreement, Appendix B (containing “Preliminary Balance Sheet” for SMCV as of 30 November 1993 and listing among its “Intangible Investments” US\$7.8 million as the “[c]ost of stripping in the preparation of the mine (pre-mining) for the sulphide project”).

<sup>106</sup> **Ex. CE-341**, Guarantee of the Republic of Peru in Favor of Cyprus Climax Metals (17 March 1994), Art. 1.6.

<sup>107</sup> **Ex. CE-339**, SMCV, Minutes of Board Meeting No. 008, p. 2 (21 January 1994).

during the negotiations with Mineró Perú, “Cyprus stated clearly its intent to enter into the stability agreements that we had promoted during the bidding process.”<sup>108</sup>

## 2. The 1994 Mining Stability Agreement

70. On 26 May 1994, the Government and SMCV also entered into a 10-year mining stability agreement (the “1994 Stability Agreement”) under Article 78 of the Mining Law.<sup>109</sup> To meet the Mining Law’s requirement of an “investment program” demonstrating a minimum US\$2 million commitment, the Government and SMCV relied on an existing Mineró Perú feasibility study for small improvements to the leaching facilities.<sup>110</sup> While the US\$316 million investment commitment under Article IV of the Share Purchase Agreement would have clearly met the US\$50 million investment threshold for a 15-year stability agreement under Article 82 of the Mining Law, SMCV first applied for the 10-year mining stability agreement because doing so allowed it to secure stability guarantees immediately, without having to conduct a feasibility study for the larger capital investment.<sup>111</sup>

71. 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.<sup>112</sup> Cyprus presented both studies to Mineró Perú as a consolidated study prepared by Minerals Advisory Group (“MAG”) in September 1995.<sup>113</sup> The Fluor/MAG study found that it would be economically feasible for SMCV to construct a new leaching pad (“Pad 4A”), plus associated equipment, and to expand the SX/EW plant, which would increase annual production by around 35%.<sup>114</sup> However, the Bechtel/MAG study concluded that investing in a concentrator was not economically feasible, largely due to the lack of available water

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<sup>108</sup> Silva ¶ 29.

<sup>109</sup> **Ex. CE-344**, Agreement of Guarantees and Measures for the Promotion of Investments Between the Peruvian State and SMCV (26 May 1994) (“1994 Stability Agreement”).

<sup>110</sup> See **Ex. CE-344**, 1994 Stability Agreement, Art. 1.3; see also **CA-1**, Mining Law, Art. 79.

<sup>111</sup> Silva ¶ 33.

<sup>112</sup> See **Ex. CE-348**, Minerals Advisory Group LLC, Cerro Verde Expansion Project: Summary Feasibility (September 1995), p. 2-2 (“SMCV contracted with Fluor Daniel Wright (FDW) and Bechtel Corporation (Bechtel) to concurrently conduct studies relative to the economic feasibility of improving and expanding the leach/SX/EW operation and the construction of a modern flotation mill, respectively.”).

<sup>113</sup> See **Ex. CE-348**, Minerals Advisory Group LLC, Cerro Verde Expansion Project: Summary Feasibility (September 1995), p. 2-2.

<sup>114</sup> **Ex. CE-348**, Minerals Advisory Group LLC, Cerro Verde Expansion Project: Summary Feasibility (September 1995), pp. 7.1-7.2 (setting out the revised leaching process overview); *id.*, p. 7-8 (showing increase in Cerro Verde’s annual production capacity from 68 to 105 million pounds).

and power sources to support its operation.<sup>115</sup> Nevertheless, it stated that “SMCV intend[ed] to continue to evaluate the mill option with the goal [of identifying] a viable alternative.”<sup>116</sup>

### 3. The 15-Year Stability Agreement

72. On 25 January 1996, SMCV filed an application with MINEM to enter into a 15-year stability agreement pursuant to Articles 82 and 84 of the Mining Law.<sup>117</sup> Compared to the 10-year stability agreement already in place for Cerro Verde’s mining unit, the 15-year stability agreement would allow SMCV to enjoy all stability guarantees over a longer period, and also would allow it to enjoy additional benefits, including the right to use up to a 20% annual depreciation rate and to keep its accounting in foreign currency.<sup>118</sup>

73. To demonstrate that it met the US\$50 million minimum investment requirement under Articles 83 and 85 of 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 (“1996 Feasibility Study”).<sup>119</sup> The 1996 Feasibility Study outlined a US\$240 million investment to construct Pad 4A and expand the SX/EW plant, and included investments laying the groundwork for the eventual construction of a concentrator, which would operate as an integrated unit alongside the expanded leaching facilities.<sup>120</sup> For example, the 1996 Feasibility Study noted that, as SMCV continued to dig deeper in the Santa Rosa pit, “both the chalcocite and covellite [*i.e.*, secondary sulfide] copper percentages decrease while the chalcopyrite [*i.e.*, primary sulfide] increases,” and that SMCV’s “mine plan will need to be managed in consideration of this factor to maintain a suitable feed to the plant”—a goal that SMCV could only achieve by building a concentrator.<sup>121</sup> Accordingly, the 1996 Feasibility Study provided for an investment of over US\$2.5 million over two years to conduct a feasibility study for a concentrator.<sup>122</sup> Ms. Chappuis, who later reviewed the 1996 Feasibility Study when she served as Director General of Mining from 2002 to 2004, testifies that “it was obvious to any mining engineer who read the 1996

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<sup>115</sup> See **Ex. CE-348**, Minerals Advisory Group LLC, Cerro Verde Expansion Project: Summary Feasibility (September 1995), p. 2-12.

<sup>116</sup> **Ex. CE-348**, Minerals Advisory Group LLC, Cerro Verde Expansion Project: Summary Feasibility (September 1995), p. 2-3.

<sup>117</sup> **Ex. CE-7**, SMCV, Request for Stability Agreement (25 January 1996), p. [3].

<sup>118</sup> **CA-1**, Mining Law, Art. 84.

<sup>119</sup> **Ex. CE-9**, 1996 Feasibility Study.

<sup>120</sup> Aquino ¶ 32; **Ex. CE-9**, 1996 Feasibility Study, Executive Summary, p. 1 (“Major new construction consists of fine crushing, pad leaching and a new solvent extraction plant.”); *id.*, p. 26 (showing increase in Cerro Verde’s annual production capacity from 68 to 105 million pounds); *id.* Sections 1.1 & 2.4.

<sup>121</sup> **Ex. CE-9**, 1996 Feasibility Study, pp. 64-65.

<sup>122</sup> **Ex. CE-9**, 1996 Feasibility Study, p. 124.

feasibility study that it laid the groundwork for building a concentrator next to the leaching facilities.”<sup>123</sup>

74. On 6 May 1996, the DGM approved the 1996 Feasibility Study and sent the file to the Vice-Minister of Mines to consider SMCV’s application for stability pursuant to Article 83 of the Mining Law.<sup>124</sup> By this time, SMCV had already substantially completed construction of Pad 4A and expansion of the SX/EW plant, and by mid-1996, these improvements allowed SMCV to increase its production of copper cathodes by over 250%.<sup>125</sup>

75. In June 1996, ICF Kaiser completed a second study assessing the feasibility of a concentrator (“1996 Mill Feasibility Study”).<sup>126</sup> Like the first, the 1996 Mill Feasibility Study concluded that, “although the project ha[d] improved significantly since the earlier 1995 Study, the pretax discounted cash flow [would] still not support the required investment” due to, among others, the lack of economical options for power and water.<sup>127</sup> 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 Share Purchase Agreement to reduce its investment commitment.<sup>128</sup> However, 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 sulfide ores,” which the Government granted.<sup>129</sup> Cyprus thus commissioned Bateman Engineering to oversee additional testing of the Cerro Verde sulfide ore and to prepare a third feasibility study (the “1998 Mill Feasibility Study”).<sup>130</sup>

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<sup>123</sup> Chappuis ¶ 41.

<sup>124</sup> See **Ex. CE-8**, MINEM, Report No. 043-96-EM-DGM-DFM/DFAE (6 May 1996); **Ex. CE-356**, MINEM, Report No. 708-97-EM/DGM/OTN (30 December 1997) (noting that the DGM sent the file to the Vice-Minister of Mines for consideration).

<sup>125</sup> Compare **Ex. CE-348**, Minerals Advisory Group LLC, Cerro Verde Expansion Project: Summary Feasibility (September 1995), p. 2-1 (noting that cathode production had dropped to 40 million pounds per year, or about 1,500 MT per month), with **Ex. CE-11**, Letter from Cyprus Climax Metals Co. to Empresa Minera del Peru S.A. of 16 September 1996, p. 1 (noting increase in cathode production to an average of more than 4,000 MT per month).

<sup>126</sup> **Ex. CE-350**, ICF Kaiser Engineers Inc., Feasibility Study Analysis for the Cerro Verde Project (1996).

<sup>127</sup> **Ex. CE-350**, ICF Kaiser Engineers Inc., Feasibility Study Analysis for the Cerro Verde Project (1996), p. 1-1; see also **Ex. CE-11**, Letter from Cyprus Climax Metals Co. to Empresa Minera del Peru S.A. of 16 September 1996, p. 2.

<sup>128</sup> **Ex. CE-11**, Letter from Cyprus Climax Metals Co. to Empresa Minera del Peru S.A. of 16 September 1996, p. 2; **Ex. CE-4**, Share Purchase Agreement, Art. 4.3(b)(i).

<sup>129</sup> **Ex. CE-11**, Letter from Cyprus Climax Metals Co. to Empresa Minera del Peru S.A. of 16 September 1996, p. 2; **Ex. CE-355**, Addendum to the Share Purchase Agreement (19 March 1997), Art. 1 (granting 18-month extension).

<sup>130</sup> **Ex. CE-13**, Bateman Engineering Inc., Primary Sulfide Ore Mill Expansion: Feasibility Study (16 March 1998), p. 1-1.

76. On 13 February 1998, SMCV and the Government signed a 15-year stability agreement under Article 82 of the Mining Law (the “Stability Agreement”).<sup>131</sup> The Stability Agreement implemented the Mining Law’s investment guarantees to stabilize the fiscal and administrative regime at 6 May 1996—the day on which the DGM approved the 1996 Feasibility Study—for SMCV’s Mining and Beneficiation Concessions.<sup>132</sup>

77. In terms of **scope**, the Agreement made clear that it applied to SMCV’s Mining and Beneficiation Concessions. In particular:

- (a) Clause 1.1, entitled “Background Information,” explained that SMCV submitted an application for the “guarantees of the benefits contained” in Articles 72, 80, and 84 of the Mining Law “in relation with the investment *in [SMCV’s] concession: Cerro Verde No. 1, No. 2 and No. 3, hereinafter ‘the leaching project of Cerro Verde.’*”<sup>133</sup>
- (b) Clause 3, which set out the “Mining Rights” covered by the Agreement, provided that the “Leaching Project of Cerro Verde is *circumscribed to the concessions, related in EXHIBIT I, with the corresponding areas.*”<sup>134</sup> Exhibit I, in turn, defined the relevant concessions as the “mining concession” called “Cerro Verde No. 1, No. 2, and No. 3” and the “Concession of Beneficiation” called “Cerro Verde Beneficiation Plant.” Clause 3 further provided that it “does not prevent [SMCV] from incorporating other *mining rights* to the Cerro Verde Leaching Project after approval by the Directorate General of Mining.”

78. The Agreement also confirmed that SMCV had met the necessary **prerequisites** set out in the Mining Law and Regulations to qualify for stability. In particular:

- (a) Clause 1.2 noted that SMCV had submitted the 1996 Feasibility Study with its application. Clause 2 confirmed that the DGM had approved the 1996 Feasibility Study pursuant to Article 85 of the Mining Law on 6 May 1996.
- (b) Clauses 4 and 5 noted that SMCV had committed to the execution of the investment plan set out in the 1996 Feasibility Study by 31 December 1997, and that the total approximate amount for completing such investment was US\$237,517,000.

79. The Agreement confirmed that SMCV would be entitled to stability benefits upon completion of its **qualifying minimum investment**. For example:

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<sup>131</sup> **Ex. CE-12**, Contract of Guarantees and Investment Promotion Measures Between the Peruvian State and Sociedad Minera Cerro Verde S.A. (26 February 1998) (“1998 Stability Agreement”).

<sup>132</sup> **Ex. CE-12**, 1998 Stability Agreement, Clauses 8.1, 9.5.

<sup>133</sup> **Ex. CE-12**, 1998 Stability Agreement, Clause 1 (emphasis added).

<sup>134</sup> **Ex. CE-12**, 1998 Stability Agreement, Clause 3 (emphasis added).

- (a) Clauses 6 and 7 set out the processes for completing the investment plan and required SMCV to notify the Directorate General within 90 days of completion of the investment plan.
- (b) Clause 8 confirmed that the stability guarantees would enter into force following completion of the investment plan or, per Article 33(b) of the Regulations, January 1 of the following year if SMCV so requested.

80. The Agreement also listed the stability **guarantees and benefits** set out in the Mining Law and Regulations. For example:

- (a) Clause 9 guaranteed to SMCV the stability protections that the Mining Law provides for 15-year stability agreements, including “tax stability in the terms established in paragraphs A) and E) of Article 80 of the [Mining Law]” (Clause 9.5), the benefits of “administrative stability referred to in paragraph A) of article 72 of the [Mining Law]” (Clause 9.6); free commercialization of SMCV’s “mineral products” (Clause 9.1), a 20% depreciation rate on “its fixed assets” (Clause 9.3), and U.S. dollar accounting (Clause 9.4).
- (b) Clause 10 exempted SMCV from any law or regulation that would “directly or indirectly denaturalize[]” the benefits of Clause 9 and “any encumbrance or obligation that could represent reduction of its availability of cash.”

81. On 25 March 1998, Cyprus delivered the 1998 Mill Feasibility Study to Minero Perú.<sup>135</sup> The Study concluded for the third time that the “economics” of the proposal “do not support a prudent investment for construction and operation of a copper sulfide ore concentrator.”<sup>136</sup>

82. On 23 November 1998, MINEM certified SMCV’s sworn statement, submitted in accordance with Article 30 of the Regulations, that it had substantially implemented the 1996 Feasibility Study, thus “[c]onfirm[ing] that [SMCV] enjoys Tax Stability for the Regime in force as of May 6, 1996.”<sup>137</sup> As required by Article 33 of the Regulations, SMCV informed the Peruvian tax agency (the National Superintendence of Customs and Tax Administration, or “SUNAT”) and

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<sup>135</sup> **Ex. CE-13**, Bateman Engineering Inc., Primary Sulfide Ore Mill Expansion: Feasibility Study (16 March 1998), p. 1-1.

<sup>136</sup> **Ex. CE-13**, Bateman Engineering Inc., Primary Sulfide Ore Mill Expansion: Feasibility Study (16 March 1998), p. 2-7.

<sup>137</sup> **Ex. CE-360**, MINEM, Directorial Resolution No. 342-98-EM/DGM (23 November 1998), Preamble and Arts. 1 & 2 (referring to Regulations, Art. 30); *see also* **CA-1**, I Mining Law, Art. 80(a) (“[T]he titleholder shall be subject, solely, by the tax regime in-force at the date of approval of the investment program, not being applicable any tax subsequently created . . .”).

MINEM of its intent to rely on the stabilized regime under the Stability Agreement as of 1 January 1999.<sup>138</sup>

83. In October and November 1999, after fulfilling the investment plan set out in the 1996 Feasibility Study, SMCV made additional investments in the Cerro Verde Mining Unit when it acquired used mining equipment for US\$4.5 million, allowing it to increase daily ore extraction from 120,000 to 161,000 MT.<sup>139</sup> The 1996 Feasibility Study did not include these investments.<sup>140</sup>

#### **E. CONSTRUCTION OF THE CONCENTRATOR BECAME POTENTIALLY FEASIBLE AFTER PHELPS DODGE TOOK OVER SMCV**

##### **1. After Phelps Dodge Acquired SMCV, Peru Insisted That the Share Purchase Agreement Committed SMCV to Construct a Concentrator**

84. In October 1999, Phelps Dodge acquired Cyprus.<sup>141</sup> Cristian Morán, who was involved in the acquisition as Director of Finance at Phelps Dodge Mining Services and later served as Phelps Dodge’s Assistant Treasurer, testifies in these proceedings.<sup>142</sup> Mr. Morán explains one of Phelps Dodge’s considerations at the time was whether to make further investments in Cerro Verde’s operations, including building a concentrator, and that because of Peru’s past economic and political turmoil, the Stability Agreement was “essential” and “critically important” for such further investment.<sup>143</sup> Copper prices were low at the time—averaging US\$0.73 per pound in 1999—and any additional taxes or charges would have jeopardized the additional investments that Phelps Dodge sought to undertake.<sup>144</sup> Mr. Morán testifies that, when Phelps Dodge acquired Cyprus, it understood that the Stability Agreement would apply to the entire Cerro Verde Mining Unit, including any investment in the development of the extraction and processing of primary sulfides, and “assigned great importance” to the Stability Agreement “in determining the company’s future plans.”<sup>145</sup>

85. In early 2000, Minero Perú informed Phelps Dodge, as Cyprus’s acquirer, that it viewed the failure to proceed with constructing a concentrator as a violation of the Share Purchase Agreement, and threatened to commence breach of contract proceedings.<sup>146</sup> Minero Perú argued that the three failed feasibility studies did not absolve Cyprus’s obligation to construct a concentrator,

<sup>138</sup> **Ex. CE-361**, SMCV Letter to SUNAT of 30 November 1998; **Ex. CE-362**, SMCV Letter to MINEM of 30 November 1998 (referring to **CA-2**, Regulations, Art. 33).

<sup>139</sup> **Ex. CE-363**, Phelps Dodge, Cerro Verde Assessment (October-November 1999), p. [14].

<sup>140</sup> See Torreblanca ¶ 11.

<sup>141</sup> See **CWS-9**, Witness Statement of Cristián Morán (27 August 2021) (“Morán”) ¶¶ 10-11.

<sup>142</sup> See Morán ¶¶ 6-9.

<sup>143</sup> Morán ¶¶ 11-15.

<sup>144</sup> Morán ¶ 14; **Ex. CE-810**, Macro Trends, Copper Prices - 45 Year Historical Chart, available at <https://www.macrotrends.net/1476/copper-prices-historical-chart-data>.

<sup>145</sup> Morán ¶¶ 14-15.

<sup>146</sup> **CWS-5**, Witness Statement of Randy L. Davenport (27 August 2021) (“Davenport”) ¶¶ 18-20 (describing dispute and eventual settlement related to Share Purchase Agreement).

given how central the primary sulfides had been to the sale of SMCV.<sup>147</sup> Phelps Dodge disagreed, invoking Cyprus’s right to reduce its investment commitment if a feasibility study showed that any part of that commitment was not feasible.<sup>148</sup>

86. Following negotiations facilitated by Humberto Montes, the then-Vice-Minister of Mines, the parties settled the dispute through an agreement signed on 30 March 2001 (the “Settlement Agreement”).<sup>149</sup> In the Settlement Agreement, Minero Perú relinquished its claim in exchange for Phelps Dodge’s commitment to (i) make at least US\$50 million in further investments into the Cerro Verde mining unit over the following three years, and (ii) explore the feasibility of processing the primary sulfides for three more years.<sup>150</sup>

87. In 2001 and 2002, Phelps Dodge, through SMCV, made two capital improvements to satisfy the bulk of the additional investment commitment under the Settlement Agreement, neither of which was included in the 1996 Feasibility Study:<sup>151</sup>

- (a) In May 2001, SMCV began implementing a revised mine plan requiring about US\$10 million in capital expenditures to optimize the leaching and SX/EW circuits in light of changes to the “cutoff grade,” the threshold amount of copper that a block of ore must contain for SMCV to process it.<sup>152</sup> Those improvements expanded production of copper cathodes from 195 to 230 MT/d, leading to an increase of 10 million pounds of annual production.<sup>153</sup> Because the new mine plan did not expand processing capacity but rather processed the same amount of ore more efficiently, SMCV was not required to seek approval from the DGM.<sup>154</sup>
- (b) In 2001 and 2002, SMCV invested US\$15 million to expand the leaching facility’s Pad 2—which allowed SMCV to process an additional 8,000 MT/d of ore through the leaching circuit.<sup>155</sup> On 21 May 2002, MINEM authorized SMCV to operate the pad

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<sup>147</sup> Davenport ¶¶ 17-18.

<sup>148</sup> See Davenport ¶ 20; see also **Ex. CE-4**, Share Purchase Agreement, Art. 4.3(b)(i).

<sup>149</sup> Davenport ¶ 20; **Ex. CE-17**, Out-of-Court Settlement Agreement Between Cyprus Climax Metals Co. and Empresa Minera del Perú S.A. (30 March 2001).

<sup>150</sup> **Ex. CE-17**, Out-of-Court Settlement Agreement Between Cyprus Climax Metals Co. and Empresa Minera del Perú S.A. (30 March 2001), Clauses 3.1, 4.1, 4.5.

<sup>151</sup> Davenport ¶ 21.

<sup>152</sup> Davenport ¶ 22.

<sup>153</sup> Davenport ¶ 22.

<sup>154</sup> Davenport ¶ 22.

<sup>155</sup> Davenport ¶ 23.

and expanded the capacity of the Beneficiation Concession from 31,000 to 39,000 MT/d.<sup>156</sup>

88. Randy Davenport, SMCV's President and General Manager from 2000 to 2005, testifies that, while "[n]either of these investments was foreseen in Cyprus's 1996 feasibility study," "there was no doubt in my mind that they were protected by the Stability Agreement and the Government always treated them as such."<sup>157</sup> Julia Torreblanca, SMCV's Vice President of Corporate Affairs, similarly testifies that "SUNAT never questioned that these investments were covered by the Stability Agreement's guarantees."<sup>158</sup>

## **2. Through an Investment in the Local Energy and Water Supply, SMCV Achieved a Breakthrough That Potentially Made Construction of a Concentrator Economically Feasible**

89. By the time Minero Perú and Cyprus signed the Settlement Agreement in March 2001, the landscape for developing Cerro Verde's primary sulfides had already started to improve. In September 2000, improvements to the electrical grid resulted in a "dramatic increase in the available energy supply" in Arequipa.<sup>159</sup> SMCV then learned that Empresa de Generación de Arequipa S.A. ("EGASA"), the regional State-owned energy company, "had been trying for several years" to construct a hydroelectric dam on the nearby Pillones River, but had been unable to obtain funding from the Government.<sup>160</sup> In October 2001, SMCV agreed to invest in the project in exchange for a share in the water rights, which SMCV could use to operate a possible future concentrator, allowing EGASA to move forward with a project that would double its output with renewable energy.<sup>161</sup> SMCV ultimately finalized this agreement in April 2004, contributing 40% of the US\$17 million in capital costs for an equivalent stake.<sup>162</sup>

90. Following these breakthroughs in water and energy supply, in 2002, SMCV conducted a pre-feasibility study for a concentrator.<sup>163</sup> However, it was not clear to Phelps Dodge that it would be worth the significant upfront investment required to build a large enough concentrator to

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<sup>156</sup> **Ex. CE-382**, MINEM, Directorial Resolution No. 151-2002-EM/DGM (21 May 2002) (approving the request and expanding the Beneficiation Concession); *see also* **Ex. CE-376**, SMCV, Petition No. 1341243 to MINEM (30 October 2001); **Ex. CE-380**, MINEM, Report No. 056-2002-EM-DGM/DPGM (18 February 2002) (recommending that the DGM approve the request).

<sup>157</sup> Davenport ¶ 21.

<sup>158</sup> Torreblanca ¶ 11.

<sup>159</sup> Davenport ¶ 24; *see* **Ex. CE-816**, Multilateral Investment Guarantee Agency, Consorcio Transmantaro S.A., <https://www.miga.org/project/consorcio-transmantaro-sa>.

<sup>160</sup> Davenport ¶ 24.

<sup>161</sup> *See* **Ex. CE-53**, Empresa de Generación Eléctrica de Arequipa S.A., Final Liquidation of Work: Pillones Dam (30 May 2011), p. 1; Torreblanca ¶ 14; Davenport ¶¶ 24, 27.

<sup>162</sup> Davenport ¶ 27; **Ex. CE-430**, EGASA and SMCV, Consortium Contract for the Construction of the Pillones Dam (27 April 2004), Clauses 5.1, 5.3.

<sup>163</sup> Davenport ¶ 25.

achieve economies of scale.<sup>164</sup> Mr. Davenport testifies that in determining whether to proceed, Phelps Dodge weighed the investment in Peru—a new market for Phelps Dodge at that time—against potential investments in “world-class copper deposits elsewhere in the Americas and beyond,” and that some Phelps Dodge executives “were skeptical” given the country’s recent economic turmoil.<sup>165</sup> Mr. Davenport also testifies that “[g]uarantees of tax and administrative stability were a prerequisite for Phelps Dodge to invest in large-scale mining investment in developing economies such as Peru,” and the Stability Agreement was therefore “of paramount importance” to the prospective Concentrator investment.<sup>166</sup> As Mr. Davenport further testifies, Phelps Dodge ultimately decided to proceed with a full-scale feasibility study into how to process the primary sulfides.<sup>167</sup> Thus, in June 2003, Phelps Dodge retained Fluor Canada Ltd. to conduct a feasibility study for construction of a concentrator.<sup>168</sup>

### 3. The Government Confirmed That the Concentrator Investment Would Enjoy the Stabilized Reinvestment Benefit

91. Beginning in mid-2003, Phelps Dodge and SMCV also set out to confirm that SMCV would be entitled to claim a tax benefit allowing it to reinvest profits from the existing operations in the Cerro Verde Mining Unit to construct a concentrator. This benefit was allowed by Article 72(b) of the Mining Law and its implementing regulations, as they existed as of 6 May 1996, the effective stabilization date of the Stability Agreement. Even though Congress had subsequently repealed the benefit, SMCV believed that it was entitled to invoke it under the Stability Agreement as part of its stabilized tax regime.<sup>169</sup> The reinvestment benefit would allow SMCV to (1) reinvest in the Mining Unit up to 80% of its non-distributed profits and (2) pay income tax on only the remaining 20%. The benefit would apply only if the “new investment program” was part of the same “mining unit[]” and “guarantee[d] the increase of production levels” in that unit.<sup>170</sup> Mr. Morán testifies that Phelps Dodge “wanted to confirm that the benefit would apply to partially fund the Concentrator, and we asked [SMCV’s executives] what requirements SMCV would have to comply with to confirm that the

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<sup>164</sup> Davenport ¶ 25.

<sup>165</sup> Davenport ¶ 25; *see also* Morán ¶ 14.

<sup>166</sup> Davenport ¶ 30.

<sup>167</sup> Davenport ¶ 26.

<sup>168</sup> *See* **Ex. CE-20**, Fluor Canada Ltd., Feasibility Study: Cerro Verde Primary Sulfide Project (May 2004), Vol. I, p. 1.

<sup>169</sup> *See* **CA-79**, Stability Agreements with the State, Law No. 27343 (5 September 2000); Morán ¶ 20; Torreblanca ¶ 16.

<sup>170</sup> *See* **CA-1**, Mining Law, Art. 72(b) (“In order to grant the mining activity the necessary international competitiveness, taxes apply only to the income distributed by mining activity titleholders.”); **CA-2**, Regulations, Art. 10 (“Non-distributed income shall be applied to the execution of new investment programs that guarantee the increase of production levels of the relevant mining units.”); **CA-68**, Application of Tax Benefits to Retained Earnings That Are Used for Investment Programs to Ensure an Increase in the Production of Mining Units, Supreme Decree No. 027-98-EF (25 March 1998), Art. 4 (“The tax benefit will operate on 80% of the earnings actually obtained and deducted in each fiscal year and up to the maximum amount of the investment program that has been approved.”).

Peruvian tax authorities would recognize the benefit,” given that it would be a critical input in assessing whether the concentrator would be economically feasible.<sup>171</sup>

92. On 3 July 2003, Ms. Torreblanca wrote to Ms. Chappuis, then head of the DGM, to confirm that SMCV would be entitled to apply the profit reinvestment benefit as a result of the Stability Agreement.<sup>172</sup> Ms. Torreblanca explained that SMCV’s decision to build a concentrator “was directly related” to the DGM’s approval of the benefit.<sup>173</sup> She continued:

Given that the executed stability agreement makes reference therein to the Leaching Project rather than to the Cerro Verde Project, which also includes the Primary Sulfides Project, we request clarification that the Investment Program using Non-Distributed Profits to be submitted would be approved *regardless of the fact that it is not confined to the Leaching Project.*

In order to complete this aspect related to reinvestment of profits in the Feasibility Study, we would like to ask for your opinion on this matter, to be able to specify that the reinvestment of profits stabilized for Cerro Verde . . . is applicable to the Primary Sulfides Project, even though the stability agreement does not mention this project. This is requested because this agreement stabilizes the profit-reinvestment regime for the mining titleholder rather than for the project that gave rise to its signing.<sup>174</sup>

93. Ms. Chappuis testifies that she and her colleagues in the DGM—the competent agency within MINEM that administers beneficiation concessions and mining stability agreements—analyzed the request under the Regulations and on their “clear” understanding that “the Stability Agreement applied to all investments that SMCV made in the Cerro Verde mining unit during the term of the Stability Agreement,” including the Concentrator.<sup>175</sup> On 8 September 2003, the DGM replied to SMCV in a report written by a MINEM attorney and engineer and approved by Ms. Chappuis.<sup>176</sup> The report concluded that the profit reinvestment program would apply to the new concentrator by virtue of the Stability Agreement because it was a “new investment program[.]” that would “increase[.] the levels of production in the involved mining unit[.]” in accordance with Article 10 of the Regulations.<sup>177</sup> The report noted that it was not a “requirement” of the law that the

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<sup>171</sup> Morán ¶ 20; *see also* Torreblanca ¶ 16-17.

<sup>172</sup> Torreblanca ¶ 18; **Ex. CE-394**, SMCV, Petition No. 1418719 to MINEM (3 July 2003).

<sup>173</sup> Torreblanca ¶ 18; **Ex. CE-394**, SMCV, Petition No. 1418719 to MINEM (3 July 2003).

<sup>174</sup> **Ex. CE-394**, SMCV, Petition No. 1418719 to MINEM (3 July 2003) (emphases added).

<sup>175</sup> Chappuis ¶ 45; **CA-1**, Mining Law, Art. 101; *see also* **CA-2**, Regulations, Art. 10; **CA-60**, Regulation of the Procedure for Submitting, Approving, and Executing Investment Programs using Non-Distributed Profits, Executive Decree 07-94-EM (21 February 1994).

<sup>176</sup> **Ex. CE-399**, MINEM, Report No. 510-2003-MEM-DGM-TNO (8 September 2003).

<sup>177</sup> **Ex. CE-399**, MINEM, Report No. 510-2003-MEM-DGM-TNO (8 September 2003).

Stability Agreement “included [a concentrator] previously as a project” within the investment program submitted to obtain stability.<sup>178</sup>

94. On 28 January 2004, Ms. Torreblanca submitted on behalf of SMCV a formal request to MINEM for permission to reinvest profits to construct “a concentrator to process the primary sulfide ore” in the Cerro Verde Mining Unit (the “Concentrator”).<sup>179</sup> Ms. Torreblanca based the request on the Stability Agreement, “which stabilized in favor of [SMCV] the tax regime in force as of May 6, 1996,” and attached a detailed summary of the Concentrator, including estimates of reserves and capital costs.<sup>180</sup>

**F. THE GOVERNMENT REPEATEDLY CONFIRMED THAT IT WOULD HONOR THE STABILITY AGREEMENT AS APPLIED TO A CONCENTRATOR TO PROCESS THE PRIMARY SULFIDE DEPOSIT AT CERRO VERDE**

**1. SMCV Obtained a Successful Feasibility Study for the Concentrator Investment**

95. In May 2004, Fluor delivered its feasibility study for the Concentrator investment (the “2004 Feasibility Study”).<sup>181</sup> The Study considered four design options: (i) a 50,000 MT/d concentrator with a crushing technology called semi-autonomous ball crushing (“SABC”); (ii) a 50,000 MT/d concentrator with crushing technology called high-pressure grinding rolls (“HPGR”); (iii) a 100,000 MT/d concentrator with SABC; and (iv) a 100,000 MT/d concentrator with HPGR, which the study found would in fact have an average operating capacity of 108,000 MT/d.<sup>182</sup> The study confirmed that upgrades in the power grid and SMCV’s participation in the Pillones dam 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.<sup>183</sup>

96. In reaching this conclusion, the 2004 Feasibility Study assumed that the Stability Agreement, which stabilized “the tax regime in force on 6 May 1996” for a 15-year period, would apply to the Concentrator.<sup>184</sup> Accordingly, the financial analysis incorporated the “key points of the

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<sup>178</sup> See **Ex. CE-399**, MINEM, Report No. 510-2003-MEM-DGM-TNO (8 September 2003); see also Chappuis ¶¶ 46-47.

<sup>179</sup> **Ex. CE-421**, SMCV, Petition No. 3616468 to MINEM (28 January 2004); Torreblanca ¶ 20.

<sup>180</sup> **Ex. CE-421**, SMCV, Petition No. 3616468 to MINEM (28 January 2004); Torreblanca ¶ 20.

<sup>181</sup> **Ex. CE-20**, Fluor Canada Ltd., Feasibility Study: Cerro Verde Primary Sulfide Project (May 2004).

<sup>182</sup> See **Ex. CE-20**, Fluor Canada Ltd., Feasibility Study: Cerro Verde Primary Sulfide Project (May 2004), Vol. I, p. 1.

<sup>183</sup> See **Ex. CE-20**, Fluor Canada Ltd., Feasibility Study: Cerro Verde Primary Sulfide Project (May 2004), Vol. I, p. 30 (noting that a 100,000 MT/d concentrator could receive enough power “by the installation of a new 220 kV double-circuit power transmission line from the regional Socabaya substation directly to the sulfide substation”); *id.*, p. 31 (noting that, to address a concentrator’s additional water needs, “SMCV has entered into a joint-venture agreement with EGASA to participate in the development of the Pillones reservoir project in the upper Rio Chili watershed”). Cf. Davenport ¶ 26.

<sup>184</sup> **Ex. CE-20**, Fluor Canada Ltd., Feasibility Study: Cerro Verde Primary Sulfide Project (May 2004), Vol. IV, pp. 14-15.

stabilized regime,” as well as “the current tax regime used in the economic analysis . . . beginning” after the conclusion of the stabilized regime, highlighting differences between the two.<sup>185</sup> The 2004 Feasibility Study also stated that “[t]he subject of mining royalties is currently under review in the Peruvian legislature” but that “no decrees are forthcoming at the time of writing this report.”<sup>186</sup> This approach was consistent with SMCV’s and Phelps Dodge’s “confiden[ce]” that “any expansion would be covered by the Stability Agreement” since “SMCV was operating its only mining unit with a single mining concession and a single beneficiation concession,” as Mr. Davenport testifies.<sup>187</sup>

## 2. Amid Intensifying Political Pressure to Extract More State Revenue from the Mining Sector, Peru Enacted a Mining Royalty Law

97. SMCV’s breakthrough in the 2004 Feasibility Study arrived amid intense political debate in Peru. Beginning in late 2002 and early 2003, as rapidly 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.<sup>188</sup>

98. The Government initially resisted these proposals. In January 2003, responding to the first draft royalty bills, Minister of Energy and Mines Jaime Quijandría issued an opinion warning that a royalty regime would be “counterproductive to the Government’s current goal of promoting the country’s development on the basis of private investment” in light of the “hugely negative effect that levying a royalty would have on [Peru’s] competitiveness and on its ability to attract investment.”<sup>189</sup> Mr. Flury, who succeeded Mr. Quijandría as Minister of Energy and Mines, echoed these sentiments in a 4 November 2003 opinion to Congress responding to additional proposed drafts.<sup>190</sup>

99. Mr. Flury also explained that any royalty would have limited upside because “the biggest companies with investments, some of which are still in the process of recouping their investment, have Tax Stability Agreements, so that the proposed royalty tax would not be applicable to them in practice.”<sup>191</sup> Several of the draft royalty bills explicitly recognized this limitation.<sup>192</sup>

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<sup>185</sup> **Ex. CE-20**, Fluor Canada Ltd., Feasibility Study: Cerro Verde Primary Sulfide Project (May 2004), Vol. IV, pp. 14-15 to 14-16 (comparing stabilized and non-stabilized regimes with respect to non-discrimination in foreign exchange, accounting in U.S. dollars, income tax, depreciation, tax on interest expense, and disposability of foreign currency).

<sup>186</sup> **Ex. CE-20**, Fluor Canada Ltd., Feasibility Study: Cerro Verde Primary Sulfide Project (May 2004), Vol. IV, p. 14-16.

<sup>187</sup> Davenport ¶ 31.

<sup>188</sup> See e.g., **Ex. CE-389**, *Tax Avoidance in the Chilean Mining Sector?*, LA REPÚBLICA (16 May 2003); **Ex. CE-387**, *The Hundred Days Proposal*, AREQUIPA AL DÍA (5 February 2003).

<sup>189</sup> **Ex. CE-386**, Official Letter No. 133-2003-EM/DM (31 January 2003); see also Flury ¶¶ 24-25.

<sup>190</sup> Flury ¶ 27; **Ex. CE-404**, MINEM, Communication No. 1609-2003-MEM/DM (4 November 2003), p. 2. (opining that a royalty would “not be advantageous” because it “would make us less competitive in comparison to other countries for the purpose of attracting such national or foreign private investments as are necessary to develop our great potential mineral resources.”).

<sup>191</sup> Flury ¶ 27; **Ex. CE-404**, MINEM, Communication No. 1609-2003-MEM/DM (4 November 2003), p. 2.

Following Mr. Flury's comments, on 26 November 2003, the Energy and Mines Commission of the Peruvian Congress issued a report recommending approval of a royalty, but clarifying that companies with mining stability agreements would be exempt—a category that Government officials repeatedly affirmed included SMCV.<sup>193</sup> Mining stability agreements thus quickly became central to the debate over royalties, since they presented a major obstacle to implementing any royalty plan.<sup>194</sup>

100. In early 2004 certain members of Congress began to push more forcefully for the position that the royalty should apply to *all* mining companies, irrespective of whether they had stability agreements.<sup>195</sup> For example, in an April 2004 presentation before Congress, Congressman Diez Canseco argued that “[m]any of these [stability] agreements are a questionable legacy of Fujimori[] and should be reviewed and renegotiated.”<sup>196</sup> Similarly, on 21 May 2004, Congressman Pedro Morales submitted a proposed royalty bill that would apply to all mining companies, “including those owners who have . . . stability agreements.”<sup>197</sup>

101. On 28 April 2004, President Toledo and his Prime Minister proposed an alternative to Congress's draft royalty law, which would have replaced Congress's proposed *ad valorem* royalty—essentially a surcharge on mining profits—with a one to three percent royalty applied as a prepayment of future income taxes.<sup>198</sup> The Government argued that this proposal struck a more suitable balance given that the Mining Law's benefits, including contractual stability, had been critical in “enabl[ing] Peru to compete for foreign direct investment.”<sup>199</sup> However, members of Congress sharply rejected this proposal<sup>200</sup> and pushed ahead with the congressional plan for an *ad valorem* royalty.<sup>201</sup>

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<sup>192</sup> Flury ¶ 26; **Ex. CE-403**, Congress, Draft Law No. 08561-2003-CR (14 October 2003); **Ex. CE-406**, Congress, Draft Law No. 08906-2003-CR (6 November 2003) (including SMCV in list of stabilized companies).

<sup>193</sup> Flury ¶ 28; **Ex. CE-415**, Congress, Opinion No. 4462/2002-CR, 4776/2002-CR, 8328/2003-CR, 8561/2003-CR, and 8906/2003-CR (5 December 2003), p. 1; *see also* **Ex. CE-19**, MEF, Evaluation of Royalty Application (11 March 2004), p. [10] (including SMCV on list of mining companies whose stability agreements would preclude application of a new royalty); **Ex. CE-403**, Congress, Draft Law No. 08561-2003-CR (14 October 2003), p. 8 (“The stability agreements that were signed with the Peruvian State prior to this law fall outside its scope of application, until the terms of said stability agreements are completed.”); **Ex. CE-406**, Congress, Draft Law No. 08906-2003-CR (6 November 2003) (including SMCV in list of stabilized companies).

<sup>194</sup> *See* Flury ¶¶ 28-30.

<sup>195</sup> *See* Flury ¶¶ 30-31.

<sup>196</sup> *See* **Ex. CE-429**, Javier Diez Canseco, Mining Royalties and the Need to Reform Mining Taxation: Who Is Opposed? (April 2004).

<sup>197</sup> **Ex. CE-438**, Congress, Draft Law No. 10636/2003-CR (21 May 2004), Art. 4.

<sup>198</sup> **Ex. CE-431**, Congress, Draft Law No. 10443/2003-CR (28 April 2004), Art. 4; *see also* **Ex. CE-433**, *Peru's Congress to Examine Mine Royalty Proposals*, OSTERDOWJONES COMMODITY WIRE (30 April 2004).

<sup>199</sup> **Ex. CE-431**, Congress, Draft Law No. 10443/2003-CR (28 April 2004), pp. [6-7] (arguing that the congressional proposal would “generate[] a loss of competitiveness” unless accompanied with “compensatory mechanisms or formulas that allow the country to remain attractive to investors.”); *see also id.* (“Due to the weakened image of the country in the world, in 1991 it was essential to give incentives to investments in mining and, as is known, the results were, in the medium and long term, extremely positive,

102. Throughout this discussion, Government officials continued to reiterate that a royalty could not apply to companies with mining stability agreements in force, and that imposition of the royalty would hurt Peru's standing with prospective investors.<sup>202</sup> These positions provoked vociferous reactions from the royalty's Congressional proponents, who accused the Government of "advocat[ing] for multinational companies" and lobbying on behalf of "private companies."<sup>203</sup>

103. Against this contentious backdrop, on 3 June 2004, the Peruvian Congress adopted the Mining Royalty Law, imposing an *ad valorem* royalty on the "holders of *mining concessions*" for the extraction of ores.<sup>204</sup> The law imposed a marginal one percent royalty for every US\$60 million in revenue, topping out at three percent for revenues in excess of US\$120 million.<sup>205</sup> On 9 June 2004, MINEM's Regional Director of Energy and Mines in Arequipa, Juan Muñiz, stressed that the Royalty Law should be "reevaluated," noting again its limited upside in light of the fact that most companies had stability agreements in place.<sup>206</sup> Nevertheless, on 23 June 2004—facing pressure from Congress that grew each day without a signature—President Toledo signed the Royalty Law and published it in the Official Gazette on the following day.<sup>207</sup>

104. The Government immediately sought to soften the impact of the Royalty Law, which it feared would suppress investment in the mining sector. Beginning on the day President Toledo signed the 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

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with a significant expansion of economic activity produced, which was reflected in the demand for mining concessions, in the production of ores, concentrates and refined metals, in the investment of large sums of capital and in the presence in the country of the most important mining companies in the world").

<sup>200</sup> **Ex. CE-433**, *Peru's Congress to Examine Mine Royalty Proposals*, OSTERDOWJONES COMMODITY WIRE (30 April 2004).

<sup>201</sup> *See, e.g., Ex. CE-437*, Congress, Committee on Economy & Financial Intelligence, Minutes of 11 May 2004, p. 17 (dismissing alternative draft bills).

<sup>202</sup> *See Ex. CE-439*, *Minister of Economy of Peru Against Mining Royalties*, AGENCE FRANCE PRESSE (30 May 2004) (quoting then-Minister of Economy and Finance Pedro Pablo Kuczynski as stating that the royalty would undermine Peru's attempts to attract investment by sending a "populist message," and also would only be "paid by a minority of companies since most of the large mining projects are stabilized in terms of both taxes and fees."); *see also Ex. CE-814*, *Royalty Law Will Be Approved But Other Proposals Will be Presented*, EL COMERCIO; Torreblanca ¶ 30.

<sup>203</sup> **Ex. CE-439**, *Minister of Economy of Peru Against Mining Royalties*, AGENCE FRANCE PRESSE (30 May 2004).

<sup>204</sup> **CA-6**, Royalty Law No. 28258 (24 June 2004), Art. 2 (emphasis added).

<sup>205</sup> **CA-6**, Royalty Law No. 28258 (24 June 2004), Arts. 2, 5.

<sup>206</sup> *See Ex. CE-441*, Royalty Law Aimed at the Small-Scale Mining Sector, AREQUIPA AL DÍA (9 June 2004) (quoting Mr. Muñiz as noting that a "large part of the transnational companies operating in the country have been exempted from taxes for a period of 10 years. Consequently, there would not be many companies on which to effectively apply this provision.").

<sup>207</sup> **CA-6**, Royalty Law No. 28258 (24 June 2004); *see Ex. CE-442*, *Kuczynski Is Held Accountable for Campaign Against Royalties*, LA REPÚBLICA (11 June 2004).

royalty would not apply, and questioned the wisdom of maintaining it permanently.<sup>208</sup> However, Members of Congress—notably Congressman Diez Canseco—viewed the proposed amendments as merely a ploy by the Government to delay approval of the regulations to implement the Royalty Law and thus its entry into force, noting that this was “unreasonable and unacceptable.”<sup>209</sup>

105. Meanwhile, the same day President Toledo signed the Royalty Law, the Mining Society announced that it planned to collect 5,000 signatures to file a lawsuit challenging the law’s constitutionality, noting that its “serious deficiencies,” threatened “legal security” and “the competitiveness of Peru.”<sup>210</sup> Over 5,000 Peruvian citizens ultimately filed a suit challenging the Royalty Law before the Constitutional Tribunal on 24 November 2004.<sup>211</sup>

### 3. SMCV Sought and Received Further Confirmation That the Government Would Honor the Stability Agreement as Applied to the Concentrator

106. In light of the Government’s approval of the Royalty Law, and the contentious political context that led to its passage, Phelps Dodge and SMCV decided that it would be prudent to seek further confirmation from the Government that it would honor its obligation to apply the stabilized regime to the Concentrator, and that SMCV would thus not pay any royalties while the Stability Agreement remained in force.<sup>212</sup>

107. Mr. Davenport explains that “[i]n view of the significant size of the planned investment,” and the contentious debate over the royalty law, “Phelps Dodge wanted to obtain express confirmation from the Government that SMCV’s mining stability agreement would shield the concentrator from the royalty and any other legislative changes that could affect the plant’s economics.”<sup>213</sup> To that end, in meetings with the Government held in the second and third quarters of 2004, Ms. Torreblanca raised the issue of whether the Government could grant a written assurance

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<sup>208</sup> **Ex. CE-446**, Congress, Draft Law No. 10876/2003 (24 June 2004), pp. 2-3; *see also* **Ex. CE-451**, Congressional Approval of Amendment to the Mining Royalty Law (23 July 2004); **Ex. CE-455**, *Minister: Permanence of Mining Royalties Must Be Evaluated*, BUSINESS NEWS AMERICAS (9 August 2004) (quoting Minister Quijandría’s observations that in the medium and long term it was necessary to “evaluate” the “permanence of the royalty,” noting that “[p]erhaps this tool is not the most suitable.”).

<sup>209</sup> **Ex. CE-464**, *The Executive Asks for Mining Royalties Based on Prices*, LA REPÚBLICA (4 September 2004); **Ex. CE-461**, *Royalty Regulations Ready but on Hold*, BUSINESS NEWS AMERICAS (2 September 2004); *see also* **Ex. CE-456**, *The Difference Between Mining Royalty and Mining Canon*, LA REPÚBLICA (18 August 2004) (op-ed by Congressman Oré arguing that there were no reasons “for mining companies not to pay a mining royalty” and criticizing “political leaders” that “persist in defending the economic interests of mining entrepreneurs.”).

<sup>210</sup> **Ex. CE-447**, *Miners to Take Legal Action Against Royalty*, BUSINESS NEWS AMERICAS (24 June 2004); *see also* **Ex. CE-449**, *SNMPE: Government Changes ‘Roadmap’ by Enacting Populist Law*, LA GESTION (24 June 2004) (describing the law as “unconstitutional” “expropriating” and “discriminatory”).

<sup>211</sup> *See* **Ex. CE-478**, Unconstitutionality Claim re: Mining Royalty Law, No. 48-2004-AI (24 November 2004).

<sup>212</sup> *See* Torreblanca ¶ 23.

<sup>213</sup> Davenport ¶ 35; Torreblanca ¶¶ 23-24.

*explicitly* confirming that the Stability Agreement covered the Concentrator investment.<sup>214</sup> The officials told Ms. Torreblanca that a specific written assurance was unnecessary because the benefits of the Stability Agreement would already extend to the Concentrator, given that the Stability Agreement applied to SMCV’s entire mining unit.<sup>215</sup>

108. Ms. Torreblanca testifies that Ms. Chappuis, then the Director General of Mining, was “particularly clear” on this point.<sup>216</sup> Ms. Chappuis testifies that, “after discussing SMCV’s request with lawyers in the DGM,” she confirmed that “the Stability Agreement would apply to any investment that SMCV made in its mining unit throughout the Agreement’s effective term.”<sup>217</sup> One of her colleagues, César Polo, disagreed, taking the position that the Concentrator would have to pay royalties—a position Ms. Chappuis saw as “politically motivated.”<sup>218</sup> However, Ms. Chappuis explained to Ms. Torreblanca that SMCV should petition MINEM to expand the geographical area and installed capacity of its existing Beneficiation Concession—which the Stability Agreement explicitly covered—to include the Concentrator’s operations, since doing so would confirm that the Concentrator was entitled to stability.<sup>219</sup>

109. Following Ms. Chappuis’s advice, on 27 August 2004, SMCV submitted a request to expand the Beneficiation Concession to the DGM.<sup>220</sup> SMCV’s request included a detailed description of the Concentrator, including reserve and capital cost estimates adopted from the 2004 Feasibility Study, which had assumed stability.<sup>221</sup> The request sought permission to build the Concentrator, at an estimated cost of US\$800 million, and expansion of the Beneficiation Concession to 1,225.08 hectares and 147,000 MT/d to account for the additional 108,000 MT/d in operating capacity.<sup>222</sup> In its cover letter accompanying the application, Ms. Torreblanca noted that the expansion was “required to pursue the scheduled exploitation of our operations,” referring to the long-anticipated exploitation of primary sulfides.<sup>223</sup> The letter also noted that the “coexistence” of flotation and leaching in the Beneficiation Concession was “nothing new” at Cerro Verde, since the pilot concentrator had operated

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<sup>214</sup> Torreblanca ¶¶ 24-25; Chappuis ¶ 52; Davenport ¶¶ 36, 39.

<sup>215</sup> Torreblanca ¶¶ 24-25; Chappuis ¶ 52; Davenport ¶¶ 36, 39.

<sup>216</sup> Torreblanca ¶ 25.

<sup>217</sup> Chappuis ¶ 52.

<sup>218</sup> Chappuis ¶ 53.

<sup>219</sup> Chappuis ¶ 53.

<sup>220</sup> Torreblanca ¶ 26.

<sup>221</sup> **Ex. CE-457**, SMCV, Petition No. 1487019 to MINEM (27 August 2004) (requesting permission to construct the Concentrator and to expand the Beneficiation Concession to accommodate it, and attaching description of the Concentrator investment as Appendix 1(b)); *see* **Ex. CE-20**, Fluor Canada Ltd., Feasibility Study: Cerro Verde Primary Sulfide Project (May 2004), Vol. IV, p. 14-15 (recognizing that “the 1996 tax regime will be applicable until fiscal year-end 2012” and noting “[k]ey points of the stabilized regime and the current tax regime used in the economic analysis”).

<sup>222</sup> **Ex. CE-457**, SMCV, Petition No. 1487019 to MINEM (27 August 2004), p. 1.

<sup>223</sup> **Ex. CE-457**, SMCV, Petition No. 1487019 to MINEM (27 August 2004), p. 1.

alongside the SX/EW plant since the 1970s until 1994 under the existing Mining and Beneficiation Concessions.<sup>224</sup> Ms. Torreblanca pointed out that the Concentrator would dramatically expand the mine's capacity, extending the life of the mine from 2018 to at least 2033.<sup>225</sup>

110. On 3 September 2004, SMCV resubmitted to the DGM its application under the profit reinvestment program for the construction of the Concentrator.<sup>226</sup> The DGM had rejected the January request on technical grounds and requested additional information, which SMCV provided with the September resubmission.<sup>227</sup> As before, SMCV based its request on the reinvestment provision and the Stability Agreement, which it noted had "stabilized in favor of SMCV the tax regime in force as of May 6, 1996," and requested approval to reinvest profits in the "expansion of current operations of Cerro Verde," *i.e.*, construction of the Concentrator.<sup>228</sup>

#### 4. Phelps Dodge and SMCV Conditionally Approved the Concentrator Investment

111. After receiving the 2004 Feasibility Study, Phelps Dodge had asked Fluor to update the study to focus on the 108,000 MT/d concentrator with HPGR, the largest and most expensive option under consideration.<sup>229</sup> Although, at the time, HPGR was a new technology for copper mining and SMCV's concentrator would be the world's first and largest HPGR installation for large-scale copper mines, after conducting research on HPGR's reliability, Phelps Dodge believed that HPGR was likely the best fit for Cerro Verde.<sup>230</sup> In early September 2004, Fluor presented its updated study, which focused on incremental results for the 108,000 MT/d concentrator, and also took into account the newly passed Royalty Law.<sup>231</sup> Fluor's analysis assumed that "no royalties will be assessed during the stability agreement" through 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 2014."<sup>232</sup>

112. On 11 October 2004, Phelps Dodge and SMCV's Boards of Directors conditionally approved an investment of US\$850 million for the construction of the Concentrator, specifying that approval would "depend on obtaining the required permits and the financing necessary for the

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<sup>224</sup> **Ex. CE-457**, SMCV, Petition No. 1487019 to MINEM (27 August 2004), p. 2.

<sup>225</sup> **Ex. CE-457**, SMCV, Petition No. 1487019 to MINEM (27 August 2004), p. 1.

<sup>226</sup> **Ex. CE-462**, SMCV, Petition No. 1488199 to MINEM (3 September 2004).

<sup>227</sup> *See Ex. CE-436*, MINEM, Report No. 454-2004-MEM (11 May 2004); **Ex. CE-462**, SMCV, Petition No. 1488199 to MINEM (3 September 2004).

<sup>228</sup> **Ex. CE-462**, SMCV, Petition No. 1488199 to MINEM (3 September 2004).

<sup>229</sup> Davenport ¶¶ 28-29.

<sup>230</sup> Davenport ¶¶ 28-29.

<sup>231</sup> **Ex. CE-459**, Fluor, SMCV Primary Sulfide Project Feasibility Study Project Update (September 2004), pp. 1, 48.

<sup>232</sup> **Ex. CE-459**, Fluor, SMCV Primary Sulfide Project Feasibility Study Project Update (September 2004), p. 48.

project.”<sup>233</sup> As Ms. Torreblanca explains, “[t]he ‘required permits’ referred to the approval of SMCV’s request to expand the Beneficiation Concession and approval of the profit reinvestment benefit to partially finance the Concentrator’s construction.”<sup>234</sup> Mr. Davenport testifies that “[i]n approving the investment, Phelps Dodge’s and SMCV’s Boards of Directors relied on financial projections that assumed the Stability Agreement’s guarantees would apply to the concentrator, consistent with Ms. Chappuis’s advice to SMCV.”<sup>235</sup> Mr. Morán served on Phelps Dodge’s Finance Committee at the time, which had recommended approval of the investment to Phelps Dodge’s Board.<sup>236</sup> Mr. Morán testifies that, in so doing, “we noted that approvals were still outstanding in Peru, including one of the most important—the permission to expand the Beneficiation Concession to include the Concentrator, which would ensure that it would be covered by the Stability Agreement.”<sup>237</sup> Mr. Morán explains that Phelps Dodge’s Board “based its approval on the Finance Committee’s recommendation, as well as the 2004 Feasibility Study and its update which . . . reflected our understanding that the Stability Agreement’s guarantees would apply to the Concentrator (an understanding that the Peruvian authorities had confirmed to SMCV representatives).”<sup>238</sup>

113. On 12 October 2004, President Toledo met with Phelps Dodge’s President, Timothy Snider.<sup>239</sup> After the meeting, President Toledo reportedly “congratulate[d] the company,” expressed gratitude “for trusting Peru,” and “wish[ed] [Phelps Dodge] good luck,” while asserting that “we will fulfill our responsibility to maintain economic and legal stability.”<sup>240</sup>

##### **5. The Government Approved SMCV’s Requests to Include the Concentrator within its Existing Beneficiation Concession and to Apply the Profit Reinvestment Benefit**

114. On 26 October 2004, MINEM approved SMCV’s request to construct the Concentrator and to expand the Beneficiation Concession.<sup>241</sup> Under MINEM’s internal procedures, this resolution authorized SMCV to begin construction on the understanding that the expansion of the Beneficiation Concession would take place, even though final approval to operate the Concentrator and to extend the Beneficiation Concession would come only after inspection and environmental

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<sup>233</sup> **Ex. CE-470**, SMCV, Board of Directors Meeting Minutes (11 October 2004); Torreblanca ¶ 27.

<sup>234</sup> Torreblanca ¶ 27.

<sup>235</sup> Davenport ¶ 40.

<sup>236</sup> Morán ¶¶ 26-28.

<sup>237</sup> Morán ¶ 28.

<sup>238</sup> Morán ¶ 29.

<sup>239</sup> **Ex. CE-471**, *Peru: President Toledo Announces an Investment of US\$850 Million in Cerro Verde*, EUROPA PRESS (12 October 2004).

<sup>240</sup> **Ex. CE-471**, *Peru: President Toledo Announces an Investment of US\$850 Million in Cerro Verde*, EUROPA PRESS (12 October 2004).

<sup>241</sup> **Ex. CE-476**, MINEM, Report No. 784-2004-MEM-DGM/PDM and Directorial Order No. 027-2004-MEM-DGM/PDM (26 October 2004).

review of the completed plant.<sup>242</sup> Ms. Torreblanca testifies that she “understood that this MINEM resolution confirmed that the Stability Agreement would cover the Concentrator, just like all other investments that SMCV had made in the Cerro Verde Mining Unit after completing the investment program contained in the 1996 Feasibility Study.”<sup>243</sup> Mr. Davenport similarly testifies that MINEM’s approval “confirm[ed] [SMCV’s and Phelps Dodge’s] understanding that the Stability Agreement would cover the Concentrator because it covered the entire beneficiation concession.”<sup>244</sup>

115. On 29 October 2004, Rosario Padilla Vidalón, a MINEM legal advisor, issued a report approving SMCV’s request under the profit reinvestment program, sending it to Ms. Chappuis and MINEM’s Director of Mining Promotion and Development, Oswaldo Tovar Jumpa, for further review.<sup>245</sup> Ms. Chappuis testifies that Mr. Tovar approached her to discuss the request and asked if SMCV’s Stability Agreement would apply to the Concentrator and that he inquired in particular about the reference to the “Cerro Verde Leaching Project” in Clause 1.1 of the Stability Agreement.<sup>246</sup> Ms. Chappuis testifies that she “did not give much weight to this point since it was just a referential name that could not change the scope of stability benefits under the Mining Law and Regulations,” which she had “no doubt” extended to all of SMCV’s investments “as long as the concentrator formed part of the Cerro Verde mining unit.”<sup>247</sup> Ms. Chappuis testifies that she explained this to Mr. Tovar, and that he agreed that the Stability Agreement applied to SMCV’s entire production unit, including the Concentrator.<sup>248</sup>

116. On 30 November 2004, Mr. Tovar and Ms. Chappuis jointly signed a report recommending approval of SMCV’s request under the profit reinvestment program.<sup>249</sup> The report noted that the reinvestment benefit could be invoked because SMCV “enjoys tax stability, according to the Agreement signed on February 13, 1998,” without making any distinction between the existing leaching facilities and the Concentrator.<sup>250</sup> On 1 December 2004, Ms. Chappuis signed off on Ms. Padilla’s report approving SMCV’s request to benefit from the profit reinvestment program.<sup>251</sup> On 3 December 2004, the MEF added its approval, noting in its internal memo that SMCV had signed a stability agreement “with respect to the investment in its concession: Cerro Verde Nos. 1, 2 and 3,

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<sup>242</sup> Chappuis ¶ 55; Vega ¶ 67.

<sup>243</sup> Torreblanca ¶ 27.

<sup>244</sup> Davenport ¶ 41.

<sup>245</sup> Ex. CE-477, MINEM, Report No. 1334-2004-EM-DGM/TNO (29 October 2004); Chappuis ¶ 37.

<sup>246</sup> Chappuis ¶ 45.

<sup>247</sup> Chappuis ¶ 46.

<sup>248</sup> See Chappuis ¶ 46.

<sup>249</sup> Ex. CE-479, MINEM, Report No. 841-2004-MEM/DGM/PDM (30 November 2004).

<sup>250</sup> Ex. CE-479, MINEM, Report No. 841-2004-MEM/DGM/PDM (30 November 2004), p. 4.

<sup>251</sup> Ex. CE-477, MINEM, Report No. 1334-2004-EM-DGM/TNO (29 October 2004) (including Ms. Chappuis’s approval dated 1 December 2004).

known as ‘The Cerro Verde Leaching Project’” that remained “in force,” and that the Concentrator was intended for the “[e]xpansion of the [c]urrent [o]perations of Cerro Verde.”<sup>252</sup> On 9 December 2004, the Minister of Energy and Mines gave final approval to SMCV’s request to apply the profit reinvestment benefit to construct the Concentrator.<sup>253</sup>

117. SMCV began constructing the Concentrator in December 2004.<sup>254</sup> During the construction of the Concentrator, SMCV invested a total of US\$850 million in reliance on the Stability Agreement.<sup>255</sup> SMCV also generated a yearly average of 1,654 direct jobs and 9,808 indirect and induced jobs, which accounted for 3.5 percent of the employed labor force in Arequipa.<sup>256</sup>

## 6. SMCV Obtained Financing for the Concentrator Investment

118. Beginning in early 2004, Phelps Dodge had begun formally negotiating with Sumitomo Metal Mining to obtain financing for the concentrator investment. In October 2004, Sumitomo Metal Mining, Sumitomo Corporation, and Phelps Dodge executed heads of agreement, according to which Phelps Dodge agreed to make SMCV issue additional capital shares, and to assign the corresponding preferential rights certificates to enable Sumitomo Metal Mining and Sumitomo Corporation to collectively acquire 21% of the outstanding capital shares of SMCV for approximately US\$265 million, all of which was earmarked to construct and operate the Concentrator.<sup>257</sup> Around the same time, Phelps Dodge also entered into heads of agreement with Buenaventura, a minority shareholder in SMCV and one of Peru’s leading mining companies, which contemplated Buenaventura’s acquisition of a total of 17% to 20% of SMCV’s outstanding capital shares for approximately US\$99.85 million.<sup>258</sup>

119. On 16 March 2005—following, among others, the Government’s approval of the Beneficiation Concession expansion, which confirmed that the Concentrator investment would enjoy the Stability Agreement’s guarantees, and the reinvestment of profits benefit—Sumitomo Metal Mining, Sumitomo Corporation, Buenaventura, Phelps Dodge, SMCV, and others entered into a participation agreement for the purpose of obtaining financing for the Concentrator (the “Participation

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<sup>252</sup> See **Ex. CE-22**, MEF, Report No. 209-2004-EF/66.01 (3 December 2004); **Ex. CE-21**, MEF, Letter No. 942-2004-EF/10 (3 December 2004).

<sup>253</sup> **Ex. CE-23**, MEF, Ministerial Resolution No. 510-2004-MEM/DM (9 December 2004).

<sup>254</sup> Davenport ¶ 41.

<sup>255</sup> See, e.g., Davenport ¶¶ 39-41; Torreblanca ¶¶ 25-27.

<sup>256</sup> **Ex. CE-597**, APOYO, Study of the Impact of the Activities of Cerro Verde on the Economy of Arequipa and Peru 2005-2010 (1 March 2010), pp. 3,13, 23-25.

<sup>257</sup> **Ex. CE-468**, Phelps Dodge, Sale of Interests in South American Operations: Principal Terms (5 October 2004), p. 4; Morán ¶ 31.

<sup>258</sup> **Ex. CE-469**, Phelps Dodge, Sale of Additional Interest in Cerro Verde to Buenaventura: Principal Terms (7 October 2004), p. 1; Morán ¶ 31.

Agreement”).<sup>259</sup> The Participation Agreement recognized that the Concentrator would be located “within the concessions of SMCV” and developed according to the plan set out in the 2004 Feasibility Study and its September 2004 update, both of which assumed that the Stability Agreement would apply.<sup>260</sup>

120. In May 2005, pursuant to the terms of the Participation Agreement, SMCV initiated a capital increase by issuing preferential subscription rights for 122,746,913 capital increase shares, of which Phelps Dodge (through Cyprus) acquired 101,250,165.<sup>261</sup> The same month, Phelps Dodge transferred its rights to purchase those shares to Buenaventura and to SMM Cerro Verde Netherlands B.V. (“SMM Cerro Verde”), a Dutch entity incorporated by Sumitomo Metal Mining and Sumitomo Corporation for the purpose of investing in the Concentrator.<sup>262</sup> On 1 June 2005, SMM Cerro Verde, Sumitomo Metal Mining, Sumitomo Corporation, Buenaventura, Phelps Dodge, SMCV, and others entered into a Shareholders Agreement.<sup>263</sup>

121. On 22 August 2005, John Broderick, who had taken over from Mr. Davenport as SMCV’s president in May of that year, addressed journalists to reaffirm the company’s commitment regarding the Concentrator. In an article published in *El Comercio*, one of Peru’s leading newspapers, he described the Concentrator as the largest mining investment in Peru’s history, noting that, unlike other investments, the company was “disbursing US\$850 [million] in one phase” because it had a “high degree of confidence about the possibility of doing business in Peru.”<sup>264</sup> Mr. Broderick noted that SMCV had signed a Stability Agreement for the “original concession” and considered that the Concentrator was “part of it.”<sup>265</sup>

122. On 30 September 2005, SMCV entered into a master participation agreement (the “Master Participation Agreement”) with the interested lenders to finance the Concentrator. Together, the lenders agreed to lend up to US\$450 million to the project, which constituted the largest bank financing operation ever in Peru to that point in time.<sup>266</sup> After securing the loans, SMCV obtained the

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<sup>259</sup> See **Ex. CE-906**, Participation Agreement.

<sup>260</sup> See **Ex. CE-906**, Participation Agreement, p. 5. (“Whereas, the board of directors of Cerro Verde (the “Board”) has approved the development of a primary sulfide ore body beneath the oxide ore body located within the mining concessions owned by Cerro Verde identified in Schedule A hereto, which shall be processed into copper concentrate as a final product at new facilities that are to be developed generally as described in the Cerro Verde Primary Sulfide Feasibility Study, dated May 2004, prepared by Fluor Canada Ltd., as modified by the Project Update, dated September 2004”).

<sup>261</sup> **Ex. CE-561**, SMCV, Financial Statements 2005-2006, p. 8.

<sup>262</sup> **Ex. CE-497**, SMCV, Board of Directors Meeting Minutes of 28 April 2005; **Ex. CE-561**, SMCV Financial Statements 2005-2006, p. 8.

<sup>263</sup> **Ex. CE-502**, Shareholders Agreement Among SMM Cerro Verde, Sumitomo Metal Mining, Sumitomo Corp., Summit Global Management B.V., Buenaventura, Cyprus, Phelps Dodge, and SMCV (1 June 2005).

<sup>264</sup> **Ex. CE-505**, “*In Two Years We Will Triple Our Production*,” *EL COMERCIO* (22 August 2005), p. 2.

<sup>265</sup> **Ex. CE-505**, “*In Two Years We Will Triple Our Production*,” *EL COMERCIO* (22 August 2005), p. 2.

<sup>266</sup> See **Ex. CE-513**, Master Participation Agreement (30 September 2005); Morán ¶ 31.

remaining financing required through a corporate bonds issuance program for US\$90 million on 26 April 2006.<sup>267</sup>

**G. THE GOVERNMENT CONTINUED TO CONFIRM THAT SMCV WOULD NOT HAVE TO PAY ROYALTIES AS A RESULT OF THE STABILITY AGREEMENT**

**1. SUNAT Confirmed That the Royalty Law Did Not Apply to Cerro Verde**

123. On 17 February 2005, Haraldo Cruz, SUNAT’s Regional Intendent for Arequipa, sent a form letter to SMCV with instructions on how to declare and pay royalties in the event that it was under an “obligation” to do so as the “holder[] of [a] mining concession[]”.<sup>268</sup> The letter explained that “in order to determine the amount of the economic consideration and to be able to file the return and pay the Mining Royalty, you must download every month from Virtual SUNAT . . . the file that contains the information about your *Production Unit(s)*.”<sup>269</sup>

124. On 4 March 2005, SMCV sent a response to SUNAT explaining that SMCV was entitled to stability, and that the mining royalty “is not applicable to Cerro Verde by application of the . . . Stability Agreement.”<sup>270</sup> Ms. Torreblanca testifies that shortly after sending the response, she met with Mr. Cruz and 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.”<sup>271</sup> She further testifies that “SUNAT did not mention the issue of royalties again for several years.”<sup>272</sup>

**2. The Constitutional Tribunal Upheld the Royalty Law but Confirmed That Investors with Administrative Stability Agreements, like SMCV, Would Not Pay Royalties**

125. In early 2005, in the lead-up to the Constitutional Tribunal’s expected decision in the Mining Society’s case challenging the constitutionality of the Royalty Law, members of Congress again began to argue that mining stability agreements should not protect companies from paying royalties. Among other things, they argued that royalties were “fair compensation for the extraction of a nonrenewable natural resource” that fell outside the scope of tax stability.<sup>273</sup> Congressman Diez Canseco published articles in the national press attacking the Government, arguing that “instead of defending the State’s income, the MEF and MINEM are standing with their arms crossed and are winking to the mining lobbies since, for Kuczynski and his advisers, the defense of royalties is none

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<sup>267</sup> Ex. CE-561, SMCV, Financial Statements 2005-2006, p. 26.

<sup>268</sup> Ex. CE-482, SUNAT Letter to SMCV of 17 February 2005.

<sup>269</sup> Ex. CE-482, SUNAT Letter to SMCV of 17 February 2005 (emphasis added).

<sup>270</sup> Ex. CE-486, SMCV, Letter No. SMCV-AL-279/2005 to SUNAT (4 March 2005).

<sup>271</sup> Torreblanca ¶ 32.

<sup>272</sup> Torreblanca ¶ 32.

<sup>273</sup> Ex. CE-489, *Mining companies urged to comply with the payment of royalties to regions*, LA REPÚBLICA (9 March 2005).

of their business!”<sup>274</sup> He also threatened to hold “sit-ins” before the Judiciary to “explain the importance of the [Mining Royalty] law” and to “call on the judges not to give away injunctions to mining companies” to protect them from paying royalties.<sup>275</sup>

126. On 1 April 2005, Peru’s Constitutional Tribunal upheld the Mining Royalty Law.<sup>276</sup> The Constitutional Tribunal held that the mining royalty was not a tax but rather an “economic consideration” for the extraction of sovereign resources consistent with the right to property.<sup>277</sup> In addition, the Tribunal held that “with the establishment of the mining royalty, the State has not breached the commitment to respect the attributes conferred by the Law on the investors holding the concession, since the nature of these acts—falling under public law—does not grant the concessionaire immutability of the legal regime, for which case contract-laws operate.”<sup>278</sup>

127. The implications of this decision for stabilized companies were not immediately apparent. Congressman Diez Canseco lauded the decision, saying that the characterization of the royalty as “the mining royalty is NOT tax but rather a mechanism to compensate for the extraction of our national resources” meant it could be “universally applied, without being stymied or distorted by tax stability agreements signed behind Peruvians’ backs.”<sup>279</sup> At the same time, however, *La República* reported that MINEM officials—including Minister of Energy and Mines Glodomiro Sánchez Mejía—were “analyzing the ruling by the Constitutional Tribunal . . . to determine whether [it would] apply to companies that enjoy tax stability agreements.”<sup>280</sup>

### 3. The Government Confirmed That the Royalty Law Did Not Apply to Stabilized Concessions like Cerro Verde

128. Shortly after the Constitutional Tribunal issued its decision, Felipe Isasi Cayo, MINEM’s Director General of Legal Affairs, prepared a legal report addressed to Minister of Energy and Mines Glodomiro Sánchez Mejía, which analyzed in detail the application of the Royalty Law to companies with stability agreements in light of the Constitutional Tribunal’s ruling (the “April 2005 Report”). Mr. Isasi’s conclusion was unequivocal: he affirmed that “the royalty is not applicable to the mineral resources *extracted* from the *concessions that form part of the contractually stabilized*

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<sup>274</sup> **Ex. CE-485**, *Mining Royalties: Sleeping with the Enemy*, LA REPÚBLICA (2 March 2005).

<sup>275</sup> **Ex. CE-487**, *Mining companies appeal to the Courts to avoid paying royalties*, LA REPÚBLICA (5 March 2005); *see also* **Ex. CE-483**, *The Offensive Against Mining Royalties*, LA REPÚBLICA (23 February 2005); **Ex. CE-489**, *Mining companies urged to comply with the payment of royalties to regions*, LA REPÚBLICA (9 March 2005).

<sup>276</sup> **Ex. CE-490**, Constitutional Tribunal, Decision, Case No. 0048-2004-PI/TC (1 April 2005).

<sup>277</sup> **Ex. CE-490**, Constitutional Tribunal, Decision, Case No. 0048-2004-PI/TC (1 April 2005), ¶¶ 48-56, 86-88.

<sup>278</sup> **Ex. CE-490**, Constitutional Tribunal, Decision, Case No. 0048-2004-PI/TC (1 April 2005), ¶ 109.

<sup>279</sup> **Ex. CE-491**, Javier Diez Canseco, *Mining Royalties: Peru Won*, LA REPÚBLICA (6 April 2005).

<sup>280</sup> **Ex. CE-492**, *Constitutional Tribunal ruling on mining companies analyzed*, LA REPÚBLICA (7 April 2005).

*investment project*” for mining investors with administrative stability guarantees.<sup>281</sup> Mr. Isasi further reiterated that the scope of those guarantees was the entire concession in which the qualifying minimum investment was made, stressing that

it is not the mining titleholder (individual 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 [the Royalty] Law.<sup>282</sup>

129. On 22 April 2005, Minister Sánchez informed *El Peruano* that he had sent the MEF and SUNAT information on the “mining companies that signed administrative guarantees with the State” and stressed that he would make a statement jointly with the MEF “to bring an end to the state of uncertainty existing in the mining sector” regarding which companies would be exempt from paying royalties.<sup>283</sup> On 6 May 2005, Minister Kuczynski publicly confirmed that the Constitutional Tribunal’s classification of the royalty as an “economic consideration” meant that it would still fall within the guarantee of “administrative stability” for companies like SMCV that had mining stability agreements, even if it did not fall within the guarantee of tax stability.<sup>284</sup> Minister Kuczynski further confirmed that MINEM had sent SUNAT information on mining stability agreements currently in force.<sup>285</sup>

#### **H. AFTER SMCV COMMENCED CONSTRUCTION OF THE CONCENTRATOR, THE GOVERNMENT FACED INCREASING POLITICAL PRESSURE TO EXTRACT ADDITIONAL REVENUES FROM SMCV AND CERRO VERDE**

130. The Government’s refusal to disclaim stability guarantees entirely frustrated the proponents of the royalty.<sup>286</sup> MINEM’s decision to grant SMCV the profit reinvestment program by virtue of its Stability Agreement also gave rise to a significant backlash against SMCV and MINEM, and the royalty’s proponents began attacking the application of stability to SMCV specifically.

131. Congressman Diez Canseco was one of the key architects of the campaign against SMCV. In a 25 August 2005 article published in *La República*, one of Peru’s leading newspapers, Congressman Diez Canseco complained that “[t]he way Cerro Verde and its expansion . . . have been

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<sup>281</sup> **Ex. CE-494**, MINEM, Report No. 153-2005-MEM/OGAJ (14 April 2005), ¶ 16 (emphasis added).

<sup>282</sup> **Ex. CE-494**, MINEM, Report No. 153-2005-MEM/OGAJ (14 April 2005), ¶ 17 (emphasis added).

<sup>283</sup> **Ex. CE-495**, *MEF and MEM Will Issue Analysis on Royalties Next Week*, EL PERUANO (22 April 2005).

<sup>284</sup> **Ex. CE-500**, *Mining Royalties to Be Defined over the Next Few Days*, AREQUIPA AL DÍA (6 May 2005) (quoting Minister Kuczynski as stating that “the only way for a company to remain exempt from the payment of mining royalties would be if it holds an administrative stability agreement, and some of these companies do have one.”)

<sup>285</sup> **Ex. CE-500**, *Mining Royalties to Be Defined over the Next Few Days*, AREQUIPA AL DÍA (6 May 2005)

<sup>286</sup> **Ex. CE-506**, Javier Diez Canseco, *Questions About Cerro Verde*, LA REPÚBLICA (25 August 2005), p. 1.

handled has been shrouded in opaque trappings” and criticized that “[t]here are too many questions that beg to be answered by [MINEM], the regional authorities, and the company itself.”<sup>287</sup> Noting that “the price of copper is breaking all-time records” and generating “huge profits for mining companies, including Cerro Verde in Arequipa,” he questioned why SMCV did “not pay Mining Royalties” and why SMCV had been permitted to use the “questionable Profit Reinvestment benefit, despite the fact that the Law that allowed it was repealed in 2000.”<sup>288</sup>

132. On 16 September 2005, Congressman Diez Canseco demanded that Minister Sánchez Mejía revoke SMCV’s authorization to reinvest profits, and “demand[] . . . that Cerro Verde comply with the payment of royalties,” threatening to file “a compliance action or process” or to “denounce [Minister Sánchez Mejía] constitutionally” if he failed to do so.<sup>289</sup> Only four days later, Minister Sánchez Mejía stated to the press that Cerro Verde would have to pay royalties related to the Concentrator.<sup>290</sup> Ms. Torreblanca testifies SMCV was “concerned about the undue political pressure from Congressman Diez Canseco and the Minister’s reaction,” but that SMCV expected that the Government would “ultimately act in accordance with the law and respect the stability commitments.”<sup>291</sup>

133. On 19 September 2005, Congressman Diez Canseco proposed a congressional investigative committee to “clarify the facts relating to the granting of tax benefits” for the Concentrator “in order to determine . . . the possible irregularities that may have been committed and establish any administrative and legal responsibilities that might exist.”<sup>292</sup> This request ultimately resulted in the creation of a Working Group by the Congressional Energy and Mines Commission on 5 October 2005, to “investigate the [alleged tax benefits that SMCV may have] received” and “adopt the appropriate measures.”<sup>293</sup> At this point, SMCV’s US\$850 million construction of the Concentrator was well underway.<sup>294</sup>

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<sup>287</sup> **Ex. CE-506**, Javier Diez Canseco, *Questions About Cerro Verde*, LA REPÚBLICA (25 August 2005), p. 1.

<sup>288</sup> **Ex. CE-506**, Javier Diez Canseco, *Questions About Cerro Verde*, LA REPÚBLICA (25 August 2005), p. 1.

<sup>289</sup> **Ex. CE-508**, *Minera Cerro Verde Under JDC's Magnifying Glass*, LA REPÚBLICA (16 September 2005); **Ex. CE-509**, *Congressman Diez Canesco considers denouncing the Minister for providing benefits to mining companies that do not pay royalties*, EL HERALDO (16 September 2005), p. 2; *see also* Torreblanca ¶ 42.

<sup>290</sup> **Ex. CE-511**, *Minister: Cerro Verde Expansion Subject to Royalty*, BUSINESS NEWS AMERICAS (20 September 2005)

<sup>291</sup> Torreblanca ¶ 40.

<sup>292</sup> **Ex. CE-510**, Congress, Agenda Motion No. 0366 2605 2006-DDP-EM/CR (19 September 2005), p. 2; *see also id.* at p. 2 ¶ 9 (arguing that the reinvestment approval was a “controversial and irregular act” resulting from “a biased interpretation and violation of the regulations governing the mining sector”).

<sup>293</sup> **Ex. CE-516**, Congress, Energy & Mines Commission, Minutes of Sixth Regular Session (5 October 2005), p. 2.

<sup>294</sup> *See* Torreblanca ¶ 27 (stating that SMCV’s board approved the US\$850 million investment to construct the Concentrator on 11 October 2004).

134. Other members of Congress echoed Congressman Diez Canseco's views and similarly demanded action from MINEM. On 15 September 2005, Congressman Alejandro Oré requested Minister Sánchez Mejía to provide "information relating to the legal stability agreement entered into with the mining company Phelps Dodge about the Cerro Verde mine, as well as the amending agreement that authorizes reinvestment of profits in the amount of US\$800 million in expansion projects."<sup>295</sup> Several days later, Mr. Isasi sent an internal report to Minister Sánchez Mejía to address Congressman Oré's request (the "September 2005 Report").<sup>296</sup> In the report, Mr. Isasi noted that the reinvestment of profits benefit was part of the contractually stabilized regime under SMCV's Stability Agreement, and concluded that MINEM had appropriately granted the request in accordance with the relevant stabilized legal framework.<sup>297</sup> Like in his previous report analyzing the effects of the Royalty Law on companies with stability agreements following the Constitutional Tribunal decision, Mr. Isasi's new report made no distinction between SMCV's two types of processing operations and nowhere indicated that the scope of the Stability Agreement would be limited to the leaching facility.<sup>298</sup>

135. On 3 October 2005, Minister Sánchez Mejía forwarded Mr. Isasi's report to Congressman Oré. In the cover letter, Minister Sánchez Mejía acknowledged that SMCV was entitled to use the profit reinvestment benefit under its Stability Agreement. However, he then asserted that

[u]nlike the Leaching Project . . . the Primary Sulfide Project will not enjoy the tax, exchange-rate and administrative stability regime, since for said Project the signing of an Agreement for Promotion and Guarantee of Investment has not been applied for.<sup>299</sup>

136. Minister Sánchez Mejía provided no basis for his assertion that the Concentrator was not covered by the Stability Agreement—a position that the Government had never set out in writing before, that was not contained in Mr. Isasi's September 2005 Report, and that contradicted the Government's earlier statements and conduct.<sup>300</sup> Neither Minister Sánchez Mejía nor any other Government official provided SMCV with a copy of this communication at the time, and SMCV received a copy only several years later, after SUNAT began issuing Royalty Assessments.<sup>301</sup>

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<sup>295</sup> **Ex. CE-507**, Communication No. 3769-2005-AOM-CR from Congressman Oré to Minister Sánchez Mejía (15 September 2005).

<sup>296</sup> **Ex. CE-512**, MINEM, Report No. 385-2005-MEM/OGJ (22 September 2005).

<sup>297</sup> **Ex. CE-512**, MINEM, Report No. 385-2005-MEM/OGJ (22 September 2005), ¶¶ 2.2.3, 3.1.1-3.1.6, Conclusion.

<sup>298</sup> *See generally* **Ex. CE-512**, MINEM, Report No. 385-2005-MEM/OGJ (22 September 2005).

<sup>299</sup> **Ex. CE-515**, MINEM, Report No. 1725-2005-MEM/DM (3 October 2005).

<sup>300</sup> *Compare* **Ex. CE-515** MINEM, Report No. 1725-2005-MEM/DM (3 October 2005); *with* **Ex. CE-512**, MINEM, Report No. 385-2005-MEM/OGJ (22 September 2005).

<sup>301</sup> *See* Torreblanca ¶¶ 75-76.

Meanwhile, Congressman Diez Canseco continued his public campaign against MINEM and SMCV.<sup>302</sup>

137. On 8 November 2005, Minister Sánchez Mejía sent a letter to Congressman Diez Canseco—who had threatened to denounce him less than two months earlier—in response to the latter’s request for information regarding MINEM’s position on SMCV’s royalty payments.<sup>303</sup> As in his 3 October letter to Congressman Oré, Minister Sánchez Mejía again asserted that “it is necessary to distinguish the legal treatment of the ‘Cerro Verde Leaching’ project, which is covered by [the Stability Agreement], from that applicable to the new Primary Sulfide Project . . . [which] does not enjoy protection under any Guarantee or Stability agreement.”<sup>304</sup> He further asserted that the Government confers stability guarantees “with regard to the specific investment project contemplated by the agreement,” and that in Cerro Verde’s case, “[t]his new Sulfide Project has not been the subject of a new [stability agreement], so . . . it will have to pay the applicable royalties when it goes on line.”<sup>305</sup> Again, the Government did not inform SMCV of this letter at the time.

138. In January 2006, the Working Group coordinator, Congressman Olaechea, invited Ms. Torreblanca to discuss SMCV’s investment in the Concentrator and its reinvestment of profits program.<sup>306</sup> Ms. Torreblanca explained that “under the Stability Agreement, Cerro Verde’s rights and obligations contained in the tax regime in force as of May 6, 1996, are stabilized.”<sup>307</sup> She further explained that:

[T]he expansion of the Current Operations of the Cerro Verde Production Unit, through the exploitation of primary sulfides, allows the mineral contained within the same geometric solid mass and the same mining concession to be exploited through two different processes. Cerro Verde, unlike other mining companies, has a single Production Unit, made up of the Cerro Verde Nos. 1, 2 and 3 mining concession and the Cerro Verde Beneficiation Plant beneficiation concession.<sup>308</sup>

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<sup>302</sup> See **Ex. CE-520**, *SUNAT Will Oversee Payment of Mining Royalties from 2006*, GESTIÓN (17 November 2005); **Ex. CE-517**, Javier Diez Canseco, *Cerro Verde: Enough Abusing Peru!*, VOLTAIRE (6 October 2005) (calling for an end to “the barbarity of giving away our wealth without receiving fair compensation” and the “generosity towards foreign multinationals and pettiness towards Peru”).

<sup>303</sup> See **Ex. CE-519**, MINEM, Report No. 2004-2005-MEM/DM (8 November 2005), p. 1 (responding to request “regarding the position of the Ministry of Energy and Mines regarding the payment of mining royalties in the Cerro Verde Leaching Project (Cerro Verde 1) and the Primary Sulfide Project (Cerro Verde 2), which belong to Sociedad Minera Cerro Verde S.A.A.”).

<sup>304</sup> See **Ex. CE-519**, MINEM, Report No. 2004-2005-MEM/DM (8 November 2005), p. 1.

<sup>305</sup> See **Ex. CE-519**, MINEM, Report No. 2004-2005-MEM/DM (8 November 2005), p. 2.

<sup>306</sup> Torreblanca ¶ 43; see also **Ex. CE-523**, SMCV, Presentation Before the Congressional Working Group (31 January 2006).

<sup>307</sup> **Ex. CE-523**, SMCV, Presentation Before the Congressional Working Group (31 January 2006), p. 48.

<sup>308</sup> **Ex. CE-523**, SMCV, Presentation Before the Congressional Working Group (31 January 2006), p. 48; see also *id.* (explaining that “with the exploitation of primary sulfides, the objective of privatization of the

139. In March 2006, the Working Group met with the Mayor Cecilia Elizabeth Linares and Mayor Juan Víctor Flores of the districts of Yarabamba and Uchumayo, where Cerro Verde is located.<sup>309</sup> According to the *El Herald* newspaper, the Mayors criticized the fact that SMCV “does not pay taxes or fees for the exploitation of Cerro Verde II [the Concentrator], nor does it help the development in the district through public interest work.”<sup>310</sup> Ms. Torreblanca testifies that she was “very surprised by this statement as it was categorically false,” considering that “SMCV paid taxes and fees for its operation and was contributing significantly to Arequipa.”<sup>311</sup> Notwithstanding these accusations against SMCV, Congressman Olaechea confirmed that “[t]he legislation on tax stability exempts [SMCV] from paying income tax on profits,” that “in February 1998 the State signed a tax stability agreement [with SMCV] . . . where it was exempted from said payment,” and that “the solution is to find other ways, not ignoring the law, to achieve a good outcome.”<sup>312</sup> SMCV provided additional information to the Working Group upon request in May 2006.<sup>313</sup>

**I. UNDER GOVERNMENT PRESSURE, SMCV MADE SUBSTANTIAL “VOLUNTARY” CONTRIBUTIONS TO PERU AND AREQUIPA ON THE UNDERSTANDING THAT IT WAS NOT SUBJECT TO THE ROYALTY LAW**

**1. Arequipa Politicians Demanded Contributions from SMCV to Compensate for Revenue Lost to the Reinvestment Benefit**

140. The results from the Royalty Law’s first year disappointed some of its proponents: throughout 2005, mining companies paid S/ 266 million (about US\$115 million) in royalties, which represented only 8.5% of the total contributions collected from the mining sector.<sup>314</sup> These results

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Cerro Verde Production Unit [was] fulfilled, materializing [the] expansion planned since the time of *Minero Perú*.”)

<sup>309</sup> See Torreblanca ¶ 45.

<sup>310</sup> **Ex. CE-525**, *Working Group Studies Destination of Cerro Verde Taxes to Districts of Arequipa and Solution to Development Works*, EL HERALDO (29 March 2006).

<sup>311</sup> Torreblanca ¶ 45; see also **Ex. CE-523**, SMCV, Presentation Before the Congressional Working Group (31 January 2006), p. 40 (from 1994 to July 2005, SMCV had paid US\$120 million in taxes, about 4.5% of everything collected in the Department of Arequipa, and its annual operations contributed 0.2% to the national GDP and 2.5% to Arequipa’s GDP).

<sup>312</sup> **Ex. CE-525**, *Working Group Studies Destination of Cerro Verde Taxes to Districts of Arequipa and Solution to Development Works*, EL HERALDO (29 March 2006).

<sup>313</sup> See **Ex. CE-529**, SMCV, Letter No. SMCV-AL-686-2006, May 11, 2006 (providing additional information about SMCV’s reinvestment of profits); see also Torreblanca ¶ 47.

<sup>314</sup> See **Ex. CE-824**, SUNAT, Revenue Collected by SUNAT 2005-2021, Table A2, cell P:16 (showing that total collections from the mining sector in 2005 totaled S/ 3123.5); **Ex. CE-825**, SUNAT, Revenue Collected by SUNAT 2005-2021, Table A6, cell P:46 (showing that SUNAT collected S/ 265.6 million in mining royalties in 2005, or 8.5% of S/ 3123.5).

became a touchstone in the 2006 presidential election between former president Alan García and newcomer Ollanta Humala, both of whom pledged to demand more from Peru’s mining companies.<sup>315</sup>

141. Local Arequipa politicians also began demanding additional contributions from SMCV, arguing that the reinvestment benefit had created a budget shortfall in Arequipa and threatening protests if the Government did not address the issue and force SMCV to pay mining royalties.<sup>316</sup> SMCV wished to reach an amicable resolution given its long-term commitment to Peru and Arequipa, and thus agreed to discuss these issues with Government representatives at a roundtable (the “Roundtable Discussions”) chaired by then-Congressman Jorge del Castillo.<sup>317</sup> In the lead up to the meeting, on 15 June 2006, César Rodríguez Villanueva, the Director General of Mining, tempered expectations, noting that the negotiations would not have major results because “for better or worse, the Peruvian State signed stability agreements with several companies and therefore these agreements must be honored.”<sup>318</sup> He stressed that the Government would “inform the politicians about the scope” of the Stability Agreement and proposed that SMCV pay an “advance . . . of royalties and taxes for the years after the termination of its Stability Agreement.”<sup>319</sup> Mr. Rodríguez did not suggest or mention that the Government was contemplating taking the position that SMCV would soon have to pay significant amounts of royalties for the ore processed in the Concentrator.<sup>320</sup>

## 2. Without Informing SMCV, MINEM Developed a Rationale to Impose Royalties on SMCV Contrary to the Position the Government Was Taking Publicly

142. Yet even on the eve of the planned discussions, Mr. Isasi of MINEM was preparing to bow to political pressure by developing a contrived interpretation to justify excluding the Concentrator, by then nearing completion, from the scope of stability guarantees. Only a day after Mr. Rodríguez’s public statement, on 16 June 2006, Mr. Isasi sent Minister Sánchez Mejía another non-binding legal report regarding the scope of SMCV’s Stability Agreement (the “June 2006 Report”).<sup>321</sup> Echoing Minister Sánchez Mejía’s October and November 2005 letters, and in an abrupt about-face from his April 2005 Report that unequivocally confirmed that stabilized *concessions* would not be subject to the Royalty Law, Mr. Isasi took the position that the Concentrator was *not* entitled to benefit from the Stability Agreement and that SMCV should pay royalties in respect of that

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<sup>315</sup> See **Ex. CE-526**, *Humala: Leap into the Unknown*, DEUTSCHE WELLE (10 April 2006); **Ex. CE-548**, *Minería-Perú: A Beggar on a Gold Throne*, TIERRAMÉRICA (22 August 2006); **Ex. CE-581**, *There is no excuse to reduce the mining contribution*, PROPUESTA CIUDADANA (1 December 2008).

<sup>316</sup> See **Ex. CE-535**, *Cerro Verde Evades Payment of Taxes Based on a Law Repealed in 2000*, LA REPÚBLICA (19 June 2006).

<sup>317</sup> Torreblanca ¶¶ 49-51.

<sup>318</sup> **Ex. CE-533**, *Advance Payment of Royalties Proposed*, LA REPÚBLICA (15 June 2006), p. 1.

<sup>319</sup> **Ex. CE-533**, *Advance Payment of Royalties Proposed*, LA REPÚBLICA (15 June 2006), p. 1.

<sup>320</sup> See **Ex. CE-533**, *Advance Payment of Royalties Proposed*, LA REPÚBLICA (15 June 2006).

<sup>321</sup> See **Ex. CE-534**, MINEM, Report No. 156-2006-MEM/OGJ (16 June 2006).

investment.<sup>322</sup> Mr. Isasi based this conclusion on a novel interpretation of Article 83 of the Mining Law and Article 22 of the Regulations that would radically curtail stability guarantees by limiting them to the investment contained in the Feasibility Study.<sup>323</sup> In particular, Mr. Isasi wrote that

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

... the stability granted by the Stability Agreement does not extend to all mining concessions or economic-administrative units, and even less so to the entire mining company. Rather, it is granted to *an investment project clearly delimited by the Feasibility Study* and agreed to in the agreement.<sup>324</sup>

143. Applying this analysis to SMCV's Stability Agreement, Mr. Isasi concluded that the Stability Agreement "deals only with the 'Cerro Verde Leaching Project'" and "cannot be extended to the entire company or to other non-stabilized projects," and SMCV was thus required to pay royalties for the Concentrator.<sup>325</sup>

144. MINEM forwarded Mr. Isasi's June 2006 Report to members of Congress, but did not share it with SMCV.<sup>326</sup> In fact, SMCV did not see this report until two years later, when César Zegarra, Mr. Isasi's successor as Director General of Legal Affairs, "unofficially" provided it to Ms. Torreblanca at the request of then Minister of Energy and Mines, Juan Valdivia Romero, after SUNAT had begun auditing SMCV in connection with its alleged liability for failing to pay royalties.<sup>327</sup> Meanwhile, members of Congress kept up the pressure to obtain additional contributions from SMCV, including by proposing a bill in June 2006 to retroactively repeal the Ministerial Resolution that accorded SMCV the profit reinvestment benefit for the Concentrator, even though SMCV had by then nearly completed construction of the Concentrator in reliance on this benefit.<sup>328</sup>

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<sup>322</sup> See **Ex. CE-534**, MINEM, Report No. 156-2006-MEM/OGJ (16 June 2006), Section IV, ¶ 4; see also **Ex. CE-515**, MINEM, Report No. 1725-2005-MEM/DM (3 October 2005); **Ex. CE-519**, MINEM, Report No. 2004-2005-MEM/DM (8 November 2005)

<sup>323</sup> See **Ex. CE-534**, MINEM, Report No. 156-2006-MEM/OGJ (16 June 2006), Section I, ¶¶ 5.1-5.3; *id.*, at Section III, ¶¶ 4.1-4.5.

<sup>324</sup> **Ex. CE-534**, **Ex. CE-534**, MINEM, Report No. 156-2006-MEM/OGJ (16 June 2006), Section I ¶ 5.2, Section III ¶ 4.1 (emphasis added).

<sup>325</sup> **Ex. CE-534**, MINEM, Report No. 156-2006-MEM/OGJ (16 June 2006), Section I ¶¶ 5.2-5.3, Section III ¶¶ 4.3-4.5.

<sup>326</sup> Torreblanca ¶ 70.

<sup>327</sup> Torreblanca ¶ 70.

<sup>328</sup> **Ex. CE-536**, Congress, Draft Bill No. 14792/2005-CR (21 June 2006), pp. 4-7; see also Torreblanca ¶¶ 49-62.

### 3. SMCV Agreed to Make Voluntary Contributions to Arequipa

145. On 23 June 2006, the SMCV-Government Roundtable Discussions commenced as planned with representatives from SMCV, MEF, and MINEM in attendance, including Minister Sánchez Mejía and Mr. Isasi.<sup>329</sup> The discussion largely focused on SMCV's profit reinvestment benefit.<sup>330</sup> *El Heraldo* reported that Minister Zavala stated that “the authorization for the reinvestment of profits is legal, because it will generate greater benefits for the future” and proposed “that [SMCV] advance part of the payment of their taxes for next year . . . to cover the shortfall in the budgets of the Region and the municipalities of Arequipa.”<sup>331</sup> Despite the fact that Mr. Isasi had issued his adverse June 2006 Report less than *one week* earlier, neither he nor Minister Sánchez Mejía informed SMCV that they had adopted a new interpretation of the scope of the stability benefits that would result in millions of dollars in royalty payments by SMCV, nor did they provide SMCV with a copy of the report.<sup>332</sup> Following the meeting, the newspaper *Correo* reported that Minister Sánchez Mejía agreed that while the reinvestment of profits would “decrease the income for Arequipa for two years, in the mid- and long-term this region will obtain more resources from income tax.”<sup>333</sup> The report made no reference to Minister Sánchez Mejía or any other official taking the position that SMCV would also make significant royalty payments.<sup>334</sup>

146. The parties reconvened on 29 June 2006.<sup>335</sup> Ms. Torreblanca attended on behalf of SMCV, and Mr. Isasi attended representing the Government.<sup>336</sup> *El Heraldo* reported that “the demand by Arequipa’s leaders focused on the repeal” of the profit reinvestment benefit and also on “the Government order[ing] the payment of the mining royalties of Cerro Verde I and II,” *i.e.*, from both the leaching facilities and the Concentrator.<sup>337</sup> Ms. Torreblanca testifies that Government officials quickly dismissed these claims and agreed with SMCV’s proposal to pay an income tax advance to offset the impact of the reinvestment of profits in the short term.<sup>338</sup> However, “the Arequipa representatives ‘firmly’ reject[ed]’ SMCV’s proposal and instead, asked SMCV to make an

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<sup>329</sup> See **Ex. CE-538**, *Congressional Pro-Investment Commission Seeks Solution to Demand Regarding Payment of Taxes of the Cerro Verde Company*, EL HERALDO (23 June 2006); Torreblanca ¶ 52.

<sup>330</sup> See **Ex. CE-538**, *Congressional Pro-Investment Commission Seeks Solution to Demand Regarding Payment of Taxes of the Cerro Verde Company*, EL HERALDO (23 June 2006).

<sup>331</sup> **Ex. CE-538**, *Congressional Pro-Investment Commission Seeks Solution to Demand Regarding Payment of Taxes of the Cerro Verde Company*, EL HERALDO (23 June 2006), p. 1.

<sup>332</sup> Torreblanca ¶¶ 52, 53, 70.

<sup>333</sup> **Ex. CE-539**, *Roundtable Discussion Initiated to Resolve Cerro Verde Case*, EL CORREO (26 June 2006).

<sup>334</sup> **Ex. CE-539**, *Roundtable Discussion Initiated to Resolve Cerro Verde Case*, EL CORREO (26 June 2006).

<sup>335</sup> See **CE-537**, Congress, Pro-Investment Commission, Minutes of the Session of 23 June 2006; see also Torreblanca ¶ 53.

<sup>336</sup> Torreblanca ¶ 53.

<sup>337</sup> **Ex. CE-540**, *Arequipa and Cerro Verde Authorities Seek Solutions*, EL HERALDO (28 June 2006), p. 2; see also Torreblanca ¶ 53.

<sup>338</sup> See Torreblanca ¶ 53.

‘extraordinary contribution’ of . . . US\$[23.2] million as an alternative.’<sup>339</sup> Ms. Torreblanca testifies that SMCV agreed to “grant an allocation to the municipal authorities of Arequipa to compensate them for the royalties they would not receive.”<sup>340</sup> Ms. Torreblanca also testifies that the Government representatives and Mr. Isasi in particular, agreed with this proposal.<sup>341</sup>

147. On 10 July 2006 the parties held a third meeting, this time also including members of Congress, to discuss details regarding SMCV’s contributions to help cover Arequipa’s budget deficit.<sup>342</sup> Ms. Torreblanca testifies that SMCV was initially “willing to contribute . . . (US\$4 million) to help solve the budget deficit in Arequipa, but Congressman Del Castillo [the chair] insisted that SMCV finance infrastructure works for a figure significantly higher than the US\$23.2 million that the Arequipa politicians had requested.”<sup>343</sup> Ms. Torreblanca also testifies that “[d]espite Congressman Del Castillo’s large demands, he reaffirmed that the Stability Agreement ‘that Cerro Verde enjoys expires in 2013.’”<sup>344</sup> This did not satisfy the members of Congress, who argued that even if SMCV was “legally exempt from paying royalties,” it still had “a moral obligation to share its profits with Arequipa’s society,” noting that the price of copper had increased over three-fold since “the date of signing the Stability Agreement.”<sup>345</sup> None of the Government representatives mentioned that SMCV would have to pay hundreds of millions of dollars in royalties over the coming years—to the contrary, those decrying SMCV’s alleged lack of contributions clearly assumed no such payments would be made.<sup>346</sup>

148. On 2 August 2006, SMCV signed a formal agreement with the Government—represented by now-Prime Minister del Castillo, Minister of Energy and Mines Juan Valdivia Romero, and Arequipa politicians—committing to (i) finance and prepare feasibility studies for the construction of a potable water treatment plant and a wastewater treatment plant; (ii) pay for the construction of the potable water treatment plant; and (iii) cover Arequipa’s budget deficit in investment expenses for local communities from June 2006 to May 2007 (the “Roundtable Discussion Agreement”).<sup>347</sup> These commitments ultimately amounted to over US\$125 million invested in

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<sup>339</sup> Torreblanca ¶ 53.

<sup>340</sup> Torreblanca ¶ 53.

<sup>341</sup> Torreblanca ¶ 53.

<sup>342</sup> **Ex. CE-541**, *Congressional Commission Envisions a Solution: Minera Cerro Verde Accepts Proposal to Pay S/ 13 Million*, EL HERALDO (10 July 2006); *see also* Torreblanca ¶ 54.

<sup>343</sup> Torreblanca ¶ 54.

<sup>344</sup> Torreblanca ¶ 54.

<sup>345</sup> **Ex. CE-541**, *Congressional Commission Envisions a Solution: Minera Cerro Verde Accepts Proposal to Pay S/ 13 Million*, EL HERALDO (10 July 2006), p. 2; *see also* Torreblanca ¶ 54.

<sup>346</sup> *See Ex. CE-541*, *Congressional Commission Envisions a Solution: Minera Cerro Verde Accepts Proposal to Pay S/ 13 Million*, EL HERALDO (10 July 2006); Torreblanca ¶ 56.

<sup>347</sup> *See Ex. CE-544*, *Agreements of the Roundtable Discussion Between the Committee of the Struggle for the Defense of the Interests of Arequipa and SMCV* (2 August 2006), Clauses 2 and 3; *see also* Torreblanca ¶ 55.

Arequipa.<sup>348</sup> Ms. Torreblanca testifies that while SMCV “had reservations about committing these very large sums,” it ultimately concluded that “it was important to maintain good relations” with Arequipa.<sup>349</sup> Ms. Torreblanca further testifies that at the time of signing, Prime Minister del Castillo confirmed to SMCV that it “could deduct these contributions from any program of ‘voluntary contributions’ created by the García administration.”<sup>350</sup>

#### 4. SMCV Also Agreed to Make Voluntary Contributions to the National Treasury on the Understanding it was not Subject to the Royalty Law

149. As the Roundtable Discussion with Arequipa politicians concluded, similar discussions began on the national scale. President Alan García had assumed office and promptly set out to make good on his campaign promise of obtaining more contributions from the mining industry.<sup>351</sup> Instead of proposing new taxes or royalties—which the Government recognized could not legally be executed against companies with stability agreements—President García proposed a “voluntary contribution” regime intended to alleviate the growing political pressure.<sup>352</sup> In his first public speech upon assuming office, President García said:

[I]n recent years, the prices of ore minerals have increased significantly and this could not be anticipated by the Peruvian State or the companies that did not expect such a large profit . . . it is fair for this profit to benefit the country somewhat more.<sup>353</sup>

150. In early August, at President García’s request, the Mining Society proposed a system by which mining companies could contribute “voluntar[ily]” to the development of local communities with a percentage of their profits.<sup>354</sup> The Mining Society hired APOYO Consultoría (“APOYO”), a leading consulting firm in Lima, to design a system that would allow the Government to increase revenue collection while respecting the Stability Agreements in force.<sup>355</sup> As these conversations occurred, Ms. Torreblanca confirmed to Phelps Dodge that the Government had guaranteed that the Roundtable Discussion Agreement met President García’s requirements for the voluntary contribution

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<sup>348</sup> See **Ex. CE-596**, SMCV, Financial Statement 2009, p. 29; see also Torreblanca ¶ 55.

<sup>349</sup> Torreblanca ¶ 55.

<sup>350</sup> Torreblanca ¶ 56.

<sup>351</sup> See **Ex. CE-548**, *Minería-Perú: A Beggar on a Gold Throne*, TIERRAMÉRICA (22 August 2006); **Ex. CE-581**, *There is no excuse to reduce the mining contribution*, **PROPUESTA CIUDADANA** (1 December 2008).

<sup>352</sup> **Ex. CE-552**, U.S. State Department, Mining Companies to Make “Voluntary” Social Contribution (14 September 2006).

<sup>353</sup> **Ex. CE-581**, *There is no excuse to reduce the mining contribution*, **PROPUESTA CIUDADANA** (1 December 2008); see also **Ex. CE-543**, *Alan García Asks Mining Companies for Contributions and Contract Renegotiation*, EL TERRITORIO (29 July 2006) (internal quotations omitted); **CWS-2**, Witness Statement of Gianfranco Castagnola (27 August 2021) (“Castagnola”) ¶ 15.

<sup>354</sup> Castagnola ¶¶ 15-16.

<sup>355</sup> Castagnola ¶¶ 17, 18, 20.

of the mining industry, for which SMCV could deduct those amounts from any “voluntary contributions” program created.<sup>356</sup>

151. APOYO’s president, Gianfranco Castagnola Zúñiga, who testifies as a witness in these proceedings, explains that APOYO’s plan calculated contributions from stabilized and non-stabilized entities differently: for stabilized companies, the voluntary contribution was simply calculated as 3% of their net profits, whereas non-stabilized companies were entitled to deduct their royalty payments from the voluntary contribution.<sup>357</sup> As Mr. Castagnola testifies, the Mining Society “always included SMCV in the group of stabilized mining companies that were not required to pay royalties during the term of their agreements,” and the Government never “questioned this classification” or APOYO’s economic models.<sup>358</sup> On 21 December 2006, President García accepted APOYO’s proposal and published the standard form contract that both stabilized and non-stabilized mining companies would sign to enroll in the Mining Program of Solidarity with the People (the “PMSP”).<sup>359</sup> Once paid, the voluntary contributions would be transferred to privately managed funds for use in local and regional infrastructure and social projects.<sup>360</sup>

152. The Government’s efforts to create the PMSP did not stop the political backlash against stability agreements. In August 2006, Members of Congress proposed amending the Royalty Law so that all mining companies—even those with mining stability agreements—would be obliged to pay royalties.<sup>361</sup> Prime Minister Del Castillo stated that the Government would not support this bill since it had to “honor the principle of legal stability” and that they “could not toy around with such a serious issue.”<sup>362</sup> Shortly thereafter, Minister Valdivia acknowledged that the proposed bill would be “unconstitutional” and that it would entitle companies with stability agreements to “resort to international arbitration.”<sup>363</sup>

153. In January 2007, SMCV signed a standard form agreement with the Government to contribute 3.75 percent of its annual net profits in voluntary contributions, the maximum amount

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<sup>356</sup> See **Ex. CE-561**, SMCV, Financial Statement 2006 (9 February 2007), p. 31 (noting that “the provision of US\$40 million related to the construction of the water plants . . . will be considered as a credit against this voluntary contribution”).

<sup>357</sup> Castagnola ¶ 29; *id.* Appendix A, p. 27, 29; *id.* Appendix B, p. 7-9.

<sup>358</sup> Castagnola ¶¶ 23, 43.

<sup>359</sup> See **CA-131**, Voluntary Contribution Program, Supreme Decree No. 071-2006-EM (21 December 2006).

<sup>360</sup> See **CA-131**, Voluntary Contribution Program, Supreme Decree No. 071-2006-EM (21 December 2006), Model Agreement, Clauses 1.1, 2.1.

<sup>361</sup> See **Ex. CE-546**, *The Government Agrees Not to Change the Mining Royalty Law*, GESTIÓN (10 August 2006).

<sup>362</sup> **Ex. CE-546**, *The Government Agrees Not to Change the Mining Royalty Law*, GESTIÓN (10 August 2006), p. 1.

<sup>363</sup> **Ex. CE-551**, *Mining Royalty Bill Is Unconstitutional*, ANDINA (12 September 2006).

under the PMSP.<sup>364</sup> On 10 August 2007, SMCV and the Government executed a final version of the Agreement (the “Voluntary Contribution Agreement”).<sup>365</sup> Ms. Torreblanca testifies that SMCV willingly made contributions under this agreement on the good faith understanding that it was exempt from paying royalties as a result of the Stability Agreement.<sup>366</sup> Accordingly, she notes that “SMCV made all its contributions to the PMSP without making any deduction for royalties” and explains that “the Government never told [SMCV] that [it] should pay royalties and adjust the value of [its] voluntary contributions.”<sup>367</sup>

154. From 2007 to 2010, SMCV contributed over S/ 420 million (about US\$140 million) in revenue from its leaching facilities and the Concentrator, constituting 18 percent of total contributions—making it the second-largest contributor nationwide in the PMSP—and 90 percent of those in Arequipa province.<sup>368</sup> SMCV’s contributions supported local nurseries and schools, small business employment programs, childhood nutrition programs, and local infrastructure, including roads and bridges.<sup>369</sup> SMCV’s voluntary contributions were *in addition to* the contributions SMCV made directly to Arequipa: the Government reneged on Prime Minister Del Castillo’s promise that SMCV could deduct those contributions from its voluntary contributions, arguing that doing so “would increase the political attention that the Government had been receiving” and that “Arequipa really needed [SMCV’s] contributions.”<sup>370</sup>

**J. AFTER SMCV SUCCESSFULLY COMPLETED CONSTRUCTION OF THE CONCENTRATOR AT THE END OF 2006, FREEPORT ACQUIRED PHELPS DODGE.**

155. SMCV finished building the Concentrator in the fourth quarter of 2006 and began testing its operations, producing small quantities of concentrate.<sup>371</sup>

156. On 19 November 2006, Freeport and Phelps Dodge announced that they had signed a definitive merger agreement according to which Freeport would acquire Phelps Dodge.<sup>372</sup>

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<sup>364</sup> See **Ex. CE-27**, SMCV, Voluntary Contribution Agreement (18 January 2007), Clause 3.1 (calculating voluntary contributions based on annual net profits).

<sup>365</sup> See **Ex. CE-560**, SMCV, Voluntary Contribution Agreement (10 August 2007).

<sup>366</sup> Torreblanca ¶¶ 60-61.

<sup>367</sup> Torreblanca ¶ 60; see also **CA-131**, Voluntary Contribution Program, Supreme Decree No. 071-2006-EM (21 December 2006), Clause 3.1.2; **CA-259**, Voluntary Contribution Program, Supreme Decree No. 033-2007-EM (2 July 2007); **Ex. CE-560**, SMCV, Voluntary Contribution Agreement (10 August 2007), Clause 3.1.2 (“The companies paying the Mining Royalty, according to articles 5° and 6° of Law No. 28258, shall deduct from the CONTRIBUTION.”).

<sup>368</sup> **Ex. CE-696**, Cesar Flores Unzaga et. al., Tax Collection and Tax Benefits in the Mining Sector: The Las Bambas and Cerro Verde Cases (July 2017), p. 72. <https://estadisticas.bcrp.gob.pe/estadisticas/series/mensuales/resultados/PN01208PM/html> (showing exchange rate).

<sup>369</sup> **Ex. CE-696**, Cesar Flores Unzaga et. al., Tax Collection and Tax Benefits in the Mining Sector: The Las Bambas and Cerro Verde Cases (July 2017), p. 72, Table 3; Torreblanca ¶ 62.

<sup>370</sup> Torreblanca ¶ 61.

<sup>371</sup> Aquino ¶ 33.

157. On 2 January 2007, SMCV notified the DGM pursuant to Article 38 of the Regulations on Mining Procedures that it had completed construction of the Concentrator.<sup>373</sup> On 26 February 2007, after conducting final engineering inspections, the DGM gave final confirmation of the expansion of the Beneficiation Concession to 147,000 MT/d and authorized SMCV to operate the Concentrator.<sup>374</sup> Ms. Torreblanca testifies that the DGM’s final resolution formalizing the expansion of the Beneficiation Concession to include the Concentrator, “assure[d] us that we had complied with all the steps to guarantee its stability, as Director Chappuis confirmed.”<sup>375</sup>

158. On 19 March 2007, Freeport completed its acquisition of Phelps Dodge, creating the world’s largest publicly traded copper company and what Freeport described at the time as “one of the most exciting portfolios” in the copper mining industry.<sup>376</sup> By virtue of this acquisition, Freeport became the indirect majority owner of SMCV.<sup>377</sup>

**K. NOTWITHSTANDING SMCV’S CONTRIBUTIONS, POLITICIANS CONTINUED TO PRESSURE THE GOVERNMENT TO ASSESS ROYALTIES AGAINST SMCV**

159. Yet neither SMCV’s participation in the voluntary contribution program, or its commitments to Arequipa, or its successful completion of the long-sought Concentrator put an end to the political campaign against it. On 12 November 2007, Dante Martínez Palacios, President of the Arequipa Association of Electric Service Users (“ADUSELA”), filed complaints against SMCV with SUNAT alleging that the company had improperly evaded royalties through “fraudulent actions” and collusion from Peruvian officials, and demanding that SUNAT assess royalties against SMCV.<sup>378</sup> Mr. Martínez Palacios reiterated these claims and his intention to force SUNAT to collect taxes and royalties from SMCV in a January 2008 article, arguing that the Government had “effectively renounced its share” of taxes relating to the Concentrator operations, and so it was “legitimat[e]” for Arequipa to “claim the full amount.”<sup>379</sup> He dismissed the voluntary contribution program as a

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<sup>372</sup> **Ex. CE-902**, Freeport-McMoRan Copper & Gold Inc., Annual Report 2006 (15 March 2007), p. 25.

<sup>373</sup> *See Ex. CE-558*, SMCV, Petition No. 1659321 (2 January 2007), p. 2; *cf. CA-48*, Regulations on Mining Procedures, Supreme Decree No. 018-92-EM (7 September 1992), Art. 38.

<sup>374</sup> *See Ex. CE-28*, MINEM, Directorial Resolution No. 056-2007-MEM/DGM (26 February 2007); *see also Ex. CE-562*, MINEM, Report No. 165-2007-MINEM-DGM/PDM (19 February 2007), p. 21 (recommending that MINEM approve SMCV’s request to expand the Beneficiation Concession); **Ex. CE-564**, MINEM, Directorial Resolution No. 081-2007-MEM/DGM (11 April 2007) (correcting an error in Directorial Resolution No. 056-2007-MEM/DGM).

<sup>375</sup> Torreblanca ¶ 60.

<sup>376</sup> **Ex. CE-903**, Freeport-McMoRan Copper & Gold Inc., Annual Report 2007 (17 March 2008), p. 5; **Ex. CE-29**, SEC Filing, Freeport Completes Acquisition of Phelps Dodge Corp. (19 March 2007).

<sup>377</sup> *See Ex. CE-265*, Freeport-McMoRan Inc., Sociedad Minera Cerro Verde S.A.A. Corporate Organizational Chart (21 February 2020).

<sup>378</sup> *See Ex. CE-588*, Dante Martinez, Superior Civil Court Complaint (28 April 2009); Torreblanca ¶¶ 64-65.

<sup>379</sup> **Ex. CE-572**, Dante Martinez, The Impunity and Hidden Truth of Sociedad Minera Cerro Verde (7 January 2008), p. 1.

“mockery” of the Royalty Law and claimed that SMCV “will not pay these royalties in the future either.”<sup>380</sup>

160. Ms. Torreblanca testifies that SUNAT’s position quickly changed in response to these claims.<sup>381</sup> On 20 November 2007—a little over a week after Mr. Martínez filed his complaints—Marcel Gastón, SUNAT’s National Intendent, sent a letter to Alfredo Rodríguez, the Director General of Mining.<sup>382</sup> Mr. Gastón requested that MINEM “send us the list of parties required to pay the mining royalty from June 2004 to date,” suggesting that SUNAT’s current information was inaccurate, because certain cases “are not included on the list,” or “are included in the list but the information on their mining concessions does not include all the concessions under their responsibility.”<sup>383</sup> As a result, Mr. Gastón noted that SUNAT has been unable “to begin the process of determining [mining companies] who have failed to file their sworn statement, which must be filed monthly by the parties that your office indicates are required to pay the mining royalty.”<sup>384</sup>

161. On 14 December 2007, Alfredo Rodríguez Muñoz, MINEM’s Director General of Mining, replied that MINEM would send the list “approximately in . . . February 2008,” as MINEM needed additional time to assess the “ownership of concessions and [Economic Administrative Units]” due to changes in MINEM’s databases.”<sup>385</sup>

162. On 29 January 2008, Mr. Rodríguez sent the “information of entities that are obligated to pay mining royalties” to SUNAT, in the form of a one-page letter enclosing (i) Mr. Isasi’s September 2005 Report regarding the reinvestment of profits, (ii) Minister Sánchez Mejía’s 8 November 2005 letter stating that the Concentrator was not within the scope of the Stability Agreement, and (iii) Mr. Isasi’s June 2006 Report setting out his novel interpretation of the Stability Agreement.<sup>386</sup> The letter explained to SUNAT that “this information is sent considering the implications that the [Stability Agreement] might have on the payment of Mining Royalties corresponding to the Primary Sulfides Project, located in the ‘Cerro Verde 1, 2, 3’ mining concession, of [SMCV].”<sup>387</sup> The letter, like the communications that preceded it, was not provided to SMCV at the time.

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<sup>380</sup> **Ex. CE-572**, Dante Martínez, *The Impunity and Hidden Truth of Sociedad Minera Cerro Verde* (7 January 2008), pp. 11-12.

<sup>381</sup> See Torreblanca ¶ 66.

<sup>382</sup> **Ex. CE-568**, SUNAT, Report No. 261-2007-SUNAT/2E0000 (20 November 2007).

<sup>383</sup> **Ex. CE-568**, SUNAT, Report No. 261-2007-SUNAT/2E0000 (20 November 2007), p. 1.

<sup>384</sup> **Ex. CE-568**, SUNAT, Report No. 261-2007-SUNAT/2E0000 (20 November 2007), p. 1.

<sup>385</sup> **Ex. CE-570**, MINEM, Report No. 1169-2007-MEM-DGM (14 December 2007), pp. 1-2.

<sup>386</sup> **Ex. CE-573**, MINEM, Report No. 077-2008-MEM-DGM (29 January 2008).

<sup>387</sup> **Ex. CE-573**, MINEM, Report No. 077-2008-MEM-DGM (29 January 2008).

163. Around the same time, SUNAT commenced an audit of SMCV.<sup>388</sup> On 2 June 2008, SMCV received an audit letter from SUNAT Arequipa asserting that SMCV had not filed documents related to the payment of royalties for the sales of copper ore from the Concentrator for 2006 and 2007.<sup>389</sup> SUNAT also stated that if SMCV did not agree with the scope of the request, SMCV could submit a responsive brief.<sup>390</sup> On 4 June 2008, Ms. Torreblanca sent a reply stating that royalties did not apply to SMCV's concentrate sales by operation of the Stability Agreement, and that SMCV thus was not required to file the requested documents.<sup>391</sup>

164. Ms. Torreblanca also met with SUNAT's regional officials in Arequipa to further explain SMCV's position. On 6 June 2008, Ms. Torreblanca met with Juan Flores, SUNAT's Regional Intendent for Arequipa, who told her "that he fully understood SMCV's position but that his hands were tied since he received an opinion from MINEM's legal counsel office stating that the Concentrator had to pay royalties because it was a 'different project' that was not expressly covered by the Stability Agreement."<sup>392</sup> Even though SMCV had been in near-constant communication with the Government, including during the Roundtable Discussions that were clearly premised on the understanding that SMCV did *not* owe any royalties, this was the first time SMCV was made aware of the existence of Mr. Isasi's June 2006 Report and the interpretation it contained.<sup>393</sup>

165. Ms. Torreblanca thus immediately sought clarification from Juan Valdivia, the Minister of Energy and Mines, and his advisors.<sup>394</sup> Ms. Torreblanca testifies that they informed her that MINEM's legal opinion had been drafted by Mr. Isasi, now the Vice-Minister of Energy and Mines, and sent to several members of Congress, and that Minister Valdivia encouraged her to meet with Vice-Minister Isasi to discuss the opinion in more detail.<sup>395</sup> After the meeting, MINEM presented Ms. Torreblanca with an unofficial copy of Vice-Minister Isasi's June 2006 Report. This was the first time that the Government provided the Report to SMCV.<sup>396</sup>

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<sup>388</sup> **Ex. CE-582**, *SUNAT: Cerro Verde Does Have to Pay Royalties*, EL CORREO DE AREQUIPA (12 December 2008) (noting that SUNAT initiated an audit process against SMCV in the beginning of 2008).

<sup>389</sup> **Ex. CE-577**, SUNAT, Inductive Letter No. 108052004279 (30 May 2008) (complaining that SMCV had not "filed [a mining royalty statement] for the sale of copper ore from the primary sulfide investment project subject to the payment of mining royalties . . . corresponding to the taxable years 2006 and 2007."); Torreblanca ¶ 66.

<sup>390</sup> **Ex. CE-577**; SUNAT, Inductive Letter No. 108052004279 (30 May 2008).

<sup>391</sup> Torreblanca ¶ 66; **Ex. CE-578**, SMCV, Letter No. SMCV-AL-1346-2008 (4 June 2008), pp. 1-2.

<sup>392</sup> Torreblanca ¶ 67.

<sup>393</sup> Torreblanca ¶ 70.

<sup>394</sup> Torreblanca ¶ 70.

<sup>395</sup> Torreblanca ¶ 70.

<sup>396</sup> Torreblanca ¶ 70.

166. In July 2008, Ms. Torreblanca met with Vice-Minister Isasi to discuss the details of his legal opinion.<sup>397</sup> She testifies that she “explained in detail why SMCV constituted a single Mining Unit and why the guarantees under the Stability Agreement covered all investments made in [SMCV’s] Mining and Beneficiation Concessions during the term of the Agreement.”<sup>398</sup> Ms. Torreblanca testifies that Vice-Minister Isasi “agreed that SMCV’s legal position was very solid and he did not challenge it or reject it in any way.”<sup>399</sup> However, “he reiterated that it was not possible for him to change the opinion that he had issued and sent to other authorities”—without mentioning that this was *exactly* what he had done with respect to his April 2005 Report, which *confirmed* SMCV’s legal position.<sup>400</sup> He further noted that “it would be preferable for [SMCV], from a political and social perspective, to pay royalties.”<sup>401</sup>

167. On 12 December 2008, the *El Correo de Arequipa* newspaper published an interview with Mr. Flores, SUNAT’s Regional Intendent for Arequipa, in which he stressed that SUNAT had “determined that Cerro Verde must pay mining royalties” “[a]s a result of a request from [MINEM].”<sup>402</sup> Mr. Flores explained that in early 2008, SUNAT had “initiated an audit process of [SMCV]” “in order to support and assess the payment of [mining royalties].”<sup>403</sup> Ms. Torreblanca “tried to meet again with Mr. Flores regarding these statements, but was unable to do so before he left his position in January 2009.”<sup>404</sup>

168. On 12 March 2009, Ms. Torreblanca met Wilfredo Albarracín, Mr. Flores’s successor, and Aldo Torres, his Chief Auditor.<sup>405</sup> According to Ms. Torreblanca, Mr. Torres stressed that “SMCV[’s] case involved a very sensitive issue and that they were evaluating it in more detail.”<sup>406</sup> Ms. Torreblanca testifies that “Mr. Albarracín confirmed that they were conducting their technical review based on MINEM’s request and opinions.”<sup>407</sup> Ms. Torreblanca ended the meeting by stressing that “if SUNAT decided to impose royalties on SMCV, there would be no doubt that [SMCV] would challenge the assessments and that the Government would also have to reimburse SMCV given that

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<sup>397</sup> Torreblanca ¶ 71.

<sup>398</sup> Torreblanca ¶ 71.

<sup>399</sup> Torreblanca ¶ 71.

<sup>400</sup> Torreblanca ¶ 71.

<sup>401</sup> Torreblanca ¶ 71.

<sup>402</sup> **Ex. CE-582**, *SUNAT: Cerro Verde Does Have to Pay Royalties*, EL CORREO DE AREQUIPA (12 December 2008).

<sup>403</sup> **Ex. CE-582**, *SUNAT: Cerro Verde Does Have to Pay Royalties*, EL CORREO DE AREQUIPA (12 December 2008).

<sup>404</sup> Torreblanca ¶ 72.

<sup>405</sup> Torreblanca ¶ 73.

<sup>406</sup> Torreblanca ¶ 73.

<sup>407</sup> Torreblanca ¶ 73.

the company had paid millions in contributions under the clear understanding that it was not required to pay royalties.”<sup>408</sup>

169. On 4 April 2009, Mr. Martínez filed claims against SUNAT before the Contentious Administrative Courts, decrying SUNAT’s “systematic reluctance to comply with its duties to assess and collect taxes and royalties evaded by SMCV.”<sup>409</sup> On 14 April 2009, Ms. Torreblanca met again with MINEM officials, including Vice-Minister Isasi and Director of Legal Affairs, Cesar Zegarra.<sup>410</sup> Ms. Torreblanca notes that Vice-Minister Isasi “defended his opinion and said that mining stability agreements only covered the investment projects included in the initial feasibility studies presented to obtain the stability agreement,” but “he refused to further explain the grounds for his position or listen to our explanations about why this interpretation did not make sense under the Mining Law,” also stating that “it would be very difficult to exempt SMCV from royalties given the public perception that we had supposedly enjoyed extraordinary windfall profits.”<sup>411</sup> Only after Ms. Torreblanca reiterated the obvious—that SMCV needed to understand MINEM’s legal rationale—at the meeting, Vice-Minister Isasi and Mr. Zegarra sent her a copy of Mr. Isasi’s September 2005 Report, Minister Sánchez Mejía’s 8 November 2005 letter, and Mr. Isasi’s June 2006 Report.<sup>412</sup> Again, neither Vice-Minister Isasi nor Mr. Zegarra disclosed Mr. Isasi’s April 2005 Report confirming that stability guarantees applied to concessions, not investments.<sup>413</sup>

**L. THE GOVERNMENT REVERSED COURSE AND ASSESSED ROYALTIES AGAINST ORE PROCESSED THROUGH SMCV’S CONCENTRATOR FOR 2006-2007, 2008, AND 2009, NOTWITHSTANDING THE STABILITY AGREEMENT**

**1. The 2006-2007 Royalty Assessments**

170. Despite the clear guarantees in the Mining Law and the Stability Agreement—and the Government’s repeated confirmation that they applied to the Concentrator—on 17 August 2009, SUNAT issued assessments against SMCV for royalties on the minerals processed in the Concentrator from October 2006 to December 2007.<sup>414</sup> 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 18.25% per annum running from the dates SUNAT claimed SMCV should have filed each

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<sup>408</sup> Torreblanca ¶ 73.

<sup>409</sup> See Ex. CE-603, Dante A. Martinez, *The Greatest Tax Fraud in the History of Peru*, Con Nuestro Perú (15 January 2011), p. 6 ¶ 26.

<sup>410</sup> Torreblanca ¶ 75.

<sup>411</sup> Torreblanca ¶¶ 75-77.

<sup>412</sup> Torreblanca ¶ 75-76.

<sup>413</sup> Torreblanca ¶ 75-76.

<sup>414</sup> See Ex. CE-31, SUNAT, 2006/07 Royalty Assessments (17 August 2009), Annex No. 1, pp. [1-3].

monthly royalty declaration (together, the “2006-2007 Royalty Assessments”).<sup>415</sup> The 2006-2007 Royalty Assessments totaled US\$32,354,013 in royalties and US\$16,359,424 in penalties and interest as of the date issued.<sup>416</sup>

171. In the section listing the “support and legal basis” for its decision, SUNAT justified the 2006-2007 Royalty Assessments by relying on the interpretation Mr. Isasi set out in his June 2006 Report, which MINEM had provided to SUNAT.<sup>417</sup> In particular, SUNAT took the position that:

[T]he [stability] benefits . . . are only related to the “Cerro Verde Leaching Project.” Therefore . . . the exploitation of mining resources destined for the “Primary Sulfides Project,” as they are not within the scope of protection of the [Stability Agreement], the payment of the mining royalty is required . . . .<sup>418</sup>

172. On 15 September 2009, SMCV requested that SUNAT reconsider the 2006-2007 Royalty Assessments.<sup>419</sup> In its Request, SMCV explained that the Stability Agreement covered the entirety of its production unit, including the Mining and Beneficiation Concessions, because Articles 83 and 82 of the Mining Law and Articles 2 and 22 of the Regulations

do not limit the benefit to a specific investment. . . . [o]n the contrary, it is clear that, according to these legal provisions, stability covers all the activities and investments made within the mining concessions or Economic-Administrative Units that were set out in the Agreement.<sup>420</sup>

173. SMCV also argued that it was not obligated to pay royalties since the Royalty Law applies on the basis of *extraction* of minerals under the Mining Concession, not their processing, so it is irrelevant whether those minerals were processed in the leaching facilities or the Concentrator—a

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<sup>415</sup> See **Ex. CE-31**, SUNAT, 2006/07 Royalty Assessments (17 August 2009); **Ex. CE-38**, SUNAT, Resolution No. 055-014-0001290/SUNAT, 2006/07 Royalty Assessments (31 March 2010), pp. 68-70 (rejecting SMCV’s reconsideration request regarding penalties imposed for failure to present certain required documents).

<sup>416</sup> See **Annex A**: Administrative Proceedings.

<sup>417</sup> See **Ex. CE-31**, SUNAT, 2006/07 Royalty Assessments (17 August 2009), Annex No. 1, pp. [1-3]; see also **Ex. CE-573**, MINEM, Report No. 077-2008-MEM-DGM (29 January 2008) (providing SUNAT with Mr. Isasi’s June 2006 Report, MINEM Report No. 156-2006-MEM/OGJ, among other MINEM documents and reports related to SMCV’s Stability Agreement); **Ex. CE-534**, MINEM, Report No. 156-2006-MEM/OGJ (16 June 2006).

<sup>418</sup> **Ex. CE-31**, SUNAT, 2006/07 Royalty Assessments (17 August 2009), Annex No. 1, pp. [1-3]; see also **Ex. CE-534**, SUNAT, 2006/07 Royalty Assessments (17 August 2009), pp. 13-14 (“[SMCV] is not obligated to pay Mining Royalties for the Cerro Verde leaching project, because this project is protected by the [Stability Agreement] . . . . [SMCV] is obligated to pay Mining Royalties for the Primary Sulfide project, because this project is not covered by the [Stability Agreement].”).

<sup>419</sup> See **Ex. CE-32**, SMCV, Request for Reconsideration, 2006/07 Royalty Assessments (15 September 2009).

<sup>420</sup> **Ex. CE-32**, SMCV, Request for Reconsideration, 2006/07 Royalty Assessments (15 September 2009), p. 18.

position that Mr. Isasi's April 2005 opinion had explicitly confirmed.<sup>421</sup> Further, SMCV pointed out that the 1996 Feasibility Study did not limit the scope of the Stability Agreement, but rather established the "minimum investment" SMCV had to meet to apply for stability benefits.<sup>422</sup> SMCV attached extensive evidence in support of its Request, including expert reports from leading mining lawyers and experts on stabilization.<sup>423</sup>

174. In November 2009, while SMCV's request was pending, Ms. Torreblanca met with two officials from the MEF to discuss SUNAT's Royalty Assessments.<sup>424</sup> Ms. Torreblanca testifies that the MEF officials told her that SMCV would have a "very strong argument for prevailing before the Tax Tribunal."<sup>425</sup>

175. On 31 March 2010, SUNAT rejected SMCV's reconsideration request for the 2006-2007 Royalty Assessments.<sup>426</sup> In its decision, SUNAT again relied on Mr. Isasi's novel and restrictive interpretation of the Mining Law, concluding that, among others:

[T]he guarantee of stability granted by the [Stability Agreement] only encompasses the activities related to the investment project contained in the Technical-Economic Feasibility Study submitted by the investor for this purpose, since the purpose of the agreement is for the investor to know in advance which rules will apply to its investment during the life of the agreement . . . .

[T]he benefits conferred through the Tax Stability Agreement signed under the General Mining Law, inure to the owner of the mining activity with respect to the activities related to the investment project that has been the object of the respective agreement, i.e., to the investment contained in the Technical-Economic Feasibility Study filed for this purpose . . . and does not fall under the concessions or

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<sup>421</sup> See **Ex. CE-32**, SMCV, Request for Reconsideration, 2006/07 Royalty Assessments (15 September 2009), pp. 14-15; **Ex. CE-494**, MINEM, Report No. 153-2005-MEM/OGAJ (14 April 2005), ¶¶ 16-17.

<sup>422</sup> See **Ex. CE-32**, SMCV, Request for Reconsideration, 2006/07 Royalty Assessments (15 September 2009), p. 18 ("[T]he investment] contemplated in the original Feasibility Study . . . is but a minimum investment commitment . . . ."); *id.*, p. 19 ("[T]he investment program submitted in 1996 by CERRO VERDE was a requirement to enjoy the stability granted by the General Mining Law, but in no way defines or limits the scope of this benefit.").

<sup>423</sup> See **Ex. CE-38**, SUNAT, Resolution No. 055-014-0001290/SUNAT, 2006/07 Royalty Assessments (31 March 2010), p. 13 ("attached to the aforementioned brief are the reports prepared by Dr. José Miguel Morales Dasso and Dr. Rossana Rodríguez (ANNEX 1) and Dr. Rudolf Röder (ANNEX 2) which, as stated by [SMCV], support that it should not pay royalties for the mineral extracted from its 'Cerro Verde Nos. 1, 2 and 3' mining concession, regardless of the treatment system subsequently used for its processing."); see also *id.* ("[SMCV] notes that in the audit stage it presented the report of Dr. Marcial García Scherck, in which he explains that the Tax Administration's use of his quote from his article on stability agreements that supposedly supported the Administration's position had been misinterpreted, since in his opinion stability contracts cover all the investments made in the concessions included in the agreement and not only those initially included in the Feasibility Study submitted to sign it.").

<sup>424</sup> Torreblanca ¶ 81.

<sup>425</sup> Torreblanca ¶ 81.

<sup>426</sup> **Ex. CE-38**, SUNAT, Resolution No. 055-014-0001290/SUNAT, 2006/07 Royalty Assessments (31 March 2010).

Economic Administrative Unit, as the appellant asserts, independently of the investment, since this would distort the agreement, as the purpose of the agreement is unknown.<sup>427</sup>

176. SUNAT thus rejected SMCV's arguments that stability guarantees under the Mining Law apply to entire mining concessions or units. SUNAT also did not conceal MINEM's involvement, expressly noting that both Minister Sánchez Mejía's 8 November 2005 letter and Mr. Isasi's June 2006 Report had concluded that "the Primary Sulfide Project does not enjoy the protection of tax, administrative and exchange-rate stability under any guarantee or stability agreement."<sup>428</sup> SUNAT also acknowledged that it had relied on information MINEM provided to SUNAT designating SMCV as a company "obliged to pay the mining royalty."<sup>429</sup>

## 2. The 2008 Royalty Assessments

177. On 1 June 2010, SUNAT issued additional royalty assessments against SMCV for minerals processed in the Concentrator from January 2008 to December 2008.<sup>430</sup> As before, SUNAT also assessed penalties equivalent to 10% of the unpaid royalties, additional penalties for SMCV's failure to file royalty declarations, and interest on the unpaid royalties and penalties at rates of 18.25% (through February 2010) and 14.6% (subsequently) per annum, calculated from the dates SUNAT claimed SMCV should have filed each monthly royalty declaration (together, the "2008 Royalty Assessments").<sup>431</sup> The 2008 Royalty Assessments totaled US\$37,416,894 in royalties and US\$19,620,939 in penalties and interest as of the date issued.<sup>432</sup> The 2008 Royalty Assessments essentially copied and pasted the reasoning from the 2006/07 Royalty Assessments, which had

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<sup>427</sup> Compare **Ex. CE-38**, SUNAT, Resolution No. 055-014-0001290/SUNAT, 2006/07 Royalty Assessments (31 March 2010), pp. 31, 34; with **Ex. CE-534**, MINEM, Report No. 156-2006-MEM/OGJ (16 June 2006), Section 3, ¶ 4.1 ("[T]he stability granted by the Stability Agreement does not extend to all [of SMCV's] mining concessions or economic-administrative units, and even less so to the entire mining company. Rather, it is granted to an investment project clearly delimited by the Feasibility Study"); *id.* at Section III ¶ 2.2 ("The Primary Sulfide Project is not part of the Leaching Project nor has it been contemplated in the Agreement . . . so it is not subject to any stabilized regime.").

<sup>428</sup> See **Ex. CE-38**, SUNAT, Resolution No. 055-014-0001290/SUNAT, 2006/07 Royalty Assessments (31 March 2010), pp. 57-60.

<sup>429</sup> See **Ex. CE-38**, SUNAT, Resolution No. 055-014-0001290/SUNAT, 2006/07 Royalty Assessments (31 March 2010), p. 25 ("the Ministry of Energy and Mines has provided the Tax Administration with the list of entities obliged to pay the mining royalty, which includes the taxpayer."); *id.* at p. 57 ("[A]s can be seen in the report sent by the Ministry of Energy and Mines to the current Tax Administration on pages 2234 to 2236 (report called Royalties Data December 2006), although this entity considers that the appellant has a single concession 'Cerro Verde Nos. 1, 2 and 3,' it includes it in the database of the owners of a mining activity who must pay the mining royalty. In addition, it is observed in the report on pages 2221 to 2223 that the Ministry of Energy and Mines considers the appellant to hold mining rights with tax, exchange-rate and administrative stability agreements, i.e., not subject to the payment of the royalty, specifying in the 'CONTRACT NAME' column 'Cerro Verde Leaching Expansion Project.'").

<sup>430</sup> **Ex. CE-39**, SUNAT, 2008 Royalty Assessments (1 June 2010), Annex 1, p. 13.

<sup>431</sup> **Ex. CE-39**, SUNAT, 2008 Royalty Assessments (1 June 2010).

<sup>432</sup> See **Annex A: Administrative Proceedings**.

adopted Mr. Isasi's assertion that only the "Cerro Verde Leaching Project" enjoyed stability guarantees and that this did not include the Concentrator.<sup>433</sup>

178. On 15 July 2010, SMCV requested that SUNAT reconsider the 2008 Royalty Assessments, reiterating its arguments and evidence in support of the request.<sup>434</sup> On 31 January 2011, SUNAT rejected SMCV's reconsideration request on grounds similar to those it had invoked with respect to the 2006-2007 Royalty Assessments.<sup>435</sup> All of these grounds centered on the erroneous conclusion that stability benefits only apply to the activities related to the investment program included in the Feasibility Study submitted by SMCV to obtain the Stability Agreement.<sup>436</sup>

### 3. The 2009 Royalty Assessments

179. On 27 June 2011, SUNAT issued royalty assessments against SMCV for the minerals processed in the Concentrator from January 2009 to December 2009,<sup>437</sup> 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 18.25% (through February 2010) and 14.6% (subsequently) per annum running from the dates SUNAT asserted SMCV should have filed each monthly royalty declaration (together, the "2009 Royalty Assessments").<sup>438</sup> At the time SUNAT issued them, the 2009 Royalty Assessments totaled US\$38,748,628 in royalties and US\$19,412,864 in penalties and interest.<sup>439</sup> On 9 August 2011, SMCV requested that SUNAT reconsider the 2009 Royalty Assessments.<sup>440</sup> On 21 December 2011, SUNAT again rejected SMCV's reconsideration request, essentially copying and pasting its decision rejecting SMCV's request to reconsider the 2008 Royalty Assessments.<sup>441</sup>

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<sup>433</sup> Compare **Ex. CE-39**, SUNAT, 2008 Royalty Assessments (1 June 2010), Annex 1, p. 13; with **Ex. CE-31**, SUNAT, 2006/07 Royalty Assessments (17 August 2009), Annex No. 1, pp. [1-3].

<sup>434</sup> See **Ex. CE-600**, SMCV, Request for Reconsideration, 2008 Royalty Assessments (15 July 2010).

<sup>435</sup> See **Ex. CE-46**, SUNAT, Resolution No. 055-014-0001394/SUNAT, 2008 Royalty Assessments (31 January 2011).

<sup>436</sup> See, e.g., **Ex. CE-46**, SUNAT, Resolution No. 055-014-0001394/SUNAT, 2008 Royalty Assessments (31 January 2011), p. 33.

<sup>437</sup> See **Ex. CE-54**, SUNAT, 2009 Royalty Assessments (27 June 2011).

<sup>438</sup> See **Ex. CE-54**, SUNAT, 2009 Royalty Assessments (27 June 2011).

<sup>439</sup> See **Annex A: Administrative Proceedings**.

<sup>440</sup> See **Ex. CE-55**, SMCV, Request for Reconsideration, 2009 Royalty Assessments (9 August 2011).

<sup>441</sup> Compare **Ex. CE-58**, SUNAT, Resolution No. 055-014-0001495/SUNAT (21 December 2011); with **Ex. CE-46**, SUNAT, Resolution No. 055-014-0001394/SUNAT, 2008 Royalty Assessments (31 January 2011).

**M. SMCV AGREED TO PAY A NEW “VOLUNTARY” CONTRIBUTION, OR “GEM,” ON THE BASIS THAT IT WOULD NOT BE PAYING ROYALTIES OR SPECIAL MINING TAX ON ANY PART OF ITS PRODUCTION UNIT**

**1. In 2011, Peru Amended the Royalty Law, Enacted a New Mining Tax, and Created the GEM Program**

180. During this time, the intense political pressure to obtain additional contributions from stabilized mining companies continued unabated. In the lead up to the 2011 presidential elections, frontrunner Ollanta Humala campaigned on promises to impose higher taxes and contributions on the mining sector, including against companies entitled to stabilization.<sup>442</sup> In March 2011, anticipating Mr. Humala’s election, the Mining Society re-engaged APOYO to prepare a new tax and contributory scheme that the Mining Society could present to the new administration, similar to the PMSP.<sup>443</sup>

181. Over the course of the next few months, APOYO met with the Government to discuss the terms of a proposal that would amend the royalty regime, create a new “special mining tax” (“SMT”), and establish a new type of “voluntary” contribution for stabilized mining companies called the *Gravamen Especial a la Minería* (“GEM”).<sup>444</sup> Hugo Santa María, chief economist at APOYO and a witness in these proceedings, was in charge of the project and participated in all the meetings APOYO had with the Mining Society and the Government.<sup>445</sup> Mr. Santa María testifies that the Mining Society member companies were divided into three groups: (1) those with production units that had stability agreements in force prior to the 2004 Royalty Law, who did not have to pay royalties at all, (2) those with stability agreements that entered into force *after* the 2004 Royalty Law, and (3) those without stability agreements.<sup>446</sup>

182. According to Mr. Santa María, APOYO always considered SMCV part of the group of stabilized mining companies that did not have to pay royalties at all, and presented it to the Government as such.<sup>447</sup> For example, Mr. Santa María testifies that at a 24 August 2011 meeting attended by high-ranking Government officials, including the Prime Minister, the Minister of Economy and Finance, and the Minister of Energy and Mines, he walked through quantitative simulations for specific mining companies, including SMCV, to demonstrate their expected

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<sup>442</sup> **Ex. CE-602**, Gana Perú, *The Great Transformation: Government Plan* (December 2010), pp. 135-136 (stating that “[t]he objective will be to establish a fiscal and tax policy for the medium and long term, aimed at helping the [mining] sector pay taxes and economic considerations incumbent upon it in a scenario of stability. Royalties, the canon and the tax on windfall profits will need to be updated. The argument of respect for the agreements signed by the State does not sound convincing. Although some companies have signed for the sake of legal stability, this has never been an impediment for them to be reviewed under a responsible and respectful negotiation proposal.”).

<sup>443</sup> **CWS-9**, Witness Statement of Hugo Santa María (27 August 2021) (“Santa María”), § III.A.

<sup>444</sup> See generally Santa María ¶¶ 30-42.

<sup>445</sup> Santa María ¶¶ 4, 10, 18, 28, 32, 36.

<sup>446</sup> Santa María ¶ 19.

<sup>447</sup> Santa María ¶¶ 21-23.

contributions under the APOYO proposal as compared to the existing regime.<sup>448</sup> APOYO’s proposed projection for SMCV’s contributions, excerpted in the table below, assumed that SMCV would not pay any royalties (*regalías*) for its sole production unit but would make substantial GEM payments.<sup>449</sup>

**Figure 2: APOYO Projections for SMCV’s GEM Payments**

**SOCIEDAD MINERA CERRO VERDE**  
**INFORMACIÓN DE LOS ESTADOS FINANCIEROS DE**  
**EMPRESAS MINERAS**  
(Miles US\$)

|   | 2007    | 2008    | 2009    | 2010    |
|---|---------|---------|---------|---------|
| <b>TRIBUTOS Y APORTES</b>                                   |         |         |         |         |
| <b>Regalías</b>   | 0       | 0       | 0       | 0       |
| <b>Regalías a las ventas</b>                                | 0       | 0       | 0       | 0       |
| <b>Nuevas regalías</b>                                      | 0       | 0       | 0       | 0       |
| <b>Aporte al Fondo Voluntario</b>                           | 48,674  | 29,496  | 27,608  |         |
| <b>GEM</b>  | 97,377  | 75,867  | 79,782  | 176,287 |
| <b>Aporte al Fondo Obligatorio<br/>(en base a Ut. Neta)</b> | 935,715 | 694,653 | 883,460 |         |

183. Mr. Santa María testifies that at no point in this meeting or any other did the Government contradict this assumption or take the position that SMCV would pay royalties for the minerals processed by the Concentrator.<sup>450</sup>

184. In early September 2011, APOYO submitted the final proposal for the new tax and contributory scheme to the Government.<sup>451</sup> Largely adopting APOYO’s proposal, on 28 September 2011 the Government enacted Laws Nos. 29788 to 29790, which amended the royalty regime and created the special mining tax (“SMT”) and the GEM.<sup>452</sup> Law 29788 amended the royalty regime to change the method of calculating royalties, which together meant that mining companies would pay more royalties when making bigger profits, and less when making small profits or losses.<sup>453</sup>

<sup>448</sup> Santa María ¶¶ 30-32.

<sup>449</sup> Santa María, Appendix C; *see also id.* ¶ 39.

<sup>450</sup> Santa María ¶¶ 38, 41, 45.

<sup>451</sup> Santa María ¶ 34; **Ex. CE-622**, APOYO Consultoría, Proposal for a New Framework for Taxes, Contributions, and Mining Contributions in Peru (2 September 2011).

<sup>452</sup> *See CA-179*, Mining Royalties Law, Law Modifying Law No. 28258, Law No. 29788 (28 September 2011); **CA-180**, Creating the Special Mining Tax, Law No. 29789 (28 September 2011); **CA-181**, Establishing GEM Legal Framework, Law No. 29790 (28 September 2011)

<sup>453</sup> *Compare CA-179*, Mining Royalties Law, Law Modifying Law No. 28258, Law No. 29788 (28 September 2011), Annex (calculating royalty quarterly based on the company’s operating profit at marginal rates ranging from 1% to 12%), *with CA-8*, Authorizing SUNAT to Implement Provisions that Facilitate the Administration of Royalties, Law No. 28969 (25 January 2007), Arts. 2, 3, 4 and 5 (calculating royalty monthly based on sales at rates of 1% to 3%); *see also CA-179*, Mining Royalties Law, Law Modifying

Law 29789 created the SMT, an additional tax based on a company's operating profit.<sup>454</sup> Law 29790 created the GEM as a voluntary payment, which like royalties and SMT would be calculated quarterly based on the operating profit from *stabilized* concessions.<sup>455</sup> The chart below summarizes the tax and contributory burden under Laws Nos. 29788 to 29790 for mining companies according to their stability status:

|                  | <b>Non-stabilized Mining Companies</b>  | <b>Mining companies stabilized after the 2004 Royalty Law</b>                                    | <b>Mining companies stabilized before the 2004 Royalty Law (SMCV)</b>    |
|------------------|---|--|--|
| <b>Royalties</b> | 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   |
| <b>SMT</b>       | Yes, at marginal rates of 2% to 8.40% based on the company's operating profit                     | No   | No   |
| <b>GEM</b>       | 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 |

185. As the chart shows, under the new scheme, non-stabilized mining companies would pay royalties under the 2011 Royalty Regime and SMT but not GEM; mining companies with mining stability agreements in force after the 2004 Royalty Law would pay royalties under the 2004 Royalty Regime and GEM, after discounting the royalty payments effectively made; and mining companies with mining stability agreements in force before the 2004 Royalty Law, such as SMCV, would only pay GEM but without any discounts.<sup>456</sup> Unlike the Voluntary Contributions, which were paid into privately administered funds to fund local social benefit projects, GEM payments constituted State

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Law No. 28258, Law No. 29788 (28 September 2011), Annex (calculating the marginal rate as an increasing function of the operating income margin, among other variables).

<sup>454</sup> See **CA-180**, Creating the Special Mining Tax, Law No. 29789 (28 September 2011), Annex.

<sup>455</sup> See **CA-181**, Establishing GEM Legal Framework, Law No. 29790 (28 September 2011), Annex II; see also **Ex. CE-64**, Agreement for the Assessment of *Gravamen Especial a la Minería* Approved by Law No. 29790 (28 February 2012), Clause 2.1 (noting that the range of effective rates is delineated in Annex II of the law).

<sup>456</sup> See **CA-181**, Establishing GEM Legal Framework, Law No. 29790 (28 September 2011), Arts. 2.1, 3(b) (applying the GEM regime only for stabilized companies and disallowing discounts for mining companies with stability agreements in force before the 2004 Royalty Law); **CA-179**, Mining Royalties Law, Law Modifying Law No. 28258, Law No. 29788 (28 September 2011) (applying the new Royalty Regime to non-stabilized mining companies); **CA-180**, Creating the Special Mining Tax, Law No. 29789 (28 September 2011) (applying the SMT to non-stabilized mining companies).

revenues that were collected and administered by SUNAT, and were not specifically earmarked for social projects.<sup>457</sup>

186. The GEM law also included a model agreement that participating companies would sign with the Government to agree to pay GEM until the expiration of their respective mining stability agreements (the “GEM Model Agreement”).<sup>458</sup> Among others, the GEM Model Agreement included the following:

- (a) The Agreement identified, in Clause 1, any stability agreements entered into by the company and their termination dates.<sup>459</sup>
- (b) The Model Agreement required a quarterly assessment of the GEM on profits “from the concessions included in each one of the Agreements entered into by the Company” and listed in Clause 1.<sup>460</sup> To account for the fact that companies with stability agreements entered into *after* 2004 would pay both GEM and royalties, the agreement also provided that “amounts paid for the mining royalties established in Law. No. 28258” would be deducted for purposes of the assessment.<sup>461</sup> The agreement also noted that GEM payments would be deductible for income tax purposes, and would constitute revenues for the public treasury (Clause 2).<sup>462</sup>
- (c) The Agreement expired on the termination date of the last of the stability agreements listed in Clause 1, and provided that GEM would be “assessed until the termination of” each of the agreements (Clause 4).<sup>463</sup>
- (d) SUNAT would collect and administer the GEM payments (Clause 6).<sup>464</sup>

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<sup>457</sup> Compare **CA-131**, Voluntary Contribution Program, Supreme Decree No. 071-2006-EM (21 December 2006), Clauses 2.1, 2.4; with **Ex. CE-64**, Agreement for the Assessment of *Gravamen Especial a la Minería* Approved by Law No. 29790 (28 February 2012), Arts. 3(d), 4.

<sup>458</sup> **CA-182**, Regulations for the Law Establishing GEM Legal Framework, Supreme Decree No. 173-2011-EF (29 September 2011), pp. 2-3.

<sup>459</sup> **CA-182**, Regulations for the Law Establishing GEM Legal Framework, Supreme Decree No. 173-2011-EF (29 September 2011), Model Agreement, Clause 1.

<sup>460</sup> **CA-182**, Regulations for the Law Establishing GEM Legal Framework, Supreme Decree No. 173-2011-EF (29 September 2011), Model Agreement, Clause 2.1.

<sup>461</sup> **CA-182**, Regulations for the Law Establishing GEM Legal Framework, Supreme Decree No. 173-2011-EF (29 September 2011), Model Agreement, Clause 2.2(b); see also **CA-181**, Establishing GEM Legal Framework, Law No. 29790 (28 September 2011), Art. 3(b).

<sup>462</sup> **CA-182**, Regulations for the Law Establishing GEM Legal Framework, Supreme Decree No. 173-2011-EF (29 September 2011), Model Agreement, Clause 2.2(c).

<sup>463</sup> **CA-182**, Regulations for the Law Establishing GEM Legal Framework, Supreme Decree No. 173-2011-EF (29 September 2011), Model Agreement, Clause 4.

<sup>464</sup> **CA-182**, Regulations for the Law Establishing GEM Legal Framework, Supreme Decree No. 173-2011-EF (29 September 2011), Model Agreement, Clause 6.

- (e) The Model Agreement did not “constitute any modification or partial waiver” of the terms of the stability agreements executed by the company (Clause 11).<sup>465</sup>

**2. SMCV Agreed to Pay a GEM Contribution for Its Entire Production Unit on the Understanding That It Would Not Be Subject to Royalties or Special Mining Tax**

187. Ms. Torreblanca testifies that it was “no surprise” when “the Government asked SMCV to participate in the GEM,” given SMCV’s participation in the Voluntary Contribution program and SMCV’s longstanding position that it would not pay royalties during the life of the Stability Agreement.<sup>466</sup> In light of SUNAT’s 2006-2007, 2008, and 2009 Royalty Assessments, however, SMCV “decided to send a letter to the Government to clarify that we would only participate in the GEM given the understanding that our activities and operations would be covered under the Stability Agreement, or that we could not be subject to the payment of the GEM and royalties at the same time.”<sup>467</sup>

188. On 7 October 2011, SMCV sent a letter to Guillermo Shinno, the Director General of Mining, explaining SMCV’s situation and requesting “urgent confirmation of the scope of the [Stability] Agreement for the application of the [GEM].”<sup>468</sup> The letter set out SMCV’s understanding that, after signing a GEM Agreement, the company would be subject “exclusively . . . to the [GEM] . . . with respect to the operating profits from the sale of the 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].”<sup>469</sup> The letter also reiterated SMCV’s views that “as long as the 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.<sup>470</sup>

189. A few days later, Ms. Torreblanca had several meetings with MEF and MINEM officials, in which she sought to “clarify the scope of the GEM, as applied to SMCV.”<sup>471</sup> Ms. Torreblanca testifies that she explained the existing royalty dispute, and that SMCV was in the process of challenging the assessments.<sup>472</sup> As Ms. Torreblanca explains, “[t]hese officials understood

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<sup>465</sup> **CA-182**, Regulations for the Law Establishing GEM Legal Framework, Supreme Decree No. 173-2011-EF (29 September 2011), Model Agreement, Clause 11.

<sup>466</sup> Torreblanca ¶ 84.

<sup>467</sup> Torreblanca ¶ 84.

<sup>468</sup> **Ex. CE-628**, SMCV, Letter No. SMCV.VL&RG-1896-2011 (7 October 2011).

<sup>469</sup> **Ex. CE-628**, SMCV, Letter No. SMCV.VL&RG-1896-2011 (7 October 2011).

<sup>470</sup> **Ex. CE-628**, SMCV, Letter No. SMCV.VL&RG-1896-2011 (7 October 2011).

<sup>471</sup> Torreblanca ¶ 86 (describing meeting with Vice-Minister of Economy, Laura Calderón, and MINEM’s legal advisor, José Manuel Pando).

<sup>472</sup> Torreblanca ¶ 86.

our concern and assured us that SMCV would only pay GEM—and not royalties and SMT—because companies could not be subject to both.”<sup>473</sup>

190. Because she had received no response to her first letter, on 26 October 2011 Ms. Torreblanca followed up with another letter on behalf of SMCV to Mr. Shinno, reiterating that SMCV had a Stability Agreement in force that “includes the ‘Cerro Verde Nos. 1, 2 and 3’ mining concession as well as the ‘Cerro Verde Beneficiation Plant’ beneficiation concession, from which all the ore corresponding to the Cerro Verde production unit, the only one the company has, is extracted and processed.”<sup>474</sup> The letter requested confirmation that if SMCV signed the GEM Agreement,

[SMCV] will pay the GEM as of October 1, 2011, and will not pay either the Special Mining Tax approved by Law No. 29789 or the Mining Royalties set forth in Law No. 28258 for the concessions mentioned in the preceding paragraph until December 31, 2013, the expiration date of the Stability Agreement.<sup>475</sup>

191. On 5 December 2011, still awaiting a response from the DGM, SMCV wrote to Minister of Economy and Finance, Miguel Castilla Rubio, stressing that it was “necessary to have 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” before it entered into the GEM Agreement.<sup>476</sup> SMCV requested that, “as has been verbally stated to us by several authorities, please confirm that upon signing the [GEM] Agreement . . . [SMCV] will only have to pay the GEM and will pay neither the Special Mining Tax nor the Mining Royalty for the concessions included in the [Stability Agreement].”<sup>477</sup> Mr. Castilla never responded to SMCV’s letter.<sup>478</sup>

192. On 28 December 2011, MINEM’s Mr. Shinno finally responded to SMCV’s letters.<sup>479</sup> Instead of confirming or denying SMCV’s clearly stated understanding of stability as requested, Mr. Shinno asserted that SMCV’s request for clarification “exceed[ed] the competence of the Energy and Mines Sector.”<sup>480</sup> Mr. Shinno’s statement was completely at odds with the previous opinions MINEM had issued with regard to the scope of SMCV’s stability agreement—most notably Mr. Isasi’s June 2006 Report, which formed the basis for SUNAT’s assessments.<sup>481</sup> Mr. Shinno also

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<sup>473</sup> Torreblanca ¶ 86.

<sup>474</sup> **Ex. CE-630**, SMCV, Letter No. SMCV-VL&RG-1968-2011 (26 October 2011); Torreblanca ¶ 87.

<sup>475</sup> **Ex. CE-630**, SMCV, Letter No. SMCV-VL&RG-1968-2011 (26 October 2011).

<sup>476</sup> **Ex. CE-631**, SMCV, Letter No. SMCV-VL&RG-2217-2011 (5 December 2011).

<sup>477</sup> **Ex. CE-631**, SMCV, Letter No. SMCV-VL&RG-2217-2011 (5 December 2011).

<sup>478</sup> Torreblanca ¶ 89.

<sup>479</sup> **Ex. CE-632**, MINEM, Official Letter No. 1333-2011-MEM/DGM, December 28, 2011.

<sup>480</sup> **Ex. CE-632**, MINEM, Official Letter No. 1333-2011-MEM/DGM, December 28, 2011.

<sup>481</sup> *Compare* **Ex. CE-632**, MINEM, Official Letter No. 1333-2011-MEM/DGM, December 28, 2011 (noting that SMCV’s request “exceeds the competence of the Energy and Mines Sector;”) *with* **Ex. CE-534**, MINEM, Report No. 156-2006-MEM/OGJ (16 June 2006), pp. 7, 12-13, Section I, ¶ 5, Section III, ¶¶ 1.1-

attached a 14 October 2011 MEF Opinion, which took the position that MEF, the Ministry of which SUNAT forms part, “has no jurisdiction to determine the content of [the Stability Agreement], . . . or to define their scope and content.”<sup>482</sup> However, the MEF Opinion confirmed that, in principle, the GEM program only applied to mining companies “for that which is covered by [a stability agreement],” whereas the SMT and Mining Royalty were applicable “on that which is not included in [stability] Agreements.”<sup>483</sup>

193. On 28 February 2012, based on Mr. Shinno and the MEF officials’ confirmations that the GEM contributions “would be exclusive of any royalty or SMT obligation” and the understanding “that most of the other large mining companies with mining stability agreements were going to participate,” Ms. Torreblanca signed an agreement committing to pay the GEM on behalf of SMCV (the “GEM Agreement”).<sup>484</sup> The GEM Agreement followed the text of the GEM Model Agreement, and obliged SMCV to make GEM payments based on its “quarterly operating profit, from the concessions included in” the Stability Agreement.<sup>485</sup>

194. SMCV ultimately disbursed more than S/ 400 million (over US\$100 million) in GEM payments from the fourth quarter of 2011 until the end of 2013, as shown in the table below.<sup>486</sup>

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4.5 (opining extensively on the scope of the Stability Agreement and interpreting benefits under the agreement as limited to the investment project delimited by the Feasibility Study).

<sup>482</sup> **Ex. CE-629**, MEF, Report No. 206-2011-EF/61.01 (14 October 2011), p. 2, Section II, ¶¶ 2-3.

<sup>483</sup> **Ex. CE-629**, MEF, Report No. 206-2011-EF/61.01 (14 October 2011), p. 2, Section II, ¶¶ 2-3.

<sup>484</sup> *See* Torreblanca ¶ 90 (noting that SMCV “did not want to be the only major mining company that would not participate in the GEM and did not want to risk reigniting a political controversy”); *see also* **Ex. CE-639**, SMCV, Letter No. SMCV-VL&RG-623-2012 (February 29, 2012); **Ex. CE-64**, Agreement for the Assessment of Gravamen Especial a la Minería Approved by Law No. 29790 (28 February 2012);

<sup>485</sup> *Compare* **CA-182**, Regulations for the Law Establishing GEM Legal Framework, Supreme Decree No. 173-2011-EF (29 September 2011) *with* **Ex. CE-64**, Agreement for the Assessment of Gravamen Especial a la Minería Approved by Law No. 29790 (28 February 2012), Art. 2.1 (confirming that GEM “is the result of assessing on the quarterly operating profit, from the concessions included in each of the Agreements signed by THE COMPANY referred to in the First Clause”); *id.* Art. 1 (listing Stability Agreement as relevant agreement held by SMCV).

<sup>486</sup> *See* **Ex. CE-65**, SMCV, GEM Payment, 4Q 2011 (29 February 2012); **Ex. CE-70**, SMCV, GEM Payment, 1Q 2012 (31 May 2012); **Ex. CE-71**, SMCV, GEM Payment, 2Q 2012 (31 August 2012); **Ex. CE-73**, SMCV, GEM Payment, 3Q 2012 (30 November 2012); **Ex. CE-78**, SMCV, GEM Payment, 4Q 2012 (28 February 2013); **Ex. CE-87**, SMCV, GEM Payment, 1Q 2013 (30 May 2013); **Ex. CE-96**, SMCV, GEM Payment, 2Q 2013 (28 August 2013); **Ex. CE-101**, SMCV, GEM Payment, 3Q 2013 (28 November 2013); **Ex. CE-106**, SMCV, GEM Payment, 4Q 2013 (27 February 2014).

| Period       | Payment Date | Payment in soles   |
|--------------|--------------|--------------------|
| Q4 2011      | February-12  | 36,607,739         |
| Q1 2012      | May-12       | 42,565,573         |
| Q2 2012      | August-12    | 70,571,171         |
| Q3 2012      | November-12  | 47,678,151         |
| Q4 2012      | February-13  | 48,946,909         |
| Q1 2013      | May-13       | 44,344,722         |
| Q2 2013      | August-13    | 44,448,320         |
| Q3 2013      | November-13  | 37,359,114         |
| Q4 2013      | February-14  | 55,584,286         |
| <b>Total</b> |              | <b>428,105,985</b> |

195. The amounts paid were based on SMCV’s operating profit for its Mining and Beneficiation Concessions—the “concessions included in” the Stability Agreement—without deducting any royalty payments.<sup>487</sup> The Government accepted each of those payments without question.<sup>488</sup>

## N. THE TAX TRIBUNAL UPHELD SUNAT’S ROYALTY ASSESSMENTS

### 1. The Tax Tribunal Upheld SUNAT’s 2006-2007 and 2008 Royalty Assessments in Resolutions Marred by Grave Procedural Irregularities

196. On 12 May 2010, SMCV challenged the 2006-2007 Royalty Assessments before the Tax Tribunal, the body within the MEF that serves as the final administrative appeal for royalty and tax matters (the “2006-2007 Royalty Case”).<sup>489</sup> The Tax Tribunal is empowered to review SUNAT assessments *de novo*, and SUNAT assessments, if challenged, are not final administrative acts or enforceable against the taxpayer until the Tax Tribunal confirms them.<sup>490</sup> The case was assigned to

<sup>487</sup> **Ex. CE-64**, Agreement for the Assessment of Gravamen Especial a la Minería Approved by Law No. 29790 (28 February 2012), Art. 2.1.

<sup>488</sup> See Torreblanca ¶ 91.

<sup>489</sup> **Ex. CE-40**, SMCV, Challenge to Tax Tribunal, 2006/07 Royalty Assessments (12 May 2010); **CA-250**, MEF Internal Regulations, Ministerial Resolution 213-2020/EF/4, Art. 16 (“The Tax Tribunal is the Ministry’s decision-making body that constitutes the highest administrative body in tax and customs matters on the national level.”); **CA-186**, Manual of the Operation and Functions of the Tax Tribunal, Ministerial Resolution No. 626-2012-EF/43 (5 October 2012), p. 1 (“The Tax Tribunal is the administrative last resort for tax and customs matters within the framework of the measures designed to improve the resolution of tax procedures”); *id.*, p. 3 (referring to the “Tax Tribunal’s administrative acts”).

<sup>490</sup> See **CA-4**, Tax Code, Supreme Decree No. 135-99-EF (19 August 1999), Art. 101(1) (“The Tax Tribunal has the following powers: Hear and resolve as the last administrative instance appeals against Resolutions of the Administration resolving reconsideration requests . . . related to the determination of tax liability.”); **CA-14**, Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Art. 101(1) (same); *id.* at Art. 115(c) (same); *id.* at Art. 127 (“The decision-making body is empowered to conduct a full re-examination of the

Chamber No. 10, one of the Tax Tribunal’s eleven chambers, and to Luis Cayo Quispe as the *vocal ponente*—that is, the *vocal* (the Tax Tribunal decision-maker) responsible for conducting the initial analysis of the case and preparing a draft resolution.<sup>491</sup>

197. Approximately nine months later, on 10 March 2011, SMCV filed a challenge to the 2008 Royalty Assessments (the “2008 Royalty Case”).<sup>492</sup> The 2008 Royalty Case was assigned to a different chamber, Chamber No. 1, and to *vocal ponente* Licette Zuñiga Dulanto, who was also the presiding *vocal* of her Chamber.<sup>493</sup> The following chart summarizes Chambers’ No. 10 and No. 1 composition during the relevant period:

| Case           | 2008 Royalty   | 2006/07 Royalty   |
|----------------|--|---|
| <b>Chamber</b> | <p><b>Chamber No. 1</b></p> <ul style="list-style-type: none"> <li>• Licette Zuñiga Dulanto (presiding <i>vocal</i> and <i>vocal ponente</i>)</li> <li>• Lorena Amico de las Casas (<i>vocal</i>)</li> <li>• Alberto Ramírez Mío (<i>vocal</i>)</li> </ul> | <p><b>Chamber No. 10</b></p> <ul style="list-style-type: none"> <li>• Carlos Moreano Valdivia (presiding <i>vocal</i>)</li> <li>• Luis Cayo Quispe (<i>vocal ponente</i>)</li> <li>• Jorge Sarmiento Díaz (<i>vocal</i>)</li> </ul> |

198. The Tax Tribunal President, Zoraida Olano Silva, took a keen and unusual interest in SMCV’s case—and its outcome—from the outset, despite having no official role in the resolution of individual cases.<sup>494</sup> In particular, instead of allowing both Chambers to proceed with a law clerk assisting the *vocal ponente* in preparing a draft resolution—as required under the Tax Tribunal Manual of Procedures<sup>495</sup>—President Olano Silva personally took control of the 2008 Royalty Case instructing her assistant, Ms. Ursula Villanueva, to prepare the draft resolution.<sup>496</sup> Contemporaneous documents confirm President Olano Silva and Ms. Villanueva’s inappropriate involvement. For example, in a 22

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issues of the disputed case.”); *id.* at Art. 157 (“The resolution of the Tax Court exhausts the administrative route.”).

<sup>491</sup> See **Ex. CE-88**, Tax Tribunal, Decision No. 08997-10-2013 (30 May 2013); Estrada ¶ 37; **CA-196**, Tax Tribunal Procedural Manual, Ministerial Resolution No. 017-2012-EF/13 (31 October 2012), p. [13], ¶ 11 (“*VOCAL PONENTE*: Receives and analyzes the draft Procedural Order or draft Resolution and, if appropriate, coordinates with the advisor(s) any changes required...”).

<sup>492</sup> **Ex. CE-49**, SMCV, Challenge to Tax Tribunal, 2008 Royalty Assessments (10 March 2011).

<sup>493</sup> See **Ex. CE-83**, Tax Tribunal, Decision No. 08252-1-2013 (21 May 2013), p. 24.

<sup>494</sup> See **CA-186**, Manual of the Operation and Functions of the Tax Tribunal, Ministerial Resolution No. 626-2012-EF/43 (5 October 2012) (establishing rules on the scope of power of the President of the Tax Tribunal, which does not include the power to resolve individual cases).

<sup>495</sup> See **CA-196**, Tax Tribunal Procedural Manual, Ministerial Resolution No. 017-2012-EF/13 (31 October 2012), p. [12], ¶¶ 5-7 (establishing rules on the process that the resolution of individual cases must follow, which includes the *vocal ponente* preparing the draft resolution with the assistance of a law clerk); Estrada ¶ 29.

<sup>496</sup> See generally Estrada ¶¶ 29-30, 36-59; **Ex. CE-648**, Email from Úrsula Villanueva Arias to Zoraida Alicia Olano Silva (22 March 2013, 4:02 PM PET); **Ex. CE-83**, Tax Tribunal, Decision No. 08252-1-2013 (21 May 2013), p. 24.

March 2013 email—sent two years after the 2008 Royalty Case had been filed, but before the scheduling of an oral hearing—Ms. Villanueva reported on her progress to President Olano Silva:

**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.<sup>497</sup>

199. On 5 April 2013—almost three years after SMCV filed its challenge—Chamber No. 10 held its oral hearing on the 2006-2007 Royalty Case.<sup>498</sup> Four days later, Chamber No. 1 scheduled its oral hearing on the 2008 Royalty Case for 2 May 2013, which then proceeded as scheduled—less than one month after the hearing on the 2006-2007 Royalty Case, despite the fact that SMCV had filed the 2008 Royalty Case challenge almost nine months later.<sup>499</sup>

200. On 21 May 2013, less than three weeks after the hearing and before Chamber No. 10 had ruled on the earlier-filed 2006-2007 Royalty Case, Chamber No. 1 issued the resolution drafted by Ms. Villanueva in the 2008 Royalty Case.<sup>500</sup> The resolution itself leaves no doubt about its author: according to the practice of the Tax Tribunal, a “work route” on the signature page designates the initials of the drafting law clerk, after those of the *vocal ponente* and the secretary-rapporteur.<sup>501</sup> Instead of the initials of a law clerk assisting Chamber No. 1, the 2008 Royalty Case lists Ursula Villanueva’s initials “UV,” confirming that she drafted the resolution.<sup>502</sup>

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<sup>497</sup> **Ex. CE-648**, Email from Úrsula Villanueva Arias to Zoraida Alicia Olano Silva (22 March 2013, 4:02 PM PET).

<sup>498</sup> See **Ex. CE-79**, Evidence of Oral Hearing Report No. 0286-2013-EF/TF (5 April 2013).

<sup>499</sup> See **Ex. CE-80**, Notification of Oral Hearing Report No. 0411-2013-EF/TF (9 April 2013) (scheduling an oral hearing for the 2008 Royalty Case for 2 May 2013); see also **Ex. CE-40**, SMCV, Challenge to Tax Tribunal, 2006/07 Royalty Assessments (12 May 2010); **Ex. CE-49**, SMCV, Challenge to Tax Tribunal, 2008 Royalty Assessments (10 March 2011).

<sup>500</sup> See **Ex. CE-83**, 21 May 2013 Tax Tribunal Decision, No. 08252-1-2013.

<sup>501</sup> Estrada ¶¶ 29, 48.

<sup>502</sup> See **Ex. CE-83**, Tax Tribunal, Decision No. 08252-1-2013 (21 May 2013), p. 24 (showing initials of *vocal ponente* “ZD” (Ms. Zúñiga Dulanto), secretary rapporteur “FQ” (Mr. Flores Quispe), “law clerk” that prepared the draft resolution “UV” (Ms. Ursula Villanueva), secretary of the Chamber “rmh” (Rosario Muñoz Hidalgo)).

Figure 3: 2008 Royalty Case Signature Page



201. The resolution drafted by Ms. Villanueva upheld the 2008 Royalty Assessments adopting the same interpretation of the Mining Law and Regulations first set out by Mr. Isasi in his June 2006 Report, namely:

[T]he benefits of legal stability are not granted in a general manner to the owner of the mining activity or any given mining concession, but rather *in relation to a specific investment project that is clearly delimited in the Feasibility Study . . .* while the benefits conferred under stability contracts go to the owner of the mining activity for the purpose of promoting the investment that develops into a concession or an Economic-Administrative Unit, *said benefits apply only to the activities related to the investment in question, the object of which is delimited in the Feasibility Study*, which, in the present case, is in reference to the activities related to the “Cerro Verde Leaching Project.”<sup>503</sup>

202. The resolution *explicitly* relied on both Minister Sanchez’s November 2005 letter to congressman Diez Canseco and Mr. Isasi’s June 2006 Report as “confirm[ing]” the position that

[t]he stability benefits have not been granted to the “Cerro Verde N° 1, N° 2 and N° 3” mining concession or to the “Cerro Verde Beneficiation Plant” beneficiation concession, nor with regard to any activity or investment therein, but rather with regard to a specific project implemented at said concessions (“Cerro Verde Leaching Project”), where the objective of that project is to expand the

<sup>503</sup> Ex. CE-83, Tax Tribunal, Decision No. 08252-1-2013 (21 May 2013), pp. 14-15 (emphasis added).

production capacity of copper cathodes obtained from copper ore heap leaching processes, as specified in the Feasibility Study submitted by [SMCV], which is incorporated in the [Stability Agreement].<sup>504</sup>

203. The resolution provided no guidance on how this interpretation could work in practice, given the difficulty of segregating the investment program in the 1996 Feasibility Study from later investments in the same integrated mining unit—particularly given that, as the resolution acknowledged, the 1996 Feasibility Study’s investment program was itself an *expansion* of existing leaching operations.<sup>505</sup> Equally, the Tax Tribunal did not identify any regulations that clarified how such segregation should take place—unsurprisingly, since none existed.<sup>506</sup> The resolution also arbitrarily took the position that SMCV should have asked the DGM to modify the 1996 Feasibility Study in order to include the Concentrator<sup>507</sup>—even though a Feasibility Study can only be modified “in the course of its execution” and the resolution itself acknowledged that SMCV decided to invest in the Concentrator only *after* the 1996 Feasibility Study had been fully executed.<sup>508</sup>

204. The resolution further concluded that the Beneficiation Concession expansion to include the Concentrator was irrelevant because it occurred after the date the contract was signed, and because “at the date the stability agreement . . . was signed, the [Beneficiation Concession] was only authorized to process copper ore through leaching.”<sup>509</sup> This conclusion was simply wrong: the Beneficiation Concession, like each of MINEM’s previous authorizations to process minerals at Cerro Verde—including Minero Perú’s 1977 special mining right, the 1991 conversion of the special mining right to the Beneficiation Concession, and subsequent expansions of the Beneficiation Concession—did not limit the rights granted to a particular processing method.<sup>510</sup> Indeed, both Minero Perú and

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<sup>504</sup> **Ex. CE-83**, Tax Tribunal, Decision No. 08252-1-2013 (21 May 2013) (citing **Ex. CE-519**, MINEM, Report No. 2004-2005-MEM/DM (8 November 2005); **Ex. CE-534**, MINEM, Report No. 156-2006-MEM/OGJ (16 June 2006)).

<sup>505</sup> **Ex. CE-83**, Tax Tribunal, Decision No. 08252-1-2013 (21 May 2013), p. 13 (“[F]rom what was indicated in the [1996] Feasibility Study . . . the object of the project was to *expand* the leaching system.”) (emphasis added).

<sup>506</sup> See generally **Ex. CE-83**, Tax Tribunal, Decision No. 08252-1-2013 (21 May 2013).

<sup>507</sup> See **Ex. CE-83**, Tax Tribunal, Decision No. 08252-1-2013 (21 May 2013), p. 13 (“[I]n the case of modification but . . . also in the case of an expansion of the . . . Feasibility Study, it was necessary to request its approval from the Bureau of Mining.”); see also *id.* p. 12.

<sup>508</sup> See **Ex. CE-83**, Tax Tribunal, Decision No. 08252-1-2013 (21 May 2013), p. 13 (The investments included in the Feasibility Study were “approved on 23 November 1998 . . . while the application for the installation of the plant that gave rise to the ‘Primary Sulfides Project’ occurred in year 2004”).

<sup>509</sup> See **Ex. CE-83**, Tax Tribunal, Decision No. 08252-1-2013 (21 May 2013), p. 17.

<sup>510</sup> Cf. **Ex. CE-382**, MINEM, Directorial Resolution No. 151-2002-EM/DGM (21 May 2002) (expanding the Beneficiation Concession); **Ex. CE-10**, MINEM, Directorial Resolution No. 339-96-EM/DGM (5 September 1996) (same); **Ex. CE-352**, MINEM, Directorial Resolution No. 308-96-EM/DGM (12 August 1996) (same); **Ex. CE-308**, Directorial Resolution No. 140-91-EM/DGM (20 December 1991) (converting Minero Perú’s special mining right into the Beneficiation Concession); **Ex. CE-295**, Supreme Decree No. 002-77-EM/DGM (13 January 1977) (granting Minero Perú’s special mining right).

SMCV had processed minerals through leaching and flotation simultaneously under those authorizations from the 1970s until 1994.<sup>511</sup>

205. In the morning of 21 May 2013, the day that Chamber No. 1 issued the resolution drafted by Ms. Villanueva, the presiding *vocal* of Chamber No. 10 hearing the 2006-2007 Royalty Case, Carlos Moreano, emailed President Olano Silva to inquire about the “Cerro Verde file” and Ms. Villanueva’s draft:

Zoraida: A question regarding the Cerro Verde file. We were informed that Ursula Villanueva made a draft that was returned to Chamber 1, Dr. Cayo [*vocal ponente* of the 2006/07 Royalty case for Chamber No. 10] tells me that he will coordinate with Licette [Zuñiga, presiding *vocal* of Chamber No. 1 hearing the 2008 Royalty case] since we have the same subject matter.<sup>512</sup>

206. President Olano Silva responded, “I spoke with Licette and she tells me that she has already coordinated with Luis Cayo.”<sup>513</sup> However, the following day, after Chamber No. 1 issued the resolution drafted by Ms. Villanueva, Mr. Moreano followed up again, clearly frustrated at the President’s attempt to circumvent Chamber No. 10:

Zoraida: . . . the ideal thing would have been for Chamber 1 to hold a session on the Cerro Verde file after coordinating with us, who have [a case with] the same subject matter and from the same taxpayer, it was the right thing to do; as always happens, if we do not call we will not find out anything.<sup>514</sup>

207. Three days after Chamber No. 1 adopted Ms. Villanueva’s draft resolution, and two days after receiving Mr. Moreano’s complaint, President Olano Silva and Ms. Zuñiga called Mr. Cayo, the *vocal ponente* of Chamber No. 10, to a meeting to discuss SMCV’s case. Mr. Cayo agreed to do so, writing:

Dear Zoraida[:] At the end of the day yesterday, I received a call from Licette to have a meeting now starting at 8:30. However, as I told her, I have to attend the oral hearings we had already scheduled for today, and they are starting early in the morning. If all goes well, we should be finished by 11.00 am. As soon as I finish I will contact you and Licette.<sup>515</sup>

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<sup>511</sup> See, e.g., **Ex. CE-457**, SMCV, Petition No. 1487019 to MINEM (27 August 2004).

<sup>512</sup> **Ex. CE-650**, Email from Carlos Hugo Moreano Valdivia to Zoraida Alicia Olano Silva (21 May 2013, 10:05 AM PET).

<sup>513</sup> **Ex. CE-650**, Email from Zoraida Alicia Olano Silva to Carlos Hugo Moreano Valdivia (21 May 2013, 10:47 AM PET).

<sup>514</sup> **Ex. CE-652**, Email from Carlos Hugo Moreano Valdivia to Zoraida Alicia Olano Silva (22 May 2013 8:58 AM PET).

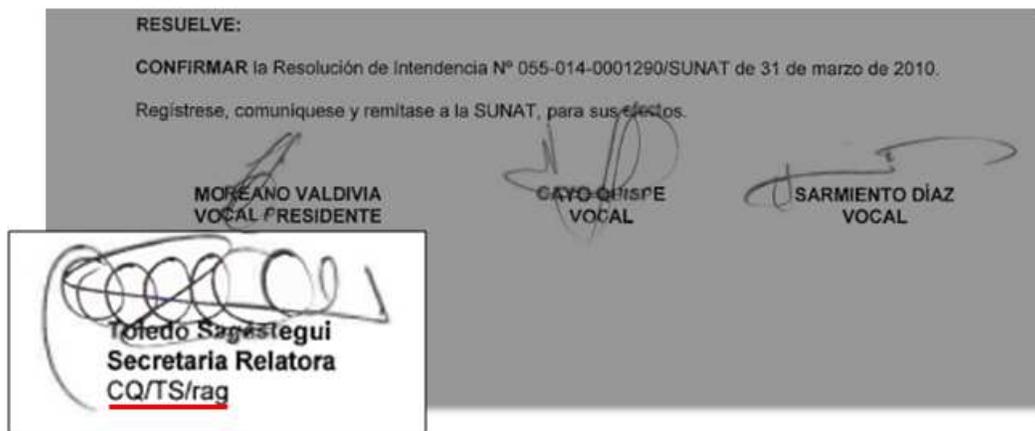
<sup>515</sup> **Ex. CE-654**, Email from Luis Gabriel Cayo Quispe to Zoraida Alicia Olano Silva and Licette Isabel Zuñiga Dulanto (24 May 2013, 8:31 AM PET).

208. President Olano Silva, in turn, confirmed the meeting and asked Mr. Cayo to bring, in addition to the 2006/07 Royalty Case, “the case file 1889-2012”—that is, the 2009 Royalty Case, which had also been assigned to Chamber No. 10 at the beginning of 2012:

Luis: Then we will wait for you when you finish your oral reports as I have a meeting later. Do you have a file number 1889-2012, which is also on the same subject?<sup>516</sup>

209. Although the specific substance of President Olano Silva’s meeting with Mr. Cayo remains unknown, after this meeting, on 30 May 2013—only six days later— Chamber No. 10 issued its resolution regarding the 2006-2007 Royalty Assessments. The resolution copy-pasted almost verbatim the resolution drafted by Ms. Villanueva that was previously issued by Chamber No. 1 in the 2008 Royalty Case.<sup>517</sup>

**Figure 4: 2006-2007 Royalty Case Signature Page**



210. The signature block on Chamber No. 10’s resolution confirms that Chamber No. 10 did not prepare its own resolution, as the work route does not include the initials of any law clerk.<sup>518</sup>

211. While the Tax Tribunal notified SUNAT of the resolution in the 2008 Royalty Case almost immediately, on 27 May 2013, it did not notify SMCV of either resolution until over three weeks later, on 20 June 2013.<sup>519</sup>

<sup>516</sup> **Ex. CE-655**, Email from Zoraida Alicia Olano Silva to Luis Gabriel Cayo Quispe and Licette Isabel Zuñiga Dulanto (24 May 2013, 10:23 AM PET).

<sup>517</sup> Compare **Ex. CE-88**, Tax Tribunal, Decision No. 08997-10-2013 (30 May 2013) with **Ex. CE-83**, Tax Tribunal, Decision No. 08252-1-2013 (21 May 2013).

<sup>518</sup> See **Ex. CE-88**, Tax Tribunal, Decision No. 08997-10-2013 (30 May 2013) (last page of the Tax Tribunal Resolution containing initials of the *vocal ponente*, *secretario relator*, *secretaria de la Sala*, but not the *asesor de la Sala*).

<sup>519</sup> See **Ex. CE-85**, Tax Tribunal, Notice No. 007270-2013-EF/40.01 (27 May 2013); **Ex. CE-89**, Receipt Notice of Resolutions No. 08252-1-2013 and No. 08997-10-2013 (20 June 2013).

## 2. The Tax Tribunal Dismissed SMCV's Request to Waive Penalties and Interest on the 2006-2007 and 2008 Royalty Assessments

212. In light of the Tax Tribunal's resolutions upholding the 2006-2007 and 2008 Royalty Assessments on the basis of Mr. Isasi's novel and restrictive interpretation—the first time this interpretation had been set out in a final administrative action—SMCV submitted requests asking the Tax Tribunal to waive penalties and interest in both cases.<sup>520</sup> SMCV's requests were based on Article 170 of the Peruvian Tax Code, which provides that penalties and 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.<sup>521</sup>

213. In its requests, SMCV explained that there was clearly “reasonable doubt” relating to the proper interpretation of the applicable legal provisions.<sup>522</sup> SMCV first noted that the Tax Tribunal's resolutions were based on a completely novel interpretation of the Mining Law and Regulations—in particular, the interpretation set forth in Mr. Isasi's June 2006 Report—which alone was sufficient to demonstrate reasonable doubt:

The [Tax Tribunal's interpretation] on the meaning and scope of Articles 82 and 83 of the General Mining Law and Articles 2, 22 and 24 of its Regulations, highlights the existence of a “reasonable doubt” waiving interest and penalties, since an interpretation is only now made on the supposedly correct meaning of the provisions in question in view of different terms used by the lawmaker when referring to the scope of stability guarantees. . . .

This new interpretation radically changes the scope and meaning that has always been given to the aforementioned articles of the General Mining Law and its Regulations, at the doctrinal as well as case law level, i.e., that the [Stability Agreement] protects the Production Unit or Concession as a whole, and not just the part of the investments

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<sup>520</sup> See **Ex. CE-656**, SMCV, Letter to the President of Chamber No. 10 (Royalties 2006/07) (26 June 2013); **Ex. CE-90**, SUNAT Letter to Tax Tribunal Chamber No. 1, Resolution No. 8252-1-2013 (26 June 2013); see also **Ex. CE-658**, SMCV, Supplemental Brief to Tax Tribunal (2006/07 Royalty Assessment) (9 July 2013); **Ex. CE-659**, SMCV, Supplemental Brief to Tax Tribunal (2008 Royalty Assessment) (9 July 2013).

<sup>521</sup> See **CA-14**, Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Art. 170 (“The assessment of interest . . . or the assessment of penalties is not applicable if: 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.”); *id.* at Art. 92(g) (summarizing the criteria in Article 170 as involving “cases of reasonable doubt”); **CA-8**, Authorizing SUNAT to Implement Provisions that Facilitate the Administration of Royalties, Law No. 28969 (25 January 2007), Art. 12 (“The application of interest or penalties does not apply in the case of obligations related to the mining royalty, in the same cases and terms provided in Art. 170 of the Tax Code. Nor is it appropriate when the obligation to pay the mining royalty was breached due to causes of an objective nature attributable to the Ministry of Energy and Mines or to SUNAT.”).

<sup>522</sup> See **Ex. CE-656**, SMCV, Letter to the President of Chamber No. 10 (Royalties 2006/07) (26 June 2013), pp. 3-5, 7-12; **Ex. CE-90**, SMCV, Letter to President of Chamber No. 1 (Royalties 2007) (26 June 2013), pp. 3-5, 7-12.

committed in the Feasibility Study that constitutes the requirement for the signing of the Agreement.<sup>523</sup>

214. SMCV also argued, among others, that the Government had repeatedly confirmed over the years that stability agreements in general and SMCV's Stability Agreement in particular corresponded to mining concessions or units, not specific projects, including by accepting significant voluntary contributions and GEM payments from SMCV for the entirety of its concessions.<sup>524</sup> SMCV further pointed out that the Tax Tribunal's own prior resolutions supported the conclusion that stabilization applied on the basis of concessions or units.<sup>525</sup>

215. Instead of addressing SMCV's arguments, on 15 July 2013, the Tax Tribunal arbitrarily rejected both of SMCV's requests on the flimsy procedural grounds that SMCV had not "put forward" the argument in its initial challenge.<sup>526</sup> This reasoning was completely at odds with both the Tax Code and the Law on General Administrative Procedure, which required the Tax Tribunal to consider the applicability of waiver due to reasonable doubt *sua sponte*.<sup>527</sup>

216. On 10 October 2013, SUNAT approved SMCV's 4 October 2013 request, under protest, to enter into a deferral and installment plan to jointly pay the 2006-2007 and 2008 Royalty Assessments.<sup>528</sup> Deferral and installment plans allow taxpayers to defer payments for up to six months, capitalize all assessment amounts owed up to the date that the taxpayer enters into the plan,

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<sup>523</sup> See **Ex. CE-90**, SMCV, Letter to President of Chamber No. 1 (Royalties 2007) (26 June 2013), pp. 4-5; **Ex. CE-656**, SMCV, Letter to the President of Chamber No. 10 (Royalties 2006/07), pp. 4-5.

<sup>524</sup> See **Ex. CE-90**, SMCV, Letter to President of Chamber No. 1 (Royalties 2007) (26 June 2013), Sections 2.2.1-2.2.4; **Ex. CE-656**, SMCV, Letter to the President of Chamber No. 10 (Royalties 2006/07), Sections 2.2.1-2.2.4.

<sup>525</sup> See **Ex. CE-90**, SMCV, Letter to President of Chamber No. 1 (Royalties 2007) (26 June 2013), Section 2.2.7; **Ex. CE-656**, SMCV, Letter to the President of Chamber No. 10 (Royalties 2006/07), Section 2.2.7.

<sup>526</sup> **Ex. CE-91**, Tax Tribunal, Decision No. 11667-10-2013 (15 July 2013), p. 5; **Ex. CE-92**, Tax Tribunal, Decision No. 11669-1-2013 (15 July 2013), p. 5.

<sup>527</sup> See **CA-14**, Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013, Art. 127 ("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."), 129 ("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 raised by the case file, failing which, the final paragraph of Article 150 shall be applicable."); **CA-18**, Law of Administrative Procedure, No. 27444 (2019), Art. 5.4 ("The content must cover all the questions of fact and law put forward by those administered, and others not proposed by them that have been *sua sponte* identified, as long as the administrative authority gives them a period of not less than five (5) days to express their position and, if applicable, submit the evidence they deem relevant"); see also Hernández ¶¶ 103-104, 127-132.

<sup>528</sup> **Ex. CE-99**, SUNAT, Resolution No. 0510170003363 (10 October 2013); **Ex. CE-664**, SMCV, Request Under Protest to Enter Into Deferral and Installment Plans (2006-07, 2008 Royalty Assessments) (4 October 2013).

and then apply interest to the amounts owed under the plan at 80% of the statutory rate established by Article 33 of the Tax Code.<sup>529</sup>

### 3. Peru's Courts First Annulled, Then Upheld the 2008 Royalty Assessment

#### i. The First-Instance Contentious Administrative Court Annulled the 2008 Royalty Assessment

217. On 19 September 2013, SMCV challenged the Tax Tribunal resolutions confirming the 2008 Royalty Assessment to the Contentious Administrative Courts, which provide a forum for judicial review of administrative resolutions.<sup>530</sup>

218. While SMCV's claims were pending, on 12 July 2014, Congress enacted Law No. 30230, incorporating a new Article 83-B to the Mining Law to provide that, for certain types of stability agreements, the stability guarantees apply "solely to the activities . . . expressly mentioned in the Investment Program included in the Feasibility Study that forms part of the Stability Agreement; or the additional activities that may be carried out subsequent to the implementation of the Investment Program, provided that such activities are . . . connected to the objective of the Investment Project."<sup>531</sup> In the draft bill, Congress asserted that the provision was intended to "establish a clearer regulatory framework in accordance with the principle of legal certainty."<sup>532</sup> In particular, Congress asserted that the existing legal framework did not "stabilize pre-existing assets or investments, nor those investments that are not included in [f]easibility [s]tud[ies]," and thus that the new provision would clarify how investors could claim stability for "additional activities" not included in the feasibility study.<sup>533</sup> In reality, however, there was no such limitation in Article 83, which applied stability guarantees on the basis of the concession or mining unit.<sup>534</sup>

219. On 17 December 2014, the 18th Contentious Administrative Court decided in SMCV's favor in the 2008 Royalty Case, annulling the 2008 Royalty Assessments and concluding that SMCV was entitled to stability for the entire Cerro Verde Mining Unit.<sup>535</sup> After emphasizing the

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<sup>529</sup> **CA-14**, Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Art. 36; **CA-215**, Amended Tax Debt Deferment and/or Installment Plan Regulations, Superintendence Resolution No. 161-2015/SUNAT (15 July 2015), Arts. 1.13, 4, 19(c).

<sup>530</sup> See **Ex. CE-97**, SMCV, Administrative Court Appeal of the Tax Tribunal Decision, 2008 Royalty Assessments (18 September 2013); **CA-18**, Law of Administrative Procedure, No. 27444 (2019), Art. 10.

<sup>531</sup> **CA-209**, Establishing Tax Measures, Simplification of Procedures, and Permits for Promoting and Revitalizing Investment in the Country, Law No. 30230 (12 July 2014), Art. 83-B.

<sup>532</sup> **Ex. CE-823**, Congress, Draft Bill Law No. 30230, p. 11.

<sup>533</sup> **Ex. CE-823**, Congress, Draft Bill Law No. 30230, p. 9.

<sup>534</sup> See *supra* § III.C.1.

<sup>535</sup> See **Ex. CE-122**, Contentious Administrative Court, Decision, No. 07650-2013-CA, 2008 Royalty Assessment (17 December 2014), p. 26, ¶ 34.

importance of stability agreements in “attracting investments for the benefit of the country,”<sup>536</sup> the court rejected the interpretation adopted by SUNAT and the Tax Tribunal:

[B]oth SUNAT and the Tax Court erred in interpreting the legal stability agreement to be limited to the . . . “Cerro Verde Leaching Project” . . . . [Their] interpretation is not supported by the General Mining Law or in the Regulations thereof. To the contrary, the benefit . . . **IS GIVEN TO THE MINING TITLEHOLDER FOR THE ACTIVITIES IT CARRIES OUT IN ITS CONCESSIONS OR ECONOMIC ADMINISTRATIVE UNITS**, as set forth in the fourth paragraph of Article 72 and 83 of the General Mining Law (referring to tax stabilization) and Article 22 of the Regulations of Title Nine of the General Mining Law; the law does not distinguish on the benefit it grants, and thus it is broad.<sup>537</sup>

220. The court further noted that “nowhere does the Mining Law or its Regulations provide that the stability guarantees apply only to the activities conducted through the project in which the investment was made,”<sup>538</sup> and clarified that:

The benefit of legal stability (tax, administrative, and others) is given to mining titleholders (individuals and companies) to undertake their activities, specifically those carrying out mining activities, in a concession or concessions included in an Economic-Administrative Unit [.]<sup>539</sup>

221. The court then concluded that the Stability Agreement’s references to the “Cerro Verde Leaching Project” did not limit the legal scope of SMCV’s stability guarantees or create a “restricted kind of tax and administrative stabilization”<sup>540</sup>:

The first through seventh clauses describe the events that occurred from submission of the technical-economic feasibility study and the investment plan, through the completion of the investment project, named the “Cerro Verde Leaching Project” . . . . From these events and having fulfilled the terms of the Stability Agreement and the General Mining Law and Regulations, i.e., by making the investment and completing it within the established term, the mining title holder

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<sup>536</sup> See **Ex. CE-122**, Contentious Administrative Court, Decision, No. 07650-2013-CA, 2008 Royalty Assessment (17 December 2014), p. 22, ¶ 29.

<sup>537</sup> See **Ex. CE-122**, Contentious Administrative Court, Decision, No. 07650-2013-CA, 2008 Royalty Assessment (17 December 2014), p. 23, ¶ 30 (emphasis original); see also *id.* pp. 18-20 (citing Arts. 72, 80, and 85 of the Mining Law and Arts. 1, 14, and 22 of the Regulations).

<sup>538</sup> See **Ex. CE-122**, Contentious Administrative Court, Decision, No. 07650-2013-CA, 2008 Royalty Assessment (17 December 2014), pp. 19-20, ¶ 23.

<sup>539</sup> See **Ex. CE-122**, Contentious Administrative Court, Decision, No. 07650-2013-CA, 2008 Royalty Assessment (17 December 2014), pp. 20-21, ¶ 25.

<sup>540</sup> See **Ex. CE-122**, Contentious Administrative Court, Decision, No. 07650-2013-CA, 2008 Royalty Assessment (17 December 2014), p. 24, ¶ 31; *id.* pp. 21-24, ¶¶ 26-31.

was conferred, among others, tax, exchange rate, and administrative stability benefits.<sup>541</sup>

222. The court also noted that the amendments made to introduce Article 83-B of the General Mining Law several months earlier—which for the first time introduced a provision explicitly restricting stability benefits to investments described in the Feasibility Study—reinforced its interpretation that the earlier stability regime did not contain a similar restriction.<sup>542</sup> Accordingly, the court concluded that SMCV’s “activities related to the flotation of primary sulfides were covered by the scope of the legal stability agreement,” and thus that SUNAT had improperly assessed Royalty payments, as well as penalties and interest, against SMCV.<sup>543</sup>

**ii. The Appellate Court Reversed the Contentious Administrative Court’s Decision and Upheld the 2008 Royalty Assessment**

223. SUNAT appealed the decision in SMCV’s favor to the Superior Court of Justice (the “Appellate Court”), which reversed the first instance court’s decision annulling the 2008 Royalty Assessments on 29 January 2016.<sup>544</sup> Echoing the novel interpretation first concocted by Mr. Isasi, and then adopted by SUNAT and the Tax Tribunal, the Appellate Court concluded that:

as laid down by Article 83 . . . of the General Mining Law, specifically the fourth paragraph and the provisions of Article 22 of the Regulations . . . it is precise that the contractual benefits arising from the Stability Agreement lie solely with the holder of the mining company and cover *exclusively and inclusively the investment made* in a specific mining concession, which allows to establish by logical inference that a future investment, subsequent to the date of conclusion of the contract, will not be covered by the benefits of the Stability Agreement signed before this latest investment.<sup>545</sup>

224. The Appellate Court also rejected SMCV’s request to waive penalty and interest charges on the 2008 Royalty Assessments without any analysis on the merits whatsoever, despite having the obligation to do so, and instead simply adopted the Tax Tribunal’s flawed reasoning on the basis that “review of the appeal on page 1913 of the administrative case file indicates that the

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<sup>541</sup> See **Ex. CE-122**, Contentious Administrative Court, Decision, No. 07650-2013-CA, 2008 Royalty Assessment (17 December 2014), p. 22, ¶ 28.

<sup>542</sup> See **Ex. CE-122**, Contentious Administrative Court, Decision, No. 07650-2013-CA, 2008 Royalty Assessment (17 December 2014), pp. 24-25, ¶ 32 (citing Art. 83-B of Law No. 30230, published on July 12, 2014); *id.* p. 25, ¶ 33.

<sup>543</sup> See **Ex. CE-122**, Contentious Administrative Court, Decision, No. 07650-2013-CA, 2008 Royalty Assessment (17 December 2014), pp. 25-26, 28 ¶ 34, 38.

<sup>544</sup> See **Ex. CE-137**, Appellate Court, Decision No. 7650-2013, 2008 Royalty Assessment (29 January 2016).

<sup>545</sup> See **Ex. CE-137**, Appellate Court, Decision No. 7650-2013, 2008 Royalty Assessment (29 January 2016), pp. 9-10, ¶ 9 (emphasis added).

applicant did not raise the argument on administrative appeal.”<sup>546</sup> The Appellate Court failed to acknowledge any of SMCV’s substantial arguments on this point.<sup>547</sup>

### iii. The Supreme Court Upheld the Appellate Court’s Decision

225. 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.<sup>548</sup> On 18 August 2017, the Supreme Court upheld the Appellate Court’s decision and dismissed SMCV’s appeal.<sup>549</sup>

226. In its decision, the Supreme Court endorsed Mr. Isasi’s novel interpretation of the scope of the stability guarantees, holding that:

the scope of the Legal Stability Agreement (or the effects of the contractual benefit) . . . “(...)shall apply exclusively to the activities of the mining company in whose favor the investment is made”. That does not mean that the contractual benefit will fall upon any of the mining activities that a mining company performs, rather *solely to the activities resulting from the investment made*. That is why the rule introduces the term “exclusively” in that paragraph.<sup>550</sup>

227. The Supreme Court further observed that:

submitting said “Technical/Economic Feasibility Study” does not merely constitute a requirement for execution of the Stability Agreement, but rather . . . 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.<sup>551</sup>

228. Based on this interpretation, the Supreme Court “noted” that while there was “no doubt” that the “Leaching Project of Cerro Verde” was circumscribed to the Mining and Beneficiation Concessions, “this does not imply that the ‘Primary Sulfide Plant’ can be considered as part of the

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<sup>546</sup> See **Ex. CE-137**, Appellate Court, Decision No. 7650-2013, 2008 Royalty Assessment (29 January 2016), p. 13, ¶ 12.

<sup>547</sup> See **Ex. CE-90**, SUNAT Letter to Tax Tribunal Chamber No. 1, Resolution No. 8252-1-2013 (26 June 2013), pp. 2-12; see also **Ex. CE-97**, SMCV, Administrative Court Appeal of the Tax Tribunal Decision, 2008 Royalty Assessments (18 September 2013), p. 3, ¶ 2.4.

<sup>548</sup> See **Ex. CE-138**, SMCV, Supreme Court Appeal of the Appellate Court Decision No. 7650-2013, 2008 Royalty Assessment (23 February 2016).

<sup>549</sup> See **Ex. CE-153**, Supreme Court, Decision No. 5212-2016, 2008 Royalty Assessment (18 August 2017).

<sup>550</sup> See **Ex. CE-153**, Supreme Court, Decision No. 5212-2016, 2008 Royalty Assessment (18 August 2017), p. 72, ¶ 166 (emphasis added).

<sup>551</sup> See **Ex. CE-153**, Supreme Court, Decision No. 5212-2016, 2008 Royalty Assessment (18 August 2017), p. 64, ¶ 142.

investment plan of the ‘Cerro Verde Leaching Project.’”<sup>552</sup> On that basis, the Supreme Court concluded that the Concentrator was not covered under the Stability Agreement.<sup>553</sup>

229. The Supreme Court also held that neither the approval of the reinvestment of profits benefit nor the expansion of the Beneficiation Concession could “extend the scope” of the Stability Agreement, because “neither the Feasibility Study in the first place nor the Investment Plan in the second place, include [the Concentrator], because there is no evidence. . . [that SMCV] initiated the respective action to include said Plant within the Investments Plan of the ‘Cerro Verde Leaching Project,’” per clause 4.2 of the Stability Agreement.<sup>554</sup> The Court was silent on what “action” could possibly have accomplished this in SMCV’s case, since the investment plan could only be amended *prior* to completion—and when SMCV signed the Stability Agreement, it had already completed the investment plan.<sup>555</sup>

230. The Supreme Court also arbitrarily upheld the Appellate Court’s one-sentence refusal to waive penalties and interest, finding that although the Appellate Court’s decision was “succinct[,]” it “expresse[d] the minimum grounds supporting its ruling,” and thus did not violate SMCV’s due process right to adequate statement of grounds of judicial decisions.<sup>556</sup> Thus, like the Appellate Court, the Supreme Court failed to consider SMCV’s arguments on the merits—including as to why the issue *had* been preserved for appeal, because the Tax Tribunal should have considered the issue *sua sponte*—and failed to provide any reasoning in support of its holding.<sup>557</sup>

#### **4. Peru’s Supreme Court Failed to Render a Final Decision on the 2006-2007 Royalty Assessments, and SMCV Ultimately Withdrew Its Appeal**

231. On 19 September 2013, SMCV challenged the 2006-2007 Royalty Assessments to the Contentious Administrative Court.<sup>558</sup> On 14 April 2016, the Contentious Administrative Court upheld the 2006-2007 Royalty Assessments.<sup>559</sup>

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<sup>552</sup> See **Ex. CE-153**, Supreme Court, Decision No. 5212-2016, 2008 Royalty Assessment (18 August 2017), p. 32, ¶ 32.

<sup>553</sup> See **Ex. CE-153**, Supreme Court, Decision No. 5212-2016, 2008 Royalty Assessment (18 August 2017), p. 34.

<sup>554</sup> See **Ex. CE-153**, Supreme Court, Decision No. 5212-2016, 2008 Royalty Assessment (18 August 2017), ¶¶ 32, 172-173.

<sup>555</sup> See, e.g., **Ex. CE-83**, Tax Tribunal, Decision No. 08252-1-2013 (21 May 2013), p. 12 (The Feasibility Study may only be modified “in the course of its execution” but was “approved on 23 November 1998 . . . while the application for the installation of the plant that gave rise to the ‘Primary Sulfides Project’ occurred in the year 2004”).

<sup>556</sup> See **Ex. CE-153**, Supreme Court, Decision No. 5212-2016, 2008 Royalty Assessment (18 August 2017), ¶ 46; see also *id.* ¶¶ 45-50.

<sup>557</sup> See **Ex. CE-153**, Supreme Court, Decision No. 5212-2016, 2008 Royalty Assessment (18 August 2017), pp. 37-38, ¶¶ 45-50; see also Hernández ¶¶ 103-104, 127-132.

<sup>558</sup> See **Ex. CE-98**, SMCV, Administrative Court Appeal of the Tax Tribunal’s Decision, 2006/07 Royalty Assessment (27 September 2013).

232. Echoing Mr. Isasi’s interpretation of the scope of the stability guarantees, the court found that “the benefits of legal stability are generally not granted to the operator of the mining enterprise or any given mining concession, but rather to a specific investment . . . as defined in the Feasibility Study.”<sup>560</sup> Although the court acknowledged that the Concentrator was part of the Beneficiation Concession referenced in the Stability Agreement, it concluded that because the “expansion” of the Concession occurred after the Stability Agreement entered into force, it did not explicitly receive stability under the Agreement.<sup>561</sup> The court also arbitrarily denied SMCV’s application for waiver of penalties and interest under Article 170 of the Tax Code without considering the merits of the issue, parroting the Tax Tribunal’s finding that the issue had not been raised before it to conclude that SMCV failed to exhaust administrative remedies.<sup>562</sup>

233. On 2 May 2016, SMCV appealed the Contentious Administrative Court’s decision to the Appellate Court.<sup>563</sup> A majority of the Appellate Court dismissed the appeal on 12 July 2017, substantially echoing the Contentious Administrative Court’s holding. The majority also dismissed SMCV’s arguments relating to the waiver of penalties and interest.<sup>564</sup> One judge, in dissent, voted to remand the case to the Contentious Administrative Court, noting that the lower court failed to state its grounds for adopting a “restrictive” interpretation of the General Mining Law, Regulations, and Stability Agreement and that “restrictive interpretations are . . . not necessarily [required] for regulations that govern . . . contracting, such as those for legal stability agreements.”<sup>565</sup>

234. On 9 August 2017, SMCV filed an appeal in cassation before the Supreme Court.<sup>566</sup> Three out of the five Justices on the Supreme Court panel—including two of the Justices who also heard and dismissed SMCV’s 2008 Royalty Assessment appeal in cassation—voted to dismiss SMCV’s claims.<sup>567</sup> The two other justices on the panel voted to annul the Appellate Court’s ruling

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<sup>559</sup> See **Ex. CE-689**, Contentious Administrative Court, Decision, No. 07649-2013, 2006/07 Royalty Assessments (14 April 2016).

<sup>560</sup> See **Ex. CE-689**, Contentious Administrative Court, Decision, No. 07649-2013, 2006/07 Royalty Assessments (14 April 2016), p. 25, ¶ 8.8.

<sup>561</sup> See **Ex. CE-689**, Contentious Administrative Court, Decision, No. 07649-2013, 2006/07 Royalty Assessments (14 April 2016), p. 26, ¶¶ 9.3-9.5.

<sup>562</sup> See **Ex. CE-689**, Contentious Administrative Court, Decision, No. 07649-2013, 2006/07 Royalty Assessments (14 April 2016), pp. 29-30, ¶¶ 12.1-12.3.

<sup>563</sup> See **Ex. CE-144**, SMCV, Appellate Court Appeal of the Administrative Court Decision (2 May 2016).

<sup>564</sup> See **Ex. CE-274**, Appellate Court, Decision No. 48, File No. 7649-2013 (12 July 2017); see *id.* p. 27, ¶ 20 (finding that SMCV’s application for waiver of penalties and interest was “not invoked in the appeal [before the Tax Tribunal]” and was thus “groundless.”).

<sup>565</sup> **Ex. CE-274**, Appellate Court, Decision No. 48, File No. 7649-2013 (12 July 2017), pp. 31, 34, ¶¶ 8.1-8.4.

<sup>566</sup> See **Ex. CE-697**, SMCV, Appeal to the Supreme Court of the Appellate Court Decision (2006/07 Royalty Assessment) (9 August 2017).

<sup>567</sup> See **Ex. CE-739**, Supreme Court, Decision, No. 18174-2017 (2006/07 Royalty Assessments) (20 November 2018), pp. 1-35.

and issued a separate opinion to that effect.<sup>568</sup> Under Peruvian law, four votes in favor are necessary for the Supreme Court to render a decision in a cassation case.<sup>569</sup> If fewer than four justices concur, the Court must summon an additional justice or justices and schedule a new hearing for the parties to argue their case with the additional justice or justices present.<sup>570</sup> Thus, the case concerning the 2006-2007 Royalty Assessments remained unresolved pending rehearing.<sup>571</sup>

235. In February 2020, SMCV applied to withdraw its appeal to the Supreme Court to comply with the waiver requirement under the TPA in connection with Freeport’s filing of a notice of arbitration.<sup>572</sup> At that point, SMCV had no knowledge of the votes that had already been issued on the appeal or that the case was to be scheduled for re-hearing. The case then formally concluded on 7 October 2020, when the Supreme Court approved SMCV’s withdrawal.<sup>573</sup> The Supreme Court did not notify SMCV of the justices’ votes and opinions until 29 December 2020.<sup>574</sup>

236. Once received, these opinions revealed that the three Justices that voted to uphold the decision adhered to Mr. Isasi’s interpretation, concluding that the “Technical/Economic Feasibility Study . . . determine[d] the scope of the Stability Agreement.”<sup>575</sup> The three justices also upheld the Appellate Court’s summary refusal to waive penalties and interest, despite acknowledging that “the [Appellate Court] failed to provide exhaustive reasoning on this issue,” because they held that SMCV failed to meet “the condition set forth in the . . . legal provision” and raise this issue on administrative appeal.<sup>576</sup>

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<sup>568</sup> See **Ex. CE-739**, 2 Supreme Court, Decision, No. 18174-2017 (2006/07 Royalty Assessments) (20 November 2018), pp. 35-48.

<sup>569</sup> **CA-203**, Single Unified Text of the Organic Law of the Judiciary (2014), Art. 141 (“In the Chambers of the Supreme Court, four assenting opinions give rise to a decision.”).

<sup>570</sup> **CA-203**, Single Unified Text of the Organic Law of the Judiciary (2014), Art. 144 (“In the event of failure to achieve a majority vote, the underlying point in dispute shall be published and communicated, under penalty of nullity. In the resolution itself, the Judge with the casting vote shall be called upon through the expedited procedure and a date and time shall be set for the hearing of the case by said Judge.”).

<sup>571</sup> **CA-203**, 2014 TUO of the Organic Law of the Judiciary, Art. 141 (“In the Chambers of the Supreme Court, four assenting opinions give rise to a decision.”); *id.*, Art. 144 (“In the resolution itself, the Judge with the casting vote shall be called upon through the expedited procedure and a date and time shall be set for the hearing of the case by said Judge.”); *id.*, Art. 145 (“In cases of failure to obtain a majority opinion or of disqualification of one or more judges, the President shall call on judges with the same specialization from other Chambers, if any, or else Judges from chambers with another specialization, in sequence from least to most senior in the order of priority established by the corresponding Executive Board.”).

<sup>572</sup> See **Ex. CE-242**, SMCV, Withdrawal, 2006/07 Royalty Case, Docket 18174-2017 (27 February 2020).

<sup>573</sup> See **Ex. CE-789**, Supreme Court, Resolution Approving SMCV’s Withdrawal, No. 18174-2017 (2006/07 Royalty Assessment) (7 October 2020).

<sup>574</sup> See **Ex. CE-794**, Supreme Court, Decision, No. 18174-2017 (2006/07 Royalty Assessment) (notified to SMCV 29 December 2020).

<sup>575</sup> **Ex. CE-739**, Supreme Court, Decision, No. 18174-2017, 2006/07 Royalty Assessments (20 November 2018), pp. 26-27, ¶¶ 20-22.

<sup>576</sup> **Ex. CE-739**, Supreme Court, Decision, No. 18174-2017, 2006/07 Royalty Assessments (20 November 2018), p. 34, ¶ 29.

237. The two remaining justices on the panel voted to annul the Appellate Court’s decision, concluding that:

[T]he ruling has 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, approved by Directorial Resolution No. 056-2007-MEM/DGM, the extension of the [stability] guarantee operated as a matter of law.<sup>577</sup>

238. The two justices voting to annul the Appellate Court’s decision also found that the Appellate Court had failed to provide grounds in support of its reasoning on multiple other counts, including failing to identify the legal bases for its opinion, failing to identify the relevant clauses of the Stability Agreement, and failing to address other arguments SMCV raised on appeal.<sup>578</sup> Moreover, they concluded that the Appellate Court failed to interpret the proper scope of Article 170 of the Tax Code, including whether the Tax Tribunal should have assessed SMCV’s entitlement to a penalties and interest waiver *sua sponte*:

[T]he Court of Appeals’ ruling has not addressed claimant’s request that it analyze the scope of article 170 of the Single Consolidated Text of the Tax Code. According to the claimant, the Tax Tribunal had the independent obligation to verify this claim, due to the fact that [Article 170] created a legal mandate that did not need to be invoked by the obligee.<sup>579</sup>

239. The two justices thus voted to annul the Appellate Court’s decision on the ground that the Appellate Court’s decision failed to “resolve the . . . wrongs invoked in [SMCV’s] appeal.”<sup>580</sup>

**O. AFTER A LONG DELAY, SUNAT ASSESSED ADDITIONAL ROYALTIES AGAINST SMCV FOR 2010, 2011, 2012, AND 2013, DESPITE THE STABILITY AGREEMENT AND SMCV’S PARTICIPATION IN THE GEM REGIME**

**1. SUNAT Assessed Further Royalties against Ore Processed in SMCV’s Flotation Plant in 2010-2011**

240. Between June 2011 and April 2016, SMCV did not receive any additional Royalty Assessments from SUNAT,<sup>581</sup> perhaps because of SMCV’s participation in the GEM voluntary contribution regime. But on 13 April 2016— only months before the six-year statute of limitations for

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<sup>577</sup> See **Ex. CE-739**, Supreme Court, Decision, No. 18174-2017, 2006/07 Royalty Assessments (20 November 2018), p. 46, ¶ 2.12.

<sup>578</sup> See **Ex. CE-739**, Supreme Court, Decision, No. 18174-2017, 2006/07 Royalty Assessments (20 November 2018), pp. 46-47.

<sup>579</sup> See **Ex. CE-739**, Supreme Court, Decision, No. 18174-2017, 2006/07 Royalty Assessments (20 November 2018), pp. 46-47, ¶ 2.15.

<sup>580</sup> See **Ex. CE-739**, Supreme Court, Decision, No. 18174-2017, 2006/07 Royalty Assessments (20 November 2018), p. 47, ¶ 2.17.

<sup>581</sup> See Torreblanca ¶ 92.

assessments expired—SUNAT issued royalty assessments against SMCV for 2010 and the first three quarters of 2011 (together with penalties and interest, the “2010-2011 Royalty Assessments”).<sup>582</sup> Along with the royalty assessments, SUNAT again assessed penalties of 10% of the unpaid royalties and additional penalties for SMCV’s failure to file royalty declarations and, for the first time, for SMCV’s failure to prove that it kept a separate accounting for the Concentrator, which SUNAT argued SMCV was required to do under Article 22 of the Regulations—even though Article 22 clearly only requires separate accounts for stabilized and non-stabilized concessions.<sup>583</sup> SUNAT imposed interest on the unpaid royalties and penalties at the rate of 14.6% per annum running from the dates SUNAT asserted SMCV should have filed each monthly royalty declaration.<sup>584</sup> By the time SUNAT issued the 2010-2011 Royalty Assessments, penalties and interest already comprised *nearly half* of the overall value, which totaled US\$80,224,271 in royalties and US\$76,629,050 in penalties and interest.<sup>585</sup> To support the assessments, SUNAT again took the position that “the benefits of the [Stability Agreement] . . . do not cover the production and sale of mineral concentrates produced in the primary sulfides plant[.]”<sup>586</sup>

241. On 11 May 2016, SMCV submitted a request for reconsideration for the 2010-2011 Royalty Assessments, also requesting in the alternative that SUNAT waive penalties and interest based on “reasonable doubt” in the interpretation of the Mining Law.<sup>587</sup> Among others, SMCV explained that Peruvian public officials, Peruvian courts, SUNAT, and leading experts in the field had repeatedly shared SMCV’s interpretation that stability guarantees were granted to entire concessions or mining units, and mining companies had consistently applied it for over 15 years.<sup>588</sup>

242. On 29 December 2016, SUNAT rejected SMCV’s request for reconsideration, again reiterating Mr. Isasi’s interpretation by concluding that “the benefits of legal stability [] are granted . . . in relation to a specific investment, with a defined plan and an expected production of copper

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<sup>582</sup> See **Ex. CE-142**, SUNAT, 2010/11 Royalty Assessments.

<sup>583</sup> See **Ex. CE-688**, SUNAT, Fine Resolution No. 052-002-0006603 to 052-002-0006645 (2010/11 Royalty Assessments) (13 April 2016); **Ex. CE-150**, SUNAT, Resolution No. 0150140013036, 2010/11 Royalty Assessments, pp. 114, 122-125.

<sup>584</sup> See **Ex. CE-142**, SUNAT, 2010/11 Royalty Assessments, Annex No. 1; Spiller and Chavich, Appendix J (establishing the 14.6% effective interest rate).

<sup>585</sup> See **Annex A**: Administrative Proceedings.

<sup>586</sup> **Ex. CE-142**, SUNAT, 2010/11 Royalty Assessments, Annex No. 1.

<sup>587</sup> See **Ex. CE-146** SMCV, Reconsideration Request of SUNAT, 2010/11 Royalty Assessments (11 May 2016), pp. 37-39, 68-85, ¶¶ 3.3, 4.4.1-4.4.12; see also **CA-8**, Authorizing SUNAT to Implement Provisions that Facilitate the Administration of Royalties, Law No. 28969 (25 January 2007), Art. 12 (“The application of interest or penalties does not apply in the case of obligations related to the mining royalty, in the same cases and terms provided in Article 170 of the Tax Code. Nor is it appropriate when the obligation to pay the mining royalty was breached due to causes of an objective nature attributable to the Ministry of Energy and Mines or to SUNAT.”).

<sup>588</sup> See **Ex. CE-146**, SMCV, Reconsideration Request of SUNAT, 2010/11 Royalty Assessments (11 May 2016), pp. 37-39, 68-85, ¶¶ 3.3, 4.4.1-4.4.12.

cathodes, clearly delimited in the Feasibility Study.”<sup>589</sup> SUNAT also rejected SMCV’s request to waive penalties and interest.<sup>590</sup>

## 2. The Tax Tribunal Upheld SMCV’s 2009 and 2010-2011 Royalty Assessments in Proceedings Marred by Conflicts of Interest, Extreme Delays and Other Procedural Irregularities

243. On 22 March 2017, SMCV challenged SUNAT’s 2010-2011 Royalty Assessments before the Tax Tribunal (the “2010-2011 Royalty Case”).<sup>591</sup> At this point, SMCV’s challenge to the 2009 Royalty Assessments—filed on 16 January 2012—had been pending for over *five years* without a resolution, and reassigned to several different chambers before ultimately being assigned to Chamber No. 2 (the “2009 Royalty Case”).<sup>592</sup> In May 2018, the Tax Tribunal’s Technical Office assigned the 2010-2011 Royalty Case to Victor Mejía Ninacondor as *vocal ponente*.<sup>593</sup> Mr. Mejía Ninacondor had joined the Tax Tribunal only days earlier, and sat in Chamber No. 1 alongside two of the same *vocales* that had issued Ms. Villanueva’s draft upholding the 2008 Royalty Assessment.<sup>594</sup>

244. Mr. Mejía Ninacondor was no stranger to Cerro Verde’s case: not only had he worked in the SUNAT department that initially confirmed the 2010-2011 Royalty Assessments,<sup>595</sup> but he had actually represented SUNAT in SMCV’s appeal of the 2006-2007 Royalty Assessments before the

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<sup>589</sup> **Ex. CE-150**, SUNAT, Resolution No. 0150140013036, 2010/11 Royalty Assessments (29 December 2016), p. 70.

<sup>590</sup> *See* **Ex. CE-150**, SUNAT, Resolution No. 0150140013036, 2010/11 Royalty Assessments (29 December 2016), pp. 125-131, ¶ 3.4.4.

<sup>591</sup> *See* **Ex. CE-151**, SMCV Appeal of SUNAT, 2010/11 Royalty Assessment (22 March 2017).

<sup>592</sup> *See* **Ex. CE-62**, SMCV, Appeal of SUNAT 2009 Royalty Assessments (16 January 2012); **Ex. CE-179**, SMCV, Submission Requesting Suspension of Procedure (20 June 2018), p. 1 (summarizing case assignment history and transfer between Chamber No. 10 to Chamber No. 5 and finally, to Chamber No. 2).

<sup>593</sup> *See* **Ex. CE-177**, MEF, Supreme Resolution No. 013-2018-EF (4 May 2018), Art. 1 (appointing Victor Mejía Ninacondor as *vocal*); **CE-194**, Tax Tribunal, Decision No. 06575-1-2018 (28 August 2018), p. 41 (denoting Victor Mejía Ninacondor as *vocal ponente*).

<sup>594</sup> *Compare* **Ex. CE-83**, 21 May 2013 Tax Tribunal Resolution No. 08252-1-2013, 2008 Royalty Case (decided by *vocales* Zuñiga Dulanto, Amico de Casas, and Ramirez Mio); *with* **CE-194**, 28 Aug. 2018 Tax Tribunal Decision No. 06575-1-2018, 2010/11 Royalty Case (decided by *vocales* Zuñiga Dulanto, Ramirez Mio, and Mejía Ninacondor).

<sup>595</sup> *See* **Ex. CE-227**, LinkedIn Profile of Mr. Victor Mejia Ninacondor, also available at <https://pe.linkedin.com/in/m-victor-mejia-ninacondor-853b43109>; *see also* **Ex. CE-18**, SUNAT, Resolution No. 143-2001/SUNAT (27 December 2001) (Victor Mejía Ninacondor held the position of Ejecutor Coactivo, Intendencia Regional Lambayeque); **Ex. CE-33**, SUNAT, Resolution No. 212-2009/SUNAT (6 October 2009) (Victor Mejía Ninacondor held the position of Fedatario Titular de la Intendencia Regional Ica); **Ex. CE-107**, SUNAT Resolution No. 080-2014/SUNAT (18 March 2015) (Victor Victor Mejía Ninacondor held the position of Ejecutor Coactivo, Intendencia Lima); **Ex. CE-129**, SUNAT, Resolution No. 011-2015-SUNAT/600000 (18 March 2015) (Victor Mejia Ninacondor held the position of Supervisor de la Seccion de Cobranza de Oficina y Soporte II (e), División de Cobranza de Oficina y Soporte, Gerencia de Cobranza, Intendencia Lima and Jefe de la Sección de Cobranza de Campo II, División de Cobranza de Campo, Gerencia de Cobranza, Intendencia Lima); **Ex. CE-216**, Tax Tribunal, Meeting Transcript No. 2019-03 (14 January 2019), p. 2 (listing Victor Mejía Ninacondor holding the position of Auditor Resolutor de la División de Reclamaciones II de la Intendencia de Principales Contribuyentes Nacionales de la SUNAT)

Appellate Court.<sup>596</sup> Citing this blatant conflict of interest, on 20 June 2018, SMCV requested that Mr. Mejía Ninacondor recuse himself from the 2010-2011 Royalty Case on the grounds that he failed to meet the most basic requirements of independence and impartiality.<sup>597</sup>

245. According to the Tax Tribunal’s procedural rules, the Plenary Chamber—made up of all the *vocales*—should have convened to discuss SMCV’s request before voting on it.<sup>598</sup> However, President Olano Silva quickly intervened, just as she had done in the 2008 Royalty Case. On the very same day that SMCV filed its request for recusal, Gina Castro Arana, head of the Technical Office, sent President Olano Silva draft minutes of the plenary meeting, stating that SMCV’s “petition for self-recusal was deliberated and it was *unanimously* agreed that the petition for self-recusal that was filed was inadmissible”—despite the fact that the Plenary Chamber had not even convened.<sup>599</sup> Attaching the draft, Ms. Castro Arana wrote:

**Sent:** Wednesday, 20 June 2018, 8:32 pm  
**Subject:** Plenary Chamber Resolution – Recusal vs. MN Cerro Verde.doc

Dr: I am sending you the file. I went to see you but you had already left. We’ll discuss early tomorrow. Gina<sup>600</sup>

246. The next morning around 11:00 a.m., Ms. Castro Arana sent President Olano Silva a slightly revised version of the minutes, noting that “the changes [are] marked in yellow,” suggesting that the two had already discussed the draft and revisions.<sup>601</sup> Like the first draft, the revised draft minutes stated that Mr. Mejía Ninacondor was not conflicted based on a narrow, literal interpretation of the Law on General Administrative Procedure, which provided that a *vocal* must be recused if he or she previously worked for an “*administrado*”—*i.e.*, anyone who could be subject to an administrative proceeding—or a “third party” to the proceeding.<sup>602</sup> Despite SUNAT’s adversarial position in the

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<sup>596</sup> See **Ex. CE-694**, Contentious Administrative Court, Entry of Appearances, 2006-2007 Royalty Case (3 January 2017), p. 3.

<sup>597</sup> See **Ex. CE-180**, SMCV, Submission Requesting Removal of Judge Ninacondor (20 June 2018), pp. 3-4.

<sup>598</sup> See **CA-120**, Tax Tribunal, Plenary Chamber Order No. 08-2005 (11 April 2005), p. 13 (“After studying the briefs and documents submitted in the plenary session, the plenary chamber will decide whether or not the abstention is to be admitted, regardless of whether it was raised by the Vocales or by the taxpayer [administrado].”); see also **CA-231**, Single Unified Text of the Law of General Administrative Procedure, Supreme Decree No. 006-2017-JUS (1 June 2017); *id.* at Art. 111.1 (“Minutes are drawn up of each session, which contain a list of attendees, as well as the place and time it was held, the agenda items, each resolution adopted separately, with mention of the form and meaning of the votes of all participants.”), Art. 111.3 (“Each set of minutes, after being approved, is signed by the Secretary, the Chairman, by those who have voted individually and by those who request it.”).

<sup>599</sup> **Ex. CE-714**, *Acta de Sala Plena – Abstención vs MN Cerro Verde*, attached to email from Gina Castro Arana to Zoraida Alicia Olano Silva (20 June 2018, 8:32 PM PET), p. 4 (emphasis added).

<sup>600</sup> **Ex. CE-713**, Email from Gina Castro Arana to Zoraida Alicia Olano Silva (20 June 2018, 8:32 PM PET).

<sup>601</sup> **Ex. CE-715**, Email from Gina Castro Arana to Zoraida Alicia Olano Silva (21 June 2018, 11:01 AM PET).

<sup>602</sup> **Ex. CE-716**, *Acta de Sala Plena – Abstencion vs. MN Cerro Verde*, attached to Email from Gina Castro Arana to Zoraida Alicia Olano Silva (21 June 2018, 11:01 AM PET), pp. 4-5; see **CA-231**, Single Unified

proceeding before the Tax Tribunal, the draft minutes concluded that there was no basis for recusal because SUNAT did not qualify as “*administrado*” or “third party to the proceedings,” but was an “administrative authority.”<sup>603</sup> Twenty minutes later, President Olano Silva forwarded the draft to the *vocales* informing them that it contained the “draft minutes for today’s meeting at 5pm” and stating to “please let me know if you agree.”<sup>604</sup>

247. Several *vocales* responded almost immediately to voice their disagreement:

**Subject:** RE: draft self-recusal minutes

Dear Zoraida: Regarding the above-mentioned subject, we, the Chamber No. 5 *vocales*, do not agree with the conclusion and legal grounds regarding Assumption 5 of Article 88 of the Law on General Administrative Procedure [the provision listing relationships requiring recusal]. We will leave it up to you to determine whether we should send you our vote or whether it would be necessary to meet [and discuss].<sup>605</sup>

Instead of discussing the issue in plenary session with the benefit of all the *vocales* present, President Olano Silva asked the *vocales* to “let me know which way the vote is going so I can start working on the draft resolution.”<sup>606</sup> The dissenting *vocales* sent a first draft of their dissenting vote a few hours later and the final draft at noon the next day.<sup>607</sup>

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Text of the Law of General Administrative Procedure, Supreme Decree No. 006-2017-JUS (1 June 2017), Art. 97(5) (“Any authority who has decision-making power . . . must refrain from participating in matters . . . in the following cases . . . . When he/she has or has had in the past twelve (12) months a relationship of service or subordination with any of the *administrados* or third parties directly involved in the matter, or if he/she had a business agreement with any of the parties.”); *id.* at Art. 97(6)(a) (“When reasons arise that disturb the function of the authority, the latter, for the sake of decorum, may recuse himself/herself by means of a duly substantiated resolution. . . a) In the event that the authority is a member of a collegiate body, the latter must accept or deny the request.”).

<sup>603</sup> See **Ex. CE-716**, *Acta de Sala Plena – Abstencion vs. MN Cerro Verde*, attached to Email from Gina Castro Arana to Zoraida Alicia Olano Silva (21 June 2018, 11:01 AM PET), pp. 4-5 (“[A]lthough SUNAT is a party in the appeal proceeding, it cannot be considered as the “third party” or an “*administrado*” since those “concepts . . . differ[] from that of the Administration.”).

<sup>604</sup> **Ex. CE-717**, Email from Zoraida Alicia Olano Silva to the *vocales* (21 June 2018, 11:21 AM PET); **Ex. CE-718**, Draft Abstention, Attachment to Email from Zoraida Alicia Olano Silva to the *vocales* (21 June 2018, 11:21 AM PET).

<sup>605</sup> **Ex. CE-719**, Email from Gabriela Patricia Marquez Pacheco to Zoraida Alicia Olano Silva (21 June 2018, 11:38 AM PET); see also **Ex. CE-716**, *Acta de Sala Plena – Abstencion vs. MN Cerro Verde*, attached to Email from Gina Castro Arana to Zoraida Alicia Olano Silva (21 June 2018, 11:01 AM PET), p. 4.

<sup>606</sup> See **Ex. CE-720**, Email from Zoraida Alicia Olano Silva to Gabriela Patricia Marquez Pacheco (21 June 2018, 11:57 AM PET).

<sup>607</sup> See **Ex. CE-721**, Email from Gabriela Patricia Marquez Pacheco to Zoraida Alicia Olano Silva (21 June 2018, 3:48 PM PET) (“Dear Zoraida: The vote of the Chamber 5 *Vocales* (Amico, Terry and Márquez) with regard to the Plenary Chamber issue of the recusal of the Vocal Mejía is attached hereto.”); **Ex. CE-722**, Email from Gabriela Patricia Marquez Pacheco to Zoraida Alicia Olano Silva (June 22, 2018, 12:11 PM PET) (“Dear Zoraida: I’m attaching the final text of the Dissenting Vote, coordinated with the *Vocales* of Chamber 7 (Barrantes and Melendez), in order for it to be considered in the minutes of the Plenary Chamber. Self-Recusal of the *Vocal* Mejía. The aforementioned Vote was cast by the following *Vocales*: Amico, Barrantes, Márquez and Meléndez.”); **Ex. CE-723**, Draft Dissenting Vote, Attached to

248. A little over two hours after receiving the final draft of the dissenting vote—and still only two days after SMCV’s request—the Plenary Chamber voted to reject SMCV’s recusal request.<sup>608</sup> The final resolution was identical to the revised draft Ms. Castro prepared with President Olano Silva, with the exception of the dissenting vote and several paragraphs added to respond to the arguments of the dissenting *vocales*.<sup>609</sup> It affirmed the dubious conclusion that recusal was not required on the ground that “SUNAT is not a party as an *administrado* [in the proceedings] but rather as the administrative authority, *i.e.* it acts from beginning to end in the exercise of the public prerogatives that have been conferred to it by our legislation.”<sup>610</sup> The resolution further took the position that SMCV’s request based on the *objective* conflict arising from Mr. Mejía Ninacondor’s prior roles could be set aside because he did “not feel that exercising competent jurisdiction in this case should undermine the honorability and probity with which he is called upon to exercise his duties,” and that SMCV’s “petition ha[d] failed to prove any reason that could result in such an alteration[.]”<sup>611</sup> By contrast, the dissenting *vocales* concluded that SUNAT should be considered an “*administrado*” for purposes of the challenge proceedings in the 2010-2011 Royalty Case, explaining that:

SUNAT does have legitimate interests or rights likely to be affected, which is admitted even by the very same Tax Code, as it grants SUNAT, from the commencement of said instance onward, the right to file an answer to the appeal, produce means of evidence and engage in all other acts deemed applicable, thereby allowing it to defend the resolution it issued and which is being appealed since an overturned resolution would negatively affect the collection of taxes under its administration.

...

In this sense, the conditions in favor of self-recusal are fully met ... and the aforementioned *vocal* should thus recuse himself from taking cognizance of Case No. 4689-2017.”<sup>612</sup>

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Email from Gabriela Patricia Marquez Pacheco to Zoraida Alicia Olano Silva (22 June 2018, 12:11 PM PET).

<sup>608</sup> See **Ex. CE-181**, Tax Tribunal, Rejection of SMCV’s Request for Removal, Minutes of Plenary Council Meeting No. 2018-20 (22 June 2018).

<sup>609</sup> Compare **Ex. CE-716**, *Acta de Sala Plena – Abstencion vs. MN Cerro Verde*, attached to Email from Gina Castro Arana to Zoraida Alicia Olano Silva (21 June 2018, 11:01 AM PET) with **Ex. CE-181**, Tax Tribunal, Rejection of SMCV’s Request for Removal, Minutes of Plenary Council Meeting No. 2018-20 (22 June 2018).

<sup>610</sup> **Ex. CE-181**, Tax Tribunal, Rejection of SMCV’s Request for Removal, Minutes of Plenary Council Meeting No. 2018-20 (22 June 2018), p. 5.

<sup>611</sup> **Ex. CE-181**, Tax Tribunal, Rejection of SMCV’s Request for Removal, Minutes of Plenary Council Meeting No. 2018-20 (22 June 2018), p. 7.

<sup>612</sup> See **Ex. CE-181**, Tax Tribunal, Rejection of SMCV’s Request for Removal, Minutes of Plenary Council Meeting No. 2018-20 (22 June 2018), pp. 9-10.

249. Tellingly, less than three months later, the Government 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—a revision that effectively confirmed Mr. Mejía Ninacondor’s conflict of interest.<sup>613</sup>

250. The Tax Tribunal ultimately scheduled hearings for both the 2009 Royalty Case and the 2010-2011 Royalty Case on 9 August 2018, even though the former had been filed over *five years* earlier than the challenge to the 2010-2011 Royalty Assessment.<sup>614</sup> On 15 August 2018, a mere *six days* after the hearing, Chamber No. 2 issued a resolution confirming SUNAT’s 2009 Royalty Assessments.<sup>615</sup> The resolution again adopted Mr. Isasi’s interpretation and copied nearly *verbatim* the section on the scope of the Stability Agreement of the original Chamber No. 1 resolution drafted by Ms. Villanueva confirming the 2008 Royalty Assessments.<sup>616</sup>

251. The Tax Tribunal also rejected SMCV’s request to waive penalties and interest on the spurious ground that Article 170 required reasonable doubt with respect to a *rule*, and that “this dispute did not originate in a doubt arising from the interpretation of the scope of Article 83 of the General Mining Law or Article 22 of its Regulations, but in the verification of the scope of the [*stability*] agreement executed.”<sup>617</sup> SUNAT’s own assessment plainly contradicted this conclusion, since it listed the General Mining Law and Regulations as part of its “support and legal basis”.<sup>618</sup>

### Figure 5: SUNAT, 2009 Royalty Assessments

#### II. SUPPORT AND LEGAL BASIS:

From the analysis of the corresponding legal norms and the Agreement of Guarantees and Measures for the Promotion of Investments signed by the Peruvian State and the taxpayer, the latter guarantees the taxpayer the benefits granted in articles 72, 80 and 84 of the General Mining Law.

#### LEGAL BASIS:

Article 7; Article 8; Article 44; Article 72; Article 78; Article 80; Article 82; Article 83; Article 84. Article 85; Article 86; Title Nine of the SINGLE UNIFIED Text of the General Mining Law, approved by Supreme Decree No. 014-92-EM.

Article 1; Article 2; Article 5; Article 10; Article 14 Article 15; Article 16; Article 17; Article 18; Article 19; Article 20; Article 22; Article 30; Article 31 of the Regulations to Title Nine of the General Mining Law approved by Supreme Decree No. 024-93-EM.

Clause One, Clause Two, Clause Three, Clause Four, Clause Five, Clause Six, Clause Seven, Clause Eight, Clause Nine, Clause Ten, Clause Eleven of the Agreement of Guarantees and Measures for the Promotion of Investments signed by the Peruvian State and the taxpayer.

<sup>613</sup> See **CA-238**, Amendments to the Tax Code, Legislative Decree No. 1421 (12 September 2018); **CA-14**, Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Art. 100 (as amended by Legislative Decree No. 1421).

<sup>614</sup> See **Ex. CE-185**, Tax Tribunal, Notice of Oral Hearing No. 1170-2018-EF/TF, 2010/11 Royalty Assessments (18 July 2018) (hearing on the 2010/11 Royalty Assessments scheduled for 9 Aug. 2018 in Chamber 1); **Ex. CE-183**, Tax Tribunal, Notice of Oral Hearing No. 1065-2018-EF/TF, 2009 Royalty Assessments (6 July 2018) (hearing on the 2009 Royalty Assessments scheduled for 9 Aug. 2018 in Chamber 2).

<sup>615</sup> See **Ex. CE-62**, SMCV, Appeal of SUNAT 2009 Royalty Assessments (12 January 2012); **Ex. CE-188**, Tax Tribunal, Chamber 2 Decision No. 06141-2-2018 (15 August 2018).

<sup>616</sup> Compare **Ex. CE-188**, Tax Tribunal, Chamber 2 Decision No. 06141-2-2018 (15 August 2018), pp. 8-33, with **Ex. CE-83**, Tax Tribunal, Decision No. 08252-1-2013 (21 May 2013), pp. 5-20.

<sup>617</sup> **Ex. CE-188**, Tax Tribunal, Chamber 2 Decision No. 06141-2-2018 (15 August 2018), p. 31 (emphasis added).

<sup>618</sup> **Ex. CE-54**, SUNAT, 2009 Royalty Assessments (27 June 2011), Annex No. 1.

252. The Tax Tribunal’s findings were also entirely at odds with its *own* analyses, which interpreted the scope of the Stability Agreement based on “the provisions in Article 83 of the General Mining Law and Articles 22 and 24 of the Regulations . . . [which] state that . . . the Feasibility Study . . . will serve as a basis for determining which investments are the subject of the contract.”<sup>619</sup> The Tax Tribunal further took the position that even if the interpretation of the Mining Law or Regulations were at issue in the case, “the aforementioned rules are clear when establishing the scope of the agreements executed under their protection.”<sup>620</sup>

253. On 28 August 2018, less than two weeks after Chamber No. 2 confirmed the 2009 Royalty Assessment, Chamber No. 1 also confirmed SUNAT’s 2010-2011 Royalty Assessments, again adopting Mr. Isasi’s interpretation and copying nearly *verbatim* the section on the scope of the Stability Agreement from the resolution in the 2008 and 2009 Royalty Cases.<sup>621</sup>

254. In addition, relying on similar reasoning as that applied by Chamber No. 2 on the 2009 Royalty Assessment, Chamber No. 1, rejected SMCV’s request to waive penalties and interest for the 2010-2011 Royalty Assessments on the spurious ground that there was no “reasonable doubt” related to the Mining Law or Regulations, and that any uncertainty relating to the scope of the Stability Agreement, as opposed to the law, could not trigger an entitlement to a waiver under Article 170.<sup>622</sup> As with the decision regarding the 2009 Royalty Assessment, the Tax Tribunal’s findings were entirely at odds with its *own* analysis in the very same decision, which was based on an interpretation of the Mining Law and Regulations.<sup>623</sup>

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<sup>619</sup> **Ex. CE-188**, Tax Tribunal, Chamber 2 Decision No. 06141-2-2018 (15 August 2018), p. 20; *see also, e.g.*, **Ex. CE-83**, Tax Tribunal, Decision No. 08252-1-2013 (21 May 2013), pp. 12-17; **Ex. CE-46**, SUNAT, Resolution No. 055-014-0001394/SUNAT, 2008 Royalty Assessments (31 January 2011), p. 32.

<sup>620</sup> **Ex. CE-188**, Tax Tribunal, Chamber 2 Decision No. 06141-2-2018 (15 August 2018), p. 37.

<sup>621</sup> *Compare Ex. CE-194*, Tax Tribunal, Decision No. 06575-1-20, 2010/11 Royalty Assessments (28 August 2018), p. 21 (“[T]he benefits of legal stability are not granted in a general manner to the owner of the mining activity or any given mining concession, but rather in relation to a specific investment project that is clearly delimited in the Feasibility Study, which in this case is “Cerro Verde Leaching Project.”) *with Ex. CE-83*, Tax Tribunal, Decision No. 08252-1-2013 (21 May 2013), pp. 14-15; **Ex. CE-188**, Tax Tribunal, Chamber 2 Decision No. 06141-2-2018 (15 August 2018), p. 24.

<sup>622</sup> **Ex. CE-194**, Tax Tribunal, Decision No. 06575-1-20, 2010/11 Royalty Assessments (28 August 2018), p. 29 (“In this case . . . *the dispute* has focused on determining the scope of the [Stability Agreement], in order to establish whether the extraction of ores intended for the “Primary Sulfide Project” . . . is protected by stability and, consequently, whether or not the appellant was obliged to pay the Mining Royalty for said ores, since such dispute, as has been analyzed, *did not originate from a misinterpretation of Article 83 of the General Mining Law or Article 22 of its regulations; in this case the existence was not found of a reasonable doubt in relation to said rules* that could have led to a misinterpretation thereof, as would happen if they were imprecise, ambiguous or obscure.”) (emphasis added).

<sup>623</sup> **Ex. CE-194**, Tax Tribunal, Decision No. 06575-1-20, 2010/11 Royalty Assessments, (28 August 2018), p. 18 (“[T]he provisions in Article 83 of the General Mining Law and Articles 22 and 24 of the Regulations . . . [which] state that . . . the Feasibility Study . . . will serve as a basis for determining which investments are the subject of the contract.”); *see also, e.g.*, **Ex. CE-83**, Tax Tribunal, Decision No. 08252-1-2013 (21 May 2013), pp. 11-15; **Ex. CE-46**, SUNAT, Resolution No. 055-014-0001394/SUNAT, 2008 Royalty Assessments (31 January 2011), pp. 29-32.

### 3. SUNAT Refused to Recalculate Interest and Penalties on the 2009 and 2010-2011 Assessments, Despite the Tax Tribunal’s Long Delays

255. On 10 and 18 October 2018, SUNAT issued writs of execution of the 2010-2011 and 2009 Royalty Assessments, respectively.<sup>624</sup> SMCV immediately requested that SUNAT suspend execution proceedings and recalculate the interest owed on the 2009 and 2010-2011 Royalty Assessments, given that the Tax Tribunal had taken six years to resolve the 2009 Royalty Case and eighteen months to resolve the 2010-2011 Royalty Case.<sup>625</sup> SMCV based its requests on Article 33 of the Tax Code, which requires SUNAT to apply the much lower Consumer Price Index (“CPI”)—which typically averages around 2.5%—instead of the annual interest rate of 14.6% after the twelfth month that challenges have been pending before the Tax Tribunal.<sup>626</sup> Yet only a few days later, SUNAT rejected SMCV’s requests on the grounds that the Royalty Law does not *expressly* provide that Article 33 of the Tax Code applies in royalty proceedings—even though royalty proceedings are subject to essentially the same procedural rules as tax proceedings, and challenges are similarly resolved by the Tax Tribunal.<sup>627</sup>

256. On 26 and 30 October 2018, SMCV requested under protest to enter into deferral and installment plans to pay the 2009 and 2010-2011 Royalty Assessments, which SUNAT approved on 30 and 31 October 2018.<sup>628</sup>

257. On 28 December 2018 and 3 January 2019, SMCV filed complaint requests (*Recursos de Queja*) that the Tax Tribunal order SUNAT to recalculate the interest owed by SMCV on the 2009 and 2010-2011 Royalty Assessments, while reserving all rights and expressly stating that the requests did not constitute acceptance of the unduly-imposed interest.<sup>629</sup> Within just a few days of

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<sup>624</sup> See **Ex. CE-727**, SUNAT, Coercive Enforcement Resolution, No. 011-006-0056517, 2010/11 Royalty Assessments (10 October 2018); **Ex. CE-729**, 18 Oct. 2018 SUNAT Writ of Execution No. 011-006-0056535, 2009 Royalty Assessments.

<sup>625</sup> See **Ex. CE-728**, 15 Oct. 2018 SMCV Request to SUNAT to Suspend Execution Proceedings, 2010/11 Royalty Assessments; **Ex. CE-730**, SUNAT, Coercive Enforcement Resolution, No. 011-006-0056535, 2009 Royalty Assessments (18 October 2018).

<sup>626</sup> See **CA-14**, Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013, Art. 33 (as amended by Law No. 30230); *id.*, Art. 150.

<sup>627</sup> **Ex. CE-731**, SUNAT, Coercive Collection Resolution No. 0110070137018, 2010-2011 Royalty Assessments, pp. 1-2 (“This is corroborated by the fact that Article 3 of Law n. 28969, which gives the rules of the Tax Code that are applicable for facilitating management of mining royalties, makes no express reference to Article 33.”); **Ex. CE-732**, SUNAT, Rejection of SMCV’s Request for Suspension of Collection Enforcement Proceedings, 2009 Royalty Assessments, (22 October 2018), pp. 1-2 (same).

<sup>628</sup> See **Ex. CE-733**, SMCV, Request Under Protest to Enter Into Deferral and Installment Plans, 2009 Royalty Assessments (26 October 2018); **Ex. CE-734**, SMCV, Request Under Protest to Enter Into Deferral and Installment Plans, 2010/11 Royalty Assessments (30 October 2018); **Ex. CE-735**, SUNAT, Approval of SMCV’s Deferral and Installment Plans, 2009 Royalty Assessments (30 October 2018); **Ex. CE-736**, SUNAT, Approval of SMCV’s Deferral and Installment Plans, 2010/11 Royalty Assessments (31 October 2018).

<sup>629</sup> See **Ex. CE-207**, 2 SMCV, Submission Requesting Recalculation of Interest, 2009 Royalty Assessment (28 December 2018), pp. 26-27; **Ex. CE-212**, SMCV, Submission Requesting Recalculation of Interest, 2010/11 Royalty Assessments (3 January 2019), p. 26.

receiving SMCV's challenges, the Tax Tribunal dismissed both of the requests on the ground that SMCV had already requested deferral and installment plans for the payment of the 2009 and 2010-2011 Royalty Assessments.<sup>630</sup> The Tax Tribunal provided no support for its conclusion that SMCV had effectively waived its right to a CPI interest rate by requesting to pay the Assessments in installments to avoid immediate collection—a conclusion that would have the perverse consequence of *discouraging* taxpayers from entering into payment agreements with the Government while they exercise their right to challenge an assessment.<sup>631</sup>

#### 4. SUNAT Issued Additional Assessments for 2011, 2012, and 2013 under the 2011 Royalty Law

258. On 29 December 2017, SUNAT issued royalty assessments against SMCV for minerals processed in the Concentrator for the fourth quarter of 2011 (together with penalties and interest, the “Q4 2011 Royalty Assessments”), the first fiscal period in which SUNAT applied the new 2011 Royalty Regime, on the grounds that “the benefits and stability guarantees inherent to the [Stability Agreement] . . . do not extend to the exploitation of metallic mining resources (copper, molybdenum and silver concentrates) from the Primary Sulfide Plant.”<sup>632</sup> SUNAT also assessed a penalty equivalent to 10% of the unpaid royalties, additional penalties for SMCV's failure to file royalty declarations, and interest on the unpaid royalties and penalties at the rate of 14.6% per annum from 29 February 2012.<sup>633</sup> As a result of the extensive penalties and the nearly *six years* SUNAT took to issue the Q4 2011 Royalty Assessments, the penalties and interest of US\$7,824,197 exceeded the principal royalty assessments of US\$7,541,272, even as of the assessment date.<sup>634</sup>

259. On 15 February 2018, SMCV submitted a request for reconsideration, which SUNAT denied on 12 October 2018.<sup>635</sup> SUNAT also again declined to waive penalties and interest.<sup>636</sup>

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<sup>630</sup> See **Ex. CE-213**, Tax Tribunal, Decision No. 00019-Q-2019, 2009 Royalty Assessment (4 January 2019); **Ex. CE-214**, Tax Tribunal, Decision No. 00036-Q-2019, 2010/11 Royalty Assessment (7 January 2019).

<sup>631</sup> See **Ex. CE-213**, Tax Tribunal, Decision No. 00019-Q-2019, 2009 Royalty Assessment (4 January 2019), pp. 1-3; **Ex. CE-214**, Tax Tribunal, Decision No. 00036-Q-2019, 2010/11 Royalty Assessment (7 January 2019), pp. 1-3

<sup>632</sup> **Ex. CE-700**, Tax Tribunal, Decision No. 00036-Q-2019, 2010/11 Royalty Assessment (7 January 2019), pp. 1-4, ¶ 1.A.

<sup>633</sup> See **Ex. CE-701**, SUNAT, Fine Resolution No. 012-002-0031073, Q4 2011 Royalty Assessment (29 December 2017); **Ex. CE-702**, SUNAT, Fine Resolution No. 012-002-0031074, Q4 2011 Royalty Assessment (29 December 2017).

<sup>634</sup> See **Annex A**: Administrative Proceedings.

<sup>635</sup> See **Ex. CE-175**, SMCV, Request for Reconsideration, 4Q 2011 Royalty Assessments (15 February 2018); **Ex. CE-198**, SUNAT, Resolution No. 0150140014441, Q4 2011 Royalty Assessment (12 October 2018), p. 1.

<sup>636</sup> See **Ex. CE-175**, SMCV, Request for Reconsideration, 4Q 2011 Royalty Assessments (15 February 2018); **Ex. CE-198**, SUNAT, Resolution No. 0150140014441, Q4 2011 Royalty Assessment (12 October 2018), pp. 45-48.

260. On 21 November 2018, SMCV challenged SUNAT’s Q4 2011 Royalty Assessments before the Tax Tribunal (the “Q4 2011 Royalty Case”).<sup>637</sup> The Technical Office assigned the Q4 2011 Royalty Case to none other than the President’s former assistant Ms. Villanueva, now a *vocal* at Chamber No. 9, thus putting her in charge of preparing the draft resolution.<sup>638</sup>

261. Given her previous intervention on behalf of President Olanó Silva in the 2008 Royalty Case, Ms. Villanueva’s appointment as *vocal ponente* left little doubt that she would confirm the Q4 2011 Royalty Assessments, which Chamber No. 9 indeed did in its 18 November 2019 resolution.<sup>639</sup> Like her prior draft resolution, the resolution confirming the Q4 2011 Royalty Assessments adopted Mr. Isasi’s interpretation that the Stability Agreement exclusively covered the investments set forth in the 1996 Feasibility Study.<sup>640</sup> Chamber No. 9 also again denied SMCV’s waiver request on the spurious grounds that the dispute did not turn on an interpretation of Article 83 of the General Mining Law and Article 22 of the Regulations, and thus could not support a finding of “reasonable doubt” under Article 170 of the Tax Code.<sup>641</sup>

262. On 28 March 2018 and 28 September 2018, SUNAT assessed royalties for the minerals processed in the Concentrator in 2012 and 2013, respectively (each together with penalties and interest, the “2012 Royalty Assessment” and the “2013 Royalty Assessment”).<sup>642</sup> SUNAT also assessed penalties equivalent to 10% of the unpaid royalties, additional penalties for SMCV’s failure to file royalty declarations, and interest on the unpaid royalties and penalties at the rate of 14.6% per annum, calculated from the dates SUNAT asserted SMCV should have filed each quarterly royalty declaration, again charging interest for the more than *five years* SUNAT took in average to issue the 2012 and 2013 Royalty Assessments.<sup>643</sup> The significant delay again meant that penalties and interest nearly equaled the principal already by the time SUNAT issued the assessments: the 2012 Royalty Assessments totaled US\$35,494,542 in royalties and, at that time, US\$34,885,678 in penalties and

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<sup>637</sup> See **Ex. CE-740**, SMCV, Appeal to Tax Tribunal, Q4 2011 Royalty Assessments (21 November 2018).

<sup>638</sup> See **Ex. CE-269**, Tax Tribunal, Decision, No. 10574-9-2019, Q4 2011 Royalty Assessments (18 November 2019), p. 14 (listing Ms. Villanueva as a *vocal ponente*).

<sup>639</sup> See **Ex. CE-269**, Tax Tribunal, Decision, No. 10574-9-2019, Q4 2011 Royalty Assessments (18 November 2019).

<sup>640</sup> See **Ex. CE-269**, Tax Tribunal, Decision, No. 10574-9-2019, Q4 2011 Royalty Assessments (18 November 2019), p. 6 (“[T]he benefits of legal stability are not granted in a general manner to the owner of the mining activity or any given mining concession, but rather in relation to a specific investment project that is clearly delimited in the Feasibility Study.”).

<sup>641</sup> See **Ex. CE-269**, Tax Tribunal, Decision, No. 10574-9-2019, Q4 2011 Royalty Assessments (18 November 2019), p. 9 (“[T]he dispute has focused on determining . . . the scope of the stability agreement . . . this dispute, as it has been analyzed, did not arise from a misinterpretation of Article 83 of the General Mining Law or Article 22 of its Regulations, in which case there is no reasonable doubt”).

<sup>642</sup> See **Ex. CE-176**, SUNAT, 2012 Royalty Assessments; **CE-195**, SUNAT, 2013 Royalty Assessments.

<sup>643</sup> See **CE-176**, SUNAT, 2012 Royalty Assessments; **CE-195**, SUNAT, 2013 Royalty Assessments.

interest, and the 2013 Royalty Assessments totaled US\$26,132,821 in royalties and, at that time, US\$23,363,492 in penalties and interest.<sup>644</sup>

263. On 17 May 2018 and 7 November 2018, SMCV submitted requests for reconsideration for the 2012 and 2013 Royalty Assessments, respectively, which SUNAT summarily denied on 11 January 2019 and 28 May 2019.<sup>645</sup> In its decisions, SUNAT restated Mr. Isasi's interpretation that the Stability Agreement only covered the investments expressly included in the 1996 Feasibility Study.<sup>646</sup> SUNAT also again denied SMCV's requests to waive penalties and interest.<sup>647</sup> As it had done with the previous Royalty Assessments, SMCV requested under protest to enter into deferral and installment plans to pay the 2012 and 2013 Royalty Assessments, respectively, which SUNAT approved on 25 February 2019 and 1 July 2019.<sup>648</sup> On 9 and 13 August 2021, under protest, SMCV made payments equal to US\$189,087,299 to pay off the total amounts outstanding under each of the deferral and installment plans for the Royalty Assessments.<sup>649</sup>

#### **P. SUNAT ARBITRARILY REFUSED TO REIMBURSE SMCV FOR PORTIONS OF ITS GEM PAYMENTS**

264. On 28 December 2017—after the Supreme Court dismissed SMCV's appeal on the 2008 Royalty Assessments—SMCV submitted reimbursement requests to SUNAT under protest for undue GEM payments corresponding to the periods Q4 2012 to Q4 2013.<sup>650</sup> SMCV argued that, based on the Government's own position, it could not be subject to paying both GEM and royalties for

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<sup>644</sup> See **Annex A**: Administrative Proceedings.

<sup>645</sup> See **Ex. CE-178**, SMCV, Request for Reconsideration, 2012 Royalty Assessments (17 May 2018); **Ex. CE-203**, SMCV, Request for Reconsideration, 2013 Royalty Assessments (7 November 2018); **Ex. CE-215**, SUNAT, Resolution No. 0150140014560, 2012 Royalty Assessments (11 January 2019); **Ex. CE-220**, SUNAT, Resolution No. 0150140014816, 2013 Royalty Assessments (23 January 2019).

<sup>646</sup> See **Ex. CE-215**, SUNAT, Resolution No. 0150140014560, 2012 Royalty Assessments (11 January 2019), p. 31 (“[T]he benefits of legal stability are not granted in a general way to the owner of the mining activity or of a specific mining concession, but in relation to a specific investment, with a defined plan, clearly delimited in the Feasibility Study.”); **Ex. CE-220**, SUNAT, Resolution No. 0150140014816, 2013 Royalty Assessments (23 January 2019), p. 24 (same).

<sup>647</sup> See **Ex. CE-215**, SUNAT, Resolution No. 0150140014816, 2013 Royalty Assessments (23 January 2019), pp. 37-39; **CE-220**, SUNAT, Resolution No. 0150140014816, 2013 Royalty Assessments (23 January 2019), pp. 36-38.

<sup>648</sup> See **Ex. CE-751**, SMCV, Request Under Protest to Enter Into Deferral and Installment Plans, 2012 Royalty Assessments (19 February 2019); **Ex. CE-763**, SMCV, Request Under Protest to Enter Into Deferral and Installment Plans, 2012 Royalty Assessments (19 February 2019); **Ex. CE-753**, SUNAT, Approval of SMCV's Deferral and Installment Plans, 2012 Royalty Assessments (25 February 2019); **Ex. CE-760**, SUNAT, Approval of SMCV's Deferral and Installment Plans, 2013 Royalty Assessments (1 July 2019).

<sup>649</sup> See **Ex. CE-831**, SMCV, Payment Receipt (2009 Royalty Assessments); **Ex. CE-832**, SMCV, Payment Receipt (2010-2011 Royalty Assessments); **Ex. CE-833**, SMCV, Payment Receipt (2012 Royalty Assessments); **Ex. CE-834**, SMCV, Payment Receipt (2013 Royalty Assessments).

<sup>650</sup> See **Ex. CE-705**, SMCV, Reimbursement Request (GEM Q4 2012) (12 January 2018); **Ex. CE-706**, SMCV, Reimbursement Request (GEM Q1 2013) (12 January 2018); **Ex. CE-707**, SMCV, Reimbursement Request (GEM Q2 2013) (12 January 2018); **Ex. CE-708**, SMCV, Reimbursement Request (GEM Q3 2013) (12 January 2018); **Ex. CE-709**, SMCV, Reimbursement Request (GEM Q4 2013) (12 January 2018).

its Concentrator-related activities and requested SUNAT “to exclude, from [its] calculation basis, the portion of the operating profit corresponding to mining activities performed” in the Concentrator.<sup>651</sup> In its requests, SMCV reserved its rights and reiterated its position that the Stability Agreement covered its entire mining unit, including the Concentrator.<sup>652</sup> On 18 December 2018, SUNAT approved SMCV’s request and ordered the reimbursement of US\$76.3 million for SMCV’s overpayments plus interest.<sup>653</sup>

265. On 28 December 2018, SMCV submitted reimbursement requests under protest for the remaining GEM overpayments corresponding to Q4 2011 to Q3 2012.<sup>654</sup> On 4 March 2019, SUNAT arbitrarily refused to repay the remaining overpayments amounting to US\$63.8 million, including interest, incorrectly asserting that under the Tax Code, the statute of limitations had expired on the first business day of 2017.<sup>655</sup>

**Q. PERU ASSESSED NEW TAXES IN BREACH OF THE STABILITY AGREEMENT, IN SOME CASES NOT ONLY ON THE CONCENTRATOR BUT ON THE ENTIRE MINING UNIT**

266. In addition to the Royalty Assessments, beginning in December 2009, SUNAT also assessed certain taxes against SMCV that were not part of the stabilized regime, along with penalties and interest on those taxes, again based on Mr. Isasi’s interpretation that the stability guarantees did not apply to the Concentrator. SUNAT applied these taxes haphazardly and inconsistently over the years, demonstrating the lack of framework to support its asserted interpretation of the law.

**1. General Sales Tax**

267. On 28 December 2009, four months after issuing the 2006/07 Royalty Assessment, SUNAT issued its first Tax Assessment against SMCV, charging SMCV with underpayment of the General Sales Tax (“GST”) for fiscal year 2005.<sup>656</sup> The GST is a tax on the domestic sale of goods and services purchased by consumers, including those provided by non-resident suppliers.<sup>657</sup> The

<sup>651</sup> *E.g.*, **Ex. CE-705**, SMCV, Reimbursement Request (GEM Q4 2012) (12 January 2018), p. 1.

<sup>652</sup> *See, e.g.*, **Ex. CE-705**, SMCV, Reimbursement Request (GEM Q4 2012) (12 January 2018), p. 2.

<sup>653</sup> **Ex. CE-746**, SUNAT, Resolution No. 012 180 0018113/SUNAT (GEM for Q4 2012) (18 December 2018); **Ex. CE-747**, SUNAT, Resolution No. 012 180 0018114/SUNAT (GEM for 2013) (18 December 2018); *see also* Spiller and Chavich ¶ 88(a) n. 118 (converting amount in *soles* to dollars).

<sup>654</sup> **Ex. CE-208**, SMCV Reimbursement Request, GEM Q4 2011 (28 December 2018); **Ex. CE-209**, SMCV Reimbursement Request, GEM Q1 2012 (28 December 2018); **Ex. CE-210**, SMCV Reimbursement Request, GEM Q2 2012 (28 December 2018); **Ex. CE-211**, SMCV Reimbursement Request, GEM Q3 2012 (28 December 2018).

<sup>655</sup> *See* **Annex A**: Administrative Proceedings; **Ex. CE-218**, SUNAT Resolution No. 012-180-0018640/SUNAT, GEM Q4 2011-Q3 2012 (4 March 2019).

<sup>656</sup> *See* **Ex. CE-35**, SUNAT, Assessments No. 052-003-0005626 to No. 052-003-0005637 (28 December 2009) (GST for 2005); **Ex. CE-36**, SUNAT, Assessments No. 052-003-0005642 to 052-003-0005653 (28 December 2009) (GST for Non-Residents 2005); *see also* **Annex A**: Administrative Proceedings.

<sup>657</sup> *See* **CA-73**, Single Unified Text of the General Sales Tax and Selective Consumption Tax, Supreme Decree No. 055-99-EF (16 April 1999), Title I, Art. 1 (“The General Sales Tax taxes . . . [s]ale within the country

GST is always bundled with the Municipal Development Tax (“MDT”), which is calculated in the same terms as the GST, and both are generally referred to collectively as GST.<sup>658</sup> Under the Stability Agreement, the GST tax rate was 18% (16% GST, plus 2% MDT).<sup>659</sup> Under the non-stabilized regime, the GST tax rate increased to 19% in August 2003 (17% of the GST, plus 2% of the MDT), and reduced back to 18% in March 2011.<sup>660</sup>

268. In its assessment, echoing Mr. Isasi’s interpretation, SUNAT noted that:

stability benefits are not awarded in a general manner to an individual or legal entity nor to a determined mining concession, but rather the benefits shall exclusively fall upon the activities done by the mining company in favor of which the investment is done in a determined project.<sup>661</sup>

269. Without providing any additional justification, SUNAT then arbitrarily concluded that the Stability Agreement covered only the sale of cathodes processed in the leaching facility, but not any other goods, such as scrap metal sales—even if they related to the leaching facility (2005 GST Assessment).<sup>662</sup> As a result, SUNAT found that SMCV could apply the stabilized rate of 18% only to the sale of cathodes but had to pay the non-stabilized rate of 19% for all other sales.<sup>663</sup> SUNAT also

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of personal property . . . [and] [p]rovision or use of services within the country.”); *id.* Art. 9(a)-(c) (“Subject to the [GST] as taxpayers are individuals [and] legal entities [that] . . . (a) [m]ake in-country sales of assets subject to taxes during any stage of the production and distribution cycle; (b) [p]rovide in-country services subject to taxes; (c) [u]se in-country services provided by non-residents . . .”).

<sup>658</sup> See, e.g., **CA-73**, Single Unified Text of the General Sales Tax and Selective Consumption Tax, Supreme Decree No. 055-99-EF (16 April 1999), Title I, Art. 31 (bundling GST with the MPT and noting that “[w]ithholdings or collections that may be made for the General Sales Tax and/or the Municipal Development Tax shall be deducted from the Tax owed.”).

<sup>659</sup> The GST and MDT rates were stabilized as of 6 May 1996, the day the DGM approved the 1996 Feasibility Study. See **Ex. CE-12**, 1998 Stability Agreement, Clause 9.5 (granting tax stability); **CA-89**, Law of General Sales Tax and Selective Consumption Tax, Legislative Decree No. 821, Art. 17 (“The tax rate is 16%.”); **CA-58**, Municipal Tax Law, Legislative Decree No. 776 (30 December 1993), Art. 76 (“The Municipal Development Tax is applied with a rate of 2% on operations subject to the General Sales Tax regime.”); see also Hernández ¶ 91.

<sup>660</sup> See **CA-101**, Amendment to the General Sales Tax and Selective Consumption Tax Law, Law No. 28033 (19 July 2003), Art. 1 (“The rate . . . of the General Sales Tax . . . shall be at 17%.”); **CA-173**, Restoring the Tax Rate Established by Article 17 of the of the Single Unified Text of the General Sales Tax and Selective Consumption Tax Law, Law No. 29666 (20 February 2011), Art. 1 (“The sixteen percent (16%) rate [of GST] . . . shall be reinstated.”); **CA-58**, Municipal Tax Law, Legislative Decree No. 776, Art. 76 (“Municipal Development Tax 2%.”).

<sup>661</sup> **Ex. CE-42**, SUNAT, Resolution No. 055-014-0001369 (GST for 2005) (25 October 2010), pp. 214-15.

<sup>662</sup> See **Ex. CE-35**, SUNAT, Assessments No. 052-003-0005626 to No. 052-003-0005637 (GST for 2005) (28 December 2009), Annex No. 1, p. 13 (applying General Sales Tax to the taxable base comprising “non-cathode sales”); **Ex. CE-42**, SUNAT, Resolution No. 055-014-0001369 (GST for 2005) (25 October 2010), p. 215 (“[T]he Tax Administration has proceeded to repair the sale of residues (lead anodes, electric wiring, and magnesium iron waste) and equipment, gas, fuel, energy, steel fiber, cement, as well as price adjustments for cathodes sale and damaged cathode straightening services, because the aforementioned sales would not be covered by the Stability Agreement.”).

<sup>663</sup> See **Ex. CE-35**, SUNAT, Assessments No. 052-003-0005626 to No. 052-003-0005637 (GST for 2005) (28 December 2009), Annex No. 1, p. 13; **Ex. CE-42**, SUNAT, Resolution No. 055-014-0001369 (GST for 2005) (25 October 2010), p. 215 (“[A]ccording to the . . . Feasibility Study and the [Stability] Agreement,

took the baseless position that the Stability Agreement did not cover *any* services provided by non-resident suppliers, irrespective of what they were used for.<sup>664</sup> SUNAT imposed penalties on SMCV equivalent to 50% of the unpaid GST.<sup>665</sup>

270. 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”).<sup>666</sup> For some of these years, SUNAT also imposed penalties on SMCV for alleged accounting violations relating to SMCV’s use of stabilized benefits, including keeping the Concentrator’s accounting in U.S. dollars—a stability benefit under Article 84 of the Mining Law, as reflected in Clause 9.4 of the Stability Agreement—and failing to keep a separate account for the Concentrator based on Article 22 of the Regulations.<sup>667</sup> In total, the GST assessments amounted to US\$8,707,010 in tax and US\$28,229,355 in penalties and interest as of each assessment date.<sup>668</sup>

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the Peruvian State protects the activities regarding . . . the collection of copper cathodes . . . stabilized at a 18% tax rate.”); *id.* at p. 217 (“[T]he stabilized rate of 18%” “does not correspond” to “sale of residues (lead anodes, electric wiring, and magnesium iron waste) and equipment, gas, fuel, energy, steel fiber, cement, as well as Price adjustments for damaged cathode straightening services.”)

<sup>664</sup> See **Ex. CE-36**, SUNAT, Assessments No. 052-003-0005642 to 052-003-0005653 (GST for Non-Residents for 2005) (28 December 2009, Annex No. 1, p. 13 (applying General Sales Tax on services rendered by non-residents); **Ex. CE-41**, SUNAT, Resolution No. 055-014-0001358 (GST for Non-Residents for 2005) (30 September 2010), pp. 34-44 (finding that the acquisition of goods and services from nonresident suppliers are outside the scope of the Stability Agreement and applying non-stabilized General Sales Tax at 19%); **Ex. CE-56**, SUNAT Resolution No. 055-014-0001444 (GST for Non-Residents for 2006) (30 September 2011), pp. 48-52 (“[T]he stability guarantee granted by the [Stability Agreement] only applies to activities related to the ‘Cerro Verde Leaching Project’ . . . provision of services or use of services with domestic and non-resident vendors . . . do not enjoy the contractual benefit, and must be governed by the common legal framework.”).

<sup>665</sup> See **Ex. CE-37**, SUNAT Fine Resolutions No. 052-002-0003816 to No. 052-002-0003827 (GST for 2005) (29 December 2009).

<sup>666</sup> See **Annex A**: Administrative Proceedings.

<sup>667</sup> See **CE-112**, SUNAT Fine Resolution No. 052-002-0006091 (GST 2009) (24 June 2014), Annex 1 (fines for keeping accounting in dollars); SUNAT Fine Resolution No. 052-002-0006101 (GST 2010) (24 June 2014), Annex 1 (same); SUNAT Fine Resolution No. 052-002-0006102 (GST 2009) (24 June 2014), Annex 1 (fines for failing to keep a separate account for the Concentrator); SUNAT Fine Resolution No. 052-002-0006090 (GST 2010), Annex 1 (same); **CE-130**, SUNAT Resolution No. 055-014-0002103 (GST 2009 and GST 2010) (27 April 2015), pp. 154-157 (confirming SUNAT Fine Resolution Nos. 052-002-0006091 and 052-002-0006101, finding that “the Primary Sulfide Project is not covered by the guarantee granted under the stability agreement . . . all of the mining activities . . . referred to in the preceding paragraph, carried out for the performance of said project, as well as the results thereof, are regulated by the common legal regime and, accordingly, the taxpayer is obliged to keep the accounts in national currency”); SUNAT Resolution No. 055-014-0002103 (GST 2009 and GST 2010), pp. 152-154 (confirming SUNAT Fine Resolution Nos. 052-002-0006102 and 052-002-0006090, finding that “the investment made in the ‘Primary Sulfide Project’ is a new investment completely distinct from the one contained in the Feasibility Study” and that “according to the provisions of . . . Article 22 of the Regulations . . . independent accounts must be kept in order to identify the individual results of the projects with different regimes”); *see also, e.g.*, **Ex. CE-12**, 1998 Stability Agreement, Clause 9.4 (“[I]t will be able to keep its accounts in dollars of the United States of America in accordance with what is provided in article 16 of the Regulations.”); **CA-2**, 1993 Mining Regulations, Supreme Decree No. 024-93-EM, Art. 22

271. SMCV requested reconsideration for each of these assessments, each of which SUNAT denied.<sup>669</sup> SMCV then challenged each of the GST Assessments before the Tax Tribunal, which sat on the challenges for years—nearly *eight years* in some cases—before it ultimately confirmed the 2005-2007 GST Assessments.<sup>670</sup> After receiving no decision on its other challenges—some of which were again pending for over eight or nine years—SMCV ultimately withdrew the stability-related claims from its remaining challenges in February 2020 to avoid any suggestion of noncompliance with the waiver requirement under Article 10.18 of the U.S.-Peru TPA.<sup>671</sup>

## 2. Income Tax

272. In May 2011, SUNAT also began issuing income tax assessments against SMCV.<sup>672</sup> Under the stabilized income tax regime, SMCV was entitled, among others, to depreciate buildings and fixed assets at a rate of up to 20% and to depreciate fixed assets for a fiscal year even if SMCV had not previously recorded them in its accounting books, and to deduct payments for the employee profit-sharing obligation (“PTU”) from its income tax base, even if they were not made prior to filing the tax return.<sup>673</sup> By contrast, the non-stabilized income tax regime provided a depreciation rate for buildings of only 3% until 2009 and 5% from 2010 onwards, required the depreciation of fixed assets to be previously recorded in the company’s accounting in order to be deductible, and required PTU to be paid prior to filing the tax return in order to be deductible in the same fiscal year it was accrued.<sup>674</sup>

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(“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.”); Hernández § IV.

<sup>668</sup> See **Annex A**: Administrative Proceedings.

<sup>669</sup> See **Annex A**: Administrative Proceedings.

<sup>670</sup> See **Ex. CE-193**, Tax Tribunal, Resolution No. 06365-2-2018 (GST for 2005) (22 August 2018) (pending since 15 December 2010); **Ex. CE-788**, Tax Tribunal, Resolution No. 04802-5-2020 (GST for Non-Residents for 2005) (15 September 2020) (pending since 15 November 2010); **Ex. CE-190**, Tax Tribunal Resolution No. 06366-2-2018 (GST for 2006) (22 August 2018) (pending since 15 Sept. 2011); **Ex. CE-202**, Tax Tribunal Resolution No. 08470-2-2018 (GST for 2007) (30 October 2018) (pending since 5 November 2012).

<sup>671</sup> See **Annex A**: Administrative Proceedings.

<sup>672</sup> See **Ex. CE-51**, SUNAT Assessment No. 052-003-0007147 (Income Tax for 2006) (27 May 2011).

<sup>673</sup> See **CA-1**, Mining Law, Art. 84 (“The agreements . . . shall guarantee the mining activity titleholder the benefits [in Article 80]. . . as well as the right to increase the annual depreciation rate of machinery, industrial equipment, and other fixed assets up to a maximum limit of twenty percent per year. . .”); **CA-2**, Regulations, Art. 17 (“[T]he titleholder will have 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. . .”); see also Choque ¶¶ 17-28.

<sup>674</sup> See **CA-59**, Income Tax Law, Legislative Decree No. 774 (31 December 1993), Art. 39 (“Buildings and constructions will be depreciated at the rate of three percent (3%) per year.”); **CA-157**, Establishing a Special Depreciation System for Depreciation of Buildings and Structures, Law No. 29342 (6 April 2009), Art. 39 (“Buildings and constructions will be depreciated at a rate of five percent (5%) per year.”); **CA-62**, Regulations of the Income Tax Law, Supreme Decree No. 122-94-EF (21 September 1994), Art. 22(a) (“In accordance with Article 39 of the Act, buildings and structures shall be depreciated exclusively according to the straight-line method, at 3% per year.”); *id.* at Art. 22(b) (“The depreciation accepted for tax purposes

273. On 27 May 2011, SUNAT issued an assessment charging SMCV with underpayment of income tax for 2006 and corresponding penalties and interest, including a 50% penalty on the unpaid taxes, adopting Mr. Isasi’s interpretation that the scope of the Stability Agreement was limited to the investments included in the 1996 Feasibility Study.<sup>675</sup> 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”).<sup>676</sup>

274. In certain of its Income Tax Assessments, SUNAT imposed additional fines against SMCV for (i) failing to keep separate accounts for the leaching facility and the Concentrator; and (ii) failing to provide SUNAT a transfer pricing study or for keeping accounting in U.S. dollars, both of which are clearly permitted under the stabilized regime.<sup>677</sup> In the 2012 Income Tax Assessment, SUNAT also rejected the deduction of the GEM overpayments for Q4 2011 to Q3 2012, despite the fact that (i) under the relevant law, GEM payments are “deductible as an expense for income tax

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shall be the depreciation recorded in the accounting books and records in the fiscal year, provided that it does not exceed the maximum percentage rate indicated in the table above for each unit of the fixed asset, irrespective of the depreciation method applied by the taxpayer.”); **CA-80**, Amendment to the Single Unified Text of the Income Tax Law Ratified by Supreme Decree No. 054-99-EF, Law No. 27356 (18 October 2000), Art. 37(v) (“Expenses or costs that constitute second-, fourth- or fifth-category income for their collector are deductible in the tax year to which they are attributable providing that they were paid by the deadline established by the Regulations for the filing of the affidavit corresponding to said year.”).

<sup>675</sup> See **Ex. CE-51**, SUNAT Assessment No. 052-003-0007147 (Income Tax for 2006) (27 May 2011); **Ex. CE-69**, SUNAT Resolution No. 055-014-0001556 (Income Tax for 2006) (30 March 2012), p. 102 (limiting stability benefits to the activities related to the Cerro Verde Leaching Project); *see also supra* §§ III.1.2; III.L.

<sup>676</sup> See **Annex A**: Administrative Proceedings.

<sup>677</sup> See, e.g., **Ex. CE-50**, SUNAT Fine Assessment No. 052-002-0004616 (Income Tax for 2006) (26 May 2011); **Ex. CE-69**, SUNAT Resolution No. 055-014-0001556 (Income Tax for 2006) (30 March 2012), pp. 122-126 (clarifying that Fine Assessment No. 052-002-0004616 was imposed for “not keeping accounting records (separate for each project)” and accounting in U.S. dollars); **Ex. CE-68**, SUNAT Fine Assessment No. 052-002-0005167 (Income Tax for 2007) (28 March 2012); **Ex. CE-77**, SUNAT Resolution No. 055-014-0001701 (Income Tax for 2007) (25 January 2013), pp. 138-142 (Fine Assessment No. 052-002-0005167 was imposed for “failure to keep accounting . . . separate” and accounting in U.S. dollars); **Ex. CE-93**, SUNAT Fine Assessment No. 052-002-0005883 (Income Tax for 2008) (19 August 2013); **Ex. CE-109**, SUNAT Resolution No. 055-014-0001907 (Income Tax for 2008) (30 May 2014), pp. 172-177 (Fine Assessment No. 052-002-0005883 was imposed for “not keeping the accounting . . . separate” and accounting in U.S. dollars); **Ex. CE-119**, SUNAT Fine Assessment No. 052-002-0006260 (Income Tax for 2009) (26 November 2014); **Ex. CE-131**, SUNAT Resolution No. 055-014-0002145 (Income Tax for 2009) (23 June 2015), pp. 367-369, 374-377 (Fine Assessment No. 052-002-0006260 was imposed “for failure to keep the accounting . . . separate” and accounting in U.S. dollars); **Ex. CE-126**, SUNAT Fine Assessment No. 052-002-0006355 (Income Tax for 2010) (18 February 2015); **Ex. CE-134**, SUNAT Resolution No. 055-014-0002255 (Income Tax for 2010) (4 November 2015), pp. 323-328 (Fine Assessment No. 052-002-0006355 was imposed because “no separate accounting was provided” and accounting in U.S. dollars); **Ex. CE-234**, SUNAT Fine Assessment No. 012-002-0033156 (Income Tax for 2012) (26 November 2019); **Ex. CE-279**, SUNAT Fine Assessment No. 012-002-0034411 (Income Tax for 2013) (28 December 2020); *see also CA-2*, Mining Regulations, Art. 22 (“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.”).

purposes”;<sup>678</sup> and (ii) SUNAT had already rejected SMCV’s request to reimburse the GEM overpayments for Q4 2011 to Q3 2012.<sup>679</sup>

275. Moreover, while SUNAT repeated Mr. Isasi’s interpretation that stability was limited to the investments included in the Feasibility Study for each of the Income Tax Assessments,<sup>680</sup> in practice the actual methodology that SUNAT used to calculate the income tax base varied between different Income Tax Assessments, without any justifiable basis.<sup>681</sup> For example, for the 2006 to 2011 Income Tax Assessments, SUNAT applied the non-stabilized depreciation regime to the assets it identified as being related to the Concentrator; but for the 2012 to 2013 Income Tax Assessments, SUNAT treated *all* the assets that SMCV started using as of 2007 as non-stabilized, even those relating to the leaching facility.<sup>682</sup> This meant that some fixed assets related to the leaching facility, as well as “mixed” assets used in both processes and non-processing operations, like agglomerator feeders and haul trucks, were subject to different depreciation regimes on different dates—even though those assets were already partially depreciated under the stabilized regime, under which assets took five years to be fully depreciated.<sup>683</sup>

276. From 2017 to 2020, under protest, SMCV filed amended income tax returns applying non-stabilized depreciation rates to its so-called Concentrator-related assets for the 2012 and 2013 fiscal years and plans to fully depreciate those assets under the non-stabilized rates.<sup>684</sup> This will allow SMCV to recapture some of the depreciation deductions that Peru denied SMCV, but over a longer period of time than if Peru had permitted SMCV to apply the accelerated depreciation rates guaranteed by the Stability Agreement.

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<sup>678</sup> See **Ex. CE-232** SUNAT Assessment No. 012-003-0108051 (Income Tax for 2012) (26 November 2019); **CA-182**, Regulations for the Law Establishing GEM Legal Framework, Supreme Decree No. 173-2011-EF (29 September 2011), Art. 9 (classifying the GEM as an “expense” for income-tax purposes).

<sup>679</sup> See **Ex. CE-218**, SUNAT Resolution No. 012-180-0018640/SUNAT, GEM Q4 2011-Q3 2012 (4 March 2019).

<sup>680</sup> See, e.g., **Ex. CE-614**, SUNAT Result of Requirement of Information No. 0522110000184 (Income Tax for 2006) (6 May 2011), p. 13; **Ex. CE-626**, SUNAT Result of Requirement of Information No. 0522110000645. (Income Tax for 2007) (26 September 2011), p. 5; **Ex. CE-657**, SUNAT Result of Requirement of Information No. 0522120000978 (Income Tax 2008), pp. 13-14; **Ex. CE-675**, 29 Oct. 2014 SUNAT Result of Requirement of Information No. 0522140001454 (Income Tax for 2009) (9 July 2013), p. 20; **Ex. CE-677**, SUNAT Result of Requirement of Information No. 0522140001090 (Income Tax for 2010) (7 November 2014), p. 4; **Ex. CE-691**, SUNAT Result of Requirement of Information No. 0522160000581 (Income Tax for 2011) (27 July 2016), p. 6; **Ex. CE-228**, SUNAT Result of Requirement of Information No. 0122190001430 (Income Tax for 2012) (4 November 2019), p. 24; **Ex. CE-792**, SUNAT Result of Requirement of Information No. 0122200001120 (Income Tax for 2013) (4 December 2020), p. 15.

<sup>681</sup> Choque ¶¶ 22-24 and Appendix F Income Tax.

<sup>682</sup> See Choque ¶¶ 22-24 and Appendix F Income Tax.

<sup>683</sup> Choque ¶ 24.

<sup>684</sup> **Ex. CE-886**, 21 Dec. 2017 Amended Income Tax Return for 2012; **Ex. CE-887**, 27 Dec. 2018 Amended Income Tax Return for 2013; **Ex. CE-888**, 12 Nov. 2019 Amended Income Tax Return for 2012; **Ex. CE-889**, 15 Dec. 2020 Amended Income Tax Return for 2013.

277. For the 2007, 2008, 2012 and 2013 Income Tax Assessments, SUNAT also applied the non-stabilized regime to *all* the PTU deductions, without attempting to distinguish or distribute the PTU deductions between the leaching facility and the Concentrator.<sup>685</sup> For the 2009 and 2010 Income Tax Assessments, SUNAT applied the non-stabilized regime to some PTU deductions, but failed to explain how it chose the workers whose PTU it treated as non-stabilized.<sup>686</sup>

278. In total, the Income Tax Assessments amounted to US\$217,050,089 in tax and US\$228,476,617 in penalties and interest as of each assessment date.<sup>687</sup> SMCV requested reconsideration for the 2006-2012 assessments, all of which were denied except the request to reconsider the 2012 Income Tax Assessment, which SUNAT failed to rule on and which SMCV ultimately withdrew in February 2020, to avoid any suggestion of noncompliance with Article 10.18's waiver requirement.<sup>688</sup> SMCV challenged the 2006-2011 Income Tax Assessments before the Tax Tribunal. After the 2006 and 2007 Income Tax Assessment challenges had been pending for over six and five years, respectively, the Tax Tribunal confirmed both of them on 22 August 2018, relying again on Mr. Isasi's interpretation of the scope of the Stability Agreement.<sup>689</sup> After receiving no resolutions for over five years in the 2008 Income Tax Assessments case, for over four years in the 2009-2010 Income Tax Assessments case and for over a year in the 2011 Income Tax Assessments case, SMCV ultimately withdrew its stability-related claims in February 2020 to avoid any suggestion of noncompliance with Article 10.18's waiver requirement.<sup>690</sup>

279. The Income Tax Assessments also caused SMCV to incur additional liabilities under Peru's employee profit sharing (PTU) law.<sup>691</sup> The PTU law requires mining companies to contribute 8% of their taxable income for the benefit of employees.<sup>692</sup> The increase in SMCV's taxable income

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<sup>685</sup> See Choque ¶¶ 25-28 and Appendix F Income Tax.

<sup>686</sup> See Choque ¶¶ 25-28 and Appendix F Income Tax.

<sup>687</sup> See **Annex A**: Administrative Proceedings.

<sup>688</sup> See **Annex A**: Administrative Proceedings. SMCV did not withdraw certain income tax claims unrelated to the Government's interpretation of the Stability Agreement, which remained pending.

<sup>689</sup> See **Ex. CE-191**, Tax Tribunal Resolution No. 06367-2-2018 (Income Tax for 2006) (22 August 2018), pp. 25-26 (“[T]he benefits conferred through the stability agreements lie with the holder of the mining activity so as to promote the investment being developed through a concession or Economic Administrative Unit, such benefits apply exclusively to activities associated with the aforementioned investment, whose object is outlined in the Feasibility Study.”); **Ex. CE-192**, Tax Tribunal Resolution No. 06369-2-2018 (Income Tax for 2007) (22 August 2018), pp. 23-24 (“the benefits of the judicial stability are . . . clearly defined in the Feasibility Study . . . the investment subject to the stability agreement is related to the “Cerro Verde Leaching Project.””).

<sup>690</sup> See **Annex A**: Administrative Proceedings. SMCV did not withdraw certain income tax claims unrelated to the Government's interpretation of the Stability Agreement, which remained pending.

<sup>691</sup> See **CA-65**, Regulations on the Rights of Workers Participating in the Company Profit Sharing Program (PTU), Legislative Decree No. 892 (11 November 1996); **CA-70**, Regulations on the Application of the Rights of Workers in Private Enterprise Participating in a Company Profit Sharing Program, Regulations of the Legislative Decree No. 892 (6 August 1998).

<sup>692</sup> See **CA-65**, Regulations on the Rights of Workers Participating in the Company Profit Sharing Program (PTU), Legislative Decree No. 892 (11 November 1996), Art. 2.

resulting from the Income Tax Assessments resulted in a corresponding increase in SMCV's PTU liabilities of approximately US\$40.1 million.<sup>693</sup>

### 3. Additional Income Tax

280. SUNAT also issued assessments against SMCV for the 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 and did not apply to SMCV by virtue of the Stability Agreement because the AIT entered into force in June 2002. The AIT Assessments for 2007 and 2008 were issued at the same time as the GST Assessments for 2007-2008.<sup>694</sup> The AIT Assessments for 2009-2013 were issued at the same time as the Income Tax Assessments, and also relied on Mr. Isasi's interpretation that stability benefits are limited to the investments set forth in the 1996 Feasibility Study.<sup>695</sup> However, in practice SUNAT disregarded the Stability Agreement entirely, assessing AIT based on *all* of SMCV's expenses on the dubious grounds that distinguishing expenses related to the stabilized investment was impossible given that SMCV had not kept separate accountings.<sup>696</sup>

281. In total, the AIT Assessments amounted to US\$4,651,665 in tax and US\$3,815,334 in penalties and interest as of each assessment date.<sup>697</sup> With the exception of 2013 AIT Assessments, SMCV requested reconsideration for each of these assessments. SUNAT denied SMCV's reconsideration requests for the 2008-2011 AIT Assessments, which SMCV challenged before the Tax Tribunal.<sup>698</sup> After receiving no decisions in any of its challenges before the Tax Tribunal—one of which had been pending for almost seven years—or from SUNAT on its reconsideration request for the 2012 AIT Assessment, SMCV ultimately withdrew them in February 2020 to avoid any suggestion of noncompliance with Article 10.18's waiver requirement.<sup>699</sup>

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<sup>693</sup> See Expert Report of Pablo Spiller and Carla Chavich, ¶ 58.

<sup>694</sup> See **Annex A**: Administrative Proceedings.

<sup>695</sup> See **Annex A**: Administrative Proceedings.

<sup>696</sup> Compare **Ex. CE-131**, SUNAT Resolution No. 055-014-0002145 (Income Tax 2009)(23 June 2015), pp. 269-275; *id.* at pp. 353-358 (confirming the application of the AIT, noting that SMCV did not distinguish between stabilized and non-stabilized expenses); **Ex. CE-134**, SUNAT Resolution No. 0550140002255 (Income Tax for 2010) (4 November 2015), pp. 311-317 (confirming the application of the AIT and noting that distinguishing between stabilized and non-stabilized amounts was not possible because SMCV did not provide separate accounting); **Ex. CE-187**, SUNAT Resolution No. 0550140014311 (Income Tax for 2011) (10 August 2018), pp. 87-91 (confirming the application of the AIT and noting that SMCV did not provide separate accounting); **Ex. CE-281**, SUNAT Assessment No. 0120030114004 (28 December 2020), Annex I (applying an AIT on certain non-deductible expenses treated as presumed dividends) *with* Appendix F Income Tax.

<sup>697</sup> See **Annex A**: Administrative Proceedings.

<sup>698</sup> See **Annex A**: Administrative Proceedings.

<sup>699</sup> See **Annex A**: Administrative Proceedings. SMCV did not withdraw certain income tax claims unrelated to the Government's interpretation of the Stability Agreement, which remained pending.

#### 4. Temporary Tax on Net Assets

282. Beginning in December 2013, SUNAT also issued assessments against SMCV for the Temporary Tax on Net Assets (“TTNA,” and collectively, the “TTNA Assessments”).<sup>700</sup> 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 December 31 of the previous year, and did not apply to SMCV given that it entered into force in January 2005.<sup>701</sup> 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, reiterating the interpretation that stability guarantees applied only to the investment in the original leaching facilities.<sup>702</sup> SUNAT also imposed penalties for SMCV’s failure to file TTNA declarations.<sup>703</sup> Although it acknowledged that at least the leaching facilities were stabilized, SUNAT again effectively disregarded the Stability Agreement entirely, assessing the TTNA based on the *entirety* of SMCV’s net assets on the grounds that segregating the Concentrator assets was impossible.<sup>704</sup>

283. In total, the TTNA Assessments amounted to US\$31,166,966 in taxes and US\$19,192,547 in penalties and interest as of each assessment date.<sup>705</sup> 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 in December 2017 to avoid further penalties and interest.<sup>706</sup> SUNAT rejected the requests for reconsideration in the 2009-2010 TTNA Assessments,

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<sup>700</sup> See **Ex. CE-103**, SUNAT Assessment No. 052-003-0011208 (TTNA for 2009) (27 December 2013).

<sup>701</sup> See **CA-112**, Temporary Tax on Net Assets Law, Law No. 28424 (21 December 2004), Art. 1 (“The tax applies to net assets as of December 31st of the previous year. The obligation originates as of January 1st of each fiscal year.”); *id.* at Art. 11 (“The Tax shall take effect as of January 1, 2005. . . .”); **CA-134**, Legislative Decree No. 976, Establishing a Gradual Reduction of the Temporary Tax on Net Assets (14 March 2007) (setting tax rates).

<sup>702</sup> See **Annex A**: Administrative Proceedings.

<sup>703</sup> See **Ex. CE-104**, SUNAT Fine Resolution No. 052-002-0006004 (TTNA 2009) (27 December 2013); **Ex. CE-113**, SUNAT Resolution No. 055-014-0001946 (TTNA 2009) (27 August 2014), p. 90 (confirming Fine Resolution No. 052-002-0006004 for failure to file required TTNA declarations); **Ex. CE-133**, SUNAT Fine Resolution No. 002-002-0006448 (TTNA 2010) (14 August 2015); **Ex. CE-140**, SUNAT Resolution No. 055-014-0002356 (TTNA 2010) (29 February 2016), p. 94 (confirming SUNAT Fine Resolution No. 002-002-0006448, same); **Ex. CE-148**, SUNAT Fine Resolution No. 052-002-0006693 (TTNA 2011) (27 July 2016); **Ex. CE-156**, SUNAT Fine Resolution No. 011-002-0022011 (TTNA 2013) (26 September 2017); **Ex. CE-724**, SUNAT Resolution No. 0150150014218 (TTNA 2013) (28 June 2018), pp. 5-6 (confirming SUNAT Fine Resolution No. 011-002-0022011, same).

<sup>704</sup> See **Ex. CE-113**, SUNAT Resolution No. 055-014-0001946, (TTNA for 2009) (27 August 2014), p. 81 (finding that distinguishing between stabilized and unstabilized assets is not possible because SMCV had not kept separate accountings); **Ex. CE-140**, SUNAT Resolution No. 055-014-0002356 (TTNA 2010) (29 February 2016), p. 84 (requiring separate accountings in order to distinguish between TTNA application).

<sup>705</sup> See **Annex A**: Administrative Proceedings.

<sup>706</sup> See **Ex. CE-162**, SMCV, Tax Return for Temporary Taxes on Net Assets and Payment Receipt (21 December 2017).

which SMCV challenged before the Tax Tribunal.<sup>707</sup> After SUNAT failed to issue a decision on SMCV's reconsideration request for the 2011 TTNA Assessments for nine months, SMCV also challenged the 2011 TTNA Assessments before the Tax Tribunal.<sup>708</sup> The Tax Tribunal confirmed the fine that SUNAT imposed in the 2013 TTNA Assessments, but it failed to rule on any other challenge, some of which remained pending for over *five years*.<sup>709</sup> To avoid any suggestion of noncompliance with Article 10.18's waiver requirement, SMCV ultimately withdrew its stability-related claims in February 2020 for the 2009-2011 TTNA Assessments before the Tax Tribunal issued a decision, as well as its request for reconsideration before SUNAT for the 2013 TTNA Assessments.<sup>710</sup>

## 5. Special Mining Tax and Complementary Mining Pension Fund

284. In December 2017, SUNAT also began assessing the new taxes that had been created in tandem with the 2011 Royalty Law, and thus should not have applied to SMCV until the end of 2013 under the Stability Agreement. In particular, on 29 December 2017 and 28 September 2018, SUNAT issued assessments against SMCV for, respectively, the fourth quarter of 2011 through the fourth quarter of 2012, and each quarter of 2013, for the SMT (collectively, the "SMT Assessments").<sup>711</sup> Like royalties under the 2011 Royalty Regime, SUNAT calculated the SMT based on the operating profit it attributed to the Concentrator at the respective marginal rate, which for SMT ranges from 2% to 8.40%.<sup>712</sup> SUNAT also imposed penalties for SMCV's failure to file SMT declarations.<sup>713</sup>

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<sup>707</sup> See **Annex A**: Administrative Proceedings.

<sup>708</sup> **Ex. CE-695**, SMCV, Challenge to Tax Tribunal (TTNA for 2011) (27 June 2017).

<sup>709</sup> See **Ex. CE-780**, SMCV, Withdrawal of Challenge to Tax Tribunal (TTNA for 2009) (25 February 2020) (noting that challenge was pending since 6 Oct. 2014); **Ex. CE-743**, Tax Tribunal, Resolution No. 10372-9-2018 (TTNA Fines for 2013) (14 December 2018).

<sup>710</sup> See **Annex A**: Administrative Proceedings. SMCV did not withdraw certain income tax claims unrelated to the Government's interpretation of the Stability Agreement, which remained pending.

<sup>711</sup> See **Ex. CE-700**, SUNAT Assessments No. 012-003-0092658 and 012-003-0092961 to 012-003-0092964 (SMT for 4Q 2011-2012) (29 December 2017); **Ex. CE-195**, SUNAT Assessment No. 012-003-0099078 to 012-003-0099081 (SMT for 2013) (28 September 2018).

<sup>712</sup> See **CA-180**, Creating the Special Mining Tax, Law No. 29789 (28 September 2011), Art. 4.2; *id.*, Annex (listing a progressive scale for SMT rates, ranging from 2 to 8.4%).

<sup>713</sup> See **Ex. CE-168**, SUNAT Fine Resolution No. 012-002-0031072 (SMT 4Q 2011) (29 December 2017), Annex 1; **Ex. CE-169**, SUNAT Fine Resolution No. 012-002-0031093 (SMT 1Q 2012) (29 December 2017), Annex 1; **Ex. CE-170**, SUNAT Fine Resolution No. 012-002-0031094 (SMT 2Q 2012) (29 December 2017), Annex 1; **Ex. CE-171**, SUNAT Fine Resolution No. 012-002-0031095 (SMT 3Q 2012) (29 December 2017), Annex 1; **Ex. CE-172**, SUNAT Fine Resolution No. 012-002-0031096 (SMT 4Q 2012) (29 December 2017), Annex 1; **Ex. CE-198**, SUNAT Resolution No. 0150140014441 (SMT 4Q 2011-4Q 2012) (12 October 2018), pp. 39-40 (confirming SUNAT Fine Resolution Nos. 012-002-0031702, 012-002-0031093 to 012-002-0031096 for failures to file SMT declarations); **CE-197**, SUNAT Fine Resolutions No. 012-002-0031706 to No. 012-002-0031709 (SMT 2013) (28 September 2018), Annex 1; **Ex. CE-221**, SUNAT Resolution No. 015014001485 (SMT 2013) (28 May 2019), pp. 38-39 (confirming SUNAT Fine Resolution Nos. 012-002-0031706 to 012-002-0031709 for failures to file SMT declarations).

285. 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 employees’ monthly gross compensation and 0.5% of mining companies’ annual pre-tax income.<sup>714</sup> SUNAT calculated the CMPF Assessment on SMCV’s entire gross income, again arbitrarily taking the position that trying to distinguish which part of the gross income was related to stabilized investments was impossible given that SMCV had not kept separate accountings—even though SUNAT itself had already calculated the Concentrator’s profit when issuing the Q4 2011–2013 Royalty Assessments and the SMT Assessments.<sup>715</sup>

286. In total, the SMT Assessments amounted to US\$61,092,613 in taxes and US\$46,344,574 in penalties and interest as of each assessment date, and the CMPF Assessment to US\$3,792,301 in taxes and US\$3,146,092 in penalties and interest as of the assessment date.<sup>716</sup> SMCV submitted requests for reconsideration for the Q4 2011-2012 and 2013 SMT Assessments, both of which SUNAT rejected.<sup>717</sup> SMCV also challenged the Q4 2011-2012 SMT Assessments before the Tax Tribunal, which upheld SUNAT’s Assessments.<sup>718</sup> SMCV also submitted a request for reconsideration for the 2013 CMPF Assessment, which SMCV eventually withdrew in February 2020 when Freeport filed its notice of arbitration.<sup>719</sup>

287. 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.<sup>720</sup> On 1 July 2019 and 16 August 2019, SUNAT approved SMCV’s deferral and installment plans.<sup>721</sup> On 18 August 2020, SMCV agreed with SUNAT to defer and combine the two deferral and installment plans into a single plan under a more lenient regime known as the RAF regime (*regimen de*

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<sup>714</sup> See **Ex. CE-237**, SUNAT Assessment No. 0120030109172 (CMPF for 2013) (20 December 2019).

<sup>715</sup> Compare **Ex. CE-771**, 18 Dec. 2019 SUNAT Result of Requirement No. 0122190002553 (CMPF for 2013) (19 December 2019), p. 37 with **Ex. CE-195**, SUNAT Assessment No. 012-003-0099082, 2013 Royalty Assessments (28 September 2018), Annex 3, p. 4 (showing a calculation for the Concentrator’s profit).

<sup>716</sup> See **Annex A**: Administrative Proceedings.

<sup>717</sup> See **Ex. CE-198**, SUNAT Resolution No. 0150140014441 (SMT for 4Q 2011-2012) (12 October 2018); **Ex. CE-221**, SUNAT, Resolution No. 015014001485 (SMT for 2013) (28 May 2019) (notified to SMCV 29 May 2019).

<sup>718</sup> **Ex. CE-198**, Tax Tribunal, Resolution No. 05634-4-2019 (SMT for Q4 2011-2012) (20 June 2019) (notified to SMCV 30 July 2019).

<sup>719</sup> See **Ex. CE-254**, SMCV Withdrawal of Request for Reconsideration (CMPF 2013) (27 February 2018).

<sup>720</sup> **Ex. CE-759**, SMCV Request Under Protest to Enter Into Deferral and Installment Plans (SMT for 2013) (25 June 2019); **Ex. CE-764**, SMCV Request Under Protest to Enter Into Deferral and Installment Plans (SMT for Q4 2011-12) (13 August 2019).

<sup>721</sup> **Ex. CE-760**, SUNAT Approval of SMCV’s Deferral and Installment Plans (SMT for 2013) (1 July 2019); **Ex. CE-765**, SUNAT Approval of SMCV’s Deferral and Installment Plans (SMT for Q4 2011-12) (16 August 2019).

*aplazamiento y fraccionamiento*).<sup>722</sup> On 13 August 2021, under protest, SMCV made a payment equal to US\$65,156,246 to pay off the outstanding balance under the RAF Plan.<sup>723</sup>

## **R. FREEPORT FILED FOR ARBITRATION**

288. On 26 November 2019, Freeport submitted a Notice of Intent advising Peru that a dispute had arisen concerning Freeport's investment.<sup>724</sup> Freeport and SMCV also made significant efforts to resolve the dispute amicably, including through consultations with the Government and with Peru's Special Commission that Represents Peru in International Investment Disputes.<sup>725</sup> When these efforts were unable to resolve the dispute amicably, Freeport filed its Notice of Arbitration on 28 February 2020.<sup>726</sup>

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<sup>722</sup> **Ex. CE-786**, 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).

<sup>723</sup> *See Ex. CE-838*, SMT RAF Payments, February 2021 to August 2021.

<sup>724</sup> *See Ex. CE-271*, Claimants' Notice of Intent to Commence Arbitration under the United States-Peru Trade Agreement (27 November 2019).

<sup>725</sup> *See Ex. CE-273*, Letter from Freeport and SMCV to the Peruvian Special Commission that Represents Peru in International Investment Disputes re: Notice of Intent (12 February 2020).

<sup>726</sup> Request for Arbitration, 30 April 2020.

## IV. LIABILITY

### A. PERU BREACHED THE STABILITY AGREEMENT

289. Peru breached the Stability Agreement each time the Royalty and Tax Assessments premised on Peru's novel and restrictive interpretation of the Agreement became final and enforceable against SMCV. Article 10.16.1(b)(i)(C) of the TPA permits Freeport to bring claims before the Tribunal for these breaches on SMCV's behalf, since the Stability Agreement is an "investment agreement" as defined by the TPA.

#### 1. The Stability Agreement is an Investment Agreement for which Freeport May Bring Claims under Article 10.16 of the TPA

290. Article 10.16.1(b) of the TPA provides that a claimant, "on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly," may submit to the arbitration "a claim that the respondent has breached . . . an *investment agreement*," and that "the enterprise has incurred loss or damage by reason of, or arising out of, that breach," as long as "the subject matter of the claim and the claimed damages directly relate to the covered investment that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement."<sup>727</sup>

291. Article 10.28 defines "investment agreement" as, among others:

*"a written agreement between a national authority of a Party and a covered investment or an investor of another Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor . . . with respect to natural resources that a national authority controls, such as for their exploration, extraction, refining, transportation, distribution, or sale."*<sup>728</sup>

292. Footnote 16 to Article 10.28 further clarifies that

'[w]ritten agreement' refers to an agreement in writing, executed by both parties, whether in a single instrument or in multiple instruments, that creates an exchange of rights and obligations, binding on both parties under the law applicable under Article 10.22.2.<sup>729</sup>

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<sup>727</sup> CA-10, TPA, Article 10.16.1(b) (emphasis added).

<sup>728</sup> CA-10, TPA, Article 10.28 (emphasis added).

<sup>729</sup> CA-10, TPA, Article 10.28, n. 16; *see also id.* ("For greater certainty, (a) a unilateral act of an administrative or judicial authority, such as a permit, license, or authorization issued by a Party solely in its regulatory capacity, or a decree, order, or judgment, standing alone; and (b) an administrative or judicial consent decree or order, shall not be considered a written agreement.").

293. Annex 10-H carves out two *specific* types of legal stability agreements from the definition of “investment agreement,” confirming that mining stability agreements *generally* qualify as “investment agreements” under Article 10.28. In particular, Annex 10-H states in relevant part that:

Pursuant to *Legislative Decrees 662 and 757*, Peru may enter into agreements known as “stability agreements” with covered investments or investors of another Party. . . . Appendices 10-H.A and 10-H.B set forth, respectively, an illustration of a stability agreement with a covered investment and an illustration of a stability agreement with an investor . . . . Where a stability agreement is *materially identical* to the illustration set forth in Appendix 10-H.A or 10-H.B, and *does not constitute one of multiple instruments that make up an ‘investment agreement,’* as defined in Article 10.28, a breach of such a stability agreement by Peru shall not constitute a breach of an investment agreement.<sup>730</sup>

294. The Stability Agreement satisfies the plain terms of these definitions, and Freeport is thus entitled to bring claims on SMCV’s behalf based on Peru’s breaches of the Stability Agreement.

295. *First*, the Stability Agreement was a “written agreement between a national authority of a Party and a covered investment or an investor of another Party”:

- (a) The Stability Agreement was an “agreement in writing” executed between then-Minister of Energy and Mines Daniel Hokama Tokashiki, acting “in the name and on behalf of the Peruvian State” and SMCV, a covered investment of Freeport.<sup>731</sup>
- (b) The Stability Agreement created an “exchange of rights and obligations.” It provided SMCV, among others, with rights to tax and administrative stability in exchange for SMCV’s qualifying minimum investment commitment to Cerro Verde.<sup>732</sup>
- (c) The Stability Agreement was binding on both parties under Peruvian law.<sup>733</sup>

296. *Second*, the Stability Agreement granted rights “with respect to natural resources that a national authority controls.” The term “with respect to” is broad, and the TPA’s non-exclusive list of examples of relevant rights meeting this definition includes rights to the “exploration, extraction, refining, transportation, distribution, or sale” of natural resources.<sup>734</sup> The Stability Agreement, which was executed pursuant to Article 82 of the Mining Law, granted SMCV stability guarantees “with respect to” *all* of its activities within the Mining and Beneficiation Concessions relating to “natural

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<sup>730</sup> CA-10, TPA, Chapter 10, Annex 10-H (emphasis added).

<sup>731</sup> See Ex. CE-12, 1998 Stability Agreement, p. 3.

<sup>732</sup> See e.g., Ex. CE-12, 1998 Stability Agreement, Clauses 1, 9.4, 9.5, 9.6, 10.1.

<sup>733</sup> See Ex. CE-12, 1998 Stability Agreement, Clause 17 (“This contract will become effective on the date when it is executed by the parties, without prejudice to its execution in the form of a public deed and registration in the Public Mining Registry”); *id.* at pp. 32-33 (signatures executing the agreement).

<sup>734</sup> CA-10, TPA, Article 10.28.

resources” in accordance with the Mining Law, and specifically references benefits directly related to, among others, exploitation, sale, and refining.<sup>735</sup> The Mining Law confirms that the Stability Agreement grants rights with respect to all “mining activities,” including “exploration, exploitation, [and] beneficiation.”<sup>736</sup> Peru also “controls” the mineral resources at issue, as the preamble to the Mining Law makes clear.<sup>737</sup>

297. *Third*, Freeport, through its predecessors in interest, “relied” on the Stability Agreement when “establishing or acquiring” its covered investment in SMCV and its covered investments in the Cerro Verde Mining Unit, including the investment to construct the Concentrator. SMCV similarly “relied” on the Stability Agreement when “establishing or acquiring” covered investments in the Cerro Verde Mining Unit, including the investment to construct the Concentrator. In particular:

- (a) Cyprus initially acquired SMCV in reliance on Peru’s guarantees of stability, which pursuant to the terms of the Share Purchase Agreement and the Guaranty Agreement would be set out in, among others, future mining stability agreements.<sup>738</sup>
- (b) Mr. Morán testifies that when Phelps Dodge assessed SMCV in connection with its acquisition of Cyprus, Phelps Dodge “believed that SMCV’s stability regime was critically important.”<sup>739</sup> In particular, Mr. Morán explains that “[b]ecause of Peru’s economic and political turmoil, the possibility of enjoying stability was essential for our operations,” and that given low copper prices at the time, “any additional taxes or charges could have jeopardized any additional investments that Phelps Dodge sought

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<sup>735</sup> Compare **CA-10**, TPA, Article 10.28 with **Ex. CE-12**, 1998 Stability Agreement, Clauses 9.1 (providing guarantees for “free availability in the export and internal sales by the owner of its mineral products”); Clause 9.3 (providing stabilized depreciation rate for fixed assets); Clause 9.5 (providing stabilized fiscal treatment, including customs duties), 9.6, 10.1; Clause 1.3 (referencing feasibility study for the processing of “the copper mineral in the facilities of Cerro Verde”); Clause 3 (describing the “mining rights” that are the subject of the agreement).

<sup>736</sup> See **CA-1**, General Mining Law, Chapter III (titled “Other Mining Activities”); Article 7 (“[E]xploration, exploitation, beneficiation, general work and mining transport activities are carried out by national or foreign natural and legal persons through the concession system.”).

<sup>737</sup> See **CA-1**, General Mining Law, Preamble, II (“All mineral resources belong to the State, whose property is inalienable and imprescriptible. The State evaluates and preserves natural resources, having to develop a basic information system for the promotion of investment; regulate the mining activity nationally; and oversee that activity according to the basic principle of administrative simplification. The exploitation of mineral resources is carried out through State and private enterprises, by the use of the system of concessions.”).

<sup>738</sup> See *supra* §III.D.1; **Ex. CE-4**, Share Purchase Agreement Between Cyprus Climax Metals Company and Empresa Minera del Peru S.A. (17 March 1994) (“Share Purchase Agreement”), Article 3.1(g) (containing Peru’s commitment to grant a mining stability agreement pursuant to Articles 78 and 79 of the Mining Law); **Ex. CE-341**, Guarantee of the Republic of Peru in Favor of Cyprus Climax Metals (17 March 1994), Art. 1.6 (Peru guaranteeing the execution of “any” mining stability agreement related to SMCV’s “business and operations” that SMCV qualified for).

<sup>739</sup> Morán ¶ 14.

to undertake.”<sup>740</sup> Mr. Morán also explains that, “[f]or this reason, the technical team reviewed the stability agreements that SMCV had signed—in particular, the [Stability Agreement]—and assigned great importance to that Agreement in determining the company’s future plans.”<sup>741</sup>

- (c) Mr. Morán also testifies that Phelps Dodge’s Board ultimately “based its approval” to invest in the Concentrator “on the Finance Committee’s recommendation, as well as the 2004 Feasibility Study and its update which . . . reflected our understanding that the Stability Agreement’s guarantees would apply to the Concentrator (an understanding that the Peruvian authorities had confirmed to SMCV representatives).”<sup>742</sup>
- (d) Mr. Davenport testifies that “[g]uarantees of tax and administrative stability were a prerequisite for Phelps Dodge to invest in large-scale mining investment in developing economies such as Peru.”<sup>743</sup> He thus explains that the Stability Agreement was “of paramount importance to Phelps Dodge” in considering the Concentrator investment.<sup>744</sup> He further testifies that “[i]n approving the investment, Phelps Dodge’s and SMCV’s Boards of Directors relied on financial projections that assumed the Stability Agreement’s guarantees would apply to the concentrator, consistent with Ms. Chappuis’s advice to SMCV.”<sup>745</sup>
- (e) Ms. Torreblanca testifies that SMCV’s Board conditionally approved the Concentrator on the understanding that it would be entitled to the stabilized regime, subject to, among others, “approval of SMCV’s request to expand the Beneficiation Concession.”<sup>746</sup> She testifies that once MINEM granted approval only weeks later, “[SMCV] understood that this MINEM resolution confirmed that the Stability Agreement would cover the Concentrator, just like all other investments that SMCV had made in the Cerro Verde Mining Unit after completing the investment program contained in the 1996 Feasibility Study.”<sup>747</sup>
- (f) The 2004 Feasibility Study, and its September 2004 update, similarly demonstrate that Phelps Dodge and SMCV relied on the Stability Agreement in relation to the

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<sup>740</sup> Morán ¶ 14.

<sup>741</sup> Morán ¶ 14.

<sup>742</sup> Morán ¶ 29.

<sup>743</sup> Davenport ¶ 30.

<sup>744</sup> Davenport ¶ 30.

<sup>745</sup> Davenport ¶ 40.

<sup>746</sup> Torreblanca ¶ 27.

<sup>747</sup> Torreblanca ¶ 27.

Concentrator investment, as both the Study and the update explicitly assumed that SMCV would be entitled to rely on the stabilized regime through December 31, 2013.<sup>748</sup>

298. *Fourth*, the Stability Agreement does not fall within Annex 10-H's narrow carve-out of two *specific* types of stability agreements from the definition of "investment agreement." By its plain terms, Annex 10-H excludes so-called "legal stability agreements" entered into under Legislative Decrees 662 and 757 that (i) are "materially identical" to the examples set out in Appendices 10-H.A and 10-H.B of the TPA, and (ii) do not constitute one of multiple agreements making up an "investment agreement." The Stability Agreement is not a legal stability agreement under Legislative Decrees 662 and 757 and is not "materially identical" to the sample legal stability agreements included in Appendices 10-H.A and 10-H.B. Instead, the Stability Agreement was executed pursuant to Article 82 of the Mining Law and MINEM's model agreement incorporating all guarantees set forth in Title Nine of the Mining Law.<sup>749</sup> Those guarantees included "tax, currency exchange, and *administrative stability*" for a 15-year period, whereas legal stability agreements granted only income tax and in some cases currency exchange stability for ten years.<sup>750</sup> Other material differences between legal stability agreements and mining stability agreements concerned the requirements to enter into these agreements—for instance, to enter into the Stability Agreement, SMCV had to prepare a feasibility study and submit it for MINEM's approval, a requirement that did not apply to legal stability agreements as the Government offered them "to all investors regardless of the sector in which they invested."<sup>751</sup>

299. *Finally*, the "subject matter of the claim[s] and the claimed damages" "directly relate" to Freeport's covered investments in SMCV and the Cerro Verde Mining Unit made in reliance on the Stability Agreement.<sup>752</sup> The subject matter of Freeport's claims is Peru's breaches of the Stability Agreement arising from its novel interpretation restricting stability guarantees to the Feasibility Study's investment program instead of granting them to SMCV for all investments in the Cerro Verde Mining Unit. Relying on this novel interpretation, Peru repeatedly refused to apply stability guarantees and the stabilized regime under the Stability Agreement to the Concentrator, a covered investment that SMCV and Freeport's predecessors made in reliance on the Stability Agreement. The

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<sup>748</sup> See *supra* §III.F.1 (citing **Ex. CE-20**, Fluor Canada Ltd., Feasibility Study: Cerro Verde Primary Sulfide Project (May 2004), Vol. IV, pp. 14-16); §III.F.4 (citing **Ex. CE-459**, Fluor, SMCV Primary Sulfide Project Feasibility Study Project Update (September 2004), p. 48).

<sup>749</sup> See *e.g.*, **Ex. CE-778**, Model Stability Agreement, Supreme Decree No. 04-94-EM (3 February 1994) (Model Agreement for fifteen-year stability agreement "granting the Regime of Guarantees and Investment Promotion Measures, provided for in the Ninth Title [of the General Mining Law]").

<sup>750</sup> Compare **CA-1**, Mining Law, Articles 72, 82 with **Ex. CE-304**, L.D. 662, Article 15; see also Vega ¶ 55.

<sup>751</sup> Compare **CA-1**, Mining Law, Article 85 with **CA-304**, L.D. 662, Articles 10, 11 and **CA-306**, L.D. 757, Article 41; see also Vega ¶ 56.

<sup>752</sup> **CA-10**, TPA, Art. 10.16.1(b).

claimed damages result from those breaches. Freeport is thus entitled to bring claims based on Peru's breaches of the Stability Agreement pursuant to Article 10.16.1(b) of the TPA.

**2. Peru Breached the Stability Agreement Each Time it Denied Stability Guarantees on the Basis of its Novel Interpretation**

300. Peru repeatedly breached its obligations under the Stability Agreement to grant stability guarantees to the entire Cerro Verde Mining Unit because:

- (i) Under the Mining Law and Regulations, stability guarantees applied to the entire mining unit or concessions in which the investor made its qualifying minimum investment;
- (ii) The Stability Agreement required Peru to apply the stabilized regime to the entire Cerro Verde Mining Unit, including the Concentrator; and
- (iii) Peru's novel interpretation limiting stability guarantees only to the investment program included in the Feasibility Study is entirely unsupported by the plain terms of the Mining Law and Regulations and the Stability Agreement itself, flies in the face of the Government's own practice, and undermines basic purposes of stability guarantees in the first place.

**i. Under the Mining Law and Regulations, Stability Guarantees Applied to the Entire Mining Unit or Concession(s) in Which the Investor Made its Qualifying Minimum Investment**

301. 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. This is also the only reasonable interpretation in light of the Mining Law's purpose, because stability guarantees must apply to the entire mining unit or concession to encourage significant and continuing mining investments—as the Mining Law's drafters clearly understood. Accordingly, until it adopted its novel and restrictive interpretation of the Mining Law in relation to Cerro Verde, the Government applied stability guarantees on the basis of a mining unit or concession.

**a. The Mining Law and Regulations Granted Stability Guarantees to the Entire Mining Unit or Concession(s)**

302. Under the version of the Mining Law and Regulations in force until 2014, the Government granted stability to investors for the *entire mining unit or concession(s)* in which the qualifying minimum investment was made, without distinguishing whether the investments were included in the investment program in the feasibility study, different processing methods were used within the mining unit, or otherwise. The plain text of both the Mining Law and Regulations made this clear.

## 1. The Mining Law

303. Under the plain terms of the Mining Law, the substantive guarantees of tax and administrative stability applied to an entire mining unit or concession(s). In particular:

- (a) Article 82 of the Mining Law—which established an investor’s entitlement to tax stability for a period of 15 years—provided that:

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.<sup>753</sup>

This provision thus explicitly 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[.]” The second sentence of Article 82 then defined “Economic-Administrative Unit” as follows:

For the purposes of the [stability] agreement . . . , 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. . . .<sup>754</sup>

Thus for the purpose of stability guarantees, the “Economic-Administrative Unit” explicitly included not only the mining concessions, but also the processing facilities and other assets that constitute a “single production unit.”

- (b) Article 83 provided that only investors who submitted an investment program meeting the qualifying minimum amount (US\$50 million for existing mining companies and US\$20 million for the start of mining activities) had the right to enter into a stability agreement. It further provided that the “effect of the contractual benefit shall apply exclusively to the *activities of the mining company* in whose favor

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<sup>753</sup> CA-1, Mining Law, Art. 82 (emphasis added).

<sup>754</sup> CA-1, Mining Law, Art. 82 (emphasis added); *see also id.* Art. 44 (stating that an Economic Administrative Unit is a “grouping of concessions” “of the same class and nature” that are proximate to one another).

the investment is made.”<sup>755</sup> By its plain text, Article 83 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 of the Mining Law, mining activities broadly included “exploration, exploitation, beneficiation, general work, and mining transport” that are “carried out . . . through the concession system.”<sup>756</sup> The stability guarantees thus applied to *all* mining activities within the mining unit or concession that were the subject of the new investment.

- (c) Article 80 granted “tax stability” and other benefits to the “*mining activity titleholder*” that entered into a 10- or 15-year stability agreement under Articles 78 or 82.<sup>757</sup> It thus made clear that those benefits derived from the investor’s relevant mining titles—in other words, the concession or concessions that made up the mining unit.
- (d) Article 84 similarly granted additional guarantees to the “*mining activity titleholder*” that entered into a 15-year stability agreement, including increased depreciation rates and the right to “keep accounting in U.S. dollars.”<sup>758</sup>
- (e) Article 72, which set out the “basic benefits” contained within the stability framework for both 10- and 15-year stability agreements, similarly characterized those benefits as granted to the “*titleholders*” of “*mining activity*.”<sup>759</sup>

## 2. The Mining Regulations

304. The Regulations in force during SMCV’s stability period similarly confirmed that stability guarantees applied to an entire mining unit or concession. In particular:

- (a) Echoing Article 83 of the Mining Law, Article 1 provided that stability guarantees are granted to “mining activity titleholders” “for the performance of their activities.”<sup>760</sup>
- (b) Article 2 provided that stability guarantees “shall apply as of right to all mining activity titleholders”—a term defined as persons or entities “that perform mining activities *in a concession or in concessions grouped in an Economic Administrative Unit*, as titleholders or assignees”—so long as they “enter[ed] into a stability

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<sup>755</sup> CA-1, Mining Law, Art. 83 (emphasis added); *see also* Chappuis ¶ 21.

<sup>756</sup> CA-1, Mining Law, Art. 7.

<sup>757</sup> CA-1, Mining Law, Art. 80 (emphasis added); *see also id.* Art. 84 (incorporating by reference benefits contained in Article 80 for fifteen-year stability agreements).

<sup>758</sup> CA-1, Mining Law, Art. 84 (emphasis added).

<sup>759</sup> CA-1, Mining Law, Art. 72 (emphasis added).

<sup>760</sup> CA-2, Regulations, Art. 1.

agreement under Articles 78 and 82.”<sup>761</sup> Article 2 then expressly confirmed that stability guarantees applied on the basis of a “concession or unit,” providing that

[w]hen the natural or legal person is the titleholder of several concessions or Economic-Administrative Units, the qualification [for stability] will only take effect *for those concessions or units* that are supported by . . . the [stability] agreement referred to in this Article.<sup>762</sup>

- (c) Article 18 of the Regulations, which included the information that titleholders must submit to “avail themselves of the provisions” of the Mining Law, confirmed that the subject of an application to execute a mining stability agreement was specific *mining rights*—*i.e.*, concessions.<sup>763</sup> In particular, Article 18 required titleholders to submit the “[n]ame of the *mining rights* set out in the application, indicating their geographic location, number of hectares, and their registrations in the corresponding Book of the Public Registry of Mining.”<sup>764</sup>
- (d) Article 22 of the Regulations provided that 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.<sup>765</sup> Article 22 also provided specific instructions for mining companies that have multiple concessions or EAUs that may have been subject to different stabilized (or non-stabilized) fiscal regimes, noting that, “[t]o 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.”<sup>766</sup> By contrast, nothing in the Mining Law or Regulations contemplated that a mining company might apply multiple fiscal regimes *within* a single mining unit or concession.
- (e) Article 25 of the Regulations also 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*.”<sup>767</sup> In such

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<sup>761</sup> CA-2, Regulations, Art. 2 (emphasis added).

<sup>762</sup> CA-2, Regulations, Art. 2 (emphasis added).

<sup>763</sup> CA-2, Regulations, Art. 18; *see also* Vega ¶45.

<sup>764</sup> CA-2, Regulations, Art. 18(b) (emphasis added).

<sup>765</sup> CA-2, Regulations, Art. 22 (emphasis added).

<sup>766</sup> CA-2, Regulations, Art. 22 (emphasis added).

<sup>767</sup> CA-2, Regulations, Art. 25 (emphasis added).

cases, Article 25 required that the mining company “make available to the Tax Administration the annexes that demonstrate the application of the tax regime granted to the aforementioned expansions or new investments.”<sup>768</sup> Article 25 thus reinforced Article 22’s confirmation that stability guarantees were granted to investors for all investments made “in the concessions or Economic-Administrative Units.”<sup>769</sup>

**b. The Mining Law’s Drafters Confirm that the Mining Law Granted Stability Guarantees to the Entire Mining Unit or Concession**

305. The Mining Law’s drafters confirm that its provisions were intended to convey stability guarantees to the entire mining unit or concession in which an investor made its qualifying minimum investment.

306. Ms. Chappuis—who, at the direction of Minister Sánchez Albavera, co-drafted the above 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.”<sup>770</sup> In particular:

- (a) Ms. Chappuis testifies that she always understood the definition of “economic administrative unit” in Article 82 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.”<sup>771</sup>
- (b) Ms. Chappuis further testifies that she and her colleague “carefully drafted” Article 83 taking into account “[Article 82’s] broad definition of ‘economic administrative unit’ and that they deliberately added the language that the “effect of the contractual benefit shall apply exclusively to the *activities of the mining company* in whose favor the investment is made” without placing any “limitation on the mining company’s ‘activities’—in both mining and beneficiation concessions—that could receive the ‘contractual benefit’ based on processing method, ore type, or any other factor.”<sup>772</sup> They also wanted to clarify that “stability would benefit only the

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<sup>768</sup> CA-2, Regulations, Art. 25.

<sup>769</sup> CA-2, Regulations, Art. 22; *see also* Vega ¶ 46 (explaining that Art. 22 “[t]ellingly . . . did not provide that mining companies must keep independent accounts and statements to distinguish between stabilized and non-stabilized investments *within* a concession or EAU,” ultimately concluding that it “similarly confirmed that stability benefits applied to concessions or EAUs”).

<sup>770</sup> Chappuis ¶ 45-46.

<sup>771</sup> Chappuis ¶ 28.

<sup>772</sup> Chappuis ¶ 21.

concession or mining unit that was the target of the qualifying minimum investment, to the exclusion of other mining units.”<sup>773</sup>

307. Ms. Vega—who at the request of MINEM and the Mining Society personally consolidated L.D. 708 into the Mining Law, in close consultation with senior Ministry officials—likewise explains that the Mining Law provisions referenced above, “alone and taken together, made clear that stability benefits extended broadly to all investments that a mining company made within the concessions or unit covered by its stability agreement during the 10 or 15 years it is in force.”<sup>774</sup>

In particular:

- (a) Ms. Vega 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).”<sup>775</sup> She goes on to explain that “the 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.”<sup>776</sup>
- (b) Ms. Vega explains that Article 83 “clarifi[ed] . . . the scope of stability guarantees” and “confirmed that they were broad.”<sup>777</sup> As she further explains, in line with Ms. Chappuis, Article 83’s purpose “was to ensure that stability guarantees would extend only to the mining unit benefitting from the company’s minimum investment.”<sup>778</sup> She also explains that, if a mining company performed all activities within a *single* mining unit, “the limitation in Article 83 would not arise” because “the stability guarantees would cover [the mining unit] entirely.”<sup>779</sup>
- (c) Ms. Vega likewise notes that the “*activities* regarding the mining industry” referenced in Article 83 are broadly defined in both the preamble and Article 7, which make clear that the relevant “activities” are those carried out “through the *concession* system.”<sup>780</sup> These affirm the conclusion that stability under Article 83 extends broadly to the concession or mining unit.

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<sup>773</sup> Chappuis ¶ 21.

<sup>774</sup> Vega ¶ 34.

<sup>775</sup> Vega ¶ 36 (quoting CA-1, Mining Law, Art. 82) (emphasis original).

<sup>776</sup> Vega ¶ 38.

<sup>777</sup> See Vega ¶ 39.

<sup>778</sup> See Vega ¶ 39.

<sup>779</sup> See Vega ¶ 39.

<sup>780</sup> See Vega ¶ 40 (citing CA-1, Mining Law, Art. 7 (“The exploration, exploitation, beneficiation, general work and mining transport activities are carried out by national or foreign natural and legal persons through the concession system.”)).

**c. To Achieve Their Intended Purpose, Stability Guarantees Must Extend to an Entire Mining Unit**

308. The Mining Law and Regulations also must be interpreted as having applied stability guarantees to *all* investments that a mining company makes within its mining unit because it is the only interpretation that is consistent with the Government's stated purpose of promoting private investment in the mining sector.

309. *First*, promoting private investment in mining was the Government's primary objective in adopting the landmark stability incentives that D.L. 708 introduced into the Mining Law.<sup>781</sup> For example:

- (a) Article 72 of the Mining Law explicitly acknowledged this objective, confirming that stability guarantees were granted “[i]n order to promote private investment in mining activity.”<sup>782</sup>
- (b) Article 82 similarly provided that the purpose of establishing the 15-year stability guarantees was “to promote investment and facilitate the financing of mining projects.”<sup>783</sup>
- (c) Minister Sánchez Albavera, who spearheaded the drafting of L.D. 708 as President Fujimori's Minister of Energy and Mines from 1990 to 1992, noted in his contemporaneous account of the process that “[g]ranting [stability] guarantees created an important incentive for mining companies by not altering the criteria that guided investment decisions, especially given their long-term recovery.”<sup>784</sup>
- (d) Ms. Chappuis, who was involved in drafting many of the Mining Law's key provisions related to stability, confirms that the Government “had a very clear vision of how important it was to offer robust stability guarantees to attract foreign investment, and . . . was emphatic in stating that these guarantees should play a key role in the reform” of the Mining Law.<sup>785</sup>
- (e) Mr. Flury, advising on the Mining Law's drafting in his role as Director of the Mining Society, confirms that Minister Sánchez Albavera made clear “that the stability policy had to be clear, broad, and easy to implement, or we would not be able to attract the

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<sup>781</sup> See *supra* § III.C.1.

<sup>782</sup> CA-1, Mining Law, Art. 72.

<sup>783</sup> CA-1, Mining Law, Art. 82.

<sup>784</sup> See *supra* § III.C.1.i; see also Ex. CE-311, Fernando Sánchez Albavera, THE CARDS ON THE TABLE (1992), p. 81.

<sup>785</sup> Chappuis ¶¶ 15; see *supra* § III.C.1.i.

investors that Peru so badly needed.”<sup>786</sup> He also notes that in implementing stability guarantees, “Peru hoped that mining companies would make all necessary investments to develop their mining units in the best possible way.”<sup>787</sup>

310. *Second*, to accomplish the purpose of promoting foreign investment, it is critical for stability guarantees to apply to the entire mining unit or concession, given the basic commercial realities of mining operations. Prof. Otto explains that stability guarantees are particularly important in the mining industry given that “[d]istinctive characteristics of mining—such as high capital costs, long payback periods, and fixed assets—make stability of the fiscal and administrative framework particularly important to a mining company’s decision to invest.”<sup>788</sup> He further explains that these guarantees serve their purpose only if they apply to an investor’s entire concession or mining unit, because mining investments are “dynamic, with constantly evolving equipment, processes, and approaches,” including the need to “update technologies, add new circuits or mills to recover additional minerals, implement new processing approaches to accommodate changing ores and technological advances, or replace trucks with conveyors.”<sup>789</sup> Prof. Otto opines that, if these types of subsequent investments do not enjoy stability, then stability guarantees become “significantly less attractive” in the initial investment decision, and mining companies would have a “disincentive” to make those subsequent improvements—precisely the opposite of the intent behind laws like the Mining Law.<sup>790</sup>

311. The individuals involved in preparing the Mining Law specifically understood that to promote investment in mining resources, stability guarantees had to protect an investor’s entire mining unit or concession:

- (a) Ms. Vega testifies that in preparing the Mining Law, she “discussed with Vice-Minister Patsías whether we should incorporate the broad definition of EAU[s],” and “the concept of a ‘single production unit’ encompassing both mining and beneficiation concessions.”<sup>791</sup> She also notes that they “both agreed that it was essential” to do so because “[t]he broad application of stability benefits to a single production unit was consistent with President Fujimori’s push to promote foreign investment in mining.”<sup>792</sup>

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<sup>786</sup> Flury ¶ 17; *see supra* § III.C.1.i; *see also* **Ex. CE-311**, Fernando Sánchez Albavera, *THE CARDS ON THE TABLE* (1992), p. 81.

<sup>787</sup> Flury ¶ 38.

<sup>788</sup> **CER-4**, Expert Report of James M. Otto on Comparative Practice of Fiscal Stability in Mining (27 August 2021) (“Otto”) ¶ 17.

<sup>789</sup> Otto ¶¶ 23, 32-34.

<sup>790</sup> Otto ¶¶ 34, 48-50.

<sup>791</sup> Vega ¶ 38.

<sup>792</sup> Vega ¶ 38.

- (b) Ms. Chappuis explains that “mining companies need to constantly make investments to optimize their production processes, make them more efficient in line with technological advances, and adapt them to the inevitable changes that the company needs to implement as it exploits the orebody.”<sup>793</sup> Ms. Chappuis testifies that, in drafting Title Nine, “it never occurred to us to limit the scope of stability to the initial investment included in the feasibility study’s investment program, or to the initial ‘activities’ that the mining company had to carry out to be entitled to enter into a stability agreement” because doing so “would have been directly at odds with Minister Sánchez Albavera’s instructions to grant extensive stability guarantees to make Peru more competitive internationally . . . and to attract much-needed private investment.”<sup>794</sup> She explains that “[s]uch a limitation would ignore how the mining industry works”: “because the orebody’s chemical composition is different at the surface than at lower depths, a processing circuit that may be appropriate at the time of the initial investment could be less efficient or even useless once the surface ore has been extracted from the deposit.”<sup>795</sup>

312. *Finally*, international practice confirms that stability guarantees typically apply to entire mining units—unsurprisingly, since governments worldwide implement stability guarantees for the same purpose, namely, to “attract investment.”<sup>796</sup> In particular:

- (a) Prof. Otto testifies that “[a]ll of the stabilization schemes” that he is aware of from his extensive experience “are granted to either the mining company or a mining unit of that company,” and that he is “not aware of any jurisdiction, law, or agreement that grants stability to just a part of the activities performed within a mining unit.”<sup>797</sup>
- (b) Prof. Otto also cites specific examples from seven jurisdictions that offered stability guarantees to mining investors with which Peru would have been competing for investment in the early 2000s.<sup>798</sup> He notes that all of these jurisdictions “reflect[] the global norm that, when a country offers stability to its mining investors, it typically does so to the mining unit as a whole, not only to specific investments that a mining company makes within that unit.”<sup>799</sup>

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<sup>793</sup> Chappuis ¶ 24.

<sup>794</sup> Chappuis ¶¶ 23; *see supra* § III.C.1.i; *see also* Chappuis ¶ 25 (“[W]e sought to encourage investors to promote . . . comprehensive development . . . by offering stability benefits to the relevant concessions or mining units.”).

<sup>795</sup> Chappuis ¶ 24.

<sup>796</sup> Otto ¶¶ 15, 17-28.

<sup>797</sup> Otto ¶ 32.

<sup>798</sup> Otto ¶ 36(a)-(g).

<sup>799</sup> Otto ¶ 36.

(c) Mr. Morán testifies that while he was leading the financing of the Minera Candelaria expansion, the Chilean authorities “never questioned the application of the foreign investment [stability] contract’s benefits to our expansion investments or sought to restrict those benefits to investments contemplated in a feasibility study.”<sup>800</sup> He also testifies that because “Peru was competing with Chile to attract mining investments and had even tried offering greater guarantees to entice foreign investors,” he “assumed that Peru would respect stability commitments towards SMCV and any investments that Phelps Dodge would make into the SMCV concessions listed in the Stability Agreement” during the life of the agreement.<sup>801</sup>

**d. Until It Adopted the Novel and Restrictive Interpretation in Cerro Verde’s Case, the Government Applied Stability Guarantees Based on Mining Units or Concessions**

313. Until its *volte-face* when it began adopting Mr. Isasi’s novel and restrictive interpretation of the scope of stability guarantees, the Government had also consistently interpreted the Mining Law and Regulations as applying stability on the basis of an entire mining unit or concession, both in theory and in practice.

314. *First*, Mr. Isasi, who in June 2006 authored the novel interpretation that formed the basis for SUNAT’s 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. In his April 2005 Report to the Minister of Energy and Mines explaining the application of the Royalty Law to mining investors with stability agreements, he stated:

[T]he royalty is not applicable to the mineral resources *extracted from the concessions that form part of the contractually stabilized investment project . . . .*

Consequently, it is not the owner of the mining project . . . 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 owner*, depending on whether or not they are part of a project subject to a stability agreement signed prior to the entry into force of Law No. 28258.<sup>802</sup>

315. These categorical statements leave no doubt that the Government understood that the *concessions*, not the qualifying minimum *investments*, defined the scope of the stability guarantees. In a communication that Peru’s Court of Transparency and Access to Public Information disclosed in

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<sup>800</sup> Morán ¶ 15.

<sup>801</sup> Morán ¶ 15.

<sup>802</sup> **Ex. CE-494**, MINEM, Report No. 153-2005-MEM/OGAJ (14 April 2005) ¶¶ 16-17 (emphasis added); *see supra* § III.G.3.

connection with a public information request, Peru’s counsel recognized that “[t]he [April 2005] Report, at first glance, appears to support” the argument that “all activities within a concession or an economic administrative unit are protected by the Stabilization Agreement and therefore do not need to pay royalties for any of those activities,” and “can be interpreted to support” Cerro Verde’s position.<sup>803</sup>

316. *Second*, MINEM’s Directorate General of Mining (“DGM”) and the Mining Council, an administrative body within MINEM in charge of “standardiz[ing] administrative jurisprudence regarding mining issues,” understood stability guarantees as applying to EAUs or concessions in their treatment of stabilized companies.<sup>804</sup> For example, a November 2001 Mining Council resolution relating to the “Parcoy” mining unit—a mining unit in northern Peru owned by Consorcio Minero Horizonte S.A.—and the DGM opinion it reviewed, both unequivocally confirmed that “tax stability [is applicable to] the Parcoy EAU, which is where the investments of the Parcoy Project were made. . . .”<sup>805</sup> The resolution also specifically confirmed that stability guarantees covered the mining rights listed in Annex I of the relevant agreement, meaning in this case that “[t]he concessions created in the Parcoy EAU and the Parcoy Plant beneficiation concession . . . are subject to the [s]tability [a]greement.”<sup>806</sup>

317. *Third*, former MINEM officials confirm that this was the Government’s understanding before the Government adopted the novel interpretation under political pressure. For example:

- (a) Ms. Chappuis testifies that during her tenure at MINEM from 2001 to 2004—including as Director General of Mining for her final two years—she always understood that Article 82 granted the stability guarantees of Title Nine to an entire mining unit, rather than limiting the guarantees to the initial qualifying minimum investment.<sup>807</sup>
- (b) Mr. Flury similarly testifies that, during his tenure as Minister of Energy and Mines, he signed a stability agreement with BHP Billiton Tintaya S.A. regarding its beneficiation concession on behalf of MINEM, and that he “clearly understood that the scope of its stability would apply” to its entire beneficiation concession and that he “naturally expected that Tintaya would make additional investments in this

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<sup>803</sup> **Ex. CE-884**, Transparency and Access to Public Information Tribunal, Decision, Case No. 00547-2021-JUS/TTAIP (16 April 2021).

<sup>804</sup> *See* **CA-1**, Mining Law, Article 94(5).

<sup>805</sup> **Ex. CE-377**, MINEM, Resolution No. 380-2001-EM-CM (16 November 2001), p. 2.

<sup>806</sup> **Ex. CE-377**, MINEM, Resolution No. 380-2001-EM-CM (16 November 2001), p. 2.

<sup>807</sup> Chappuis ¶ 28.

concession during the 15-year term of its [a]greement, as most mining companies would, in order to keep operations current and productive.”<sup>808</sup>

318. *Fourth*, SUNAT also clearly assumed that stability guarantees applied to concessions and mining units. For example:

- (a) In early 2005, Haraldo Cruz, SUNAT’s Regional Intendent for Arequipa, sent a form letter to SMCV referring to it as a “holder[] of [a] mining concession[]” with instructions on how to submit certain information about its “*Production Unit(s)*,” thus confirming that the mining unit and concessions were the relevant item for purposes of stability.<sup>809</sup> Ms. Torreblanca explained that SMCV did not owe royalties because the Stability Agreement covered its entire mining unit, and SUNAT did not raise the issue again until several years later.<sup>810</sup>
- (b) In late 2007, less than two years before SUNAT issued the first royalty assessment against SMCV, SUNAT and MINEM further confirmed this understanding while exchanging reports regarding a “list of subjects obliged to pay the mining royalty from June 2004 to date,” noting that the final list would be based on information that MINEM would provide on “*ownership of concessions and EAUs*.”<sup>811</sup>
- (c) In a September 2012 Report, SUNAT explicitly confirmed 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.”<sup>812</sup>

319. *Fifth*, the Government’s initial implementation of the Royalty Law confirms that stability guarantees applied to whole mining units or concessions. In particular:

- (a) Articles 2 and 8 of the Royalty Law assigned the royalty obligation to “*holders of mining concessions*” based on the “*extraction*” of minerals, making clear that the Government assessed royalties on the basis of *concessions*.<sup>813</sup> Articles 4 and 7.1 of

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<sup>808</sup> Flury ¶¶ 33-38.

<sup>809</sup> **Ex. CE-482**, SUNAT, Letter to SMCV (17 February 2005), p. 1; *see also supra* § III.G.1.

<sup>810</sup> *See supra* § III.G.1 (citing Torreblanca ¶¶ 31-32).

<sup>811</sup> *See Ex. CE-568*, SUNAT, Report No. 261-2007-SUNAT/2F0000 (20 November 2007), p. 2 (emphasis added); **Ex. CE-570**, MINEM, Report No. 1169-2007-MEM-DGM (14 December 2007); *see also supra* § III.K.

<sup>812</sup> **Ex. CE-883**, SUNAT, Report No. 084-2012-SUNAT/4B0000 (13 September 2012), p. 3.

<sup>813</sup> *See CA-6*, Royalty Law No. 28258 (24 June 2004), Art. 2 (providing that “holders of mining concessions” shall pay royalties as consideration for the “*exploitation* of metallic and non-metallic mineral resources”) (emphasis added); **CA-1**, Single Unified Text of the General Mining Law, Supreme Decree No. 014-92-EM (as amended) (3 June 1992) (“Mining Law”), Art. 8 (providing that “*exploitation* is the activity of *extracting* minerals”) (emphasis added).

the Regulations similarly confirmed that the reference base for royalty calculations was initially the “*mining concession*”; in January 2005 the Government amended Article 6 of the Regulations to include the “*Production Unit*”—*i.e.*, a specific group of concessions—as the relevant reference base for royalty calculations.<sup>814</sup>

- (b) Prof. Hernández confirms that “[t]he *extraction* of ore generates the mining royalty payment obligation.”<sup>815</sup> Prof. Hernández explains that by establishing the extraction as the triggering event, “the State ensured that mining titleholders pay royalties, regardless of what is done to the ore after it has been extracted.”<sup>816</sup> If instead “the event triggering the payment obligation was—for example, the processing of ore—the State would run the risk that the mining titleholder evades paying royalties if it sells the ore without processing it first.”<sup>817</sup>
- (c) Around the time Congress passed the Royalty Law, senior Government officials publicly acknowledged that companies with stability agreements would be *exempt* from royalty payments—confirming that, like the Royalty Law’s obligations, stability guarantees applied to entire concessions.<sup>818</sup> For example, in May 2004, then-Minister of Economy and Finance Kuczynski noted that the royalty would apply only to “a minority of companies, since the majority of the big mining projects are stabilized in both taxes and charges.”<sup>819</sup>
- (d) Mr. Isasi’s April 2005 Report likewise confirmed that the Royalty Law could not apply to a mining company—like SMCV—with a stability agreement applicable to its mining concession at the time the Government adopted the Royalty Law.<sup>820</sup>

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<sup>814</sup> See **CA-7**, Royalty Law Regulations, Supreme Decree No. 157-2004-EF (15 November 2004), Art. 4 (defining the “reference base for the payment of the mining royalty for the ore *extracted from the mining concessions* in operation”) (emphasis added); see *id.* Art. 7.1 (“The obligated entities must submit a monthly sworn statement in the media, conditions, form and places determined by SUNAT. In the sworn return, the reference base for *each mining concession* in operation must be entered independently.”) (emphasis added); **CA-116**, Amendments to Royalty Law Regulations, Supreme Decree No. 018-2005-EF (28 January 2005), Art. 6 (“The obligated entities must submit a monthly sworn statement in the means, conditions, form and places determined by SUNAT. The sworn statement must state separately the reference base for *each Production Unit*, indicating for each one of them the tonnage of ore treated from each concession.”) (emphasis added).

<sup>815</sup> Hernández ¶ 81.

<sup>816</sup> Hernández ¶ 81.

<sup>817</sup> Hernández ¶ 81.

<sup>818</sup> See *supra* § III.F.2.

<sup>819</sup> See *supra* § III.F.2 (citing **Ex. CE-439**, *Minister of Economy of Peru Against Mining Royalties*, Agence France Presse (30 May 2004)).

<sup>820</sup> See *supra* § III.G.3 (citing **Ex. CE-494**, MINEM, Report No. 153-2005-MEM/OGAJ (14 April 2005), p. 7 (“[T]he royalty is not applicable to the mineral resources *extracted from the concessions that form part of the contractually stabilized investment project.*”) (emphasis added)).

- (e) SUNAT instructed mining companies to provide information related to their “Production Unit” for purposes of determining royalty obligations, and similarly stored information on “Virtual SUNAT” in terms of each “Production Unit,” confirming that this was the relevant designation for calculating royalties.<sup>821</sup>

**ii. The Stability Agreement Required Peru to Apply the Stabilized Regime to the Entire Cerro Verde Mining Unit**

320. By entering into the Stability Agreement with SMCV, Peru guaranteed stability for the entire Cerro Verde Mining Unit, made up of the Mining and Beneficiation Concessions. This is clear from the Stability Agreement itself, which must implement all guarantees of the Mining Law and Regulations, and as such extends those guarantees to the entire concession or mining unit identified by the Agreement—here, the Mining and Beneficiation Concessions. There is further no question that Cerro Verde, including the Concentrator, operates as an integrated mining unit, and the Government’s own conduct confirmed that the entire Cerro Verde Mining Unit was stabilized.

**a. The Stability Agreement Confirmed That Stability Guarantees Applied to the Mining and Beneficiation Concessions, *i.e.*, the Cerro Verde Mining Unit**

321. In implementing the Mining Law and Regulations, the Stability Agreement confirmed that stability guarantees applied to all mining activities carried out within SMCV’s Mining Unit, which comprises the Mining and Beneficiation Concessions.

322. *First*, 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, according to which stability was granted to the entire mining unit or concession:

- (a) Article 86 of the Mining Law provided that stability agreements “shall incorporate all the guarantees established” in the Mining Law.<sup>822</sup> To that end, the Government also created model contracts for all stability agreements entered into pursuant to Articles 78 or 82 of the Mining Law.<sup>823</sup>
- (b) Ms. Chappuis testifies that the purpose of Article 86 was to ensure that all stability agreements would “ensur[e] equality for all investors with stabilized investments,”

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<sup>821</sup> See *supra* § III.G.1 (citing **Ex. CE-482**, SUNAT Letter to SMCV of 17 February 2005 (instructing companies that “you must download every month from Virtual SUNAT through the SUNAT Online Transactions module (SOL), by selecting the option ‘*Production Unit Download*’, the file that contains the information about your *Production Unit(s)*”) (emphasis added)).

<sup>822</sup> **CA-1**, Mining Law, Article 86; see also **Ex. CE-12**, 1998 Stability Agreement, Clause 1.1 (entitling SMCV to “guarantees of the benefits contained” in Articles 72, 80, and 84 of the General Mining Law); see also Chappuis, ¶ 26; Vega ¶ 31.

<sup>823</sup> See *e.g.*, **Ex. CE-778**, Model Stability Agreement, Supreme Decree No. 04-94-EM (3 February 1994) (3 February 1994) (Model Agreement for fifteen-year stability agreement).

meaning that “each stability agreement would secure all the guarantees under the Mining Law without the parties being able to negotiate the agreement’s specific scope of protection—that they would not depend on the official in charge at the time, but on the Law.”<sup>824</sup> She understood the text of Article 86 to “prevent[] scrutiny from political actors, ensuring that they could not interfere with their terms or question whether the agreements fell within the applicable legal framework.”<sup>825</sup>

- (c) Ms. Vega similarly confirms that the “Stability Agreement implemented the stability guarantees available to SMCV under Title Nine of the Mining Law,” and that “neither the Government nor a mining company could negotiate a stability agreement that was broader or narrower than MINEM’s model incorporating all the guarantees of Title Nine.”<sup>826</sup> In the words of Ms. Vega, stability agreements “‘must incorporate all the guarantees set forth’ in Title Nine—no more, no less.”<sup>827</sup>
- (d) Alfredo Bullard, Professor of Civil Law at Pontificia Universidad Católica del Perú and a leading jurist on Peruvian contract law, explains that the Mining Law “define[d] the scope and content of the stability agreements,” and that the guarantees granted “are not subject to negotiation by the parties.”<sup>828</sup> For this reason, Mr. Bullard concludes that “the State, which was in charge of preparing the form of the mining stability agreement, could not have included guarantees that are more restricted or limited than those included in the regulatory framework.”<sup>829</sup>

323. *Second*, Clause 3 of the Stability Agreement, entitled “Mining Rights,” set the operative scope of the Agreement. It confirmed that, in conformity with the Mining Law, the stability regime’s guarantees applied to all of SMCV’s activities in the Cerro Verde Mining Unit.<sup>830</sup> In particular:

- (a) The first paragraph of Clause 3 provided that the “Leaching Project of Cerro Verde is circumscribed to the concessions, related in EXHIBIT I, with the corresponding

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<sup>824</sup> Chappuis ¶ 26.

<sup>825</sup> Chappuis ¶ 26.

<sup>826</sup> Vega ¶¶ 31, 59.

<sup>827</sup> Vega ¶ 53; *see also* CA-1, Mining Law, Art. 86 (“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.”); *cf.* CA-39, Peruvian Civil Code, Legislative Decree No. 295 (24 July 1984), Art. 1357 (“Based upon reasons pertaining to the social, national, or public interest, guarantees and warranties granted by the State by means of contract may be established.”).

<sup>828</sup> Bullard ¶ 21.

<sup>829</sup> Bullard ¶ 21.

<sup>830</sup> *See* Bullard ¶ 28 (“In order to determine the scope of the Stability Agreement and the guarantees granted to SMCV, we must begin interpreting Clause 3 of the Agreement literally.”).

areas.”<sup>831</sup> Exhibit I, in turn, listed both SMCV’s Mining Concession (“Cerro Verde No. 1, No. 2 and No. 3”), and its Beneficiation Concession (“Cerro Verde Beneficiation Plant”), which includes the Concentrator.<sup>832</sup>

- (b) Clause 3 and Exhibit I thus implemented Article 82 of the Mining Law by identifying the “Economic Administrative Unit”—here, the Cerro Verde Mining Unit, which comprises the Mining and Beneficiation Concessions—in which the qualifying minimum investment or expansion was being made and that, as a result, was entitled to enjoy the stability guarantees.<sup>833</sup>
- (c) The second sentence of Clause 3 provided that the identification of the Mining and Beneficiation Concessions as the relevant mining rights for purposes of the Stability Agreement “does not prevent the owner from incorporating other mining rights to the Cerro Verde Leaching Project, after approval by the [DGM].”<sup>834</sup> Hence, SMCV would have been entitled to incorporate an additional concession (“mining right”) into the scope of its stabilized regime, subject to the approval of the DGM. By contrast, Clause 3 did not reference any mechanism by which SMCV could incorporate additional *investments* within those concessions under the scope of stability—confirming that no such need existed, because any investment made within those concessions was covered while the Agreement remained in force.<sup>835</sup>

324. *Third*, Clauses 9 and 10 of the Stability Agreement, which reflected the stability guarantees set out in the Mining Law, confirmed that stability extended to all of SMCV’s activities in the Cerro Verde Mining Unit. For example:

- (a) Clause 9.1 provided for the free commercialization of “[SMCV’s] products” without any limitation by processing method or particular “investment”;<sup>836</sup>
- (b) Clause 9.2 provided for the free disposal of “foreign currency generated by its exports, subject of the contract,” *i.e.*, of the SMCV Concessions, and not only of the exports generated through a specific project or investment.<sup>837</sup>

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<sup>831</sup> **Ex. CE-12**, 1998 Stability Agreement, Clause 3.

<sup>832</sup> **Ex. CE-12**, 1998 Stability Agreement, Exhibit I.

<sup>833</sup> *See CA-1*, Mining Law, Article 82.

<sup>834</sup> *See Ex. CE-12*, 1998 Stability Agreement, Clause 3.

<sup>835</sup> *See Bullard* ¶¶ 31-32.

<sup>836</sup> **Ex. CE-12**, 1998 Stability Agreement, Clause 9.1; *see also Bullard* ¶ 37.

<sup>837</sup> **Ex. CE-12**, 1998 Stability Agreement, Clause 9.2; *see also Bullard* ¶ 37.

- (c) Clause 9.3 entitled SMCV to use a 20% depreciation rate on “its fixed assets,” not merely the fixed assets forming part of a particular investment or used in a specific processing method;<sup>838</sup>
- (d) Clause 9.4 entitled SMCV to keep “its account[ing]” in U.S. dollars and did not oblige SMCV to keep separate accounts for each of its investments;<sup>839</sup>
- (e) Clause 9.6.1 preserved the validity fee “of the mining concession,” *i.e.*, the administration fee paid by SMCV to maintain its concession in force, at the rate of US\$2 per hectare per year, as well as that of the “Concession of Beneficiation,” without distinguishing among various forms of use of those concessions;<sup>840</sup> and
- (f) Clause 10.2 assessed the impact of certain measures on SMCV’s “availability of cash” without distinguishing between the availability of cash for SMCV’s various investments.<sup>841</sup>

325. *Finally*, the Peruvian law experts confirm that the Stability Agreement implemented the Mining Law and Regulations to confer stability guarantees to SMCV’s Mining and Beneficiation Concessions. In particular:

- (a) Prof. Bullard confirms Clause 3 “defined the scope of protection under the Stability Agreement,” and that it did so “by ‘limiting’ [stability guarantees] to certain ‘concessions’ or ‘mining rights’”—namely, the Mining and Beneficiation Concessions.<sup>842</sup>
- (b) Prof. Bullard further opines that “principles of contract interpretation from the Peruvian Civil Code all confirm that SMCV’s Stability Agreement covered all investments that SMCV made within its mining unit.”<sup>843</sup>
- (c) Ms. Vega likewise opines that “Clause 3 and Exhibit I appear to me as entirely consistent with the broad scope of stability guarantees under the Mining Law and Regulations,” ultimately concluding that the “Stability Agreement confirmed that its benefits applied to SMCV’s entire mining unit.”<sup>844</sup>

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<sup>838</sup> **Ex. CE-12**, 1998 Stability Agreement, Clause 9.3; *see also* Bullard ¶ 37.

<sup>839</sup> **Ex. CE-12**, 1998 Stability Agreement, Clause 9.4; *see also* Bullard ¶ 37.

<sup>840</sup> **Ex. CE-12**, 1998 Stability Agreement, Clause 9.6.1; *see also* Bullard ¶¶ 37.

<sup>841</sup> **Ex. CE-12**, 1998 Stability Agreement, Clause 10.2; *see also* Bullard ¶ 37.

<sup>842</sup> Bullard ¶ 28.

<sup>843</sup> Bullard ¶ 16.

<sup>844</sup> Vega ¶ 61; *see also* Chappuis ¶ 39.

**b. Cerro Verde Is an Integrated Mining Unit, Which Includes the Concentrator**

326. In SMCV's case, the Stability Agreement guarantees benefits for the entirety of Cerro Verde's operations, including the Concentrator, because Cerro Verde operates as a single integrated mining unit made up of the Mining and the Beneficiation Concessions, both of which are explicitly covered by the Stability Agreement. Further, the Government officially endorsed the Concentrator's inclusion in the Cerro Verde Mining Unit when it approved the Beneficiation Concession expansion, reflecting its decades-long position that Cerro Verde is a single mining unit.

327. *First*, Cerro Verde operates as a single mining unit, comprising the Mining and Beneficiation Concessions, both of which are explicitly covered by the Stability Agreement:

- (a) SMCV's integrated mining, leaching, and flotation operations meet the characteristics of an "EAU" set forth in Article 82 of the Mining Law because they constitute a mining concession, processing plants, and other assets that share "supply" (orebody), "administration" (personnel, offices), and "services" (water, electricity, insurance, transport, etc.).<sup>845</sup>
- (b) Ramiro Aquino, who serves as SMCV's Chief Engineer of Long-Term Planning, explains that the leaching and flotation (concentrator) facilities share all key infrastructure for power, water, and transportation.<sup>846</sup> The oxides and secondary sulfides processed in the leaching facilities and the primary sulfides processed in the Concentrator all derive from the same intermingled ore body.<sup>847</sup>
- (c) Mr. Aquino further explains that the leaching and flotation processes are inextricably linked in SMCV's long-term financial projections. In preparing its annual life-of-mine plan to determine how it will process Cerro Verde's remaining ore, SMCV carefully assesses which processing method will be most profitable for each block of mixed ore in an integrated mine planning process.<sup>848</sup> Because flotation yields higher copper and molybdenum recovery from a block of ore but entails up to double the operating cost of leaching, this analysis changes with market conditions, and the optimal processing balance for the remaining ore shifts from year to year.<sup>849</sup>
- (d) The coexistence of *both* processes is also critical for maximum *leaching* recovery: as Mr. Aquino explains, flotation "enable[s] [SMCV] to process more secondary sulfides

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<sup>845</sup> See Aquino § II; cf. CA-1, Mining Law, Art. 82.

<sup>846</sup> Aquino § II.D.

<sup>847</sup> See Aquino ¶¶ 15-17, 21-22; see also *supra* § III.A.1.

<sup>848</sup> Aquino ¶¶ 53-58.

<sup>849</sup> Aquino ¶¶ 55-58.

through leaching.”<sup>850</sup> Prior to construction of the Concentrator, SMCV simply left those secondary sulfides in the ground, as it was not economical to extract and process them through leaching without also being able to process the primary sulfides: because the ore types are so intermingled, it would have been extremely inefficient for SMCV to dig around the primary sulfides or mine them out only to put them in a waste dump.<sup>851</sup>

328. *Second*, because SMCV operated as a single mining unit with integrated operations, MINEM specifically endorsed the Concentrator’s inclusion in the Cerro Verde Mining Unit, and hence the Stability Agreement, when the DGM preliminarily approved the expansion of the Beneficiation Concession to include the Concentrator in October 2004.<sup>852</sup> 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. In particular:

- (a) Ms. Chappuis testifies that she confirmed to SMCV that it could petition MINEM to expand the area and processing capacity of its existing Beneficiation Concession to include the Concentrator, and that this would confirm that the Stability Agreement applied to it.<sup>853</sup> Ms. Chappuis testifies that she agreed that the DGM should expand the Beneficiation Concession to include the Concentrator once it was built, including because the expansion was needed to process the primary sulfides and that Minero Perú had previously operated a small concentrator within the beneficiation concession.<sup>854</sup> She also found it convincing that “SMCV and the Government had long sought to construct a concentrator,” and that “both the leaching facilities and the concentrator fell under the Mining Law’s definition of ‘[b]eneficiation.’”<sup>855</sup>
- (b) In submitting SMCV’s request for the expansion, Ms. Torreblanca explained that the “coexistence” of flotation and leaching in the Beneficiation Concession was “nothing new” at Cerro Verde given the previous use of the small concentrator under the

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<sup>850</sup> Aquino ¶ 59.

<sup>851</sup> Aquino ¶ 59.

<sup>852</sup> *See supra* § III.F.5 (citing **Ex. CE-476**, MINEM, Report No. 784-2004-MEM-DGM/PDM and Directorial Order No. 027-2004-MEM-DGM/PDM (26 October 2004)).

<sup>853</sup> *See supra* § III.F.3 (citing Chappuis ¶¶ 53).

<sup>854</sup> Chappuis ¶ 54 (discussing **Ex. CE-458**, SMCV, Petition No. 1487157 (August 27, 2004), p. 2).

<sup>855</sup> Chappuis ¶ 54 (citing **CA-1**, Mining Law, Article 17 (“Beneficiation is the set of physical, chemical, and/or physicochemical processes performed to extract or concentrate the valuable parts of an aggregate of minerals and/or to purify, smelt or refine metals.”)).

existing processing rights.<sup>856</sup> The Concentrator was further “needed . . . ‘to pursue the scheduled exploitation of [SMCV’s] operations’” in light of the exhaustion of leaching-only reserves, as Ms. Torreblanca also explained.<sup>857</sup>

- (c) While Ms. Chappuis’s colleague at the Ministry, Cesar Polo, had previously expressed a dissenting view, the October 2004 approval for the Beneficiation Concession confirmed to SMCV that Ms. Chappuis’s view was the correct one and SMCV understood that issue to be resolved.<sup>858</sup>
- (d) Ms. Vega notes that the MINEM resolution approving construction of the Concentrator within the Beneficiation Concession “did not distinguish between the Concentrator and the existing leaching facilities in setting the new capacity level.”<sup>859</sup> Rather, MINEM set the capacity of the Beneficiation Concession at a combined 147,000 MT/d for both the leaching and flotation operations—a decision Ms. Vega opines “was reasonable . . . since it would have been artificial and inconsistent with the Mining Law to segregate those operations.”<sup>860</sup> Ms. Vega notes that “[h]ad MINEM disagreed with SMCV’s characterization of the operations of the mining unit or expected to treat the fiscal regime governing the two processes differently, it should have said so in its reply to SMCV and it should have required that SMCV apply for a different beneficiation concession for the Concentrator.”<sup>861</sup>
- (e) Prof. Otto similarly observes that “[i]f MINEM had intended to regulate the operations differently, it would have made more sense for it to have rejected SMCV’s request and instructed the company to seek a separate beneficiation concession for the concentrator alone.”<sup>862</sup>

329. *Third*, 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. For example:

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<sup>856</sup> **Ex. CE-457**, SMCV, Petition No. 1487019 to MINEM (27 August 2004); Torreblanca ¶ 26; *see also supra* § III.F.3.

<sup>857</sup> **Ex. CE-457**, SMCV, Petition No. 1487019 to MINEM (27 August 2004) (requesting permission to construct the Concentrator and to expand the Beneficiation Concession to accommodate it).

<sup>858</sup> **Ex. CE-476**, MINEM, Report No. 784-2004-MEM-DGM/PDM and Directorial Order No. 1027-2004-MEM-DGM/PDM (26 October 2004); Torreblanca ¶¶ 25-27.

<sup>859</sup> Vega ¶ 67.

<sup>860</sup> Vega ¶ 68.

<sup>861</sup> Vega ¶ 66.

<sup>862</sup> Otto ¶ 44.

- (a) The 1972 feasibility study Minero Perú commissioned for Cerro Verde explored both leaching and flotation within the “Cerro Verde Economic and Administrative Unit,” leading to the construction of the pilot concentrator alongside the original SX/EW plant in 1979.<sup>863</sup>
- (b) In 1976, MINEM expanded Minero Perú’s special mining rights within what it called the “Cerro Verde Mining Unit.”<sup>864</sup>
- (c) Between 1975 and 1992, recognizing that the eventual construction of a concentrator was an existential imperative for the mine, Minero Perú conducted at least *seven* additional feasibility studies to build a concentrator to operate alongside the leaching facilities.<sup>865</sup> Minero Perú also constructed the leaching facilities with this future concentrator in mind, even sketching out a “Future Sulfide Plant” in blueprints for the site plan.<sup>866</sup>
- (d) Minero Perú’s 1993 plan to privatize Cerro Verde—which then included both the leaching facilities and the pilot concentrator—referred to the mine as a “Production Unit.”<sup>867</sup> Ms. Silva describes selling SMCV’s mining and beneficiation concessions together as a “single mining unit” as a “key” part of its privatization plan, which was focused on obtaining “an investor with the required technical and financial capacity [that] could build a concentrator to efficiently process the primary sulfides.”<sup>868</sup>
- (e) The Public Deed establishing SMCV in 1993 confirmed that Minero Perú contributed to SMCV “the mining and beneficiation concessions and the assets that constitute the ‘Cerro Verde Mining Unit.’”<sup>869</sup>
- (f) The 1994 Share Purchase Agreement defined “Unidad Cerro Verde” as “the mining and beneficiation concessions previously known collectively as the Cerro Verde Production Unit.”<sup>870</sup>

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<sup>863</sup> See *supra* § III.A.2 (citing **Ex. CE-290**, Wright Engineers Ltd., Feasibility Study for the Cerro Verde Project for Empresa Minera del Perú (1 February 1972), Vol. I, p. 3).

<sup>864</sup> See *supra* § III.A.2 (citing **Ex. CE-2**, Supreme Decree No. 027-76-EM/DGM (19 July 1976)).

<sup>865</sup> See *supra* §§ III.A.2; III.A.3.

<sup>866</sup> See *supra* § III.A.3 (citing **Ex. CE-296**, Wright Engineers Ltd., Copper: From Oxides to Cathodes (April 1978), p. 29).

<sup>867</sup> See *supra* § III.C.3 (citing **Ex. CE-351**, CEPRI, Minutes for SMCV (3 July 1996), p. 5 (“This need was clearly identified as the main objective for promoting private investment in the Cerro Verde Production Unit and in this vein it was that the Special Committee, in coordination with the COPRI, that decided to prioritize it vis-à-vis the other promotions to be carried out with the Production Units.”)).

<sup>868</sup> Silva ¶¶ 15, 19; see *supra* § III.C.3.

<sup>869</sup> See *supra* § III.C.3 (citing **Ex. CE-330**, SMCV Public Deed (20 August 1993), Clause 1.1; **Ex. CE-329**, Minero Perú, Minutes of Board Meeting No. 634 (22 June 1993), pp. 5-6; Silva ¶¶ 18-19).

(g) In a 1997 report relating to the relationship between the 1994 and 1998 Stability Agreements, MINEM referred to Cerro Verde both as an “Economic Administrative Unit” and a “Production Unit.”<sup>871</sup>

(h) The Stability Agreement itself referenced Cerro Verde as a “Unit of Production.”<sup>872</sup>

330. *Finally*, 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. For example:

(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 statements to that effect in September 2003.<sup>873</sup> The Regulations required that mining companies reinvest their profits in the same “mining unit,” meaning that MINEM could not have approved the benefit unless the Concentrator fell within SMCV’s Mining Unit.<sup>874</sup> Ms. Chappuis testifies that, in approving this request, she readily concluded that the new investment would be part of “SMCV’s ‘mining unit.’”<sup>875</sup>

(b) In its 2009 investment report, MINEM referred to Cerro Verde as a single production unit, and also depicted Cerro Verde as a “mining unit” in its official map of ongoing mining projects.<sup>876</sup> Because the Concentrator had commenced operations at this time, MINEM’s reference to Cerro Verde as a single “mining unit” confirmed yet again that the Concentrator was part of SMCV’s stabilized Mining Unit.

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<sup>870</sup> **Ex. CE-4**, Share Purchase Agreement Between Cyprus Climax Metals Co. and Empresa Minera del Peru S.A. (17 March 1994), Definitions; *see supra* § III.D.1.

<sup>871</sup> **Ex. CE-356**, MINEM, Report No. 708-97-EM/DGM/OTN (30 December 1997).

<sup>872</sup> **Ex. CE-12**, 1998 Stability Agreement, Clause 1.4 (“By Supreme resolution No. 14-293-PCM of April 22, 1993, the resolution adopted by the Private Investment Promotion Committee (COPRI) was ratified, by means of which they defined the modality to carry out the procedure of promotion of private investment referred to in legislative decree No. 674, in the Unit of Production of Cerro Verde, Arequipa, of Empresa Minera del Peru S. A. - Minero Peru.”).

<sup>873</sup> *See supra* §§ III.E.3; III.F.5 (citing **Ex. CE-22**, MEF, Report No. 209-2004-EF/66.01 (3 December 2004); **Ex. CE-21**, MEF, Communication No. 942-2004-EF/10 (3 December 2004)).

<sup>874</sup> **CA-2**, Regulations to Title Nine of the General Mining Law, Supreme Decree No. 024-93-EM (“Regulations”), Article 10 (“Non-distributed income shall be applied to the execution of new investment programs that guarantee the increase of production levels of *the relevant mining units*.”) (emphasis added); *see also* **CA-68**, Application of Tax Benefits to Retained Earnings That Are Used for Investment Programs to Ensure an Increase in the Production of Mining Units, Supreme Decree No. 027-98-EF (25 March 1998) (25 March 1998) (“Issues rules for the application of tax benefits to retained earnings that are used for investment programs to *ensure an increase in the production of mining units*.”) (emphasis added).

<sup>875</sup> Chappuis ¶ 45.

<sup>876</sup> *See* **Ex. CE-584**, MINEM, 2009 Mining Investment Report, p. 44; *see also* **Ex. CE-593**, MINEM, Report on Mining Projects (2 October 2009).

- (c) Throughout 2009, MINEM’s Supervisory Agency for Investment in Energy and Mining (“OSINERGMIN”) similarly consistently referred to the “Cerro Verde Mining Unit” in its reports.<sup>877</sup>
- (d) In 2009, SUNAT’s webpage similarly described SMCV’s operations as one “production unit.”<sup>878</sup>

**c. The Government’s Own Conduct Confirms That Stability Applied to the Entire Cerro Verde Mining Unit**

331. In addition to consistently recognizing that Cerro Verde is a single mining unit, and explicitly confirming that the Concentrator is part of it, the Government also repeatedly confirmed that stability guarantees would apply to Cerro Verde’s entire unit.

332. *First*, Peru’s conduct prior to the Concentrator investment confirms that Peru understood that the Agreement would apply to the *entirety* of SMCV’s Mining Unit.<sup>879</sup> For example:

- (a) When promoting the sale of Cerro Verde in January 1993, the Government specifically touted both the potential to process the primary sulfides and the promise of tax and administrative stability in public advertisements and in the draft Heads of Agreement that it sent to pre-qualified companies, including Cyprus—a document that also included “refusal of the Peruvian State to execute a stability contract” as a condition under its *force majeure* clause that would suspend the investment obligations of the purchaser.<sup>880</sup>
- (b) A 1997 internal MINEM memo relating to whether SMCV’s 1994 Stability Agreement would continue to apply after SCMV signed the 1998 Stability Agreement affirmed that the 1998 Stability Agreement would apply to SMCV’s “Economic Administrative Unit” and that two different tax regimes could not “co-exist” within that unit.<sup>881</sup>

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<sup>877</sup> See **Ex. CE-587**, OSINERGMIN, Report No. 597-2009-OS-GFM (14 April 2009); **Ex. CE-591**, OSINERGMIN, Report No. 902-2009-OS-GFM (3 June 2009); **Ex. CE-589**, OSINERGMIN, Report No. 876-2009-OS-GFM (1 June 2009); **Ex. CE-590**, OSINERGMIN, Report No. GFM 266-2009 (1 June 2009); **Ex. CE-592**, OSINERGMIN, Report No. 1551-2009-OS-GFM (29 September 2009).

<sup>878</sup> See **Ex. CE-826**, SUNAT’s profile for SMCV.

<sup>879</sup> See Bullard ¶¶ 49-62.

<sup>880</sup> See *supra* § III.C.3 (citing **Ex. Ex. CE-332**, CEPRI, International Public Competitive Bidding for the Sale of SMCV S.A.: Heads of Agreement (26 October 1993)); see also Silva ¶ 23 (noting that “on 26 October 1993, CEPRI sent draft ‘Heads of Agreement’ to the pre-qualified companies for a future purchase and sale agreement”); **Ex. CE-320**, *Peru*, 320 MINING JOURNAL 1 (22 January 1993), pp. 11, 14-15 (“[E]xploitation of the primary sulphides will play an increasing role during any expansion at Cerro Verde.”).

<sup>881</sup> See **Ex. CE-356**, MINEM, Report No. 708-97-EM/DGM/OTN (30 December 1997)).

- (c) When SMCV sought confirmation prior to investing in the Concentrator, Ms. Chappuis—the head of the office responsible for designating beneficiation concessions—specifically confirmed that the Concentrator investment would be entitled to stability, because the *entire* Cerro Verde Mining Unit was stabilized.<sup>882</sup>
- (d) In October 2004, President Toledo applauded Phelps Dodge’s decision to invest in the Concentrator and “wish[ed] [Phelps Dodge] the best of luck,” while asserting that “we will fulfill our responsibility to maintain economic and legal stability.”<sup>883</sup>

333. *Second*, the 2006 Roundtable Discussions attended by SMCV, Arequipa commissioners, and Government officials—including Mr. Isasi and Minister Sánchez Mejía—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. For example:

- (a) In the lead-up to the Roundtable Discussions, MINEM officials publicly acknowledged the Stability Agreement and stated that they would honor it, and that MINEM would “inform the commissioners about the scope of the laws that protect the contract they signed with Cerro Verde.”<sup>884</sup> MINEM further suggested that SMCV should pay “an *advance* of canon [the share of income tax distributed to regional governments] and royalties on account for the years *in which its stability agreement expires*,” again implicitly acknowledging that SMCV did not have to pay royalties prior to the expiration of the agreement.<sup>885</sup>
- (b) Ms. Torreblanca testifies that during the Roundtable Discussions, the Government officials “quickly dismissed” the demands from Arequipa politicians that the Government order “payment of the mining royalties of Cerro Verde I and II”—*i.e.*, the leaching and flotation operations.<sup>886</sup>
- (c) Ms. Torreblanca further testifies that “[t]he Government representatives and Director Isasi, in particular . . . never mentioned that SMCV would have to pay royalties because the Stability Agreement would not apply to the Concentrator.”<sup>887</sup>

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<sup>882</sup> See Chappuis ¶ 52.

<sup>883</sup> See *supra* § III.F.4 (citing **Ex. CE-471**, *Peru: President Toledo Announces an Investment of US\$850 Million in Cerro Verde*, EUROPA PRESS (12 October 2004)).

<sup>884</sup> See **Ex. CE-533**, *La República, Advance Payment of Royalties Proposed*, LA REPÚBLICA (15 June 2006); see also *supra* § III.I.1.

<sup>885</sup> See **Ex. CE-533**, *Advance Payment of Royalties Proposed*, LA REPÚBLICA (15 June 2006); see also *supra* § III.I.1.

<sup>886</sup> See Torreblanca ¶ 53; see also *supra* § III.I.3.

<sup>887</sup> See Torreblanca ¶ 53; see also *supra* § III.I.3.

334. *Third*, the Government treated SMCV as fully stabilized with respect to the entire Cerro Verde Mining Unit during the preparation of the Voluntary Contribution and GEM programs. In particular:

- (a) Mr. Castagnola testifies that when negotiating the Voluntary Contributions for President Garcia’s PMSP program in mid-2006, APOYO Consultoría used a “financial model . . . to estimate and simulate potential contributions under the Program [that] always assumed [] SMCV was a stabilized mining company that did not have to pay royalties during the term of its stability agreement.”<sup>888</sup> He also notes that “no Government representative ever questioned this classification.”<sup>889</sup>
- (b) Mr. Santa María testifies that during the preparation of the GEM program, the financial projections APOYO Consultoría used and shared with the Government “included SMCV in the group of stabilized mining companies *not* obliged to pay royalties.”<sup>890</sup> He also testifies that “no one in the Government questioned this classification, nor did anyone say that SMCV would have to pay royalties or the SMT for some part of its operations and that therefore we should modify the value of its contribution.”<sup>891</sup>
- (c) The Government’s inducement of SMCV’s significant payments under both the Voluntary Contribution Agreement and the GEM Agreement—without so much as a word to suggest that the payments made were not required because SMCV would owe Royalty payments—further confirmed SMCV’s understanding that its entire mining unit was stabilized.<sup>892</sup> The purpose of both agreements was to raise additional revenue from mining companies that did not pay royalties *because* their operations were protected by a stability agreement.<sup>893</sup> SMCV’s contributions under both agreements were clearly based on, respectively, annual net income or operating profit from SMCV’s *entire* Mining Unit, not only the leaching facility, and the Government never once suggested that these payments were excessive.<sup>894</sup>

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<sup>888</sup> Castagnola ¶ 44; *see also supra* § III.I.4.

<sup>889</sup> Castagnola ¶ 44; *see also supra* § III.I.4.

<sup>890</sup> Santa María ¶ 23; *see also supra* § III.M.1.

<sup>891</sup> Santa María ¶ 45; *see also supra* § III.M.1.

<sup>892</sup> *See supra* § III.M.2 (citing **Ex. CE-64**, Agreement for the Assessment of Gravamen Especial a la Minería Approved by Law No. 29790 (28 February 2012)).

<sup>893</sup> *See supra* §§ III.I.4; III.M.2.

<sup>894</sup> *See supra* §§ III.I.4; III.M.2 (citing Torreblanca ¶ 84).

### iii. Peru's Novel and Restrictive Interpretation Is Entirely Unsupported

335. Peru's *ex post* justification for its breaches of the Stability Agreement—that stability guarantees were limited to the investment program included in the feasibility study submitted with the investor's application for a stability agreement—has no basis in the text of the Mining Law and Regulations, which made clear that the purpose of submitting the feasibility study was instead to demonstrate the investor's *eligibility* to enter into a stability agreement. In fact, the Government later had to *amend* both the Mining Law and Regulations to support its novel and restrictive interpretation—confirming that the prior version was not similarly restricted. The Government's novel and restrictive interpretation is also entirely at odds with the investment-promoting purpose of stability guarantees, because it creates legal uncertainty and significant administrative burdens.

#### a. The Feasibility Study's Investment Program Demonstrated an Investor's Eligibility to Enter into a Stability Agreement, Not the Scope of That Agreement

336. Peru's novel and restrictive interpretation of the scope of the stability guarantees improperly distorts the purpose of the feasibility study's investment program, which was to demonstrate that the mining company was *eligible* for stability guarantees and to identify the mining unit in which the company would execute the qualifying minimum investment—as the plain text of the Mining Law and Regulations, the testimony of Ms. Vega and Ms. Chappuis, and the Stability Agreement itself each confirm.

337. *First*, under the Mining Law and Regulations, the feasibility study served the purpose of demonstrating an investor's eligibility by virtue of its qualifying minimum investment program. In particular:

- (a) Article 85 of the Mining Law provided that “[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.”<sup>895</sup> The only other provision that referenced feasibility studies was Article 101, which provided that the DGM had the authority to approve feasibility studies.<sup>896</sup>
- (b) Article 18 of the Regulations, which indicated the information that titleholders had to submit to “avail themselves of the provisions” of the Mining Law, required titleholders to submit the “corresponding feasibility study for purposes of Article 82” of the Mining Law, which together with Article 83 set out the qualifying minimum investment and increase in production capacity.<sup>897</sup> The feasibility study thus was

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<sup>895</sup> CA-1, Mining Law, Art. 85 (emphasis added).

<sup>896</sup> See CA-1, Mining Law, Art. 101(c); see also Vega ¶ 50(a).

<sup>897</sup> CA-2, Regulations, Art. 18.

meant to provide proof that the mining titleholder would meet the qualifying minimum investment requirement of US\$50 million or US\$20 million, and as such *qualified* the titleholder to enter into a stability agreement.<sup>898</sup>

- (c) Article 19 required that mining companies include in their feasibility study the “[t]erm, execution schedule and amount of disaggregated investment” of their qualifying minimum investment.<sup>899</sup> Article 24 provided that the DGM would submit to the Vice-Minister of Energy and Mines its “directorial resolution approving the [] Feasibility Study . . . which will serve as the basis to determine the investments set out in the agreement, in order to proceed” with signing a 15-year stability agreement.
- (d) Conversely, the Mining Law and Regulations nowhere provided that the feasibility study, or the qualifying investment program included in the feasibility study, defined the scope of stability guarantees.<sup>900</sup>

338. *Second*, Ms. Vega and Ms. Chappuis confirm based on their extensive experience and expertise 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 guarantees’ protective scope. In particular:

- (a) Ms. Chappuis testifies that the “purpose” of requiring a feasibility study under Article 85, which she helped draft, was to show that the investor could achieve the qualifying minimum investment threshold to access the stability regime with a feasible investment program.<sup>901</sup> She explains that the initial investment included in the feasibility study was a “floor,” not a ceiling; that “the more investments the company made after meeting the initial investment, the more the mining industry and the overall economy of the country would benefit”; as an engineer, she knew that “a company would not be able to include in its initial investment program . . . all the investments that it could possibly make over 10 or 15 years of operations”; and that, even if it could, MINEM could not review such a plan in 90 days.<sup>902</sup>
- (b) Ms. Vega similarly explains that feasibility studies “demonstrated that the mining company’s investment program met the initial minimum investment requirement to

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<sup>898</sup> See CA-2, Regulations, Art. 18; see also Vega ¶ 33 (explaining that “feasibility studies played a specific role in the stability regime: they demonstrated that the mining company’s investment program met the initial minimum investment requirement to receive stability guarantees, and that it was technically and economically feasible”).

<sup>899</sup> CA-2, Regulations, Art. 19.

<sup>900</sup> See Vega § III.C.

<sup>901</sup> Chappuis ¶ 22.

<sup>902</sup> Chappuis ¶¶ 22-24; see also Otto ¶¶ 48-50.

receive stability guarantees, and that it was technically and economically feasible.”<sup>903</sup> She explains that “once the DGM determined that the feasibility study included in the investment program complied with the necessary requirements, only then could the investment serve as the basis on which to sign a 15-year stability agreement.”<sup>904</sup> She further explains that feasibility studies “also identified the concessions or mining unit in which the mining company would implement the qualifying investment program, and thus the concessions or mining unit that would benefit from stability if the DGM approved the study.”<sup>905</sup> By contrast, Ms. Vega confirms that “the Mining Law and Regulations . . . [did not] provide[] any basis to limit the scope of stability guarantees to the investment program foreseen in the feasibility study.”<sup>906</sup> Ms. Vega testifies that she has “no recollection during [her] time assisting the Government and while preparing the Mining Law of ever hearing any official at MINEM or elsewhere say that the Mining Law would limit the scope of stability guarantees to the qualifying investment program foreseen in the feasibility study.”<sup>907</sup>

- (c) Ms. Vega also explains that because Article 85 provided a mechanism for default acceptance of a feasibility study if the DGM fails to approve it within 90 days, the feasibility study *cannot* limit the scope of stability guarantees.<sup>908</sup> In particular, she explains that “Government inaction, and a feasibility study that has not been subjected to any Government scrutiny, cannot define the scope of stability guarantees” because “[i]f it did, the mining company itself would potentially have had the ability to define the scope of its stability agreement, which is plainly not the rule.”<sup>909</sup>

339. *Third*, 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. In particular:

- (a) Clause 1, which set forth the “background” for the conclusion of the Stability Agreement, explained that SMCV presented its application for stability by virtue of

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<sup>903</sup> Vega ¶ 50.

<sup>904</sup> Vega ¶ 50(c).

<sup>905</sup> Vega ¶ 50.

<sup>906</sup> Vega ¶ 51.

<sup>907</sup> Vega ¶ 51.

<sup>908</sup> See Vega ¶ 58; CA-1, Mining Law, Art. 85 (“If the Directorate General of Mining does not issue any statement, [the feasibility study] 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.”).

<sup>909</sup> Vega ¶ 53.

its “investment *in its concession*: Cerro Verde No. 1, No. 2, and No. 3, hereinafter ‘the leaching project of Cerro Verde.’”<sup>910</sup> Clause 1 further provided that SMCV “filed with the Ministry of Energy and Mines the pertinent application[.]” to obtain such guarantees and benefits, for which purpose it “attached to its application the technical-economic feasibility study.”<sup>911</sup> As Prof. Bullard notes, “there is nothing in SMCV’s underlying request [for stability guarantees] that shows that the company intended to extend those benefits solely to its leaching operations or in connection with its initial investment program.”<sup>912</sup>

- (b) Clause 3 and Exhibit I then confirmed that the relevant concessions for the stability guarantees were “Cerro Verde No. 1, No. 2 and No. 3” (the Mining Concession) and “Cerro Verde Beneficiation Plant” (the Beneficiation Concession), the concessions in which the qualifying investment was being made.<sup>913</sup>
- (c) Clauses 2 and 4 mentioned the details regarding the DGM’s approval of the feasibility study, and described the qualifying investment program and the term of execution, during which time the feasibility study could be subject to amendments.<sup>914</sup>

340. *Finally*, 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.<sup>915</sup> To begin with, the Court’s position in that case was wrong for the reasons set out above, and failed to give effect to the plain text of the Mining Law and Regulations.<sup>916</sup> Moreover, the Court’s decision was not precedential on any subsequent cases and did not have the purpose of establishing a definitive interpretation of the Stability Agreement, as the divided vote in the 2006-2007 Royalty Case made clear.<sup>917</sup> In any event, it is ultimately for the Tribunal to decide whether there has been a breach of the State’s international law obligations under the umbrella clause.<sup>918</sup>

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<sup>910</sup> **Ex. CE-12**, 1998 Stability Agreement, Clause 1.1 (emphasis added).

<sup>911</sup> **Ex. CE-12**, 1998 Stability Agreement, Clauses 1.1 and 1.2.

<sup>912</sup> Bullard ¶ 40.

<sup>913</sup> **Ex. CE-12**, 1998 Stability Agreement, Clause 3, Exhibit I.

<sup>914</sup> **Ex. CE-12**, 1998 Stability Agreement, Clauses 2 and 4.

<sup>915</sup> *Cf. Ex. CE-138*, 23 Feb. 2016 SMCV Supreme Court Appeal of the Appellate Court Decision No. 7650-2013, 2008 Royalty Assessment.

<sup>916</sup> *See supra* § IV.A.2.i.

<sup>917</sup> *See* Bullard ¶¶ 76-79.

<sup>918</sup> *See, e.g., CA-122, Eureka B.V. v. Poland*, Partial Award (19 August 2005) (Fortier, Schwebel, Rajski (dissenting in part on other grounds)) (“Eureka Partial Award”) ¶¶ 92, 112-114 (dismissing respondent’s admissibility objection based on forum-selection clause because the tribunal concluded it was “require[d] to “consider whether the acts of which Eureka complains, whether or not also breaches of the SPA and the First Addendum, constitute breaches of the Treaty.”); **CA-251, ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italy**, ICSID Case No.

**b. The Government Had to Amend the Mining Law and Regulations to Conform Them to its Restrictive “Interpretation”**

341. In contrast to the Mining Law and Regulations’ clear language that applied stability guarantees to the entire mining unit or concessions (see section IV.A.2.i.a above), there was simply no language in the Mining Law and Regulations that limited stability guarantees to the qualifying minimum investment program. To the contrary, to advance its novel and restrictive interpretation, Peru had to *amend* both the Mining Law and Regulations, confirming that the version in effect at the relevant time did *not* limit stability guarantees to the investment included in the feasibility study.

342. *First*, 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 that applied to SMCV did not *implicitly* contain this limitation, since the amendment would have otherwise been unnecessary.<sup>919</sup> In particular, the 2014 amendment, which became Article 83-B of the Mining Law in force today, states that mining stability agreements granted under that article for investments over US\$500 million “shall apply exclusively to the activities of the mining company in whose favor the investment is made, *provided that said investments are expressly mentioned in the Investment Program contained in the Feasibility Study that is part of the Stability Agreement.*”<sup>920</sup> As Ms. Vega notes, the “amendment in Article 83-B would have been unnecessary if the original text of Article 83 had already limited the scope of 15-year stability agreements to the investments contained in the feasibility study.”<sup>921</sup>

343. *Second*, MINEM’s December 2019 amendments to Article 22 of the Regulations—enacted approximately one month after Freeport submitted its Notice of Intent—similarly confirm that the previous version of the Regulations did not limit stability to the feasibility study’s investment program. In particular, the December 2019 amendment to Article 22 provides that “[t]he contractual guarantees benefit the mining activity titleholder *exclusively for the investments set out in the agreement* that it makes in the concessions or Economic-Administrative Units,” and required that mining titleholders keep “independent accounts *for each of said activities.*”<sup>922</sup> It would simply have been unnecessary for MINEM to limit the scope of Article 22 in 2019 if the original text had already

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ARB/16/5, Award (14 September 2020) (Alvarez, Pryles, Boisson de Chazournes (dissenting in part)) (“ESPF Award”) ¶ 823 (“...the national law assessment of whether the measures breached obligations is not of primary importance, as it cannot override international law obligations.”).

<sup>919</sup> **CA-1**, Mining Law, Art. 83-B (citing **Ex. CE-680**, Promoting Economic Reactivation, Law No. 30296 (31 December 2014)); *see also* **Ex. CE-122**, Contentious Administrative Court, Decision, No. 07650-2013-CA, 2008 Royalty Assessment, pp. 24-25, ¶ 32 (citing Article 83-B of Law No. 30230, published on July 12, 2014, and noting that the amendments reinforced its interpretation that the earlier stability regime did not contain the restriction); *id.* p. 25, ¶ 33.

<sup>920</sup> **CA-1**, Mining Law, Article 83-B (citing **Ex. CE-680**, Promoting Economic Reactivation, Law No. 30296 (31 December 2014) (emphasis added)).

<sup>921</sup> Vega ¶ 52.

<sup>922</sup> **CA-246**, Supreme Decree No. 021-2019-EM (28 December 2019), Article 22 (emphasis added).

limited the stability guarantees to the investment program. Prof. Hernández confirms that “[t]he Government would only have found it necessary to amend Article 22 of the Regulations to expressly limit the scope of the mining stability agreement to the investments ‘set out in the agreement’ if before that date stability agreements covered *all* the investments made in concessions or EAUs.”<sup>923</sup> Ms. Vega similarly notes that “the amendment to Article 22, which limited the scope of stability guarantees to investments ‘set out in the agreement’ would have been unnecessary if the original text had limited stability guarantees to the investments mentioned in the stability agreement.”<sup>924</sup>

**c. The Government’s Interpretation Undermines the Mining Law’s Purpose of Promoting Investment by Creating Administrative Burdens and Legal Uncertainty.**

344. The Government’s interpretation also upends the basic purpose that the Mining Law’s drafters sought to achieve in creating stability guarantees—to offer investors a predictable tax and administrative framework. Instead, it creates legal uncertainty and administrative burdens that discourage continued investment in the mining sector. Because mining companies need to continuously make new investments, applying stability on the basis of a feasibility study’s investment program is difficult to implement coherently, administratively burdensome, and would require extensive regulatory guidance to implement in a non-arbitrary manner—guidance that was entirely lacking under the existing law. Peru’s haphazard, erratic attempts to apply and implement its novel interpretation clearly demonstrate these pitfalls and are a powerful confirmation that the Mining Law and Regulations were never intended to be interpreted that way.

345. *First*, by their very nature, mining units require continuing investments over time, as discussed above (see Section IV.A.2.i.c above). As such, limiting stability guarantees to the investments in the feasibility study undermines the promotion of investment in mining resources. As Prof. Otto explains, “[m]any mining investors make substantial further investments not contemplated in the initial feasibility study within the 10 to 15 years following its completion,” and if these investments are not stabilized, the stability guarantees are “significantly less attractive” to investors, and also act as a “disincentive” to further development of the mining unit.<sup>925</sup>

346. *Second*, 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. As a result, applying separate stability regimes to different investments within the same integrated mining unit—as Peru’s novel interpretation would require—would be administratively burdensome, and would require extensive regulatory guidance to implement in a non-arbitrary manner. For example:

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<sup>923</sup> Hernández ¶ 119 (emphasis in original).

<sup>924</sup> Vega ¶ 47.

<sup>925</sup> Otto ¶¶ 23, 34, 50.

- (a) Prof. Otto explains that it is

difficult to overstate the challenges associated with attributing shared mining assets and costs to one of the two processing circuits in an integrated mining operation for the purposes of calculating a net-asset or net-profit tax. In SMCV's case, shared assets and costs associated with mining, such as exploration, blasting, extraction, haulage, crushing, electricity, water, communications, salaries, insurance, or marketing cannot be easily disaggregated into cathode versus concentrate production. When SMCV invests in new haulers to carry ore out of the pits, for example, it cannot easily break down their capital or operating cost between leaching and flotation. The same principle applies when SMCV deducts the depreciation of those haulers, which becomes a haphazard exercise when different depreciation rates apply to the leaching and flotation plants.<sup>926</sup>

- (b) Mr. Choque similarly testifies that from an accounting perspective, separating SMCV's accounting between leaching and flotation was "not viable" because "SMCV maintained a single set of accounting records applying the stabilized regime to its entire Mining Unit, including the Concentrator" and "the applicable laws and regulations did not provide any criteria for SMCV to apply in dividing the costs . . . between the two processing facilities."<sup>927</sup> Mr. Choque likewise explains that keeping part of SMCV's accounting in U.S. dollars and part in Peruvian *soles*—as the Government suggested it should have done—would have "imposed significant costs and administrative burdens on SMCV."<sup>928</sup>

347. *Third*, Peruvian law provided no guidance whatsoever on how to actually implement a stability regime based on individual investments. The Mining Law and Regulations were *silent* on how to allocate assets and costs between stabilized and non-stabilized investments within the same integrated mining unit—in contrast to allocating costs between different stabilized and non-stabilized concessions or mining units.<sup>929</sup> This is further confirmation that the Government's interpretation is simply wrong, and does not reflect the actual intent of the drafters of the Mining Law and Regulations. In particular:

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<sup>926</sup> Otto ¶ 52; *see also* Choque ¶ 13; Aquino ¶ 57 ("[W]e do not divide mining costs between the processing facilities because it would be virtually impossible to figure out what share of our mining costs generate ore for the leaching facilities versus the concentrator. That is simply not how mining works.").

<sup>927</sup> Choque ¶¶ 34, 15.

<sup>928</sup> Choque ¶ 33.

<sup>929</sup> *Cf.* CA-2, Regulations, Art. 22 (noting that "a mining activity titleholder that has other concessions or Economic Administrative Units shall keep independent accounts and reflect them in separate earnings statements," and that if expenses cannot be identified to a particular concession or Economic Administrative Unit, they "shall be distributed among them in proportion to the net sales of the mining substances extracted from them").

- (a) Prof. Otto opines that if the stabilization regime actually required companies to allocate shared assets and costs between specific investments, he would expect, at a minimum, that the Government would “provide reasoned, detailed rules on how to apply the different regimes to the applicable parts of the mining unit for determining net-asset or net-profit taxes charged on the mine’s activities.”<sup>930</sup>
- (b) Mr. Choque notes that “neither the applicable legal framework, nor SUNAT provided SMCV with criteria to apply to separate its single account into separate leaching facility and concentrator accounts.”<sup>931</sup>
- (c) Prof. Hernández opines that “SUNAT clearly acknowledged that no official criteria existed for dividing accounting of non-processing operations and mixed assets between the Leaching Plant and the Concentrator.”<sup>932</sup> Prof. Hernández further notes, “[n]ot only did SUNAT never identify any official criteria or order SMCV to apply it,” but it also inconsistently applied its Tax Assessments, reflecting the fact that no division criteria were available.<sup>933</sup>

348. *Finally*, 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. For example, both the Temporary Tax on Net Assets (“TTNA”) and Income Tax require the identification of fixed assets in their respective calculations—TTNA because it is determined based on net assets, including fixed assets, and Income Tax because it takes into account the depreciation of fixed assets.<sup>934</sup> However, Peru’s approach varied significantly in its treatment of these taxes:

- (a) For fiscal years 2009, 2010, and 2011, SUNAT treated *all* of SMCV’s fixed assets as non-stabilized for TTNA, while treating only fixed assets related to the Concentrator as non-stabilized for Income Tax.<sup>935</sup> This had the illogical result that fixed assets relating to the leaching facility were considered stabilized for the purpose of Income Tax but not for purposes of TTNA.<sup>936</sup> For 2009, 2010, and 2011 Income Tax,

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<sup>930</sup> Otto ¶ 51.

<sup>931</sup> Choque ¶ 33.

<sup>932</sup> Hernández ¶ 79.

<sup>933</sup> Hernández ¶ 79.

<sup>934</sup> See **CA-112**, Temporary Tax on Net Assets Law, Law No. 28424 (21 December 2004), Arts. 4-5; **CA-104**, Amendment to the Income Tax Law, Legislative Decree No. 945 (23 December 2003), Art. 384.

<sup>935</sup> See *supra* §§ III.Q.2, III.Q.4.

<sup>936</sup> See *supra* §§ III.Q.2, III.Q.4 (citing Choque ¶¶ 22-24; Appendix F Income Tax); see also Choque ¶ 32; **Ex. CE-640**, SUNAT, Result of Requirement of Information No. 0522110000141 (Income Tax for 2007) (23 March 2012), Annex No. 2; **Ex. CE-626**, SUNAT, Result of Requirement of Information No. 0522110000645 (Income Tax for 2007) (26 September 2011) (notified to SMCV 27 September 2011), p. 5.

SUNAT also applied the non-stabilized depreciation regime to certain assets without providing any reason for doing so.<sup>937</sup>

- (b) In 2012 and 2013, SUNAT changed course and treated all the fixed assets SMCV started using as of 2007 as non-stabilized for Income Tax as well. This meant that certain leaching facility assets, such as the agglomeration feeder, were subject to both legal regimes: the stabilized regime before 2012 but then the non-stabilized regime in 2012 and 2013.<sup>938</sup>
- (c) In the 2007-2013 Income Tax Assessments, SUNAT also denied on a blanket basis SMCV's income tax deductions for employee profit-sharing ("PTU") amounts that SMCV paid after filing its income tax returns for the corresponding years and recreational expenses, as well as deductions for payments that SMCV recorded in accordance with the rules applicable under the Stability Agreement, without attempting to identify which deductions related to the Concentrator.<sup>939</sup>

349. When it was unable to figure out how to distinguish between stabilized and allegedly non-stabilized income or assets, the Government also insisted that SMCV bear the burden of the Government's incoherent approach and assessed Temporary Tax on Net Assets (TTNA) and the Complementary Mining Pension Fund (CMPF) against SMCV's *entire* net assets or income and Additional Income Tax (AIT) on *all* of SMCV's expenses—including those relating to net income, assets, and expenses that under the Government's own novel interpretation were clearly stabilized. For example:

- (a) For fiscal years 2009 to 2011 and 2013, SUNAT issued Assessments for TTNA based on SMCV's *entire* net assets, including those related to the leaching facility that SUNAT had conceded were covered by the Stability Agreement.<sup>940</sup>
- (b) For fiscal year 2013, SUNAT charged CMPF on the *entirety* of SMCV's net income, including income generated from the sales of cathodes which SUNAT had never disputed was within the scope of the Stability Agreement.<sup>941</sup>

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<sup>937</sup> See Choque ¶¶ 21-4; Expert Report of Pablo Spiller and Carla Chavich, Table 49.

<sup>938</sup> See *supra* § III.Q.2 (citing Choque ¶ 24; Appendix F Income Tax).

<sup>939</sup> See Choque ¶¶ 25-28 and **Annex A**: Administrative Proceedings; Expert Report of Pablo Spiller and Carla Chavich, Table 49.

<sup>940</sup> See *supra* § III.Q.4 (citing **Ex. CE-103**, SUNAT Assessment No. 052-003-0011208 (27 December 2013) (TTNA for 2009); **Ex. CE-132**, SUNAT Assessment No. 052-003-0012908 (14 August 2015) (TTNA for 2010); **Ex. CE-147**, SUNAT Assessment No. 052-003-0014319 (27 July 2016) (TTNA for 2011); **Ex. CE-230**, SUNAT Assessment Resolution No. 012-003-0107987 (20 November 2019) (TTNA for 2013)); Choque ¶ 32.

<sup>941</sup> See *supra* § III.Q.5 (citing **Ex. CE-771**, SUNAT, Result of Requirement No. 0122190002553 (CMPF for 2013) (19 December 2019); Choque ¶ 32).

- (c) For fiscal years 2007 to 2013, SUNAT applied the 4.1% AIT rate on all expenses, regardless of whether those expenses had been incurred in relation to leaching-related activities.<sup>942</sup>

350. Peru also treated investments *not* included in the Feasibility Study's investment program as stabilized on multiple occasions. For example:

- (a) The investment program included in the 1996 Feasibility Study built on the *existing* leaching facilities at Cerro Verde; namely, primary through secondary crushing plants, conveyor and stacking system, leaching pads, and an SX/EW plant.<sup>943</sup> If the Government had consistently applied its novel and restrictive interpretation, the assets that existed at the time of the 1996 Feasibility Study would not have been covered by the Stability Agreement, as they did not fall within the Feasibility Study. The Government, however, treated the existing assets as stabilized.<sup>944</sup>
- (b) In 1999 and 2002, before it invested in the Concentrator, SMCV made a number of significant investments that were not contemplated in the 1996 Feasibility Study. These included (i) a US\$4.5 million investment in used mining equipment to increase daily ore extraction in 1999, (ii) a US\$10 million investment in implementing a revised mine plan to optimize leaching and SX/EW circuits and expand production of copper cathodes in 2001, and (iii) a US\$15 million investment to expand the leaching facility's Pad-2, which expanded leaching circuit processing capacity in 2001 and 2002.<sup>945</sup> Again, under the Government's novel and restrictive interpretation, these investments would not have been covered by the Stability Agreement because, like the Concentrator, they were not investments included in the 1996 Feasibility Study's investment program. Yet nobody from the Government ever suggested that these investments were not entitled to stability, nor did SUNAT assess any non-stabilized taxes or royalties against them.<sup>946</sup>

### 3. The Government's Breaches and Freeport's Claims

351. Because the Stability Agreement applies to the entire Cerro Verde Mining Unit, and the Concentrator is part of that Mining Unit, Peru violated the Stability Agreement each time SUNAT's Royalty and Tax Assessments became binding and enforceable against SMCV. Specifically, Peru repeatedly breached the following obligations contained in the Stability Agreement with respect

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<sup>942</sup> See *supra* § III.Q.3; Choque ¶ 32.

<sup>943</sup> See *supra* § III.D.3.

<sup>944</sup> See, e.g., **Ex. CE-31**, SUNAT, 2006/07 Royalty Assessments (17 August 2009).

<sup>945</sup> See *supra* § III.E.1 (citing Davenport ¶ 23).

<sup>946</sup> See Torreblanca ¶ 11.

to each of its Assessments: (i) Clauses 9.4, 9.5, and 9.6, and the obligation to provide tax and administrative stability to SMCV;<sup>947</sup> (ii) Clause 10.1, and the obligation to exempt SMCV from the application of any new laws or regulations that “directly or indirectly, denaturalize[d] the guarantees provided” by the Stability Agreement;<sup>948</sup> 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.”<sup>949</sup> Further, Peru breached Clauses 9.4, 9.5, 9.6, 10.1, and 10.2 of the Stability Agreement when certain of its Tax Assessments became final and enforceable for the independent reason that Peru arbitrarily applied the non-stabilized regime to assets and activities that enjoyed stability *even under* Peru’s own flawed interpretation of the stability agreement (see paragraphs 348 and 349 above).

352. Each of Peru’s breaches of the Stability Agreement arose as of the date that the relevant Assessment became final and enforceable against SMCV.<sup>950</sup> In other words, Peru breached its obligations under the Stability Agreement when it *actually applied* a tax and administrative regime other than SMCV’s stabilized regime to SMCV’s stabilized concessions.<sup>951</sup> Under Peruvian law, such breaches could only occur through administrative acts (*actos administrativos*) that were “final, definitive, and enforceable,” since prior to becoming final, definitive, and enforceable, there was no effect on SMCV’s legal interests, no damage to SMCV and the administrative authority could have reversed course at any time.<sup>952</sup> As Professor Bullard—a leading jurist on Peruvian contract and

<sup>947</sup> See **Ex. CE-12**, 1998 Stability Agreement, Clause 9.5 (tax stability); *id.*, Clause 9.6 (administrative stability).

<sup>948</sup> **Ex. CE-12**, 1998 Stability Agreement, Clause 10.1.

<sup>949</sup> **Ex. CE-12**, 1998 Stability Agreement, Clause 10.2; *see also id.*, Clause 9.4 (allowing SMCV to keep its accounting in dollars); *id.*, Clause 13 (providing that the provisions referenced in the Stability Agreement are the ones in force at the time of the approval of the Feasibility Study).

<sup>950</sup> **CA-14**, Peruvian Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Article 115 (“An enforceable debt will give rise to coercive actions for its collection. To this end, the following are considered to be enforceable debts: a) A debt created by means of an Assessment or Penalty Resolution . . . and not complained against by the legal deadline; . . . c) An enforceable debt created by a Resolution not appealed by the legal deadline, or appealed after the legal deadline, . . . or the one required in the Resolution of the Tax Tribunal.”); *id.*, Article 157 (“The resolution of the Tax Tribunal exhausts the administrative channel.”); **CA-18**, Supreme Decree No. 004-2019-JUS, Single Unified Text of Law No. 27444, Law of General Administrative Procedure, Article 222 (“Once the deadlines for filing administrative appeals have expired, the right to file them will be lost and the act will become final.”); *id.*, Article 201.2 (“An administrative appeal may be withdrawn before notification of the final decision in the instance, determining that the challenged decision becomes final, unless other parties have joined the appeal, in which case it will only have effect for the party that filed it.”); *see also* Bullard ¶¶ 80-89.

<sup>951</sup> *Id.*; *see also* **CA-282**, Cassation No. 1665-2016 Ica (17 April 2017), ¶ 7 (“As regards contractual liability, the doctrine finds its basis in the debtor’s acceptance of the obligation, in the fulfillment of rules and conditions established by common agreement (or perhaps regulated by law) to be observed to satisfy the interest of the obligee; in the necessary adoption of all possible measures to guarantee and carry out performance of the obligation in the terms desired by the obligee (mere diligence is not enough, there are inherent duties of protection and foresight in the actions of the obligor). Thus, the violation of such duties, the non-performance of the performance and, therefore, the dissatisfaction of the interest of the obligee is the basis for seeking compensation from the obligor.”); *see also* Bullard ¶ 86.

<sup>952</sup> See **CA-14**, Peruvian Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Article 115 (“An enforceable debt will give rise to coercive actions for its collection. To this end, the following are considered to be enforceable debts: a) A debt created by means of an Assessment or Penalty Resolution . . .

administrative law—explains, “[u]nder Peruvian law there is a breach of a contractual obligation when the debtor’s conduct fails to deliver what it had promised,” and “in the case of stability agreements and SUNAT assessments against SMCV, for the debtor’s conduct to have failed to deliver what it had promised, the State must act or perform its conduct through final, definitive, and enforceable administrative acts.”<sup>953</sup> Once SUNAT’s assessments become final, definitive, and enforceable administrative acts, “the will of the State affects private parties’ legal and financial interests, the public administration is no longer able to control its own agencies’ acts, and the administrative process is powerless to change the acts’ legal effects on private parties.”<sup>954</sup> Accordingly, Professor Bullard explains that “[o]nly when SUNAT’s assessments became final, definitive, and enforceable administrative acts did SMCV suffer an economic loss and acquire the right to file claims for contractual breach in court.”<sup>955</sup> Professor Bullard also explains that “under Peruvian law, each final, definitive, and enforceable SUNAT assessment against SMCV constituted a separate breach of the Stability Agreement,” because “[e]ach assessment constituted a separate administrative act that determined and quantified SMCV’s liability for an administrative charge or tax, for a specific period of time, and on the basis of concrete facts.”<sup>956</sup>

353. Here, SUNAT’s Assessments became final and enforceable on either (i) the business day after SMCV was served with the Tax Tribunal resolution, for the Assessments it challenged before the Tax Tribunal; (ii) the business day after SMCV’s deadline for submitting a challenge before SUNAT or the Tax Tribunal expired, for the cases where SMCV did not file a challenge before the Tax Tribunal or a request for reconsideration before SUNAT; or (iii) the business day after SMCV was served with the SUNAT or Tax Tribunal resolution accepting SMCV’s withdrawal, for the cases SMCV withdrew.<sup>957</sup> Peru has not yet accepted SMCV’s withdrawal of its challenges for certain tax assessments although the withdrawals were submitted nearly twenty months ago. In light of Peru’s

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and not complained against by the legal deadline . . . c) An enforceable debt created by a Resolution not appealed by the legal deadline, or appealed after the legal deadline . . . or the one required in the Resolution of the Tax Tribunal.”); *id.*, Article 157 (“The resolution of the Tax Tribunal exhausts the administrative channel.”); **CA-18**, Supreme Decree No. 004-2019-JUS, Single Unified Text of Law No. 27444, Law of General Administrative Procedure, Article 222 (“Once the deadlines for filing administrative appeals have expired, the right to file them will be lost and the act will become final.”); *id.*, Article 201.2 (“An administrative appeal may be withdrawn before notification of the final decision in the instance, determining that the challenged decision becomes final, unless other parties have joined the appeal, in which case it will only have effect for the party that filed it.”); *see also* Bullard ¶¶ 80-82.

<sup>953</sup> See Bullard ¶¶ 81-82.

<sup>954</sup> Bullard ¶ 85 (citing **CA-287**, Jorge Danós Ordoñez, *La Impugnación de los Actos de Trámite en el Procedimiento Administrativo y la Queja*, DERECHO Y SOCIEDAD No. 28 (2007), p. 268 (“Procedural administrative acts are instrumental acts for the issuance of another final administrative act . . . and unlike definitive acts, they do not terminate the administrative procedure because they lack decisive content and the will to resolve the substantive issue.”)).

<sup>955</sup> Bullard ¶ 89.

<sup>956</sup> Bullard ¶ 88.

<sup>957</sup> Hernández ¶ 41 (citing **CA-14**, Tax Code, Supreme Decree No. 133-2013-EF (June 22, 2013), Article 115, subdivisions a and c).

failure to act, Freeport considers the date of SMCV’s withdrawal petitions as the relevant date of breach for those assessments. **Table A** below lists each of the breaches of the Stability Agreement for which Freeport has submitted claims in this arbitration, along with the relevant date of breach:

**Table A: Peru’s Breaches of the Investment Agreement**

| <b>Peru’s Breaches of the Investment Agreement</b>  | <b>Date of Breach</b> |
|---|-----------------------|
| 2009 Royalty Assessments                            | 2 October 2018        |
| 2010-2011 Royalty Assessments                       | 20 September 2018     |
| Q4 2011 Royalty Assessments                         | 6 December 2019       |
| 2012 Royalty Assessments                            | 14 February 2019      |
| 2013 Royalty Assessments                            | 20 June 2019          |
| 2006 Income Tax Assessments                         | 20 November 2018      |
| 2007 Income Tax Assessments                         | 20 November 2018      |
| 2008 Income Tax Assessments                         | 18 March 2021         |
| 2009 Income Tax Assessments                         | 27 February 2020      |
| 2010 Income Tax Assessments                         | 27 February 2020      |
| 2011 Income Tax Assessments                         | 27 February 2020      |
| 2012 Income Tax Assessments                         | 16 November 2020      |
| 2013 Income Tax Assessments                         | 28 January 2021       |
| 2007 Additional Income Tax Assessments              | 22 November 2018      |
| 2008 Additional Income Tax Assessments              | 27 February 2020      |
| 2009 Additional Income Tax Assessments              | 27 February 2020      |
| 2010 Additional Income Tax Assessments              | 27 February 2020      |
| 2011 Additional Income Tax Assessments              | 27 February 2020      |
| 2012 Additional Income Tax Assessments              | 15 May 2020           |
| 2013 Additional Income Tax Assessments              | 28 January 2021       |
| 2005 General Sales Tax Assessments                  | 20 November 2018      |
| 2005 General Sales Tax on Non-Residents             | 30 September 2020     |
| 2006 General Sales Tax Assessments                  | 20 November 2018      |
| 2006 General Sales Tax on Non-Residents Assessments | 27 February 2020      |
| 2007 General Sales Tax Assessments                  | 22 November 2018      |
| 2008 General Sales Tax Assessments                  | 27 February 2020      |
| 2009 General Sales Tax Assessments                  | 27 February 2020      |

| <b>Peru’s Breaches of the Investment Agreement</b> | <b>Date of Breach</b>                   |
|--|---|
| 2010 General Sales Tax Assessments                 | 27 February 2020                        |
| 2011 General Sales Tax Assessments                 | 27 February 2020                        |
| 2009 Temporary Tax on Net Assets Assessments       | 4 March 2020                            |
| 2010 Temporary Tax on Net Assets Assessments       | 10 March 2020                           |
| 2011 Temporary Tax on Net Assets Assessments       | 4 March 2020                            |
| 2013 Temporary Tax on Net Assets Assessments       | 15 May 2020<br>8 January 2019 (Penalty) |
| Q4 2011-2012 Special Mining Tax Assessments        | 31 July 2019                            |
| 2013 Special Mining Tax Assessments                | 20 June 2019                            |
| 2013 Complementary Mining Pension Fund Assessments | 15 May 2020                             |

354. As Freeport explained in its Notice of Arbitration, and Notice of Additional Claims, each of these claims has been properly submitted to arbitration and falls within Peru’s consent to arbitrate.<sup>958</sup>

355. *First*, each of Freeport’s claims satisfies Article 10.18.1’s requirement that at the time Freeport submitted the claim, no “more than three years ha[d] elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach . . . and knowledge that the claimant . . . or the enterprise . . . has incurred loss or damage.”<sup>959</sup> As the table above makes clear, the date of breach for each of Freeport’s claims occurred within three years of Freeport’s filing of its Notice of Arbitration on 28 February 2020. Freeport also “first acquired . . . knowledge” of each breach within this three year period, since it could not have knowledge of a breach *before* that breach occurred. Similarly, Freeport “first acquired . . . knowledge” that it and SMCV had “incurred loss or damage” as a result of Peru’s breaches within this three year period. As the plain language of Article 10.18 makes clear, it is impossible for a claimant to have knowledge that it “has incurred” loss or damage until it *has actually incurred* that loss.<sup>960</sup> Here, as explained above, SMCV did not “incur” loss or damage until the Assessments became final and enforceable, which occurred within three years of Freeport’s filing of its Notice of Arbitration for each of Freeport’s claims. Freeport does not submit claims for Peru’s breaches of the Stability Agreement arising from the 2006-2007 and 2008 Royalty Assessments, because those claims fall outside the three-year prescription period.

<sup>958</sup> See Notice of Arbitration ¶¶ 143-147; Notice of Additional Claims ¶¶ 5-8.

<sup>959</sup> CA-10, TPA, Article 10.18.1.

<sup>960</sup> CA-10, TPA, Article 10.18.1.

356. *Second*, Freeport and SMCV have submitted valid waivers with respect to all “measure[s] alleged to constitute a breach” for each of these claims pursuant to Article 10.18.2(b), and SMCV has voluntarily withdrawn from each and every proceeding in Peru related to the Stability Agreement in an abundance of caution, as set out in Freeport’s Notice of Arbitration.<sup>961</sup>

357. *Third*, neither Freeport nor SMCV has submitted contractual claims for the same breaches of the Stability Agreement “to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure,” as required pursuant to Article 10.18.4 for claims based on breaches of an investment agreement.<sup>962</sup> SMCV’s challenges to the Royalty and Tax Assessments were not contractual claims; rather, they were administrative challenges to the validity of SUNAT’s Assessments under the Mining Laws and Regulations. Further, none of these administrative challenges were submitted to the Contentious Administrative Courts, which are the competent “administrative tribunal” under Peruvian law, or to any other binding dispute settlement procedure. While SMCV did submit administrative challenges to the 2006-2007 and 2008 Royalty Assessments to the Contentious Administrative Courts, Freeport is not bringing claims for breach of the Stability Agreement based on these Assessments, as noted above.

## **B. PERU BREACHED ARTICLE 10.5 OF THE TPA**

358. In addition, by engaging in arbitrary and unreasonable conduct in contravention of basic notions of due process and fundamental principles of fairness, Peru repeatedly breached its obligation to accord fair and equitable treatment under Article 10.5 of the TPA. Specifically:

- (a) Peru violated Article 10.5 when each of the 2009, 2010-2011, Q4 2011, 2012, and 2013 Royalty Assessments became final and enforceable because the Government breached its guarantees of stability in contravention of Freeport’s and SMCV’s legitimate expectations, arbitrarily and unreasonably adopted its novel and restrictive interpretation of the scope of stability guarantees in response to domestic political pressure, acted inconsistently and non-transparently in executing a complete *volte-face* from its prior position regarding the scope of stability, and then upheld the Assessments in Tax Tribunal proceedings marred by serious due process violations. Peru likewise violated Article 10.5 because the final and enforceable 2006-2007 and 2008 Royalty Assessments resulted directly from serious due process violations by the Tax Tribunal.

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<sup>961</sup> **CA-10**, TPA, Article 10.18.2(b); Notice of Arbitration ¶ 146; *see also* **Ex. CE-267**, 21 Feb. 2020, Waiver Declaration, Freeport-McMoRan Inc.; **Ex. CE-240**, 25 Feb. 20[20], Waiver Declaration, Sociedad Minera Cerro Verde; **Ex. CE-283**, 14 June 2021, Waiver Declaration, Freeport-McMoRan Inc.; **Ex. CE-284**, 14 June 2021, Waiver Declaration, Sociedad Minera Cerro Verde.

<sup>962</sup> **CA-10**, TPA, Article 10.18.4.

- (b) In addition, Peru violated Article 10.5 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, given that SMCV's position was clearly based on a reasonable interpretation of the Mining Law and Regulations.
- (c) Further, Peru violated Article 10.5 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 previously acknowledged that GEM payments are only owed when a company does *not* pay Royalties by virtue of its stability agreement.

**1. Article 10.5 Requires Peru to Accord the Minimum Standard of Treatment to Freeport's Covered Investments**

359. Article 10.5 provides in relevant part:

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including *fair and equitable treatment* and full protection and security.
2. For greater certainty, paragraph 1 prescribes the *customary international law minimum standard of treatment of aliens* as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide: (a) "*fair and equitable treatment*" includes the obligation *not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the legal systems of the world*; and (b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.<sup>963</sup>

360. Annex 10-A clarifies the State Parties' understanding of "customary international law" and their intention to incorporate "all" relevant customary international law principles in the protections afforded by Article 10.5:

The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 10.5 results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 10.5, the customary international law minimum standard of treatment of

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<sup>963</sup> CA-10, TPA, Art. 10.5 (emphasis added).

aliens refers to *all* customary international law principles that protect the economic rights and interests of aliens.<sup>964</sup>

361. Tribunals have repeatedly acknowledged that the minimum standard of treatment is an evolving concept, and that its obligation of fair and equitable treatment is today “not materially different” from the treaty-based “fair and equitable treatment” standard as it has been interpreted by international investment tribunals.<sup>965</sup> Further, tribunals have repeatedly concluded that the minimum standard of treatment’s fair and equitable treatment obligation encompasses several interrelated obligations, including obligations (i) to honor the investor’s legitimate expectations, (ii) of non-arbitrariness and reasonableness, (iii) to act with reasonable consistency and transparency, and (iv) to act with procedural propriety and due process.<sup>966</sup>

362. *First*, tribunals have repeatedly confirmed that legitimate expectations are a core component of fair and equitable treatment, and accordingly, that a State’s repudiation of the general legal framework or specific representations on which the investor reasonably relied is relevant to assessing whether there has been a breach of the fair and equitable treatment obligation.<sup>967</sup> For example:

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<sup>964</sup> CA-10, TPA, Annex 10-A (emphasis added).

<sup>965</sup> See CA-237, *Rumeli Telekom A.S. et al. v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008 (Hanotiau, Lalonde, Boyd) (“*Rumeli Award*”), ¶ 611 (adopting “the view of several ICSID tribunals that the treaty standard of fair and equitable treatment is not materially different from the minimum standard of treatment in customary international law”); see, e.g., CA-279, *Murphy Exploration & Production Co. Int’l v. Ecuador*, PCA Case No. 2012-16 (formerly AA 434), Partial Final Award, 6 May 2016 (Hanotiau, Hobér, Derains) (“*Murphy Partial Final Award*”), ¶ 208 (noting that “[t]he international minimum standard and the treaty standard continue to influence each other” and that “these standards are increasingly aligned”); CA-276, *Railroad Development Corp. v. Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012 (Sureda, Eizenstat, Crawford) (“*RDC Award*”), ¶ 218 (interpreting DR-CAFTA and adopting “the conclusion that the minimum standard of treatment is ‘constantly in a process of development’”) (quoting *ADF Group Inc. v. United States*, ICSID Case No. ARB(AF)/00/1 (NAFTA), Award, 9 January, 2003 (Feliciano, de Mestral, Lamm) ¶ 179);

<sup>966</sup> See CA-269, *Waste Management, Inc. v. Mexico*, ICSID Case No. ARB(AF)/00/3 (NAFTA), Award, 30 April 2004 (Crawford, Civiletti, Gómez) (“*Waste Management II Award*”), ¶ 98 (“[T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.”); see also CA-276, *RDC Award*, ¶ 219 (applying the DR-CAFTA and finding “that *Waste Management II* persuasively integrates the accumulated analysis of prior NAFTA Tribunals and reflects a balanced description of the minimum standard of treatment”).

<sup>967</sup> See, e.g., CA-279, *Murphy Partial Final Award*, ¶¶ 206-07 (holding that “[p]rotecting the stability and predictability of the host State’s legal and business framework,” including “the fulfilment of an investor’s legitimate expectations . . . underpins the modern customary international law standard”); CA-278, *Clayton et al v. Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015 (Schwartz, Simma, McRae (dissenting)) (“*Clayton/Bilcon v. Canada Award*”), ¶ 589 (“The *Waste Management* standard calls for a consideration of representations made by the host state which an investor relied on to its detriment.”); CA-277, *Abengoa, S.A. et al. v. Mexico*, ICSID Case No. ARB(AF)/09/2, Award, 18 April 2013 (Mourre, Fernández-Armesto, Siqueiros) (“*Abengoa Award*”), ¶ 642 (“[A] grossly

- (a) In *Murphy v. Ecuador*, the tribunal concluded that Ecuador’s adoption of new fiscal measures to increase revenue from oil production breached its obligation to accord fair and equitable treatment because, among others, the new measures undermined legitimate expectations “grounded in” an oil participation contract with fiscal stabilization provisions.<sup>968</sup> The tribunal noted that Ecuador had entered into the relevant contract “at a time when Ecuador was striving to retain and attract foreign investment” by holding “itself out as being able to provide a modern, stable, and predictable legal and business framework that would operate for the mutual benefit of foreign investors and Ecuador.”<sup>969</sup> The tribunal underscored that Ecuador’s new measures “fundamentally, and prejudicially, changed” the “business and legal framework that existed at the time [the investment was made].”<sup>970</sup>
- (b) In *Clayton/Bilcon v. Canada*, the tribunal found that Canada failed to afford the minimum standard of treatment when its environmental review board adopted a “highly problematic” and “unprecedented approach” to interpreting and applying domestic law after claimant had already invested “very substantive corporate resources” in a rock quarry.<sup>971</sup> The tribunal found that the claimants could “reasonably expect” the relevant administrative review board to be “methodical[]” and conduct a “thorough” administrative review process,<sup>972</sup> but contrary to this expectation, the Government enmeshed the claimant in an “unwinnable” administrative process despite “specific encouragement[]” from government officials that “they could succeed on the basis of the individual merits of their case.”<sup>973</sup>
- (c) In *Abengoa v. Mexico*, the tribunal concluded that Mexico had breached the minimum standard of treatment when it revoked the investor’s authorization for a waste management project, contrary to the Government’s past assurances, representations, and issuance of construction permits and other regulatory approvals, which the

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inconsistent, contradictory action devoid of reasons that comes to arbitrarily reverse previous or preexisting decisions or approvals issued by the State on which the investor relied and based the assumption of its commitments, is contrary to the minimum level of treatment in keeping with customary international law.”); **CA-269**, *Waste Management II* Award ¶ 98

<sup>968</sup> **CA-279**, *Murphy* Partial Final Award , ¶¶ 249, 281, 292-93.

<sup>969</sup> **CA-279**, *Murphy* Partial Final Award , ¶¶ 258, 280-81.

<sup>970</sup> **CA-279**, *Murphy* Partial Final Award , ¶ 281.

<sup>971</sup> See **CA-278**, *Clayton/Bilcon v. Canada* Award, ¶¶ 446-49.

<sup>972</sup> See **CA-278**, *Clayton/Bilcon v. Canada* Award, ¶480-81.

<sup>973</sup> See **CA-278**, *Clayton/Bilcon v. Canada* Award, ¶¶ 446-54.

tribunal found had established a “legitimate expectation that the Plant’s situation met all the necessary administrative and legal requirements.”<sup>974</sup>

- (d) In *Eco Oro v. Colombia*, a majority of the tribunal concluded that Colombia’s granting of a mining concession near an un-delimited sensitive environmental zone, and repeated assurances of support for the development of the mining project based on its positive economic impact to the local community, including specific support from Colombia’s President, created legitimate expectations that the mining company “would be entitled to undertake mining exploitation activities in the entirety of” the concession.<sup>975</sup> The majority concluded that governmental delay in delimiting the protected zone and “grossly inconsistent” statements and positions adopted by the relevant mining and environmental ministries constituted a “regulatory roller-coaster” that undermined the mining company’s legitimate expectations, thus breaching the treaty.<sup>976</sup>

363. *Second*, tribunals have confirmed that government action is arbitrary if, among other factors, it is taken “not based on legal standards but on excess of discretion, prejudice or personal preference,” or based on political calculations.<sup>977</sup> For example:

- (a) In *Abengoa v. Mexico*, the tribunal concluded that Mexico breached the minimum standard of treatment when it reversed course and cancelled the investor’s operational license for its waste management project following political campaign promises to shut down the project in the face of local opposition.<sup>978</sup> The tribunal found that cancellation of the permit was, among others, “arbitrary” and “completely

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<sup>974</sup> **CA-277**, *Abengoa Award*, ¶¶ 173-91, 646-51.

<sup>975</sup> **CA-285**, *Eco Oro Minerals Corp., v. Colombia*, ICSID Case No. ARB/16/341, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021 (Blanch, Grigera Naón (dissenting in part on other grounds), Sands (dissenting)) (“*Eco Oro Decision on Jurisdiction, Liability and Directions on Quantum*”), ¶¶ 766-89, 804.

<sup>976</sup> **CA-285**, *Eco Oro Decision on Jurisdiction, Liability and Directions on Quantum*, ¶¶ 791, 806-21 (noting that “Eco Oro was left in limbo for a very considerable period of time, with no certainty” and that at “all times [there were] two competing approaches within the Colombian ministries, on the one hand the need for the economic benefits derived from a vibrant mining industry and on the other a belief in the need to protect the [environmental wetland area], but there was also a complete lack of agreement or even coordination in any part of the Government as to what should be done”).

<sup>977</sup> See **CA-222**, *Crystalex International Corp. v. Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (4 April 2016) (Lévy, Gotanda, Boisson de Chazournes) (“*Crystalex Award*”), ¶ 578 (defining arbitrary decisions as those “not based on legal standards but on excess of discretion, prejudice or personal preference, and taken for reasons that are different from those put forward by the decision maker”); **CA-163**, *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (14 January 2010) (Fernández-Armesto, Paulsson, Voss) (“*Lemire Decision on Jurisdiction and Liability*”), ¶¶ 262-63 (“[T]he underlying notion of arbitrariness is that prejudice, preference or bias is substituted for the rule of law.”).

<sup>978</sup> **CA-277**, *Abengoa Award*, ¶¶ 646-51.

contradictory to the positions previously taken by the competent municipal, state and federal authorities.”<sup>979</sup>

- (b) In *Crystallex v. Venezuela*, the tribunal concluded that Venezuela’s shift in position to deny the claimant a mining permit was arbitrary because it was a “complete *volte-face* to the previous course [of support]” and was the result of “political pressure regarding the project from the highest Venezuelan officers” that “began to pervade the [permitting] process.”<sup>980</sup>
- (c) In *Gold Reserve v. Venezuela*, the tribunal concluded that Venezuela’s failure to sign a necessary approval to allow the claimant to begin constructing a mining project was arbitrary because “the real reason” for its conduct was not the one “officially stated,” but rather was the “change of political priorities of the Administration . . . as evidenced by a stream of statements and public announcements” made during this period.<sup>981</sup>
- (d) In *Eureko v. Poland*—a case involving a failed privatization bid—the tribunal found that Poland breached its obligation of fair and equitable treatment where, among others, it abruptly implemented a “change of privatization strategy” “not for cause but for purely arbitrary reasons linked to the interplay of Polish politics and nationalistic reasons of a discriminatory character,” including the government’s “concern that most of the financial sector in Poland [was] already in foreign hands.”<sup>982</sup>
- (e) In *RDC v. Guatemala*, the tribunal applied the minimum standard of treatment in the DR-CAFTA and concluded that Guatemala’s decree declaring the investor’s railroad concession to be illegal was “arbitrary, grossly unfair, [and] unjust” because, *inter alia*, it was “used under a cloak of formal correctness allegedly in defense of the rule of law, in fact for exacting concessions unrelated to the finding of *lesivo* [illegality].”<sup>983</sup>

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<sup>979</sup> CA-277, *Abengoa Award*, ¶ 651.

<sup>980</sup> See CA-222, *Crystallex Award*, ¶¶ 589-99.

<sup>981</sup> CA-213, *Gold Reserve Inc. v. Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (22 September 2014) (Bernardini, Williams, Dupuy) (“*Gold Reserve Award*”), ¶¶ 580, 590, 591 (“Respondent violated the BIT’s fair and equitable treatment provision through the measures and conduct . . . examined above.”).

<sup>982</sup> CA-122, *Eureko Partial Award*, ¶¶ 213, 221-33

<sup>983</sup> See CA-276, *RDC Award*, ¶¶ 234-35.

364. *Third*, tribunals have also repeatedly confirmed that a State violates the minimum standard of treatment's fair and equitable treatment obligation if it fails to act with reasonable consistency and transparency in the treatment of foreign investments.<sup>984</sup> For example:

- (a) In *Windstream v. Canada*, the tribunal held that Canada failed to comply with its affirmative obligation under the minimum standard of treatment to act consistently and clarify regulatory uncertainty for the investor when it failed to clarify a situation of "legal and contractual limbo" imposed on the investor through the government's adoption of a moratorium on offshore wind investment in response to local political pressure.<sup>985</sup>
- (b) In *Metalclad v. Mexico*, the tribunal concluded that Mexico breached its obligation of fair and equitable treatment when it arbitrarily denied the investor a permit for a landfill project when construction of the project was "virtually complete," after previously "assur[ing]" the investor that it met all necessary requirements and that the permit would be granted "as a matter of course."<sup>986</sup> The tribunal found that in so doing, the State "failed to ensure a transparent and predictable framework" for the investor's "business planning and investment."<sup>987</sup>
- (c) The *Crystallex* tribunal noted that "it constitutes non-transparent and inconsistent conduct" for the government to "invite the investor" to make a substantial investment

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<sup>984</sup> See e.g., **CA-234**, *Deutsche Telekom v. India*, PCA Case No. 2014-10, Interim Award (13 December 2017) (Kaufmann-Kohler, Price, Stern) ("*Deutsche Telekom Interim Award*"), ¶ 387 (finding breach of fair and equitable treatment in light of, among other reasons, a "manifest" "lack of transparency and forthrightness"); **CA-213**, *Gold Reserve Award* ¶ 591 (finding breach of fair and equitable treatment as a result of, among other reasons, "a lack of transparency, consistency and good faith in dealing with an investor"); **CA-133**, *PSEG Global Inc. et al. v. Turkey*, ICSID Case No. ARB/02/5, Award (19 January 2007) (Orrego Vicuña, Fortier, Kaufmann-Kohler) ("*PSEG Award*"), ¶ 246 (finding breach of fair and equitable treatment in light of "serious administrative negligence and inconsistency"); *id.* ¶ 248 (noting that "[s]tability cannot exist in a situation where the law kept changing continuously and endlessly, as did its interpretation and implementation," and particularly that "it was not only the law that kept changing but notably the attitudes and policies of the administration"); **CA-108**, *Occidental Exploration and Production Co. v. Ecuador*, LCIA Case No. UN3467, Award (1 July 2004) (Orrego Vicuña, Brower, Sweeney) ("*Occidental Award*"), ¶¶ 183-185 (holding that "[t]he stability of the legal and business framework is thus an essential element of fair and equitable treatment," based on treaty preamble language that states that such treatment is "desirable" and finding that Ecuador violated this "need for this stability" by changing its tax law "without providing any clarity about its meaning and extent and the practice and regulations" and by adopting an interpretation of the claimant's investment contract that "ended up being manifestly wrong").

<sup>985</sup> **CA-280**, *Windstream Energy LLC v. Canada*, PCA Case No. 2013-22, Award, 27 September 2016 (Bishop, Cremades, Heiskanen), ¶¶ 376-80 ("[T]he failure of the Government of Ontario to take the necessary measures, including when necessary by way of directing the OPA, within a reasonable period of time after the imposition of the moratorium to bring clarity to the regulatory uncertainty surrounding the status and the development of the Project created by the moratorium, constitutes a breach of Article 1105(1) of NAFTA.").

<sup>986</sup> **CA-78**, *Metalclad Corp. v. Mexico*, ICSID Case No. ARB(AF)/97/11, Award, 30 August 2000 (Civiletti, Siqueiros, Lauterpacht) ("*Metalclad Award*"), ¶¶ 80, 85-90.

<sup>987</sup> See **CA-78**, *Metalclad Award*, ¶ 99.

when Venezuelan officials “had already come to the conclusion” that they would commit a “*volte-face*” by denying the claimant’s application for a mining permit after the claimant had completed the investment that the government had previously supported.<sup>988</sup>

- (d) The *Gold Reserve* tribunal similarly concluded that the inconsistent conduct that resulted from Venezuela’s shifting political priorities contributed to its breach of the fair and equitable treatment obligation. The tribunal reasoned that Venezuela’s conduct in failing to grant a mining approval “despite Claimant’s repeated requests without explaining the reasons for such inaction, rather reinforcing Claimant’s expectation that such signature would be forthcoming once the proposed alternative access road had been accepted, amount[ed] to conduct evidencing (through acts and omissions) a lack of transparency, consistency and good faith in dealing with an investor.”<sup>989</sup>
- (e) In *Deutsche Telekom v. India*, the claimant challenged India’s annulment of an investment contract related to use of a satellite spectrum based on alleged “military and societal needs.”<sup>990</sup> The tribunal concluded that India had breached its obligation of fair and equitable treatment where, among others, it not only failed to “raise the issues it had identified” with the investor and “engage with a view to attempting to reach an acceptable solution,” but that Indian officials had also “affirmatively misled” the investor when they held meetings with the investor and made no reference to internal decisions already made against the company.<sup>991</sup> The tribunal stressed the unfairness of government officials continuing to act “as if the project [was] on track and it was business as usual, when in fact the contract had been annulled.”<sup>992</sup>

365. Finally, tribunals have further confirmed that an absence of fair procedure or a finding of serious procedural shortcoming in administrative or judicial proceedings violates the

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<sup>988</sup> See **CA-222**, *Crystallex Award*, ¶¶ 589-99.

<sup>989</sup> See **CA-213**, *Gold Reserve Award*, ¶ 591.

<sup>990</sup> **CA-234**, *Deutsche Telekom Interim Award*, ¶¶ 361-62.

<sup>991</sup> **CA-234**, *Deutsche Telekom Interim Award*, ¶¶ 375-87.

<sup>992</sup> **CA-234**, *Deutsche Telekom Interim Award*, ¶ 387; see also **CA-223**, *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. India*, PCA Case No. 2013-09, Award on Jurisdiction and Merits (25 July 2016) (Lalonde, Haigh (dissenting in part on other grounds), Singh) (“*CC/Devas Award*”), ¶¶ 468, 470 (noting based on the same factual circumstances that “at none of [the meetings with the claimant] did the Respondent indicate that the [government agency] had decided to annul the . . . Agreement or that there were competing military or other societal needs for the S-band spectrum which had been allocated to Devas” and concluding that “Respondent’s conduct constitutes a clear breach of . . . the FET clause”).

minimum standard of treatment.<sup>993</sup> Due process forms an essential part of the obligation of fair and equitable treatment, which is intended “to ensure that the legal process governing the protected rights as a whole, including its judicial manifestations, is fair and reasonable, devoid of arbitrariness, discrimination or manipulation to the detriment of those rights.”<sup>994</sup> For example:

- (a) In *TECO v. Guatemala*, the tribunal, applying the minimum standard of treatment in DR-CAFTA, found that an administrative agency’s disregard of its own rules and procedures—there, the failure to consider an expert report without providing adequate reasoning—was both “arbitrary and breache[d] elementary standards of due process in administrative matters.”<sup>995</sup>
- (b) In *OAO Tatneft v. Ukraine*, the tribunal concluded that a politically-appointed prosecutor’s persistent interference and “increasingly questionable role” in administrative and judicial proceedings, coupled with “systematic decisions” by the Ukrainian courts against the investor despite the investor having “equally tenable” arguments, indicated that “the process might have run astray of due process and the necessary impartiality in delivering justice” and contributed to a violation of fair and equitable treatment.<sup>996</sup>
- (c) In *Dan Cake v. Hungary*, the tribunal concluded that the Hungarian Bankruptcy Court’s imposition of multiple “unjustified” procedural obstacles—such as requiring detailed supplemental filing requirements with very short deadlines and then denying the investor a substantive hearing on the basis of alleged noncompliance with those requirements—was a due process violation that also constituted a denial of justice.<sup>997</sup>
- (d) In *Lemire v. Ukraine*, the tribunal concluded that Ukraine’s National Council, an administrative body tasked with issuing broadcast licenses, failed to provide due process in breach of fair and equitable treatment when it rendered decisions “behind

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<sup>993</sup> See, e.g., **CA-278**, *Clayton/Bilcon v. Canada* Award, ¶¶ 446-55 (finding that “unwinnable” administrative review process violated the minimum standard of treatment where claimants were given “no reasonable notice” of the agency’s new interpretation of environmental regulations); **CA-202**, *TECO Guatemala Holdings, LLC v. Guatemala*, ICSID Case No. ARB/10/17, Award (19 December 2013) (Park, Mourre, von Wobeser) (“*TECO* Award”), ¶ 493 (“[I]t is up to an international arbitral tribunal to sanction decisions. . . taken in manifest disregard of the applicable legal rules and in breach of due process in regulatory matters.”); **CA-277**, *Abengoa* Award, ¶ 649 (concluding that Mexico breached the MST when it cancelled a license “with complete disregard for due administrative process (since the decision was adopted without having notified SDS of the process, preventing it from exercising its right to a defense)”).

<sup>994</sup> **CA-211**, *OAO Tatneft v. Ukraine*, PCA Case No. 2008-08, Award (29 July 2014) (Orrego Vicuña, Brower, Lalonde) (“*OAO Tatneft* Award”), ¶ 395 (FET requires that the “legal process . . . including its judicial manifestations, is fair and reasonable, devoid of arbitrariness, discrimination or manipulation to the detriment of those rights”).

<sup>995</sup> **CA-202**, *TECO* Award, ¶¶ 682-83, 711.

<sup>996</sup> **CA-211**, *OAO Tatneft* Award, ¶¶ 265-68, 402.

<sup>997</sup> **CA-217**, *Dan Cake* Decision on Jurisdiction and Liability, ¶¶ 142-46.

closed doors,” “absen[t] reasoning of the decision,” and under a procedural framework that was prone to political interference, including that all members of the body were political appointees selected by the executive or legislative branches.<sup>998</sup>

366. *Finally*, while each of these concepts presents a different dimension of the obligation of fair and equitable treatment that forms part of the minimum standard of treatment, it is not defined by a single definitive test: rather, the Tribunal’s task is to assess whether viewed comprehensively, the Government’s conduct violated the Treaty standard for each claimed breach.<sup>999</sup>

## **2. Peru Violated Article 10.5 Each Time the Royalty Assessments Became Enforceable Against SMCV**

367. Peru violated Article 10.5 each time the 2009, 2010-2011, Q4 2011, 2012, and 2013 Royalty Assessments against SMCV became final and enforceable, because:

- (i) Peru’s decisions to effectively unilaterally amend the Stability Agreement and the Mining Law under the guise of adopting a novel interpretation that drastically narrowed the scope of stability guarantees were contrary to Freeport and SMCV’s legitimate expectations;
- (ii) Peru arbitrarily upheld and enforced each of the Assessments adopting its novel and restrictive interpretation of the scope of stability guarantees as a result of domestic political pressure and not for legitimate reasons;
- (iii) Peru upheld and enforced each of the Assessments adopting its novel interpretation after acting inconsistently and non-transparently with respect to its intentions regarding SMCV’s Stability Agreement, including by initially affirming SMCV’s understanding that the Concentrator would enjoy stability guarantees, then withholding key documents setting forth the legal basis for its novel and restrictive interpretation until well after the US\$850 million Concentrator investment was complete, and negotiating with SMCV to induce significant voluntary contributions on the understanding that the entire mining unit, including the Concentrator, would be stabilized; and

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<sup>998</sup> **CA-163**, *Lemire* Decision on Jurisdiction and Liability, ¶¶ 293-96 (describing the National Council license administrative process), 299, 309, 316 (finding that “Members of the National Council, by virtue of the designation [appointment] system, tend to have political affiliations and interests . . . the procedure . . . is fraught with shortcomings that facilitate arbitrary decision making”), 343 (concluding that interference and impartial evaluation of the license tender process violates FET).

<sup>999</sup> *See, e.g.*, **CA-222**, *Crystallex* Award, ¶ 545 (While each “element of which FET is composed may be a useful tool to assess the facts in concrete cases, including this one, it is the overall evaluation of the state’s conduct as ‘fair and equitable’ that is the ultimate object of the Tribunal’s examination . . . the Tribunal will endeavor to establish whether an overall pattern of conduct has emerged from these instances and whether that . . . does indeed breach the standard”).

(iv) Peru upheld and enforced each of the Assessments after committing serious due process violations when the Tax Tribunal President interfered in the challenges SMCV filed to the Royalty Assessments, presumably to ensure that the Tax Tribunal would uphold those Assessments on the basis of the Government's novel and restrictive interpretation. Peru's serious due process violations also resulted in violations of Article 10.5 when each of the 2006-2007 and 2008 Royalty Assessments became final and enforceable.

**i. Peru Frustrated Freeport and SMCV's Legitimate Expectations by Repudiating its Obligations under the Stability Agreement**

368. Tribunals have repeatedly confirmed that a State's failure to honor an investor's legitimate expectations by abrogating the legal framework on which the investor party reasonably relied when making an investment may give rise to a breach of its fair and equitable treatment obligation.<sup>1000</sup> These legitimate expectations may derive from specific representations made to the investor, or may be "based on an objective assessment of the legal framework absent specific representations or promises made by the State to the investor."<sup>1001</sup> Here, SMCV, and Freeport's predecessor, Phelps Dodge, invested in the Concentrator in reliance on the stability guarantees set forth in the Stability Agreement, which they understood would apply to the Concentrator based on the existing legal framework and specific assurances given by Peruvian officials, only to have that

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<sup>1000</sup> **CA-279**, *Murphy* Partial Final Award, ¶¶ 249, 258, 280-81 (concluding that Ecuador breached legitimate expectations "grounded in" an oil participation contract with fiscal stabilization provisions that Ecuador entered into "at a time when Ecuador was striving to retain and attract foreign investment" by holding "itself out as being able to provide a modern, stable, and predictable legal and business framework that would operate for the mutual benefit of foreign investors and Ecuador"); **CA-278**, *Clayton/Bilcon v. Canada* Award, ¶¶ 480-81 (holding that under the NAFTA, claimant could "reasonably expect" the relevant administrative review board to be "methodical[]" and conduct a "thorough" administrative review process); **CA-130**, *LG&E Energy Corp v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 133 (holding that "abrogation of these specific [fiscal] guarantees violates the stability and predictability underlying the standard of fair and equitable treatment"); **CA-99**, *Tecmed* Award, ¶ 154 ("The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.").

<sup>1001</sup> See **CA-279**, *Murphy* Partial Final Award, ¶ 248; see also, e.g., *id.* ("the investor is entitled to rely" on "the host State's international law obligations, its domestic legislation and regulations, as well as the contractual arrangements concluded between the investor and the State"); **CA-125**, *Saluka Investments BV v. Czechia*, PCA Case No. 2001-04, Partial Award, 17 March 2006 (Behrens, Yves Fortier, Watts), ¶ 329 (claimant bank had a reasonable expectation to be entitled to "consistent and even-handed" treatment despite absence of an "explicit assurance" from the government); **CA-108**, *Occidental* Award, ¶ 191 (finding that the "relevant question" is whether the "legal and business framework meets the requirements of stability and predictability under international law"); **CA-271**, *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007 (Garro, van den Berg, Álvarez), ¶ 307 (finding that Argentina "violated the principles of stability and predictability inherent to the standard of fair and equitable treatment" when it "entirely altered the legal and business environment by taking a series of radical measures . . . in contradiction with the established Regulatory Framework, as well as the specific commitments represented by Argentina, on which BG relied when it decided to make the investment").

legitimate expectation of stability thwarted by Peru's decisions to effectively re-write the scope of the Stability Agreement and the Mining Law.

369. *First*, as discussed above, Peru's existing legal framework made clear that the Mining Law's stability guarantees were granted to the entire Mining Unit or concession(s), such that *all* investments within a stabilized concession or mining unit would be entitled to stability guarantees.<sup>1002</sup> Accordingly, SMCV and Phelps Dodge reasonably understood that the specific guarantees of stability that Peru granted to the Cerro Verde Mining Unit—both the Mining and Beneficiation Concessions—by virtue of the Stability Agreement applied to all investments made within the Cerro Verde Mining Unit, including the Concentrator.

370. *Second*, Peruvian officials knew from the outset that SMCV understood that the Concentrator would be stabilized—and officials frequently confirmed SMCV's understanding, and its legitimate expectation that Peru would honor its stability guarantees, when inducing that investment. For example:

- (a) Ms. Chappuis, then MINEM's Director General of Mining responsible for supervising mining and beneficiation concessions, testifies that, in discussions in 2004, she explicitly confirmed to representatives from SMCV and Phelps Dodge that the Stability Agreement would apply to the planned concentrator.<sup>1003</sup> SMCV's understanding of its rights under the Mining Law was consistent with Ms. Chappuis's view.<sup>1004</sup> SMCV understood that its application to expand the Beneficiation Concession would, if granted, confirm that it was entitled to stability guarantees for the Concentrator.<sup>1005</sup>
- (b) The DGM approved the expansion of the Beneficiation Concession to include the Concentrator, instead of requiring SMCV to include it in a separate Beneficiation Concession and without any suggestion that the Concentrator would be subject to a separate legal regime.<sup>1006</sup> Phelps Dodge and SMCV viewed the DGM's approval as officially confirming their understanding that the Concentrator would fall under the scope of the Stability Agreement.<sup>1007</sup>
- (c) In October 2004, around the same time the DGM expanded the Beneficiation Concession, Peru's President lauded the investment in the Concentrator, calling it a

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<sup>1002</sup> See *supra* § IV.A.2.

<sup>1003</sup> See *supra* § III.F.3 (citing Torreblanca ¶ 25; Chappuis ¶ 52-53; Davenport ¶¶ 36, 39).

<sup>1004</sup> See Chappuis ¶¶ 51, 53.

<sup>1005</sup> See *supra* § III.F.3 (citing Torreblanca ¶ 25; Chappuis ¶¶ 52-53).

<sup>1006</sup> See *supra* § III.F.5 (citing **Ex. CE-476**, MINEM, Report No. 784-2004-MEM-DGM/PDM and Directorial Order No. 027-2004-MEM-DGM/PDM (26 October 2004)).

<sup>1007</sup> See *supra* § III.F (citing Torreblanca ¶¶ 25-28).

“new conquest of an investment for Peru” and confirming that Peru would “fulfill our responsibility to maintain economic and legal stability.”<sup>1008</sup>

371. *Third*, SMCV and Freeport’s predecessor, Phelps Dodge, invested in the Concentrator in reliance on the reasonable expectation that Peru would honor those guarantees, as discussed above.<sup>1009</sup> For example:

- (a) Mr. Morán testifies that Phelps Dodge’s Finance Committee relied on the Stability Agreement in recommending approval of the Concentrator investment to Phelps Dodge.<sup>1010</sup>
- (b) Mr. Davenport testifies that the Stability Agreement was “of paramount importance to Phelps Dodge” in considering the Concentrator investment.<sup>1011</sup>
- (c) Ms. Torreblanca testifies that SMCV’s approval of the Concentrator investment was conditioned on, among others, “approval of SMCV’s request to expand the Beneficiation Concession.”<sup>1012</sup> She further testifies that SMCV understood MINEM’s subsequent approval as “confirm[ing] that the Stability Agreement would cover the Concentrator.”<sup>1013</sup>
- (d) The 2004 Feasibility Study and its September 2004 update explicitly assumed that SMCV would be entitled to rely on the stabilized regime through December 31, 2013.<sup>1014</sup>

372. Peru’s repeated failures to observe its obligations under the Stability Agreement thus thwarted SMCV’s and Phelps Dodge’s legitimate expectation of stability in the relevant legal framework.

## ii. Peru Acted Against SMCV Due to Political Pressure

373. Tribunals have repeatedly found breaches of a State’s fair and equitable treatment obligation when a state acts “not for cause but for purely arbitrary reasons,” including where it takes a

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<sup>1008</sup> **Ex. CE-471**, *Peru: President Toledo Announces an Investment of US\$850 Million in Cerro Verde*, EUROPA PRESS (12 October 2004); *see also supra* § III.F.4.

<sup>1009</sup> *See supra* § IV.A.1.

<sup>1010</sup> Morán ¶ 29.

<sup>1011</sup> Davenport ¶ 30.

<sup>1012</sup> Torreblanca ¶ 27.

<sup>1013</sup> Torreblanca ¶ 27.

<sup>1014</sup> *See supra* § III.F.1 (citing **Ex. CE-20**, Fluor Canada Ltd., Feasibility Study: Cerro Verde Primary Sulfide Project (May 2004), Vol. IV, pp. 14-16); § III.F.4 (citing **Ex. CE-459**, Fluor, SMCV Primary Sulfide Project Feasibility Study Project Update (September 2004), p. 48).

“*volte-face*” from its prior conduct as a result of “political pressure.”<sup>1015</sup> Here, the evidence makes clear that instead of correctly applying the law, Peru’s decisions against SMCV were results-oriented, and the result of significant political pressure to extract royalties and additional tax payments from SMCV.<sup>1016</sup> This politically motivated campaign against SMCV arose despite SMCV’s significant contributions to Peru and Arequipa, including fulfilling the Government’s decades-long economic priority for Cerro Verde by constructing the Concentrator, creating significant jobs and tax revenues in Arequipa, and contributing to social projects throughout the region.<sup>1017</sup> Peru’s *volte-face* in the face of this sustained, targeted political pressure ultimately resulted in it upholding each of the relevant Royalty Assessments, rendering those decisions arbitrary and in breach of Peru’s obligations under Article 10.5.

374. *First*, the Royalty Law discussions were politically charged from the outset, with stability agreements as a key point of contention (see section III.F.2 above). After increased commodity prices—and mining profits—led to a backlash against mining companies, members of Congress fought hard for the royalty, including by seeking to disregard existing stability agreements entirely. For example:

- (a) In April-May 2004, Congressmen Diez Canseco argued that existing stability agreements should be “reviewed and renegotiated” in relation to the proposed royalty, and another member of Congress proposed a draft royalty bill that explicitly applied to “mining titleholders . . . who have . . . stability agreements.”<sup>1018</sup>
- (b) After the Royalty Law was passed in June 2004, and the Government proposed additional amendments that would have softened its impact on the mining sector, members of Congress accused the Government of intentionally delaying the law’s entry into force, calling it “unreasonable and unacceptable.”<sup>1019</sup>

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<sup>1015</sup> See, e.g., **CA-222**, *Crystallex Award*, ¶¶ 588-600, 614; **CA-122**, *Eureka Partial Award*, ¶¶ 213-14, 221-33; **CA-78**, *Metalclad Award*, ¶¶ 92-97 (“The Town Council denied the permit for reasons which included. . . the opposition of the local population . . . [t]he actions of the Municipality following its denial of the municipal construction permit, coupled with the procedural and substantive deficiencies of the denial, [which] support the Tribunal’s finding, for the reasons stated above, that the Municipality’s insistence upon and denial of the construction permit in this instance was improper.”).

<sup>1016</sup> See **CA-251**, *ESPF Award*, ¶ 702; **CA-222**, *Crystallex Award*, ¶ 614.

<sup>1017</sup> See *supra* §§ III.C.3; III.I.3; III.I.4; III.J.

<sup>1018</sup> **Ex. CE-429**, Javier Diez Canseco, *Mining Royalties and the Need to Reform Mining Taxation: Who Is Opposed?* (April 2004); see also *supra* § III.F.2 (citing **Ex. CE-438**, Congress, *Draft Law 10636/2003-CR* (21 May 2004)).

<sup>1019</sup> **Ex. CE-464**, *The Executive Asks for Mining Royalties Based on Prices*, LA REPÚBLICA (4 September 2004); see also *supra* § III.F.2 (citing **Ex. CE-461**, *Royalty Regulations Ready but on Hold*, BUSINESS NEWS AMERICAS (2 September 2004) (reporting on complaints by members of Congress such as Diez Canseco about alleged delay in the legislative process); **Ex. CE-456**, *The Difference Between Mining Royalty and Mining Canon*, LA REPÚBLICA (18 August 2004) (op-ed by Congressman Oré arguing that there were no reasons “for mining companies not to pay a mining royalty” and criticizing “political leaders” that “persist in defending the economic interests of mining entrepreneurs”)).

- (c) In early 2005, members of Congress continued to argue that stability agreements did not protect mining companies from paying royalties, characterizing them as “fair compensation for the extraction of a non-renewable natural resource.”<sup>1020</sup>
- (d) In August 2006, members of Congress proposed amending the Royalty Law so that companies with stability agreements would be obliged to pay royalties.<sup>1021</sup>

375. *Second*, when the Government appropriately granted SMCV’s profit reinvestment request in December 2004, SMCV became a specific target of ire among certain members of Congress and local politicians.<sup>1022</sup> The ire only intensified after the Constitutional Court confirmed that companies with administrative stability protections—like SMCV—were exempt from the royalty.<sup>1023</sup> For example:

- (a) Beginning in August 2005, Congressman Diez Canseco began publishing articles attacking SMCV for its alleged lack of fiscal contributions and sharply criticizing MINEM for conferring “excessive and undue benefits” on SMCV.<sup>1024</sup>
- (b) In October 2005, spurred by Congressman Diez Canseco’s unfounded request to investigate “possible irregularities” relating to the reinvestment credit, Congress created a Working Group to “investigate the alleged tax benefits received by [SMCV] and “adopt the appropriate measures.”<sup>1025</sup>
- (c) In 2006, local politicians from Arequipa publicly blamed SMCV for a shortfall in the regional budget and threatened protests if the Government did not force SMCV to pay mining royalties.<sup>1026</sup> Members of Congress further argued that even if legally exempt from royalty payments, SMCV had a “moral obligation to share its profits with Arequipa’s society.”<sup>1027</sup>

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<sup>1020</sup> **Ex. CE-489**, *Mining companies urged to comply with the payment of royalties to regions*, LA REPÚBLICA (9 March 2005); *see also supra* § III.G.2.

<sup>1021</sup> *See supra* § III.I.4 (citing **Ex. CE-546**, *The Government Agrees Not to Change the Mining Royalty Law*, GESTIÓN (10 August 2006)).

<sup>1022</sup> *See Ex. CE-23*, MEF, Ministerial Resolution No. 510-2004-MEM/DM (9 December 2004).

<sup>1023</sup> *See Ex. CE-490*, Constitutional Tribunal, Decision, Case No. 0048-2004-PI/TC (1 April 2005).

<sup>1024</sup> *See Ex. CE-506*, Javier Diez Canseco, *Questions about Cerro Verde*, LA REPÚBLICA (25 August 2005); **Ex. CE-517**, Javier Diez Canseco, *Cerro Verde: Enough Abusing Peru!*, VOLTAIRE; *see also supra* § III.H.

<sup>1025</sup> **Ex. CE-516**, Congress, Energy & Mines Commission of the Sixth Regular Session (5 October 2005), pp. 2-3; *see also supra* § III.H (citing **Ex. CE-525**, *Working Group Studies Destination of Cerro Verde Taxes to Districts of Arequipa and Solution to Development Works*, EL HERALDO (29 March 2006)).

<sup>1026</sup> *See supra* § III.I.1 (citing **Ex. CE-535**, *Cerro Verde evades payment of taxes based on a law repealed in 2000* LA REPÚBLICA (19 June 2006)).

<sup>1027</sup> **Ex. CE-541**, *Congressional Commission glimpses a solution*, EL HERALDO (10 July 2006); *see also supra* § III.I.3.

- (d) On 21 June 2006, Congressman Diez Canseco proposed a bill in Congress that would have retroactively revoked SMCV's profit reinvestment benefit, even though by that point, SMCV's US\$850 million investment was nearly complete.<sup>1028</sup>

376. *Third*, this backlash was frequently directed not only at SMCV, but at MINEM, SUNAT, and the MEF, and against specific Government officials. For example:

- (a) In 2004, after then-Minister of Economy and Finance Pedro Pablo Kuczynski publicly opposed the royalty, the royalty's proponents accused him of being an "advocate for multinational companies" and of lobbying on behalf of "private companies."<sup>1029</sup>
- (b) In early 2005, Congressman Diez Canseco published incendiary articles in the national press strongly criticizing the MEF and MINEM for what he viewed as failing to "defend[] the State's income," accusing them of being complicit with the mining lobby, and calling for "sit-ins" before the courts.<sup>1030</sup>
- (c) In September 2005, Congressman Diez Canseco demanded that Minister Sánchez Mejía revoke SMCV's reinvestment benefit and order SMCV to pay royalties, threatening to file a constitutional complaint against Minister Sánchez Mejía if he failed to comply.<sup>1031</sup> Other members of Congress wrote to Minister Sánchez Mejía requesting further information about SMCV's Stability Agreement.<sup>1032</sup>
- (d) In November 2007, local Arequipa activist Dante Martínez Palacios filed complaints against SMCV with SUNAT, alleging that SUNAT had colluded with SMCV to commit tax fraud in relation to the reinvestment benefit and non-payment of royalties, and demanding that SUNAT assess royalties against SMCV.<sup>1033</sup> Mr. Martínez

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<sup>1028</sup> See *supra* § III.I.2 (citing **Ex. CE-536**, Congress, Draft Bill No. 14792/2005-CR (21 June 2006), pp. 2, 5).

<sup>1029</sup> **Ex. CE-439**, *Minister of Economy of Peru Against Mining Royalties*, AGENCE FRANCE PRESSE (30 May 2004); see also *supra* § III.F.2.

<sup>1030</sup> See **Ex. CE-485**, *Mining Royalties: Sleeping with the Enemy*, LA REPÚBLICA (2 March 2005); **Ex. CE-487**, *Mining companies appeal to the Courts to avoid paying royalties*, LA REPÚBLICA (5 March 2005); see also *supra* § III.G.2 (citing **Ex. CE-483**, *The offensive against mining royalties*, LA REPÚBLICA (23 February 2005); **Ex. CE-489**, *Mining companies urged to comply with the payment of royalties to regions*, LA REPÚBLICA (9 March 2005)).

<sup>1031</sup> **Ex. CE-508**, *Minera Cerro Verde under the scrutiny of [Javier Diez Canseco]*, LA REPÚBLICA (16 September 2005); **Ex. CE-509**, *Congressman Diez Canseco considers denouncing the Minister for providing benefits to mining companies that do not pay royalties*, EL HERALDO (16 September 2005); see also *supra* § III.H.

<sup>1032</sup> See *supra* § III.H (citing **Ex. CE-507**, Communication No. 3769-2005-AOM-CR from Congressman Oré to Minister Sánchez Mejía (15 September 2005)).

<sup>1033</sup> See *supra* § III.K (citing **Ex. CE-603**, Dante A. Martinez, *The Largest Tax Fraud in the History of Peru*, CON NUESTRO PERÚ (15 January 2011)).

subsequently laid out these charges in detail in press articles in January 2008.<sup>1034</sup> In April 2009, Mr. Martínez also filed claims against SUNAT before the Contentious Administrative Courts, accusing SUNAT of improperly exempting SMCV from tax and royalty payments and decrying SUNAT's "systematic reluctance to comply with its duties to assess and collect taxes and royalties evaded by SMCV."<sup>1035</sup>

377. *Fourth*, although the Government initially defended stability guarantees,<sup>1036</sup> it ultimately reversed course and adopted its novel and restrictive interpretation of SMCV's Stability Agreement. The evidence demonstrates that this *volte-face* resulted from the intense domestic political pressure. For example:

- (a) Only days after Congressman Diez Canseco threatened to file a constitutional complaint against Minister Sánchez Mejía if he did not revoke SMCV's reinvestment benefit, Minister Sánchez Mejía made statements to the press asserting that the Concentrator would not be protected by SMCV's existing Stability Agreement.<sup>1037</sup> Several weeks later, Minister Sánchez Mejía sent a letter to Congressman Oré taking the position that SMCV would have to pay royalties for the Concentrator, without providing any legal support.<sup>1038</sup>
- (b) Mr. Isasi's June 2006 non-binding legal report (the "June 2006 Report"), which for the first time set out the novel and restrictive interpretation that "stabilization is not . . . for a specific mining concession, but in relation to *a specific project*," directly contradicted his earlier legal report from April 2005 (the "April 2005 Report"), which confirmed that it is the "*concessions*" that are "part of a project subject to a stability

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<sup>1034</sup> See *supra* § III.K (citing **Ex. CE-572**, Dante Martinez, THE IMPUNITY AND HIDDEN TRUTH OF SOCIEDAD MINERA CERRO VERDE – SMCV (7 January 2008), p. 1).

<sup>1035</sup> See **Ex. CE-603**, Dante A. Martinez, *The Largest Tax Fraud in the History of Peru*, CON NUESTRO PERÚ (15 January 2011).

<sup>1036</sup> See *supra* §§ III.F.2, III.G.2, III.G.3, IV.A.2(i)(d) (citing, for example, **Ex. CE-490**, Constitutional Tribunal, Decision, Case No. 0048-2004-PI/TC, (1 April 2005), ¶ 109 (holding that the mining royalty did not apply to investors with mining stability agreements, which are governed by "contract-laws" that "grant the concessionaire immutability of the legal regime"); **Ex. CE-494**, MINEM, Report No. 153-2005-MEM/OGAJ (14 April 2005), ¶ 16 ("[T]he royalty is not applicable to the mineral resources extracted from the concession that form part of the contractually stabilized investment project."); **Ex. CE-500**, *Mining Royalties to Be Defined over the Next Few Days*, AREQUIPA AL DÍA (6 May 2005) (quoting Minister Kuczynski as stating that "the only way for a company to remain exempt from the payment of mining royalties would be if it holds an administrative stability agreement"); **Ex. CE-19**, MEF, Evaluation of Royalty Application (11 March 2004), p. 10 (noting that SMCV had a tax stability agreement for its "Mining Unit," "Cerro Verde 1, 2, and 3" through 2013, and including SMCV on list of companies to which the Royalty Law would not apply)).

<sup>1037</sup> See *supra* § III.H (citing **Ex. CE-511**, *Minister: Cerro Verde Expansion Subject to Royalty*, BUSINESS NEWS AMERICAS (20 September 2005).

<sup>1038</sup> See *supra* § III.H (citing **Ex. CE-515**, MINEM, Report No. 1725-2005-MEM/DM) (3 October 2005)).

agreement” that would be exempt from the Royalty Law.<sup>1039</sup> Mr. Isasi offered no explanation for this total reversal, which came on the heels of several months of intense public campaigning against SMCV and the Congressional Working Group.<sup>1040</sup> Mr. Isasi’s June 2006 Report also aligned his opinion with that taken by Minister Sánchez Mejía in his October and November 2005 letters responding to the intense political pressure from members of Congress.<sup>1041</sup>

- (c) A month after Mr. Martínez filed his claims in late 2007 alleging that SMCV had colluded with SUNAT to avoid royalty payments and demanding that SUNAT impose royalties on SMCV, SUNAT asked MINEM to provide a “list of parties obligated to pay mining royalties from June 2004 to date.”<sup>1042</sup>
- (d) In late January 2008, only weeks after Mr. Martínez published a highly critical article highlighting his claims before SUNAT, MINEM provided SUNAT with, among others, Minister Sánchez Mejía’s November 2005 letter and Mr. Isasi’s June 2006 Report setting out his novel and restrictive interpretation of the Stability Agreement.<sup>1043</sup> As soon as SUNAT had received these documents, SUNAT initiated an audit of SMCV and issued its first Assessments only months later, explicitly acknowledging that it had relied on MINEM’s designation that SMCV owed royalties for the Concentrator.<sup>1044</sup>

### iii. Peru Acted Inconsistently and Non-Transparently on Whether It Would Impose Royalties Against the Concentrator

378. Tribunals have confirmed that a State breaches its obligation of fair and equitable treatment when it fails to act in a “transparent and consistent matter” with respect to the treatment of covered investments, which goes hand in hand with a State’s obligation to provide a stable and

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<sup>1039</sup> Compare **Ex. CE-534**, MINEM, Report No. 156-2006-MEM/OGJ (16 June 2006) with **Ex. CE-494**, MINEM, Report No. 153-2005-MEM/OGAJ (14 April 2005), ¶ 17 (emphasis added); see also *supra* § III.I.2.

<sup>1040</sup> See *supra* § III.H.

<sup>1041</sup> See *supra* § III.H (citing **Ex. CE-515**, MINEM, Report No. 1725-2005-MEM/DM (3 October 2005); **Ex. CE-519**, MINEM, Report No. 2004-2005-MEM/DM (8 November 2005)).

<sup>1042</sup> **Ex. CE-568**, SUNAT Report No. 261-2007-SUNAT/2E0000 (20 November 2007), p. 1; see also *supra* § III.K (citing **Ex. CE-570**, MINEM Report No. 1169-2007-MEM-DGM (14 December 2007) (responding to SUNAT’s request)).

<sup>1043</sup> See *supra* § III.K (citing **Ex. CE-573**, MINEM Report No. 077-2008-MEM-DGM) (29 January 2008)).

<sup>1044</sup> See *supra* §§ III.K, III.L (citing **Ex. CE-577**, SUNAT, Inductive Letter No. 108052004279 (30 May 2008) (requesting that SMCV file documents related to the payment of royalties for sales of copper ore from the Concentrator from 2006 and 2007); **Ex. CE-31**, SUNAT, Fine Assessments Nos. 052-002-0003607 to 052-002-0003631, 2006/07 Royalty Assessment (17 August 2009); **Ex. CE-38**, SUNAT, Resolution No. 055-014-0001290/SUNAT, 2006/07 Royalty Assessment (31 March 2010), p. 25 (“[T]he Ministry of Energy and Mines has provided the Tax Administration with the list of entities obliged to pay the mining royalty, which includes the taxpayer.”)).

predictable legal framework for the investor.<sup>1045</sup> These obligations of transparency, consistency, and stability are particularly critical in relation to stability guarantees and where the size of the investment is very significant—as it was here.<sup>1046</sup>

379. A State further must not “affirmatively mis[lead]” an investor through inconsistent, nontransparent conduct, including by failing to advise the investor of internal decisions already made against them while acting “as if [a] project were on track and it was business as usual.”<sup>1047</sup> The TPA’s preamble confirms the importance of these obligations, as it emphasizes the object and purpose of, among others, “ensur[ing] a *predictable legal and commercial framework for business and investment*” and “promot[ing] *transparency . . . in international trade and investment.*”<sup>1048</sup>

380. Here, Peru breached its obligations under Article 10.5 with respect to the 2009, 2010-2011, Q4 2011, 2012, and 2013 Royalty Assessments for the additional reason that it acted with a total lack of consistency and transparency, including by reversing course and advancing the novel interpretation internally after SMCV invested in the Concentrator, and by withholding key information from SMCV even as it demanded and accepted additional contributions based on the premise that stability applied to the entire Cerro Verde Mining Unit.

381. *First*, as discussed above, Peruvian officials knew from the outset that SMCV understood that the Concentrator would be stabilized—and officials frequently confirmed SMCV’s understanding. However, when certain MINEM officials began advancing the novel interpretation that the Stability Agreement excluded the Concentrator, the Government withheld information from SMCV regarding the *volte-face* in its position, even though it had ample opportunity to share this information. Moreover, at the same time, the Government continued to confirm through its conduct SMCV’s understanding that the Concentrator was covered. For example:

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<sup>1045</sup> See, e.g., **CA-222**, *Crystallex Award*, ¶¶ 589, 598 (concluding that Venezuela’s *volte-face* breached the fair and equitable treatment standard because it constituted “non-transparent and inconsistent conduct”); **CA-133**, *PSEG Award*, ¶¶ 250-52 (concluding that Respondent breached the fair and equitable treatment standard “through numerous changes in the legislation and inconsistencies in the administration’s practice” regarding the investment’s corporate structure, the legal status of the investment concession, and applicable domestic tax law); **CA-189**, *EDF Award*, ¶¶ 1008-09 (concluding that respondent’s inconsistent conduct in failing “to raise tariffs in a timely manner, so as to restore balance when rates were set in U.S. dollars [to the contractually agreed upon and stabilized tariff amount], constituted unfair and inequitable treatment in and of itself”); **CA-78**, *Metalclad Award*, ¶¶ 88-97, 99 (holding that Mexico “failed to ensure a transparent and predictable framework for Metalclad’s business planning and investment” because of the “lack of orderly process and timely disposition” for claimant’s landfill license application, contrary to plaintiff’s legitimate expectation that it would be treated fairly).

<sup>1046</sup> See **CA-108**, *Occidental Award*, ¶¶ 103, 183-84, 196 (concluding that Ecuador breached the fair and equitable treatment standard by altering “in an important manner” through changing State “policy and legal interpretation” the “legal and business environment that was certain and predictable” by virtue of an “[e]conomic [s]tability” clause in claimant’s oil participation contract).

<sup>1047</sup> See **CA-234**, *Deutsche Telekom Interim Award*, ¶¶ 387-90; **CA-223**, *CC/Devas Award on Jurisdiction and Merits*, ¶¶ 468-70.

<sup>1048</sup> **CA-10**, TPA, Preamble (emphasis added).

- (a) After Minister Sánchez Mejía responded to Congressman Diaz Canseco’s threats by issuing his 3 October and 8 November 2005 letters taking the position that the Concentrator was not stabilized—a position which had never previously been established in any Government document—MINEM did not share these documents with SMCV or otherwise inform SMCV that it intended to alter its position, even though Ms. Torreblanca was concurrently participating in extensive meetings with the Congressional Working Group relating to the stabilized reinvestment benefit.<sup>1049</sup> While Mr. Sánchez Mejía made a general statement to the press that the Concentrator would not be stabilized around the same time, SMCV interpreted this as a clear response to the pressure directed at him from Congress and did not understand it to affect SMCV’s legal rights.<sup>1050</sup>
- (b) On 16 June 2006, Mr. Isasi issued the June 2006 Report articulating for the first time the novel interpretation that under the Mining Law, stabilization guarantees were limited to the investment program set out in the feasibility study.<sup>1051</sup> The Government again did not provide SMCV with a copy of the June 2006 Report or share the legal basis for Mr. Isasi’s conclusions—even though only a day earlier, the Director General of Mining, César Rodríguez, announced publicly that the planned Roundtable Discussions with SMCV relating to Arequipa’s alleged budget shortfall would not have major results because SMCV had a stability agreement, which the Government must honor “because we are in a State governed by the rule of law and the Government is determined to attract investments, not scare them away.”<sup>1052</sup>
- (c) *One week* after Mr. Isasi issued the June 2006 Report, *both* Minister Sánchez Mejía and Mr. Isasi participated in the Roundtable Discussions with SMCV to discuss a “harmonious solution” to the budget shortfall in Arequipa that allegedly resulted from SMCV’s application of stability guarantees.<sup>1053</sup> At no point in these meetings did Minister Sánchez Mejía, Mr. Isasi, or any other Peruvian official mention Mr. Isasi’s June 2006 Report or suggest that SMCV would be paying hundreds of millions of

<sup>1049</sup> See *supra* § III.K (citing Torreblanca, ¶ 53; **Ex. CE-515**, MINEM, Report No. 1725-2005-MEM/DM (3 October 2005); **Ex. CE-519**, MINEM, Report No. 2004-2005-MEM/DM) (8 November 2005).

<sup>1050</sup> See *supra* § III.H (citing Torreblanca ¶ 40 (noting that SMCV trusted that the Government would “ultimately act in accordance with the law and respect the stability commitments”); **Ex. CE-511**, *Minister; Expansion of Cerro Verde subject to royalty tax*, BUSINESS NEWS AMERICAS (20 Sept. 2005)).

<sup>1051</sup> See *supra* § III.L.2 (citing **Ex. CE-534**, MINEM, Report No. 156-2006-MEM/OGJ (16 June 2006)).

<sup>1052</sup> **Ex. CE-533**, *Advance payment of royalties proposed*, LA REPÚBLICA (15 JUNE 2006); see *supra* § III.K; see also Torreblanca ¶ 70 (noting SMCV first received a copy of Mr. Isasi’s June 2006 Report in June 2008).

<sup>1053</sup> **Ex. CE-538**, *Congressional Pro-Investment Commission seeks solution to demand payment of taxes from Cerro Verde*, EL HERALDO (23 June 2006); see also *supra* § III.L.3 (citing Torreblanca ¶¶ 53-54).

dollars in Royalties over the next seven years.<sup>1054</sup> Instead, the negotiations were clearly based on the understanding that SMCV would not pay *any* royalties, including on concentrate sales, and that it should therefore make significant contributions to Arequipa.<sup>1055</sup>

- (d) Government officials continued to express the view that SMCV was entitled to stability with respect to the Concentrator even after SUNAT had issued the initial Assessments, including when Ms. Torreblanca met with officials from the MEF regarding the 2006-2007 Royalty Assessments who advised her that SMCV had a “strong argument” and encouraged SMCV’s efforts to challenge the assessment.<sup>1056</sup>

382. *Second*, not only did the Government withhold information regarding its novel interpretation of the Mining Law, it also solicited *additional* contributions clearly premised on the understanding that SMCV enjoyed stability for its entire mining unit, again demonstrating the Government’s inconsistent conduct toward SMCV. For example:

- (a) SMCV voluntarily contributed US\$125 million to Arequipa following the 2006 Roundtable Discussions, which as noted above were premised on the understanding that SMCV would not pay *any* royalties during the term of the Stability Agreement.<sup>1057</sup>
- (b) Despite these significant contributions, the Government wanted more, and requested that SMCV sign the Voluntary Contribution Agreement in January 2007. The Government then induced SMCV’s significant contributions under that Agreement—ultimately amounting to US\$140 million—which were unquestionably premised on the understanding that SMCV would not be subject to *any* royalty payments.<sup>1058</sup> Again, the Government did not mention to SMCV that it would charge SMCV hundreds of millions in royalties under a novel interpretation of the Mining Law.<sup>1059</sup>
- (c) In 2011, before committing to make full GEM payments, Ms. Torreblanca asked MINEM’s Director General of Mining for “urgent confirmation” that once it did so, SMCV would pay only GEM and not Royalties or SMT.<sup>1060</sup> Ms. Torreblanca also conveyed SMCV’s understanding that the Stability Agreement applied to the entirety

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<sup>1054</sup> See *supra* §§ III.I.3, III.I.4 (citing Torreblanca ¶¶ 53-54).

<sup>1055</sup> See *supra* §§ III.I.3, III.I.4 (citing Torreblanca ¶¶ 53-54).

<sup>1056</sup> See *supra* § III.L.1 (citing Torreblanca ¶ 81).

<sup>1057</sup> See *supra* § III.I.3 (citing Torreblanca ¶¶ 53-55).

<sup>1058</sup> See *supra* § III.I.4 (citing **Ex. CE-27**, SMCV, Voluntary Contribution Agreement (10 August 2007)).

<sup>1059</sup> See *supra* § III.I.4 (citing Torreblanca ¶¶ 60-62).

<sup>1060</sup> **Ex. CE-628**, SMCV, Letter No. SMCV.VL&RG-1896-2011 (7 October 2011); Torreblanca ¶ 85.

of the Mining and Beneficiation Concessions through 31 December 2013.<sup>1061</sup> Ms. Torreblanca similarly wrote to the MEF asking it to confirm the Government’s verbal assurances to SMCV that it would “only have to pay the GEM and will pay neither the Special Mining Tax nor the Mining Royalty for the concessions included in the current [Stability] Agreement.”<sup>1062</sup> Instead of informing Ms. Torreblanca that the Government intended to assess royalties and taxes based on the novel interpretation, these officials stated that they were not competent to answer her questions.<sup>1063</sup>

383. Peru’s inconsistency in its conduct and representations to SMCV, its lack of transparency and candor, and its deliberate obfuscation of its true intentions during the period when SMCV executed its significant investment in the Concentrator, fall far short of the level of *fair and equitable* treatment Peru was obligated to grant Freeport’s investment under Article 10.5.<sup>1064</sup>

#### iv. The Tax Tribunal Committed Serious Due Process Violations

384. Peru’s politically motivated measures against SMCV became even more egregious in light of the serious due process violations that occurred when SMCV attempted to challenge SUNAT’s Royalty Assessments before the Tax Tribunal, the entity within the MEF that acts as the final administrative authority on tax and royalty matters.<sup>1065</sup> There, the Tax Tribunal President improperly

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<sup>1061</sup> **Ex. CE-628**, SMCV Letter No. SMCV.VL&RG-1896-2011 (7 October 2011); *see also supra* § III.O.2 (citing **Ex. CE-629**, SMCV, Letter No. SMCV-VL&RG-1968-2011 (26 October 2011); Torreblanca, ¶¶ 85-89).

<sup>1062</sup> **Ex. CE-631**, SMCV, Letter No. SMCV-VL&RG-2217-2011 (5 December 2011); *see also supra* § III.M.2 (citing Torreblanca ¶¶ 85-89).

<sup>1063</sup> *See supra* § III.M.2 (citing **Ex. CE-632**, MINEM, Official Letter No. 1333-2011-MEM/DGM (28 December 2011); **Ex. CE-629**, MEF Report No. 206-2011-EF/61.01 (14 October 2011), p. 2, II. Analysis, ¶¶ 2-3).

<sup>1064</sup> *See, e.g.*, **CA-223**, *CC/Devas Award on Jurisdiction and Merits*, ¶¶ 467-70 (finding a “clear” breach of the “simple good faith required under international law and the FET clause” when Claimants were “completely left in the dark” about government decisions that “affect[ed] the basic expectations” of the investment); **CA-64**, *Saar Papier Vertriebs GmbH v. Republic of Poland I*, UNCITRAL, Final Award, 16 October 1995 (Ahrens, Szurski (dissenting), Karrer), ¶ 92 (articulating a common “obligation of good faith in public law which applies to all branches of government” that excuses private parties for their reliance on a prior understanding where “the state has given misleading information about the law or where the law or administrative or court practice have changed”); **CA-278**, *Clayton/Bilcon v. Canada Award*, ¶ 592 (“[I]t was unjust for officials to encourage coastal mining projects in general and specifically encourage the pursuit of the project at the Whites Point site, and then, after a massive expenditure of effort and resources by Bilcon on that basis, have other officials effectively determine that the area was a “no go” zone for this kind of development rather than carrying out the lawfully prescribed evaluation of its individual environmental merits.”); **CA-277**, *Abengoa Award*, ¶¶ 646-51 (concluding that Mexico’s politically motivated campaign to shut down a waste management plant post-investment violated the minimum standard of treatment in light of the fact that “the Claimants made their investment trusting that it enjoyed all the necessary administrative and environmental authorizations at both the municipal and the state and federal levels” and “invested based on the legitimate expectation that the Plant’s situation met all the necessary administrative and legal requirements”).

<sup>1065</sup> *See CA-186*, Manual of Organization and Functions of the Tax Tribunal, Ministerial Resolution No. 626-2012-EF-43 (10 October 2012), p. 1 (“The Tax Tribunal is the administrative last resort for tax and

interfered in the resolution of SMCV's Royalty cases by instructing her own assistant to draft the resolution in the 2008 Royalty Case in lieu of the assigned *vocales*, presumably to ensure that the Tax Tribunal would uphold SUNAT's unlawful Assessments on the basis of the Government's novel and restrictive interpretation. The President then imposed this flawed resolution in the 2006-2007 Royalty Case. Further, the Tax Tribunal allowed a blatantly conflicted former SUNAT employee to sit as the *vocal ponente* in SMCV's 2010-2011 Royalty Case, assigned the Q4 2011 Royalty Case to the Tax Tribunal President's former assistant, now acting as a *vocal*, and copy-pasted significant portions of the original flawed decision to resolve the 2009 and 2010-2011 Royalty Cases.

385. Tribunals have repeatedly recognized that the due process violations like these, involving the presence of a biased decision-maker,<sup>1066</sup> interference with a party's right to be heard, total disregard for the individual circumstances of a particular case,<sup>1067</sup> use of "unjustified" procedural obstacles to avoid hearing the merits,<sup>1068</sup> and excessive delays in proceedings,<sup>1069</sup> may give rise to breaches of the fair and equitable treatment obligation in the context of administrative action, and that these violations may further be exacerbated by defects in the "general legal framework."<sup>1070</sup>

**a. The Tax Tribunal Committed Serious Procedural Irregularities in the 2006-2007 and 2008 Royalty Cases**

386. Here, the Tax Tribunal President Olano Silva unlawfully interfered to take control of SMCV's challenges to the 2006-2007 and 2008 Royalty Assessments from the outset. The Tax Tribunal's irregularities in these proceedings laid the foundation for Peru's due process violations in SMCV's challenges to the remaining Royalty Assessments.

387. President Olano Silva is a long-time employee of the MEF, the Government Ministry responsible for assessing and collecting taxes.<sup>1071</sup> The MEF carries out that function through SUNAT, which issues and enforces tax and royalty assessments, and the Tax Tribunal, which hears individual

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customs matters within the framework of the measures designed to improve the resolution of tax procedures.").

<sup>1066</sup> See, e.g., **CA-195**, *Deutsche Bank AG v. Sri Lanka*, ICSID Case No. ARB/09/2, Award (31 October 2012) (Hanotiau, Williams, Ali Khan) ("*Deutsche Bank Award*"), ¶¶ 479-480; **CA-78**, *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000) (Lauterpacht, Civiletti, Siqueiros), ¶¶ 92, 97-99; see also **CA-211**, *OAO Tatneft Award*, ¶¶ 402-404.

<sup>1067</sup> See **CA-195**, *Deutsche Bank Award*, ¶¶ 487-491.

<sup>1068</sup> **CA-217**, *Dan Cake Decision on Jurisdiction and Liability*, ¶¶ 142, 145.

<sup>1069</sup> **CA-167**, *Chevron Corporation and Texaco Petroleum Company v. Ecuador*, PCA Case No. 2007-02/AA277, Partial Award on the Merits (30 March 2010) (van den Berg, Brower, Böckstiegel), ¶ 262 (finding that "the existence of long delays, even after official acknowledgements by the courts that they were ready to decide the cases, to be a decisive factor demonstrating that the delays experienced by TexPet are sufficient to breach the BIT").

<sup>1070</sup> See e.g., **CA-163**, *Lemire Decision on Jurisdiction and Liability*, ¶ 315

<sup>1071</sup> See **CA-250**, *Regulations of Organization and Functions of the Ministry of Economy and Finance, 2020*, Arts. 2, 3.

administrative challenges to SUNAT assessments and acts as the final administrative decision-maker.<sup>1072</sup> The Tax Tribunal President is appointed and reconfirmed every three years by the President of the Republic and the MEF.<sup>1073</sup> The individual *vocales* are subject to renewal every three years, at the discretion of a four-person commission that includes a MEF representative—who chairs the commission and has the tie-breaking vote—and the President of the Tax Tribunal.<sup>1074</sup>

388. According to the Tax Tribunal’s binding Rules of Procedure, the Tax Tribunal president is responsible for organizing and supervising the administrative and technical functions of the Tribunal, and to presiding over the Plenary Chamber.<sup>1075</sup> The Tax Tribunal president is also responsible for the Tax Tribunal budget, which derives from a percentage of SUNAT’s collections.<sup>1076</sup> However, the Tax Tribunal President has no role in deliberating or resolving individual challenges.<sup>1077</sup> Instead, challenges must be decided, and the corresponding resolutions must be prepared, exclusively by the *vocales* and their support staff within the Chamber.<sup>1078</sup> This limitation is critical to protecting the due process rights of participants, because only the *vocales* are under a specific legal duty to “deliberate” and state the grounds for their decision.<sup>1079</sup>

389. Despite this limitation, evidence that SMCV first received in 2021 through freedom of information requests demonstrates that the President’s Office directly interfered to resolve SMCV’s challenges in the 2006-2007 and 2008 Royalty Cases in favor of the Government. Specifically, the evidence shows that President Olano Silva improperly tasked her assistant with drafting the resolution

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<sup>1072</sup> See **CA-250**, Regulations of Organization and Functions of the Ministry of Economy and Finance, 2020, Arts. 16, 17(b).

<sup>1073</sup> See **CA-14**, Tax Code, Supreme Decree No. 133-2013-EF, Art. 99.

<sup>1074</sup> See **CA-14**, Tax Code, Supreme Decree No. 133-2013-EF, Art. 99; **CA-232**, Criteria for the Appointment and Ratification of the Vocales of the Specialized Chambers of the Tax Tribunal as Well as for the Appointment of Resolver-Secretaries for Handling Complaints and Reporting Secretaries of Said Tribunal, Supreme Decree No. 180-2017-EF (20 June 2017), Art. 4; see also **Ex. CE-667**, *Testimony of a Former Member of the Tax Tribunal: Interview with Dr. Ana María Cogorno Prestinoni*, No. 311, Análisis Tributario, 2013, p. 14, ¶¶ 32-33 (interview with Ana María Cogorno Prestinoni, a *vocal* for 21 years, explaining that the renewal process “seem[ed] wrong” because it “[was] a form of indirect pressure,” “a means of pressure,” particularly since it “has to be done every three years.”); *id.*, ¶ 60 (explaining that since she had retired “it [was] great to be absolutely free and not to be wondering: will they ratify me or not ratify me, do they like me or do they not like me.”).

<sup>1075</sup> See **CA-186**, Manual of Operation and Functioning of the Tax Tribunal, Ministerial Resolution 626-2012-EF/43, pp. 12-13.

<sup>1076</sup> See **CA-186**, Manual of Organization and Functions of the Tax Tribunal, Ministerial Resolution No. 626-2012-EF-43 (10 October 2012), p. 12 (functions include “[a]pprov[ing] the Tax Tribunal’s draft budget, annual financial statements, and development plan”); **CA-5**, Emergency Decree No. 112-2000 (7 December 2000).

<sup>1077</sup> Hernández ¶ 171.

<sup>1078</sup> See **CA-250**, 2020 Regulations of the Functions of the MEF, Ministerial Resolution 213-2020/EF/41 (24 July 2020), Art. 23; see also Hernández ¶¶ 186-187.

<sup>1079</sup> See **CA-196**, Tax Tribunal Procedural Manual, approved by Resolution of the General Secretariat of the Ministry of Economy and Finance No. 017-2012-EF/13, 31 October 2012, Annex (*vocales* deliberate and draft resolutions); **Ex. CE-553**, Minutes of Plenary Meeting No. 2006-33, October 4, 2006, p. 1 (*vocales* attend oral hearings); see also Hernández ¶¶ 190-192.

in the 2008 Royalty Case and ensured that this resolution would be rendered before the resolution in the earlier-filed 2006-2007 Royalty case. The evidence also demonstrates that President Olano Silva then pressured the *vocales* who were in charge of the 2006-2007 Royalty Case to copy-paste the 2008 Royalty Case resolution in the 2006-2007 Royalty Case.

390. *First*, contemporaneous internal communications confirm that President Olano Silva charged her assistant Ms. Villanueva with drafting the resolution of the 2008 Royalty Case.

- (a) A 22 March 2013 email confirms that President Olano Silva and Ms. Villanueva discussed preliminary conclusions on the merits of the case well *before* the hearing, with Ms. Villanueva reporting that “[t]here 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.”<sup>1080</sup>
- (b) On 24 April 2013, Ms. Villanueva sent an *ex parte* communication to Gabriela Bedoya—a SUNAT official who had both prepared SUNAT’s decisions rejecting SMCV’s requests for reconsideration in the 2006-2007 and 2008 Royalty Assessments, *and* would represent SUNAT in oral hearings before the Tax Tribunal in SMCV’s challenges to those Assessments<sup>1081</sup>—requesting a copy of the Stability Agreement that SMCV concluded with the Government in 1994, suggesting that Ms. Villanueva was in possession of and actively working on the case file.<sup>1082</sup>
- (c) The signature block of Chamber No. 1’s resolution, which lists Ms. Villanueva’s initials—“UV”—in the spot for the “drafting law clerk,” also confirms that Ms. Villanueva drafted it.<sup>1083</sup>
- (d) On the same day Chamber No. 1 issued its resolution, Chamber No. 10’s presiding *vocal*, Mr. Moreano Valdivia, sent an email to President Olano Silva saying that his

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<sup>1080</sup> **Ex. CE-648**, Email from Úrsula Villanueva Arias to Zoraida Alicia Olano Silva (22 March 2013, 4:02 PM PET; *see also supra* § III.N.1 (citing Estrada ¶¶ 26, 29-30, 59)).

<sup>1081</sup> *See Ex. CE-38*, SUNAT, Resolution No. 055-014-0001290 (2006-2007 Royalty Assessment) (31 March 2010) (notified to SMCV 22 April 2010); **Ex. CE-46**, SUNAT, Resolution No. 055-014-0001394 (2008 Royalty Assessment) (31 January 2011) (notified to SMCV 17 February 2011); **Ex. CE-79**, Oral Hearing Report Record No. 0286-2013-EF/TF, April 5, 2013 (2006/07Royalty Case); **Ex. CE-82**, Oral Hearing Report Record No. 0411-2013-EF/TF, May 2, 2013 (2008 Royalty Case).

<sup>1082</sup> *See Ex. CE-81*, Email from Úrsula Villanueva Arias to Gabriela Bedoya of SUNAT (24 April 2013, 2:37 PM PET) (“I am writing in relation to ... Cerro Verde ... so that you can send us [illegible] this way the first stability agreement signed by the company in 1994.”); **Ex. CE-81**, Email from Gabriela Bedoya of SUNAT to Úrsula Villanueva Arias (24 April 2013, 2:55 PM PET) (attaching the “Agreement for Promotion and Guarantee of Investment, Ministerial Resolution No. 011-94-EM/VMM”); *see also* Estrada ¶ 44.

<sup>1083</sup> **Ex. CE-83**, Tax Tribunal Decision, No. 08252-1-2013 (21 May 2013), p. 24; *see also supra* § III.N.I; Estrada ¶ 48; Hernández ¶¶ 199-202.

Chamber “[was] informed that Ursula Villanueva made a draft that was returned to Chamber 1,” confirming that Ms. Villanueva drafted Chamber No. 1’s resolution.<sup>1084</sup>

- (e) Mr. Estrada, who at that time served as law clerk at the Tax Tribunal, testifies that President Olano Silva “improperly intervened to influence the resolution of cases of high interest to her, with the help of her assistants.”<sup>1085</sup> He testifies that “SMCV’s 2008 Royalty Case was a perfect example of a case that would have been of great interest . . . given the amount at issue.”<sup>1086</sup> Mr. Estrada further testifies that individual *vocales* were unlikely to contest President Olano Silva’s interventions, due to a general impression that “the President was influential within the Tax Tribunal and the MEF, so voicing any objections to her intervening in the resolution of cases could have negative repercussions.”<sup>1087</sup>
- (f) Mr. Estrada also explains that in order to meet the MEF’s ambitious production goals, the *vocales* maintained an extremely heavy workload that “affected the proper functioning of the Tax Tribunal and the quality of its resolutions.”<sup>1088</sup>

391. *Second*, following President Olano Silva’s intervention, the 2008 Royalty Case proceeded on a fast track, ensuring that Ms. Villanueva’s resolution would be the first issued, even though the 2006-2007 Royalty Case was the first-filed and had been pending before the Tax Tribunal *nine months* longer than the 2008 Royalty Case. In particular:

- (a) Mr. Estrada testifies that the Tax Tribunal’s general practice is that the first-filed challenge is usually decided first, and the Tax Tribunal maintains a duty to resolve each case *individually* on the basis of the facts before it.<sup>1089</sup>
- (b) Even though SMCV filed the 2006-2007 Royalty Case nine months before the 2008 Royalty Case, the hearing in the 2008 Royalty Case was scheduled only one month after the hearing in the 2006-2007 Royalty Case.<sup>1090</sup>

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<sup>1084</sup> **Ex. CE-651**, Email from Zoraida Alicia Olano Silva to Carlos Hugo Moreano Valdivia (May 21, 2013, 10:47 AM PET); *see also supra* § III.N.1; **Ex. CE-679**, Email from Úrsula Villanueva Arias to Licette Isabel Zuñiga Dulanto (December 29, 2014, 5:00 PM PET) (indicating that Ms. Villanueva prepared a draft report summarizing Cerro Verde’s case for the Inspector General).

<sup>1085</sup> Estrada ¶ 33.

<sup>1086</sup> Estrada ¶ 35.

<sup>1087</sup> Estrada ¶ 34.

<sup>1088</sup> Estrada ¶ 25.

<sup>1089</sup> Estrada ¶ 23 (“The Law on General Administrative Procedure, provides that ‘a strict first-come, first-serve’ basis must be followed . . . the *vocales* generally tried to comply with this rule.”) (citing **CA-18**, General Administrative Procedure Law (25 January 2019), Art. 66.1); *id.* at ¶¶ 30-31; Hernández ¶ 188-189.

<sup>1090</sup> *See Ex. CE-79*, Record of Oral Hearing No. 0286-2013-EF/TF (record of hearing date for 2006/07 Royalty Case) (5 April 2013); **Ex. CE-80**, Notification of Oral Hearing No. 0411-2013-EF/TF (5 April 2013) (scheduling an oral hearing for the 2008 Royalty Case for 2 May 2013); *see also Ex. CE-40*, SMCV,

- (c) Chamber No. 1 issued Ms. Villanueva’s resolution in the 2008 Royalty Case—which rejected SMCV’s challenge based on the novel interpretation that stability guarantees are granted “in relation to a specific investment project that is clearly delimited in the Feasibility Study”—only *three weeks* after that hearing, and before Chamber No. 10 could issue its own resolution in the 2006-2007 Royalty Case.<sup>1091</sup> This was a departure from the typical first-in, first-out resolution practice, which Mr. Estrada confirms was the “general rule.”<sup>1092</sup>
- (d) An email from Chamber No. 10’s presiding *vocal*, Mr. Moreano Valdivia, to President Olano Silva the day after Chamber No. 1 issued Ms. Villanueva’s decision shows that he objected to the President’s usurpation of Chamber No. 10’s role. Mr. Moreano complained that “the ideal thing would have been for Chamber 1 to hold a session on the Cerro Verde file after coordinating with us . . . it was the right thing to do.” He also complained about the lack of transparency surrounding the adoption of Chamber No. 1’s resolution, stating that “as always happens, if we do not call we will not find out anything.”<sup>1093</sup>

392. *Third*, President Olano Silva then seemingly imposed the flawed resolution in the 2008 Royalty Case on the *vocales* of Chamber No. 10, who issued a copy-pasted resolution in the 2006-2007 Royalty Case only nine days later.<sup>1094</sup> According to Articles 103 and 129 of the Tax Code and Article 6.1 of the Law on General Administrative Procedure, the Tax Tribunal Chambers are required to independently deliberate and decide each case *individually* on the basis of the facts and arguments before them.<sup>1095</sup> Although some informal consultation between Chambers is permissible,

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Challenge to Tax Tribunal, 2006/07 Royalty Assessments (12 May 2010); **Ex. CE-49**, SMCV, Challenge to Tax Tribunal, 2008 Royalty Assessments (10 March 2011).

<sup>1091</sup> See **Ex. CE-83**, Tax Tribunal Decision, No. 08252-1-2013 (2008 Royalty Case) (21 May 2013); **Ex. CE-80**, Notification of Oral Hearing No. 0411-2013-EF/TF (9 April 2013) (scheduling an oral hearing for the 2008 Royalty Case for 2 May 2013).

<sup>1092</sup> Estrada ¶ 23; see also **CA-18**, Law on General Administrative Procedure, January 25, 2019. Art. 66.1 (according to the text approved by Supreme Decree No. 004-2019-JUS); Art. 159.1.

<sup>1093</sup> **Ex. CE-652**, Email from Carlos Hugo Moreano Valdivia to Zoraida Alicia Olano Silva (22 May 2013 8:58 AM PET); see also *supra* § III.N.I; Hernández ¶¶ 201-202.

<sup>1094</sup> Compare **Ex. CE-88**, Tax Tribunal Resolution No. 08997-10-2013 (30 May 2013), with **Ex. CE-83**, Tax Tribunal Resolution, No. 08252-1-2013 (21 May 2013).

<sup>1095</sup> See **CA-14**, Tax Code, Art. 103 (“The grounds for the actions by the Tax Administration will be stated and will be recorded in the respective instruments or documents”); *id.*, Article 129 (“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 . . . .”); **CA-18**, Consolidated Uniform Text of the Law on General Administrative Procedure, Art. 6.1 (according to the text approved by Supreme Decree No. 004-2019-JUS); see also Estrada ¶¶ 30-31; Hernández ¶ 190.

this does not absolve *vocales* of their “indispensable duty to deliberate among themselves” and to decide each individual case “impartially and independently,” as Prof. Hernández explains.<sup>1096</sup>

393. Here, contemporaneous internal emails demonstrate that President Olano Silva pressured Chamber No. 10 to adopt Ms. Villanueva’s resolution:

- (a) Three days after Chamber No. 1 issued the 2008 Royalty Case Resolution, and only six days before Chamber No. 10 issued the 2006-2007 Royalty Case resolution, President Olano Silva met with Mr. Cayo and Ms. Zuñiga, the *vocales ponentes* in the 2006-2007 and 2008 Royalty Cases, respectively, to ensure “coordination” with Ms. Villanueva’s just-issued resolution in the 2008 Royalty Case.<sup>1097</sup>
- (b) The resolution in the 2006-2007 case reveals that the “coordinat[ion]” sought by President Olano Silva meant copy-pasting Ms. Villanueva’s resolution essentially verbatim. A comparison of the text of the two resolutions shows that virtually 85% of the text is identical, except for the sections of the resolutions identifying information specific to each case, a small handful of additional arguments responding to SMCV’s claims and evidence, and other minor differences in wording.<sup>1098</sup>
- (c) The resolution in the 2006-2007 case also does not include initials for any drafting law clerk in the work route, thus confirming that the resolution was not drafted by a law clerk, as would usually have been the case considering the complexity of the challenge and the amounts involved.<sup>1099</sup>

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<sup>1096</sup> Hernández ¶ 206 (“The email from Mr. Moreano suggests that normally the Chambers consulted among themselves before resolving similar matters of the same taxpayer. If this were the case, I consider that said practice would not violate the right to due process of taxpayers, as long as the members of each Chamber comply with their indispensable duty to deliberate among themselves and each Chamber decides impartially and independently.”); *see also* **CA-196**, Tax Tribunal Procedural Manual, approved by Resolution of the General Secretariat of the Ministry of Economy and Finance No. 017-2012-EF/13, 31 October 2012, p. 13 (“On the day of the session [the *vocales*] participate in the presentation, discussion and approval of the draft Resolutions and Procedural Orders to the session.”); **CA-231**, Single Unified Text of the Law on General Administrative Procedure, Article 3.1 (according to the text approved by Supreme Decree No. 004-2019-JUS) (providing that for administrative acts, such as the Chambers’ resolution, to be valid they “must meet the *indispensable* requirements pertaining to the session, quorum and deliberation for its issue[d]” decision) (emphasis added).

<sup>1097</sup> *See* **Ex. CE-650**, Email from Carlos Hugo Moreano Valdivia to Zoraida Alicia Olano Silva (21 May 2013, 10:05 AM PET) (noting that Chamber No. 1 and Chamber No. 10 “will coordinate”); **Ex. CE-653**, Email from Licette Isabel Zuñiga Dulanto to Zoraida Alicia Olano Silva (22 May 2013, 9:55 AM PET) (“As I spoke with Luis Cayo before the first session, they were in agreement to confirm and it seemed to us that the terms of the resolution were quite clear . . . so we agreed that after the session I would send them a copy of the draft to coordinate.”); **Ex. CE-655**, Email from Zoraida Alicia Olano Silva to Luis Gabriel Cayo Quispe and Licette Isabel Zuñiga Dulanto (24 May 2013, 10:23 AM PET) (“Do you have a file number 1889-2012, which is also on the same subject?”); *see also supra* § III.N.1.

<sup>1098</sup> *See* Hernández, Appendix D (redline of the resolutions) (comparing **Ex. CE-83** and **Ex. CE-88**).

<sup>1099</sup> *See* **Ex. CE-83**, Tax Tribunal Decision, No. 08252-1-2013 (21 May 2013), p. 24 (signature page missing the initials of a drafting law clerk in the work route).

394. Prof. Hernández concludes that “[t]he irregularities committed by the Tax Tribunal . . . are extremely serious” and that they “seriously violate SMCV’s right to due process and its right to obtain a duly motivated, impartial and independent decision.”<sup>1100</sup>

**b. The Tax Tribunal Refused to Recuse a Blatantly Conflicted Decision-Maker in the 2010-2011 Royalty Case, Assigned the Q4 2011 Royalty Case to the Same Former Assistant that Drafted the 2008 Royalty Case, and again Copy-Pasted from its Resolution in the 2008 Royalty Case**

395. The Tax Tribunal’s due process violations, including President Olano Silva’s unlawful interventions, continued unabated in the 2009, 2010-2011, and Q4 2011 Royalty Cases. Peru’s conduct in these cases additionally led to breaches of the fair and equitable treatment obligation because the Tax Tribunal appointed and then refused to recuse a clearly conflicted decision-maker, and then again copy-pasted significant portions of the 2008 Royalty Case resolution to decide the 2009 and 2010-2011 Royalty Cases.

396. *First*, the Tax Tribunal reassigned the 2010-2011 Royalty Case to a *vocal ponente* with a clear conflict of interest, denying SMCV’s right to an impartial decision-maker. In particular:

- (a) In March 2017, SMCV challenged the 2010-2011 Royalty Case, which was initially assigned to Chamber No. 10. However, in May 2018, the 2010-2011 Royalty Case was reassigned to Chamber No. 1 and specifically to *vocal ponente* Mr. Ninacondor, who had joined Chamber No. 1 as a *vocal* only four days earlier.<sup>1101</sup>
- (b) Not only was Chamber No. 1 the very same chamber that had adopted Ms. Villanueva’s resolution in the 2008 Royalty Case, including two of the same *vocales*, but the new *vocal*, Mr. Ninacondor, was blatantly conflicted.<sup>1102</sup> In particular, Mr. Ninacondor had previously worked at the very SUNAT department that had confirmed the 2010-2011 Royalty Assessments in the first place, and even represented SUNAT *against* SMCV before the Court of Appeals in the 2006-2007 Royalty Case.<sup>1103</sup>
- (c) Less than a month after SMCV requested Mr. Ninacondor to recuse himself on the basis of these conflicts, Peru amended the Tax Code to explicitly require *vocales* to

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<sup>1100</sup> Hernández ¶ 215.

<sup>1101</sup> See *supra* § III.O.2 (citing **Ex. CE-177**, MEF, Supreme Resolution No. 013-2018-EF (3 May 2018), Article 1 (appointing Victor Mejía Ninacondor as *vocal*); **Ex. CE-194**, Tax Tribunal, Decision No. 06575-1-2018, 2010/11 Royalty Case (28 August 2018), p. 41 (denoting Victor Mejía Ninacondor as *vocal ponente*)).

<sup>1102</sup> See *supra* § III.O.2.

<sup>1103</sup> See *supra* § III.O.2 (citing, *e.g.*, **Ex. CE-227**, LinkedIn Profile of M. Victor Mejía Ninacondor, also available at <https://pe.linkedin.com/in/m-victor-mejia-ninacondor-853b43109>).

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.<sup>1104</sup> By this amendment, the Government effectively confirmed that Mr. Ninacondor should not have participated in SMCV’s case, although that acknowledgment came too late for SMCV’s 2010-2011 Royalty Case.

- (d) Prof. Hernández confirms that Mr. Ninacondor’s participation “violated SMCV’s right to due process, since there were justified doubts about his impartiality and independence.”<sup>1105</sup>

397. *Second*, when SMCV requested that Mr. Ninacondor recuse himself as the *vocal ponente* for the 2010-2011 Royalty Case due to his blatant conflict of interest, President Olano Silva and her staff again disregarded the Tax Tribunal’s Rules of Procedure to push through a decision that baselessly denied SMCV’s request.<sup>1106</sup> In particular:

- (a) According to the Tax Tribunal’s Rules of Procedure, President Olano Silva should have convened the Plenary Chamber to deliberate and decide upon the request once received.<sup>1107</sup> Instead, the very same day SMCV filed its request, President Olano Silva directed her staff to prepare “draft minutes” of a deliberation that had not yet taken place.<sup>1108</sup> The draft minutes, sent to President Olano Silva that same evening, set out the predetermined conclusion that SMCV’s “petition for recusal was deliberated and it was unanimously agreed that the petition for recusal that was filed was unwarranted.”<sup>1109</sup> President Olano Silva then distributed her draft to the *vocales* the next morning informing them to “please let me know if you agree.”<sup>1110</sup>

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<sup>1104</sup> See **CA-238**, 13 Sep. 2018, Legislative Decree No. 1421 (amending article 100 of the Tax Code); see also Hernández ¶ 242.

<sup>1105</sup> Hernández ¶ 248.

<sup>1106</sup> See **Ex. CE-180**, 20 Jun. 2018 SMCV Submission Requesting Recusal of Judge Victor Mejía Ninacondor, pp. 3-4; **Ex. CE-181**, 22 Jun. 2018 Tax Tribunal Rejection of SMCV’s Request for Recusal, Minutes of Plenary Council Meeting No. 2018-19.

<sup>1107</sup> See **CA-120**, Tax Tribunal, Plenary Chamber Order No. 2005-08 (11 April 2005), Section 3.1, p. 13 (“After studying the briefs and documents submitted in the plenary session, the plenary chamber will decide whether or not the abstention is to be admitted, regardless of whether it was raised by the Vocales or by the taxpayer [administrado].”).

<sup>1108</sup> See **Ex. CE-713**, Email from Gina Castro Arana to Zoraida Alicia Olano Silva (June 20, 2018, 8:32 PM PET) (sending President Olano Silva a draft of the minutes for the plenary session, two days before the deliberation took place).

<sup>1109</sup> **Ex. CE-714**, Acta de Sala Plena – Abstención vs MN Cerro Verde, attached to Email from Gina Castro Arana to Zoraida Alicia Olano Silva (June 20, 2018, 8:32 PM PET) (SMCV’s “petition for self-recusal was deliberated and it was *unanimously* agreed that the petition for self-recusal that was filed was inadmissible”).

<sup>1110</sup> **Ex. CE-717**, Email from Zoraida Alicia Olano Silva to the *vocales* (June 21, 2018, 11:21 AM PET) (“Dear Vocales: I am attaching draft minutes for today’s meeting at 5 p.m. Please let me know if you agree. Thank you.”).

- (b) When several *vocales* announced their disagreement with President Olano Silva’s conclusion, President Olano Silva instructed those *vocales* to “let me know which way the vote is going so I can start working on the draft resolution,” even though there had still been no deliberation by the Plenary Chamber.<sup>1111</sup>
- (c) A little over two hours after receiving the final draft of the dissenting vote, and only two days after SMCV’s request, the Plenary Chamber passed the resolution rejecting SMCV’s recusal request, which was identical to the draft distributed by President Olano Silva except for several paragraphs to counter the arguments of the dissenting *vocales*.<sup>1112</sup>
- (d) Prof. Hernández confirms that President Olano Silva’s treatment of SMCV’s recusal request meant that “the Plenary Chamber did not carry out a serious deliberative exercise.”<sup>1113</sup>

398. *Third*, with Mr. Ninacondor in place, Chamber No. 1 again moved swiftly, holding its hearing in the 2010-2011 Royalty Case the *same day* Chamber No. 2 held its hearing in the 2009 Royalty Case—despite being filed five years later—and ultimately issuing its resolution only one week after Chamber No. 2’s.<sup>1114</sup> In each of these cases, as it had done in the 2006-2007 Royalty Case, the Tax Tribunal disregarded its duty to independently consider and decide individual cases on the basis of the facts before it, instead repeatedly copy-pasting significant parts of the flawed 2008 Royalty Case resolution and propagating its serious procedural defects. Specifically, both Chamber No. 2’s resolution in the 2009 Royalty Case and Chamber No. 1’s resolution in the 2010-2011 Royalty Case copied the sections of the resolution drafted by Ms. Villanueva in the 2008 Royalty Case that related to the novel interpretation of the Mining Law nearly *verbatim*.<sup>1115</sup>

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<sup>1111</sup> See **Ex. CE-719**, Email from Gabriela Márquez Pacheco to Zoraida Alicia Olano Silva (June 21, 2018, 11:38 AM PET) (“Regarding the above-mentioned subject, we, the Chamber No. 5 *vocales*, do not agree with the conclusion and legal grounds regarding Assumption 5 of Article 88 of the Law on General Administrative Procedure [the provision listing relationships requiring recusal]. We will leave it up to you to determine whether we should send you our vote or whether it would be necessary to meet [and discuss].”); **Ex. CE-720**, Email from Zoraida Alicia Olano Silva to Gabriela Patricia Marquez Pacheco (June 21, 2018, 11:57 AM PET) (“We’re meeting at 5 p.m. in a plenary session. However, let me know which way the vote is going so I can start working on the draft resolution.”).

<sup>1112</sup> See **Ex. CE-181**, Tax Tribunal Rejection of SMCV’s Request for Recusal, Minutes of Plenary Council Meeting No. 2018-19 (22 June 2018) (the Plenary Chamber convened and passed the resolution that rejected SMCV’s request on 22 June 2018 at 2:30 pm).

<sup>1113</sup> Hernández ¶¶ 232-235.

<sup>1114</sup> See **Ex. CE-185**, Tax Tribunal Notice of Oral Hearing, No. 1170-2018-EF/TF (18 July 2018) (2010/11 Royalty Assessments) (hearing on the 2010/11 Royalty Assessments scheduled for 9 Aug. 2018 in Chamber 1); **Ex. CE-183**, Tax Tribunal Notice of Oral Hearing, No. 1065-2018-EF/TF (6 July 2018) (2009 Royalty Assessments) (hearing on the 2009 Royalty Assessments scheduled for 9 Aug. 2018 in Chamber 2).

<sup>1115</sup> Compare **Ex. CE-188**, Tax Tribunal Decision No. 06141-2-2018 (15 August 2018 ) (2009 Royalty Case), pp. 8-33, with **Ex. CE-83**, Tax Tribunal Decision No. 08252-1-2013 (21 May 2013) (2008 Royalty Case),

399. Finally, after SMCV challenged the Q4 2011 Royalty Case, the case was assigned to none other than Ms. Villanueva, who in the meantime had been promoted to *vocal* for Chamber No. 9, as *vocal ponente*.<sup>1116</sup> Unsurprisingly, the result was the same: Ms. Villanueva again adopted the novel interpretation limiting stability guarantees “to a specific investment project, clearly delimited in the Feasibility Study,” and ruled against SMCV, and SMCV was once again denied the opportunity to have its case properly heard and decided by an impartial decision-maker.<sup>1117</sup>

### 3. Peru Violated Article 10.5 Each Time It Arbitrarily and Unreasonably Failed to Waive the Assessments of Penalties and Interest Against SMCV

400. In addition to the above breaches of Article 10.5, Peru’s conduct also fell below the minimum standard of treatment each time it failed to waive the exorbitant and punitive penalties and interest assessments against SMCV for the Royalty and Tax Assessments listed in Annex A.

401. These penalty and interest charges were unfair and inequitable, as SMCV’s position that it was not required to pay royalties and taxes was eminently reasonable in light of the clear provisions of the Mining Law and Regulations, the Government’s previous position regarding the scope of stability guarantees, and the need of mining companies to make continuous investments. The penalties and interest were also wholly disproportionate: the penalties and interest that SMCV ultimately paid significantly *exceeded* the amount of principal assessed, amounting to 112% of the overall assessments for royalties and new taxes.<sup>1118</sup>

402. Peru’s refusal to waive the penalty and interest, as it was required to do, thus resulted in a windfall to Peru at SMCV’s expense, in violation of Peruvian law and fundamental notions of fairness and equity. Prior tribunals have concluded that this type of arbitrary misapplication of domestic law gives rise to a breach of a State’s international obligations. For example, in *Tza Yap Shum v. Peru*—a case involving SUNAT’s unjustified use of interim enforcement measures to freeze the investor’s accounts in relation to pending tax assessments—the tribunal found that “even recognizing the importance of the functions that SUNAT exercises in tax administration and collection, SUNAT’s behaviour in imposing the preliminary precautionary measures on [claimant], particularly the *failure to observe its own procedures*, must be considered arbitrary.”<sup>1119</sup> Tribunals

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pp. 5-20; compare **Ex. CE-194**, Tax Tribunal Decision No. 06575-1-2018 (28 August 2018) (2010/11 Royalty Case), pp. 15-40; with **Ex. CE-83**, Tax Tribunal Decision No. 08252-1-2013 (21 May 2013) (2008 Royalty Case), pp. 1-21.

<sup>1116</sup> See **Ex. CE-269**, Tax Tribunal, Resolution No. 10574-9-2019 (Q4 2011 Royalty Case) (18 November 2019), p. 14.

<sup>1117</sup> See **Ex. CE-269**, Tax Tribunal Resolution No. 10574-9-2019, Q4 2011 Royalty Case) (18 November 2019), p. 6. Compare *id.* with **Ex. CE-83**, Tax Tribunal, Resolution No. 08252-1-2013 (2008 Royalty Case) (21 May 2013).

<sup>1118</sup> Spiller and Chavich ¶ 87, Figure 7.

<sup>1119</sup> See **CA-176**, *Tza Yap Shum v. Peru*, ICSID Case No. ARB/07/6, Award (7 July 2011) (Fernández-Armeosto, Otero, Kessler), ¶¶ 181, 218, 231-40 (concluding that this “arbitrary” conduct resulted in an indirect

have further concluded that a State may violate its fair and equitable treatment obligation where it takes punitive action that is “out of proportion to the wrongdoing alleged” or that is not “appropriately tailored to the pursuit of that rational policy with due regard for the consequences imposed on investors.”<sup>1120</sup>

**i. 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**

403. It is fundamentally unfair and inequitable to impose penalties and interest where nonpayment or delayed payment results from a lack of clarity in the underlying law. Peruvian law recognizes this, and provides that the Government *must* waive penalties and interest if there was “reasonable doubt” with respect to interpretation of the relevant law.<sup>1121</sup> In particular:

- (a) Under Article 170 of the Tax Code—which applies equally in the case of royalties pursuant to Article 12 of Law No. 28969<sup>1122</sup>—a party is entitled to a waiver of penalty and interest if the party’s failure to pay results from “reasonable doubt,” in the correct

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expropriation in violation of Peru’s international obligations); *see also* **CA-278**, *Clayton/Bilcon v. Canada Award*, ¶¶ 446-54 (holding Canada liable for its provincial agency’s “highly problematic” and “unprecedented approach” to interpreting and applying domestic law).

<sup>1120</sup> *See* **CA-194**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II)*, ICSID Case No. ARB/06/11, Award (5 October 2012) (Williams, Stern (dissenting in part on other grounds), Fortier), ¶¶ 450-452 (concluding that the penalty imposed by Ecuador on foreign investors for the investor’s failure to comply with regulatory approval requirements for oilfield contractors was disproportionate and in breach of FET because the “hundreds of millions of dollars” price paid by the claimants “was out of proportion to the wrongdoing alleged [], and similarly out of proportion to the importance and effectiveness of the ‘deterrence message’ which the Respondent might have wished to send to the wider oil and gas community”); **CA-201**, *Ioan Micula, et al. v. Romania*, ICSID Case No. ARB/05/20, Award (11 December 2013) (Alexandrov, Abi-Saab (dissenting in part on other grounds), Lévy), ¶ 525 (stating in relation to fair and equitable treatment obligation that “for a state’s conduct to be reasonable, it is not sufficient that it be related to a rational policy; it is also necessary that, in the implementation of that policy, the state’s acts have been appropriately tailored to the pursuit of that rational policy with due regard for the consequences imposed on investors”).

<sup>1121</sup> *See* **CA-14**, Peruvian Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Art. 170 (“The assessment of interest . . . or . . . penalties is inappropriate if: As a result of the misinterpretation of a provision, no amount of the tax debt related to said interpretation should be paid until clarified.”); *id.* at Art. 92(g) (summarizing the criteria in Article 170 as involving “cases of reasonable doubt”); **CA-8**, 25 Jan. 2007 Law 28969, Law that Authorizes SUNAT to Implement Provisions that Facilitate the Administration of Royalties, Article 12 (“[I]nterest or penalties does not apply in the case of obligations related to the mining royalty, in the same cases and terms provided in Art. 170 of the Tax Code.”); *see also supra* § III.N.2.

<sup>1122</sup> *See* **CA-14**, Peruvian Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Art. 170; **CA-8**, 25 Jan. 2007 Law 28969, Law that Authorizes SUNAT to Implement Provisions that Facilitate the Administration of Royalties, Article 12 (“The application of interest or penalties does not apply, in the case of obligations related to the mining royalty, in the same cases and terms provided in Art. 170 of the Tax Code.”); *see also* Hernández ¶ 98.

interpretation of the relevant rule, which exists when the text of the rule is imprecise, ambiguous, or obscure.<sup>1123</sup>

- (b) The purpose of the waiver provision is readily apparent: a party like SMCV, which believes it does not owe royalty and tax payments based on a reasonable interpretation of the relevant laws and regulations, should not be punished for nonpayment.<sup>1124</sup> Further, a party that reasonably believes it does *not* owe royalty and tax payments should not be discouraged by the threat of cascading interest payments from challenging SUNAT’s assessment in administrative or court proceedings—where it indeed may ultimately prevail.<sup>1125</sup> This is particularly true where, as in SMCV’s case, the company’s reasonable belief was repeatedly reinforced by the conduct and statements of various Government officials.<sup>1126</sup>
- (c) Where there is “reasonable doubt,” the Government *must* (i) clarify the scope of the rule and (ii) waive penalties and interest. The Government must do so *irrespective* of whether a party requests it.<sup>1127</sup> Article 170 expressly confirms that SUNAT, the Tax Tribunal, and the MEF, along with Congress and the Executive, are all empowered to clarify the scope of the rule by various means available to them, including a SUNAT Directive or SUNAT Superintendence Resolution, a decision of the Tax Tribunal’s Plenary Chamber, or Supreme Decree signed by the MEF.<sup>1128</sup> Once any of these bodies issues such a clarification, SUNAT must issue a resolution recalculating the taxpayer’s debt, excluding penalties and interest.<sup>1129</sup>

**ii. SMCV’s Non-payment Arose from “Reasonable Doubt,” Rendering Penalties and Interest Charges Inapplicable**

404. Here, Peru’s refusal to waive penalties and interest charges for each of the Royalty and Tax Assessments set out in Annex A was unfair and inequitable, because there was clearly, at the minimum, “reasonable doubt” as to the proper interpretation of the Mining Law and Regulations.

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<sup>1123</sup> CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Art. 170; *see also* Hernández, ¶¶ 101-102.

<sup>1124</sup> *See* Hernández ¶¶ 99.

<sup>1125</sup> *See* Hernández ¶¶ 99-108.

<sup>1126</sup> *See generally supra* §§ III.F, III.G, IV.A.2(i)(d).

<sup>1127</sup> Hernández §VIII.A (citing CA-14, Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Arts. 127, 129, 170; CA-18, Single Unified Text of the Law on General Administrative Procedure, Supreme Decree No. 004-2019-JUS, Art. 5.4).

<sup>1128</sup> *See* CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Art. 170.

<sup>1129</sup> *See* CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Art. 156.

405. *First*, the court decision and opinions in SMCV’s favor demonstrate that there was, at the very minimum, “reasonable doubt” as to the proper interpretation of the Mining Law and Regulations. In particular:

- (a) The Contentious Administrative Court’s decision in the 2008 Royalty Case endorsed SMCV’s interpretation (see section III.N.3.i above).<sup>1130</sup>
- (b) The dissenting Appellate Court judge in the 2006-2007 Royalty Case similarly voted to remand the Contentious Administrative Court’s decision that rejected SMCV’s interpretation, noting that the lower court had not provided grounds for adopting its “restrictive[]” interpretation of the Mining Law and opining that “this case basically boils down to a dispute surrounding two clashing interpretations on the same piece of legislation” (see section III.N.4 above).<sup>1131</sup>
- (c) The two Supreme Court justices who voted in SMCV’s favor in the 2006-2007 Royalty Case similarly voted to annul the Appellate Court’s ruling for, among others, failing to examine SMCV’s arguments or to provide grounds for its conclusion regarding the scope of stability under the Mining Law (see section III.N.4 above).<sup>1132</sup>

406. *Second*, and as explained in Section IV.A.2, 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.<sup>1133</sup>

407. *Third*, in enacting the 2014 and 2019 amendments to the Mining Law and Regulations,<sup>1134</sup> respectively, the Government itself took the position that the prior versions of those provisions were ambiguous and imprecise. In particular:

- (a) In its draft bill establishing Article 83-B, which for the first time limited stability guarantees only to the investment contained in the feasibility study, Congress stated that its motivation was to “establish a regulatory framework that is clearer and in accordance with the principle of legal certainty in favor of the investor,” thus conceding that the prior framework was, at minimum, imprecise or ambiguous.<sup>1135</sup>

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<sup>1130</sup> See **Ex. CE-122**, Contentious Administrative Court, Decision, No. 07650-2013-CA, 2008 Royalty Assessment (17 December 2014).

<sup>1131</sup> See **Ex. CE-274**, Appellate Court, Decision No. 48, 7649-2013, 2006/07 Royalty Case (12 July 2017), p. 37, 34 ¶¶ 8.1, 8.5; see also *id.* pp. 33-37, ¶¶ 8-10.

<sup>1132</sup> See **Ex. CE-739**, Supreme Court Decision, No. 18174-2017, 2006/07 Royalty Assessment (20 November 2018), p. 46, ¶ 2.12.

<sup>1133</sup> See also *supra* § III.C.1.

<sup>1134</sup> See *supra* § IV.A.2.iii.b.

<sup>1135</sup> **Ex. CE-823**, Draft Bill of Law 30230, p. 12; see also *supra* §§ III.N.3, IV.A.2.iii.b.

- (b) Similarly, in the Statement of Legislative Intent accompanying the 2019 amendment to Article 22 of the Regulations, MINEM asserted that the plain text of the previous 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,” thus *explicitly* conceding the existence of reasonable doubt.<sup>1136</sup> MINEM stated that the purpose of the amendment was to “reduce the risk” of such an interpretation being adopted, and concluded that the amendment would “contribute to clarifying” 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.”<sup>1137</sup>

408. *Fourth*, SMCV’s interpretation was consistent with Government officials’ conduct, both generally and toward SMCV. For example:

- (a) Minero Perú’s privatization outreach to foreign investors linked the development of primary sulfides (*i.e.*, a large concentrator) at Cerro Verde with the benefit of stability guarantees, making clear that the purpose of stability was to encourage *continued* investment (see sections III.C.3 and IV.A.2.i.c).<sup>1138</sup>
- (b) In the Share Purchase Agreement and Guarantee Agreement, the Government promised Cyprus it would guarantee stability to SMCV in exchange for, among others, its investment in a concentrator (see section III.D.1 above).<sup>1139</sup>
- (c) Ms. Chappuis and Mr. Flury both testify that, during their tenure at MINEM, their understanding was always that stability guarantees applied to an entire mining unit or concession(s) (see section IV.A.2.i.d above).<sup>1140</sup>
- (d) The Mining Council and the DGM applied stability guarantees on the basis of a mining unit or concession, as the 2001 Mining Council resolution makes clear (see section IV.A.2.i.d above).<sup>1141</sup>

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<sup>1136</sup> **CA-246**, Supreme Decree No. 021-2019-EM (28 December 2019), Statement of Legislative Intent (emphasis added); *see also* Hernández ¶¶ 119-121; *supra* § IV.A.2.iii.b.

<sup>1137</sup> **CA-246**, Supreme Decree No. 021-2019-EM (28 December 2019), Statement of Legislative Intent (emphasis added); *see also* Hernández ¶ 120; *supra* § IV.A.2.iii.b.

<sup>1138</sup> *See Ex. CE-321*, Morgan Grenfell & Co. Ltd., Cerro Verde Copper Mine: Information Memo (April 1993), pp. 1.1, 1.3, 5.3 (“Further exploitation of the resource base at Cerro Verde requires the construction of a sulphide flotation plant.”); *see also Ex. CE-320*, *Peru*, 320 MINING JOURNAL 1 (22 January 1993), pp. 11, 14-15 (“[E]xploitation of the primary sulphides will play an increasing role during any expansion at Cerro Verde.”).

<sup>1139</sup> *See Ex. CE-4*, Share Purchase Agreement between Minero Perú and Cyprus Climax Metals Company (17 March 1994); **Ex. CE-17**, Out of Court Settlement Agreement, 30 Mar. 2001, Clauses 3.1, 4.1, 4.5.

<sup>1140</sup> *See* Chappuis, ¶¶ 28, 53; Flury, ¶¶ 17, 34-38.

- (e) MINEM recognized in September 2003 and again in December 2004 that the Concentrator would be part of SMCV's Mining Unit when it confirmed that SMCV was entitled to the profit reinvestment benefit (see sections III.E.3 and III.F.5 above).<sup>1142</sup>
- (f) Ms. Chappuis confirmed to SMCV that the Concentrator would be stabilized and simply recommended that SMCV expand its Beneficiation Concession to include the Concentrator (see section III.F.3 above).<sup>1143</sup>
- (g) The DGM confirmed that the Concentrator would be stabilized when it approved SMCV's request to expand the Beneficiation Concession, which was explicitly covered by the Stability Agreement, to include the Concentrator (see sections III.F.5 and IV.A.2.ii.b above).<sup>1144</sup>
- (h) During Congressional debates about the Royalty Law, draft bills and senior Government official statements referenced SMCV as a "stabilized" company exempt from paying mining royalties, without any suggestion that it was "partially" stabilized (see section III.F.2 above).<sup>1145</sup>
- (i) In 2005, after Ms. Torreblanca informed SUNAT that SMCV was not required to pay royalties during the term of the stability agreement, SMCV received no response contradicting this interpretation (see section III.G.1 above).<sup>1146</sup>
- (j) In his April 2005 Report, Mr. Isasi confirmed that stabilization guarantees applied on the basis of an entire concession and that if "Administrative Stability has been agreed . . . the royalty is not applicable to mineral resources extracted *from the concessions* that form part of the contractually stabilized investment project" (see sections III.G.3 and IV.A.2.i.d).<sup>1147</sup>
- (k) The negotiations with Members of Congress and other Government representatives that participated in the Roundtable Discussions were based on the premise that

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<sup>1141</sup> See **Ex. CE-377**, MINEM, Resolution No. 380-2001-EM-CM.

<sup>1142</sup> See **Ex. CE-399**, MINEM, Report No. 510-2003-MEM-DGM-TNO (8 September 2003); **Ex. CE-23**, MEF, Ministerial Resolution No. 510-2004-MEM/DM (9 December 2004).

<sup>1143</sup> See Torreblanca ¶ 25; Chappuis ¶¶ 52-53.

<sup>1144</sup> See **Ex. CE-28**, MINEM, Directorial Resolution No. 056-2007-MEM/DGM (26 February 2007); see also **Ex. CE-562**, MINEM, Report No. 165-2007-MINEM-DGM/PDM (19 February 2007), p.21 (recommending that MINEM approve SMCV's request to expand the Beneficiation Concession); **Ex. CE-564**, MINEM, Directorial Resolution No. 081-2007-MEM/DGM (11 April 2007) (correcting an error in Directorial Resolution No. 056-2007-MEM/DGM).

<sup>1145</sup> See Flury ¶ 27; **Ex. CE-403**, Congress, Draft Law No. 8561-2003-CR (14 October 2003); **Ex. CE-406**, Congress, Draft Law No. 08906-2003-CR (including SMCV in list of stabilized companies).

<sup>1146</sup> See Torreblanca ¶¶ 31-32.

<sup>1147</sup> See **Ex. CE-494**, MINEM, Report No. 153-2005-MEM/OGAJ (14 April 2005), ¶ 16 (emphasis added).

SMCV was not required to pay royalties by virtue of its Stability Agreement (see sections III.I and IV.A.2.ii.c above).<sup>1148</sup>

- (l) Even after SUNAT’s initial Assessments, MEF officials confirmed to Ms. Torreblanca that SMCV would have a strong argument for prevailing before the Tax Tribunal (see section III.L.1 above).<sup>1149</sup>
- (m) The *three* separate agreements by which SMCV agreed to pay voluntary contributions—namely, the Roundtable Discussions Agreement under which SMCV made voluntary contributions to Arequipa, the Voluntary Contribution Agreement under the PMSP, and the GEM Agreement—supported SMCV’s interpretation, because they were each based on the premise that SMCV was not obliged to pay royalties (see sections III.I, III.M, and IV.A.2.ii.c). Likewise, the fact that the Government happily acknowledged hundreds of millions of dollars in payments under these agreements without any suggestion that SMCV would have to pay royalties and new taxes demonstrated, at the very minimum, that SMCV’s interpretation of the Mining Law was reasonable.<sup>1150</sup>

**iii. 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**

409. In the 2006-2007 and 2008 Royalty Cases, SMCV requested that the Tax Tribunal waive penalties and interest immediately after it was notified of the Tax Tribunal’s decisions in those cases.<sup>1151</sup> But instead of granting those requests, as they were required to do, the Tax Tribunal, and then the Contentious Administrative Courts, arbitrarily and unreasonably refused to even consider them, baselessly asserting that SMCV had abandoned the issue by not first raising it *during* the initial challenge proceedings.

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<sup>1148</sup> See also Torreblanca ¶ 53 (noting that SMCV agreed—without committing to a specific amount—to “grant an allocation to the municipal authorities of Arequipa to compensate them for the royalties they would not receive” and that “Government representatives, and Director Isasi in particular, agreed with our proposal and never mentioned that SMCV would have to pay royalties because the Stability Agreement did not apply to the Concentrator”).

<sup>1149</sup> See also Torreblanca ¶ 81 (noting that after the 2006/07 SUNAT assessments she met with two MEF officials—Marisol Guiulfo, the Vice-Minister of Economy, and Liliana Chipoco, the General Director of Public Revenue Policy—who confirmed that SMCV “would have a very strong argument for prevailing before the Tax Tribunal”).

<sup>1150</sup> See *supra* §§ III.I; III.M; see also Hernández ¶ 122.

<sup>1151</sup> See *supra* § III.N.2 (citing **Ex. CE-656**, SMCV, Letter to the President of Chamber No. 10 (Royalties 2006/07) (26 June 2013); **Ex. CE-90**, SMCV, Letter to the Tax Tribunal Chamber No. 1, Resolution No. 8252-1-2013 (Royalties 2008) (26 June 2013); see also **Ex. CE-658**, SMCV, Supplemental Brief to Tax Tribunal (Royalties 2006/07) (9 July 2013); **Ex. CE-659**, SMCV, Supplemental Brief to Tax Tribunal (Royalties 2008) (9 July 2013)).

410. The Tax Tribunal’s rejections of SMCV’s requests for the 2006-2007 and 2008 Royalty Assessments were arbitrary and unfounded for the further reason that under Peruvian law, the right to waiver or penalties and interest cannot be waived. In particular:

- (a) As Prof. Hernández explains, under Peruvian law, a taxpayer *cannot* waive its right to a penalties and interest waiver by procedural default.<sup>1152</sup> Rather, because Article 170 of the Tax Code is a “peremptory norm,” each of the Government authorities—including SUNAT, the Tax Tribunal, and the courts—has an obligation to consider the issue *sua sponte* and to grant or order a waiver whenever a taxpayer meets the conditions of Article 170.<sup>1153</sup> This obligation exists regardless of whether or when the taxpayer *requests* such a waiver.<sup>1154</sup>
- (b) The Tax Tribunal provided only limited justifications for why SMCV had allegedly waived the argument, and failed to address altogether SMCV’s argument that the Tax Tribunal was required to consider the waiver of penalties and interest *sua sponte*.<sup>1155</sup>

411. The Contentious Administrative Courts arbitrarily accepted the Tax Tribunal’s erroneous conclusion without any independent analysis whatsoever. As Prof. Hernández explains, in the context of contentious administrative challenges to the Tax Tribunal’s actions, “the Courts have plenary jurisdiction to review and decide on the merits of a case—that is, their jurisdictional function is not limited to reviewing the legality of the administrative actions, they can also rule on the merits, even reversing what was resolved by the Tax Tribunal.”<sup>1156</sup> Moreover, like the Tax Tribunal, the Courts are authorized to determine that an Article 170 waiver is appropriate and are *obligated* to do so when there is reasonable doubt.<sup>1157</sup> Yet despite this obligation, the Courts equally refused to consider the merits of SMCV’s requests to waive penalties and interest.<sup>1158</sup> In particular:

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<sup>1152</sup> Hernández §VIII.A.2.

<sup>1153</sup> Hernández ¶¶ 103-104.

<sup>1154</sup> Hernández ¶¶ 103-104.

<sup>1155</sup> See *supra* § III.N.2 (citing **Ex. CE-91**, Tax Tribunal, Decision No. 11667-10-2013 (15 July 2013) (notified to SMCV 23 July 2013), at 5; **Ex. CE-92**, Tax Tribunal, Decision No. 11669-1-2013 (15 July 2013) (notified to SMCV 23 July 2013), at 5; **Ex. CE-656**, SMCV, Letter to the President of Chamber No. 10 (Royalties 2006/07) (26 June 2013), at 7 (noting that the Tax Tribunal is able to declare the cancellation of interest and penalties “ex-officio”); **Ex. CE-90**, SMCV, Letter to the Tax Tribunal Chamber No. 1, Resolution No. 8252-1-2013 (Royalties 2008) (26 June 2013), at 7 (same)).

<sup>1156</sup> Hernández ¶ 36.

<sup>1157</sup> See Hernández §VIII.A.

<sup>1158</sup> See *supra* §§ III.N.3.ii; III.N.4 (citing **Ex. CE-137**, Appellate Court, Decision, No. 7650-2013, 2008 Royalty Assessment (29 January 2016), p. 15 ¶ 12; **Ex. CE-274**, Appellate Court, Decision No. 48, File No. 7649-2013 (2006/07 Royalty Case) (12 July 2017), p. 27, ¶ 20); see also Hernández §VIII.C; **CA-158**, Constitutional Tribunal, Decision No. 00246-2009-PA/TC (30 April 2009), ground 5 (exercising its jurisdiction to provide relief to taxpayer for disputed tax payments “[u]ntil July 1, 2007, on which date [...] the constitutionality of the tax [Temporary Net Assets Tax - ITAN] was confirmed, and it should be understood then that those taxpayers who filed their claim after this date must pay their tax and interest”); **CA-14**, Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Art. 153; **CA-53**, Political

- (a) After the first instance Court ruled in SMCV’s favor in the 2008 Royalty Case, the Appellate Court reversed and upheld the Tax Tribunal’s decision.<sup>1159</sup> In doing so, it simply parroted the Tax Tribunal’s conclusion that SMCV had “waived” its rights under Article 170, without considering whether the Tax Tribunal had been obligated to decide the question irrespective of whether SMCV had raised it.<sup>1160</sup> Further, the Appellate Court’s reasoning was only *one sentence long*, even though at that time over US\$19.6 million in penalties and interest was at stake.<sup>1161</sup> The Supreme Court then upheld the Appellate Court’s decision without addressing this clear omission, taking the position that although the one-sentence ruling was “succinct[,]” it “state[d] the minimum grounds supporting its ruling.”<sup>1162</sup> Neither the Appellate Court nor the Supreme Court addressed the judiciary’s own power and obligation to grant an Article 170 waiver in cases of reasonable doubt, thus completely abdicating the judiciary’s responsibility to consider the issue irrespective of whether it had been raised before the Tax Tribunal.<sup>1163</sup>
- (b) In the 2006-2007 Royalty Case, the first instance court similarly refused to consider the merits of whether SMCV was entitled to a waiver under Article 170 despite its authority and obligation to do so, instead echoing the Tax Tribunal’s finding that the issue had not been raised before it and concluding that SMCV failed to exhaust administrative remedies.<sup>1164</sup> The Appellate Court then did the same, this time providing reasoning that was only *three sentences long*, despite there being over US\$16.4 million in penalties and interest at stake at the time.<sup>1165</sup> As in the 2008 case, the Appellate Court also did not address whether the Tax Tribunal should have considered SMCV’s entitlement to a waiver *sua sponte*. On appeal to the Supreme Court, the two justices who voted to overturn the decision highlighted this defect, noting that the Appellate Court had “not addressed claimant’s request” to waive

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Constitution of Peru (1993), Article 139(8) (Peruvian courts are bound by Article 139(8) of the Constitution to never “fail to administrate justice, despite loopholes or deficiencies in the law.”).

<sup>1159</sup> See *supra* § III.P.3.ii (citing **Ex. CE-137**, Appellate Court, Decision No. 7650-2013, 2008 Royalty Assessment (29 January 2016), p. 24, ¶ 31; *id.* pp. 21-24, ¶¶ 26-31).

<sup>1160</sup> See **Ex. CE-137**, Appellate Court, Decision No. 7650-2013, 2008 Royalty Assessment (29 January 2016), p. 15, ¶ 12.

<sup>1161</sup> See **Ex. CE-137**, Appellate Court, Decision No. 7650-2013, 2008 Royalty Assessment (29 January 2016), p. 15, ¶ 12.

<sup>1162</sup> See **Ex. CE-153**, Supreme Court, Decision No. 5212-2016, 2008 Royalty Assessment (18 August 2017), pp. 38, 37, ¶¶ 49, 46.

<sup>1163</sup> See *supra* §§ III.N.3.ii, III.N.3.iii.

<sup>1164</sup> See **Ex. CE-689**, Contentious Administrative Court, Decision No. 07649-2013, 2006/07 Royalty Case (14 April 2016), pp. 29-30, ¶¶ 12.1-12.3; see generally *supra* § III.N.4.

<sup>1165</sup> See **Ex. CE-274**, Appellate Court, Decision No. 7649-2013, 2006/07 Royalty Case (12 July 2017), p. 27, ¶ 20.

penalties and interest under Article 170.<sup>1166</sup> Based on this and other omissions, the justices concluded that the Appellate Court’s ruling “fails to satisfy the [constitutional] requirement of judicial motivation [proper reasoning of judicial decisions], which violates due process,” and as a result should be annulled.<sup>1167</sup>

412. As the *Lion Mexico* tribunal recently concluded in finding that actions by Mexico’s judiciary constituted a denial of justice in violation of NAFTA’s fair and equitable treatment obligation, attempts to cure substantive injustices through local court proceedings should not be summarily dismissed based on “dubious formalistic nuances of local procedural law.”<sup>1168</sup> There, Mexican courts repeatedly refused to consider significant evidence that the claimant had been defrauded in a local real estate transaction based on “reasons which were unclear, contradictory within the same process, or purely formalistic,” including that the evidence had not been submitted with claimant’s initial application.<sup>1169</sup> Likewise here, the Contentious Administrative Courts’ repeated refusal to entertain the merits of SMCV’s waiver request on dubious procedural grounds “amount to an improper and egregious procedural conduct, which does not meet the basic internationally accepted standard of administration of justice and due process.”<sup>1170</sup>

**iv. The Tax Tribunal and SUNAT Rejected SMCV’s Waiver Requests for the 2009, 2010-2011, 4Q 2011, 2012, and 2013 Royalty Assessments and Tax Assessments on Arbitrary and Pretextual Grounds**

413. Following the Tax Tribunal’s unfounded “procedural default” rulings, SMCV raised its requests for waiver of penalties and interest together with its challenges to the remaining Royalty Assessments before SUNAT and the Tax Tribunal. But SUNAT and the Tax Tribunal still refused to comply with their obligation to waive penalties and interest relying on flimsy and pretextual grounds that were likewise arbitrary and unreasonable.

414. *First*, for the 2009, 2010-2011, and 4Q 2011 Royalty Assessments, as well as in its rulings on certain Tax Assessments,<sup>1171</sup> the Tax Tribunal sought to again avoid addressing the merits of

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<sup>1166</sup> See **Ex. CE-739**, Supreme Court, Decision No. 18174-2017, 2006/07 Royalty Assessment (20 November 2018), pp. 46-47 ¶ 2.15; see *supra* § III.N.4.

<sup>1167</sup> See **Ex. CE-739**, Supreme Court, Decision No. 18174-2017, 2006/07 Royalty Assessment (20 November 2018), pp. 46-47, ¶¶ 2.15-2.17; see *supra* § III.N.4.

<sup>1168</sup> See **CA-286**, *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award, 20 September 2021 (Fernández-Armesto, Cairns, Boisson de Chauzournes), ¶¶ 490-499.

<sup>1169</sup> See **CA-286**, *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award, 20 September 2021 (Fernández-Armesto, Cairns, Boisson de Chauzournes) (“*Lion Mexico Award*”), ¶ 499.

<sup>1170</sup> See **CA-286**, *Lion Mexico Award*, ¶¶ 490, 496-502, 508.

<sup>1171</sup> See **Ex. CE-150**, SUNAT, Intendancy Resolution No. 0150140013036 (December 29, 2016) (2010-2011 Royalties), pp. 125-131; **Ex. CE-188**, Tax Tribunal Resolution No. 06141-2-2018 (2009 Royalties) (August 15, 2018), pp. 33-37; **Ex. CE-194**, Tax Tribunal Resolution No. 06575-1-2018 (2010/11 Royalties) (August 28, 2018), pp. 36-40; **Ex. CE-269**, Tax Tribunal Resolution No. 10574-9-2019 (4Q 2011 Royalties) (November 18, 2019), p. 9; **Ex. CE-190**, Tax Tribunal Resolution No. 06366-2-2018

SMCV's waiver requests by taking the position that 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*. But:

- (a) SUNAT, the Tax Tribunal, and SMCV all based their arguments on opposing interpretations of the *Mining Law*—including in the very resolutions where the Tax Tribunal took the position that the case related solely to the interpretation of the *Stability Agreement* (see Sections III.N.1 and III.P.1 above).<sup>1172</sup> SUNAT's Assessments clearly list the *Mining Law* and Regulations as their "support and legal basis" (see Section III.N.1 above).<sup>1173</sup>
- (b) The Tax Tribunal's reasoning also simply made no sense, in light of the fact that the *Stability Agreement* as an adhesion contract must reflect the *Mining Law*, without granting broader or narrower guarantees.<sup>1174</sup> Accordingly, any argument relating to the scope of those guarantees necessarily was about the *Mining Law*.

415. *Second*, in each of SMCV's remaining challenges, the Tax Tribunal and SUNAT refused to engage with the clear evidence of "reasonable doubt," brushing aside on spurious grounds the many examples of Government statements, conduct, and court decisions adopting SMCV's interpretation.<sup>1175</sup> For example:

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(2006 GST) (August 22, 2018), pp. 9-10; **Ex. CE-202**, Tax Tribunal Resolution No. 08470-2-2018 (2007 GST) (October 30, 2018), pp. 40-41; **Ex. CE-191**, Tax Tribunal Resolution No. 06367-2-2018 (2006 Income Tax) (August 22, 2018), pp. 26-27; **Ex. CE-192**, Tax Tribunal Resolution No. 06369-2-2018 (2007 Income Tax) (August 22, 2018), p. 51; **Ex. CE-223**, Tax Tribunal Resolution No. 05634-4-2019 (2011-2013 SMT) (June 30, 2019), pp. 18-20.

<sup>1172</sup> See e.g., **Ex. CE-188**, Tax Tribunal, Chamber 2 Decision No. 06141-2-2018, 2009 Royalty Assessments (15 August 2018) (notified to SMCV 1 October 2018), p. 20 (citing the General Mining Law and Regulations to find that the Feasibility Study determines the subject of the *Stability Agreement*); **Ex. CE-83**, Tax Tribunal, Resolution No. 08252-1-2013, 2008 Royalty Assessments (21 May 2013) (notified to SMCV 20 June 2013), pp. 12-17 (same); **Ex. CE-46**, SUNAT, Resolution No. 055-014-0001394, 2008 Royalty Assessment (31 January 2011) (notified to SMCV 17 February 2011) (notified to SMCV on 17 February 2011), p. 32 (same).

<sup>1173</sup> See **Ex. CE-54**, SUNAT, 2009 Royalty Assessment Nos. 052-003-0007274 to 052-003-0007285 (27 June 2011) (notified to SMCV 8 July 2011), Annex No. 1.

<sup>1174</sup> See *supra* § IV.A.2.ii.a (citing **CA-1**, *Mining Law*, Article 86 ("[Stability] agreements shall incorporate all the guarantees established in this Title.")).

<sup>1175</sup> See **Ex. CE-91**, Tax Tribunal Resolution No. 11667-10-2013 (2006-2007 Royalties) (July 15, 2013), p. 5; **Ex. CE-92**, Tax Tribunal Resolution No. 11669-1-2013 (2008 Royalties) (July 15, 2013), p. 5; **Ex. CE-150**, SUNAT denies SMCV's request on the 2010-2011 Royalties Assessment (June 29, 2016), served on SMCV on March 1, 2017, pp. 125-131, ¶ 3.4.4; **Ex. CE-188**, Tax Tribunal Resolution No. 06141-2-2018 (2009 Royalties) (August 15, 2018), p. 35; **Ex. CE-194**, Tax Tribunal Resolution No. 06575-1-2018 (2010-2011 Royalties) (August 28, 2018), p. 37; **Ex. CE-200**, SUNAT, Intendancy Resolution No. 0150140014440 (4Q 2011 Royalties) (October 12, 2018), pp. 45-48; **Ex. CE-269**, Tax Tribunal Resolution No. 10574-9-2019 (4Q 2011 Royalties) (November 18, 2019), p. 9; **Ex. CE-215**, Intendancy Resolution No. 0150140014560 (2012 Royalties) (January 11, 2019), pp. 37-39; **Ex. CE-220**, Intendancy Resolution No. 0150140014816 (2013 Royalties) (May 28, 2019), pp. 36-38; **Ex. CE-190**, Tax Tribunal Resolution No. 06366-2-2018 (GST 2006) (August 22, 2018), pp. 9-11; **Ex. CE-202**, Tax Tribunal

- (a) Both SUNAT and the Tax Tribunal took the position that, among others, the many statements from Government officials in support of SMCV’s interpretation did not “establish an express interpretation” of the Mining Law or Regulations that could support a finding of reasonable doubt, especially since SMCV had not proven that these statements “established institutional positions for the entities that said persons represented.”<sup>1176</sup> Not only was this argument wrong given the high-ranking positions of the Government officials, it was also completely irrelevant: SMCV was not required to show “institutional positions”; rather, the relevant question is whether, objectively, there was reasonable doubt.<sup>1177</sup>
- (b) Both SUNAT and the Tax Tribunal took the position that the Contentious Administrative Court’s decision agreeing with SMCV’s interpretation in the 2008 Royalty Case was not relevant to the “reasonable doubt” analysis, because a court decision could not “clarify” the ambiguous rule to trigger application of the waiver provision.<sup>1178</sup> That argument, too, was completely baseless, as it disregarded the fact that the Court’s decision demonstrated the *existence* of reasonable doubt in the first place—even more so as the Tax Tribunal and SUNAT both conversely relied on the court decisions *against* SMCV to “ratif[y]” their novel interpretation.<sup>1179</sup>
- (c) The Tax Tribunal also summarily dismissed SMCV’s extensive voluntary and GEM contributions as irrelevant with the conclusory statement that these were not “circumstance[s] that evidence[] ambiguity, imprecision or obscurity” in the relevant law, even though those agreements and contributions were evidence of both the

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Resolution No. 08470-2-2018 (GST 2007) (October 30, 2018), pp. 40-41; **Ex. CE-191**, Tax Tribunal Resolution No. 06367-2-2018 (2006 Income Tax) (August 22, 2018), pp. 26-27; **Ex. CE-192**, Tax Tribunal Resolution No. 06369-2-2018 (2007 Income Tax) (August 22, 2018), p. 51; **Ex. CE-223**, Tax Tribunal Resolution No. 05634-4-2019 (4Q 2011-2012 SMT) (June 20, 2019), pp. 18-20.

<sup>1176</sup> **Ex. CE-194**, Tax Tribunal, Decision No. 06575-1-2018, 2010/11 Royalty Assessments, (28 August 2018) (notified to SMCV on 18 Sept. 2018), at 39; *see also supra* § III.O.1 (citing **Ex. CE-150**, SUNAT, Resolution No. 0150140013036, 2010/11 Royalty Assessment (29 December 2016) (notified to SMCV on 1 March. 2017), p. 125-131, ¶ 3.4.4); Hernández § VIII.C.

<sup>1177</sup> *See* Hernández ¶¶ 135-138.

<sup>1178</sup> *See e.g.*, **Ex. CE-150**, SUNAT, Resolution No. 0150140013036, 2010/11 Royalty Assessment (29 December 2016) (notified to SMCV on 1 March. 2017), ¶ 3.4.4.

<sup>1179</sup> *See e.g.*, **Ex. CE-194**, Tax Tribunal, Decision No. 06575-1-2018, 2010/11 Royalty Assessments, (28 August 2018) (notified to SMCV on 18 Sept. 2018), at 37-38 (noting that the Supreme Court decision in the 2008 Royalty Case “ratified” the Tax Tribunal’s interpretation); **Ex. CE-743**, Tax Tribunal, Resolution No. 10372-9-2018 (TTNA Fines for 2013) (14 December 2018), p. 6 (noting that the Supreme Court decision in the 2008 Royalty Case “ratified” and “makes it clear that it was the signed contract that defined the scopes of the stability guarantee”).

Government and SMCV interpreting the Mining Law to cover entire *units* and of their shared understanding that SMCV did not owe royalties.<sup>1180</sup>

416. *Third*, SUNAT’s claim that even any “‘ambiguity in the rule’ if it existed, would not be an enabling assumption for the application of the ‘reasonable doubt’” because Article 170 requires the misinterpretation of the rule to be “clarified in the manner provided for in the second subsection of [Article 170] paragraph 1” simply made no sense.<sup>1181</sup> SUNAT itself was not only authorized but also *obligated* to issue such a clarification confirming the application of Article 170 in light of the existence of reasonable doubt, and indeed, that was exactly what SMCV sought.<sup>1182</sup> Article 170 explicitly provides that SUNAT may do so through a Directive or a Superintendence Resolution.<sup>1183</sup> SUNAT cannot rely on its own failure to clarify the rule to deny SMCV the waiver of penalties and interest to which it is entitled. SUNAT’s claim that the lack of a clarification prohibited the application of Article 170 thus was entirely baseless and pretextual.

**v. Peru’s Own Conduct Compounded the Arbitrary, Unreasonable, and Inequitable Nature of Its Failures to Waive Penalties and Interest Charges**

417. The Government also compounded its own arbitrary and inequitable failure to waive the penalties and interest charges against SMCV because its excessive delays in rendering Assessments and in addressing SMCV’s administrative challenges significantly increased the punitive interest charges, and because the Government arbitrarily refused to adjust the applicable interest rate following extensive Tax Tribunal delays, even though it was required to do so under Peruvian law.

418. *First*, Peru’s extensive and undue delays—both SUNAT’s delay in issuing the Assessments *and* the Tax Tribunal’s delays in rendering its resolutions—led to a significant increase in the amounts of interest on both principal and penalties. For example:

- (a) SUNAT issued the 2010-2011 Royalty Assessment more than five years after what would have been SMCV’s filing date of the tax and royalty returns for that year. By that time, penalties and interest charges already accounted for *nearly half* of the total Assessments—over *US\$76.6 million* in that case alone.<sup>1184</sup>

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<sup>1180</sup> See, e.g., **Ex. CE-194**, Tax Tribunal, Decision No. 06575-1-2018, 2010/11 Royalty Assessments, (28 August 2018) (notified to SMCV on 18 Sept. 2018), at 39.

<sup>1181</sup> See **CE-150**, SUNAT, Resolution No. 0150140013036 (22 March 2017) (2010/11 Royalty Assessments), p. 129.

<sup>1182</sup> See Hernández ¶¶ 124-125.

<sup>1183</sup> See **CA-14**, Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Art. 170.

<sup>1184</sup> See *supra* § III.O.1 (citing **Ex. CE-142**, SUNAT, 2010/11 Royalty Assessments).

- (b) The 2009 Royalty Case was pending before the Tax Tribunal for over *six years* before it was resolved, during which time Peru’s windfall from the interest imposed on the principal and penalties continued to grow significantly.<sup>1185</sup>
- (c) Certain of SMCV’s tax challenges remained pending before the Tax Tribunal for nearly a *decade* without resolution, all while punitive interest continued to accrue.<sup>1186</sup>

419. As noted, these delays resulted in ballooning interest charges, such that to date, over half of the overall Royalty and Tax Assessments against SMCV are attributable to penalties and interest.<sup>1187</sup>

420. *Second*, the Government also arbitrarily applied the statutory interest rate of 14.6% instead of the much lower CPI rate for interest—around 2%—which Peruvian law required it to do when a challenge was pending before the Tax Tribunal for more than 12 months.<sup>1188</sup> In particular:

- (a) Article 33 of the Tax Code requires SUNAT to apply the CPI rate when the Tax Tribunal fails to resolve a challenge within 12 months, and the delay is attributable to the Tax Tribunal.<sup>1189</sup> Prof. Hernández explains that the purpose of this provision is (i) to ensure that taxpayers are not punished for delays attributable to the Tax Tribunal, and (ii) to eliminate the perverse incentive for the Government to be rewarded for the Tax Tribunal’s inefficiencies.<sup>1190</sup>
- (b) After the Tax Tribunal took 18 months to resolve SMCV’s challenge against the 2010-2011 Royalty Assessments and *six years* to resolve the challenge against the 2009 Royalty Assessments, SUNAT nonetheless continued to apply the 14.6% statutory interest rate to those Assessments for the full length of the Tax Tribunal proceedings.<sup>1191</sup> The Tax Tribunal then arbitrarily upheld SUNAT’s decision on the

<sup>1185</sup> See **Ex. CE-62**, 16 Jan. 2012 SMCV Appeal of SUNAT’s 2009 Royalty Assessments; **Ex. CE-188**, Tax Tribunal Decision No. 06141-2-2018, 2009 Royalty Assessments (15 August 2018).

<sup>1186</sup> See *supra* § III.Q.1; see e.g., **Ex. CE-788**, Tax Tribunal, Resolution No. 04802-5-2020 (GST for Non-Residents for 2005) (15 September 2020) (pending resolution for just two months short of one decade).

<sup>1187</sup> Spiller and Chavich ¶ 87, Figure 7.

<sup>1188</sup> See *supra* § III.O.3 (citing **CA-14**, Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Art. 33); see also **CE-145**, Constitutional Tribunal, Decision No. 04082-2012-PA/TC (10 May 2016); **CE-189**, Constitutional Tribunal, Decision No. 04532-2013-PA/TC (16 August 2018)).

<sup>1189</sup> Hernández § IX.A

<sup>1190</sup> Hernández ¶ 150.

<sup>1191</sup> See *supra* § III.O.3 (citing **Ex. CE-727**, SUNAT, Coercive Enforcement Resolution, No. 011-006-0056517, 2010/11 Royalty Assessments (10 October 2018); **Ex. CE-729**, SUNAT, Coercive Enforcement Resolution, No. 011-006-0056535, 2009 Royalty Assessments (18 October 2018); **Ex. CE-728**, SMCV, Request for Suspension of Collection Enforcement Proceedings, 2010/11 Royalty Assessments (15 October 2018) (requesting that SUNAT suspend execution and recalculate CPI); **Ex. CE-730**, SMCV, Request for Suspension of Collection Enforcement Proceedings, 2009 Royalty Assessments (same); **Ex. CE-731**, SUNAT, Coercive Collection Resolution No. 0110070137018, 2010/11 Royalty Assessments (19 October 2018), pp. 1-2 (rejecting SMCV’s recalculation request, finding that “Law no. 28969, which

ground that, by applying (under protest) for an installment payment plan for the 2009 and 2010-2011 Royalty Assessments, SMCV waived its right to a reasonable CPI rate.<sup>1192</sup> As Prof. Hernández explains, by refusing to apply CPI, SUNAT and the Tax Tribunal not only disregarded that SMCV had paid *under protest*, but also (i) “punished SMCV and rewarded the Government for the Tax Tribunal’s unjustified delays”; (ii) “violated SMCV’s right to obtain a decision within a reasonable length of time”; and (iii) effectively held that SMCV had to bear the adverse effects of SUNAT’s coercive collection procedure in order to exercise its right to have CPI applied.<sup>1193</sup>

#### 4. Peru Violated Article 10.5 When It Arbitrarily and Unreasonably Refused to Reimburse SMCV’s GEM Overpayments

421. Independently of its other breaches, Peru also breached Article 10.5 when it refused to reimburse SMCV’s GEM overpayments for Q4 2011 through Q3 2012 with respect to its operations in the Concentrator.

422. SMCV’s GEM payments were clearly premised on the fact that, under the GEM program implemented by the Government, SMCV was not obligated to make royalty or SMT payments.<sup>1194</sup> Government officials repeatedly confirmed that they could not charge both GEM and royalty and SMT payments at the same time, and then reinforced this position by reimbursing SMCV’s GEM overpayments for Q4 2012 to Q4 2013.<sup>1195</sup> Yet Peru then arbitrarily withheld part of SMCV’s GEM overpayments even *after* it issued final and enforceable Royalty and Tax Assessments

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gives the rules of the Tax Code that are applicable for facilitating management of mining royalties, makes no express reference to Article 33.”); **Ex. CE-732**, SUNAT, Rejection of SMCV’s Request to Suspension of Collection Enforcement Proceedings, 2009 Royalty Assessments (22 October 2018), p. 1-2 (same)).

<sup>1192</sup> See *supra* § III.O.3 (citing **Ex. CE-213**, Tax Tribunal, Decision No. 00019-Q-2019, 2009 Royalty Assessment (4 January 2019); **Ex. CE-214**, Tax Tribunal, Decision No. 00036-Q-2019, 2010/11 Royalty Assessment) (7 January 2019)).

<sup>1193</sup> Hernández ¶ 164.

<sup>1194</sup> See *supra* § III.M.2 (citing Torreblanca ¶ 90 (noting SMCV’s “understanding that the commitment to pay the GEM would be exclusive of any royalty or SMT obligations”)).

<sup>1195</sup> See *supra* §§ III.M.2, III.P; see also **Ex. CE-631**, SMCV, Letter No. SMCV-VL&RG-2217-2011 (5 December 2011) (stating that “as has been verbally stated to us by various authorities, please confirm that upon signing the aforementioned Agreement, as of the third quarter of 2011, my client will only have to pay the GEM and will pay neither the Special Mining Tax nor the Mining Royalty for the concessions included in the current [Stability] Agreement.”); **Ex. CE-629**, MEF, Report No. 206-2011-EF/61.01 (14 October 2011) (noting that the GEM because it was “applicable by virtue of an Agreement to those engaged in mining activity for that which is covered by a [mining stability agreement],” whereas the “general regime . . . considers the [SMT] and Mining Royalty on that which is not included in the aforementioned Agreements”); **Ex. CE-746**, SUNAT, Resolution No. 012-180-0018113/SUNAT (GEM Q4 2012) (18 December 2018); **Ex. CE-747**, SUNAT, Resolution No. 012-180-0018114/SUNAT (GEM 2013) (18 December 2018).

for the same period.<sup>1196</sup> This resulted in a windfall to Peru by allowing it to immediately collect GEM, and then to collect royalty and SMT payments, as well as penalties and interest based on the original nonpayment of royalties and SMT—even though SMCV *had* paid GEM during that time—effectively amounting to a triple charge that falls well short of basic notions of fairness and equity.<sup>1197</sup> Peru thus also breached its obligation to accord fair and equitable treatment when its authorities unfairly and arbitrarily refused to reimburse US\$63.8 million in GEM overpayments that SMCV made between 4Q 2011 and 3Q 2012.

423. SMCV agreed to pay the highest amount of GEM on the understanding that it was not obliged to pay royalties—an understanding that the Government repeatedly encouraged in inducing SMCV’s significant GEM payments. In particular:

- (a) The Mining Society was involved in extensive discussions with the Government to design the GEM process in the second half of 2011.<sup>1198</sup> During this process, SMCV was always characterized as a “stabilized” company, and at no point did the Government ever indicate otherwise.<sup>1199</sup> Mr. Santa María, who worked with the Government to design the GEM program, testifies that during the GEM negotiations, APOYO shared detailed projections for SMCV that contemplated *zero* royalty payments for the entirety of the Cerro Verde Mining Unit, without objection from the Government.<sup>1200</sup>
- (b) The Government also did not inform SMCV that it planned to assess additional royalties against SMCV in the lead-up to SMCV’s signing of the GEM Agreement, even when Ms. Torreblanca sought clarification on this specific point from the DGM, the MEF, and MINEM.<sup>1201</sup> Instead, MINEM and MEF officials formally evaded the question, stating that interpreting the stability agreement was outside their competence—an assertion that is plainly contradicted by the fact that MINEM’s

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<sup>1196</sup> See *supra* § III.P (citing **Ex. CE-218**, SUNAT, Resolution No. 012-180-0018640/SUNAT (GEM Q4 2011-Q3 2012) (4 March 2019)).

<sup>1197</sup> See **CA-222**, *Crystallex Award*, ¶¶ 589-599 (finding breach of fair and equitable treatment where, among others, the government “invite[d] the investor to pay a substantial bond and the environmental taxes” even though it had already decided to take action against the investor); see also **CA-233**, *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award (22 August 2017) (Naón, Edward, Derains), ¶ 554 (concluding that Pakistan Supreme Court’s decision was “arbitrary” in violation of international law and unfair due in part to its “serious consequences” on the investor without defining “with some particularity the evidential and legal basis” for its decision).

<sup>1198</sup> See *generally supra* § III.M.1 (citing Santa María § III.A).

<sup>1199</sup> See *supra* § III.M.1 (citing Santa María ¶¶ 21-23, 38, 41, 45).

<sup>1200</sup> See *supra* § III.M.1 (citing Santa María Appendix C, ¶ 39).

<sup>1201</sup> See *supra* § III.M.2; see Torreblanca ¶¶ 85-89; **Ex. CE-628**, SMCV Letter No. SMCV.VL&RG-1896-2011 (7 October 2011) (requesting clarification on the scope of the Stability Agreement in relation to the GEM); **Ex. CE-630**, SMCV, Letter No. SMCV-VL&RG-1968-2011 (26 October 2011); **Ex. CE-631**, SMCV, Letter No. SMCV-VL&RG-2217-2011 (5 December 2011) (same).

Mr. Isasi had provided the interpretation at the heart of the dispute, which MINEM then provided to SUNAT.<sup>1202</sup> In addition, Ms. Torreblanca testifies that MEF and MINEM officials verbally confirmed to her that they agreed with SMCV’s position, and with the proposition that mining companies “could not be subject to both.”<sup>1203</sup>

- (c) At no point did SUNAT, or any other part of the Government, inform SMCV that it should take into account royalty payments for the Concentrator in determining its GEM payments, as SMCV would have been entitled to do under Article 2.2 of the GEM Agreement.<sup>1204</sup>
- (d) SUNAT did not issue any additional Royalty Assessments (i) while SMCV was negotiating the GEM Agreement and (ii) while SMCV was making GEM payments over a two year period—thus confirming SMCV’s expectation that the issue would eventually be resolved in its favor.<sup>1205</sup> It was only *after* SMCV had paid over US\$100 million in GEM payments without deducting royalty payments that in 2016, SUNAT started issuing Royalty Assessments again, starting with the 2010-2011 Royalty Assessments—*five full years* after the relevant assessment period.<sup>1206</sup>

424. Peru’s refusal to fully reimburse SMCV for its GEM overpayments—again on dubious grounds—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. In particular:

- (a) SMCV first submitted a reimbursement request for the Q4 2012 to Q4 2013 period shortly after the Supreme Court dismissed SMCV’s challenge on the 2008 Royalty Assessments, seeking to minimize further harm to the company.<sup>1207</sup> SUNAT granted

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<sup>1202</sup> See *supra* § III.M.2; see also Torreblanca ¶ 86; **Ex. CE-632**, MINEM, Official Letter No. 1333-2011-MEM/DGM(28 December 2011) (taking the position that SMCV’s request for clarification “exceed[ed] the competence of the Energy and Mines Sector”); **Ex. CE-629**, MEF, Report No. 206-2011-EF/61.01 (14 October 2011) (taking the position that the MEF “has no jurisdiction to determine the content of [the Stability Agreement]”).

<sup>1203</sup> See Torreblanca ¶ 86; see also *supra* § III.M.2.

<sup>1204</sup> See *supra* § III.M.2.

<sup>1205</sup> See *supra* § III.M.2 (citing Torreblanca ¶ 91 (“[T]he Government fully accepted each of the payments that SMCV made to GEM, without any deductions, based on the operating profits of SMCV’s entire mining unit.”)).

<sup>1206</sup> See *supra* § III.O.1 (citing **Ex. CE-142**, SUNAT, 2010/11 Royalty Assessments); see also Torreblanca ¶ 92.

<sup>1207</sup> See *supra* § III.P (citing **Ex. CE-705**, SMCV, Reimbursement Request (GEM Q4 2012) (12 January 2018); **Ex. CE-709**, SMCV, Reimbursement Request (GEM Q4 2013); **Ex. CE-707**, SMCV, Reimbursement Request (GEM Q2 2013) (12 January 2018); **Ex. CE-706**, SMCV, Reimbursement Request (GEM Q3 2013) (12 January 2018); **Ex. CE-708**, SMCV, Reimbursement Request (GEM Q4 2013) (12 January 2018)).

the request and repaid US\$76 million, including interest, thereby confirming that SMCV was entitled to reimbursement of its GEM overpayments.<sup>1208</sup>

- (b) But SUNAT then arbitrarily refused to repay the remaining overpayments, from Q4 2011 through Q3 2012, which amounted to US\$66 million including interest.<sup>1209</sup> As the Tax Tribunal had done in the case of penalties and interest, SUNAT attempted to justify its actions by arguing that a procedural defect prevented it from considering the merits of SMCV’s request—here, that SMCV’s request was allegedly time-barred.<sup>1210</sup>
- (c) SUNAT’s claim was entirely baseless: under both the Tax Code and the Civil Code, the statute of limitations on a claim does not begin to run until the claimant learns that the challenged payment was improper.<sup>1211</sup> But SUNAT argued that the statute of limitations had commenced on the date that SMCV *made* its GEM payments—meaning that a taxpayer would have to know that GEM payments were improper *and* that it would be double-charged royalties and SMT at the time it made the payments.<sup>1212</sup> This is completely illogical: a taxpayer that expected to pay royalties would not have made GEM payments in the first place.

## 5. The Government’s Breaches and Freeport’s Claims

425. As a result of the unlawful conduct described above, Peru thus repeatedly violated Article 10.5 of the TPA by failing to accord the minimum standard of treatment to SMCV. Freeport’s specific claims are as follows:

426. *First*, in addition to breaching the Stability Agreement, Peru violated Article 10.5 when the 2009, 2010-2011, Q4 2011, 2012, and 2013 Royalty Assessments became final and enforceable. The dates of the Article 10.5 breaches for each of these assessments are set forth in **Table A** above. Peru also violated Article 10.5 due to President Zoraida and Ms. Villanueva’s

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<sup>1208</sup> See *supra* § III.P (citing Spiller and Chavich ¶ 88(a) n.118 (noting currency conversion); **Ex. CE-746**, SUNAT, Resolution No. 012-180-0018113/SUNAT (GEM Q4 2012) (18 December 2018); **Ex. CE-747**, SUNAT, Resolution No. 012-180-0018114/SUNAT, (GEM 2013) (18 December 2018).

<sup>1209</sup> See *supra* § III.P (citing Spiller and Chavich ¶ 88(a) n.118 (noting currency conversion); **Ex. CE-218**, SUNAT Resolution No. 012-180-0018640/SUNAT, GEM Q4 2011-Q3 2012) (4 March 2019).

<sup>1210</sup> See *supra* § III.P (citing **Ex. CE-218**, SUNAT, Resolution No. 012-180-0018640/SUNAT (GEM Q4 2011-Q3 2012) (4 March 2019), p. 4 (arguing that the time bar for overpayment requests expired almost two years before SMCV submitted its requests)).

<sup>1211</sup> **CA-39**, Civil Code, Article 1993 (stating the general Peruvian Law principle that the prescription period “starts counting from the day on which the action can be brought.”); **CA-14**, Tax Code, Article 44(5) (providing that prescription period must be calculated from “the January 1 following the date on which the undue or excess payment was made, *or on which it became such*”) (emphasis added).

<sup>1212</sup> See **Ex. CE-218**, SUNAT, Resolution No. 012-180-0018640/SUNAT (GEM Q4 2011-Q3 2012) (4 March 2019) (notified to SMCV 22 March 2019), pp. 2-4.

unlawful interference in the challenges to the 2006-2007 and 2008 Royalty Assessments. These breaches likewise occurred when each Assessment became final and enforceable on 21 June 2013; however, SMCV did not acquire knowledge of them until much later.

427. *Second*, and in addition to the first set of breaches, Peru violated Article 10.5 with respect to each of the Royalty and Tax Assessments when it arbitrarily and unreasonably failed to waive penalties and interest. For all claims, except the 2006-07 and 2008 Royalty Assessments, Freeport has submitted claims based on the breaches that occurred when the Assessments of penalties and interest became final and enforceable and the administrative process concluded. For the 2006-2007 and 2008 Royalty Assessments, which SMCV submitted to the contentious-administrative courts, Freeport has submitted claims based on the breaches that occurred when the Supreme Court arbitrarily and unreasonably failed to waive penalties and interest with respect to the 2008 Royalty Assessments; and the Appellate Court arbitrarily and unreasonably failed to waive penalties and interest with respect to the 2006-2007 Royalty Assessment. Because the Contentious Administrative Courts were required to consider SMCV’s entitlement to a waiver *de novo*, and arbitrarily refused to do so, these constitute self-standing breaches that occurred once those decisions were notified to SMCV. **Table B** below lists each of the Article 10.5 breaches relating to failure to waive penalties and interest for which Freeport has submitted claims in this arbitration, along with the relevant date of breach. For the Tax Assessments in which Peru has failed to act on SMCV’s withdrawal petition despite being submitted nearly twenty months ago, Freeport considers the date of SMCV’s withdrawal petitions as the relevant date of breach for those assessments.

**Table B: Peru’s Article 10.5 Breaches for Failure to Waive Penalties and Interest**

| <b>Peru’s Breaches for Failure to Waive Penalties and Interest</b> | <b>Date of Breach</b> |
|--|-----------------------|
| 2006-2007 Royalty Assessments (Court Proceedings)                  | 21 July 2017          |
| 2008 Royalty Assessments (Court Proceedings)                       | 10 October 2017       |
| 2009 Royalty Assessments   | 2 October 2018        |
| 2010-2011 Royalty Assessments                                      | 20 September 2018     |
| Q4 2011 Royalty Assessments  | 6 December 2019       |
| 2012 Royalty Assessments   | 14 February 2019      |
| 2013 Royalty Assessments   | 20 June 2019          |
| 2006 Income Tax Assessments  | 20 November 2018      |
| 2007 Income Tax Assessments  | 20 November 2018      |
| 2008 Income Tax Assessments  | 18 March 2021         |
| 2009 Income Tax Assessments  | 27 February 2020      |
| 2010 Income Tax Assessments  | 27 February 2020      |

| <b>Peru's Breaches for Failure to Waive Penalties and Interest</b> | <b>Date of Breach</b>                     |
|--|---|
| 2011 Income Tax Assessments  | 27 February 2020                          |
| 2012 Income Tax Assessments  | 16 November 2020                          |
| 2013 Income Tax Assessments  | 28 January 2021                           |
| 2007 Additional Income Tax Assessments                             | 22 November 2018                          |
| 2008 Additional Income Tax Assessments                             | 27 February 2020                          |
| 2009 Additional Income Tax Assessments                             | 27 February 2020                          |
| 2010 Additional Income Tax Assessments                             | 27 February 2020                          |
| 2011 Additional Income Tax Assessments                             | 27 February 2020                          |
| 2012 Additional Income Tax Assessments                             | 15 May 2020                               |
| 2013 Additional Income Tax Assessments                             | 28 January 2021                           |
| 2005 General Sales Tax Assessments                                 | 20 November 2018                          |
| 2005 General Sales Tax on Non-Residents                            | 30 September 2020                         |
| 2006 General Sales Tax Assessments                                 | 20 November 2018                          |
| 2006 General Sales Tax on Non-Residents Assessments                | 27 February 2020                          |
| 2007 General Sales Tax Assessments                                 | 22 November 2018                          |
| 2008 General Sales Tax Assessments                                 | 27 February 2020                          |
| 2009 General Sales Tax Assessments                                 | 27 February 2020                          |
| 2010 General Sales Tax Assessments                                 | 27 February 2020                          |
| 2011 General Sales Tax Assessments                                 | 27 February 2020                          |
| 2009 Temporary Tax on Net Assets Assessments                       | 4 March 2020                              |
| 2010 Temporary Tax on Net Assets Assessments                       | 10 March 2020                             |
| 2011 Temporary Tax on Net Assets Assessments                       | 4 March 2020                              |
| 2013 Temporary Tax on Net Assets Assessments                       | 15 May 2020<br>8 January 2019 (Penalties) |
| Q4 2011-2012 Special Mining Tax Assessments                        | 31 July 2019                              |
| 2013 Special Mining Tax Assessments                                | 20 June 2019                              |
| 2013 Complementary Mining Pension Fund Assessments                 | 15 May 2020                               |

428. *Third*, Peru breached Article 10.5 when it arbitrarily and unreasonably refused to reimburse SMCV's GEM overpayments for Q4 2011 through Q3 2012. This breach occurred on

23 August 2019, the date that SUNAT’s decision denying SMCV’s request for reconsideration regarding the reimbursement request became a final administrative act.<sup>1213</sup>

429. As Freeport explained in its Notice of Arbitration and Notice of Additional Claims, each of these claims has been properly submitted to arbitration and falls within Peru’s consent to arbitrate.<sup>1214</sup>

- (a) For each of these claims, Freeport first acquired knowledge of the breach and knowledge of the loss or damage incurred within three years of filing its Notice of Arbitration on 28 February 2020. As explained above, this is necessarily the case where the breach itself—and the loss or damage resulting therefrom—occurred within the three year period, as is the case for each of the claims listed above except the claims under Article 10.5 based on the due process violations in the challenges to the 2006-2007 and 2008 Royalty Assessments, which Freeport submits to arbitration with its Memorial.<sup>1215</sup> For those claims, while the breaches occurred more than three years ago, when those Assessments became final and enforceable, Freeport and SMCV did not acquire knowledge of the due process violations until 2019 at the earliest, when they began investigating who had drafted the resolution for the 2008 Royalty Assessment challenge, and did not know about the full extent of the Tax Tribunal President’s interference until early 2021, when Freeport and SMCV obtained documents that the Government made available under Peru’s freedom of information act.<sup>1216</sup> Accordingly, Freeport and SMCV first acquired knowledge of the breach within three years of submitting these claims.
- (b) Freeport and SMCV have submitted valid waivers with respect to all “measure[s] alleged to constitute a breach” for each of these claims pursuant to Article 10.18.2(b), and, in an abundance of caution, SMCV has voluntarily withdrawn from each and every proceeding in Peru related to the Stability Agreement, as set out in Freeport’s Notice of Arbitration.<sup>1217</sup> These waivers also cover the two additional Article 10.5 claims based on the due process violations in the challenges to the 2006-2007 and

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<sup>1213</sup> **Ex. CE-874**, SUNAT, Resolution No. 0150140014950/SUNAT (GEM Q4 2011-Q3 2012) (31 July 2019) (notified to SMCV 1 August 2019); *see* **CA-14**, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, Art. 137(2) (establishing that if a request for reconsideration is not submitted within a term of 20 working days, the assessment will become final).

<sup>1214</sup> *See* Notice of Arbitration ¶¶ 143-147; Notice of Additional Claims ¶¶ 5-8..

<sup>1215</sup> *See supra* § IV.2.iii.c.3.

<sup>1216</sup> Torreblanca ¶ 92.

<sup>1217</sup> Notice of Arbitration ¶ 146; *see also* **Ex. CE-267**, 21 Feb. 2020, Waiver Declaration, Freeport-McMoRan Inc.; **Ex. CE-240**, 25 Feb. 20[20], Waiver Declaration, Sociedad Minera Cerro Verde; **Ex. CE-283**, 14 June 2021, Waiver Declaration, Freeport-McMoRan Inc.; **Ex. CE-284**, 14 June 2021, Waiver Declaration, Sociedad Minera Cerro Verde.

2008 Royalty Assessments that Freeport is submitting to arbitration with its Memorial, since they include waivers of all rights “to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measures alleged to constitute a breach referred to in Article 10.16” of the TPA, including “the measures described in Section VI (Merits) of the Notice of Arbitration concerning . . . denial of SMCV’s due process rights before the Tax Tribunal.”<sup>1218</sup> For the avoidance of doubt, Freeport and SMCV reaffirm those waivers with respect to the two additional claims.

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<sup>1218</sup> See **Ex. CE-267**, 21 Feb. 2020, Waiver Declaration, Freeport-McMoRan Inc.; **Ex. CE-240**, 25 Feb. 20[20], Waiver Declaration, Sociedad Minera Cerro Verde.

## V. DAMAGES

430. As a result of Peru’s breaches of the Stability Agreement and Article 10.5 of the TPA, Freeport and SMCV have suffered substantial damages. Under international law, Freeport and SMCV are entitled to full reparation for the harm caused by Peru’s violations of its obligations.

### A. CUSTOMARY INTERNATIONAL LAW REQUIRES FULL REPARATION FOR DAMAGES RESULTING FROM BREACH OF AN INTERNATIONAL OBLIGATION

431. The TPA entitles Freeport to recover “monetary damages and any applicable interest” but does not specify any standards for assessing damages.<sup>1219</sup> Therefore, the customary international law standard of full reparation applies to determine the compensation due.<sup>1220</sup> Under this standard, the purpose of damages is to restore the injured party to the position it would have been in if the illegal act had not occurred.

432. The Permanent Court of International Justice articulated the full reparation standard in the seminal *Chorzów Factory* case:

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe-out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should

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<sup>1219</sup> CA-10, TPA, Art. 10.26.1(a).

<sup>1220</sup> See CA-237, *Rumeli Award*, ¶¶ 789-792 (noting that “[i]n assessing compensation for internationally wrongful acts other than expropriation [whose remedy is specified in the BIT], the Tribunal considers that it should apply the principle of the *Factory at Chorzow* case.”); CA-218, *Quiborax S.A. & Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015 (Stern, Lalonde, Kaufmann-Kohler) (Stern, dissenting in part on other grounds), ¶ 326 (applying full reparation principle where treaty’s compensation standard did not expressly apply to the claim); CA-165, *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Cases Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010 (Orrego Vicuña, Lowe, Fortier), ¶¶ 532–534 (finding the BIT silent on remedies for the alleged breaches and applying compensation “sufficient to compensate the affected party fully and to eliminate the consequences of the state’s action”); CA-140, *Compañía de Aguas del Aconquija, S.A. & Vivendi Universal v. Argentine Republic* (“*Vivendi Award II*”), ICSID Case No. ARB/97/3, Award, 20 August 2007 (Rowley, Bernal Vereza, Kaufmann-Kohler), ¶¶ 8.2.3–8.2.7 (“There can be no doubt about the vitality of [the *Chorzów Factory*] statement of the damages standard . . . absent limiting terms in the relevant treaty . . . the level of damages awarded in the international investment arbitration is supposed to be sufficient to compensate the affected party fully.”); CA-129, *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006 (C. Brower, A. Jan van den Berg, N. Kaplan), ¶¶ 483-484.

serve to determine the amount of compensation due for an act contrary to international law.<sup>1221</sup>

433. The *Chorzów Factory* standard is widely recognized as the prevailing standard for compensation for breaches of international investment obligations.<sup>1222</sup> It is codified in the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (the "ILC Draft Articles"), which provides that: "[t]he state responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby . . . . The compensation shall cover any financially assessable damage including loss of profits insofar as it is established."<sup>1223</sup> As tribunals have recognized, "it is generally accepted today that, regardless of the type of investment, and regardless of the nature of the illegitimate measure, the level of damages awarded in international investment arbitration is supposed to be sufficient to compensate the affected party fully and to eliminate the consequences of the state's action."<sup>1224</sup>

434. It is also well-established that a claimant is entitled to recovery even if the specific amount of damages cannot be quantified with certainty.<sup>1225</sup> For instance, the ICJ recognized this principle in *Certain Activities (Costa Rica v. Nicaragua)*, citing the U.S. Supreme Court's ruling in *Story Parchment Company v. Paterson Parchment Paper Company*:

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<sup>1221</sup> **CA-26**, *Factory at Chorzów (Germany v. Poland)*, 1928 P.C.I.J., Ser. A, No. 17, Claim for Indemnity – The Merits, Judgement No. 13, September 13, 1928 ("Factory at Chorzów Judgement"), ¶ 125.

<sup>1222</sup> See **CA-216**, *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015 (Hwang, Williams, Yves Fortier) ("von Pezold Award"), ¶ 761 ("The approach of customary international law to reparation is founded in *Factory at Chorzów*, which is reflected in the ILC Articles on State Responsibility."); **CA-213**, *Gold Reserve Award*, ¶ 678 ("[I]t is well accepted in international investment law that the principles espoused in the *Chorzów Factory* case, even if initially established in a State-to-State context, are the relevant principles of international law to apply when considering compensation for breach of a BIT."); **CA-206**, *SAUR International v. Argentine Republic*, ICSID Case No. ARB/04/4, Award, 22 May 2014 (Tomuschat, Hanotiau, Fernández-Armesto) ("SAUR Award"), ¶ 160 (recognizing full reparation as a well-established principle of international law).

<sup>1223</sup> **CA-82**, U.N. International Law Commission, *Articles on the Responsibility of States for Internationally Wrongful Acts* (2001), Y.B. INT'L L. COMM'N (2001), Vol. II, UN Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), at p. 40, annex to General Assembly resolution 56/83 of 12 December 2001, as corrected by document A/56/49(Vol. I)/Corr.4, Art. 36; cf. *id.* Art. 31 (setting forth the requirement of "full reparation").

<sup>1224</sup> **CA-140**, *Vivendi Award II*, ¶ 8.2.7. See also **CA-174**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011 (Fernández-Armesto, Paulsson, Voss (dissenting in part on other grounds)) ("Lemire Award"), ¶¶ 147-149 (applying *Chorzów* principle to breach of the fair and equitable treatment standard even where such breach "does not amount to a total loss of the investment"); **CA-251**, *ESPF Award*, ¶¶ 832, 854-855 (applying full reparation standard to remedy breach of ECT umbrella clause, and citing the *Chorzów* principle).

<sup>1225</sup> See **CA-160**, *Eritrea-Ethiopia Claims Commission*, PCA Case No. 2001-02, Final Award - Ethiopia's Damages Claims, 17 August 2009 (H. van Houtte, G. Aldrich, J. Paul, L. Reed, J. Crook ¶ 37 ("[T]he Commission has made the best estimates possible on the basis of the available evidence. Like some national courts and international legislators, it has recognized that when obligated to determine appropriate compensation, it must do so even if the process involves estimation, or even guesswork, within the range of possibilities indicated by the evidence.") (citations omitted); **CA-26**, *Factory at Chorzów Judgement*, ¶ 143 (recognizing that damages including lost profits were in principle recoverable despite "difficulties. . . connected with the time that elapsed between the dispossession and the demand for compensation, and with the transformations of the factory and the progress made in the industry with which the factory is concerned").

Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate.<sup>1226</sup>

The tribunal in *Lemire v. Ukraine* similarly observed that, the principle that a claimant is only required to establish the quantum of damages with reasonable certainty is “commonly accepted” in investment treaty jurisprudence.<sup>1227</sup>

435. All damages that Freeport claims under Article 10.16.1(a) of the TPA are subsumed within the damages that Freeport claims on behalf of SMCV under Article 10.16.1(b) of the TPA. Thus, in this case, the requirement of full reparation can be satisfied by calculating the cash flows that SMCV has lost as a result of Peru’s unlawful conduct and adjusting them to net present value.<sup>1228</sup> Consistent with Article 10.26.2(b) of the TPA, the Tribunal’s award of damages and applicable interest should provide that the sum be paid to SMCV.<sup>1229</sup>

**B. SMCV HAS SUFFERED DAMAGES IN THE AMOUNT OF US\$909 MILLION AS OF THE DATE OF THIS MEMORIAL AS A RESULT OF PERU’S BREACHES OF THE STABILITY AGREEMENT AND THE TPA**

436. Freeport presents a report by valuation experts Pablo Spiller and Carla Chavich (the “Spiller-Chavich Report”) quantifying the damages that SMCV has suffered as a result of Peru’s

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<sup>1226</sup> **CA-219**, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Compensation, Judgment, I.C.J. Reports 2018, ¶ 35 (citing *Story Parchment Company v. Paterson Parchment Paper Company*, 282 U.S. 555 (1931)).

<sup>1227</sup> **CA-174**, *Lemire Award*, ¶ 246 (“Once causation has been established, and it has been proven that the *in bonis* party has indeed suffered a loss, less certainty is required in proof of the actual amount of damages; for this latter determination Claimant only needs to provide a basis upon which the Tribunal can, with reasonable confidence, estimate the extent of the loss.”). See also **CA-222**, *Crystallex Award*, ¶¶ 875–877 (“[O]nce the fact of future profitability is established and is not essentially of speculative nature, the amount of such profits need not be proven with the same degree of certainty.”); **CA-99**, *Tecmed Award*, ¶ 190 (“[A]ny difficulty in determining the compensation does not prevent the assessment of such compensation where the existence of damage is certain.”); **CA-47**, *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992 (Jiménez de Aréchaga, El Madhi, Pietrowski) (El Madhi dissenting on other grounds), ¶ 215 (“[I]t is well-settled that the fact that damages cannot be assessed with certainty is no reason not to award damages when a loss had been incurred.”).

<sup>1228</sup> Freeport and SMCV expect SUNAT and the Tax Tribunal to accept SMCV’s requests to withdraw challenges to the assessments that are still pending and confirm the underlying assessments. See **Annex A: Administrative Proceedings**.

<sup>1229</sup> **CA-10**, TPA, Art. 10.26.2(b) (“[W]here a claim is submitted to arbitration under Article 10.16.1(b) . . . an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise.”).

breaches of the Stability Agreement and Article 10.5 of the TPA.<sup>1230</sup> Dr. Spiller and Ms. Chavich use the date of the Award as the valuation date and, for purposes of their current report, 19 October 2021, as a proxy for the date of the Award.<sup>1231</sup>

437. To provide the Tribunal with a calculation of the damages incurred at the date of the Award, they will further update their calculations in their rebuttal report to be submitted with Freeport's Reply submission and/or at a later date close to the issuance of the Award or as the Tribunal may direct.<sup>1232</sup> Dr. Spiller and Ms. Chavich use 15 October 2021 as the cut-off date for incorporating into their valuation new information, such as SMCV's ongoing payments.<sup>1233</sup>

438. Dr. Spiller and Ms. Chavich conclude that, as of 19 October 2021, SMCV has suffered US\$909 million in damages due to: (i) Peru's breaches of the Stability Agreement with respect to the final and enforceable 2009, 2010-2011, 4Q 2011, 2012, and 2013 Royalty Assessments, the Tax Assessments listed in Annex A, and related penalties and interest; (ii) Peru's breaches of Article 10.5 with respect to upholding and enforcing the 2009, 2010-2011, 4Q 2011, 2012, and 2013 Royalty Assessments and related penalties and interest; and (iii) Peru's breaches of Article 10.5 resulting from its failure to afford due process in relation to the final and enforceable 2006-2007 and 2008 Royalty Assessments and related penalties and interest<sup>1234</sup> Alternatively, Dr. Spiller and Ms. Chavich conclude that, even if the Stability Agreement did not apply to the entire Cerro Verde Mining Unit, SMCV suffered US\$682.1 million in damages as of 19 October 2021 due to Peru's other breaches of the Stability Agreement and the TPA, including Peru's arbitrary failure to waive penalties and interest (the "Alternative Claim").<sup>1235</sup>

439. Dr. Spiller and Ms. Chavich conclude that, in this case, the lost cash flows to SMCV resulting from Peru's unlawful conduct are equivalent to the lost cash flows to SMCV's equity holders.<sup>1236</sup> Accordingly, they assess damages by calculating the dividend distributions that SMCV would have made but for Peru's unlawful conduct.<sup>1237</sup>

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<sup>1230</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶ 1.

<sup>1231</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶ 4, n. 3.

<sup>1232</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶ 4, n. 3.

<sup>1233</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶ 4, n. 3.

<sup>1234</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶¶ 6, 99, Table 1, Table 4.

<sup>1235</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶¶ 5, 6, 115, Table 1, Table 8.

<sup>1236</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶ 83.

<sup>1237</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶ 83.

**1. As of the Date of This Memorial, SMCV Has Suffered US\$909 Million in Damages Due to Peru’s Unlawful Conduct**

440. The liabilities that Peru unlawfully imposed on SMCV have reduced SMCV’s cash flows causing substantial damages to SMCV. Dr. Spiller and Ms. Chavich calculate US\$909 million in damages to SMCV in five steps:<sup>1238</sup>

- (a) they total SMCV’s liabilities resulting from Peru’s unlawful conduct;<sup>1239</sup>
- (b) they subtract the losses that SMCV mitigated by obtaining reimbursements of the GEM payments for the Q4 2012 to Q4 2013 period and adopting a non-stabilized tax depreciation schedule;<sup>1240</sup>
- (c) they subtract the reductions in Income Tax and PTU liabilities that SMCV has realized or will realize as a result of the final and enforceable Assessments (the “Tax Savings”);<sup>1241</sup>
- (d) they apply the interest rate for short-term bank deposits in Peru to update SMCV’s lost cash flows to the dates that SMCV would have distributed those amounts as dividends to its shareholders;<sup>1242</sup> and
- (e) they adjust SMCV’s lost cash flows to present value, as of 19 October 2021, by updating or discounting them at SMCV’s cost of equity from the but-for dividend distribution dates to 19 October 2021.<sup>1243</sup>

**i. Peru’s Unlawful Conduct Resulted in US\$1,207.6 Million in Total Liabilities**

441. Dr. Spiller and Ms. Chavich calculate US\$1,207.6 million in total liabilities resulting from Peru’s unlawful conduct.<sup>1244</sup> Dr. Spiller and Ms. Chavich are able to calculate SMCV’s total liabilities with reasonable certainty because Peru’s unlawful conduct resulted in liabilities in precise amounts with interest accruing at rates dictated by Peruvian law.<sup>1245</sup> During the relevant times, the

<sup>1238</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶¶ 6, 99, Table 1, Table 4.

<sup>1239</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶¶ 85(a), 86–87, Table 3, Figure 7.

<sup>1240</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶¶ 85(b), 88, Table 3.

<sup>1241</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶¶ 85(c), 89, Table 3.

<sup>1242</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶¶ 93-95(a), n. 129.

<sup>1243</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶¶ 93-95(a).

<sup>1244</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶¶ 85(a), 86–87, Table 3.

<sup>1245</sup> **CA-04**, Peruvian Tax Code, Supreme Decree 135-99-EF, August 19, 1999, Article 33; **CA-096** SUNAT, Resolution No. 032-2003/SUNAT (6 February 2003), Article 1 (establishing an 1.5% default interest rate applicable to tax debts in Peruvian soles) and Article 2 (establishing an 0.84% default interest rate applicable to tax debts in foreign currency), effective on February 7, 2003; **CA-106**, SUNAT, Resolution No. 028-2004/SUNAT (31 January 2004), Article 1 (establishing an 0.75% default interest rate applicable to tax debts in foreign currency) effective on February 1, 2004; **CA-164**, SUNAT, Resolution No. 053-2010/SUNAT (17 February 2010), Article 1 (establishing an 1.2% default interest rate applicable to tax debts in Peruvian soles) and Article 2 (establishing an 0.60% default interest rate applicable to tax debts in

effective annual interest rates applicable to fiscal obligations under Article 33 of the Peruvian Tax Code ranged between 6.08% and 10.22% for assessments in US dollars and 10.95% and 18.25% for assessments in Peruvian soles (the “Statutory Interest”).<sup>1246</sup>

442. The total liabilities include US\$1,170.6 million in paid amounts and US\$36.9 million in still outstanding amounts, which Dr. Spiller and Ms. Chavich assume are paid as of 19 October 2021.<sup>1247</sup>

- (a) The US\$1,170.6 million in paid amounts include: (i) assessment amounts that SMCV paid without entering into a payment plan;<sup>1248</sup> (ii) assessment amounts that SMCV paid pursuant to the deferral and installment plans and the *Régimen de aplazamiento y/o fraccionamiento de las deudas tributarias administradas por la SUNAT* (the “RAF Plan”) that it entered into under protest for certain Royalty and SMT Assessments, as well as the related penalties and Statutory Interest (the “Payment Plans”);<sup>1249</sup> (iii) the interest that accrued at 80% of the Statutory Interest rate under the deferral and installment plans and the interest that accrued at 40% of the Statutory Interest rate under the RAF Plan (the “Payment Plan Interest”);<sup>1250</sup> and (iv) bank fees for letters of guarantee required to enter into and maintain the Payment Plans.<sup>1251</sup>

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foreign currency), effective on March 1, 2010); **CA-247**, SUNAT, Resolution No. 066-2020/SUNAT (31 March 2020), Article 1 (a) (establishing an 1% default interest rate applicable to tax debts in Peruvian soles) and Article 2(b) (establishing an 0.50% default interest rate applicable to tax debts in foreign currency), effective on April 1, 2020; **CA-254**, SUNAT, Resolution No. 044-2021/SUNAT (31 March 2021), Single Article (establishing an 0.9% default interest rate applicable to tax debts in Peruvian soles), effective on April 1, 2021).

<sup>1246</sup> Expert Report of Pablo Spiller and Carla Chavich, Appendix J (citing **Ex. CE-860**, SUNAT, Moratory Interest Rate (TIM) and Interest Rate Applicable to Refunds).

<sup>1247</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶ 86, Figure 7. *See also id.* p. 19 (“Due to rounding, some totals may not correspond with the sum of the separate figures.”)

<sup>1248</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶ 85(a), Figure 7.

<sup>1249</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶¶ 85(a), 86, Figure 7. *See e.g.*, **Ex. CE-99**, SUNAT, Resolution No. 0510170003363 (2006/07, 2008 Royalty Assessments, SUNAT Approval of SMCV’s Deferral and Installment Plans) (10 October 2013); **Ex. CE-735**, SUNAT, Approval of SMCV’s Deferral and Installment Plans (2009 Royalty Assessments) (30 October 2018); **Ex. CE-736**, SUNAT, Approval of SMCV’s Deferral and Installment Plans (2010/11 Royalty Assessments) (31 October 2018); **Ex. CE-753**, SUNAT, Approval of SMCV’s Deferral and Installment Plans (2012 Royalty Assessments) (25 February 2019); **Ex. CE-760**, SUNAT, Approval of SMCV’s Deferral and Installment Plans (2013 Royalty Assessments) (1 July 2019); **Ex. CE-765**, SUNAT, Approval of SMCV’s Deferral and Installment Plans (SMT for Q4 2011-12) (16 August 2019); **Ex. CE-786**, SUNAT, Approval of RAF Regime (SMT for Q4 2011-2013) (18 August 2020).

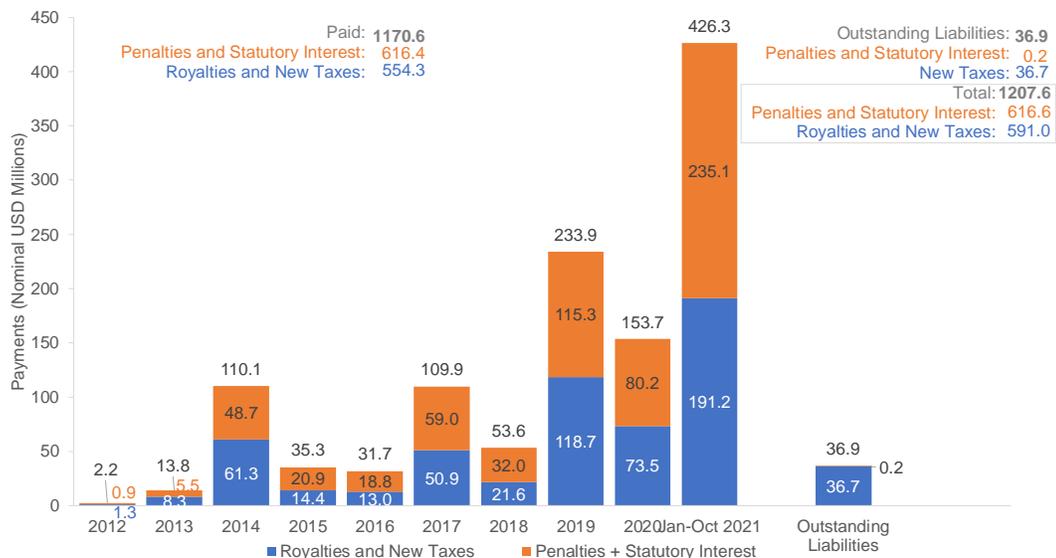
<sup>1250</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶¶ 34, 45, 85(a), Figure 7. *See e.g.*, **CE-735**, SUNAT, Approval of SMCV’s Deferral and Installment Plans (2009 Royalty Assessments) (30 October 2018), Art. 4 (“The interest rate applicable to the tax debt approved by the Deferment with Installment Payment Plan shall be 80% of the TIM (Moratorium Interest Rate) for the deferment period and of 80% of the TIM for the Installment Payment Plan.”); **CE-786**, SUNAT, Approval of RAF Regime (SMT for Q4 2011-2013) (18 August 2020), Art. 4 (“The interest rate applicable to the tax debt covered by the Deferment with Installment Plan will be 40% of the default interest rate for a deferment and/or installment plan period.”).

<sup>1251</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶¶ 34, 44, 84(a), n. 44, Figure 7.

- (b) The US\$36.9 million in outstanding amounts include liabilities for:<sup>1252</sup> (i) 2006 general sales tax for services provided by non-residents and the related interest accrued as of 19 October 2021;<sup>1253</sup> and (ii) the additional PTU liabilities.<sup>1254</sup>

443. Dr. Spiller and Ms. Chavich convert: (i) SMCV’s payments in Peruvian soles to US dollars using the exchange rate prevailing on the date of payment according to the Peruvian Superintendence of Banking, Insurance and Private Pensions Funds (the “SBS”);<sup>1255</sup> and (ii) the outstanding amounts due in Peruvian soles to US dollars using the projected SBS exchange rate prevailing on 19 October 2021.<sup>1256</sup> Figure 6 below shows the US\$1,207.6 million in total paid and outstanding amounts.

**Figure 6: SMCV’s Total Liabilities<sup>1257</sup>**



**ii. Dr. Spiller and Ms. Chavich Offset SMCV’s Total Liabilities with US\$242.4 Million in Mitigated Losses**

444. Dr. Spiller and Ms. Chavich offset the total liabilities resulting from Peru’s unlawful conduct with the US\$242.4 million in losses that SMCV mitigated by: (i) obtaining reimbursements

<sup>1252</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶ 86, Figure 7, Appendix K.

<sup>1253</sup> Expert Report of Pablo Spiller and Carla Chavich, n. 117 (“For GST NR 2006 amounts, the CPI applies instead of the Statutory Interest since July 14, 2015 given that the assessments have been pending before the Tax Tribunal for more than 12 months.”).

<sup>1254</sup> Expert Report of Pablo Spiller and Carla Chavich, n. 117, Figure 7, Appendix K.

<sup>1255</sup> Expert Report of Pablo Spiller and Carla Chavich, n. 116.

<sup>1256</sup> Expert Report of Pablo Spiller and Carla Chavich, n. 117.

<sup>1257</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶ 87, n. 117, Figure 7, (“We allocate amounts related to Installment Interest, RAF Interest, and bank fees based on whether they are attributable to Royalty and SMT Assessments or the related penalties and Statutory Interest.”).

of the GEM payments for the Q4 2012 to Q4 2013 period; and (ii) adopting a non-stabilized tax depreciation schedule.<sup>1258</sup>

- (a) Dr. Spiller and Ms. Chavich account for the US\$76.3 million in losses that SMCV mitigated by obtaining GEM reimbursements for the Q4 2012 to Q4 2013 period.<sup>1259</sup> They do so because, but for Peru's unlawful conduct, SMCV would not have been entitled to reimbursement of GEM payments.<sup>1260</sup>
- (b) Dr. Spiller and Ms. Chavich calculate US\$166.1 million in losses that SMCV has mitigated or will mitigate by adopting a tax depreciation schedule applying non-stabilized depreciation rates to the so-called "Concentrator-related assets" beginning in fiscal year 2012.<sup>1261</sup> Over time, this allows SMCV to recapture depreciation deductions that it lost due to Peru's refusal to allow SMCV to depreciate assets at the accelerated rate guaranteed by the Stability Agreement.<sup>1262</sup>

**iii. Dr. Spiller and Ms. Chavich Offset SMCV's Total Liabilities with US\$158.5 Million in Tax Savings**

445. Dr. Spiller and Ms. Chavich also offset SMCV's total liabilities resulting from Peru's unlawful conduct with the US\$158.5 million in Tax Savings that SMCV has realized or will realize because the final and enforceable Assessments result in reductions in SMCV's taxable income, which is used to calculate Income Tax and PTU obligations.<sup>1263</sup> If SMCV had not had to pay the final and enforceable Assessments, its taxable income would have been higher resulting in increased Income Tax and PTU obligations.<sup>1264</sup>

446. As Dr. Spiller and Ms. Chavich have incorporated tax liabilities in Peru into their analysis, their valuation presents damages on an after-tax basis.<sup>1265</sup> Accordingly, Freeport requests that to ensure full reparation the Tribunal award the compensation due to SMCV net of Peruvian taxes

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<sup>1258</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶¶ 85(b), 87, Table 3, Appendix E.1.

<sup>1259</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶ 88(a), Table 2, Table 3; **Ex. CE-746**, SUNAT, Resolution No. 012 180 0018113/SUNAT (GEM for Q4 2012) (18 December 2018) (approving and ordering SMCV's GEM reimbursement request); **Ex. CE-747**, SUNAT, Resolution No. 012 180 0018114/SUNAT (GEM for 2013) (18 December 2018) (same).

<sup>1260</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶ 88(a), Table 3.

<sup>1261</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶ 88(b), Table 3, Appendix E.1.

<sup>1262</sup> See Expert Report of Pablo Spiller and Carla Chavich, ¶ 88(b), Appendix E.1.

<sup>1263</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶ 89, Table 3.

<sup>1264</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶ 89.

<sup>1265</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶ 89.

and order Peru to indemnify Freeport and SMCV with respect to any Peruvian taxes imposed on the Award.<sup>1266</sup>

**iv. Dr. Spiller and Ms. Chavich Update SMCV's Lost Cash Flows to the But-For Dividend Distribution Dates**

447. Dr. Spiller and Ms. Chavich assume that SMCV would have invested the additional cash it would have had, but for Peru's unlawful conduct, in short-term securities until the dates that it would have distributed those amounts to its shareholders as dividends.<sup>1267</sup> As Dr. Spiller and Ms. Chavich explain, damages to SMCV can be calculated by assessing the lost cash flows to SMCV's equity holders because there is no evidence that Peru's unlawful conduct affected the value of a SMCV's debt.<sup>1268</sup> They assess the lost value to SMCV's equity holders resulting from Peru's unlawful conduct by modeling the additional amounts that SMCV would have distributed as dividends but-for Peru's unlawful conduct.<sup>1269</sup>

448. Dr. Spiller and Ms. Chavich are able to model SMCV's but-for dividend distributions by relying on SMCV's "well-established practice" of distributing available cash holdings as dividends, except "during years in which the company was accumulating cash for major capital investments."<sup>1270</sup> They base the timing of SMCV's but-for dividend distributions on SMCV's actual dividend distribution history.<sup>1271</sup> As they explain, SMCV suspended dividend payments "from 2011 to 2017 due to the expansion of the Concentrator and the construction of a second concentrator" and "resumed dividend distribution in April 2018."<sup>1272</sup> Moreover, Dr. Spiller and Ms. Chavich observe that SMCV suspended dividend payments in 2020 due to COVID-related uncertainty.<sup>1273</sup>

449. Thus, Dr. Spiller and Ms. Chavich assume that: (i) SMCV would have distributed the payments it made between 2012 and 2017 as dividends in April 2018, when SMCV actually resumed dividend distributions following the completion of the expansion; (ii) SMCV would have distributed the payments it made in 2018 as dividends in April 2019; (iii) SMCV would have distributed the payments it made in 2019 as dividends in April 2021, because SMCV did not distribute dividends in 2020 due to COVID-related uncertainty; and (iv) SMCV would have distributed the payments it made

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<sup>1266</sup> See, e.g. **CA- 288, Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela**, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016 (Fernández-Armesto, Vicuña, Simma), ¶¶ 849, 853, 855 (declaring "that compensation, damages and interest granted in this Award are net of any taxes imposed by the Bolivarian Republic and orders the Bolivarian Republic to indemnify Rusoro with respect to any Venezuelan taxes imposed on such amounts" because taxes were computed on an after tax-basis).

<sup>1267</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶¶ 93-95(a).

<sup>1268</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶ 83.

<sup>1269</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶ 83.

<sup>1270</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶ 93.

<sup>1271</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶¶ 93, 97.

<sup>1272</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶ 93.

<sup>1273</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶ 93, n. 128.

in 2021, and the amounts outstanding as of 19 October 2021, as dividends in April 2022.<sup>1274</sup> Applying the interest rate for short-term bank deposits, Dr. Spiller and Ms. Chavich conclude that SMCV’s lost cash flows would have earned US\$5.8 million between the payment dates and the but-for dividend distribution dates.<sup>1275</sup>

450. International investment authorities support Dr. Spiller’s and Ms. Chavich’s approach to quantifying lost cash flows to equity.

- (a) The tribunal in *Duke Energy v. Peru* assessed lost cash flows to equity based on historical dividend practices.<sup>1276</sup> Unlike here, the tribunal’s assessment in *Duke Energy* featured more uncertainty than the Spiller-Chavich Report because the tribunal awarded lost dividends based on *future* assessments that SUNAT had not yet rendered for fiscal years running three years after the date of the award.<sup>1277</sup> By contrast, here, not only are all of the Assessments on which Dr. Spiller and Ms. Chavich base their valuation final and enforceable, they impose liabilities in precise amounts, 97% of which SMCV has already paid.
- (b) The tribunal in *TECO v. Guatemala I*, assessed lost cash flows to equity by calculating the lost revenues that a Guatemalan electricity utility suffered “from the moment the high revenues would have been first received until the moment when the Claimant sold its share in” the utility.<sup>1278</sup> Unlike the Spiller-Chavich Report, there is no indication that the *TECO I* tribunal considered the utility’s historical dividend distribution practices.
- (c) In *LG&E v. Argentina*, the tribunal assessed lost cash flows to equity based on “the amount of dividends that claimants would have received *but for* Argentina’s breaches.”<sup>1279</sup> Like Dr. Spiller and Ms. Chavich, the tribunal took into account the local gas distribution companies’ dividend distribution history and practices and assumed that “[e]ach company continued to apply the same dividend policy” as it did prior to Argentina’s first breach of the BIT.<sup>1280</sup>

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<sup>1274</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶ 95.

<sup>1275</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶¶ 94, 95(a), Table 4.

<sup>1276</sup> See **CA-149**, *Duke Energy Award*, ¶¶ 458, 473, 483.

<sup>1277</sup> See **CA-149**, *Duke Energy Award*, ¶¶ 462, 483.

<sup>1278</sup> See **CA-202**, *TECO Award*, ¶ 742 (awarding US\$21,100,552); *id.* at ¶ 336 (“Mr. Kaczmarek used EEGSA’s current and projected financial statements to calculate the loss of free cash flow of the firm, and estimated EEGSA’s cash flows loss between August 1, 2008 and October 21, 2010 at US\$87 million. As a consequence, Teco’s loss, given its 24.3 percent stake in the company, was US\$21,100,552.”) (citations omitted).

<sup>1279</sup> **CA-139**, *LG&E Award*, ¶ 58.

<sup>1280</sup> **CA-139**, *LG&E Award*, ¶ 61.

v. **Dr. Spiller and Ms. Chavich Update SMCV's Lost Cash Flows to Present Value as of 19 October 2021**

451. Under the full reparation standard, Freeport is entitled to recover damages adjusted to present value as of the date of the Award. Here, the most reasonable rate to apply to calculate present value is SMCV's cost of equity. Cost of equity is an equity investor's opportunity cost of capital; it represents the opportunity cost that an investor bears when it makes a particular equity investment.<sup>1281</sup> SMCV's cost of equity is the rate of return that its shareholders would require to justify making an equity investment in SMCV.<sup>1282</sup> Peru's unlawful conduct has effectively caused SMCV to delay dividend distributions to its shareholders.<sup>1283</sup> SMCV's cost of equity most accurately compensates SMCV for the delay in dividend distributions resulting from the Government's unlawful conduct because it is the rate of return that SMCV is required to pay to its shareholders to compensate them for the delay in dividend distributions.<sup>1284</sup> A rate that is any lower than SMCV's cost of equity will not sufficiently compensate SMCV.

452. International investment authorities have consistently recognized that the appropriate rate at which to update historical lost cash flows is the claimant's opportunity cost of capital and that the cost of equity is the most appropriate rate in cases exclusively involving lost cash flows to equity.<sup>1285</sup> As the tribunal in *Phillips v. Petroleos de Venezuela* explained, where the claimant "is a supplier of capital for a project from which it expected to receive certain cash flows . . . the interest rate to be applied should measure the opportunity cost of capital," otherwise "the principle of full

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<sup>1281</sup> See Expert Report of Pablo Spiller and Carla Chavich, ¶ 96; **CA-242**, *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V., and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela* ("ConocoPhillips Award"), ICSID Case No. ARB/07/30, Award, 8 March 2019 (Zuleta Jaramillo, Fortier, Bucher), ¶ 813 ("The cost of equity of the Projects is the minimum rate at which such investors would have voluntarily reinvested additional monies in the Projects.") (citation omitted).

<sup>1282</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶ 96.

<sup>1283</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶ 96.

<sup>1284</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶ 96.

<sup>1285</sup> See, e.g. **CA-242**, *ConocoPhillips Award*, ¶¶ 815-818 (awarding pre-award interest at a rate reflecting cost of equity); **CA-193**, *Phillips Petroleum Company Venezuela Limited and ConocoPhillips Petrozuata B.V. v. Petroleos de Venezuela, S.A.* ("Phillips Petroleum Award"), ICC Case No. 16848/JRF/CA (C-16848/JRF/CA), Final Award, 17 September 2012 (Tercier, Grigera Naón, El-Kosheri), ¶¶ 294-300 (deciding to "apply the cost of equity as suggested by Claimants' experts" as the applicable interest rate); **CA-140**, *Vivendi Award II*, ¶¶ 9.2.3, 9.2.7-9.2.8 (holding that "[t]he object of an award of interest is to compensate the damage resulting from the fact that, during the period of non-payment by the debtor, the creditor is deprived of the use and disposition of that sum he was supposed to receive" and awarding pre-award interest using "a reasonable proxy for the return the Claimants could otherwise have earned on the amounts invested and lost"); **CA-152**, T. J. Senechal & J. Y. Gotanda, *Interest as Damages*, 47 COLUMBIA J. TRANSNAT'L L. 491, 521 (2009) ("We advocate using the opportunity cost approach, which provides for interest to accrue at a rate in line with specific market realities with the interest award to be compounded on a yearly basis."); *id.* at p. 524 ("However, for an investment dispute involving a private party, a claimant may rightly select interest at its opportunity cost of capital. This is particularly true for any publicly-traded or privately held businesses operating under an on-going concern.").

compensation would not be satisfied.”<sup>1286</sup> The tribunal further observed that “cost of equity . . . is a widely recognized method of determining the opportunity cost of the lost cash flows or incomes” and awarded pre and post-award interest at the cost of equity applicable to the projects that the claimant invested in.<sup>1287</sup> Similarly, in *ConocoPhillips v. Venezuela*, the tribunal granted pre-award interest on dividends the claimant lost as a result of Venezuela’s expropriation of the claimants’ equity stakes in three oil projects at the projects’ cost of equity.<sup>1288</sup> As the tribunal explained,

the appropriate rate must be set at a level at which the investor expects to retain a profit, by keeping the amount corresponding to the dividends within the Projects. Such rate should represent the sum of risks inherent in the Project and expressed in the form of a proportion of profit, or interest. It represents the level at which the investor, all factors considered, accepts to assume the investment in considering the assessment of risks related to the Projects’ operation.<sup>1289</sup>

453. Dr. Spiller and Ms. Chavich calculate SMCV’s damages as the present value of the but-for dividends, updated or discounted from the but-for dividend distribution dates to 19 October 2021 at a rate equivalent to SMCV’s cost of equity, compounded annually.<sup>1290</sup> They update cash flows that SMCV would have distributed as dividends as of April 2018 at a rate of 8.6% during 2018, SMCV’s cost of equity in that year.<sup>1291</sup> They update cash flows that SMCV would have distributed as dividends after April 2018 at a rate of 7.9%, SMCV’s cost of equity in 2019.<sup>1292</sup> They also discount dividend distributions that would have occurred after 19 October 2021 at a rate of 7.9%.<sup>1293</sup> Thus, as shown in Table C below, they add to the nominal lost cash flows US\$96.6 to reach a total damages figure of US\$909 million as of 19 October 2021.<sup>1294</sup>

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<sup>1286</sup> **CA-193**, *Phillips Petroleum Award*, ¶ 295. *Cf.* **CA-140**, *Vivendi Award II*, ¶¶ 9.2.3, 9.2.7–9.2.8 (reasoning that “[t]he object of an award of interest is to compensate the damage resulting from the fact that, during the period of nonpayment by the debtor, the creditor is deprived of the use and disposition of that sum he was supposed to receive” and awarding pre-award interest using “a reasonable proxy for the return the Claimants could otherwise have earned on the amounts invested and lost”).

<sup>1287</sup> *See* **CA-193**, *Phillips Petroleum Award*, ¶¶ 294–295.

<sup>1288</sup> *See* **CA-242**, *ConocoPhillips Award*, ¶¶ 71, 815–818.

<sup>1289</sup> **CA-242**, *ConocoPhillips Award*, ¶ 818.

<sup>1290</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶¶ 97–98.

<sup>1291</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶ 98.

<sup>1292</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶ 98.

<sup>1293</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶¶ 97–98.

<sup>1294</sup> Expert Report of Pablo Spiller and Carla Chavich, Table 4.

**Table C: SMCV's Damages**<sup>1295</sup>

| USD Million             | Nominal Payments | Nominal Mitigation | Nominal Tax Savings | Nominal Net Losses    | Interest on Short-Term Deposits | Nominal Lost Cash Flows | Dividend Payment Date | Update/Discount to Oct 19, 2021 | Damages to SMCV as of Oct 19, 2021 |
|-------------------------|------------------|--------------------|---------------------|-----------------------|---------------------------------|-------------------------|-----------------------|---------------------------------|------------------------------------|
|                         | [a]              | [b]                | [c]                 | [d] = [a] + [b] + [c] | [e]                             | [f] = [d] + [e]         | [g]                   | [h] = [f] x Cost of Equity      | [i] = [f] + [h]                    |
| 2012                    | 2.2              | -                  | -                   | 2.2                   | 0.1                             | 2.2                     | Apr-18                | 0.7                             | 2.9                                |
| 2013                    | 13.8             | -                  | -                   | 13.8                  | 0.3                             | 14.1                    | Apr-18                | 4.4                             | 18.5                               |
| 2014                    | 110.1            | -                  | (9.3)               | 100.7                 | 1.4                             | 102.2                   | Apr-18                | 31.7                            | 133.9                              |
| 2015                    | 35.3             | -                  | (5.7)               | 29.7                  | 0.4                             | 30.0                    | Apr-18                | 9.3                             | 39.3                               |
| 2016                    | 31.7             | -                  | (5.8)               | 26.0                  | 0.2                             | 26.2                    | Apr-18                | 8.1                             | 34.3                               |
| 2017                    | 109.9            | (27.5)             | (7.0)               | 75.5                  | 0.3                             | 75.8                    | Apr-18                | 23.5                            | 99.3                               |
| 2018                    | 53.6             | (87.3)             | 26.0                | (7.7)                 | 0.1                             | (7.6)                   | Apr-19                | (1.6)                           | (9.1)                              |
| 2019                    | 233.9            | (5.2)              | (46.9)              | 181.8                 | 1.8                             | 183.5                   | Apr-21                | 6.7                             | 190.2                              |
| 2020                    | 153.7            | (4.1)              | (18.3)              | 131.3                 | 0.4                             | 131.7                   | Apr-21                | 4.8                             | 136.5                              |
| Jan 2021 - Oct 2021     | 426.3            | -                  | (83.3)              | 343.0                 | 0.9                             | 343.9                   | Apr-22                | (13.6)                          | 330.3                              |
| Outstanding Liabilities | 37.0             | -                  | (8.2)               | 28.8                  | 0.0                             | 28.8                    | Apr-22                | (1.1)                           | 27.7                               |
| Nov 2021 - 2026         | -                | (118.2)            | (0.0)               | (118.2)               | (0.1)                           | (118.3)                 | Apr-22 - Apr-27       | 23.6                            | (94.8)                             |
| <b>Total</b>            | <b>1,207.6</b>   | <b>(242.4)</b>     | <b>(158.5)</b>      | <b>806.7</b>          | <b>5.8</b>                      | <b>812.4</b>            |                       | <b>96.6</b>                     | <b>909.0</b>                       |

454. Post-award interest should also be calculated using SMCV's cost of equity, as the same principles apply. Any delay by Peru in paying the Award similarly has the effect of delaying SMCV's payment of dividends to its shareholders. Accordingly, post-award interest at SMCV's cost of equity is necessary to ensure full reparation.

455. Dr. Spiller and Ms. Chavich demonstrate the reasonableness of their damages assessment by calculating damages to SMCV under a "free cash flows to the firm" methodology using three alternative rates to update nominal losses: (i) SMCV's WACC; (ii) Peru's cost of debt; and (iii) the rates that would apply to the reimbursement of SMCV's nominal lost cash flows under Peruvian law (the "Reimbursement Approach").<sup>1296</sup>

- (a) **SMCV's WACC.** A firm's WACC is "the cost of raising funds from shareholders and lenders for a typical company operating in a given industry."<sup>1297</sup> International investment authorities have recognized that the WACC is the appropriate rate for computing present value if, under the circumstances of the case, it best represents the claimant's opportunity cost of capital.<sup>1298</sup> Dr. Spiller and Ms. Chavich calculate a WACC adjustment of US\$206 million by updating each payment that SMCV made as a result of Peru's unlawful conduct at SMCV's WACC from the date of each payment to 19 October 2021.<sup>1299</sup> Accordingly, they assess damages to SMCV, as of 19 October 2021, in the amount of US\$1,012.7 under the WACC approach.<sup>1300</sup>

<sup>1295</sup> Expert Report of Pablo Spiller and Carla Chavich, Table 4.

<sup>1296</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶¶ 100–105.

<sup>1297</sup> **CA-289, RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain**, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum (Pellet, Volterra (dissenting in part on other grounds), Nikken), 30 November 2018, ¶ 574; *see also* Expert Report of Pablo Spiller and Carla Chavich, ¶ 100.

<sup>1298</sup> **CA-206, SAUR Award**, ¶¶ 296-300, 427-430.

<sup>1299</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶¶ 100, 104, 116, Table 1, Table 6, Table 9.

<sup>1300</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶¶ 100, 104, 116, Table 1, Table 6, Table 9.

- (b) **Peru’s Cost of Debt.** Peru’s unlawful conduct has effectively made SMCV a creditor of Peru, entitled to interest on its “coerced” loan at a rate equivalent to Peru’s cost of debt.<sup>1301</sup> Peru’s cost of debt “is directly observed in the debt capital markets, which show the interest rate (yield to maturity) on traded, USD-denominated, Peru Government bonds.”<sup>1302</sup> While it would not “fully compensate SMCV for its opportunity cost of capital, using Peru’s borrowing rate compensates SMCV for the risk of Peru defaulting, similar to other lenders that extended voluntary loans to Peru.”<sup>1303</sup> Using a rate lower than Peru’s cost of debt would result in a windfall to Peru because it would have effectively obtained a loan from SMCV at an interest rate lower than the rate it would pay to borrow an equivalent amount on the market.<sup>1304</sup> For the same reason, a rate lower than Peru’s cost of debt would produce an incentive for Peru to delay payment of the Award. Dr. Spiller and Ms. Chavich calculate a cost of debt adjustment of US\$84.8 million by updating each payment that SMCV made as a result of Peru’s unlawful conduct at Peru’s cost of debt from the date of each payment to 19 October 2021.<sup>1305</sup> Accordingly, they assess damages to SMCV, as of 19 October 2021, in the amount of US\$891.4 under the cost of debt approach.<sup>1306</sup>
- (c) **Reimbursement Approach.** Under Peruvian law, SMCV would be entitled to interest at statutorily determined rates on all of the lost cash flows it suffered as a result of Peru’s unlawful conduct. Article 38 of the Tax Code establishes the interest that is due on excess payments of taxes, royalties, penalties, and Statutory Interest (the “Reimbursement Rate”).<sup>1307</sup> The Reimbursement Rate is the same as the Statutory Interest rate, except for amounts that SUNAT has not assessed, in which case it is approximately half of the Statutory Interest rate.<sup>1308</sup> The Tax Code does not regulate the interest rate that would be applicable to the additional employee profit sharing liabilities that SMCV suffered as a result of the Income Tax Assessments.<sup>1309</sup> For those amounts, SMCV would be entitled to interest at the “legal interest rate”

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<sup>1301</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶ 104, n. 135.

<sup>1302</sup> Expert Report of Pablo Spiller and Carla Chavich, n. 135.

<sup>1303</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶ 104.

<sup>1304</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶ 104.

<sup>1305</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶¶ 100, 104, 116, Table 1, Table 6, Table 9.

<sup>1306</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶¶ 100, 104, 116, Table 1, Table 6, Table 9.

<sup>1307</sup> **CA-14**, Peruvian Tax Code, Peruvian Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Article 38; Hernández, ¶¶ 47-50.

<sup>1308</sup> **CA-14**, Peruvian Tax Code, Peruvian Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Article 38; **CE-860**, Superintendency of Banking, Insurance and AFP, Market Liability Interest Rates as of 18 October 2021, <https://www.sunat.gob.pe/indicestajas/tim.html>; Hernández, ¶¶ 47-50.

<sup>1309</sup> Hernández, ¶¶ 47-50.

established by the Peruvian Civil Code.<sup>1310</sup> Dr. Spiller and Ms. Chavich calculate an adjustment of US\$121.3 million by updating SMCV’s lost cash flows at the rates that would be applicable to those amounts under Peruvian law.<sup>1311</sup> Accordingly, they assess damages to SMCV, as of 19 October 2021, in the amount of US\$928 under the Reimbursement Approach.<sup>1312</sup>

456. Thus, Dr. Spiller’s and Ms. Chavich’s calculation of damages by assessing nominal lost cash flows to equity and adjusting those cash flows to present value using SMCV’s cost of equity is eminently reasonable. It produces values well within the range of the values derived from applying the three alternative rates under the “free cash flows to the firm” methodology. In fact, as reflected in Table D below, the present value adjustments based on SMCV’s cost of equity are lower than those calculated using SMCV’s WACC or the reimbursement rates applicable under Peruvian law.

**Table D: Main Claim – Summary of Damages**

| USD Million  | Main Claim   |                        |
|--|--------------|------------------------|
|  | Nominal      | As of October 19, 2021 |
| <b>Approach</b>                                    |              |                        |
| <b>FCFE (Updated/Discounted @ Cost of Equity)*</b> | <b>806.7</b> | <b>909.0</b>           |
| <b>FCFF (Discounted @ WACC)**</b>                  |              |                        |
| - Updated @ WACC                                   | 806.7        | 1,012.7                |
| - Updated @ Peru’s Cost of Debt                    | 806.7        | 891.4                  |
| - Updated @ Reimbursement Rates                    | 806.7        | 928.0                  |

**2. In the Alternative, Even if the Stability Agreement Did Not Cover the Entire Mining Unit, SMCV Has Suffered US\$682.1 in Damages, as of the Date of This Memorial**

457. In the alternative, even on Peru’s flawed theory that SMCV had to pay royalties and new taxes because it was entitled to stability only for the investments set forth in the investment program in the 1996 Feasibility Study, SMCV has still suffered damages. In particular: (i) Peru should have waived the extraordinarily punitive penalties and interest because, at a minimum, the correct interpretation of the laws that Peru based the assessments of royalties and taxes on was subject to reasonable doubt;<sup>1313</sup> (ii) Peru should have fully reimbursed SMCV for GEM overpayments that SMCV made based on the understanding that the Stability Agreement protected the entire Cerro Verde

<sup>1310</sup> CA-39, Peruvian Civil Code, Legislative Decree No. 295 (24 July 1984), Articles 1245, 1264; Ex. CE-860, Superintendency of Banking, Insurance and AFP, Market Liability Interest Rates as of 18 October 2021, <https://www.sbs.gob.pe/app/pp/EstadisticasSAEEPPortal/Paginas/TIPasivaMercado.aspx?tip=B>.

<sup>1311</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶ 105, Table 1, Table 6, Table 9.

<sup>1312</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶ 105, Table 1, Table 6, Table 9.

<sup>1313</sup> See *supra* §§ III.3; IV.B.3.

Mining Unit from royalties and new taxes;<sup>1314</sup> and (iii) Peru arbitrarily imposed various liabilities on SMCV that are inconsistent with Peru's flawed interpretation of the Stability Agreement, as well as Peruvian and international law.<sup>1315</sup> Dr. Spiller and Ms. Chavich conclude that, even if the Stability Agreement did not apply to SMCV's entire Cerro Verde Mining Unit, SMCV has suffered US\$682.1 million in damages, as of 19 October 2021, due to Peru's breaches of the Stability Agreement and the TPA.<sup>1316</sup>

458. *First*, Dr. Spiller and Ms. Chavich conclude that Peru wrongfully imposed US\$699.3 million in total liabilities on SMCV under the Alternative Claim scenario.<sup>1317</sup>

- (a) Dr. Spiller and Ms. Chavich calculate \$616.6 million in nominal losses to SMCV resulting from Peru's arbitrary refusal to waive penalties and interest.<sup>1318</sup> As the Spiller-Chavich Report shows, this figure accounts for over 50% of the liabilities resulting from the Peru's unlawful conduct.<sup>1319</sup> The liabilities corresponding to penalties and interest include US\$616.4 million in paid amounts and US\$0.2 million in outstanding amounts.<sup>1320</sup>
- (b) Dr. Spiller and Ms. Chavich calculate US\$63.8 million in nominal losses to SMCV resulting from Peru's arbitrary refusal to reimburse the GEM payments that SMCV made for the Q4 2011 to Q3 2012 period based on the understanding that the Stability Agreement protected the Cerro Verde Mining Unit from royalties and new taxes.<sup>1321</sup> They convert the unreimbursed GEM overpayments from Peruvian soles to US dollars at the exchange rate prevailing on 23 August 2019, the date on which SUNAT's denial of SMCV's GEM reimbursement request became final and enforceable.<sup>1322</sup> They assume that interest would have accrued on the GEM overpayments from the date of the respective payments until 23 August 2019 at SUNAT's reimbursement rate of 0.5% per month applicable at the time.<sup>1323</sup>

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<sup>1314</sup> See *supra* §§ III.P; IV.B.4.

<sup>1315</sup> See *supra* § III.Q.

<sup>1316</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶¶ 6, 114-116, Table 1, Table 7, Table 8.

<sup>1317</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶¶ 107(a)-(c), 109, 111, Table 7, Table 8.

<sup>1318</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶ 108, Figure 8, Table 7.

<sup>1319</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶ 87. Compare *id.* ¶ 108, Figure 8, Table 56, with *id.* at Figure 7, Table 3.

<sup>1320</sup> Expert Report of Pablo Spiller and Carla Chavich, Figure 8.

<sup>1321</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶ 112, Table 7; **CE-218**, SUNAT Resolution No. 012-180-0018640/SUNAT (GEM 4Q 2011-Q3 2012) (4 March 2019).

<sup>1322</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶ 112.

<sup>1323</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶ 112.

(c) Dr. Spiller and Ms. Chavich calculate US\$18.8 million in nominal losses to SMCV due to Peru's arbitrary failure to apply the Stability Agreement to the Leaching Facility.<sup>1324</sup> As explained in Section III.Q above, in the 2007–2013 Income Tax, TTNA, AIT, and Complementary Mining Pension Fund Assessments, Peru failed to consistently apply the arbitrary distinction between SMCV's stabilized and non-stabilized operations that it applied in other assessments and instead arbitrarily calculated those assessments assuming that the Stability Agreement did not apply to SMCV at all.<sup>1325</sup>

459. As with the Main Claim, Dr. Spiller and Ms. Chavich convert: (i) amounts that SMCV paid in Peruvian soles to US dollars using the SBS exchange rate prevailing on the date of payment; and (ii) outstanding amounts at the SBS exchange rate prevailing on 19 October 2021.<sup>1326</sup>

460. *Second*, Dr. Spiller and Ms. Chavich calculate US\$630.5 million in lost cash flows to SMCV under the Alternative Claim scenario.<sup>1327</sup> Consistent with the approach that they adopt for the Main Claim, they do so by: (i) deducting from the total liabilities the US\$5.8 million in losses that SMCV has mitigated or will mitigate by adopting a tax depreciation schedule applying non-stabilized depreciation rates to the so-called "Concentrator-related assets;" (ii) deducting from the total liabilities the US\$66.9 million in Tax Savings that SMCV has realized or will realize by discharging the liabilities that Peru wrongfully imposed;<sup>1328</sup> and (iii) adding to the total liabilities the US\$3.9 million they conclude SMCV would have earned on the lost cash flows by investing them in short-term securities until the but-for dividend distribution dates.<sup>1329</sup>

461. *Finally*, Dr. Spiller and Ms. Chavich adjust the US\$630.5 million to a present value by updating or discounting the lost cash flows from the but for dividend distribution dates to 19 October 2021 at SMCV's cost of equity.<sup>1330</sup> As shown in Table E below, they calculate a cost of equity adjustment in the amount of US\$51.6, resulting in damages to SMCV of US\$682.1 million for the Alternative Claim as of 19 October 2021.

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<sup>1324</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶ 110, Table 7.

<sup>1325</sup> *See also* Expert Report of Pablo Spiller and Carla Chavich, ¶¶ 109-110.

<sup>1326</sup> Expert Report of Pablo Spiller and Carla Chavich, n. 144.

<sup>1327</sup> Expert Report of Pablo Spiller and Carla Chavich, Table 8.

<sup>1328</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶ 107(d)–(e), Table 7.

<sup>1329</sup> Expert Report of Pablo Spiller and Carla Chavich, ¶¶ 94, 95(a), 115, Table 7.

<sup>1330</sup> Expert Report of Pablo Spiller and Carla Chavich, Table 8.

**Table E: SMCV's Damages for the Alternative Claim**<sup>1331</sup>

| USD Million             | Nominal Payments | Nominal Mitigation | Nominal Tax Savings | Nominal Net Losses    | Interest on Short-Term Deposits | Nominal Lost Cash Flows | Update/Discount to Oct 19, 2021 | Damages to SMCV as of Oct 19, 2021 |
|-------------------------|------------------|--------------------|---------------------|-----------------------|---------------------------------|-------------------------|---------------------------------|------------------------------------|
|                         | [a]              | [b]                | [c]                 | [d] = [a] + [b] + [c] | [e]                             | [f] = [d] + [e]         | [g]                             | [h] = [f] + [g]                    |
| 2012                    | 1.3              | -                  | -                   | 1.3                   | 0.0                             | 1.3                     | 0.4                             | 1.7                                |
| 2013                    | 10.5             | -                  | -                   | 10.5                  | 0.2                             | 10.7                    | 3.3                             | 14.0                               |
| 2014                    | 51.2             | -                  | (6.2)               | 45.0                  | 0.6                             | 45.6                    | 14.2                            | 59.8                               |
| 2015                    | 20.9             | -                  | (3.4)               | 17.5                  | 0.2                             | 17.8                    | 5.5                             | 23.3                               |
| 2016                    | 18.8             | -                  | (3.4)               | 15.3                  | 0.1                             | 15.5                    | 4.8                             | 20.3                               |
| 2017                    | 60.6             | (0.5)              | (3.0)               | 57.1                  | 0.2                             | 57.3                    | 17.8                            | 75.1                               |
| 2018                    | 32.0             | (1.0)              | (1.5)               | 29.5                  | 0.2                             | 29.8                    | 6.2                             | 35.9                               |
| 2019                    | 181.1            | (0.5)              | (34.6)              | 146.0                 | 1.4                             | 147.4                   | 5.4                             | 152.8                              |
| 2020                    | 84.3             | (0.5)              | (10.8)              | 73.0                  | 0.2                             | 73.2                    | 2.7                             | 75.9                               |
| Jan 2021 - Oct 2021     | 236.8            | -                  | (3.6)               | 233.2                 | 0.6                             | 233.7                   | (9.2)                           | 224.5                              |
| Outstanding Liabilities | 1.8              | -                  | (0.4)               | 1.4                   | 0.0                             | 1.4                     | (0.1)                           | 1.3                                |
| Nov 2021 - 2026*        | -                | (3.2)              | -                   | (3.2)                 | (0.0)                           | (3.2)                   | 0.6                             | (2.6)                              |
| <b>Total</b>            | <b>699.3</b>     | <b>(5.8)</b>       | <b>(66.9)</b>       | <b>626.6</b>          | <b>3.9</b>                      | <b>630.5</b>            | <b>51.6</b>                     | <b>682.1</b>                       |

462. As they have done for Main Claim, Dr. Spiller and Ms. Chavich demonstrate the reasonableness of their damages assessment for the Alternative Claim. As reflected in Table F below, their valuation for the Alternative Claim is well within the range of values derived from applying the three alternative rates under the “free cash flows to the firm” methodology.

**Table F: Alternative Claim – Summary of Damages**<sup>1332</sup>

| USD Million  | Alternative Claim |                        |
|--|-------------------|------------------------|
|  | Nominal           | As of October 19, 2021 |
| <b>Approach</b>                                    |                   |                        |
| <b>FCFE (Updated/Discounted @ Cost of Equity)*</b> | <b>626.6</b>      | <b>682.1</b>           |
| <b>FCFF (Discounted @ WACC)**</b>                  |                   |                        |
| - Updated @ WACC                                   | 626.6             | 747.2                  |
| - Updated @ Peru's Cost of Debt                    | 626.6             | 668.5                  |
| - Updated @ Reimbursement Rates                    | 626.6             | 690.6                  |

### C. FREEPORT IS ENTITLED TO ARBITRATION COSTS AND EXPENSES

463. The principle of full reparation also requires that Freeport be compensated for the costs of the arbitration proceedings and its legal expenses. Article 10.26.1 of the TPA authorizes the Tribunal to “award costs and attorney's fees in accordance with [Chapter 10, Section B] and the applicable arbitration rules.”<sup>1333</sup> Article 61(2) of the ICSID Convention grants the Tribunal discretion to assess costs.<sup>1334</sup> International tribunals have increasingly exercised that discretion to award the

<sup>1331</sup> Expert Report of Pablo Spiller and Carla Chavich, Table 8.

<sup>1332</sup> Expert Report of Pablo Spiller and Carla Chavich, Table 9.

<sup>1333</sup> CA-10, TPA, Art. 10.26.1.

<sup>1334</sup> CA-22, April 2006, ICSID Convention, Regulations and Rules, Art. 61(2) (“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

prevailing party its portion of the costs of the arbitration and the reasonable costs it incurs to vindicate its rights, including legal and expert fees.<sup>1335</sup> Freeport will submit a statement of its fees and costs at an appropriate time, as the Tribunal may order.

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be paid.”); Rule 28(1) (“[T]he Tribunal may . . . decide . . . the portion which each party shall pay . . . of the fees and expenses of the Tribunal and charges for the use of the facilities of the Centre . . . that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties.”).

<sup>1335</sup> See, e.g., **CA-225**, *Tenaris S.A. & Talta –Trading y Marketing Sociedade Unipessoal LDA v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/23, Award, 12 December 2016 (Fernández-Armesto, Gómez Pinzón, Stern), ¶ 845 (“The Arbitral Tribunal will apply the rule that costs follow the event to the two major cost categories: on the one hand, the Costs of the Proceeding and, on the other Defense Expenses.”).

## VI. REQUESTED RELIEF

464. Freeport and SMCV are entitled to be restored to the situation they would have been in but for Peru's breaches of the Stability Agreement and the TPA. To this end, Freeport respectfully requests the Tribunal to issue an award:

- A. Declaring that Peru breached the Stability Agreement;
- B. Declaring that Peru breached Article 10.5 of the TPA;
- C. Ordering Peru to pay monetary damages to SMCV in an amount that would wipe out all the consequences of Peru's illegal acts, valued at US\$909 million as of 19 October 2021, and subject to updating closer to the date of the Award (the "Main Claim").
- D. In the alternative to C, ordering Peru to pay monetary damages to SMCV in an amount that would wipe out all the consequences of Peru's arbitrary failure to waive penalties and interest in breach of Article 10.5 of the TPA; arbitrary refusal to reimburse SMCV for the Q4 2011 to Q3 2012 GEM payments in breach Article 10.5 of the TPA; and arbitrary failure to apply the non-stabilized regime to assets and activities that enjoyed stability even under Peru's own flawed interpretation of the Stability Agreement, valued at US\$682.1 million as of 19 October 2021, and subject to updating closer to the date of the Award (the "Alternative Claim").
- E. Ordering Peru to pay annually compounding post-award interest on Freeport's and SMCV's damages and losses at a rate equal to SMCV's cost of equity running from the date of the Award to the date full payment of those amounts is made;
- F. Ordering Peru to pay all the costs of the arbitration, as well as Freeport's and SMCV's attorneys' fees and expenses in an amount to be determined by such means as the Tribunal may direct;
- G. Declaring that all amounts paid by Peru are net of any Peruvian taxes or other fiscal obligations and ordering Peru to indemnify Freeport and SMCV with respect to any Peruvian tax imposed on such amounts; and
- H. Ordering any other such relief as the Tribunal may deem just and appropriate in the circumstances.

465. Freeport reserves its rights to amend or supplement this Memorial, including the requested relief and the amounts claimed, and to seek further relief for additional breaches arising from Peru's past, present, or future conduct.

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New York, 19 October 2021

**Annex A**  
**ADMINISTRATIVE PROCEEDINGS**

| Claim                                     | Principal (US\$) | Penalty and Interest (US\$) | Total (US\$) | SUNAT Assessment Notified to SMCV                      | SUNAT Confirmation of Assessment Notified to SMCV | Tax Tribunal Resolution Notified to SMCV                  | Tax Tribunal Denial of Request for Expansion or Clarification Notified to SMCV | Tax Tribunal Denial of Request for Interest Recalculation Notified to SMCV |
|---|------------------|-----------------------------|--------------|--|---|---|--|--|
| <b>Royalties</b>                          |                  |                             |              |  |   |   |  |  |
| 2006-2007 Royalty Case                    | 32,343,086       | 16,353,899                  | 48,696,985   | 18/08/09 <sup>1</sup>                                  | 22/04/10 <sup>2</sup>                             | 20/06/13 <sup>3</sup>                                     | 23/07/13 <sup>4</sup>  | --   |
| 2008 Royalty Case                         | 37,403,742       | 19,614,043                  | 57,017,785   | 17/06/10 <sup>5</sup>                                  | 17/02/11 <sup>6</sup>                             | 20/06/13 <sup>7</sup>                                     | 23/07/13 <sup>8</sup>  | --   |
| 2009 Royalty Case                         | 38,734,584       | 19,405,827                  | 58,140,411   | 08/07/11 <sup>9</sup>                                  | 26/12/11 <sup>10</sup>                            | 01/10/18 <sup>11</sup>                                    | --   | 11/01/19 <sup>12</sup>   |
| 2010-2011 Royalty Case                    | 80,150,693       | 76,558,770                  | 156,709,463  | 13/04/16 <sup>13</sup>                                 | 01/03/17 <sup>14</sup>                            | 19/09/18 <sup>15</sup>                                    | --   | 11/01/19 <sup>16</sup>   |
| Q4 2011 Royalty Case                      | 7,525,005        | 7,807,319                   | 15,332,324   | 18/01/18 <sup>17</sup>                                 | 30/10/18 <sup>18</sup>                            | 05/12/19 <sup>19</sup>                                    | --   | --   |
| 2012 Royalty Case                         | 35,439,580       | 34,831,659                  | 70,271,239   | 18/04/18 <sup>20</sup>                                 | 23/01/19 <sup>21</sup>                            | --  | --   | --   |
| 2013 Royalty Case                         | 26,101,164       | 23,335,189                  | 49,436,354   | 10/10/18 <sup>22</sup>                                 | 29/05/19 <sup>23</sup>                            | --  | --   | --   |
| <b>Taxes</b>                              |                  |                             |              |  |   |   |  |  |
| <b>Income Taxes</b>                       |                  |                             |              |  |   |   |  |  |
| 2006 Income Tax                           | 4,762,424        | 7,485,101                   | 12,247,525   | 03/06/11 <sup>24</sup>                                 | 11/04/12 <sup>25</sup>                            | 19/11/18 <sup>26</sup>                                    | --   | --   |
| 2006 Income Tax Additional Penalties      | --               | 31,705                      | 31,705       | 03/06/11 <sup>27</sup>                                 | -- <sup>1</sup>                                   | --  | --   | --   |
| 2007 Income Tax                           | 1,753,323        | 1,733,861                   | 3,487,183    | 11/04/12 <sup>28</sup>                                 | 18/02/13 <sup>29</sup>                            | 19/11/18 <sup>30</sup>                                    | --   | --   |
| 2007 Income Tax Additional Penalties      | --               | 48,677                      | 48,677       | 11/04/12 <sup>31</sup>                                 | --  | --  | --   | --   |
| 2008 Income Tax                           | 5,605,501        | 5,635,351                   | 11,240,852   | 02/09/13 <sup>32</sup>                                 | 10/06/14 <sup>33</sup>                            | Withdrawal confirmed 17/03/21 <sup>34</sup>               | --   | --   |
| 2008 Income Tax Additional Penalties      | --               | 69,250                      | 69,250       | 02/09/13 <sup>35</sup>                                 | --  | --  | --   | --   |
| 2009 Income Tax and Additional Income Tax | 36,955,876       | 36,849,876                  | 73,805,752   | 30/10/14 <sup>36</sup><br>27/11/14 (AIT) <sup>37</sup> | 07/08/15 <sup>38</sup>                            | Confirmation of 27/02/20 withdrawal pending <sup>39</sup> | --   | --   |
| 2009 Income Tax Additional Penalties      | --               | 48,422                      | 48,422       | 27/11/14 <sup>40</sup>                                 | --  | --  | --   | --   |

<sup>1</sup> Unless otherwise noted, SMCV challenged the “Additional Penalties” related to certain tax assessments in the same proceedings as the underlying assessments.

| Claim                                     | Principal (US\$) | Penalty and Interest (US\$) | Total (US\$) | SUNAT Assessment Notified to SMCV | SUNAT Confirmation of Assessment Notified to SMCV | Tax Tribunal Resolution Notified to SMCV                  | Tax Tribunal Denial of Request for Expansion or Clarification Notified to SMCV | Tax Tribunal Denial of Request for Interest Recalculation Notified to SMCV |
|---|------------------|-----------------------------|--------------|-----------------------------------|---|---|--|--|
| 2010 Income Tax and Additional Income Tax | 37,269,551       | 34,232,615                  | 71,502,166   | 13/02/15 <sup>41</sup>            | 06/11/15 <sup>42</sup>                            | Confirmation of 27/02/20 withdrawal pending <sup>43</sup> | --   | --   |
| 2010 Income Tax Additional Penalties      | --               | 46,750                      | 46,750       | 23/02/15 <sup>44</sup>            | --  | --  | --   | --   |
| 2011 Income Tax and Additional Income Tax | 26,234,643       | 43,886,909                  | 70,121,552   | 15/11/17 <sup>45</sup>            | 22/08/18 <sup>46</sup>                            | Confirmation of 27/02/20 withdrawal pending <sup>47</sup> | --   | --   |
| 2011 Income Tax Additional Penalties      | --               | 34,583                      | 34,583       | 15/11/17 <sup>48</sup>            | --  | --  | --   | --   |
| 2012 Income Tax                           | 29,587,162       | 42,541,966                  | 72,129,128   | 29/11/19 <sup>49</sup>            | Withdrawal confirmed 13/11/2020 <sup>50</sup>     | --  | --   | --   |
| 2012 Income Tax Additional Penalties      | --               | 41,994                      | 41,994       | 29/11/19 <sup>51</sup>            | --  | --  | --   | --   |
| 2012 Additional Income Tax                | 910,815          | 912,637                     | 1,823,452    | 29/11/19 <sup>52</sup>            | Withdrawal confirmed 14/05/2020 <sup>53</sup>     | --  | --   | --   |
| 2013 Income Tax                           | 5,819,715        | 11,356,593                  | 17,176,308   | 30/12/20 <sup>54</sup>            | --  | --  | --   | --   |
| 2013 Income Tax Additional Penalties      | --               | 24,173                      | 24,173       | 30/12/20 <sup>55</sup>            | --  | --  | --   | --   |
| 2013 Additional Income Tax                | 401,908          | 400,088                     | 801,996      | 30/12/20 <sup>56</sup>            | --  | --  | --   | --   |
| <b>General Sales Taxes</b>                |                  |                             |              |                                   |   |   |  |  |
| 2005 General Sales Tax                    | 30,432           | 55,004                      | 85,435       | 30/12/09 <sup>57</sup>            | 25/11/10 <sup>58</sup>                            | 19/11/18 <sup>59</sup>                                    | --   | --   |
| 2005 General Sales Tax on Non-Residents   | 791,363          | 665,160                     | 1,456,524    | 30/12/09 <sup>60</sup>            | 22/10/10 <sup>61</sup>                            | Withdrawal confirmed 29/09/20 <sup>62</sup>               | --   | --   |
| 2006 General Sales Tax                    | 25,181           | 41,745                      | 66,926       | 30/12/10 <sup>63</sup>            | 24/08/11 <sup>64</sup>                            | 19/11/18 <sup>65</sup>                                    | --   | --   |
| 2006 General Sales Tax on Non-Residents   | 200,170          | 143,106                     | 343,277      | 30/12/10 <sup>66</sup>            | 28/10/11 <sup>67</sup>                            | Confirmation of 27/2/20 withdrawal pending <sup>68</sup>  | --   | --   |

| Claim  | Principal (US\$) | Penalty and Interest (US\$) | Total (US\$) | SUNAT Assessment Notified to SMCV | SUNAT Confirmation of Assessment Notified to SMCV | Tax Tribunal Resolution Notified to SMCV                 | Tax Tribunal Denial of Request for Expansion or Clarification Notified to SMCV | Tax Tribunal Denial of Request for Interest Recalculation Notified to SMCV |
|--|------------------|-----------------------------|--------------|-----------------------------------|---|--|--|--|
| 2007 General Sales and Additional Income Tax | 580,009          | 412,413                     | 992,424      | 29/12/11 <sup>69</sup>            | 12/10/12 <sup>70</sup>                            | 21/11/18 <sup>71</sup>                                   | --   | --   |
| 2008 General Sales and Additional Income Tax | 758,740          | 517,591                     | 1,276,331    | 27/12/12 <sup>72</sup>            | 04/11/13 <sup>73</sup>                            | Confirmation of 27/2/20 withdrawal pending <sup>74</sup> | --   | --   |
| 2009 General Sales Tax                       | 46,530           | 66,231                      | 112,760      | 30/12/13 <sup>75</sup>            | 14/11/14 <sup>76</sup>                            | Confirmation of 27/2/20 withdrawal pending <sup>77</sup> | --   | --   |
| 2009 General Sales Tax Additional Penalties  | --               | 31,257                      | 31,257       | 30/12/13 <sup>78</sup>            | --  | --   | --   | --   |
| 2010 General Sales Tax                       | 13,171           | 17,775                      | 30,945       | 24/06/14 <sup>79</sup>            | 09/06/15 <sup>80</sup>                            | Confirmation of 27/2/20 withdrawal pending <sup>81</sup> | --   | --   |
| 2010 General Sales Tax Additional Penalties  | --               | 31,257                      | 31,257       | 24/06/14 <sup>82</sup>            | --  | --   | --   | --   |
| 2011 General Sales Tax Additional Penalties  | --               | 17,016                      | 17,016       | 10/10/17 <sup>83</sup>            | 18/07/18 <sup>84</sup>                            | Confirmation of 27/2/20 withdrawal pending <sup>85</sup> | --   | --   |
| <b>Temporary Tax on Net Assets</b>           |                  |                             |              |                                   |   |  |  |  |
| 2009 Temporary Tax on Net Assets             | 6,398,519        | 2,287,095                   | 8,685,614    | 30/12/13 <sup>86</sup>            | 15/09/14 <sup>87</sup>                            | Withdrawal confirmed 03/03/20 <sup>88</sup>              | --   | --   |
| 2010 Temporary Tax on Net Assets             | 5,763,856        | 2,248,729                   | 8,012,585    | 14/08/15 <sup>89</sup>            | 16/03/16 <sup>90</sup>                            | Withdrawal confirmed 09/03/20 <sup>91</sup>              | --   | --   |
| 2011 Temporary Tax on Net Assets             | 6,332,458        | 2,448,761                   | 8,781,219    | 27/07/16 <sup>92</sup>            | --  | Withdrawal confirmed 03/03/20 <sup>93</sup>              | --   | --   |
| 2012 Temporary Tax on Net Assets             | 7,529,051        | 3,121,545                   | 10,650,596   | -- <sup>94</sup>                  | --  | --   | --   | --   |

| Claim  | Principal (US\$) | Penalty and Interest (US\$) | Total (US\$) | SUNAT Assessment Notified to SMCV                               | SUNAT Confirmation of Assessment Notified to SMCV | Tax Tribunal Resolution Notified to SMCV  | Tax Tribunal Denial of Request for Expansion or Clarification Notified to SMCV | Tax Tribunal Denial of Request for Interest Recalculation Notified to SMCV |
|--|------------------|-----------------------------|--------------|---|---|---|--|--|
| 2013 Temporary Tax on Net Assets   | 10,565,722       | 10,178,705                  | 20,744,428   | 21/11/19 <sup>95</sup><br>03/10/17 <sup>96</sup><br>(Penalties) | 19/07/2018 <sup>97</sup><br>(Penalties)           | Withdrawal confirmed<br>14/05/20 <sup>98</sup><br><br>07/01/2019 <sup>99</sup><br>(Penalties) | --   | --   |
| <b>Special Mining Tax</b>  |                  |                             |              |   |   |   |  |  |
| Q4 2011-2012 Special Mining Tax  | 37,395,955       | 29,223,859                  | 66,619,813   | 18/01/18 <sup>100</sup>   | 30/10/18 <sup>101</sup>                           | 30/07/19 <sup>102</sup>   | --   | --   |
| 2013 Special Mining Tax  | 23,587,207       | 17,036,875                  | 40,624,082   | 10/10/18 <sup>103</sup>   | 29/05/19 <sup>104</sup>                           | --  | --   | --   |
| <b>Complementary Mining Pension Fund</b>   |                  |                             |              |   |   |   |  |  |
| 2013 Complementary Mining Pension Fund   | 3,786,600        | 3,141,363                   | 6,927,962    | 24/12/19 <sup>105</sup>   | Withdrawal confirmed<br>14/05/20 <sup>106</sup>   | --  | --   | --   |
| <b>Note:</b> Nominal amounts as of the date of the initial assessment with amounts in Peruvian soles converted to U.S. dollars at the exchange rate prevailing on that date. |                  |                             |              |   |   |   |  |  |

| Claim  | Principal (US\$) | Interest (US\$) | Total (US\$) | SMCV Reimbursement Request | SUNAT Reimbursement Denial Notified | SUNAT Request for Reconsideration Denial Notified |
|--|------------------|-----------------|--------------|----------------------------|-------------------------------------|---|
| Q4 2011-3Q 2012 GEM  | 45,557,595       | 18,234,785      | 63,792,380   | 28/12/18 <sup>107</sup>    | 22/03/19 <sup>108</sup>             | 01/08/19 <sup>109</sup>                           |
| <b>Note:</b> Nominal amount as of 28 December 2018 converted from Peruvian soles to U.S. dollars at the exchange rate prevailing on that date. |                  |                 |              |                            |                                     |   |

<sup>1</sup> **Ex. CE-31**, SUNAT, Assessment Nos. 052-003-0005174, 052-003-0005187, 052-003-0005188, 052-003-0005175 to 052-003-0005186 (2006-2007 Royalty Assessment) (17 August 2009) (notified to SMCV 18 August 2009); **Ex. CE-31**, SUNAT, Fine Assessments Nos. 052-002-0003607 to 052-002-0003631 (2006-2007 Royalty Assessment) (17 August 2009) (notified to SMCV 18 August 2009).

<sup>2</sup> **Ex. CE-38**, SUNAT, Resolution No. 055-014-0001290 (2006-2007 Royalty Assessment) (31 March 2010) (notified to SMCV 22 April 2010).

<sup>3</sup> **Ex. CE-88**, Tax Tribunal, Resolution No. 08997-10-2013 (2006-2007 Royalty Assessment) (30 May 2013) (notified to SMCV 20 June 2013).

<sup>4</sup> **Ex. CE-91**, Tax Tribunal, Resolution No. 11667-10-2013 (2006-2007 Royalty Assessment) (15 July 2013) (notified to SMCV 23 July 2013).

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- <sup>5</sup> **Ex. CE-39**, SUNAT, Royalty Assessment Nos. 052-003-0006092 to 052-003-0006103 (2008 Royalty Assessment) (1 June 2010) (notified to SMCV 17 June 2010); **Ex. CE-39**, SUNAT, Fine Assessment Nos. 052-002-0004037 to 052-002-0004057 (2008 Royalty Assessment) (1 June 2010) (notified to SMCV 17 June 2010).
- <sup>6</sup> **Ex. CE-46**, SUNAT, Resolution No. 055-014-0001394 (2008 Royalty Assessment) (31 January 2011) (notified to SMCV 17 February 2011).
- <sup>7</sup> **Ex. CE-83**, Tax Tribunal, Decision, No. 08252-1-2013 (2008 Royalty Assessment) (21 May 2013) (notified to SMCV 20 June 2013).
- <sup>8</sup> **Ex. CE-92**, Tax Tribunal, Resolution No. 11669-1-2013 (2008 Royalty Assessment) (15 July 2013) (notified to SMCV 23 July 2013).
- <sup>9</sup> **Ex. CE-54**, SUNAT, Royalty Assessment Nos. 052-003-0007274 to 052-003-0007285 (2009 Royalty Assessment) (27 June 2011) (notified to SMCV 8 July 2011); **Ex. CE-54**, SUNAT Fine Assessment Nos. 052-002-0004716 to 052-002-0004739 (2009 Royalty Assessment) (27 June 2011) (notified to SMCV 8 July 2011).
- <sup>10</sup> **Ex. CE-58**, SUNAT, Resolution No. 055-014-0001495 (2009 Royalty Assessment) (21 December 2011) (notified to SMCV 26 December 2011).
- <sup>11</sup> **Ex. CE-188**, Tax Tribunal, Resolution No. 06141-2-2018 (2009 Royalty Assessments) (15 August 2018) (notified to SMCV 1 October 2018).
- <sup>12</sup> **Ex. CE-213**, Tax Tribunal, Resolution No. 00019-Q-2019 (2009 Royalty Assessments) (4 January 2019) (notified to SMCV 11 January 2019).
- <sup>13</sup> **Ex. CE-142A**, SUNAT, Assessment Resolution Nos. 052-003-0014011 to 052-003-0014015, 052-003-0014020 to 052-003-0014022, 052-003-0014024, 052-003-0014026 to 052-003-0014028 (2010-2011 Royalty Assessments) (13 April 2016) (notified to SMCV 13 April 2016); **Ex. CE-142B**, SUNAT, Assessment Resolution Nos. 052-003-0014016 to 052-003-0014019, 052-003-0014023, 052-003-0014025, 052-003-0014029 to 052-003-0014031 (2010-2011 Royalty Assessments) (13 April 2016) (notified to SMCV 13 April 2016); **Ex. CE-688**, SUNAT, Fine Resolution No. 052-002-0006603 to 052-002-0006645 (2010-2011 Royalty Assessments) (13 April 2016) (notified to SMCV 13 April 2016).
- <sup>14</sup> **Ex. CE-150**, SUNAT, Resolution No. 0150140013036 (2010-2011 Royalty Assessment) (29 December 2016) (notified to SMCV on 1 March 2017)
- <sup>15</sup> **Ex. CE-194**, Tax Tribunal, Resolution No. 06575-1-2018 (2010-2011 Royalty Assessments) (28 August 2018) (notified to SMCV 19 September 2018).
- <sup>16</sup> **Ex. CE-214**, Tax Tribunal, Resolution No. 00036-Q-2019 (2010-2011 Royalty Assessments) (7 January 2019) (notified to SMCV 11 January 2019).
- <sup>17</sup> **Ex. CE-700**, SUNAT, Assessment No. 012-003-009285 (Q4 2011 Royalty Assessment) (29 December 2017) (notified to SMCV 18 January 2018); **Ex. CE-701**, SUNAT, Fine Resolution No. 012-002-0031073 (Q4 2011 Royalty Assessments) (29 December 2017) (notified to SMCV 18 January 2018); **Ex. CE-702**, SUNAT Fine Resolution No. 012-002-0031074 (Q4 2011 Royalty Assessment) (29 December 2017) (notified to SMCV 18 January 2018).
- <sup>18</sup> **Ex. CE-200**, SUNAT, Resolution No. 0150140014440 (Q4 2011 Royalty Assessment) (12 October 2018) (notified to SMCV on 30 October 2018).
- <sup>19</sup> **Ex. CE-269**, Tax Tribunal Resolution No. 10574-9-2019 (Q4 2011 Royalty Assessment) (18 November 2019) (notified to SMCV 5 December 2019).
- <sup>20</sup> **Ex. CE-176**, SUNAT, Assessment No. 012-003-0094883 to No. 012-003-0094886 (2012 Royalty Assessment) (28 March 2018) (notified to SMCV 18 April 2018); **Ex. CE-176 D-K**, SUNAT, Fine Resolutions No. 012-002-0031322 to No. 012-002-0031329 (2012 Royalty Assessment) (28 March 2018) (notified to SMCV 18 April 2018).
- <sup>21</sup> **Ex. CE-215**, SUNAT, Resolution No. 0150140014560 (2012 Royalty Assessment) (11 January 2019) (notified to SMCV 23 January 2019).

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- <sup>22</sup> **Ex. CE-195**, SUNAT, Assessment No. 012-003-0099082 to 012-003-0099085 (2013 Royalty Assessment) (28 September 2018) (notified to SMCV 10 October 2018); **Ex. CE-873**, SUNAT, Fine Resolutions No. 012-002-0031710 to No. 012-002-0031717 (2013 Royalty Assessment) (28 September 2018) (notified to SMCV 10 October 2018).
- <sup>23</sup> **Ex. CE-220**, SUNAT, Resolution No. 0150140014816 (2013 Royalty Assessment) (28 May 2019) (notified to SMCV 29 May 2019).
- <sup>24</sup> **Ex. CE-51**, SUNAT, Assessment No. 052-003-0007147 (Income Tax for 2006) (27 May 2011) (notified to SMCV 3 June 2011); **Ex. CE-52**, SUNAT, Fine Assessment No. 052-002-0004617 (Income Tax for 2006) (26 May 2011) (notified to SMCV 3 June 2011).
- <sup>25</sup> **Ex. CE-69**, SUNAT, Resolution No. 055-014-0001556 (Income Tax for 2006) (30 March 2012) (notified to SMCV 11 April 2012).
- <sup>26</sup> **Ex. CE-191**, Tax Tribunal, Resolution No. 06367-2-2018 (Income Tax for 2006) (22 August 2018) (notified to SMCV 19 November 2018).
- <sup>27</sup> **Ex. CE-50** SUNAT, Fine Assessment No. 052-002-0004614 to 052-002-0004616 (Income Tax for 2006) (26 May 2011) (notified to SMCV 3 June 2011).
- <sup>28</sup> **Ex. CE-66**, SUNAT, Assessment No. 052-003-0008345 (Income Tax for 2007) (28 March 2012) (notified to SMCV 11 April 2012); **Ex. CE-67**, SUNAT, Fine Assessment No. 052-002-0005166 (Income Tax for 2007) (28 March 2012) (notified to SMCV 11 April 2012).
- <sup>29</sup> **Ex. CE-77**, SUNAT, Resolution No. 055-014-0001701 (Income Tax for 2007) (25 January 2013) (notified to SMCV 18 February 2013).
- <sup>30</sup> **Ex. CE-192**, Tax Tribunal, Resolution No. 06369-2-2018 (Income Tax for 2007) (22 August 2018) (notified to SMCV 19 November 2018).
- <sup>31</sup> **Ex. CE-68**, SUNAT, Fine Assessment No. 052-002-0005167 to 052-002-0005168 (Income Tax for 2007) (28 March 2012) (notified to SMCV 11 April 2012).
- <sup>32</sup> **Ex. CE-95**, SUNAT, Assessment No. 052-003-0010790 (Income Tax for 2008) (21 August 2013) (notified to SMCV 2 September 2013); **Ex. CE-94**, SUNAT, Fine Assessment No. 052-002-0005884 (Income Tax for 2008) (19 August 2013).
- <sup>33</sup> **Ex. CE-109**, SUNAT, SUNAT Resolution No. 0550140001907 (Income Tax for 2008) (30 May 2014) (notified to SMCV 10 June 2014).
- <sup>34</sup> **Ex. CE-253**, SMCV, Withdrawal of Challenge (Income Tax for 2008) (27 February 2020); **Ex. CE-804**, Tax Tribunal, Resolution No. 01733-5-2021 accepting partial withdrawal (Income Tax for 2008) (23 February 2021) (notified to SMCV 17 March 2021).
- <sup>35</sup> **Ex. CE-93**, SUNAT, Fine Assessment No. 052-002-0005882 to 052-002-0005883 (Income Tax for 2008) (19 August 2013) (notified to SMCV 2 September 2013); **Ex. CE-661**, SUNAT, Fine Assessment No. 052-002-0005881 (Income Tax for 2008) (19 August 2013) (notified to SMCV 2 September 2013).
- <sup>36</sup> **Ex. CE-115**, SUNAT, Assessment No. 052-003-00011921 (Income Tax for 2009) (30 October 2014) (notified to SMCV 30 October 2014); **Ex. CE-116**, SUNAT, Fine Assessment No. 052-002-0006238 (Income Tax for 2009) (30 October 2014) (notified to SMCV 30 October 2014).
- <sup>37</sup> **Ex. CE-121**, SUNAT, Assessments No. 052-003-0012000 to 052-003-0012002, 052-003-0012007 to 052-003-0012010, 052-003-0012013 to 052-003-0012016 and 052-003-0012018 (Additional Income Tax for 2009) (26 November 2014) (notified to SMCV 27 November 2014).
- <sup>38</sup> **Ex. CE-131**, SUNAT, Resolution No. 055-014-0002145 (Income Tax for 2009) (23 June 2015) (notified to SMCV 7 August 2015).

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- <sup>39</sup> **Ex. CE-243**, SMCV, Withdrawal of Challenge (Income Tax for 2009) (27 February 2020).
- <sup>40</sup> **Ex. CE-119**, SUNAT, Fine Assessment No. 052-002-0006260 (Income Tax for 2009) (26 November 2014) (notified to SMCV 27 November 2014); **Ex. CE-120**, SUNAT, Fine Assessment No. 052-002-0006267 (Income Tax for 2009) (26 November 2014) (notified to SMCV 27 November 2014); **Ex. CE-118**, SUNAT, Fine Assessment No. 052-002-0006272 (Income Tax for 2009) (26 November 2014) (notified to SMCV 27 November 2014).
- <sup>41</sup> **Ex. CE-123**, SUNAT, Assessment No. 052-003-0012411 (Income Tax for 2010) (13 February 2015) (notified to SMCV 13 February 2015); **Ex. CE-125**, SUNAT, Fine Assessment No. 052-002-0006347 (Income Tax for 2010) (13 February 2015) (notified to SMCV 13 February 2015); **Ex. CE-124**, SUNAT, Assessments No. 052-003-0012396, 052-003-0012400 to 052-003-0012403, 052-003-0012408 to 052-003-0012410, and 052-003-0012415 to 052-003-0012418 (Additional Income Tax 2010) (13 February 2015) (notified to SMCV 13 February 2015).
- <sup>42</sup> **Ex. CE-134**, SUNAT, Resolution No. 055-014-0002255 (Income Tax for 2010) (4 November 2015) (notified to SMCV 6 November 2015).
- <sup>43</sup> **Ex. CE-244**, SMCV, Withdrawal of Challenge (Income Tax for 2010) (27 February 2020).
- <sup>44</sup> **Ex. CE-126**, SUNAT, Fine Assessment No. 052-002-0006355 to 052-002-0006356 (Income Tax for 2010) (18 February 2015) (notified to SMCV 23 February 2015); **Ex. CE-127**, SUNAT, Fine Assessment No. 052-002-0006357 (Income Tax for 2010) (18 February 2015) (notified to SMCV 23 February 2015).
- <sup>45</sup> **Ex. CE-157**, SUNAT, Assessment No. 012-003-0090355 (Income Tax for 2011) (31 October 2017) (notified to SMCV 15 November 2017); **Ex. CE-160**, SUNAT, Fine Assessment No. 012-002-0030879 (Income Tax for 2011) (31 October 2017) (notified to SMCV 15 November 2017); **Ex. CE-159**, SUNAT, Assessments No. 052-003-00900368 to 052-003-0090378 (Additional Income Tax 2011) (31 October 2017) (notified to SMCV 15 November 2017).
- <sup>46</sup> **Ex. CE-187**, SUNAT, Resolution No. 0550140014311 (Income Tax for 2011) (10 August 2018) (notified to SMCV 22 August 2018).
- <sup>47</sup> **Ex. CE-245**, SMCV, Withdrawal of Challenge (Income Tax for 2011) (27 February 2020).
- <sup>48</sup> **Ex. CE-161**, SUNAT, Fine Assessment No. 012-002-0030892 to 012-002-0030893 (Income Tax for 2011) (31 October 2017) (notified to SMCV 15 November 2017).
- <sup>49</sup> **Ex. CE-232**, SUNAT, Assessment No. 012-003-0108051 (Income Tax for 2012) (26 November 2019) (notified to SMCV 29 November 2019); **Ex. CE-235**, SUNAT, Fine Assessment No. 012-002-0033157 (Income Tax for 2012) (26 November 2019) (notified to SMCV 29 November 2019).
- <sup>50</sup> **Ex. CE-252**, SMCV, Withdrawal of Request for Reconsideration (Income Tax for 2012) (27 February 2020); **CE-791**, SUNAT, Resolution No. 0150140015674 Approving Partial Withdrawal (Income Tax for 2012) (12 November 2020) (notified to SMCV 13 November 2020).
- <sup>51</sup> **Ex. CE-233**, SUNAT, Fine Assessment No. 012-002-0033155 (Income Tax for 2012) (26 November 2019) (notified to SMCV 29 November 2019); **Ex. CE-234**, SUNAT, Fine Assessment No. 012-002-0033156 (Income Tax for 2012) (26 November 2019) (notified to SMCV 29 November 2019).
- <sup>52</sup> **Ex. CE-231**, SUNAT, Assessment No. 012-003-0108050 (AIT for 2012) (26 November 2019) (notified to SMCV 29 November 2019).
- <sup>53</sup> **Ex. CE-259**, SMCV, Withdrawal of Request for Reconsideration (Additional Income Tax for 2012) (27 February 2020); **CE-880**, SUNAT, Resolution No. 0150140015383 Approving Partial Withdrawal (Additional Income Tax for 2012) (13 May 2020) (notified to SMCV 14 May 2020).

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- <sup>54</sup> **Ex. CE-277**, SUNAT, Assessment No. 0120030113991 (Income Tax for 2013) (28 December 2020) (notified to SMCV 30 December 2020); **Ex. CE-279**, SUNAT, Fine Assessment No. 012-002-0034411 (Income Tax for 2013) (28 December 2020) (notified to SMCV 30 December 2020).
- <sup>55</sup> **Ex. CE-280**, SUNAT, Fine Assessment No. 012-002-0034412 (Income Tax for 2013) (28 December 2020) (notified to SMCV 30 December 2020).
- <sup>56</sup> **Ex. CE-281**, SUNAT, Assessment No. 012-003-0114004 (AIT for 2013) (28 December 2020) (notified to SMCV 30 December 2020).
- <sup>57</sup> **Ex. CE-35**, SUNAT, Assessment Nos. 052-003-0005626 to 052-003-0005637 (GST for 2005) (28 December 2009) (notified to SMCV 30 December 2009); **Ex. CE-37**, SUNAT, Fine Assessment No. 052-002-003816 to 052-002-0002827 (GST for 2005) (29 December 2009) (notified to SMCV 30 December 2009).
- <sup>58</sup> **Ex. CE-42**, SUNAT, Resolution No. 055-014-0001369 (GST for 2005) (25 October 2010) (notified to SMCV 25 November 2010).
- <sup>59</sup> **Ex. CE-193**, Tax Tribunal, Resolution No. 06365-2-2018 (GST for 2005) (22 August 2018) (notified to SMCV 19 November 2018).
- <sup>60</sup> **Ex. CE-36**, SUNAT, Assessments No. 052-003-0005642 to 052-003-0005653 (GST for Non-Residents for 2005) (28 December 2009) (notified to SMCV 30 December 2009).
- <sup>61</sup> **Ex. CE-41**, SUNAT, Resolution No. 055-014-0001358 (GST for Non-Residents for 2005) (30 September 2010) (notified to SMCV 22 October 2010).
- <sup>62</sup> **Ex. CE-788**, Tax Tribunal Resolution No. 04802-5-2020 (GST for Non-Residents for 2005) (15 September 2020) (notified to SMCV 29 September 2020).
- <sup>63</sup> **Ex. CE-43**, SUNAT, Assessments No. 052-003-006737 to 052-003-006744, No. 052-003-006777 to 052-003-006780 (GST for 2006) (29 December 2010) (notified to SMCV 30 December 2010); **Ex. CE-44**, SUNAT, Fine Assessments No. 052-002-0004402 to 052-002-0004413 (GST for 2006) (29 December 2010) (notified to SMCV 30 December 2010).
- <sup>64</sup> **Ex. CE-604**, SUNAT, Resolution No. 055-014-0001431 (GST for 2006) (27 July 2011) (notified to SMCV 24 August 2011).
- <sup>65</sup> **Ex. CE-190**, Tax Tribunal, Resolution No. 06366-2-2018 (GST for 2006) (22 August 2018) (notified to SMCV 19 November 2018).
- <sup>66</sup> **Ex. CE-206**, SUNAT, Assessments No. 052-003-0006753 to No. 052-003-0006764 (GST for Non-Residents for 2006) (29 December 2010) (notified to SMCV 30 December 2010).
- <sup>67</sup> **Ex. CE-56**, SUNAT, Resolution No. 055-014-0001444 (GST for Non-Residents for 2006) (30 September 2011) (notified to SMCV 28 October 2011).
- <sup>68</sup> **Ex. CE-247**, SMCV, Withdrawal of Challenge (GST for Non-Residents for 2006) (27 February 2020).
- <sup>69</sup> **Ex. CE-60**, SUNAT, Assessments No. 052-003-0008024 to No. 052-003-0008035 (GST and AIT for 2007) (27 December 2011) (notified to SMCV 29 December 2011); **Ex. CE-59** Fine Assessments No. 052-002-0005053 to 052-002-0005064 (GST for 2007) (27 December 2011) (notified to SMCV 29 December 2011); **Ex. CE-61**, SUNAT, Assessments No. 052-003-0008036 to 052-003-0008046 (Additional Income Tax for 2007) (27 December 2011) (notified to SMCV 29 December 2011).
- <sup>70</sup> **Ex. CE-72**, SUNAT, Resolution No. 055-014-0001662 (GST for 2007) (27 September 2012) (notified to SMCV 12 October 2012).

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- <sup>71</sup> **Ex. CE-202**, Tax Tribunal, Resolution No. 08470-2-2018 (GST for 2007) (30 October 2018) (notified to SMCV 21 November 2018).
- <sup>72</sup> **Ex. CE-75**, SUNAT, Assessments No. 052-003-0009549, 052-003-0009591 to 052-003-0009593 and 052-003-0009595 to 052-003-0009602 (GST and AIT for 2008) (20 December 2012) (notified to SMCV 27 December 2012); **Ex. CE-74**, Fine Assessments No. 052-002-0005664, 052-002-0005679, 052-002-0005680, 052-002-0005682 to 052-002-0005687, 052-002-0005691 to 052-002-0005693 (GST for 2008) (20 December 2012) (notified to SMCV 27 December 2012); **Ex. CE-76**, SUNAT, Assessments No. 052-003-0009550 to 052-003-0009554, 052-003-0009562 to 052-003-0009564, 052-003-0009580, 052-003-0009581, 052-003-0009589, 052-003-0009594 (Additional Income Tax for 2008) (20 December 2012) (notified to SMCV 27 December 2012).
- <sup>73</sup> **Ex. CE-100**, SUNAT, Resolution No. 055-014-0001810 (GST for 2008) (24 October 2013) (notified to SMCV 4 November 2013).
- <sup>74</sup> **Ex. CE-253**, SMCV, Withdrawal of Challenge (GST for 2008) (27 February 2020).
- <sup>75</sup> **Ex. CE-102**, SUNAT, Assessments No. 052-003-0011235 to No. 052-003-0011245 and 052-003-0011484 (GST for 2009) (27 December 2013) (notified to SMCV 30 December 2013); **Ex. CE-105**, Fine Assessments No. 052-002-0006017 to 052-002-0006027 (GST for 2009) (27 December 2013) (notified to SMCV 30 December 2013).
- <sup>76</sup> **Ex. CE-114**, SUNAT, Resolution No. 055-014-0001988 (GST for 2009) (27 October 2014) (notified to SMCV 14 November 2014).
- <sup>77</sup> **Ex. CE-243**, SMCV, Withdrawal of Challenge (GST for 2009) (27 February 2020).
- <sup>78</sup> **Ex. CE-112**, SUNAT, Fine Assessment No. 052-002-0006102, 052-002-0006091 (GST for 2009) (24 June 2014) (notified to SMCV 24 June 2014).
- <sup>79</sup> **Ex. CE-110**, SUNAT, Assessments No. 052-003-0011478 to No. 052-003-0011483, No. 052-003-0011485 to No. 052-003-0011490 (GST for 2010) (24 June 2014) (notified to SMCV 24 June 2014); **Ex. CE-111** Fine Assessments No. 052-002-0006087 to 052-002-0006089, 052-002-0006092 to 052-002-0006100 (GST for 2010) (24 June 2014) (notified to SMCV 24 June 2014).
- <sup>80</sup> **Ex. CE-130**, SUNAT, Resolution No. 055-014-0002103 (GST for 2010) (27 April 2015) (notified to SMCV 9 June 2015).
- <sup>81</sup> **Ex. CE-244**, SMCV, Withdrawal of Challenge (GST for 2010) (27 February 2020).
- <sup>82</sup> **Ex. CE-112**, SUNAT, Fine Assessment No. 052-002-0006090, 052-002-0006101 (GST for 2010) (24 June 2014) (notified to SMCV 24 June 2014).
- <sup>83</sup> **Ex. CE-154**, SUNAT, Fine Assessment No. 012-002-0030759 (GST for 2011) (29 September 2017) (notified to SMCV 10 October 2017).
- <sup>84</sup> **Ex. CE-182**, SUNAT, Resolution No. 0150140014204 (GST for 2011) (27 June 2018) (notified to SMCV 18 July 2018).
- <sup>85</sup> **Ex. CE-245**, SMCV, Withdrawal of Challenge (GST for 2011) (27 February 2020).
- <sup>86</sup> **Ex. CE-103**, SUNAT, Assessment No. 052-003-0011208 (TTNA for 2009) (27 December 2013) (notified to SMCV 30 December 2013).
- <sup>87</sup> **Ex. CE-113**, SUNAT Resolution No. 055-014-0001946 (TTNA for 2009) (27 August 2014) (notified to SMCV 15 September 2014).

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- <sup>88</sup> **Ex. CE-875**, Tax Tribunal, Resolution No. 02213-2-2020 (TTNA for 2009) (27 February 2020) (notified to SMCV 3 March 2020).
- <sup>89</sup> **Ex. CE-132**, SUNAT, Assessment No. 052-003-0012908 (TTNA for 2010) (14 August 2015) (notified to SMCV 14 August 2015).
- <sup>90</sup> **Ex. CE-140**, SUNAT, Resolution No. 055-014-0002356 (TTNA for 2010) (29 February 2016) (notified to SMCV 16 March 2016).
- <sup>91</sup> **Ex. CE-877**, Tax Tribunal Resolution No. 02247-5-2020 (TTNA for 2010) (3 March 2020) (notified to SMCV 9 March 2020).
- <sup>92</sup> **Ex. CE-147**, SUNAT, Assessment No. 052-003-0014319 (TTNA for 2011) (27 July 2016) (notified to SMCV 27 July 2016).
- <sup>93</sup> **Ex. CE-876**, Tax Tribunal, Resolution No. 02202-9-2020 (TTNA for 2011) (27 February 2020) (notified to SMCV 3 March 2020).
- <sup>94</sup> **Ex. CE-699**, SMCV, Payment Receipt (TTNA for 2012) (21 December 2017).
- <sup>95</sup> **Ex. CE-230**, SUNAT, Assessment No. 0120030107987 (TTNA for 2013) (20 November 2019) (notified to SMCV 21 November 2019).
- <sup>96</sup> **Ex. CE-156**, SMCV, Fine Assessment No. 011-002-0022011 (TTNA for 2013) (Fine) (26 September 2017) (notified to SMCV 3 October 2017).
- <sup>97</sup> **Ex. CE-724**, SUNAT, Resolution No. 0150150014218 (TTNA for 2013) (Fine) (28 June 2018) (notified to SMCV 19 July 2018).
- <sup>98</sup> **Ex. CE-879**, SUNAT Resolution No. 0150140015385 (TTNA for 2013) (13 May 2020) (notified to SMCV 14 May 2020).
- <sup>99</sup> **Ex. CE-205**, Tax Tribunal, Resolution No. 10372-9-2018 (TTNA for 2013) (Fine) (14 December 2018) (notified to SMCV 7 January 2019).
- <sup>100</sup> **Ex. CE-163**, SUNAT, Assessment No. 012-003-0092658 (SMT for Q4 2011-2012) (29 December 2017) (notified to SMCV 18 January 2018); **Ex. CE-164**, SUNAT, Assessment No. 012-003-0092961 (SMT for Q4 2011-2012) (29 December 2017) (notified to SMCV 18 January 2018); **Ex. CE-165**, SUNAT, Assessment No. 012-003-0092962 (SMT for Q4 2011-2012) (29 December 2017) (notified to SMCV 18 January 2018); **Ex. CE-166**, SUNAT, Assessment No. 012-003-0092963 (SMT for Q4 2011-2012) (29 December 2017) (notified to SMCV 18 January 2018); **Ex. CE-167**, SUNAT, Assessment No. 012-003-0092964 (SMT for Q4 2011-2012) (29 December 2017) (notified to SMCV 18 January 2018).
- <sup>101</sup> **Ex. CE-198**, SUNAT, Resolution No. 0150140014441 (SMT for Q4 2011-2012) (12 October 2018) (notified to SMCV 30 October 2018).
- <sup>102</sup> **Ex. CE-198**, Tax Tribunal, Resolution No. 05634-4-2019 (SMT for Q4 2011-2012) (20 June 2019) (notified to SMCV 30 July 2019).
- <sup>103</sup> **Ex. CE-195**, SUNAT, Assessment No. 012-003-0099078 to 012-003-0099081 (SMT for 2013) (28 September 2018) (notified to SMCV 10 October 2018).
- <sup>104</sup> **Ex. CE-221**, SUNAT, Resolution No. 015014001485 (SMT for 2013) (28 May 2019) (notified to SMCV 29 May 2019).
- <sup>105</sup> **Ex. CE-237**, SUNAT, Assessment No. 0120030109172 (CMPF for 2013) (20 December 2019) (notified to SMCV 24 December 2019).
- <sup>106</sup> **Ex. CE-878**, SUNAT Resolution No. 0150140015384 (CMPF for 2013) (13 May 2020) (notified to SMCV 14 May 2020).

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<sup>107</sup> **Ex. CE-208**, SMCV, Reimbursement Request (GEM Q4 2011) (28 December 2018); **Ex. CE-209**, SMCV, Reimbursement Request (GEM Q1 2012) (28 December 2018); **Ex. CE-210**, SMCV, Reimbursement Request (GEM Q2 2012) (28 December 2018); **CE-211**, SMCV, Reimbursement Request (GEM Q3 2012) (28 December 2018).

<sup>108</sup> **Ex. CE-218**, SUNAT, Resolution No. 012-180-0018640/SUNAT (GEM Q4 2011-Q3 2012) (4 March 2019) (notified to SMCV 22 March 2019).

<sup>109</sup> **Ex. CE-874**, SUNAT, Resolution No. 0150140014950/SUNAT (GEM Q4 2011-Q3 2012) (31 July 2019) (notified to SMCV 1 August 2019).