

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Freeport-McMoRan Inc.

v.

Republic of Peru

(ICSID Case No. ARB/20/8)

PROCEDURAL ORDER NO. 7
On Documentary Evidence Issues

Members of the Tribunal

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

Assistant to the Tribunal

Ms. Charlotte Matthews

Secretary of the Tribunal

Ms. Marisa Planells-Valero

26 April 2023

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

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The Tribunal hereby issues Procedural Order No. 7 on documentary evidence issues.

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

I. SECTION A - PROCEDURAL HISTORY

1. On 14 March 2023, the Tribunal issued Procedural Order No. 3 on Documentary Evidence Issues (**PO3**), including a draft Confidentiality Protocol to ensure the protection of any protected information used during the Hearing, for the Parties' consideration.
2. On 23 March 2023, the Tribunal issued Procedural Order No. 4 on the Hearing Organization (**PO4**).
3. On the same day, the Tribunal issued Procedural Order No. 5 on the Use of the Transcript and Recording from the *SMM Cerro Verde* Arbitration (**PO5**).
4. On 24 March 2023, further to the issuance of PO3, PO4 and PO5, the Tribunal advised the Parties that there would be no written submissions on the new evidence submitted to the record prior to the Hearing and that the Parties would have the opportunity to be heard on all of the evidence on the record during the Hearing and in any post-Hearing briefs.
5. Also on 24 March 2023, having considered the Parties' positions, the Tribunal issued the Confidentiality Protocol as Annex A to PO3.
6. On 13 April 2023, the Tribunal issued Procedural Order No. 6 on Documentary Evidence Issues (**PO6**).
7. On 21 April 2023, the Respondent submitted a letter dated 20 April 2023 in which it sought leave from the Tribunal to submit eight new documents into the record.
8. On the same day, the Tribunal invited the Claimant's comments to the Respondent's letter dated 20 April 2023 by 24 April 2023.
9. On 24 April 2023, the Claimant submitted a letter in which it requested the Tribunal to deny the Respondent's request to submit the eight new documents into the record.

II. SECTION B - THE PARTIES' POSITIONS

A. The Respondent's position

10. The Respondent seeks leave to introduce eight new documents from the *SMM Cerro Verde* arbitration discussed during the hearing in that arbitration “*in light of the recent admission of the SMM Cerro Verde hearing transcripts into the Freeport record*”¹ pursuant to Sections 17.3 and 25.1 of Procedural Order No. 1 (PO1).
11. The Respondent submits that these eight new exhibits “*will provide the Tribunal with a full picture of the facts related to Phelps Dodge’s lack of adequate due diligence and conversations with the government at the time it decided to invest in the Concentrator, and will allow the Tribunal to better understand the discussions contained in the SMM Cerro Verde hearing transcripts about these same documents.*”²
12. Specifically, the Respondent seeks to introduce (i) a letter from Phelps Dodge to Sumitomo Metal Mining dated 10 February 2004; (ii) a Phelps Dodge Meeting Memo dated 4 March 2004; (iii) a Cerro Verde Due Diligence Report dated 16 June 2004; (iv) a Cerro Verde Due Diligence Report dated 23 June 2004; (v) a Due Diligence Review dated 23 July 2004; (vi) Cerro Verde Technical DD Follow-Up Meeting Minutes dated 26 July 2004; (vii) Cerro Verde Sulfide Project Technical Meeting Report dated 2 August 2004; and (viii) Cerro Verde/Ojos del Salado 4th Negotiation Session dated 3 September 2004.
13. According to the Respondent, all of these documents demonstrate Phelps Dodge’s inadequate due diligence as they allegedly show that Phelps Dodge thought it was important to obtain written assurances from Peruvian officials regarding the scope of the 1998 Stabilization Agreement. The Respondent also submits that these documents provide important context to the Tribunal on issues related to the recently admitted *SMM Cerro Verde* hearing transcript.
14. The Respondent adds that while the Claimant would not be prejudiced by the admission of these documents, not admitting them would severely prejudice the Respondent and its ability to fully present its case. In particular, the Respondent submits that the documents memorialize meetings between Phelps Dodge, on whose due diligence the Claimant relies, and SMM. Accordingly, Phelps Dodge and the Claimant know these documents well. In addition, all but one of the meetings were attended by Mr. Davenport, one of the Claimant’s witnesses who will testify at the Hearing. The Claimant’s counsel also knows the documents well as they were added to the record in the *SMM Cerro Verde* arbitration and discussed at the hearing.

¹ Respondent’s letter to the Tribunal dated 20 April 2023, p. 1.

² Respondent’s letter to the Tribunal dated 20 April 2023, p. 1.

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15. The Respondent concludes that in light of such special circumstances, the Tribunal should grant the Respondent's request pursuant to Section 17.3 of PO1.

B. The Claimant's position

16. According to the Claimant, the Respondent's request should be denied because the special circumstances required under Section 17.3 of PO1 do not exist.
17. First, according to the Claimant, most of the requested documents have been in possession of the Respondent for almost one year and a half and all of them have been in possession of the Respondent for at least nine months. Thus, the Claimant submits that the Respondent's request is extraordinarily untimely and contrary to the orderly conduct of the proceedings. In addition, according to the Claimant, the Respondent could have requested leave to submit the documents into the record when it requested that the Tribunal authorize the use of the *SMM Cerro Verde* hearing transcript over six weeks ago on 9 March 2023 or, at the latest, when the Tribunal issued its procedural order ordering the Parties to submit the transcript into the record almost one month ago on 23 March 2023.
18. Second, the Claimant submits that the Respondent has failed to explain how the requested documents are necessary to “provide important context [...] on issues related to the recently admitted *SMM Cerro Verde* [hearing] transcript.”³ According to the Claimant, the Respondent seeks to exhibit the new documents not to provide context for the *SMM Cerro Verde* hearing transcript but to provide context for its argument that SMCV and Phelps Dodge performed inadequate due diligence prior to the investment in the Concentrator, which has been the Respondent's argument since the Counter-Memorial and was not prompted by the submission of the *SMM Cerro Verde* hearing transcript into the record. The Claimant avers that the Respondent also fails to establish that the *SMM Cerro Verde* hearing transcript itself and the existing record are insufficient to provide the context necessary for its due diligence argument and that the Respondent has already made extensive submissions on that point based on the existing evidentiary record. In addition, the Claimant submits that if the Respondent is so concerned about providing context for the *SMM Cerro Verde* hearing transcript, it should finally comply with the Tribunal's orders in PO3 and submit the 105 SUNAT documents from the *SMM Cerro Verde* arbitration into the record.
19. Third, according to the Claimant, the Respondent's request is prone to upend the orderly conduct of the proceedings as by the Respondent's logic the submission into the record of the transcript of the *SMM Cerro Verde* hearing would justify admitting each exhibit and

³ Claimant's letter to the Tribunal dated 24 April 2023, p. 1 citing Respondent's letter to the Tribunal dated 20 April 2023, p. 4.

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authority that was discussed in that proceeding into the record on the eve of the Hearing in this case.

20. Fourth, the Claimant avers that admitting the requested documents into the record now in the eleventh hour before the Hearing would be severely prejudicial to the Claimant. In particular, the Claimant submits *inter alia* that (i) neither the Claimant, its predecessor Phelps Dodge, nor SMCV retained any of the requested documents; (ii) six of the documents are in Japanese and were created by SMM or Sumimoto Corporation, which are not parties in the arbitration; (iii) there is no indication that the Claimant, Phelps Dodge, or SMCV ever received those six documents; (iv) contrary to the Respondent's contention, the Claimant and SMCV do not know these documents well; (v) the witness that provided his testimony on the documents at the *SMM Cerro Verde* hearing is not a witness in these proceedings; and (vi) the Respondent has deprived the Claimant of the opportunity to address the documents in its written submissions.

III. SECTION C - THE TRIBUNAL'S CONSIDERATIONS

21. The Tribunal takes note that the Respondent makes its request to submit additional documents on the basis of Sections 17.3 and 25.1 of PO1.
22. The Tribunal recalls that Section 17.3 of PO1 provides as follows:

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

23. In addition, Section 25.1 of PO1 provides as follows:

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

24. The Respondent argues that the submission of the *SMM Cerro Verde* hearing transcript to the evidentiary record of these proceedings has triggered the Respondent to request the inclusion of the eight new documents to the record. However, the Tribunal finds that the Respondent's request is neither justified under Section 17.3 nor Section 25.1 of PO1.
25. The Tribunal finds that the submission of the *SMM Cerro Verde* hearing transcript to the record of these proceedings does not constitute a "special circumstance" justifying the admission of additional evidence into the record less than one week prior to the Hearing.

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The Tribunal rather finds that the Respondent's request is manifestly untimely in the circumstances.

26. Notably, as the Tribunal understands from the Claimant's submission, the Respondent has not only been in possession of the evidence for a long time but also submitted five of the requested documents in the *SMM Cerro Verde* arbitration on 27 August 2021 and the remaining three documents on 1 July 2022. Thus, unlike the evidence at issue in PO3 and PO6, the Respondent was in a position to submit the evidence much earlier in these proceedings but elected not to do so. Furthermore, the Tribunal notes that the issue of Phelps Dodge's alleged lack of due diligence has already been briefed by both Parties in this arbitration and the record includes evidence on this issue. The Tribunal is also not convinced that it requires the documents "*to better understand the discussions contained in the SMM Cerro Verde hearing transcripts*"⁴ and Phelps Dodge's alleged lack of due diligence.
27. In addition, since the Respondent's request is allegedly triggered by the submission of the transcripts of the *SMM Cerro Verde* hearing, the Respondent could have more recently formulated such request, for example directly after the Tribunal's issuance of PO5 on the use of the transcript and recording of the *SMM Cerro Verde* arbitration. The Respondent, however, only requested that the eight new documents be adduced to the record on 21 April 2023, *i.e.* less than ten days prior to the commencement of the Hearing.
28. The Tribunal is mindful that the requested documents essentially concern Sumitomo Metal Mining (SMM), and that no SMM witnesses will be available at the Hearing. Moreover, the Claimant submits that it did not retain any of the documents and that one of its witnesses, Mr. Davenport, only first saw the documents when preparing for the *SMM Cerro Verde* hearing. Accordingly, the Tribunal does not find it appropriate to adduce additional evidence to the record that will not be able to be appropriately tested at the Hearing.
29. In any event, the purpose of PO5 admitting the *SMM Cerro Verde* hearing transcript was not to create an additional avenue for the admission of new evidence to the record. If the Tribunal were to grant the Respondent's request, it would open the gates for both Parties to make further submissions to introduce and resist the introduction of new documents from the *SMM Cerro Verde* arbitration.
30. For the avoidance of doubt, the Tribunal is also not inclined to exercise its discretion to summon additional evidence pursuant to Section 17.4 of PO1. While in PO3 and PO6 the Tribunal has used its *ex officio* discretion to summon supplementary evidence from both Parties, the Tribunal finds that contrary to the documents ordered to be submitted by PO3 and PO6, the eight documents at hand have been directly available to the Respondent for a

⁴ Respondent's letter to the Tribunal dated 20 April 2023, p. 1.

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long period of time and the issue of Phelps Dodge's alleged lack of due diligence has already been briefed by the Parties.

IV. SECTION D - THE TRIBUNAL'S ORDER

31. In light of the foregoing considerations, the Tribunal:

- **Rejects the Respondent's request to add eight new exhibits to the record.**

[signed]

Dr. Inka Hanefeld
President of the Tribunal
Date: 26 April 2023