

BEFORE THE INTERNATIONAL CENTRE FOR THE SETTLEMENT
OF INVESTMENT DISPUTES

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In the Matter of Arbitration between: :
:
FREEPORT-MCMORAN INC., :
:
Claimant, : Case No.
: ARB/20/8
v. :
:
REPUBLIC of PERÚ, :
:
Respondent. :
:
----- x Volume 7

HEARING ON JURISDICTION, MERITS, AND QUANTUM

Tuesday, May 9, 2023

The World Bank Group
1225 Connecticut Avenue, N.W.
Conference Room C1-450
Washington, D.C. 20003

The Hearing in the above-entitled matter
came on at 9:28 a.m. before:

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President of the Tribunal

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Co-Arbitrator

MR. BERNARDO M. CREMADES
Co-Arbitrator

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P R O C E E D I N G S

1
2 PRESIDENT HANEFELD: Good morning to
3 everyone. Welcome to Day 7 of our Hearing, and
4 welcome also to Ms. Olano.

5 Before we start talking with you, I just
6 briefly address the Parties.

7 Our Secretary has circulated the time block
8 yesterday and asked whether the Parties have reached
9 any agreement on the timing of the next three days.

10 Claimant, do you have any comments on that?

11 MR. PRAGER: Yes. Good morning, Members of
12 the Tribunal.

13 The Parties did discuss.

14 So, Friday is set aside for the Closing. If
15 you don't count in the closing time, then we have in
16 the next three days, which includes today, allocated a
17 total of 18 hours and 47 minutes left for Witnesses
18 and Experts. That's jointly. If we continue down the
19 regular schedule, we would have 16 hours and
20 30 minutes. So, we have a slight surplus.

21 We would suggest jointly that, subject to
22 the Tribunal's availability, of course, that, to make

1 up some of the time, we would reduce the lunch breaks
2 to 40 minutes on all three days--today, tomorrow, and
3 on Thursday; that today and tomorrow we would
4 sit--and, again, subject to the Tribunal's
5 availability--until 6:00 p.m., but I think it's the
6 strong preference of both Parties on Thursday to
7 finish at 5:30, since we have some homework to do for
8 the Closings on the following day.

9 That may not catch up all of the time, but
10 hopefully a substantial amount of the time.

11 PRESIDENT HANEFELD: And does Respondent
12 agree with this proposal?

13 MS. HAWORTH McCANDLESS: Yes, with the
14 precisión--there's no equivalent in English, so--the
15 Thursday 5:30 is a hard stop. That's from
16 Respondent's perspective.

17 So, everything else, we are in accord.

18 PRESIDENT HANEFELD: We are fully fine with
19 this, so we can do it exactly as the Parties have
20 proposed.

21 Our question would be whether you would like
22 to start, in addition, in the morning earlier at 9:00.

1 MS. HAWORTH McCANDLESS: Not from
2 Respondent's perspective.

3 PRESIDENT HANEFELD: Okay. Understood.

4 So, then we will proceed like the Parties
5 have proposed, and we will from now on reduce our
6 lunch break to 40 minutes, and we will end the Hearing
7 day today and tomorrow at 6:00 and sharp at 5:30 on
8 Thursday. This is understood.

9 ZORAIDA ALICIA OLANO SILVA,
10 RESPONDENT'S WITNESS, CALLED

11 PRESIDENT HANEFELD: And then we can turn to
12 you.

13 Welcome, Ms. Olano. This is a Tribunal. In
14 this case, I am here with my co-arbitrators Professor
15 Tawil and Dr. Cremades. My name is Inka Hanefeld.
16 I'm the presiding arbitrator in this case.

17 You should have in front of you a
18 Declaration under Article 35(a) of the Arbitration
19 Rules. Would you please be so kind to read out this
20 Declaration?

21 THE WITNESS: Yes. Certainly. Good
22 morning.

1 I solemnly declare, upon my honor and
2 conscience, that I shall speak the truth, the whole
3 truth, and nothing but the truth.

4 PRESIDENT HANEFELD: Thank you very much.

5 Let's turn to your two Witness Statements.
6 It is Exhibit RWS-5 and RWS-12.

7 Do you have the Witness Statements in front
8 of you?

9 THE WITNESS: That is correct.

10 PRESIDENT HANEFELD: Can you confirm that
11 these are your Witness Statements that correspond to
12 your recollection, or is there anything that you wish
13 to amend or correct?

14 THE WITNESS: No. They are fine. I
15 confirm.

16 PRESIDENT HANEFELD: Perfect. Then we turn
17 to Respondent for questions.

18 MS. HIKAWA: Thank you.

19 DIRECT EXAMINATION

20 BY MS. HIKAWA:

21 Q. Good morning, Ms. Olano.

22 Your Witness Statements, are they based on

1 your personal knowledge and experience?

2 A. Yes, that is correct.

3 Q. Please describe your educational background.

4 A. I am attorney specializing in administration
5 and tax technique. I graduated in 1995 at the
6 Pontificia University of Perú.

7 Q. What is your current position?

8 A. I am currently President of the Tax
9 Tribunal.

10 (Overlapping interpretation and speakers.)

11 (Interruption.)

12 (Stenographer clarification.)

13 BY MS. HIKAWA:

14 Q. How long have you been in that position?

15 A. Starting November 14, 2006.

16 Q. What are the responsibilities of the
17 President of the Tax Tribunal?

18 A. Well, I have various responsibilities. On
19 the one hand, I plan budgets, operational plans. I
20 represent the Tax Tribunal. I preside over the
21 Plenary Chamber, and I also oversee Management Plans,
22 operational plans. I also verify issues that have to

1 do with the "vocales" and the staff. I also need to
2 create the Specialized Chambers and appoint the
3 Presidents.

4 I supervise and coordinate the technical and
5 administrative tasks of the Tax Tribunal.

6 Q. I understand that the Chambers of the Tax
7 Tribunal have law clerks--in Spanish,
8 "asesores"--assigned to them.

9 What is the role of a law clerk?

10 A. Yes. The Specialized Chambers have law
11 clerks. A law clerk is a support staff that helps
12 "vocales" in resolving case files. The person has to
13 look into the background, arguments, the various
14 positions, and also prepares a draft resolution,
15 together with the presiding "vocal," "vocal ponente,"
16 that is the one that has the case file record
17 assigned.

18 Q. What is a substitute law clerk, or, in
19 Spanish, an "asesor suplente"?

20 A. Well, formally, a substitute law clerk does
21 not exist, but what does it mean? It is a temporary
22 law clerk that is assigned to a Chamber or to a

1 different area, depending on the needs.

2 Q. Do temporary asesores have the same
3 functions as "asesores"?

4 A. Whenever they are in the Chamber, they do
5 have the same function, whenever they are in the
6 Chamber that they work at.

7 Q. And do law clerks decide cases?

8 A. No, they don't. The law clerks are support
9 staff. The law clerks do not make any decisions.
10 They do not have any responsibility. The "vocales"
11 are the one that make a Decision.

12 First, the vocal ponente, the one that has
13 the case file assigned, who has to review the draft,
14 the one that has to review whether they are working
15 along the same lines, who has to make all the
16 adjustments, observations and comments because
17 finally, that is the vocal that will be supporting in
18 the session with the other "vocales," because, at the
19 end of the day, the ones that have to decide are the
20 three "vocales."

21 Q. Who is Ms. Úrsula Villanueva?

22 A. Úrsula Villanueva was "asesor de

1 Presidencia." And also, specialized law clerk. She was
2 the chief of the technical office. She had several
3 positions. She's currently a "vocal."

4 Q. Was she your assistant?

5 A. No, she was not. She was "asesor de
6 Presidencia."

7 Q. Why did you assign Ms. Villanueva to act as
8 temporary law clerk to Chamber 1?

9 A. Well, when she was assigned to Chamber 1,
10 that was at the request of the presiding "vocal" that
11 also had these case files assigned to her, and this
12 was the presiding "vocal," and we were in a situation
13 in which we had no law clerks, and that's the reason
14 why she requested the support.

15 Q. On the basis of which of your
16 responsibilities as President did you assign
17 Ms. Villanueva as temporary law clerk?

18 A. Well, I have a very broad mandate under the
19 Manual of Operation and Functions that established
20 that I need to supervise, coordinate,
21 administrative-technical work, and that is translated
22 as me having to manage resources whenever needed.

1 Q. Claimant in this Arbitration has submitted
2 Statements from a Mr. Estrada, a former law clerk in
3 the Tax Tribunal.

4 Have you read those Statements?

5 A. Yes.

6 Q. Claimant and Mr. Estrada have alleged that
7 you interfered in the cases of Cerro Verde that were
8 before the Tax Tribunal by assigning Ms. Villanueva,
9 whom Claimant alleges was your assistant, as temporary
10 law clerk to Chamber 1 and directing her in the
11 drafting of the Resolution in the 2008 Royalty Case.

12 What is your response to that allegation?

13 A. Well, that is completely false. As I
14 explained before, if Úrsula Villanueva was assigned to
15 Chamber 1, it was at the request of the "vocal," in a
16 context in which there were no law clerks. And I
17 never interfered with the resolution of the dispute,
18 and I never guided her to make one decision, for that
19 Resolution to be one way or the other, because it
20 would be the "vocal ponente," the one making a
21 decision.

22 The three "vocales" are the ones that make

1 the decision at the Specialized Chamber level. I do
2 not make a decision.

3 Q. Mr. Estrada has also alleged that there was
4 a Legislative Decree in 2012 that, if implemented,
5 would have provided performance bonuses to "vocales"
6 and to the President of the Tax Tribunal, and that the
7 prospect of bonuses motivated you to push "vocales" to
8 resolve Cerro Verde's cases quickly and in SUNAT's
9 favor.

10 What is your response to that allegation?

11 A. The same, but it is completely incorrect at
12 the very least. There was a legal provision that, as
13 part of some strengthening standards for the Tribunal,
14 established a bonus for the "vocales," and also a
15 bonus for the other practitioners within the Tax
16 Court. But it was never implemented.

17 But those bonuses have nothing to do with
18 the assignment of the records of cases or the decision
19 on those records or files.

20 Within the Tribunal, we follow goals and
21 objectives, and, based on that, we assign the case
22 records, and we also resolve those case records. So,

1 one thing is not related to the other one.

2 Q. We understand that there's a process by
3 which "vocales" are confirmed or retained in their
4 employment, which, in Spanish, is called
5 "ratificación."

6 Please describe this process.

7 A. Yes. There is a confirmation process for
8 the "vocales" that takes place every so often and that
9 is regulated. There is a Supreme Decree that
10 establishes the phases and also the characteristics of
11 this process.

12 This ratification process is in the hands of
13 a specialized commission that is presided by a
14 representative of the Minister, and it is also
15 integrated or it's also composed of two members of the
16 civil society. They are the deans of the--the oldest
17 national and private universities, and I am also part
18 of that commission. I am another member.

19 The confirmation process has several phases.
20 One of them is the assessment of the academic activity
21 during that period. There is another phase that is
22 the assessment: there is a psychological exam as well

1 as an exam on competence.

2 There is also a third phase, which is the
3 quality assessment, and it is carried out by tax,
4 legal or juridical experts who have nothing to do with
5 the Tribunal, and they assess the structure of the
6 Resolutions, three resolutions are chosen by the
7 "vocales" and the other three are chosen randomly in
8 presence of a Notary.

9 So, there is another phase that has to do
10 with the Management Report that is my own
11 responsibility under the Regulations.

12 This Management Report does have some
13 objective portions. These are objective--this is
14 objective data. What do we measure? We measure the
15 performance of the "vocal" given the average; also,
16 what the contribution is to reduce the number of case
17 files that still have to be decided. What is the
18 number of older case files that are decided, given the
19 average of the "vocales"? Also, how much do they
20 participate in the analysis committees to take some of
21 the topics to be considered by the Tribunal's Plenary
22 Chamber?

1 So, this is statistical data; and the
2 conclusion is a description of the result. And,
3 finally, we say the "vocal" is above average, average,
4 below average, and we also highlight or point out the
5 areas that are where that person excels. That is all
6 the Management Report, and, finally there is an
7 interview.

8 Q. When is the next confirmation process?

9 A. Well, there is no specific date right now.

10 We are currently having a competition.
11 There was one in which the candidates did not pass the
12 exam, so we have initiated another process. The
13 Ministerial Resolution was just passed while we are
14 here that has approved the basic terms drafted by the
15 Commission for that competition. That will take four
16 or five months; then the Commission will determine the
17 ratification process and when it will take.

18 Q. Thank you.

19 MS. HIKAWA: No more questions.

20 ARBITRATOR CREMADES: I would like to ask
21 you: Who appoints the President of the Tax Tribunal?

22 THE WITNESS: Well, it is an appointment.

1 It is appointed by Supreme Resolution, a Supreme
2 Resolution by the President and also the Minister of
3 Economy and Finance.

4 ARBITRATOR CREMADES: Who may revoke the
5 appointment? How?

6 THE WITNESS: In principle, it was an
7 appointment based on trust. That is, there could
8 be--if there was no agreement, the position as
9 President could come to an end, but then currently
10 there is also a ratification process, but it hasn't
11 taken place.

12 ARBITRATOR CREMADES: Do you consider that
13 yours is a political position, or are you part of the
14 judiciary?

15 THE WITNESS: No. This is not a political
16 position, and I am not with the judiciary. I am a
17 public servant. I have a career in the public sector.
18 I worked before in the Economy and Finance Ministry.
19 I was part of the Tax Policy Department that now is
20 Public Revenue, I was director of Fiscal Studies and I
21 started early in the Ministry of Finance.

22 ARBITRATOR CREMADES: Thank you very much.

1 PRESIDENT HANEFELD: Thank you very much.

2 Please, go ahead, Claimant.

3 CROSS-EXAMINATION

4 BY MR. PRAGER:

5 Q. Good morning, Ms. Olano. It's a pleasure to
6 see you again. I hope it's mutual.

7 Let me ask you a few questions, and let's
8 just start with a big-picture question.

9 The Tax Tribunal, would you agree, is the
10 last administrative instance when it comes to tax and
11 royalty matters? Is that right?

12 A. Yes. The Tax Tribunal is the last
13 administrative instance. Hence, the Code provides that
14 if there is disagreement with the Resolution issued,
15 there could be a contentious-administrative action
16 before the judiciary.

17 Q. And the Tax Tribunal forms part of the
18 Ministry of Economy and Finance; right?

19 A. Yes. It is part of the executive.

20 Q. And specifically of the Ministry of Economy
21 and Finance; right?

22 A. Yes. But we do have functional

1 independence. Administratively, we report back to the
2 Ministry, but we have functional independence, and
3 that's the way it is established.

4 Q. Well, I just remember from seeing the
5 building in San Isidro which has written "Ministry of
6 Economy and Finance" under "Tax Tribunal."

7 Is that so?

8 A. Clearly it does say "Ministry of Economy and
9 Finance" because, yes, we are part of the Ministry of
10 Economy and Finance, but what I am telling you is
11 that, since it is an Administrative Tribunal, the law
12 establishes that we have functional independence.
13 Right? Yes, we do depend administratively on the
14 Ministry, but there is functional independence.

15 (Overlapping interpretation and speakers.)

16 (Interruption.)

17 (Stenographer clarification.)

18 BY MR. PRAGER:

19 Q. Is it correct that you are serving as the
20 liaison of the Tax Tribunal with the Ministry of
21 Economy and Finance?

22 A. I do not understand the question. What do

1 you mean by "liaison"?

2 Q. Let me be more specific. When it comes to
3 your administrative functions, you are reporting on
4 those matters to the Ministry of Economy and Finance;
5 right?

6 A. Let me see. What is it that we report back
7 to the Ministry of Economy and Finance? We have an
8 operational institutional plan that includes general
9 goals for all of the public sector. That is reported
10 right? That is the only thing that we report to the
11 Ministry, or let's say we request for the IT system,
12 for its update. It is reported to the Ministry of
13 Economy and Finance.

14 Q. When Arbitrator Cremades asked you a
15 question earlier, you replied that your position is
16 one that is called, in Spanish, "cargo de confianza."

17 Do you recall that?

18 A. Yes. I told him that it was a trust
19 position, but that currently there is a confirmation
20 process that has not taken place. That's what I said;
21 right? I'm saying that because I was appointed. Yes,
22 it is true, I was appointed.

1 Q. And "cargo de confianza" also means that the
2 Minister of Economy and Finance could remove you
3 without cause; is that right?

4 A. It could be, but now, as I said before,
5 there is a confirmation process that has not taken
6 place yet, but there is a process that has been
7 established and that has been issued for the
8 President, and also for the administrative "vocales."

9 Q. Well, we are less interested in now. What
10 we are interested in is 2013, for instance.

11 In 2013, your position was one of "cargo de
12 confianza," where the Ministry of Finance had the
13 authority to remove you without cause if she or he
14 deemed so fit?

15 A. Yes, as in any other trust position. Yes.

16 Q. And we were talking about Ms. Úrsula
17 Villanueva, and I'm going to come to her later, but
18 her position was also one of "cargo de confianza";
19 right?

20 A. Yes.

21 Q. So, the same would hold true for her; she
22 was reporting to you as the President of the Tax

1 Tribunal; right?

2 A. Yes. She was the "asesor de Presidencia."
3 Clearly, she depended on me, reported to me. That's
4 the way it was established in the job classification.
5 Yes

6 Q. And since she had a "cargo de confianza,"
7 you could have removed her without cause? You had the
8 authority to remove her without cause; right?

9 A. Yes. It is not what usually happens;
10 right?

11 Q. Yeah, you had the authority to. I know you
12 didn't, but you had the authority to.

13 A. But I don't really understand your question.

14 Q. You directly listed a number of functions
15 that you had as the President of the Tax Tribunal. I
16 wrote them down in Spanish, and I don't want to
17 translate them now, but is it fair to say that none of
18 those functions involves deciding cases before the Tax
19 Tribunal, with the exception of your role as the
20 presiding--as the President, if there is a Plenary
21 Chamber?

22 A. Yes. I totally agree with you, if I

1 understand correctly.

2 So, as President, I do not decide on
3 Resolutions in Chambers. My intervention is at the
4 Plenary Chamber. Yes, there I do see topics. Right?
5 If that's what you are trying to ask me. Is that what
6 you asked me?

7 Q. Yes. Let me put it differently.

8 In your function as the President of the Tax
9 Tribunal, you cannot interfere in the decision of
10 cases that are pending before Chambers; is that right?

11 A. Of course I cannot interfere.

12 Q. So, let's discuss the Royalty Cases of Cerro
13 Verde. Is it correct that the 2006-2007 Royalty Case
14 and the 2008 Royalty Case were the first cases before
15 the Tax Tribunal that involved the new Royalty Law
16 from 199--sorry, from 2004?

17 A. Yes. I think it was one of the very first
18 cases.

19 Q. Well, I think in the SMM Case, you told us
20 they were the first cases that involved the Royalty
21 Law.

22 Is that still your recollection?

1 A. Yes, but--well I think it was one of the
2 first cases. Clearly, I do not have that fresh in my
3 mind, but if it was not the first one, it was one of
4 the first ones; right?

5 Q. And at the time the 2006-'07 and 2008
6 Royalty Cases were pending--well, let me reformulate
7 that.

8 You were aware that the 2006-'07 and the
9 2008 Royalty Cases were pending before the Tax
10 Tribunal?

11 A. Let me see. I do not understand. There is
12 a timing issue here, because I may know that something
13 is pending, when they are ready to be decided. I don't
14 always know what is still pending to be resolved.

15 Q. Fair enough.

16 A. Right?

17 Q. Fair enough. In 2013, you were aware that
18 the 2006-'07 and the 2008 Royalty Cases were pending
19 before the Tax Tribunal?

20 A. In 2013, yes, because I was told.

21 Q. You described the two Royalty Cases of Cerro
22 Verde as "particularly controversial" in your Witness

1 Statement.

2 Do you remember that?

3 A. Yes. Yes, I do recall that.

4 Q. Can you explain to us why you thought that
5 the two Royalty Cases were particularly controversial?

6 A. Let me see. What I recall what I said, the
7 time before, precisely because of the especially
8 controversial issue, is that I was referring to the
9 various case files that have different matters to be
10 resolved. For example, some of them have to do with
11 sector laws, different issues.

12 So, that's what I was saying in particular
13 when I said that they were especially controversial.
14 They could also be called "especially complex," or
15 whatever terminology you deem appropriate or
16 understand better, but that's what I was referring to.

17 There are some complex case files, others
18 that are less complex, and others that are simple;
19 right? Our IT system establishes already the case
20 files that are complex, because whenever they are
21 classified at the level of the Technical Office, the
22 descriptors are attached. The descriptors are

1 attached, and then they determine which ones are
2 complex, which ones are less complex, and which ones
3 are simple. That is what I was referring to.

4 Q. You also knew--well, would it be a fair way
5 of describing the two Royalty Cases as involving large
6 amounts of money, compared to other cases before the
7 Tax Tribunal?

8 A. I do not know the amount exactly, but it
9 could be. Yes, it could be. In general, the most
10 complex cases, yes, they do contain more amounts in
11 arrears.

12 Q. When I asked you whether you knew whether
13 the cases were pending in 2013, you answered that:
14 "Sí, me lo hicieron saber." If "they let me know about
15 it," who would have let you know about those cases?

16 A. No, no, I don't understand. I Don't know if
17 it's the translation, but I don't understand your
18 question.

19 Q. When I asked you about whether you were
20 aware in 2013 that the 2006-'07 and the 2008 Royalty
21 Cases were pending, you said: "If they let me know
22 about it," "Sí, me lo hicieron saber" in Spanish, "Sí,

1 me lo hicieron saber.

2 A. Umm-hmm.

3 Q. And you-

4 A. That's what I just said.

5 Q. And you-I just wanted to follow up on that
6 and ask you: Who is "they"? Who let you know about
7 it?

8 A. The "vocal," the "vocal," the ones who were
9 handling the case.

10 Q. Okay. In your Witness Statement, you also
11 mentioned that there were lists of the important cases
12 pending before the Tax Tribunal that involved large
13 amounts of money.

14 Do you recall whether those two cases were
15 included in one of those lists?

16 A. In which Statement did I say that?

17 Q. In your Second Declaration.

18 A. Could you show me, please?

19 Q. One second. It's in Paragraph 64 of the
20 Second Declaration. Maybe we can put it on the
21 screen.

22 A. Could you put it on?

1 Q. Yeah, we're going to put it on the screen.

2 It's also in your tab--if you look at the
3 small--it's in both of your binders, but probably the
4 more comfortable one is the smaller one. If you look
5 in your Second Statement--

6 (Overlapping interpretation and speakers.)

7 A. No, I prefer to read it.

8 Q. -It is paragraph 64.

9 And I wanted to point your attention to the
10 last sentence, which says in English--let me see
11 whether we have it on--can we also put on the next
12 page? Yeah, like this is good.

13 "Accordingly, the lists were means by which
14 the Tribunal could accelerate the adjudication of
15 certain cases on the Tribunal's list of case files."

16 Do you see that?

17 A. Let's see. In principle, it was a statement
18 by this Mr. Estrada, who spoke of certain lists that
19 were drawn up to rule in favor of SUNAT, and what we
20 have responded is that we don't draw up lists so as to
21 be able to rule in favor of SUNAT. No. We are guided
22 by goals and objectives, and what was presented, well,

1 there was, let's say, a list of cases which spoke of
2 seniority; right? and the amount of the debt.

3 Why? Well, I have said, we are guided by
4 goals and objectives. When we came in in 2010, we had
5 a case backlog that was huge. We had about 30,000
6 cases; right? That's why the Specialized Chambers
7 were begun. The backlog was reduced, right? and we
8 began to see the question of the main controversies,
9 yes.

10 Why? Well, we would--it was being said that
11 we were resolving the easy cases, but not the
12 difficult ones, not the complex cases.

13 So, we saw that there were some big and old
14 cases, and that list that is mentioned speaks of
15 seniority and the amounts in controversy, because it's
16 a case management approach. That's what we're doing.

17 Now, what that gentleman, who has never had
18 a managerial experience--he's a professional who came
19 through the Tribunal--well, there's no major--that's
20 not really right. Obviously I need to look at the
21 statistics of where we stand and manage on that basis.
22 So, we are managing for the main or larger

1 controversies to be resolved as well, but in no way
2 for them to be resolved in one way or another.

3 Moreover, we send a table indicating that
4 the main controversies tended to be more favorable to
5 the taxpayer than to SUNAT; right?

6 The thing is that, when we say that they're
7 especially controversial or especially complex, well,
8 the case files need to be reviewed carefully to make
9 sure that no point is omitted, nothing to be called
10 into question, so that the Decision can be defended,
11 because, at the end of the day, it's going to be
12 challenged, either by the taxpayer or by the
13 Administration.

14 Oftentimes, we've also been questioned by
15 the Administration. They've gone to the judiciary.
16 They've gone even to the Constitutional Tribunal
17 because of Decisions that have not been favorable to
18 the administration, but rather to the taxpayer, right?
19 And so, the situation is the same.

20 Q. You mentioned the goals and the objectives
21 of putting the cases on that list. What are those
22 goals?

1 A. Uh-hum.

2 Q. --and objectives?

3 A. Well, let's see. We have output goals,
4 backlog reduction goals, and also goals when it comes
5 to looking at the main controversies.

6 Why? Well, there are specialized Chambers.
7 Initially, since there were so many cases, we had to
8 set up two Chambers for municipal taxes. They were
9 smaller cases, but they were a huge part of the
10 backlog. And so, that was reduced.

11 Once that's reduced, let's look at the
12 backlog of the heavier cases, and that involved SUNAT.
13 We look at cases that come from municipalities
14 nationwide, cases that come from SUNAT, customs cases
15 as well, and cases from other smaller Administrations.
16 And so, we need to see to it that everything is moving
17 forward.

18 At this time, we have reduced the municipal
19 taxes to a single Chamber, and they're up to date. We
20 are no longer bothered by the backlog. Customs is
21 also up to date, right? So, we are focusing on cases
22 involving SUNAT, and with SUNAT, one has to look at

1 the major cases.

2 In 2010 we saw that major cases were
3 beginning to be resolved, right? And that was also a
4 complaint lodged by the taxpayers, because the
5 taxpayers are saying: "My cases aren't being
6 resolved. The easy ones are being resolved, but
7 you've not gotten to mine."

8 Q. And in your direct, Ms. Olano, you said:
9 "We follow goals and objectives, and, based on that,
10 we assign case records and we also resolve those case
11 records."

12 So, are you saying that you assign case
13 records to Chambers based on those goals and
14 objectives that you just explained?

15 A. Let's see. Let me explain. The assignment
16 is random, right? The cases come in, and they are
17 assigned every fifteen days, except for the urgent
18 ones. There are some cases that have summary terms,
19 much shorter time frames, say, a closing. Those are
20 assigned on a daily basis. Or enforcement case files.

21 What do we call enforcement case files?
22 Well, when it's already gone to the administration, it

1 comes back and one needs to issue a resolution, or it
2 comes from the judicial branch and we need to resolve
3 it in the short time frame that the judicial branch
4 has indicated. Normally, they are assigned on a
5 random basis every fifteen days. That is the
6 assignment.

7 And the assignment, why do I say based on
8 goals and objectives? Well, it goes out based on the
9 Specialized Chambers. There are Chambers for
10 municipal taxes, as I was saying. Now there's one.
11 The Chamber for municipal taxes, for customs taxes,
12 those that look at SUNAT taxes. There are some that
13 look at the Lima Region and the other one that looks
14 at IPCN, which is the main Intendency for National
15 Major Taxpayers, and Lima as well. That's how they
16 are determined, and that's why I was telling you that
17 it's in function of the goals and objectives. Each
18 specialization has a goal and objective, and they're
19 different ones.

20 Q. So, let's move on to the Cerro Verde Royalty
21 Cases. So, there were several Cerro Verde Royalty
22 Cases before the Tribunal. Now, once a Chamber

1 renders the first Decision in one of those cases, is
2 it correct that the other Chambers that are hearing
3 Cerro Verde Royalty Cases have the following choice:
4 They could either follow the same criteria that is set
5 forth in the first Decision, or if the "vocal"
6 disagrees with that criteria, the "vocal ponente,"
7 that "vocal ponente" could request that the case be
8 brought before the Plenary Chamber of the Tax
9 Tribunal.

10 Is that a correct description?

11 A. Yes. Let's see. The Tax Tribunal also has
12 a function of ensuring uniformity of criteria. So,
13 when a Chamber resolves a case, and then another case
14 comes along with the same situation, it will either
15 decide in the same manner or it will not be in
16 agreement with how it was decided. If it's not in
17 agreement with how it was decided, then it has the
18 power to bring it to the Plenary Chamber in order to
19 request a change in criteria. We don't know the
20 outcome, but they do have that power.

21 Was that your question?

22 Q. Yes. Thank you.

1 And the Plenary Chamber is comprised of 33
2 "vocales" and yourself; right?

3 A. At that time, yes. It was 33, plus myself.
4 I am also a member of the Plenary Chamber.

5 (Comments off microphone.)

6 Q. In 2013, right. In 2013, there were 33
7 "vocales" and yourself in the Plenary Chamber; right?

8 A. Yes.

9 Q. And if the Plenary Chamber took a position
10 and took a decision on a particular case, it would
11 then be binding on all subsequent Royalty Cases?

12 A. Yes. If the Plenary Chamber adopts a
13 criterion, it is binding for future cases; right?

14 Q. So, in other words, the first Chamber that
15 would decide the Cerro Verde Royalty Case would have
16 the advantage of deciding it according to its own
17 criteria without having to face that dilemma of having
18 either to adopt a criteria of a previous Chamber or
19 having to put the case in front of the entire Plenary.

20 Is that a correct description?

21 A. It's not exact, well, what you're saying,
22 because actually--well, I would not speak of an

1 advantage. Actually, each "vocal" manages their
2 cases, right? So each one sees at what moment they are
3 going to decide it; right?

4 The ideal thing is that when there are
5 similar cases, that they coordinate; right? But it is
6 not that one has an advantage, obviously. It could be
7 in various situations that a criterion has already
8 been adopted or there might be one that has been
9 adopted in the past, and the "vocal" is not in
10 agreement, and so he brings it to the Plenary Chamber
11 in order to change the criterion because he believes
12 that is called for. And then the Plenary Chamber
13 takes a look at it and they see whether or not they
14 agree with the "vocal" or not. That is what happens.

15 Q. Well, let's take a Chamber that--the Second
16 Chamber that decides a Royalty Case of Cerro Verde.
17 It faces the situation that the first Chamber has
18 rendered a decision that employs certain criteria, and
19 it now can either follow those criteria or it has to
20 go to the Plenary Chamber and has a decision taken by
21 the entire Plenary; right?

22 A. Are you talking hypothetically or about this

1 actual case?

2 Q. I'm talking about the case--hypothetically.
3 Let's take the hypothetical Royalty Case. There are a
4 series of Royalty Cases. The Second Chamber to render
5 a decision already faces a decision by the first
6 Chamber that has certain criteria, so it can either
7 adopt those criteria or it can go to the Plenary
8 Chamber and have the entire Plenary Chamber vote on
9 this issue. But it cannot on its own take different
10 criteria; right?

11 A. It is not correct because independently they
12 make a decision. Let's take the hypothetical; right?
13 A criterion was adopted, and then there's another
14 Chamber--and I can tell you this because I have worked
15 in the Chambers as well--and I am not in agreement
16 with the criterion. The first thing they need to look
17 at is whether they are in agreement or in
18 disagreement, that's the first thing, because they may
19 not be in disagreement necessarily. If there is
20 agreement, then they will adopt the same criterion.
21 If they are in disagreement, then they are going to
22 decide to take it to the Plenary Chamber. That's how

1 it works; right?

2 But the first thing they have to do is see
3 whether they agree or disagree. In a hypothetical
4 case. And in the specific case, here there was no
5 disagreement, and that is why the matter was not taken
6 to the Plenary Chamber.

7 Q. I was talking about the hypothetical. And
8 you just confirmed that a second Chamber cannot
9 take--if they disagreed with the criteria of the
10 first, they cannot, by themselves, issue a resolution
11 with different criteria. They have to take it to the
12 Plenary Chamber; right?

13 A. That's right. Because when it goes to the
14 technical office for dispatch, we need to double-check
15 whether there's any observation that would be
16 conflicting, because, as I say, the Code establishes
17 that it needs to be uniform criteria. So, we make an
18 observation.

19 If there's a conflicting criteria, we in the
20 technical office--when I say "we," it's not me. It's
21 the Technical Office. But the Technical Office makes
22 the observation, I take a look at it, and then it goes

1 to the Chamber. And there the Chamber evaluates and,
2 in any event, if they want to take it to the Plenary,
3 they do so.

4 Q. The first Chamber to render the Decision
5 does not face that situation because it itself--let's
6 assume in our hypothetical there are no preexisting
7 criteria. It itself decides a case, either in favor
8 of SUNAT or in favor of the taxpayer. It sets its own
9 criteria, and whatever those criteria are, it does not
10 have to follow a previous decision, and it also does
11 not have to go to the Plenary Chamber when it renders
12 its decision; right?

13 A. Yes. That's what normally happens. A
14 decision is adopted. It goes through the Technical
15 Office. If there's no observation, then it is issued.

16 Q. Okay. So, let's look what happened
17 specifically in the Cerro Verde Royalty Cases and who
18 got to render the first Decision and who got to render
19 the second Decision. For that, since we are going
20 mention a number of names of "vocales," we have
21 prepared a demonstrative that we put here on the
22 screen and that we can also distribute in hard copy

1 and that shows the two Chambers involved in the
2 2006-'07 and 2008 Cases. So, if you confirm that the
3 2006-'07 Case was pending before Chamber 10; is that
4 correct?

5 A. Yes, it is.

6 Q. And the 2008 Royalty Case was pending before
7 Chamber Number 1; correct?

8 A. Yes.

9 Q. You see here the names of the "vocales"
10 sitting in those Chambers in the year 2013. To the
11 best of your recollection, that's the--does the
12 demonstrative have an accurate representation of the
13 names of the "vocales" that were in those two Chambers
14 in 2013?

15 A. Yes, that's correct.

16 Q. So, in Chamber Number 1, the "vocal," the
17 President of the Chamber and the reporting "vocal,"
18 "vocal ponente," was Ms. Licette Zúñiga Dulanto;
19 right?

20 A. Yes.

21 Q. And in Chamber Number 10, the position of
22 President and reporting "vocal" did not coincide, the

1 President of the Chamber was Mr. Carlos Moreano
2 Valdivia; right?

3 A. Yes.

4 Q. And the "vocal ponente" was Luis Cayo
5 Quispe; right?

6 A. Yes.

7 Q. The 2006-'07 Case was filed in May 2010.
8 Do you recollect that?

9 A. It was filed--I'm sorry? You're saying a
10 session was held?

11 Q. No. Cerro Verde filed the 2006-'07 Case
12 before the Tax Tribunal in May 2010; right?

13 A. I don't actually remember the date of when
14 the appeal came in. Is that what you're talking
15 about, when the appeal came into the Tribunal? I
16 don't remember. What I remember from the last Hearing
17 is that there was an oral hearing before May, so it
18 must have come in before then.

19 Q. So, I represent to you that it was filed on
20 the 12th of May 2010, and that's in Exhibit CE-40 in
21 your Tab 17. We don't have to go there. I just say
22 this--

1 A. Uhhm.

2 Q. --as a reference.

3 The 2008 Royalty Case was filed nine months
4 later on 10th March 2011. That's--and again, I
5 represent it to you, and it's in Exhibit CE-49,
6 Tab 19.

7 You mentioned at the SMM Hearing that
8 Mr. Cayo, who was the "vocal ponente" of Chamber
9 Number 10, requested the file of the Royalty Case in
10 2011; right?

11 A. Yes. According to the information system of
12 the Tribunal, yes.

13 Q. Would you agree with me that when a "vocal
14 ponente" requests a file, she or he typically does so
15 because the "vocal" was to review the file, wanted to
16 review the file?

17 A. I understand that, yes, and that's what I
18 also said. Because--according to the way the system
19 works, "Vocal" Cayo asked for the record in 2011,
20 before it was in the archive to be delivered. That's
21 what it is called. So, normally when they ask for the
22 file it's because they are going to review it. Now,

1 whether or not he reviewed, that I don't know. I have
2 no way of knowing, right?

3 All I have is what the information system
4 says, which is that it was asked for in 2011.

5 Q. And then in--sorry, on 6 March 2013, Chamber
6 Number 10 announced that it would hold an oral
7 hearing; right?

8 A. Well, according to the latest action, I
9 don't recall the dates so well, right? Because the
10 oral hearing was in March, you say, right? It must
11 have been in March, the Parties must have been given
12 notice about it, and there is the date.

13 Q. And we will look it up. It is Exhibit 79 in
14 your Tab 22. It was on the 6th of March that Chamber
15 Number 10 announced that there would be a hearing in
16 the 2006-'07 case on 5th of April.

17 Do you see that?

18 A. Yes. When you say "announced," you're
19 referring to the notice; right? Because that's the
20 notice to the taxpayer. There is no announcement,
21 let's say, public announcement, but rather, notice is
22 given.

1 Q. And would you agree with me that once
2 "vocales" go to an oral hearing, in most cases they
3 would already have a preliminary draft of their
4 decision?

5 A. Let's see. I recall very well what I said
6 the last time, and ideally when there is an oral
7 hearing, there should be a draft at least; right?

8 If there's not a draft, because I have no
9 way of knowing that; right? Then, there is at least an
10 explanation by the "vocal" to the other "vocales,"
11 about the case there's going to be, because there is
12 going to be an oral hearing where one is going to
13 listen to the Parties. And obviously, one goes into
14 the hearing well-informed about what it's all about so
15 as to be able to better understand what the Parties
16 have to say. That is what I said.

17 Q. Now, Chamber Number 1 was the--sorry,
18 Chamber Number 10 was the first one to hold the oral
19 hearing. Is it typical practice of the Tax Tribunal
20 that the Chamber--isn't it the typical practice of the
21 Tax Tribunal that the Chamber that was first seized
22 with a particular case would decide the case first?

1 A. I'm sorry. I don't know what you're
2 referring to.

3 Q. Well, isn't it typically the case that, if a
4 Chamber is first seized with a case, if there are a
5 number of cases, such as in the royalty matters, the
6 Chamber that's first seized with the case would first
7 render the first resolution?

8 A. Let's see. The thing is that there are
9 different Chambers; right? Each Chamber manages, and
10 I have no way of knowing that. Each one determines
11 the errands, the oral hearing, and what they do in
12 their own timeframes. There may be a Chamber that
13 even though there has been an oral hearing, may take
14 more time; right? Or one might take less time. I
15 cannot know that; right? What I said is that
16 normally, or what should be is that in an oral
17 hearing, they already go with a draft or at least they
18 should be familiar with the issue. That is what
19 happens. And I say this based on my experience, for I
20 too have been a "vocal" in a Chamber. That is the
21 situation.

22 Now, what actually happens in reality? That

1 I cannot say. Now, it's not that there is an exact
2 track: "This file entered first, I carry out the oral
3 hearing and I resolve first." That doesn't exist. It
4 depends on how the given "vocal" or the Chamber
5 handles their cases. There are some who work more
6 quickly. There are others who do not work as quickly.
7 So, it depends on them.

8 Q. Ms. Olano, we can agree that the--at least
9 with regard to the 2006-07 Case. That was the case
10 that was first filed of the Royalty Cases, and Chamber
11 Number 10 hearing the case was the first Chamber to
12 schedule an oral hearing for a Royalty Case; right?

13 A. It scheduled the oral hearing, but I don't
14 see how that is relevant. Yes, it did schedule the
15 oral hearing.

16 Q. Okay. So, this scheduled it on March 6.
17 So, let's see what happened with the other case, the
18 2008 Royalty Case.

19 So, in the 2008 Royalty Case, in March--
20 after Chamber Number 10 scheduled the hearing,
21 Ms. Úrsula Villanueva starts working on a resolution
22 for Chamber Number 1; is that correct?

1 A. What's the date that you said?

2 Q. I was saying that after March 6, after
3 Chamber Number 10 scheduled a hearing for the 2006-'07
4 Case, Ms. Úrsula Villanueva starts working on a
5 resolution for the 2008 Case that is pending before
6 Chamber Number 1; right?

7 A. I could not tell you the date. What I can
8 tell you is that she began to work on the case with
9 "Vocal" Zúñiga. The exact date, I don't know.

10 Q. Okay. I'm going to come back to the date.
11 Let me ask you still a few questions about Ms. Úrsula
12 Villanueva.

13 So, I think you already mentioned that she
14 was your advisor. So, if I understand correctly, you
15 had one such advisor, and you had one administrative
16 assistant; right?

17 A. Yes.

18 Q. And Ms. Úrsula Villanueva was your advisor;
19 right?

20 A. Yes.

21 Q. And her function was to assist you in
22 conducting your various functions that you had at the

1 Tax Tribunal?

2 A. Yes. Well, she would issue Technical
3 Reports, she would carry out several tasks in
4 coordination, and during that period, she was in
5 several places, because she was entrusted to the areas
6 that needed her. She was entrusted as a one who
7 resolves complaints (resolutor de queja). She was in
8 charge of the Technical Office when no one else was
9 there, and she also helped in the Chambers when
10 needed.

11 ARBITRATOR TAWIL: Sorry. Mr. Prager, before
12 you follow your line of questions, in order to
13 understand better the chronology. Good morning,
14 Ms. Olano.

15 When was Ms. Villanueva called to work in
16 Chamber 1?

17 THE WITNESS: I don't remember the date so
18 well. I think it must have been in March, which is
19 when the "vocal ponente" and Chamber 1's President,
20 Licette Zúñiga asked for it.

21 ARBITRATOR TAWIL: Is that the date of the
22 email that you brought here, approximately?

1 THE WITNESS: It must be approximately
2 because, as of that date, she was working on the case
3 apparently. I don't remember the exact date.

4 ARBITRATOR TAWIL: And you had assigned
5 Ms. Villanueva to other Chambers?

6 THE WITNESS: She supported different
7 Chambers.

8 ARBITRATOR TAWIL: Had you assigned her to
9 other Chambers in specific cases?

10 THE WITNESS: When other Chambers have asked
11 for my support, yes. When it was required from other
12 areas as well. Because, unfortunately, we were short
13 on personnel.

14 ARBITRATOR TAWIL: I understand that we
15 don't have any document in connection with the request
16 by Ms. Zúñiga or your instruction. You said
17 everything was done verbally?

18 THE WITNESS: No, I don't have an email, no.

19 ARBITRATOR TAWIL: And the cases in which
20 Ms. Villanueva had been involved before—let's see.
21 She was involved before in other cases; right?

22 THE WITNESS: She provided support in other

1 cases. Yes, yes.

2 ARBITRATOR TAWIL: And in those other cases,
3 did she liaise with you in connection with the case
4 files?

5 THE WITNESS: No. She provided support in
6 the Chambers and then she had to work with the "vocal
7 ponente," with the "vocal" she was helping.

8 ARBITRATOR TAWIL: But she knew that she
9 didn't have to have any relationship with you about
10 the case file?

11 THE WITNESS: Yes, she knew that perfectly
12 well.

13 ARBITRATOR TAWIL: And she had done so in
14 other cases?

15 THE WITNESS: Yes, she provided support in
16 other cases.

17 ARBITRATOR TAWIL: Then, how do you explain
18 this email in which she told you "Read the arguments
19 and then we can talk about it."

20 THE WITNESS: I don't know what she was
21 thinking, really. Simply, I think, it was a concern
22 of hers, and that's what I've stated. I don't know

1 exactly what happened to her and why she stated what
2 she stated.

3 ARBITRATOR TAWIL: Did you reprimand her in
4 any way. Like "No, I cannot intervene, you know that
5 that doesn't correspond to me." 'The only thing we saw
6 was your email saying "Okay."

7 THE WITNESS: Yes, because I gave a formal
8 reply, simply as "received," and she knew perfectly
9 well that I am not involved in the cases. She knows
10 that.

11 ARBITRATOR TAWIL: However, she knows that,
12 but she told you: "Read the arguments and we can talk
13 about it," after having intervened in other cases.

14 THE WITNESS: Yes, I cannot answer that,
15 because I do not know what Úrsula Villanueva wanted;
16 right? But I imagine that this was a concern of hers
17 to work on this case file in a proper manner, right?
18 That was entrusted to her.

19 ARBITRATOR TAWIL: Thank you.

20 BY MR. PRAGER:

21 Q. Let me follow up with the questions that
22 Professor Tawil asked.

1 So, first of all, you mentioned that
2 Ms. Úrsula Villanueva was regularly assigned to
3 Chambers to assist as an "*asesor suplente*."

4 You have not presented a single email that
5 would show that Ms. Villanueva was assigned to another
6 Chamber, did you?

7 A. Yes. I have not submitted emails because I
8 have not found emails. These are old emails. So, I
9 can indeed say that she had provided support to other
10 Chambers. I didn't say regularly, but she has
11 supported other Chambers. Yes, when there's a
12 shortage of personnel. In this context, in 2013, we
13 were short on personnel, and in my Statements, I
14 submitted all of the memoranda that showed that we
15 were short about 30 professionals.

16 On this basis, when we were short on
17 personnel and somebody needed support and there was no
18 other professional available, then I had to allocate
19 the professional we had at hand, and more so in a
20 large and complex case because she had that
21 experience; right?

22 Q. Ms. Olano, you had to produce the emails,

1 all your emails, from the relevant time period here,
2 2013, in response to a transparency request, didn't
3 you?

4 A. Yes.

5 Q. So, you had the emails from that time
6 period; right?

7 A. Let's see. The emails that were requested
8 via the transparency request had to do with a long
9 period of time. We have done--well, I say "we" but,
10 finally, it was the General Office of Technology and
11 Information, the one that was asked to help to back up
12 all the information requested and to provide all the
13 emails that they found in the computer. That was asked
14 after a certain time went by. I don't know what may
15 have happened because sometimes they change the
16 computers and they erase them. But, indeed, it was
17 requested to the general IT office to conduct a search
18 on backup information, well, I don't know the
19 technicalities of it all, but they were asked to look
20 for all of the emails on the basis of the transparency
21 request. Because Transparency requested a specific
22 period of time, specific set of addressees and that is

1 what they found and what was provided.

2 Q. And when you wanted to show that
3 Ms. Villanueva was appointed to other Chambers, you
4 produced a couple of emails that show that law clerks
5 from other Chambers were appointed to different
6 Chambers. You found those emails; right? But you did
7 not find any email in your collection which
8 Ms. Villanueva was assigned to any Chamber as an
9 "asesor suplente"?

10 A. Let's see. I showed those emails as an
11 example of the resource management. That's not all
12 the supports that existed. Those were the ones that
13 we were able to find. Those were not the only
14 supports. There were other supports from other
15 Chambers, but I don't have them in email either or I
16 haven't found them. They haven't come out in the
17 search.

18 Q. Ms. Olano, the 2008 Resolution has Úrsula
19 Villanueva's initials on it.

20 If you wanted to show us that Úrsula
21 Villanueva was assigned to other Chambers, you could
22 have given us resolutions that have her initials on

1 it, but you didn't produce a single resolution, other
2 resolution than the 2008 Royalty Case that has Úrsula
3 Villanueva's initials on there, probably because they
4 don't exist; right?

5 A. Let's see. In principle, I have not
6 conducted that search. But, in this case the topic
7 was about the initials, and that's a matter of
8 transparency; right? That she participated there. Not
9 all of the Chambers put their initials there. That
10 depends on the style of each of the Chambers. If you
11 tell me that I have to find resolutions with the
12 initials, well, I didn't even conduct that search. I
13 think, I don't know exactly what you're trying to
14 refer to.

15 Q. Ms. Olano, you wrote in your Second Report
16 several paragraphs on how Ms. Villanueva was assigned
17 to other Chambers. You did, apparently, a diligent
18 search because you came up with other emails, although
19 they don't relate to Úrsula Villanueva. So, you
20 clearly searched. Isn't it the case that you just
21 didn't find any other resolution and any other email
22 that would show that Ms. Úrsula Villanueva was ever

1 appointed as an "asesor suplente" to another Chamber?

2 A. Let's see. If I haven't shown them, it's
3 because I haven't found the emails. These are old
4 emails, as I tell you. And we don't even have there
5 all of the supporting emails from the other law
6 clerks, they are some that we have found. I remember
7 very clearly that she provided support to other
8 chambers. I have not submitted other emails because I
9 haven't found them.

10 Q. Well, there is no evidence of that other
11 than your Statement. You also have not presented a
12 single document that would show that Ms. Zúñiga
13 requested you to have Ms. Villanueva as her "asesor
14 suplente," did you?

15 A. Well, as I said last time, the requests
16 could be telephonic or oral. At the time we were all
17 in person, then I didn't really have to submit emails
18 that I don't even know whether they existed or not.

19 Q. Let's look at--just to confirm, Ms. Olano,
20 you have access to all the resolutions; right?

21 A. Let's see. I do not have access to all of
22 the resolutions. Why? Because once the Chamber hands

1 down its Resolution, when the Resolution is sent out,
2 then it is put into the system, and then it is placed
3 on the web page. That's what happens.

4 Q. So, you testified that as the President of
5 the Tax Tribunal, you don't have access to the
6 resolutions of the Tax Tribunal, Ms. Olano?

7 Is that what you're saying?

8 A. I have access to them after they have
9 been issued. Is that the question?

10 (Overlapping interpretation and speakers.)

11 BY MR. PRAGER:

12 Q. Ms. Olano, I'm not asking you about Tax
13 Tribunal resolutions that are pending right now.

14 We are talking about the past 10 years while
15 Ms.--no, we are talking about the time period in which
16 Ms. Villanueva was your "asesor," during that time
17 period. You have access to the resolutions that were
18 issued during that time period. And sitting here
19 today, can you name us one other resolution that has
20 the initials of Úrsula Villanueva on it?

21 A. No, I don't have that committed to memory to
22 determine whether there's a resolution that bears the

1 initials of Úrsula Villanueva.

2 Q. So, let's look at the email that we have
3 here on the screen. The email is dated March 22nd;
4 right?

5 A. Yes.

6 Q. And that was about more than two weeks after
7 Chamber Number 10 announced that it would have an oral
8 hearing at the beginning of April; right?

9 A. According to the date you have shown me and
10 well, I don't understand about this that was
11 announced. If there is a notice, it is sent to the
12 Parties. It is not a public announcement. It is not
13 that we all know that an oral hearing will come to
14 being. The Party knows it, the taxpayer knows it and
15 the Administration knows it.

16 Q. You would agree with me on 6th of March,
17 Chamber Number 10 notified the Parties that it would
18 hold an oral hearing at the beginning of April; right?

19 A. Umm-hmm.

20 Q. And this email, we can agree that, is more
21 than two weeks after that date; right?

22 A. 22 March. Yes, okay. I'm looking at the

1 email.

2 Q. Can we also agree that on that email there
3 is no mention of Ms. Zúñiga. She is neither copied on
4 the email nor is that email directed to Ms. Zúñiga,
5 the President and "vocal ponente" of Chamber 1; right?

6 A. Not in that email. What else could have
7 happened? If the email was sent to her? I don't know,
8 but it is not in that message.

9 Q. We can agree she's not copied on that
10 message; right?

11 A. Well, not in this message, is what I see on
12 the email. But more--if it was sent later, I can't
13 know that.

14 Q. Ms. Olano, is there any reason we only have
15 your reply and not the original email from Ms. Úrsula
16 Villanueva to you?

17 A. Let's see. As I was explaining to you
18 before, when there was this request for transparency,
19 the request covered quite a long period for emails and
20 certain addressees. And we asked the IT office to
21 provide support, for the IT office to look at the
22 backed-up information and to extract all of the

1 emails. That is what the General IT office did, they
2 extracted all of that and that's what they found.

3 Q. Ms. Olano, you told us last time that you
4 reviewed the emails and you were withholding emails on
5 what you said were for personal information; isn't
6 that right?

7 A. Yes.

8 Q. And Ms. Olano, we have a total of nine
9 emails from you that relate to the 2006-'07 and 2008
10 Royalty Cases. They are all from your outbox except
11 of one.

12 Is there any reason that you did not provide
13 emails from your inbox, with one exception, but only
14 from the outbox? Did you withhold emails that were in
15 the inbox and forgot to check the outbox?

16 A. Let's see. I explain this to you again. As
17 there was an old period of time, who assisted us was
18 someone from the General IT office. Because, of
19 course, I wasn't able to look at all those emails. I
20 did say that, yes, because I was the responsible one.
21 Because I was the one who had been requested. These
22 were my emails. So, I asked for the backup of all my

1 emails, and that is what was found, the email messages
2 that were found in my machine. And what I also said
3 is that this is an old period of time, so the time
4 went by, there have been computer changes, computers
5 erased. I don't know if all of the emails were there,
6 but it was what was found. We have provided what was
7 found.

8 Q. Ms. Olano, can you confirm here again today
9 what you told us at the SMM Hearing, that you were
10 withholding emails that were not produced?

11 A. Health-related is what I said. It was
12 health-related.

13 Q. Ms. Olano, you personally made that
14 selection; right? You determined which emails relate
15 to what you say "health"; right?

16 A. Let's see. When I say that I did it, it is
17 because I was the person responsible for that.
18 Because they were asking for the emails from the
19 President of the Tax Tribunal addressed to the
20 "vocales" and, well, addressed to other addressees,
21 and they did that for a given period of time. But
22 obviously we are talking about a large number of

1 emails. I don't know. The period covered five or
2 six years. Something like that, I don't recall
3 exactly. And then there was a brief period of time
4 for us to provide the information. I couldn't really
5 afford to look at all of these emails. I was
6 responsible; that's why I said "I." But, let's say,
7 that in the transparency requests, you know, it was
8 sent also to the office..

9 Q. Ms. Olano.

10 A. --IT Office.

11 Q. Ms. Olano, I asked you a very specific
12 question. We are going to go on the whole day if your
13 answers aren't more precise. So, try to be more
14 precise. Your counsel can then ask you follow-up
15 questions to elaborate, but we need shorter answers
16 from you.

17 My question was, did you withhold emails
18 that were responsive to the request? Did you or did
19 you not? Did you personally select emails to
20 withhold? Yes or no?

21 A. I did not provide emails related to
22 health-related matters. And as I said last time, I'm

1 not even sure if 100 percent of those health-related
2 emails were not provided.

3 Q. Did you select emails that you were to
4 withhold or not--that were withheld or not? Did you
5 personally select them? That was my question. And I
6 want an answer to that question.

7 A. I selected them with an IT assistant.
8 That's the exact answer. I had done the selection
9 with an IT assistant.

10 (Overlapping interpretation and speakers.)

11 BY MR. PRAGER:

12 Q. Is it a coincidence that all the emails we
13 have from you on these matters, which are not many,
14 that they all come from your outbox except of one?

15 A. I cannot answer that question. I haven't
16 looked if it was in the inbox or outbox. What was
17 found was provided and delivered, and that's that. I
18 cannot say whether this is a coincidence or not. I
19 don't know. I have tried to explain to you in all
20 manners possible; that this happened long ago and that
21 the emails were delivered. And now I explained it to
22 you with more clarity, because when I say that "I

1 delivered," as I speak as the responsible person,
2 well, I delivered those with the assistance of an
3 assistant. Obviously, I cannot do all that search
4 myself.

5 Q. Let's take this concrete email.

6 So, Ms. Olano, what you're telling us is
7 that the email with the attachment that Ms. Villanueva
8 sent you got lost in the course of time, but that your
9 response, which doesn't have the attachment, was still
10 in your outbox.

11 Is that what you're telling us?

12 ARBITRATOR TAWIL: Sorry, could you identify
13 that, maybe, for the record?

14 MR. PRAGER: Yes. I'm talking about
15 Exhibit CE-648, which is the March 22 email.

16 THE WITNESS: Is that the one on the screen?

17 BY MR. PRAGER:

18 Q. Yes. Let me ask the question again.

19 With regard to CE-648, is it your testimony
20 that the email from Ms. Villanueva, which had
21 attachments on it, got lost in the course of time;
22 whereas, your response, without the attachments,

1 happened to still be in your outbox?

2 Is that your testimony, or did you
3 purposefully not submit the first email and forgot
4 about checking your outbox?

5 Which one of the two options is it?

6 A. I state what I already said, that I reviewed
7 all of these email messages with the assistance of a
8 specialized person from the IT Office of the MEF, and
9 that is what was found, and that is what was provided,
10 and that is what I state.

11 Q. So, Ms. Olano, in this email, Ms. Villanueva
12 tells you that she is sending you the arguments of
13 both sides.

14 Do you see that?

15 A. I do.

16 Q. Arguments of both sides here means arguments
17 made by SUNAT and by Cerro Verde in their submissions
18 to the Tax Tribunal in the 2008 Royalty Case; right?

19 A. I assume that that's the case, yes.

20 Q. And Ms. Villanueva also tells you here she's
21 sending you the main clauses of the Stability
22 Agreement; right?

1 A. Yes. That's what the email says.

2 Q. And then she goes on and says, there are
3 good arguments for both sides, but she was leaning in
4 one direction.

5 So, Ms. Villanueva--you surely understood
6 Ms. Villanueva, here, as having assessed the Merits of
7 the 2008 Royalty Case; right?

8 A. She must have. I don't know.

9 Q. And to analyze the arguments of both
10 Parties, Ms. Villanueva must have had the case file in
11 her office; right?

12 A. Probably. Otherwise, how else was she going
13 to provide support to the Chamber.

14 Q. And just to be clear, her office was not at
15 Chamber Number 1; her office was next to yours.
16 Right?

17 Across the aisle.

18 A. The question is if Villanueva's office was
19 across from mine?

20 Q. Yes.

21 A. Yes, it was across from mine.

22 Q. And then she goes on and says: "Please read

1 the arguments when you can, and we can talk about it."

2 Do you see that?

3 A. Yes, I do see that.

4 Q. So, she wanted you to review the arguments.

5 And so, you understood that as her wanting you to
6 review the arguments of the Cerro Verde Case, and to
7 have a conversation with her about it; right?

8 A. Well, I cannot say what she wanted. I am
9 not able to know what she wanted, but what I said is
10 what I said before. For me, it was a concern of hers
11 in order to say that she was doing a good job Nothing
12 else.

13 Q. And in your First Witness Statement, you say
14 that—your response was a solitary "thank you"; right?

15 Do you recall that?

16 A. Yes. Yes, I do recall that.

17 Q. But that's not really her response here,
18 your response here. I mean, what you said is "Okay.
19 Thank you"; right?

20 A. I don't see the difference, really. In my
21 opinion, it was solely a thank you, nothing else.

22 Q. Okay. When you said "okay," it means that

1 you agreed with her suggestion, didn't you?

2 A. That is your presupposition, but, to me, it
3 was simply a formality.

4 Q. Well, Ms. Olano, you didn't tell
5 Ms. Villanueva that it was inappropriate to discuss
6 cases with you, did you?

7 A. As I said, she knew that I did not intervene
8 in cases.

9 Q. Apparently, she did not, because she wrote
10 you that email.

11 So, you didn't—you didn't reply, like:
12 "Úrsula, after 10 years of working in the Tax
13 Tribunal, you should know that you cannot ask me such
14 questions," did you?

15 A. Well, like I said, it was simply a
16 formalistic answer acknowledging the receipt of the
17 email. I received lots of emails every single day, so
18 it was just a formal answer.

19 ARBITRATOR TAWIL: Ms. A question. We do
20 not have the attachments. Do you know what
21 attachments were sent to you by Ms. Villanueva?

22 THE WITNESS: No, 'I don't have the Annexes.

1 ARBITRATOR TAWIL: Did you not find out
2 later on what those attachments were?

3 THE WITNESS: No. I have not found out what
4 those attachments were.

5 ARBITRATOR TAWIL: Thank you.

6 THE WITNESS: Because once the case file is
7 decided, it is sent to the Administration. We no
8 longer have the case file.

9 ARBITRATOR TAWIL: Well, we're talking about
10 before the Resolution is made and after when this was
11 submitted to the Tribunal; right? When it was sent to
12 this Arbitral Tribunal, and we do not have the
13 Annexes. We would be interested to know what those
14 attachments were.

15 THE WITNESS: But I don't have them. I
16 didn't have them. That's why I haven't submitted
17 them.

18 ARBITRATOR TAWIL: Okay. Thank you.

19 BY MR. PRAGER:

20 Q. You didn't tell Ms. Villanueva that she
21 should send that question to Ms. Zúñiga; right?

22 That's not your reply; right?

1 A. Again, I simply provided an acknowledgement,
2 a receipt answer. It was formalistic. She knew very
3 well that she had to talk to the "vocal" Villanueva.
4 And she should had done it like that, because the
5 "vocal" Villanueva is finally the one that had to
6 define the draft with the other two "vocales" that
7 were going to agree or disagree on a certain position.

8 Q. Ms. Olano, apparently she did not know that.
9 You testified that you actually met with
10 Villanueva in response to that email, didn't you?

11 A. Let's see. I do not recall exactly. What I
12 did say is the only thing that may have happened is
13 that I told her to be exhaustive in her answer, which
14 I repeated before, to be exhaustive, to look at both
15 Parties' arguments very well, and to prepare a good
16 draft so that the Tax Tribunal vocales can define, can
17 assess and discuss about the situation.

18 Q. Well, let's see what you said in your First
19 Witness Statement. Let's pull up Paragraph 49.
20 That's in Tab 1, and you can also look at it in your
21 binder. So you said, this email simply indicates that
22 I met with Ms. Villanueva, to recommend to her that

1 she be exhaustive in the research preparation of the
2 legal foundation for the decision in the 2008 Case.

3 Do you see that?

4 A. I do see that.

5 Q. Ms. Olano, you told us that Ms. Villanueva
6 worked already for a long number of years at the Tax
7 Tribunal, that she was, before, a legal clerk, in
8 various Chambers, that she headed the Technical Office
9 of the Tax Tribunal. At that time, she has been
10 working at your--as your "asesor" for a number of
11 years. You think you had to tell Ms. Villanueva that
12 she needs to be exhaustive in her research and prepare
13 the legal foundation for her decision?

14 You're telling us Ms. Villanueva didn't know
15 that, that you needed to tell her that?

16 A. Yes, because this is just a recommendation
17 that I always give. It does not hurt, regardless of
18 how specialized she is. Well, there could be a very
19 good law clerk, but you have to give to them that
20 recommendation still; right? Because these are very
21 large files with different controversies and we have
22 to look at it very carefully, precisely, because we

1 know that once a decision is made, a challenge will be
2 placed, whether the taxpayer or the Administration.
3 So, the resolution has to be well-founded regardless
4 of the position adopted. It has to be well-founded.
5 As I said before--

6 Q. Ms. Olano--I have to wait for the
7 translation.

8 So, Ms. Olano, you testified--and tell me
9 whether you still agree with that. You testified
10 in--at the SMM Arbitration, that Ms. Villanueva had
11 great technical skill and experience.

12 Is that still your view?

13 A. Yes.

14 Q. And you testified that Ms. Villanueva
15 prepared high quality draft resolutions.

16 Is that still your view?

17 A. Let's see. What I have said about her is
18 that she is an "asesor"--a well-prepared professional,
19 right? Who started very young at the Tax Tribunal, and
20 then she went to the private sector. She went to law
21 firms, she worked for other institutions, and came
22 back to the Tax Tribunal. Then, yes, she is a

1 well-prepared professional. That is what I've said.

2 Q. And, yet, you still needed to remind her--or
3 you're telling us that the purpose of the meeting
4 after Ms. Villanueva asked you to discuss with her the
5 Cerro Verde Case, and the arguments of the Parties,
6 your response is that when you met her you told her:
7 "Please draft a thorough decision." Is that still
8 your testimony? Notwithstanding that Ms. Villanueva
9 had all that experience in drafting decisions already,
10 and you described her as being very thorough?

11 Is that what you're telling the Tribunal?

12 A. Yes. Because a recommendation never hurts.
13 Even when you talk to a "vocal," well, I was in the
14 Chamber, and we always knew that. That is a
15 recommendation that never hurts. The fact that she is
16 a specialized "asesor," as I say, it doesn't mean that
17 I cannot make a recommendation that bears in mind all
18 of the items. Otherwise there wouldn't be a
19 resolution, whenever there is, for example, a request
20 to expand or elaborate on the grounds, and, in that
21 case, these are resolved by vocales, who are
22 specialized professionals that have all the

1 experience. So, you cannot tell me to not make a
2 recommendation in that case. Nevertheless, we do get
3 clarification requests, where there is an omitted
4 point that they have to resolve. Even if they are
5 specialized professionals, they miss something, so the
6 recommendation never hurts, in my opinion.

7 Q. Ms. Olano, you didn't tell Ms. Zúñiga that
8 she had to draft a thorough decision, did you?

9 A. Let's see. I didn't tell her she had to
10 draft. She had to support the "vocal" because the
11 draft of the final resolution will be something
12 finally seen by the "vocal ponente." She may prepare
13 a draft. She may analyze the background to support.
14 She may have--if there are two positions, one
15 position, whatever it is, to look for all of the
16 grounds for the "vocales" to be able to discuss and
17 define, but the one that will look at the final draft
18 resolution will be the "vocal ponente." That person
19 will say, yes, or no, follow that path or the other
20 path, because he has to provide support with the other
21 two "vocales," because the ones who decide are the
22 "vocales."

1 Q. Ms. Olano, please keep your answers short.
2 I know you want to speak long, but you have the chance
3 to do it afterwards. Keep the answers short. We need
4 to move on.

5 You also testified that one your obligations
6 was to ensure that Chambers that had similar cases
7 pending coordinate.

8 Do you recall that correctly?

9 A. Yes, that's what they should do.

10 Q. Would you agree with me that in March 2013,
11 while Ms. Villanueva was working on the draft
12 resolution for the 2008 Royalty Case, you did not
13 inform Chamber Number 10 that Ms. Villanueva was
14 working on the draft resolution?

15 A. That was not what I had to do. What I said
16 is that whenever there are similar pending
17 proceedings, the "vocal" is the one that has to do
18 that, not myself. I do not need to participate in
19 this. I am just a liaison. I am told, look, there is
20 another "vocal" who is looking at the same topic, and
21 I may say "Okay. Coordinate." Or I may say, yes,
22 they're looking at the same topic, when I'm told. But

1 I do not need to report to another "vocal" that
2 someone is doing a draft. This corresponds to the
3 "vocal ponente," to the "vocales" that are looking, to
4 the Chambers. They are the ones who coordinate between
5 Chambers.

6 Q. Ms. Olano--

7 QUESTIONS FROM THE TRIBUNAL

8 ARBITRATOR CREMADES: I'd like to ask you,
9 within the Tribunal, there is collegiate work, and
10 therefore it is logical that among the "vocales" and
11 those who participate in decision-making may have some
12 sort of communication because, at the end of the day,
13 there is an action in solidarity.

14 So, my question is, within the Tribunal, are
15 there any rules preventing that type of communication,
16 or, quite the contrary, is it normal?

17 THE WITNESS: Let' see. If I understood
18 correctly, in the chamber--

19 ARBITRATOR CREMADES: Sure.

20 THE WITNESS: --the "vocal ponente" prepares
21 its draft, and clearly discusses this with the
22 "vocales," or explains to the "vocales" on the

1 contents of the draft because, at the end of the day,
2 the three would need to make a decision. A resolution
3 comes to fruition with two votes, at least, with two
4 votes. There could be a dissenting vote, but you need
5 two votes to have a resolution. So, he has to provide
6 support and talk to the other vocales of the Chamber.

7 ARBITRATOR CREMADES: But that is not my
8 question.

9 My question is that as President, you said
10 you have to coordinate even the activity of various
11 Chambers, and to coordinate, you need to have some
12 sort of information from those three "vocales," or one
13 of them, or whoever it is with the President. So,
14 leaving aside this case, in other cases, is this the
15 norm?

16 THE WITNESS: Yes. Sometimes the "vocal"
17 tells me I am looking at a case, and there is another
18 pending case, or sometimes the Technical Office, there
19 are two cases. So, let's say two cases with similar
20 situations. So, whenever we have that, I told them to
21 coordinate with the other vocal, to coordinate with
22 the other Chamber, that it is what they normally do. I

1 am sort of a liaison, a link in between Chambers so
2 that they can coordinate their position, or if
3 something that has to be dealt with the Plenary
4 Chamber. They make the coordination.

5 ARBITRATOR CREMADES: I do not understand
6 the scandal behind the email from Úrsula Villanueva
7 asking you, because Úrsula, at any rate, is advising
8 "Vocal" Zúñiga, and within the Tribunal whether it is
9 the "vocal" or the assistant, it is logical for them
10 to coordinate with the President. This, then, may
11 seem normal to me, doesn't seem to be for the
12 Tribunal. Is it the way it works, or there are some
13 ethical rules that maybe prevent you from doing that?

14 THE WITNESS: Let's say that, usually, there
15 is support staff that coordinates with the Chamber,
16 with the Chamber, with the "vocal ponente" that is
17 looking at the topic. Not with myself. I am not the
18 one that is in charge of decision-making. And, in my
19 opinion--or my opinion would not be valid either
20 because, at the end of the day, you have three who
21 make the Decision, three who will see whether they
22 agree or not. So, that is what usually happens; that

1 is, there is coordination with a "vocal ponente."

2 ARBITRATOR CREMADES: But if there is a
3 complicated case, such as this one, there might be
4 consultation, or they may make some comments because,
5 at the end of the day, the Resolution to be made by
6 the three "vocales" might entail that it is a
7 complicated case, and that they may need some sort of
8 information that is part of the solidarity that the
9 Tribunal may have.

10 Is this normal?

11 THE WITNESS: This is not what we usually
12 see, but whenever there are plenaries, I do
13 participate. Whenever we have a Plenary Chamber, when
14 a "vocal" has something in the case file, or a topic
15 that needs to be taken to the plenary, even though I
16 do not see the case file, I do see the topic that is
17 part of the analysis conditions, and that's how I see
18 the topics, and I offer a position because I also
19 sign. So, here, whoever signs has the responsibility.

20 I also sign and I share my opinion, whether
21 I am in favor, against, or whatever it is. In the
22 Resolutions the ones signing are the ones that have

1 the responsibility for the Resolution. The law clerk
2 does not have the responsibility because the "vocales"
3 are the ones who will be defending that Resolution,
4 not only in the case of an amparo but also in the case
5 of a contentious administrative proceeding, so in some
6 cases the "vocales" need to defend the Resolution.

7 ARBITRATOR CREMADES: Thank you very much.

8 PRESIDENT HANEFELD: May I ask a follow-up
9 question to Dr. Cremades. It also concerns the
10 assignment of Ms. Villanueva and the email that we now
11 already saw.

12 Do I understand correctly that your
13 testimony was that there was a lack of personnel, you
14 were lacking, more or less, 30 people, so you had to
15 substitute for law clerks?

16 THE WITNESS: Yes. In 2013, we didn't have
17 staff. Even in my Statements, you will see all the
18 memoranda sent to the office, the General Office of
19 the Ministry, requesting hirings, new hire-ups. So,
20 in that context, without staff, I was asked for
21 support. And other times we have also had support
22 from other areas.

1 So, if there is a shortage of staff, it is
2 my function to manage those resources, and I need to
3 send an individual wherever that person needs to be.
4 In this case it was Úrsula Villanueva, to send Úrsula
5 to that Chamber. And at some point, there was also a
6 Complaint Office that had been recently created, and
7 there wasn't anyone to make decisions as to the
8 complaints presented. So, she also had to go to that
9 office or also go to the Technical Office.

10 So, let's say that it would have been ideal
11 to have full staff, but whenever there is--that is not
12 the case, the law clerks get moved around to the areas
13 based on the needs, and I think that that is part of
14 my function.

15 PRESIDENT HANEFELD: At that point in time,
16 in 2013, had Chamber Number 10 a law clerk, or were
17 they also short of staff?

18 THE WITNESS: They did not request a law
19 clerk. Whoever the "vocal ponentes" were the ones who
20 requested the law clerk. So, based on my examples,
21 the one I found, there were some "vocales" that
22 requested support, and sometimes we sent from the

1 Technical Office whenever support staff was needed,
2 but it had to be requested. I had to be told.

3 If they didn't ask me, it was because it
4 wasn't necessary, and I do not participate in each
5 Chamber. Each Chamber sees their own management, but
6 if I am asked for support, I try to see what I do and
7 how I manage that.

8 PRESIDENT HANEFELD: But had Chamber 10 a
9 law clerk, or do you not remember? I heard you saying
10 they had not asked you for a substitute law clerk, but
11 had they one or not?

12 THE WITNESS: They had law clerks. I do not
13 know whether they required someone with a higher
14 level, but they did have law clerks.

15 PRESIDENT HANEFELD: Thank you. Understood.

16 And when you assigned Ms. Villanueva, who
17 was your personal law clerk, to a Chamber, this meant
18 you, then, missed her assistance; right?

19 I mean, the day has only 24 hours, so it was
20 a work allocation decision from your end?

21 THE WITNESS: Yes. As I said before, I did
22 not only send her there. I also had to send her to

1 the Complaint Office whenever it was necessary, to the
2 Technical Office. Right now, I do not have an "asesor
3 de Presidencia." So, in some situations I do need to
4 look into the issues, and I get the support of the
5 Technical Office, but whenever it was necessary we had
6 to do it. There was no other option.

7 PRESIDENT HANEFELD: And did you discuss
8 with her for, example, the time budget, how much time
9 she was supposed to be--spend on this assignment, and
10 the other assignment, and also on your specific
11 assignments, or was she, then, simply assigned to
12 Chamber 1 for this Decision, without any further
13 instructions on time budgets and duration, whatever?

14 THE WITNESS: She was appointed to
15 Dr. Zúñiga, Chamber 1, full-time. Once she finished
16 and once the "vocal" didn't need her, she would go
17 back to the position of "asesor de Presidencia."

18 PRESIDENT HANEFELD: This I do not yet fully
19 understand. I saw in Paragraph 46 of your Witness
20 Statement that Ms. Villanueva was assigned by you also
21 to other cases in Chamber 1. So, how was her time
22 period at this Chamber 1 limited, or how--because you

1 lost her, so to say, as your right hand. And I just
2 want to better understand, for how long you lost her,
3 or wanted to lose her, or gave her permission to not
4 to work for you.

5 THE WITNESS: I lost her many times because
6 we also had a shortage of staff also in other areas.
7 So, whenever she was not available, I resorted to the
8 Technical Office. There is a Technical Office that
9 also helps me.

10 So, whenever she was not available, I got
11 the support of the Technical Office, but whenever she
12 worked there, she was there in the Chamber, and then
13 she was also the one addressing complaints in the
14 specific Complaint Office, and right now I do not have
15 an "asesor" that is, for example, and I get the
16 support of the Technical Office. That's what I do.

17 PRESIDENT HANEFELD: Thank you.

18 ARBITRATOR TAWIL: I have a few questions in
19 connection with this. Is there any type of record of
20 the assignments of the law clerks?

21 THE WITNESS: In the case of the law clerks,
22 there is no record because, in general, they have a

1 temporary regime that is called "CAS." C-A-S.
2 Currently, they have a better regime. But they are
3 hired, and based on the number of law clerks in the
4 various Chambers, they are assigned. But law clerks
5 may move from one Chamber to the other one whenever
6 needed. For example, in some case we also had the
7 Complaint Office, that--and we established shifts.

8 ARBITRATOR TAWIL: But how do you know how
9 many law clerks you have, if there is no centralized
10 record? How do you know, for example, if there are
11 four in Chamber 3, five in Chamber 2?

12 THE WITNESS: It is not--I guess I didn't
13 understand your question when you said the record.

14 ARBITRATOR TAWIL: Whenever the Chambers are
15 put together--well, you are saying that the Chambers
16 are put together, but law clerks are moved from one
17 Chamber to the other one. There needs to be some sort
18 of record as to see who is where.

19 THE WITNESS: Yes. There is a composition
20 of those Chambers with the vocales and the
21 rapporteurs. In the case of law clerks, we see how
22 they are doing and we appoint them. The

1 administrative "vocal" sends the Chamber composition
2 with the law clerks assigned, and I understood you
3 whether, when you talked about a "record," whether
4 there was a written document.

5 ARBITRATOR TAWIL: But this is related to
6 the same thing. For example, I was Secretary of the
7 Supreme Court of Justice, which was something similar
8 when I was young. At that point, there were permanent
9 allocations. There were no substitute allocations, as
10 you are saying, but if the Justices wanted to know the
11 Secretary working for each "vocal," that was written
12 somewhere.

13 So, how could you know who was working with
14 these substitute law clerks?

15 THE WITNESS: The law clerks are established
16 in each Chamber.

17 ARBITRATOR TAWIL: But the substitute law
18 clerks?

19 THE WITNESS: The substitute law clerks are
20 assigned just to provide some support at that
21 specific point in time, and then they go back.

22 ARBITRATOR TAWIL: So, those are not

1 recorded anywhere, formally; correct?

2 THE WITNESS: I do not understand
3 "formally." Unless they stay for a long time, because
4 there is no law clerk and there would be--

5 ARBITRATOR TAWIL: So, there is no record
6 that would allow us to know that the substitute law
7 clerk would be assigned to Chamber 3 or 4 on Day 3.
8 That there is no way that we could see?

9 THE WITNESS: Not with substitute law
10 clerks, you wouldn't be able to know that.

11 ARBITRATOR TAWIL: You also said that--and
12 this was striking--that you could have required a
13 higher level law clerk. Are there different level law
14 clerks? So, these permanent law clerks are not
15 enough? Is that what you are saying? What do you
16 mean a "higher-level law clerk," and who
17 determines--for example, I understand that you thought
18 that Ms. Villanueva was a higher level law clerk; is
19 that correct?

20 THE WITNESS: The Chambers have junior law
21 clerks, the ones that have less experience. You have
22 analysts and you have specialists. Specialists are

1 Experts. So, that's what I was trying to imply.
2 Those that are of a higher level. What I said is
3 that, in that case, it wasn't requested.

4 ARBITRATOR TAWIL: And Dr. Villanueva was
5 the highest--was the law clerk that provided the
6 highest possible level; is that correct?

7 THE WITNESS: Úrsula Villanueva was an
8 asesor de Presidencia. She was also an expert
9 asesora. So, she had seen--she had been junior, an
10 analyst, and she was now asesora de Presidencia.

11 ARBITRATOR TAWIL: So, in your opinion, it
12 was the logical person to be assigned to big cases and
13 she could be moving from Chamber to Chamber?

14 THE WITNESS: Yes, she could have been if it
15 was necessary.

16 ARBITRATOR TAWIL: You also said in--to
17 answer a question by the President, that she worked
18 with Ms. Zúñiga for a while. I understand that they
19 worked together on some case files. I understood that
20 she had only been assigned to this case file, but, in
21 answering a question by the President, I understood
22 that she was in the Chamber for some time.

1 Could you please clarify whether she only
2 worked on Cerro Verde, as I think I read it in
3 writing? Or did she also work in other--on other
4 files with Dr. Zúñiga, during that period?

5 THE WITNESS: To be honest, I do not recall
6 whether there was any other case file, but based
7 on--but Dr. Zúñiga requested it for this case file.

8 ARBITRATOR TAWIL: So, it is not that she
9 worked at that Chamber for some time.

10 THE WITNESS: Only for some time until the
11 case file was completed. What I wanted to tell you is
12 that during that time she was in the Chamber, and then
13 she went back to the President's Office.

14 ARBITRATOR CREMADES: President Olano, I
15 have a question, and please answer by going back to
16 your First Statement, that you were only going to say
17 the truth and nothing but the truth.

18 In this Arbitration--or in this file, case
19 file, we are discussing whether there was a change in
20 the legal, in tax criteria based on political
21 pressure. We even heard that SUNAT in Arequipa could
22 assess or not, and it was discussed--and this is

1 something that was discussed yesterday--addressed not
2 only the specific case but also the global situation
3 in Arequipa.

4 My question is very specific. Would you
5 please tell us whether you have received any sort of
6 call, link, political pressure in your professional
7 activity? And that Law Clerk Villanueva may be
8 considered as a "parachuter," that you launched to the
9 Chamber, along the same lines of political pressure to
10 resolve the issue one way or the other?

11 THE WITNESS: Let me answer. I have not had
12 any political pressure. Here, there was only a
13 Resolution based on the technical and legal issue. At
14 any time, did we have any political pressure of any
15 type.

16 ARBITRATOR CREMADES: Are you aware of
17 having received any call, any intervention by someone
18 that may move the decision one way or the other?

19 THE WITNESS: No. I have not received any
20 phone calls, and I can say that throughout my tenure
21 as President, the Ministers were very respectful of
22 the independence, of the operational independence of

1 the Tribunal. I never received any call regarding the
2 resolution of a case.

3 PRESIDENT HANEFELD: Many thanks. Please go
4 ahead.

5 (Comments off microphone.)

6 PRESIDENT HANEFELD: Yes, we can take a
7 break. 15 minutes.

8 (Brief recess.)

9 PRESIDENT HANEFELD: Then let us continue.

10 MR. PRAGER: Thank you, Madam President.

11 BY MR. PRAGER:

12 Q. Ms. Olano, you said that Ms. Villanueva had
13 a "cargo de confianza," she reported directly to you,
14 and you had the authority to remove her without cause,
15 but with regard to law clerks, law clerks did not have
16 a "cargo de confianza," so they only could be laid off
17 if there was cause, and they do not report directly to
18 you, but to the President of the Chamber; is that
19 correct?

20 A. No, it's not correct, and I can explain why.

21 Most of the professionals that are on the
22 Tax Tribunal are under the CAS Regime. Up until last

1 year, there was a change in the CAS Regime, which now
2 means that they are permanent, but before the CAS,
3 hiring regime would last six months or one year. So,
4 you could simply not renew the contract without
5 expression of cause, so it's not true that it was only
6 for cause or anything of the sort. It was the same
7 situation.

8 And, as regarding the CAS personnel, the one
9 who sends the documentation to hire and to determine
10 whether or not there's a renewal is me, obviously with
11 the opinion of the Chamber.

12 Now, I don't know all of the law clerks. I
13 only know them by reference. So, I ask the Chambers
14 for their opinions to determine whether or not to
15 renew the Contract.

16 Q. And we can agree that the law clerks did not
17 have a "cargo de confianza"; correct?

18 A. It was not a position of trust. It was
19 different, because the position of Úrsula Villanueva
20 is a directing or managerial position.

21 Q. Well, you said before that Úrsula had a
22 "cargo de confianza"; right? You still--

1 A. Yes. She had a management position.

2 Q. And that was a "cargo de confianza"; right?

3 You had the authority to remove her without cause.

4 That's what you testified.

5 Is that still your testimony? Right?

6 A. Yes. What I say is that she was designated.

7 Like any other designation, it's a position of trust.

8 Q. Ms. Olano, you could have assigned, instead

9 of Ms. Villanueva, another law clerk to assist

10 Chamber 1, couldn't you?

11 You provided us with emails in which you
12 showed that, when other Chambers had a staff shortage,
13 you appointed law clerks from other Chambers, and you
14 could have done that with Chamber 1 as well, couldn't
15 you?

16 A. Now, let's see. As I explained, in
17 principle, the scenario was one of a shortage of
18 personnel, and my Witness Statements include all the
19 memoranda.

20 Second, Ms. Zúñiga was the one who sought
21 the support, the support of Úrsula Villanueva. So,
22 when they asked me for her support--I don't have the

1 emails, it's true, but on several occasions, I've been
2 asked to provide Úrsula Villanueva's support because
3 of her experience, precisely. So, it was not possible
4 in every situation.

5 In that case, "Vocal" Zúñiga asked for
6 Villanueva's support because she wanted to make sure
7 her case file would be well-reviewed, or she wanted
8 her to take a look at it.

9 Q. You could have--you could have told her that
10 she should take the--borrow the law clerk of
11 Chamber 10 that were hearing a similar case. They
12 were hearing another Royalty Case; they already worked
13 on it.

14 You could have told her that the clerk of
15 Chamber 10 could assist her instead of Ms. Villanueva,
16 couldn't you?

17 A. No, because I was not involved in the
18 Chambers. I would not go and remove a law clerk from
19 one Chamber to another. That would have to be
20 coordinated with the "vocales."

21 At the Complaint Office, which was created
22 in 2013, there was a system of terms which was

1 discussed with the Presidents of the Chambers, that
2 every so often a law clerk would go to that Chamber.
3 But it's not that I can take away a law clerk from one
4 Chamber and put them in another one. There has to be
5 coordination.

6 Q. Well, you testified in Paragraph 9 of your
7 First--Second Witness Statement that it was a
8 well-established practice that when staff is needed,
9 the Chamber requests the assistance, and that you
10 assigned them law clerks from other Chambers, and you
11 provided us two emails in which you appointed law
12 clerks from other Chambers.

13 You could have done the same thing in this
14 case, couldn't you?

15 A. The examples that I showed you, which had to
16 do with resource management, yes, in effect, I showed
17 you the issue of the complaints office, where there
18 were terms.

19 And the other one was the law clerk in the
20 Technical Office. Obviously, I had to talk to the
21 Director of the Technical Office for her to be able to
22 lend her law clerk.

1 Q. Did you ask Chamber 10 whether they could
2 lend their law clerk for Chamber 1? You didn't;
3 right?

4 A. I did not do so because I had no reason to
5 do so. I don't go into the Chambers and ask whether a
6 law clerk can be placed on loan. I don't even know
7 quite what they are doing.

8 Q. Ms. Olano, you kept on repeating that you
9 assigned Ms. Villanueva several times to Chamber 1 or
10 to other Chambers.

11 Again, you have not found a single
12 Resolution that bears at the end the initials of
13 Úrsula Villanueva in order to prove that point?

14 A. Well, I already answered.

15 Q. So, let's come back to the point where we
16 left it.

17 So, we said Chamber 10 had scheduled at the
18 beginning of March a Hearing for the beginning of
19 April; on 23rd of March you had that email exchange
20 with Ms. Villanueva. And I followed up with the
21 question that, in that time period in March, you did
22 not inform Chamber 10 that Ms. Villanueva was not

1 working on the case. And let me show you that part of
2 the Transcript from the SMM Hearing where we talked
3 about your functions of coordinating.

4 That is Tab 3, CE-1139.

5 And we don't have the right page. I'm
6 sorry. I have it here as 1769, 2-6. That's in the
7 English version. And in the Spanish, 1841, 6-11.
8 And, it's Line 2-6 in the English and in Spanish
9 Line 6-11.

10 And you said: "Yes, what I said was that,
11 yes, I do coordinate among the Chambers when they're
12 looking at similar cases, precisely so that they can
13 either reach agreement or see whether it's a matter
14 that's going to have to go to the Plenary Chamber."

15 Do you see that?

16 A. Yes.

17 Q. Is that still your testimony?

18 A. Yes.

19 Q. And--in the time period, again, until--in
20 the time period of March 20--what are we in?--2013,
21 you did not contact Chamber Number 10 to tell them
22 that Ms. Villanueva is working on the draft resolution

1 for Chamber Number 1, did you?

2 A. Yes, but I already explained that I don't
3 have an obligation to inform anyone about that matter.
4 I didn't have any reason to know. I do--I am a link
5 I coordinate when they tell me "I have a case file and
6 someone else is looking at it." But it's not that I
7 need to be looking so closely and saying: "Look, you
8 coordinate with this." That I don't do.

9 Q. And you're not aware that anyone else
10 contacted Chamber 10 to tell them that Úrsula
11 Villanueva is working on a draft, are you?

12 A. I don't know. I don't who has communicated
13 or if there's been any communication.

14 Q. So, in April, at the beginning of April,
15 Chamber 10 holds the oral hearing, and we now go to
16 May, May 21. Okay?

17 On May 21, Chamber Number 1 passes the
18 Resolution that Ms. Villanueva drafted; right?

19 A. Let's see. As I have explained to you on
20 several occasions, I can't decide that they adopted
21 what was drafted by Úrsula Villanueva, because Úrsula
22 Villanueva was providing support.

1 The final draft, I don't know who did it,
2 because it had to be looked at by the vocal Zúñiga.
3 So, I cannot know that, I can't affirm that.

4 Q. But you do recall--I mean, we can show it to
5 you. It's in Tab CE-80--it's Exhibit CE-83, Tab 20.

6 But you do recall that on the 21st of
7 May 2013, Chamber Number 1 passed a Resolution in the
8 2008 Case; right?

9 A. Yes, you have the date of the session. In
10 effect, what I can say is that on 21 May, as per the
11 date of the Resolution, the case was taken up in
12 Chamber 1.

13 Q. And that means that at that date, Chamber
14 Number 1 approved the Resolution; is that correct?
15 They had a session in which they voted to approve that
16 Resolution; correct?

17 A. Yes, that's right.

18 Q. And at that point in time, before they
19 approved the Resolution, Chamber Number 1 did not have
20 a copy of the draft resolution; correct?

21 A. Let' s see.

22 Q. Sorry. What did I say? Sorry. I'll

1 restate my question.

2 So, before Chamber Number 1 approved this
3 Resolution, Chamber Number 10 had not received a draft
4 of that Resolution; correct?

5 A. I cannot say what I don't have personal
6 knowledge of. The only thing is that there are some
7 emails, and what I can say is what is said there.

8 Q. Well, we worked through it in the last
9 Hearing.

10 Let me show you an email that Mr. Moreano
11 wrote on the 28th at 10:05 in the morning. That's in
12 Tab 6, CE-650.

13 That's an email from that day, May 22; he
14 wrote it at 10:05 p.m.

15 Just to recall, again, Mr. Moreano was the
16 President of Chamber Number 10; right?

17 A. Yes, vocal Moreano was President of Chamber
18 10.

19 Q. So, he wrote at 10:00 in the morning--where
20 is that--is this a question--that's the wrong email, I
21 think. That's from the next day. That's the 21st of
22 May, the email. CE-650.

1 Here we have it. That's the second one from
2 here.

3 He writes: "Zoraida, a question regarding
4 the Cerro Verde file. We were informed that Úrsula
5 Villanueva made a draft that was returned to
6 Chamber Number 1. Dr. Cayo tells me that he will
7 coordinate with Licette, since we have the same
8 subject matter."

9 Do you see that?

10 A. Yes, I see it.

11 Q. So, it's at that time on Tuesday, March 21
12 that Mr. Moreano finds out--he says "we were
13 informed"--that Ms. Úrsula Villanueva had made a
14 draft; correct?

15 May--sorry. May 21.

16 A. Well, what you have there was that, at that
17 time, he wrote that email, and I answered saying, "I
18 spoke with Licette and she told me she already
19 coordinated." That's what was my answer to him.

20 Q. Right. And Mr. Moreano at that point in
21 time informs you that he just heard that Ms. Úrsula
22 Villanueva made a draft and that Mr. Cayo will

1 coordinate with Licette, will in the future, in future
2 tense; right?

3 A. Of course, he speaks in the future tense,
4 and the "vocal" from the Chamber 1 speaks in the past
5 tense.

6 Q. Well, you write the email at 10:47 a.m.--so,
7 apparently Mr.--it will be reasonable to infer that
8 Mr. Cayo had what he called the coordination between
9 10:05 and 10:47; right?

10 A. Well, you are speculating, because here
11 there is simply an email that indicates that "Vocal"
12 Moreano, he says that he recently found out and that
13 he's going to coordinate.

14 So, I asked "Vocal" Zúñiga, who said that
15 she already coordinated with the "vocal ponente,"
16 because normally one coordinates with the "vocal
17 ponente."

18 Now you are speculating that, in the
19 interim, he's coordinated. Well, that I don't know.

20 Q. Ms. Olano, you were not present at that
21 coordination; right?

22 A. No.

1 Q. And the following day Mr. Moreano sent you
2 another email. That's Tab 13, CE-992. That's an
3 email from the 22nd of May. He writes it at 11:00 in
4 the morning. And he writes to you: "Zoraida, that
5 coordination was done by Luis Cayo"--the 'vocal
6 ponente'--"with Licette because I told him to call
7 her, since we found out extra-officially that Úrsula
8 Villanueva had already delivered the draft, and that
9 Chamber Number 1 was going to take up the Cerro Verde
10 Case file yesterday. Chamber Number 1 did not
11 previously inform us that it was going to meet
12 yesterday morning, let alone hand us its draft to
13 coordinate, which only reason us today"--that's
14 May 22, the day after the Resolution was approved--"in
15 which I find out that the Chamber 1 case file was
16 taken up yesterday morning. With all due respect, I
17 don't think that was the right thing to do."

18 Do you see that?

19 A. Yes, I see it. That's why I immediately
20 forwarded the email to the President of Chamber 1,
21 Ms. Zúñiga, to see what had happened, because I didn't
22 understand.

1 And then she answers, saying that, yes, she
2 had spoken with "Vocal" Cayo and had said that they
3 were in agreement, and they had left it that she was
4 going to send the draft after the session.

5 Q. Well, yes, she spoke with him after
6 Mr. Moreano told him to call Licette because they just
7 had found out the day before that Úrsula Villanueva
8 had already delivered a draft; right? That's what he
9 says here. Any--

10 MS. HIKAWA: I'm sorry to interrupt.

11 The email that she's referring to below is
12 not translated into the English translation. Could
13 you read it into the record so it can be translated
14 for everyone else?

15 MR. PRAGER: You can do that on redirect, if
16 you want.

17 BY MR. PRAGER:

18 Q. Mr. Moreano here says Chamber Number 10
19 found out yesterday that Úrsula Villanueva had a
20 draft; he told Mr. Cayo to call; they had that--what
21 you call the coordination, and the draft reached him
22 only this morning.

1 So, he received--he received the draft of
2 the Resolution only after it had been passed; right?

3 A. Let's see. That is what the vocal Moreano
4 says, and the vocal Zúñiga indicates something
5 different, that she had already coordinated things
6 with the "vocal ponente," and that she was told that
7 all the "vocales" were in agreement and that the draft
8 was going to be sent after the session. They had
9 agreed on that.

10 Q. Ms. Olano, the email that you mentioned from
11 Ms. Zúñiga, let's take--let's take a look at it
12 because Mr. Moreano replies to that email, he replies
13 to Ms. Zúñiga's email. Ms. Zúñiga said: "Zoraida.
14 According to my conversation with Luis Cayo before
15 this session, they were in agreement with confirming
16 things, and we thought that the terms of the decision
17 were quite clear and that they would not bring about
18 any discussion. And so, we said that after the
19 session, we are going to send a copy of the draft to
20 coordinate any kind of adjustment, which I said
21 yesterday immediately after the session. I'm sorry
22 that this brought about some discomfort, but that was

1 not intentional."

2 So, she confirms here that she--

3 (Overlapping interpretation and speakers.)

4 (Interruption.)

5 (Stenographer clarification.)

6 BY MR. PRAGER:

7 Q. --So, she confirms that the draft of the
8 resolution was only sent after the session; correct?

9 A. Yes.

10 Q. And Mr. Moreano then replies to that email
11 and clarifies. He says, wait a second, that
12 coordination was done because I told Luis Cayo to call
13 her, Ms. Zúñiga, who is the President of
14 Chamber Number 1, since we found out extra-officially
15 that Úrsula Villanueva had already delivered the draft
16 and that Chamber Number 1 was to take up the file
17 yesterday. Chamber Number 1 did not previously inform
18 us. So, he clarifies here. He clarifies here that
19 the call took only place the day before and that he
20 actually did not receive the file after on May 21st,
21 after the session, but he only received it this
22 morning; right?

1 So, he corrects Ms. Zúñiga. Isn't that what
2 he says?

3 A. Let's see. I'm not sure whether he's
4 correcting or not. There is two assertions here. The
5 truth is, that Mr. Moreano is nowhere here saying that
6 he is not in agreement with the draft. He says he is
7 uncomfortable with a formal matter, but what
8 Ms. Zúñiga did was coordinate things with the "vocal
9 ponente;" that's what she says. And she also says
10 that Mr. Cayo, who was the "ponente" seeing the case
11 file, said that the other "vocales" were in agreement.

12 Now, how the final draft of the resolution
13 is, that's something different. They said after the
14 session as it was their agreement.

15 Q. Ms. Olano, what happened here is that
16 Mr. Moreano and Chamber Number 10, they held an oral
17 hearing, they had a draft prepared of the Resolution.
18 They suddenly find out that actually Úrsula Villanueva
19 had drafted a decision in the 2009 Case, and that that
20 resolution was actually voted on and they only
21 received the draft after that resolution. That's what
22 happened; right?

1 A. No, you are speculating that there was a
2 prior resolution. I cannot assert that because I
3 don't know that. He never said here that he had a
4 draft. He was not the "ponente," Cayo was the
5 "ponente."

6 Q. Ms. Olano, you testified today that any
7 diligent Chamber that goes into a Hearing has a draft
8 prepared or has, at a minimum, carefully thought about
9 the issue.

10 Since that hearing, a month and a half had
11 passed. You're telling me that they didn't have a
12 draft.

13 Do you know that?

14 A. I'm not saying that they had a draft or that
15 they didn't have a draft. Because, I cannot assert
16 something that I have no personal knowledge of. What
17 I said is that the ideal would be that, but if there
18 is no draft, then discussions are had amongst the
19 "vocales" because they are going to go to an oral
20 hearing. They should have knowledge of the matter when
21 they're going to an oral hearing, because, obviously,
22 they are going to be listening to the Parties and they

1 maybe have to ask questions; right? So, you can't go
2 there without knowing what's it about.

3 So, I cannot know whether they had it or
4 not. Moreover, you are speculating that there was a
5 draft and there was a draft that said something that
6 was different. That's your speculation. That's where
7 you are imagining it.

8 Q. Ms. Olano--Ms. Olano--you just testified
9 that you don't know whether they had a draft or not.
10 You do not know that they did not have a draft, do
11 you?

12 A. I do not know. I do not know whether they
13 had or they didn't have a draft. I have spoken
14 hypothetically.

15 Q. Ms. Olano, Chamber Number 10 had the file
16 since 2010. You testified that Mr. Cayo, who's the
17 reporting judge, got the file in 2011. They had the
18 oral hearing at the beginning of April, and you
19 testified that--in Spanish: "Ideally, when there is
20 an oral hearing, there must be at least a draft."

21 Another month and a half have passed.
22 Chamber Number 1 clearly had a draft ready, and that

1 is why Mr. Moreano was so upset with. Chamber Number
2 10 had at least a draft ready, and that's why
3 Mr. Moreano was so upset when he wrote the email.
4 Isn't that the case?

5 A. That is not true, sir. At least I cannot
6 assert what you are imagining. Again, what I said is
7 that generally when there is an oral hearing, and I
8 cannot say whether there was or there was not a draft,
9 well, the ideal thing would be for a pre-draft to
10 exist. If there is not, at least the "vocal" that has
11 the case file has to let the other two "vocales" know
12 what it's about. So, when they hear the Parties, they
13 know what the case is about. This is the only thing I
14 have said. If there's a pre-draft or a draft, well, if
15 there was one there or not, I cannot assert that.
16 That is your imagination.

17 If Moreano, who was not the "ponente"--I
18 don't know why he would be upset for not having the
19 draft. He was not the "ponente." There was another
20 "vocal" that was the "ponente." And he said that he
21 had spoken to them. And you're saying that the *vocal*
22 *presidente* that did not have the file had a different

1 draft and he was bothered by that. That's what you
2 are saying. But that's your imagination.

3 I cannot know that and I cannot assert that.
4 It would be strange to me that the President of the
5 Chamber be so upset and that he has a draft, when the
6 one who handles the draft is the "ponente," who has to
7 provide support before the other two "vocales."

8 Q. Ms. Olano--

9 QUESTIONS FROM THE TRIBUNAL

10 ARBITRATOR TAWIL: Mr. Moreano also voted.
11 He also signed and he wanted to know what was in
12 there?

13 THE WITNESS: Yes. He voted, yes. I
14 understand that, but the one that explains the draft
15 is the "ponente." I look at what Counsel has said.
16 He assumes that the "vocal ponente" had a draft and
17 that he was upset because it was another draft in
18 there. I am not able to know those things. The
19 presiding "vocal," who was not the "ponente" had
20 another draft at hand, but generally the "vocal
21 ponente" generally is the one that coordinates things.

22 ARBITRATOR TAWIL: So, there were two

1 Chambers with a similar case of two different periods,
2 and they were deciding at the same time. Apparently
3 the Chamber called the oral hearing, and there was a
4 law clerk there, and then the Resolution was made by
5 Chamber 1.

6 THE WITNESS: What we are not taking into
7 account is what Mr. Cayo says. The draft includes the
8 Decision. What I've said here and in other Hearings
9 is that the "vocales" in the Chamber surely knew about
10 the matter because if there was an oral report that
11 took place two months before, then they knew what this
12 was about. And according to Ms. Zúñiga, Cayo had told
13 her that they agreed. So, the language includes the
14 decision made.

15 Perhaps he was upset formally: Why didn't
16 you give me the draft before, because I wanted to
17 correct something here or there? Perhaps he was just
18 formally upset, but not substantially upset.

19 ARBITRATOR TAWIL: What it says here is that
20 they were coordinating, but Moreano hadn't seen the
21 draft apparently and that the draft was sent to him
22 when the Decision was already made.

1 THE WITNESS: But Cayo was the "vocal
2 ponente," and he said that the "vocales" were in
3 agreement, and that is included in that email. And he
4 tells Zúñiga that there was agreement. At no time did
5 Moreano say, I disagree. We had another draft.
6 Nowhere in the email it says that. He expresses that
7 he is upset, as presiding "vocal" you should have
8 coordinated this with me as well, there was no
9 coordination, but nothing else. I cannot assert that
10 there was something else different from that.

11 BY MR. PRAGER:

12 Q. So, Ms. Olano, the Chamber 10, now is
13 suddenly put in front of the following dilemma: It
14 either has to accept the criteria of the Decision that
15 Chamber 1 had just rendered without letting them know,
16 or it can go to the Plenary Chamber if it disagreed
17 with that criteria. Isn't that the case?

18 A. Well, if Chamber 1 has already held
19 sessions, then Chamber 10 had the option, if it
20 disagreed, if the three "vocales" disagreed, and also
21 the "ponente" was in disagreement, to go to the
22 plenary session to ask for a change in criteria, or at

1 least to express their disagreement. If I am so
2 mortified because I had another position, I can show
3 my discrepancy. That resolution was rendered without
4 any dissenting vote. Mr. Moreano was a "vocal" that
5 usually submitted dissenting votes in resolutions in
6 the Plenary Chamber. So, if he wanted to show his
7 disagreement, he could have rendered a dissenting
8 vote.

9 Q. You said that the Royalty Cases should all
10 be decided according to the same criteria, wasn't it?

11 A. It's not only my position is. It's what the
12 Tax Code says. There is uniformity of criteria, so if
13 there is a criteria that the Tribunal has, the next
14 one has to be decided in a similar manner. If there
15 is disagreement, this has to go to the Plenary
16 Chamber, and the criteria has to be changed, and the
17 "vocales" will decide whether it will be changed or
18 not.

19 Q. Ms. Olano, your position was not that the
20 Plenary Chamber should decide what the right criteria
21 was. Your position was that once a first Decision in
22 a Royalty Case came out, which was the 2008 Royalty

1 Case decision, that all the other Royalty Cases should
2 follow that criteria of the Chamber 1 Decision, wasn't
3 it?

4 A. Sir. I insist; it is not that that is my
5 position. That is what the Code provides. According
6 to that, if there's a certain criteria in the
7 Tribunal, the next case has to follow that criteria,
8 otherwise there will be a conflicting decision
9 observation and this has to be taken up to the Plenary
10 Chamber.

11 Now, if there's a disagreement, nothing
12 prevents you from taking this to the Plenary Chamber.
13 There are no impediments.

14 ARBITRATOR TAWIL: And in the Plenary
15 Chamber you intervene and you are the one that directs
16 the Plenary; right?

17 THE WITNESS: Yes. I am one more member
18 with vote.

19 ARBITRATOR TAWIL: And you direct the
20 Plenary Chamber?

21 THE WITNESS: Yes, I direct the Plenary
22 Chamber. That's in the Code.

1 BY MR. PRAGER:

2 Q. Well, Ms. Olano, on the 24th of May, which
3 is two days after you received the email from
4 Mr. Moreano, you arranged for a meeting with "Vocal"
5 Cayo from Chamber Number 10, and with Ms. Zúñiga from
6 Chamber 1; right?

7 A. Yes.

8 Q. And you testified that the purpose of the
9 meeting was for you to coordinate between the two
10 Chambers; right?

11 A. Yes.

12 Q. What was there to coordinate given that
13 Chamber Number 1 already had voted on its resolution?
14 That coordination came too late, wasn't it?

15 A. No. We had to see what had happened. As
16 you've explained on the emails, what Mr. Moreano
17 said--and there is another email in which Ms. Zúñiga
18 says something different, so I wanted to know what had
19 happened. That is why vocal Cayo also informed that
20 the "vocales" were in agreement. That is why I said
21 to you that he was upset only in form. It is not that
22 there was a disagreement. I wanted to know what had

1 happened. There were two *vocales presidentes* and one
2 said A and the other one said B. So, I wanted to know
3 what had happened in connection with the coordination.

4 Q. Ms. Olano, after you held that meeting,
5 which was on a Friday, the following Monday, the 27th
6 of May, the Tax Tribunal notified the 2008 Decision to
7 SUNAT, and three days later, on the 30th of May,
8 Chamber Number 10 votes on its 2006-2007 Royalty Case
9 Resolution.

10 Do you recall that?

11 A. Let's see. The exact dates, I'm not sure.
12 But, let's say, once the Decision is rendered, it goes
13 to the Technical Office. If there are no objections,
14 it follows the procedure, and back then--now things
15 are different, the notices are given electronically--
16 because of an agreement with SUNAT, two resolutions
17 were sent to SUNAT in order to notify the taxpayer.

18 (Overlapping interpretation and speakers.)

19 BY MR. PRAGER:

20 Q. And I will show you now a demonstrative that
21 compares the 2008 Resolution of Chamber Number 1 with
22 the 2006-'07 Resolution that was rendered by

1 Chamber Number 10-

2 MS. HIKAWA: I'm sorry.

3 MR. PRAGER: --few days after your meeting.

4 MS. HIKAWA: I'm sorry. This isn't cited in
5 her Witness Statements.

6 MR. PRAGER: I'm sorry. This--the whole
7 Witness Statement is about the 2006-'07 and 2008
8 Cases.

9 MS. HIKAWA: No, it's not. She did not
10 decide either of those Cases, and she wasn't involved
11 in the drafting of the Resolution--

12 (Overlapping speakers.)

13 MR. PRAGER: The whole Witness Statement is
14 about the process of how those Resolutions came about.

15 MS. HIKAWA: And we have one of the
16 "vocales" from Chamber 10 who was involved--

17 (Overlapping speakers.)

18 MR. PRAGER: You can ask him. You can ask
19 him questions.

20 BY MR. PRAGER:

21 Q. Ms. Olano--

22 MS. HIKAWA: It's outside the scope of her

1 testimony.

2 (Comments off microphone.)

3 PRESIDENT HANEFELD: Please go ahead.

4 BY MR. PRAGER:

5 (Comments off microphone.)

6 Q. Ms. Olano, you see here the text in black
7 without underlining is identical in the 2008
8 Resolution and the 2006-'07 Resolution.

9 Do you see that?

10 A. Yes.

11 Q. You can feel free to take a look at the
12 actual Resolution.

13 You would agree with me that the vast
14 majority of the text between the 2006-'07, 2008
15 resolution is identical?

16 A. Let's see. I think that in the last Hearing
17 I also said that if the cases were similar and there
18 were similar arguments, obviously the Resolutions will
19 look alike. Or is it that the appeals submitted by
20 the taxpayer were different, and the arguments were
21 different. Were the arguments by the Tax Authorities
22 different? No, they were similar. That's what I

1 understand. Normally, what happens in similar cases is
2 that the arguments are similar as well.

3 (Overlapping interpretation and speakers.)

4 BY MR. PRAGER:

5 Q. Ms. Olano, this cannot possibly be the
6 Resolution that Chamber Number 10 had drafted without
7 coordinating previously with Chamber Number 1. This
8 is the Resolution that Chamber Number 1 received on
9 May 22 from Chamber Number 1, with some amendments?

10 A. That is your statement, not mine. I'm not
11 going to qualify these Resolutions. Because,
12 ultimately, what's important is the discussion and the
13 Agreement. The drafting really shows in evidence as
14 the Agreement. There are arguments—because right
15 there you say they do this in conformity, they do this
16 in conformity with the Regulations. And the other is
17 not alleging the same thing? So, because these are
18 similar texts, there must be similarities, but this
19 does not impact the substance of the matter.

20 Q. Ms. Olano, the discussion about adopting
21 this text took place at your Friday meeting on
22 24th May 2013, that let Chamber Number 10 to adopt the

1 draft that Úrsula had prepared for Chamber Number 1.

2 Isn't that the case?

3 A. No. I don't know.

4 MR. PRAGER: Thank you. I don't have any
5 further questions.

6 QUESTIONS FROM THE TRIBUNAL

7 PRESIDENT HANEFELD: Before we continue with
8 questions from the Respondent, in redirect, I would
9 like to better understand one aspect that you have
10 mentioned earlier. You mentioned some transparency
11 requests, as to which you produced emails or,
12 according to Claimant, was old email.

13 Can you explain to us who made this
14 transparency request and when?

15 THE WITNESS: Yes. Well, there are some
16 transparency procedures that have to do with access to
17 information by the public. Then, any individual can
18 submit a request. In this case, there were several
19 requests by Cerro Verde and some others that were not
20 Cerro Verde, but they asked for a number of emails.
21 Emails that covered long periods. If memory serves, I
22 think first period was from 2010 to 2015, then from

1 2016 to 2020, something like that.

2 They asked for emails from the President to
3 the "vocales," to the Technical Office, to different
4 addressees. Then, we're talking about a large number
5 of emails. I wasn't the only one asked to provide
6 emails, others were as well, and also other documents
7 that were asked according to a request for
8 transparency.

9 So, as it was a large number of documents,
10 and old emails, we asked the IT Office of the Ministry
11 to provide support so that they could look for in the
12 backup for those old emails that sometimes you don't
13 see.

14 They provided to me an assistant, and with
15 the assistant, we were able to determine--well, the
16 assistant extracted all the backup of those emails,
17 and I told him, look for the word "health" and take
18 everything out that has to do with "health."

19 Because this is a private matter. Sometimes
20 I received medical certificates and things like that
21 that I didn't want to make public, because nobody had
22 to find out about that. And, finally, a large number

1 of emails with a lot of information was what was left.
2 And this was, I think, sent out via a link. That is
3 handled by a different office. We sent this to the
4 office, and the office sends this to the interested
5 Party.

6 PRESIDENT HANEFELD: And do you remember
7 when these requests were made?

8 THE WITNESS: In a number of years.

9 PRESIDENT HANEFELD: Was it in '19 or '20?

10 THE WITNESS: 2018, 2020. We have had
11 requests in a number of years. I don't remember the
12 dates exactly.

13 PRESIDENT HANEFELD: And you say you had
14 requests in a number of years? So, but not only
15 related to Cerro Verde, but also related to other
16 taxation proceedings?

17 THE WITNESS: Well, we got a number of
18 requests under the transparency regulations. In that
19 specific case, we were asked to provide emails. Other
20 documents were also requested from us under the
21 transparency rules. I remember that Cerro Verde,
22 well, there were specific requests in connection with

1 Cerro Verde, and also there were other requests made
2 by people who I didn't know, that were related to
3 Cerro Verde, but they also asked for emails.

4 PRESIDENT HANEFELD: So, in Perú, and if a
5 taxpayer has questions as to the irregularity or
6 regularity of the proceedings within the Tax Tribunal,
7 would he or should be able to file such a request
8 under the transparency rules right away, or now--when
9 is such a request founded?

10 What does the Applicant needs to establish?

11 THE WITNESS: There is also a procedure to
12 provide complaints before the Tax Tribunal. There are
13 complaints against the Tax Administrations and against
14 the Tax Tribunals. Those complaints are presented,
15 and they are dealt with by the Ombudsman's Office for
16 the taxpayer.

17 PRESIDENT HANEFELD: And is there some sort
18 of time bar for complaints or for such a request for
19 transparency, or can the taxpayer come whenever he or
20 she considers it appropriate?

21 THE WITNESS: In connection with
22 transparency, things are different. This has to do

1 with access to information. Anybody can ask for any
2 piece of information. We were asked to provide
3 information about the IT system and how it works. We
4 have been asked to provide the procedures manual, all
5 of the memorandums that we have issued.

6 We have asked for all documentary and email
7 information, and we are obligated to provide that
8 information. There is a special Office of the
9 Ministry that deals with transparency requests. The
10 requests are sent to us and then we act accordingly.

11 In connection with the complaints against
12 the Tax Tribunal, well, I don't remember if there is
13 some kind of time bar, but no complaints can be placed
14 against the Resolution itself because you can then go
15 to the Courts. Because, if you don't agree with the
16 Resolution, at the administrative level, then--you
17 then go to the Courts.

18 If there is a procedural matter that wants
19 to be pointed out, then that could be part of the
20 complaint. I don't know. Perhaps the responsibility
21 of officials could be something that could be the
22 subject matter of a request. These are different

1 processes that could have taken place.

2 PRESIDENT HANEFELD: And
3 my final question is, since when do
4 these transparency rule, this access to
5 information law exists in Perú?

6 If you don't know, you don't know.

7 THE WITNESS: 2003 or '04. I don't remember
8 the date.

9 PRESIDENT HANEFELD: So, they were already
10 existing at the time.

11 (Overlapping interpretation and speakers.)

12 (Interruption.)

13 PRESIDENT HANEFELD: So, in any event, these
14 transparency rules already existed at the time the
15 Chamber 1 and Chamber 10 Resolutions were passed?

16 THE WITNESS: Yes, I think so.

17 PRESIDENT HANEFELD: So, if one had doubts
18 on the regularity of the proceedings, one could have
19 submitted a request for existent information already
20 at that time?

21 THE WITNESS: Yes. The only thing that
22 couldn't have been given back then were the draft

1 Resolution or something that was still being looked
2 at and in process to be resolved. That couldn't
3 happen. Once the process ends, then, yes, that
4 information can be provided.

5 PRESIDENT HANEFELD: Thank you.

6 MS. HIKAWA: If I could just have one minute
7 to confer with my colleagues, then I'll let you know.

8 (Pause.)

9 MS. HIKAWA: Madam President, just to
10 clarify, you had asked about a request for
11 transparency, and there is on the record an
12 Exhibit CE-1092 dated February 10, 2021, which is
13 titled "SMCV Request for Access to Information," just
14 for the record.

15 PRESIDENT HANEFELD: Exactly. It is dated
16 2021.

17 MS. HIKAWA: Umm-hmm, and we have no
18 redirect questions.

19 PRESIDENT HANEFELD: Does the Claimant have
20 follow-up questions to the Tribunal's questions?

21 MR. PRAGER: No follow-up questions.

22 Thank you.

1 PRESIDENT HANEFELD: Ms. Olano, the Tribunal
2 has also no further questions, so you are released,
3 with thanks, as a Witness. Thank you.

4 THE WITNESS: Thank you very much.

5 (Witness steps down.)

6 PRESIDENT HANEFELD: Would the Parties agree
7 that this is a good time for a lunch break, or do we
8 want to continue with the next witness?

9 MR. PRAGER: I think it is probably a good
10 time for a lunch break.

11 PRESIDENT HANEFELD: Okay. Then we will
12 have a lunch break for 40 minutes, which means that we
13 will see us again at 1:15.

14 (Whereupon, at 12:34 p.m., the Hearing was
15 adjourned until 1:15 p.m., the same day.)

16 AFTERNOON SESSION

17 PRESIDENT HANEFELD: Welcome back, and good
18 afternoon, Mr. Sarmiento.

19 JORGE ORLANDO SARMIENTO DÍAZ,

20 RESPONDENT'S WITNESS, CALLED

21 PRESIDENT HANEFELD: You have been named as
22 a Witness in this Arbitration.

1 To introduce the Panel briefly, on my left
2 is Professor Tawil; on my right, Dr. Cremades. My
3 name is Inka Hanefeld. I'm the presiding arbitrator.

4 As a Witness in these proceedings, you have
5 to read out a Declaration under Article 35(5) of the
6 ICSID Arbitration Rules. Can you please be so kind to
7 read the Declaration out to us?

8 THE WITNESS: Thank you.

9 Witness Statement: I solemnly declare, upon
10 my honor and conscience, that I shall speak the truth,
11 the whole truth, and nothing but the truth.

12 PRESIDENT HANEFELD: Thank you.

13 And then let us turn to your Witness
14 Statement.

15 Do you have your Witness Statement, RWS-15,
16 in front of you?

17 THE WITNESS: No.

18 PRESIDENT HANEFELD: Yes? Do you have it,
19 or do you need it? Maybe it will be helpful. It will
20 be handed over by the Respondent's Counsel.

21 (Comments off microphone.)

22 PRESIDENT HANEFELD: Just to get a look at

1 your Witness Statement, can you confirm that this is
2 your Witness Statement and that it corresponds to your
3 recollection?

4 Or let us kindly know if there is anything
5 to amend or to correct.

6 THE WITNESS: Yes, it is my Statement.

7 PRESIDENT HANEFELD: Anything to add or to
8 correct?

9 THE WITNESS: No.

10 PRESIDENT HANEFELD: Okay. Then we will
11 turn now to the Respondent's Counsel for a brief
12 direct examination.

13 DIRECT EXAMINATION

14 BY MS. HIKAWA:

15 Q. Thank you. Good afternoon, Mr. Sarmiento.

16 A. Good afternoon.

17 Q. Your Witness Statement, is it based on your
18 personal knowledge and experience?

19 A. Yes.

20 Q. Please describe your educational background.

21 A. I am an attorney. I graduated from Lima
22 Perú University with a master's degree from the

1 University of Barcelona, and I became a "vocal" in
2 2010 of the Tax Tribunal. In this 2023, I've been
3 there for 13 years as a "vocal."

4 Q. Please describe the process of deliberation
5 by which a Chamber resolves a case that is before the
6 Tax Tribunal.

7 A. As you just mentioned, it is a deliberation
8 process. Since it initiates with knowledge about the
9 case filed by the "vocal ponente," who is the one that
10 reviews the case file and points out the arguments and
11 the controversial issues, as well as the arguments by
12 the Parties, and then a draft is prepared. That can be
13 done just by the "vocal" or with the help of a law
14 clerk. Then, this draft will be communicated to the
15 other two "vocales." - Three vocales that make up the
16 Chamber to carry out an exhaustive analysis, and also
17 to see whether on the day of the Hearing we fully
18 agree on the draft.

19 And at some times, as we saw in this
20 particular case, at Chamber 10, the deliberation
21 process starts much earlier; for example, in our case,
22 with the oral hearing. The oral hearing was carried

1 out two months before the date of the Session, and, as
2 part of this hearing, we had the Administration and
3 the taxpayer, and they presented their arguments, and
4 also the rules and regulations that they deemed
5 applicable, and we could see what the controversial
6 issues were, and from that moment onwards we could
7 have a clear idea as to what would be the sense, the
8 meaning behind the Resolution that we would issue.

9 Finally, after the whole process, we reach
10 the session day. And in the case of Chamber 10, we
11 all agreed that that is how we were going to issue our
12 Resolution. So, after a brief conversation, we would
13 reach an agreement.

14 Q. According to Claimant in this case,
15 Chamber 10's Resolution in Cerro Verde's Appeal of
16 SUNAT's Resolution on the 2006-'07 Royalty Assessments
17 is almost identical to Chamber 1's Resolution in Cerro
18 Verde's Appeal of the 2008 Royalty Assessments, and
19 that that suggests that there was no deliberation on
20 the part of Chamber 10.

21 What is your opinion?

22 A. It should be stated that there is a

1 universal legal principle that we clearly apply at the
2 Tax Court. That is the predictability. -According to
3 this principle of predictability or precedent.

4 If there is a resolution that resolves the
5 case of a taxpayer on a controversial issue, and it
6 turns out that there is the same controversial issue
7 and the same taxpayer in another case, by application
8 of the principle, the second resolution should be the
9 same as the first one. It is the principle of the
10 case law and predictability, and it wouldn't be
11 strange that the second one is similar.

12 But I should also mention that, at the Tax
13 Tribunal, in spite of this previous case, we could
14 decide differently, because if the "vocales" thought
15 that the case law was not the actual interpretation or
16 solution to the problem, we could present this for the
17 consideration of all of the "vocales" as part of the
18 Plenary Chamber.

19 But this was not the case. We all agreed
20 with the previous case law. But even though this
21 could have been a copy-and-paste, which it was not, at
22 Chamber 10, since the oral hearing, we had some

1 reasoning that we thought was relevant to this case in
2 particular and that were not applied to the Resolution
3 of Chamber 1, some ideas that were only applied to the
4 Resolution of Chamber 10.

5 Just to mention one among many that we considered in
6 the Chamber. For example, we have the topic of the
7 final product. The final product in the investment
8 project that was stabilized by Cerro Verde was
9 something that is known as copper cathodes.

10 This product, Copper cathodes is the
11 production after a chemical procedure or process that
12 is known as leaching, and this is what was provided
13 for under the Stability Agreement, production and
14 leaching of copper cathodes. But later on there was a
15 new draft, and this new draft had a different product
16 that was copper concentrates, with a lower purity and
17 a different metal, molybdenum, and this process
18 through which they obtained the new product was not
19 the chemical procedure called leaching, but it was a
20 physical procedure called concentration through
21 crashing and also floating of the minerals.

22 So, for us, this is one among many elements

1 that are important to be taken into account which make
2 different our resolution from Chamber 1's Resolution,
3 and also that led us to this Decision.

4 (Comments off microphone.)

5 Q. In your Witness Statement, you explain that
6 Chamber 10 independently deliberated in the 2006-2007
7 Case, and its Resolution is not a copy of Chamber 1's
8 Resolution.

9 Claimant has put on the record a comparison
10 of the two Resolutions, and if you could, please, with
11 reference to that comparison, explain some examples
12 that show your independent deliberation.

13 And we will put it on the screen for you.

14 A. Okay.

15 Q. Thank you.

16 A. Very well. And just to recall--and I will
17 speak slower--our Resolution from Chamber 10 is not
18 the same to Chamber 1's Resolution because we have
19 seen several elements that are different from Chamber
20 1's, which have been logical to us to reach that
21 solution and that--or that Resolution, and this is
22 what we see here.

1 This is the comparison between--the
2 comparison of the Resolutions in Chamber 1 and
3 Chamber 10, our Chamber.

4 For example, at Page 1, I see in blue what
5 would be the new text included by Chamber 10 instead
6 of Chamber 1. So, I see three lines in the first
7 paragraph which mention three issues that were not
8 addressed at all in the Resolution by Chamber 1.
9 These are violations by the taxpayer that are thereby
10 mentioned in connection with Tax Code's article 177-1,
11 176-1, and article 10.2 of the special royalty law.

12 This was not addressed in the Resolution of
13 Chamber 1, only in Chamber 10 Resolution. Clearly,
14 there is not a copy-and-paste action. Otherwise, we
15 wouldn't have looked at these aspects.

16 If we could look at Page 15.

17 If we look at Page 15, we could see that
18 some paragraphs are identical, and the identical
19 paragraphs have to do with the arguments presented by
20 the taxpayer, which are the same in the draft
21 resolutions by Chambers 1 and 10.

22 So, the arguments by the Parties are exactly

1 the same.

2 ARBITRATOR TAWIL: So, the ones that do not
3 have changes are the same arguments, but it is a
4 copy-and-paste - then, the drafting is identical;
5 correct?

6 THE WITNESS: Yes, it could not be
7 otherwise, clearly, because the arguments are the
8 same.

9 ARBITRATOR TAWIL: But the drafting of the
10 Tribunal is identical. Is that copy-and-paste because
11 the arguments are identical?

12 THE WITNESS: No. The copy and pasting is
13 only if all the Resolution is copy and pasted.

14 ARBITRATOR TAWIL: Doctor, but if the
15 drafting is exactly the same, there are no two
16 Tribunals--no two persons that draft identically. So,
17 I'm asking you: in those parts, you copy-and-pasted,
18 and you only introduced changes where it is different;
19 correct?

20 THE WITNESS: Yes, of course. Those
21 paragraphs where you see no modification are identical
22 to the ones of Chamber 1.

1 ARBITRATOR TAWIL: So, that is
2 copy-and-paste?

3 THE WITNESS: Yes, that is copy-and-paste.

4 I was telling you that the logic we worked
5 with in Chamber 10 was different, different starting
6 with the first paragraph that I showed you on the
7 first page, and it was identical in those paragraphs
8 that you just mentioned, and also it is the same
9 regarding the legal rules and regulations in the
10 drafting of the Stability Agreement. There couldn't
11 be any difference. It is the same Stability Agreement
12 from the very first to the last word of the paragraph.
13 It should be the same. There can be a
14 change--changes.

15 So, for example, Page 15. At Page 15, we
16 can see--this is Page 15. If we can look at Page 15.

17 Here we see an argument that was completely
18 new for Chamber 10, and that is the
19 interpretation--restrictive interpretation.
20 Restrictive interpretation is applied to special rules
21 and regulations, exceptional rules and regulations,
22 such as the one conferring benefits, such as in the

1 case instant. In these cases, according to the
2 national doctrine - in the footnote of the same page,
3 you see one of the relevant authors in national
4 doctrine who indicates that in these cases, you should
5 adopt a restrictive interpretation that is to be
6 applied only to cases if there is no doubt. Whenever
7 there is doubt, the benefit rule should not be
8 applied.

9 This is a new topic that was not in
10 Chamber 1--in the resolution of Chamber 1; rather, in
11 the Resolution of Chamber 10. And if we move on to
12 Page 32, at Page 32 we have a whole paragraph that is
13 completely new, and this completely new paragraph,
14 that is our own reasoning, the reasoning of
15 Chamber 10, is trying to explain that there was then
16 another mining company that also had a stabilized
17 mining project. This different mining company, Minera
18 Yanacocha, had --as was the case with Cerro Verde--an
19 Economic-Administrative Unit, and within that
20 Economic-Administrative Unit there were two or more
21 Concessions, and this Minera Yanacocha had two
22 Concessions within this Economic-Administrative Unit,

1 yes? And each of these two Concessions had two
2 Stability Regimes that were different for each of
3 them. Then, as part of that Economic-Administrative
4 Unit, there were at least four different Stability
5 Regimes.

6 In our opinion, it was a logic that was
7 attempting to show that the argument by the taxpayer
8 was not correct because for the taxpayer in a
9 Economic-Administrative Unit, if one stability was
10 approved, it applied to the entire
11 Economic-Administrative Unit.

12 It is not consistent with what we are saying
13 here, which was a confirmation of what had already
14 been decided by the administrative authorities and
15 also by the Tax Administration, and also the way it
16 was done with other mines.

17 I think that this is enough to explain that.

18 (Overlapping interpretation and speakers.)

19 (Interruption.)

20 (Stenographer clarification.)

21 BY MS. HIKAWA:

22 Q. As a "vocal," you are subject to a

1 confirmation process--in Spanish, the
2 "ratificación"--which we understand is led by a
3 commission of which President Olano is a member.

4 Does that affect your independence when
5 resolving a case at the Tax Tribunal or your testimony
6 in this case?

7 A. No, it doesn't. At that time, 2013, there
8 was no confirmation process pending. Ultimately, it
9 happened in 2018. And at this time, as far as I know,
10 there is no ratification process.

11 And I would also say that Ms. Olano is one
12 of four members, as I understand it, who make up that
13 Commission. She doesn't chair it, either. And these
14 members act as established by the law through
15 objective indicators regarding the efficiency of the
16 Tribunals during the years we have been working. So,
17 there is no sort of influence at all.

18 Q. After you submitted your Witness Statements,
19 Claimant introduced to the record a Resolution of the
20 Tax Tribunal from 2018 in the case of the mining
21 company Tintaya.

22 You were "vocal ponente" in that case.

1 Could you please briefly explain that
2 Resolution, which we'll put on the screen for you? It
3 is CA-446.

4 A. Of course. If you would be so kind as to
5 turn to Page 5.

6 At Page 5, one finds the discussion that is
7 relevant for our case, which is the issue of the
8 Economic-Administrative Units, as one can see.

9 Now, this is just four paragraphs. There's
10 no analysis set forth there about the
11 Economic-Administrative Units. The analysis there is
12 for a case in which there are being two stabilized
13 investment projects, and one has profit and the other
14 has losses. The issue is whether one could offset the
15 profit on one side with the loss on the other, the
16 idea being that each investment project has to
17 calculate their Income Tax separately. That is what
18 is at issue.

19 Nonetheless, there being
20 Economic-Administrative Units, the relevant thing is
21 in the antecedent which is indicated practically in
22 the last paragraph, and this is the background of a

1 Resolution of 2013 where, by chance, I also
2 participated, and where there is an analysis of the
3 Economic-Administrative Units and the role of a
4 Stability Agreement in this these.

5 And we could turn to this, and also the
6 antecedent that is mentioned in Paragraph--or, rather,
7 Page 8.

8 If we go to Page 8--that's it. Page 8.

9 Now, in the last paragraph, a legal
10 provision that we think is important is indicated. I
11 should note that it is one of those provisions that
12 grants investors tax stability. It's Article 70-80 of
13 the General Law on Mining, and in Article 82, it says
14 specifically that, for contractual guarantees, tax
15 stability will benefit the Titleholder of the mining
16 activity, and now I note exclusively for the
17 investments--that is to say, tax stability is granted
18 exclusively to this concept called "investments."

19 And, of course, if I continue reading, these
20 investments may be made in Concessions or
21 Economic-Administrative Units, in the one or the
22 other.

1 (Overlapping speakers.)

2 MR. RIVERA: I'm sorry—I am very
3 sorry to interrupt, but I think your time is
4 up. I mean - even like a few minutes ago so.

5 I'm sorry Madam President. PRESIDENT

6 HANEFELD: I just don't want to interrupt the
7 Witness.

8 MR. RIVERA: I was saying that I didn't--I
9 don't want to interrupt, but it's already been a
10 couple of minutes over his time. So, I think it's
11 due.

12 MS. HIKAWA: There was the question from the
13 Tribunal.

14 MR. RIVERA: But even considering that, I
15 think it's time.

16 MS. HIKAWA: Yes. He will finish up.

17 PRESIDENT HANEFELD: Then we hand over to
18 Claimant's Counsel to continue.

19 MR. RIVERA: Thank you, Madam President.
20 With your permission, I'm go to switch to--with your
21 permission, I'm going to switch to Spanish.

22 CROSS-EXAMINATION

1 BY MR. RIVERA:

2 Q. Mr. Sarmiento, it's a pleasure to meet you.

3 A. Good afternoon. How are you?

4 Q. Delighted to see you once again.

5 A. Likewise.

6 Q. Mr. Sarmiento, first a clarification. The

7 Tintaya Resolution that you referred to--for the

8 record, it is CA-446--is from 2018; correct?

9 A. Yes.

10 Q. Fine. Then, in your direct, you spoke of a
11 principle of predictability.

12 Do you recall that at the last Hearing we
13 had an exchange on this topic?

14 At the last Hearing, I asked you whether, to
15 carry out the principle of predictability, it's
16 necessary to cut and paste; right?

17 And you said: "It is true that, obviously,
18 one need not copy and paste to carry out this
19 principle."

20 Do you recall the exchange?

21 A. Yes, I do. And I said that there could be a
22 copy and paste, but that, in our case, there was no

1 such thing.

2 Q. Okay. So, your position is that there has
3 never been a copy-and-paste in the Resolution?

4 A. Of course not.

5 Q. I also recall that at the last Hearing I
6 asked you whether Chamber 10 had a draft of the
7 2006-2007 Royalties Case before receiving the
8 Resolution from Chamber 1.

9 And you answered: "There must be a draft,
10 but it's too many years that have gone by and I can't
11 remember that. But," you said, "there must have been
12 a draft that we saw prior to the session to be able to
13 adopt our Decision."

14 Do you remember your testimony in that
15 regard?

16 (Overlapping interpretation and speakers.)

17 BY MR. RIVERA:

18 Q. And I'm sorry for interrupting you, but it's
19 just a yes-or-no answer.

20 A. No.

21 Q. You don't recall having said that? It's up
22 on the screen.

1 A. Yes, I do remember, but not expressly what
2 you say.

3 Q. So, your testimony is that the Transcript is
4 incorrect? Your testimony is on the screen.

5 A. If I read the Transcript, I could tell you.
6 The Transcript is in yellow; correct?

7 Q. Yes.

8 A. "There must have been a draft, but it's too
9 many years, and I can't remember it, but there must
10 have been a draft that was--that we saw prior to the
11 session."

12 "Yes, exactly, prior to the session."

13 Yes, I remember that, because it's likely that I
14 received a draft one day before the session.

15 Q. Fine.

16 A. But, as I say, it's so many years that have
17 gone by, I can't say for sure.

18 Q. And that draft which you mention that you
19 must have seen before the session could not be the
20 Resolution that was ultimately issued, because, as we
21 saw, it was 85 percent similar to what the Chamber 1
22 had decided; is that right?

1 A. I don't understand your question.

2 Q. The question is: If there was a draft that
3 had been prepared by Chamber 10 independently, that
4 draft could not have been the draft or the same
5 Resolution as Chamber 10 adopted, because that one has
6 a high level of similarity to the Resolution issued by
7 Chamber 1?

8 A. Yes. The problem is that - the concept you
9 have of "draft."

10 This draft that we received prior to the
11 session was a draft that is provided one or two days
12 before the session, based on how we normally work, and
13 this draft that we received includes the draft as the
14 "vocal ponente" would like it to turn out in the final
15 Resolution, and we must have had that draft one or
16 two days earlier.

17 I repeat, I don't remember if it was one or
18 two days, but clearly that draft had to include
19 everything that had been taken as a precedent from
20 Chamber 1, because that had happened a few days
21 earlier.

22 Q. You didn't answer my question,

1 Mr. Sarmiento, because my question--and it's up on the
2 screen--is: You received a draft, and that's what you
3 testified to, that you had a draft before you received
4 the Resolution from Chamber 1. And you said: "Yes,
5 there must have been one."

6 That's what you said on that occasion.

7 A. What I'm saying is that we saw a draft
8 before the session, but not that it was a draft that
9 existed prior to the session.

10 What I said with regard to the existence of
11 a draft before the session of Chamber 1 is that, in
12 reality, I don't know if there was or was not a draft
13 because I was not the "vocal ponente." It was not my
14 mission to prepare that draft. And if there was a
15 draft prepared by the "vocal ponente," it was probably
16 some notes and their logic. That I don't--that I
17 never saw.

18 Q. But a moment ago you said that it's likely
19 that in Chamber 1 you already had a draft before
20 having received the Resolution from Chamber 1.

21 We agree on that; right?

22 A. It's likely that the "vocal" had a draft

1 resolution long before. Nonetheless, I would have had
2 to have received a draft before the session, which is
3 the draft that is eventually adopted as the Resolution
4 of Chamber 10 and which you're all familiar with.

5 Q. And do you remember having testified at
6 Paragraph 15 of your Witness Statement, which you have
7 in front of you as well--you have it right there--you
8 said that "Vocal" Moreano was upset because Chamber 1
9 had not shared its preliminary conclusions with you,
10 Chamber 10, who were already familiar with the same
11 analysis on the Merits of the case.

12 In other words, Chamber 1 did not share the
13 draft or the Resolution with you until after it was
14 issued.

15 Do you remember that? Yes or no.

16 Do you remember having testified to that?

17 Yes or no.

18 A. If you allow me to read what it says.

19 Q. Yes.

20 A. It says he was simply "upset." Of course he
21 was upset, and that's why he sent an email.

22 Q. He was upset for not having received the

1 Resolution from beforehand.

2 A. But I don't know exactly what he was
3 thinking..

4 SPANISH REALTIME STENOGRAPHER: You're both
5 speaking very quickly, and you're overlapping when you
6 speak, and so I'm not able to take it down. Apologies.

7 BY MR. RIVERA: Ok, thank you.

8

9 BY MR. RIVERA:

10 Q. My question was whether you recalled having
11 testified that "Vocal" Moreano was upset because he
12 did not receive in timely fashion or before the draft
13 Resolution from Chamber 1?

14 A. Well, certainly I must have told you--and
15 I'm not in the shoes of "Vocal" Moreano, so I don't
16 know exactly.

17 I suppose, based on what I read in the
18 email, that he was upset. That's what I can assume.
19 And he was upset surely because of what the email
20 says, because he wanted to take stock of the scope of
21 the Resolution of Chamber 1 with some lead time.

22 I must have said something along those

1 lines, "ahead of time."

2 MR. RIVERA: No further questions, Madam
3 President.

4 PRESIDENT HANEFELD: Any questions in
5 redirect?

6 MS. HIKAWA: If I could just have one minute
7 to check with my colleagues.

8 (Pause.)

9 MS. HIKAWA: No questions. Thank you.

10 PRESIDENT HANEFELD: Then just a few
11 questions from the side of the Tribunal.

12 QUESTIONS FROM THE TRIBUNAL

13 PRESIDENT HANEFELD: I heard earlier today
14 Ms. Olano testifying: "Of course, I cannot interfere
15 in the resolution of cases."

16 Did you experience interference by her in
17 the Decision of the Royalty Case 2006-2007?

18 THE WITNESS: No.

19 PRESIDENT HANEFELD: Did you by other means
20 sense that there was some sort of a political pressure
21 on the Decision of the Cerro Verde Cases?

22 THE WITNESS: No, not at all.

1 PRESIDENT HANEFELD: Do you remember in your
2 time of being in office at the Tax Tribunal occasions
3 where people attempted to exercise political
4 influence, or did it never happen in your career?

5 THE WITNESS: Fortunately, it has never
6 happened.

7 PRESIDENT HANEFELD: And are you aware that
8 Ms. Olano was ever charged of unduly performing her
9 functions?

10 THE WITNESS: No. I'm not familiar with
11 anything along those lines, really.

12 PRESIDENT HANEFELD: And in the context of
13 the Cerro Verde Resolutions, are you aware that any
14 requests under the transparency law were made where
15 information, further information on these cases, was
16 requested?

17 THE WITNESS: No. The truth is, I'm not
18 familiar with those details.

19 PRESIDENT HANEFELD: Thank you. That
20 concludes my questions.

21 Have the Parties additional questions as
22 follow-up questions?

1 MR. RIVERA: Not from us. Thank you, Madam
2 President.

3 MS. HIKAWA: Not from us. Thank you.

4 PRESIDENT HANEFELD: Thank you very much,
5 Mr. Sarmiento. You are then released as a Witness,
6 with thanks. Thank you.

7 THE WITNESS: Thank you.

8 (Witness steps down.)

9 PRESIDENT HANEFELD: Can we then continue
10 with the next Expert right away?

11 GARY SAMPLINER, CLAIMANT'S WITNESS, CALLED

12 MR. UKABIALA: Claimant would just like to
13 move to introduce as a Hearing exhibit the privilege
14 protocol concerning Expert and Witness communications
15 agreed between the Parties in this proceeding.

16 We believe that it will help reduce the
17 incidence of procedural discussions about the proper
18 scope of cross-examination.

19 PRESIDENT HANEFELD: Any objections to this
20 introduction?

21 MS. HAWORTH McCANDLESS: Well, I assume this
22 is something that is already part of the Hearing

1 proceedings, so no objections, but that doesn't
2 necessarily have--yes, no objections, I guess. I have
3 to see it, but I think that's something that's already
4 on--part of record.

5 I don't know if it's handy. Is it handy?
6 Do you have a copy handy? Oh, I have a copy handy.

7 Yes, of course.

8 MR. UKABIALA: Perfect.

9 The other housekeeping matter is
10 Mr. Sampliner's hearing aid has picked a very
11 inopportune moment to stop working. We think it will
12 be fine, but he'll use the headphones, even though he
13 will be testifying in English, and he'll let us know
14 if he has any AV difficulties.

15 PRESIDENT HANEFELD: Yes, please let us know
16 if you experience any difficulties.

17 Can you hear me well?

18 THE WITNESS: I'm able to function without
19 the headphones, but if they're here, I know the
20 headphones will work if I need them.

21 PRESIDENT HANEFELD: Then I take this
22 opportunity to welcome you as an Expert. You are

1 presented by the Claimant in these proceedings.

2 Here on the side of the Tribunal is
3 Professor Tawil and Dr. Cremades, and my name is Inka
4 Hanefeld. We are the Arbitral Tribunal in this case.
5 And under Rule 35(3) of the ICSID Arbitration Rules,
6 as you may know, you are requested to make a
7 declaration.

8 Can you read it out, what you have on your
9 desk?

10 THE WITNESS: I solemnly declare, upon my
11 honor and conscience, that my statement will be in
12 accordance with my sincere belief.

13 PRESIDENT HANEFELD: Thank you. And do you
14 have your Expert Reports, CER-11 and 14, in front of
15 you?

16 THE WITNESS: I do.

17 PRESIDENT HANEFELD: Can you confirm that
18 these are your Expert Reports?

19 THE WITNESS: I can.

20 PRESIDENT HANEFELD: Do you have anything to
21 amend or correct?

22 THE WITNESS: No.

1 PRESIDENT HANEFELD: Then I understand that
2 you will make a presentation, and we will be glad to
3 listen to your presentation.

4 ARBITRATOR TAWIL: I need the presentation.
5 It has not been uploaded. I don't have it by mail. I
6 need the presentation. I took notes on the
7 presentation.

8 (Pause.)

9 (Comments off microphone.)

10 MR. UKABIALA: We are currently having it
11 circulated to everybody, including the Members of the
12 Tribunal. Apologies.

13 PRESIDENT HANEFELD: Then we will wait until
14 Professor Tawil confirms receipt.

15 (Pause.)

16 (Comments off microphone.)

17 PRESIDENT HANEFELD: Perfect. Then we can
18 proceed.

19 EXPERT PRESENTATION

20 THE WITNESS: Madam President, Members of
21 the Tribunal, good afternoon.

22 I am here to testify about my conclusions

1 regarding the certain provisions of the United
2 States-Perú Trade Promotion Agreement, based on my
3 experience in negotiating this Agreement, as well as
4 more than 20 others, during my 20 years of experience
5 in the U.S. Government.

6 I'll start with a word about my
7 qualifications and experience.

8 I started at Treasury in late 1998, and from
9 then until 2014 I was the only attorney at Treasury
10 responsible for investment treaty negotiations,
11 including this TPA.

12 For all of my close to 21 years there, I was
13 the principal Treasury staff member on Investor-State
14 Dispute Settlement submissions from the very
15 beginning, and they started coming very shortly after
16 I arrived. The first case ever against the United
17 States, Loewen, arrived a little over two weeks after
18 I got to Treasury. So, I worked on that, and every
19 other one for the succeeding 21 years.

20 My time at Treasury turned out to be a key
21 formative period for our U.S. Investment Treaties, and
22 where I was able to help develop the 2004 and 2012

1 U.S. Model BITs, as well as the FTA investment chapter
2 standard template.

3 I also assisted in resolving investment
4 disputes between U.S. investors and foreign
5 governments. And over time, as I accumulated more
6 experience, a number of my colleagues in State, in the
7 U.S.D.R. and elsewhere, rotated out. I became more of
8 a repository of information for my U.S. Government
9 colleagues.

10 For example, even after I retired, I was
11 asked to conduct a seminar by my ex-colleagues at
12 U.S.D.R. called "Ask Professor Sampliner" about the
13 evolution and origin of our investor investment treaty
14 and many of their provisions.

15 Let me go now to a summary of my
16 conclusions.

17 First, on Article 10.18.1 on the Limitation
18 Period, the Limitations Period cannot begin to run
19 until a breach has occurred and loss has been
20 incurred.

21 Secondly, a Claimant cannot acquire
22 knowledge of a breach resulting from a Government

1 measure and that it has incurred loss or damage until
2 the Government measure is binding and enforceable in
3 the host country.

4 Third, that legally distinct injuries have
5 separate Limitation Periods, even if they are related.

6 Regarding the fork-in-the-road, in
7 Article 10.18.4, this Article of the TPA and similar
8 provisions in U.S. treaties only apply when the same
9 Alleged Breach has been previously submitted for
10 adjudication to a competent forum.

11 Regarding nonretroactivity, in
12 Article 10.1.3, the rule does not bar claims
13 challenging post-entry into force measures that are
14 actionable in their own right.

15 And, finally, regarding Investment Agreement
16 claims, under Article 10.28, the definitions, and
17 Article 10.16.1, the gateway to arbitration,
18 investment agreement claims are permitted if either
19 the Claimant or the enterprise relied on the
20 agreement.

21 Now I'll discuss a little about the
22 negotiation process and about Treasury's role in it.

1 The U.S. negotiates investment treaties through an
2 interagency process where we apply Congress'
3 negotiating objectives through model treaty
4 provisions. If there are departures from these model
5 treaty provisions, they've got to be cleared through
6 an interagency process. The greater the departure, of
7 course, the more debate and higher-level clearance may
8 be necessary, and, importantly, if there is a
9 deviation, once we deviate, our practice was not to
10 deviate further unless there were very compelling
11 reasons to do so, and further clearance often would
12 have to be required.

13 This picture on the right hand of the screen
14 just depicts my observations of Treasury's role in the
15 process. And often, as in the U.S.-Perú TPA, I found
16 that Treasury took, overall, the second leading role
17 in our investment chapter negotiations, second to
18 U.S.D.R.

19 Here is an overview of our TPA negotiations.
20 They started as the Andean FTA negotiations with
21 Colombia, Perú, and Ecuador. It wasn't until the very
22 end that we realized there would be just a Perú and a

1 Colombia TPA. The U.S. entered these negotiations
2 with a template, and we developed it from, first, the
3 U.S. Model BIT from 1994, and NAFTA, which in many
4 parts were quite different. So, we engaged in what we
5 called a "BIT-plus" exercise from 2000 to 2001, later
6 on in 2003, also, to try to come up with a U.S. best
7 practice that would be applicable for our agreements
8 across the board.

9 In August of 2002, Congress passed the U.S.
10 Trade Promotion Authority statute with negotiating
11 objectives that we had to comply with. And, finally,
12 before we started the TPA negotiations we had just
13 finished our first post-Trade Promotion Authority
14 negotiations with Singapore and Chile, and so, the
15 provisions we had there were essentially used as our
16 template with a few tweaks that came from a little bit
17 of experience in negotiating that and the next one,
18 which was DR-CAFTA. So, that is the template we
19 started with.

20 Personally, I was involved throughout the
21 TPA negotiations. I attended three rounds myself,
22 three of the important rounds, but in addition, I was

1 always present, as far as I know, at all of our
2 interagency meetings that we had and intra-agency
3 meetings in between rounds to keep up with what was
4 going on and our strategy on what we would do in
5 succeeding rounds.

6 Now, let me go to Article 10.18.1 on the
7 limitations period. The Article here is in front of
8 you, and it says that no claim can be submitted--

9 SPANISH REALTIME STENOGRAPHER: I'm not
10 hearing Interpreters. Now it's fine. Thank you.

11 THE WITNESS: So, here is Article 10.18.1,
12 and it says no claim can be submitted to arbitration
13 if more than three years have elapsed from when the
14 Claimant had actual or constructive knowledge of the
15 breach alleged as well as that it has incurred loss or
16 damage.

17 A little background to Article 10.18.1 is in
18 this slide. We have had Limitation Periods standard
19 in our U.S. FTAs since NAFTA. We did not have them in
20 our BITs. So, that was one of the subjects we
21 discussed in our BIT-plus exercise. We concluded,
22 after not that much debate, that it would be very

1 helpful to have them and that the NAFTA formulation
2 should be adjusted--should be adopted and, in
3 substance, that's what we did. The intent of these
4 provisions were to prevent stale claims and promote
5 certainty for possible exposure in litigation or
6 arbitration.

7 The provisions at the same time were also
8 not intended to encourage unripe claims, and that
9 concept was an important one to us that we emphasized
10 in our negotiations and many of our ISDS submissions
11 and in our intra-U.S. Government discussions on what
12 positions we could take.

13 The U.S. proposed the Article 10.18.1 in
14 this TPA negotiations early on. It was not much of an
15 issue of contention, and ultimately the Andean Parties
16 agreed to it pretty early also without any substantive
17 change.

18 Now this slide talks about our U.S. practice
19 on these limitations provisions. My personal
20 experience came from negotiating the limitation
21 provisions and many of the Agreements where I was
22 involved in negotiating them, as well as working on

1 U.S. ISDS submissions, of which there were quite a few
2 on the limitation provisions while I was there.

3 One of the most common statements that we
4 made in our U.S. ISDS submissions was just on the
5 definition of "incurred." As the screen notes, it
6 means "liable or subject to loss or damage," and the
7 U.S. was consistent in describing that term that way.

8 In addition, we often stated that loss can
9 be incurred even if the financial impact of a Measure
10 is not immediate, but--and this is in the Mesa
11 submission on the right--another important thing we
12 have always said was that claims can only be submitted
13 for a breach that already has occurred and for which
14 damage or loss has already been incurred and,
15 therefore, that claims cannot be submitted for future
16 breaches or future losses.

17 Now, here is the logic behind my conclusion
18 that Government Measures must be binding and
19 enforceable to result in breach and loss.

20 First, the limitation period only begins to
21 run when a Claimant knows or should know of a breach
22 and that loss or damage has been incurred. Second, as

1 in the last slide, "incurred" means that the Claimant
2 is liable or subject to loss or damage; and, third, a
3 Claimant can only be liable or subject to loss or
4 damage from a Measure that is capable of being
5 enforced.

6 Now, here is some considerations underlying
7 my other conclusion that legally distinct injuries
8 have separate Limitations Periods. There have been a
9 number of U.S. submissions concerning a series of
10 similar and related acts. They emerged in response to
11 concern about continuing breach claims, and in,
12 particular, after the holding in UPS v. Canada that
13 continuing breaches may renew claims period under
14 international law, which both the United States and
15 most commentators felt was erroneous.

16 So, in these cases, what we've stated--and
17 this is an excerpt from one of the U.S. submissions in
18 Spence, there were several others, that--so we stated
19 that a Claimant cannot evade a limitations period by
20 basing its claim on the most recent act in a series of
21 acts. But what is important to emphasize about these
22 cases--and in this regard they were all the same--is

1 that they related to a single cause of action that
2 could, together, constitute a continuing breach.

3 What we also said consistently in our U.S.
4 submissions on this point were--and this was said in
5 Spence and all the other cases that are relevant, is
6 that, when there is a legally distinct injury, i.e., a
7 distinct cause of action, there is a new limitations
8 period.

9 Okay. Let me go to Article 10.18.4 on the
10 fork-in-the-road. Here is the Article, and it says
11 that no claim may be submitted to arbitration for
12 breach of an Investment Agreement if the Claimant or
13 the enterprise, as the case may be, has previously
14 submitted the same Alleged Breach to an Administrative
15 Tribunal or court of the Respondent or to any other
16 binding dispute settlement procedure.

17 Now, there are two key points that I'm going
18 to emphasize about Article 10.18.4. One of them is
19 that it was not intended to apply to anything other
20 than the same Alleged Breach. This is obvious from
21 the language as well as from its history, that I'll
22 get into next.

1 In addition, the distinct order for this
2 provision to make sense that Courts, Administrative
3 Tribunals, and other binding dispute settlement
4 procedures must be competent to adjudicate claims for
5 breach of an investment agreement.

6 Now, here is a brief history of our
7 fork-in-the-road in U.S. investment treaties. Our
8 pre-2004 U.S. BITs used a fork-in-the-road for any
9 dispute that it had to--the Claimant had to make a
10 choice about whether to go to a domestic court,
11 domestic administrative tribunal, or other dispute
12 settlement procedures on the one hand, or arbitration
13 under the BIT on the other. And that choice would be
14 definitive. NAFTA was different because it introduced
15 what we call the "no U-turn" approach, under which
16 Claimants can go to arbitration even after they go to
17 any of these other procedures, but they must file a
18 waiver that would prevent them from going back to any
19 of the other procedures for measures alleged to be a
20 breach.

21 In our BIT-plus exercise we have this
22 difference between the BITs and the NAFTA, and this is

1 one of the most hotly debated subjects internally, and
2 ultimately, our U.S. inner agency group decided to use
3 the no U-turn approach rather than the
4 fork-in-the-road, starting with our first FTAs for
5 Chile and Singapore. Same was later done for the 2004
6 Model BIT. The intent of this was to promote broad
7 access to ISDS and to encourage resolving disputes in
8 the local courts.

9 During our negotiations of our initial FTAs,
10 Chile argued that since their courts hear treaty
11 claims, Claimants should be precluded from submitting
12 the same treaty claims in local courts and ISDS.
13 There was a provision we had in NAFTA for this that
14 applied to México, which--whose courts also had
15 similar powers. The U.S. team sympathized with this
16 argument, but provided that the preclusion that might
17 be contemplated only would apply to treaty claims that
18 were raised in the local fora. So, that was with
19 respect to treaty claims.

20 We were also starting to negotiate
21 Investment Agreement claims with Chile, and they made
22 the same argument, saying there could be the same

1 breaches alleged of an Investment Agreement in the
2 arbitration as was alleged in the local courts or
3 other fora, and therefore, that the same argument for
4 fork-in-the-road should apply to Investment Agreement
5 claims in that circumstance as for treaty claims.

6 The U.S. agreed, but again, we only agreed
7 provided that the fork applied to the exact same
8 Investment Agreement claims that were raised in the
9 initial fora first.

10 During our DR-CAFTA negotiations, the same
11 thing, essentially, the same progression happened and
12 we ended up with provisions that had a
13 fork-in-the-road for both Treaty breaches that are
14 alleged, as well as alleged Investment Agreement
15 breaches.

16 In our negotiation of Article 10.18.4, the
17 U.S. adopted an initial position, as was in our
18 template for no fork-in-the-road provisions and only a
19 no U-turn waiver provision. The Andean States didn't
20 want to have any Investment Agreement claims, so we
21 didn't discuss, initially, a fork-in-the-road for
22 Investment Agreements, but we did discuss a

1 fork-in-the-road for treaty claims. And the language
2 you see was the Andean proposal regarding a
3 fork-in-the-road for treaty claims applying to a
4 breach of the disciplines contained under Section A.

5 The U.S. considered that much too broad, and
6 we rejected that proposal. But as negotiation went
7 on, the U.S. indicated that we would have flexibility
8 on exclusive forum selection, and we proposed forks in
9 the road that follow the Chile and CAFTA language.

10 Perú agreed to that language, to both the--at the time
11 the fork-in-the-road was very helpful in getting them
12 to agree to coverage of Investment Agreement claims in
13 the first place. So, they agreed to that, as well as
14 the same fork-in-the-road for treaty claims, and the
15 other Andean Parties followed shortly thereafter.

16 But during these negotiation, we did make
17 clear to all of the Andean Parties that this
18 Article only applies to claims for the same Alleged
19 Breach. Again, the language, we think, made that
20 quite clear.

21 Now, moving on to Article 10.1.3, on
22 nonretroactivity, the Article here is in front of you,

1 and, as you'll see, it is identical in substance to
2 the Article 28 of the Vienna Convention on the Law of
3 Treaties, and they both say--I'll read from 10.1.3,
4 that this chapter does not bind any party in relation
5 to any act or fact that took place or any situation
6 that ceased to exist before the date of entry into
7 force of this Agreement, for greater certainty, that
8 I'll explain in a minute.

9 Now, the key question in trying to apply
10 this provision, or the Vienna Convention provision, to
11 any Treaty is which acts or facts don't bind a party
12 with respect--or can bind a party with respect to
13 retroactivity. And the answer to that question with
14 respect to the TPA is found in Article 10.1.1 because
15 that shows that for the investment chapter, at least,
16 that this chapter applies to Measures adopted or
17 maintained by a party. That's what it regulates. So
18 that it is the Measures that are the relevant facts,
19 or acts or facts that can bind a party for the
20 purposes of Article 10.1.3.

21 Now, here are the key points that I think
22 have been raised in U.S. submissions regarding the

1 interpretation of this Article.

2 First is that pre-entry-into-force acts or
3 facts can be relevant as background in assessing
4 whether or not a State has subsequently breached an
5 obligation.

6 At the same time, a claim that challenges a
7 post-entry-into-force Measure that is itself a breach
8 does not violate the nonretroactivity rule. This is
9 what we have said in the Spence submission and in
10 several other submissions.

11 Now, as background to what we did in the TPA
12 negotiations, most of our prior BITs, as well as the
13 FTAs you see noted here, had no retroactivity
14 provision. In fact, our template had no retroactivity
15 provision, because our initial position was that no
16 provision was necessary because the nonretroactivity
17 rule, under the Vienna Convention, applied, and under
18 customary international law. But in prior FTAs we had
19 where the U.S. did include this provision, we used a
20 "for greater certainty" formulation just to assure
21 that any reader would know that, in a treaty that
22 didn't have this provision, it was no less--the

1 principle under the Vienna Convention was no less
2 applicable than it was when we laid it out here as in
3 this case, in CAFTA, in writing.

4 Now, in our negotiation of this Article, the
5 Andean States began by--they proposed a broader
6 nonretroactivity provision that you see on the top of
7 your screen here, and it applied to disputes over
8 facts and acts. And it was something that the U.S.
9 explained we could not accept, that it was too broad,
10 and that we would only accept if we did reiterate the
11 Vienna Convention formulation. That is what we
12 ultimately did. We used the exact same language as
13 was in the DR-CAFTA and that you'll see is--and it was
14 accepted pretty early, in February of 2005, was at the
15 bottom of the screen.

16 Finally, regarding Investment Agreement
17 claims and the reliance issue under it, the analysis
18 of this starts with Article 10.28, because that is the
19 definition of "Investment Agreements" for the TPA, and
20 it is the only provision we have in there that
21 establishes a reliance requirement. And what it says
22 clearly is that the Investment Agreement is this

1 written agreement between the national authority and a
2 covered investment or investor, but it is on which the
3 covered investment or the investor relies in
4 establishing or acquiring a covered investment. So,
5 this is a disjunctive requirement; either the investor
6 or the enterprise can satisfy it.

7 Now, under Article 10.16.1, and this is the
8 gateway to arbitration, so this talks about the
9 conditions under which any claim can be submitted, the
10 only condition that Article 10.16.1 adds is this
11 direct nexus condition which you see on the bottom of
12 the screen.

13 The subject matter of a claim in damages
14 must directly relate to the investment that the
15 investor or enterprise established or acquired in
16 reliance on the relevant Investment Agreement. But
17 again, the nexus is simply between the claim on one
18 hand and the covered investment that happened to be
19 established in reliance on the Investment Agreement,
20 on the other hand.

21 This shows what was in the 1994 Model BIT,
22 and it shows that this same reliance requirement in

1 substance applied. We used the term "investment
2 national or company" in those days, but it had the
3 same meaning as a "covered investment" or "investor,"
4 that either one could rely upon the Investment
5 Agreement, and that was always part of the definition.
6 So, there really was no change, and that's what is
7 illustrated in this slide.

8 Personally I was involved quite a bit when
9 we updated this in 2004, and we had a very extensive
10 interagency debate about this, and the debate
11 concerned what you see in blue on the screen, and that
12 is, what was the scope of this clause? What rights
13 did it grant? And back in the '94 Model, it talked
14 about "grants rights with respect to natural resources
15 or other assets." Many of our U.S. agencies felt that
16 that was too broad--what other assets?--so we
17 ultimately defined it in the subparts (a), (b), (c) in
18 the 2004 Model BIT that you see in blue there.

19 However, the reliance requirement in yellow was
20 exactly the same, in substance. It did not change at
21 all into the 2004 Model.

22 Now, this is what we did in the 2004 Model

1 regarding the direct nexus requirement, and again, all
2 we did was add this nexus between a claim and that the
3 covered investment on which the Claim was being made
4 that that covered investment had to be the one that
5 was established in reliance on the Investment
6 Agreement.

7 There is nothing else that was in this
8 requirement that we added. And this was done--our TPA
9 provisions were identical. We were--decided them
10 right around the same time as we decided what would be
11 in the Model BIT, and, you know, they are identical.

12 So, there is one other argument that I saw
13 from Perú that I wanted to address, which is the
14 argument that there could be, based on the reliance
15 language, that there might be some temporal limitation
16 for Investment Agreement claims in the TPA and
17 any--there could be any temporal limitation for
18 Investment Agreement claims in the TPA, and the
19 history behind this, in addition to the language, I
20 think, is very instructive on this question.

21 The U.S. agreed--there was a substantial
22 discussion about a temporal limitation in our initial

1 post-NAFTA FTA negotiations with Singapore and Chile.
2 And at that time these provisions were new to them.
3 They had been in other U.S. BITs, but not to these
4 countries, and their position was they needed some
5 time in order to get the Regulatory Framework and
6 contracts in place in order to be sure that they could
7 accommodate investor-State arbitration overload, and
8 ultimately they insisted on having these temporal
9 limitations.

10 In Singapore it would apply to any agreement
11 from the time of the entry into force. It would only
12 be those Investment Agreements that would be covered.

13 In Chile, they insisted on having any--only
14 those Investment Agreements that were entered into
15 two years after the FTA entered into force, and this
16 was a make-or-break issue as far as getting Investment
17 Agreements, and it seemed to us at the time, in the
18 U.S., so we did agree to that. But what we found was,
19 after we agreed to it--and also CAFTA, where shortly
20 thereafter we agreed to something very similar to
21 Singapore--our U.S. industry was very upset with the
22 U.S. Government for doing this, because they had many

1 Investment Agreements that their companies had entered
2 into for a long time that they felt it was critical
3 that our FTAs cover, and as long as there was a
4 breach, of course, after entry into force of the FTAs,
5 they said it was absolutely essential for the
6 Investment Agreement clause that would permit
7 arbitration to have no temporal limitation.

8 And as part of the compromise that included
9 the scope of the Agreement that I described a few
10 slides ago, this was one other element that the U.S.
11 interagency group agreed on, which was that, going
12 forward, there would be no temporal limitation. So,
13 in the TPA, that was their hard position, and other
14 ones, Korea, Oman, Uruguay, Rwanda after that, that
15 was the same position that the U.S. took.

16 In addition, with respect to Perú, we
17 actually had concerns about potential breaches of
18 Perú's preexisting agreements derived from the actions
19 of SUNAT, and that was another reason why, in this
20 negotiation, it was very important to the U.S. not to
21 have a temporal limitation.

22 This matter was discussed, and on the left

1 side you'll see the Andean proposal, which was just
2 like the--what we had agreed to with Chile, that in
3 the definition of "Investment Agreement," it would be
4 only those that took effect two years after the date
5 of entry into force of the agreement. But the U.S.
6 rejected that. It was very much a no-go issue. We
7 did discuss it at length, but it was in that context
8 where we discussed it. And you'll see, as in the
9 bottom of the screen on the right, a clean agreement.
10 It did not have this temporal limitation, and all of
11 our discussion, in this agreement and in my
12 recollection, any other agreement because it was so
13 clear that that is where it would be discussed in the
14 definition of "Investment Agreement," I do not recall
15 any discussion that the U.S. ever had, either
16 internally in the U.S. or with any other country where
17 anyone suggested that the reliance requirement
18 made--would suggest that there was a temporal
19 limitation that would apply because of that language.

20 So, that concludes my presentation, and I
21 welcome any questions.

22 PRESIDENT HANEFELD: Many thanks.

1 So, the first questions come from the
2 Respondent's side.

3 MS. HAWORTH McCANDLESS: Thank you, Madam
4 President. We have some binders we'll be passing out.
5 Let's wait a minute or two.

6 CROSS-EXAMINATION

7 BY MS. HAWORTH McCANDLESS:

8 Q. Good afternoon, Mr. Sampliner. My name is
9 Jennifer Haworth McCandless, and I'm part of the legal
10 team representing the Republic of Perú.

11 A. Good afternoon.

12 Q. Good afternoon. We have met before. You
13 may not recall. It was about 20 years ago, and we
14 were representing a party in which we were discussing
15 with interagency officials, and you were among those
16 people, but that was, I think about 20 years--I think
17 it was 2004. So, it was a long time ago.

18 A. I do remember.

19 Q. Well, hello again.

20 So, I'm going to ask you some questions
21 regarding your Expert Reports in this Arbitration.
22 Although I'll be speaking in English and you'll be

1 answering in English, as you may know, there is
2 simultaneous translation ongoing, and so, we should
3 pause. I will try to pause in between your answers
4 and my questions so that there is time for the
5 translation, but don't take my pauses as an invitation
6 to say more. I'm just trying to wait and be patient
7 until the Transcript catches up.

8 Please listen to my questions carefully and
9 respond concisely as you can, given that we have
10 limited time in the proceedings. So, initially, with
11 respect to your First Report, you state that you
12 worked at the Treasury Department from October of 1998
13 until 2019; is that correct?

14 A. Yes.

15 Q. And just to understand the employment
16 timeline, you said in Paragraph 1 of your First Report
17 that you served as Attorney Advisor through 2003. So,
18 I assume that you held that position from 1998 to
19 2003?

20 A. Yes.

21 Q. And then from 2004 to June 2019 is the
22 period of time which you served as the Senior Counsel

1 at the Office of the Assistant General Counsel for
2 International Affairs at Treasury; correct?

3 A. Yes.

4 Q. And the only reason I ask is, in looking at
5 your--the Appendix 1 to your First Report which
6 contains your CV, you indicate that you held the
7 position of Senior Counsel of the Office of Assistant
8 General Counsel for International Affairs from October
9 of 1998 to June of 2019, but that isn't actually
10 accurate--correct?--because for part of that time you
11 were Attorney Advisor.

12 A. That is a good point. I did that for
13 brevity, and substantively there really wasn't any
14 difference in what I did, but you're correct.

15 Q. Thank you.

16 And you state in Paragraph 5 of your First
17 Report that you based your Report "on your personal
18 experience as a negotiator of the Agreement that
19 became the TPA"; correct?

20 A. Yes.

21 Q. And during the time which you were working
22 and negotiating the Agreement, did you take any notes

1 or prepare any memorandum during those negotiations?

2 A. I took a lot of notes of those negotiations
3 and prepared lots of emails, at least.

4 Q. And did you review those notes or memorandum
5 before you prepared your Expert Reports in this
6 Arbitration?

7 A. No. When I left the Government, I did not
8 bring any documents with me from any negotiation I
9 participated in.

10 Q. So, when would you say was the last time
11 that you would have reviewed those notes or memorandum
12 with respect to the TPA at issue in this case?

13 A. I think I did review them from time to time
14 while I was at Treasury because, again, I was even
15 known as someone who kept track of these things. So,
16 I did refer to them from time to time, but not since I
17 retired.

18 Q. So, at least not since June of 2019?

19 A. Yes.

20 Q. And you state in Paragraph 6 of your First
21 Report that, in preparing your Report, you relied on,
22 among other things, drafts of the U.S.-Andean FTA and

1 TPA, which you understand were obtained by a U.S.
2 Freedom of Information Act request; is that right?

3 A. Yes.

4 Q. So, you did not make the FOIA request
5 yourself; is that correct?

6 A. I did not. That's right.

7 Q. And you relied on Claimant's Counsel to
8 provide you documents, presumably they made the FOIA
9 request?

10 A. Yes. When I was retained, I was told they
11 already had made the FOIA request and provided me
12 documents that they had.

13 Q. But given your experience in the U.S.
14 Government, and indeed, you indicate in your CV that
15 you had defended FOIA lawsuits, both before you went
16 to Treasury--not defending there. You were involved
17 in FOIA litigation before you went to Treasury, and
18 while you were at Treasury you defended FOIA lawsuits,
19 so I assume you were familiar with the FOIA process;
20 correct?

21 A. Yes.

22 Q. Did you consider making a FOIA request

1 yourself to obtain some of the contemporaneous
2 documents for the negotiations or meeting minutes or
3 any other notes or memos that would support your
4 assertions regarding the TPA interpretation?

5 A. I didn't. I know that--for two things: One
6 was that I was told by Counsel for Claimant that they
7 had made a request for the entire negotiating record;
8 and, secondly, I know from my experience at Treasury
9 that my status as former Treasury employee would not
10 make any difference and that I would not--there would
11 be no reason to think I would get anything more from
12 my FOIA request than Counsel for Claimant already
13 received.

14 Q. But you might have had more specific
15 knowledge of exactly how to structure the FOIA request
16 based on the documents that you knew existed; correct?

17 A. Theoretically I think that's possible, but I
18 think that, you know, looking in good faith at a
19 request for the entire negotiating record was--my
20 former colleagues would have done that, and I'm not
21 sure that I would have done any better than Counsel
22 for Claimant had done.

1 Q. Did you see the request that they made?

2 A. No.

3 Q. You present two Expert Reports in this
4 proceeding; correct?

5 A. Yes.

6 Q. And you are presenting yourself as an expert
7 on the issue of negotiations of the U.S.?

8 A. I am.

9 Q. You also state in your Report that you were
10 involved as a negotiator in the U.S. TPA and again,
11 today, in direct testimony, you are discussing, in
12 part, your own personal experience while you were
13 negotiating.

14 So, you are as an expert on international
15 treaties, but also you personally had experience in
16 this TPA; is that correct?

17 A. Yes.

18 Q. But you're saying that you--in your Second
19 Report you say that you are basing your opinion on
20 your years of experience drafting and negotiating
21 International Investment Agreements, including this
22 TPA, and you indicate that--but you also indicate

1 that, in your First Report, that the U.S. Trade
2 Representative's Office was the lead agency in
3 negotiations of trade agreements; correct?

4 A. Yes.

5 Q. And so, it was the USTR in this particular
6 TPA that took the lead in the negotiations on behalf
7 of the U.S. with respect to the investment chapter of
8 what became the U.S.-Perú TPA?

9 A. They did. As a formal lead, I think, in
10 particular provisions, the Treasury took at least a
11 co-leading role.

12 Q. Let's discuss that, because you mention in
13 your First Report in Paragraph 9 that Treasury has a
14 leading role for all financial provisions in FTAs,
15 including taxation; is that correct? And is that what
16 you meant, what you were just saying, they
17 take--Treasury had some kind of specific role, in
18 particular?

19 A. Yes. In taxation in particular, the
20 responsibilities were divided in terms of the Office
21 of Tax Policy would deal with any straight tax issues,
22 what's a tax measure, or anything that was really an

1 issue of tax law. I was not a tax law expert, but I
2 was--I think they would rely on me as an expert on any
3 tax issues that related to the exceptions, such as the
4 exception for expropriation.

5 Q. And you stated--actually today you said you
6 were personally involved throughout the negotiations,
7 and I think you said you were involved in three of
8 the--actually present for three of the rounds; is that
9 correct?

10 A. Yes.

11 Q. And there were how many total rounds of
12 negotiations?

13 A. I believe there were 13.

14 Q. And where were the ones that you were
15 participating in? Were they ones in Washington?

16 A. They were the--the first one was in Atlanta,
17 Round 2; the next one was in Washington, Round 8; and
18 the last one was actually--it was called one
19 "Round 13," but it was two different functional rounds
20 in November-December of 2005.

21 Q. So, you--it's fair to say that you weren't
22 present, physically present for 10 of the 13

1 negotiating rounds?

2 A. That's true, but as I had also said, I was
3 present for all of our interagency meetings as far as
4 I knew, where we would discuss what had happened and
5 what the U.S. position would be going forward for the
6 next round.

7 Q. And do you know Carlos Herrera?

8 A. Yes.

9 Q. When did you meet him?

10 A. I met him--I think I may have met him first
11 in FTA negotiations in 19--late 1998, 1999, but I
12 certainly met him, worked with him quite a bit during
13 these negotiations, and then again a little bit in the
14 TPP negotiations.

15 Q. So, in your Reports you state that--in your
16 First Report, you say that your Reports are based on
17 your personal experience. You say that--the Report is
18 based--your first one, your Report is based on your
19 personal experience as a negotiator of the Agreement
20 that became the TPA, and in your Second Report, you
21 say that the Report reflects your genuine beliefs
22 concerning the matters described therein; correct?

1 A. I don't know if you were intending to
2 distinguish the two, but I certainly wasn't when I
3 said those things.

4 Q. No. No.

5 A. Okay.

6 Q. You also say that you do not purport to
7 speak on behalf of the U.S. Department of Treasury or
8 the U.S. Government in preparing your Reports;
9 correct?

10 A. Yes.

11 Q. So, to be clear, in your Statements
12 regarding the TPA provisions in both your Reports,
13 you're not representing the U.S. Government's official
14 position; is that correct?

15 A. I am not currently representing the U.S.
16 Government's official position, but I am recounting my
17 recollections of what the U.S. Government's official
18 position was during the negotiations.

19 Q. But you are saying that you are expressing
20 your personal view and not that of the United States;
21 correct?

22 A. In terms of any opinion, yes. And, again,

1 I'm not appearing as a representative of the United
2 States, but I was a representative at the time in
3 question. And so, what I'm testifying about were when
4 I was in that capacity.

5 Q. Okay. But to be clear, because you stated
6 in your Second Expert Report in Paragraph 2: "I do not
7 purport to speak on behalf of the U.S. Department of
8 Treasury or the U.S. Government preparing this
9 Report."

10 So, I take that to mean that, in essence,
11 you are testifying in your personal capacity?

12 A. I am currently testifying in my personal
13 capacity, yes.

14 Q. Okay. Thank you.

15 And in your Expert Reports, you provide
16 comments on very--and you did today here too--in your
17 direct examination, you provide comments on various
18 provisions concerning the TPA; correct?

19 A. Yes.

20 Q. And in particular, you are--you provided
21 comments on the limitations period provision, and you
22 did this also in your direct, on the nonretroactivity

1 provision, which you also did in your direct, and the
2 fork-in-the-road provision; correct? And you also did
3 that in your Direct and the reliance provision;
4 correct?

5 A. Yes.

6 Q. And, to confirm, we had just discussed, you
7 stated that Treasury Department played a leading role
8 with respect to all financial provisions in FTAs and
9 those provisions including taxation; correct?

10 A. Yes. To the extent I just discussed it.

11 Q. Yes. But you didn't provide in either of
12 your Reports--or today, indeed, in your direct
13 testimony, you didn't provide any comments
14 in--regarding Article 22.3, which discusses Taxation
15 Measures; correct?

16 A. I didn't. And, as I understand it, the
17 issues in question don't relate really to the
18 exceptions that I am an Expert in, and they relate to
19 the areas where our Office of Tax policy would be
20 Expert.

21 Q. And was it your choice not to discuss
22 Article 22.3--or were you instructed by Counsel not to

1 discuss it?

2 A. I was asked to discuss the particular issues
3 you've seen. I don't recall any back-and-forth
4 between us about would I discuss this or not, and I
5 think in--when I described my background to them,
6 initially, when I was retained, I think I made pretty
7 clear that I was not a taxation Expert.

8 On taxation, per se, other than with respect
9 to, let's say, the expropriation exception.

10 Q. So, to be clear, Claimant's Counsel did not
11 ask you to opine on 22.3 regarding Taxation Measures,
12 even though you worked as a negotiator for Treasury,
13 and Treasury played a leading role regarding all
14 financial positions in FTAs; correct?

15 A. Correct, and my--well, I don't know why they
16 didn't ask me, but my guess would be that because I
17 told them that other people had the expertise and were
18 relied on as the key negotiators there. And I would
19 just add that, if people from that office were here
20 today, they would emphatically confirm that they were
21 the Experts on this subject, and certainly at the time
22 they would say, I was not the right person to

1 represent Treasury on pure Taxation Law Measures, and
2 pure taxational issues.

3 Q. And you think you did mention something
4 about exceptions with respect to taxation, when you
5 were involved in that?

6 A. Yes.

7 Q. Have you seen the--I know you're familiar
8 with U.S. Non-Disputing Party submissions because
9 you've testified to that today in your Reports, and so
10 clearly you know that those exist.

11 A. Yes.

12 Q. In your view, are--those submissions are the
13 official word of the U.S. Government on those
14 provisions that they discuss in the submissions?

15 A. Yes.

16 Q. Have you seen the U.S. Non-Disputing Party
17 submission in this case?

18 A. Yes.

19 Q. And with respect to Article 22.3, you're
20 familiar that the U.S. says--

21 MR. UKABIALA: Objection. This is not a
22 provision that the Expert has opined on, as Counsel

1 has just established. So, I can't see any legitimate
2 purpose in asking the Expert about the U.S. position
3 in the Non-Disputing Party submission on this clause.

4 MS. HAWORTH McCANDLESS: Well, he is
5 testifying as a--based on his experience working as a
6 negotiator of this TPA--

7 MR. UKABIALA: I'm sorry, Section 35 of PO4
8 is very clear that the Expert will not be
9 cross-examined on matters beyond the scope of their
10 Expert Report. So, I can't see the possible--

11 MS. HAWORTH McCANDLESS: Well, his Expert
12 Report concerns his negotiations. The negotiations of
13 the U.S. with respect to the TPA, which he was
14 involved in, and he went through a great length of
15 telling about his experience with respect to that
16 negotiation. It's completely within the scope.

17 MR. UKABIALA: Yes, but we're talking about
18 a specific provision, the tax exclusion, which the
19 Expert did not testify about in his Expert Reports, or
20 today during his Direct Presentation. And which
21 Counsel has just gone to great lengths to establish he
22 did not testify about. So, it cannot possibly be

1 permissible under Section 35 of P04.

2 PRESIDENT HANEFELD: I would have also asked
3 you the question whether you were involved in the
4 negotiations of this provision, but I understand you
5 are saying, no, it would have been a different
6 colleague from the Office of Tax Policy; right?

7 THE WITNESS: Well, when you say "this
8 provision," it has exceptions. So, I was involved in
9 negotiations of the exceptions under the provision,
10 but not--not the pure tax issues.

11 PRESIDENT HANEFELD: Then we can come maybe
12 to this point later, and the Tribunal may have
13 questions on this point.

14 MS. HAWORTH McCANDLESS: Look, I was just
15 going to ask, in his professional experience, based on
16 his experience negotiating this TPA, in particular,
17 what his--if he agreed with the U.S. in
18 Paragraphs 32--

19 MR. UKABIALA: Yeah, that's the exact
20 question that we object to.

21 MS. HAWORTH McCANDLESS: And I think we've
22 just determined he said, he's been discussing his

1 entire negotiation as a representative of the United
2 States in the TPA, and he just said he did have
3 information about the exceptions of the taxation, and
4 that's exactly what this question goes to. I think
5 it's completely within the scope of his expertise to
6 answer the question, which is a very specific
7 question.

8 MR. UKABIALA: Yeah, that's not the standard
9 in PO4. The standard is matters that were covered in
10 the Expert's Reports or direct testimony.

11 MS. HAWORTH McCANDLESS: He has been
12 testifying today about his experience as a negotiator,
13 and this is part of that negotiation, so it's
14 completely within the scope of his testimony. If not
15 in his Report, and today, when he's discussing the
16 scope of his experience as a negotiator on this issue.

17 MR. UKABIALA: He has been testifying that
18 he would not have been the person negotiating this
19 provision, and that it would have been his other
20 colleagues at Treasury that would have the expertise
21 to discuss that matter.

22 (Overlapping speakers.)

1 MS. HAWORTH McCANDLESS: Madam President, he
2 just clarified that wasn't the case with the
3 exceptions, and this is an issue of exceptions.

4 PRESIDENT HANEFELD: Yeah. Now, to get this
5 discussion cut short. So, on which provision in this
6 protocol you rely when you say you object to this line
7 of question and the testimony of the Expert?

8 MR. UKABIALA: I'm sorry, Madam President.
9 Are you referring to the privilege Protocol?

10 PRESIDENT HANEFELD: Yes. So, what is
11 your--and now, your P04, whatever--

12 (Overlapping speakers.)

13 MR. UKABIALA: Yeah, P04. Section 38 of
14 P04.

15 PRESIDENT HANEFELD: Can you maybe put it on
16 screen because I do not have it here at my desk.

17 MR. UKABIALA: But I can just read it into
18 the record. It does say: "The adverse Party may
19 cross examine an Expert on matters that were addressed
20 or presented in the Expert Report or during direct
21 examination or presentation."

22 MS. HAWORTH McCANDLESS: And my response to

1 that is he did discuss his negotiations of this TPA in
2 his Direct Presentation, very extensively, and,
3 therefore, it's completely within the scope to ask him
4 a question about this issue, which he has already
5 stated is actually within his scope of knowledge.
6 Even if it weren't in--within his scope of his
7 knowledge of being an Expert, which, of course, it
8 would be.

9 MR. UKABIALA: That can't possibly be the
10 standard. She's asking the Expert about a specific
11 provision, Article 22.3.1, which he first established
12 that the Expert does not have expertise in, and was
13 not involved in negotiating in the TPA.

14 MS. HAWORTH McCANDLESS: And then he just
15 corrected that and said that he did have that
16 knowledge.

17 MR. UKABIALA: No, he said that he had
18 experience with 22.3.6, which is the exception to the
19 tax exclusion.

20 MS. HAWORTH McCANDLESS: This is relevant to
21 that issue.

22 MR. UKABIALA: No, because the U.S. does not

1 discuss that provision. The U.S. only discusses
2 Article 22.3.1 in its Non-Disputing Party submission,
3 so asking the Expert whether he agrees with the U.S.
4 Non-Disputing Party submission could not possibly be
5 relevant to the exceptions to that provision.

6 PRESIDENT HANEFELD: Please rephrase your
7 question. We want to come to the core of his
8 testimony, and we had the same debate earlier on when
9 Mr. Prager raised some question, and we also said it's
10 the core of the testimony.

11 So, to ask the Expert on his involvement in
12 the negotiation is certainly proper, but what you have
13 just raised, I think, is correct. It cannot be
14 related to the Non-Disputing Party submission.

15 MR. UKABIALA: Yeah, and just--we'll just
16 add that asking the Expert about provisions that he
17 did not testify about is--couldn't be further from the
18 core of his testimony.

19 So, we would just submit that P04 should be
20 followed, and Counsel should stick to cross-examining
21 the Expert on matters he testified about.

22 MS. HAWORTH McCANDLESS: Madam President,

1 he--what he testified about, he is--as a negotiator,
2 and he had experience with respect to this
3 negotiation; therefore, the fact of what he includes
4 or doesn't include is certainly relevant within the
5 scope of his testimony.

6 Well, we'll just--if you've had--well.

7 All right.

8 Well, I note that he has not, as a matter of
9 fact, then, testified on an issue with respect to
10 taxation Measures, notwithstanding the fact that he is
11 the part of the Treasury, which is the lead
12 negotiating agency, and lead role with respect to
13 taxation in the TPA, which, in and of itself, says--

14 (Overlapping speakers.)

15 MR. UKABIALA: Counsel is testifying.

16 Is there a question?

17 PRESIDENT HANEFELD: I think now we change
18 it a little bit, and maybe you can talk with me for a
19 moment. The Tribunal is permitted to ask questions at
20 any time, and in order to--and now discuss procedural
21 objections on cross-examination, I would like to be
22 educated by you as an Expert on the exceptions to the

1 tax exemption.

2 So, maybe we can put the specific Provision,
3 22.3, on the screen and the exceptions, and then you
4 can just educate me on what you can give your Expert
5 testimony or on whatnot.

6 So, if we look at this Article 22.3, with
7 what provisions, or on what provisions were you
8 involved in the negotiations?

9 THE WITNESS: Okay. I wasn't involved in
10 either Paragraph 1 or Paragraph 2. I was occasionally
11 involved Paragraph 3 and 4 on the NTMFN that was one
12 of joint responsibility between me and my colleagues
13 in tax policy because it involved some tax issues and
14 some investment issues. And then, I think you'd see
15 Paragraph 5 and 6 were ones--5 relates to performance
16 requirements, 6 relates to expropriation and
17 Investment Agreements, and I was very much involved in
18 those paragraphs.

19 PRESIDENT HANEFELD: But, do I understand
20 you correctly that in--

21 (Overlapping speakers.)

22 THE WITNESS: They are on the screen.

1 PRESIDENT HANEFELD: And what--were you
2 involved in fair and legitimate expectations? Or...

3 THE WITNESS: I don't even see legitimate
4 expectations. But so--right. So, Paragraphs 5, which
5 relates to performance requirements, and 6 on
6 expropriation and Investment Agreements were the main
7 ones that I was Expert on. And I was just saying,
8 above that, Paragraphs, 3 and 4, which pertain to
9 national treatment and Most Favored Nation Treatment
10 were--they had mixed investment issues and tax issues,
11 so often on those paragraphs, our tax people--you'll
12 see various types of tax measures described on
13 purchase and consumption of services and
14 generation-skipping taxes and the like.

15 And we would need our Tax Experts to talk
16 about that. But in talking about national treatment
17 and some of the subparagraphs, I would talk. So, that
18 was just a joint responsibility. But it just was
19 Paragraphs 3 and 4 were joint responsibilities between
20 me and my Tax Policy Office counterparts. 5 and 6
21 were primarily me as the Expert. Paragraphs 1 and 2
22 were--the Tax Policy people were the Experts on that.

1 PRESIDENT HANEFELD: And let me just ask,
2 now, a simple question. My understanding, now, of the
3 Parties' submissions, or some positions was that
4 arguably, we, as a Tribunal, have jurisdiction. If
5 the breach of an Investment Agreement is at stake,
6 even on questions that are, then, taxation Measures.

7 So, and now, if, as a consequence of this
8 alleged breach of the Investment Agreement, specific
9 taxes have been charged which are stabilized--or not,
10 whatever, we have jurisdiction, nevertheless, to
11 decide.

12 This is your understanding of the provisions
13 as well, or do I misread something in the TPA?

14 THE WITNESS: That is my understanding. I
15 just thought, though, there is a question, and I
16 thought that the U.S. Non-Disputing Party submission
17 related to the question of what was or wasn't a
18 taxation Measure, and that's an Article 22.3.1 issue.

19 PRESIDENT HANEFELD: Exactly. But--and now,
20 taxes are certainly a taxation Measure?

21 THE WITNESS: Right.

22 PRESIDENT HANEFELD: And nevertheless, my

1 understanding is, as long as a breach of an Investment
2 Agreement is at issue, we can--or have jurisdiction to
3 decide also on this the tax consequences of the case.

4 Is my understanding correct? Is this your
5 Expert testimony?

6 THE WITNESS: Yes. And I would say anything
7 that is discussed in Paragraph 6 about the coverage of
8 Investment Agreements is something that I could
9 testify about. But the question--if the question is,
10 what is a taxation Measure, which that term is used in
11 these paragraphs, but the way it is defined, and the
12 question of who negotiates it is--that's the Office of
13 Tax Policy. And that actually--and maybe this would
14 help.

15 In the negotiation of these--of all of our
16 Free Trade Agreements, there would be an investment
17 group, and we would discuss the investment issues and
18 things like what kind of--what kind of Tax Measures
19 might be an expropriation. Or even, you know, to what
20 extent Investment Agreements are covered.

21 We would discuss that in our group, but the
22 tax part in Article 22 generally was a completely

1 different group, that I hardly ever attended, and
2 that's our Office of Tax Policy would be the people
3 who would talk about the general coverage, and
4 particularly Paragraphs 1 and 2, as well as 3 and 4.

5 PRESIDENT HANEFELD: And this is understood,
6 and I will definitely not ask you on, now, on these
7 tax specificities, but one other question I would
8 have, and please let me know whether you can testify
9 on that or not.

10 So, we address the issue when an Investment
11 Agreement is breached, we are competent to have
12 jurisdiction, also decide on taxation consequences,
13 whatever, claims that are related to that.

14 But on the Alternative Claim of the
15 Claimant, which goes on the assumption--it's not the
16 breach of the Investment Agreement. It's a breach of
17 other provisions of the TPA. And if, in this context
18 of this Alternative Claim, breach of customary
19 international law, for example, we come across a clear
20 Taxation Measure. It's about whether the taxation
21 regime applied, stabilized or not, or whatever.

22 Are we still competent? Can you testify

1 whether, in your view, we have still jurisdiction to
2 decide on these taxation measures included or being
3 part of the Claim?

4 THE WITNESS: Well, I could say that part of
5 your question addresses whether Minimum Standard of
6 Treatment Claims can be raised with respect to a
7 Taxation Measure, and on that one, the article, makes,
8 I think, pretty clear that because Paragraph 1 says
9 all Taxation Measures are excluded, unless listed
10 below, and Minimum Standard of Treatment is not listed
11 below. We would say that if it is a Taxation Measure,
12 that Minimum Standard of Treatment with regard to that
13 Measure is not covered.

14 That we would even talk about in the
15 investment group, but whether it is a Taxation Measure
16 in the first place is the question that our Tax Policy
17 people are the Experts on.

18 PRESIDENT HANEFELD: Thank you very much.
19 This was very clear. And so, please, Respondent,
20 continue with your question.

21 MS. HAWORTH McCANDLESS: Thank you, Madam
22 President.

1 BY MS. HAWORTH McCANDLESS:

2 Q. So, you said that the Tax Policy people
3 would be the ones to discuss a Taxation Measure, and
4 when the--and you're familiar as we had just discussed
5 about U.S. Non-Disputing Party submissions. If, for
6 putting together U.S. Non-Disputing Party submission,
7 would those Tax Policy people have been consulted?

8 A. Sorry. I lost your question somewhere.
9 Could you repeat it?

10 Q. Sure. You said that the Tax Policy people
11 are the ones who would have worked on the definition
12 of "Taxation Measure," and asking that if in putting
13 together U.S. Non-Disputing Party submission on that
14 issue, would they have consulted with those Tax Policy
15 people?

16 A. Probably, yes. And in my experience, I
17 remember they would normally--the State Department
18 would go to me, and then I would--if the question was
19 whether it was a Taxation Measure, I would then go as
20 the interlocutor to our Tax Policy people, but the
21 substantive discussion would be between the Tax Policy
22 people and the Office of Claims Investment Disputes at

1 State.

2 Q. Thank you.

3 MS. HAWORTH McCANDLESS: Thank you. I have
4 no further questions.

5 QUESTIONS FROM THE TRIBUNAL

6 ARBITRATOR TAWIL: Concerning the taxation
7 issue, and I understand you have not negotiated, and I
8 don't know how much can you speak about this, in
9 particular, but both in the Main Claim and in the
10 Alternative Claim there's a discussion about
11 Royalties, and Royalties have not been considered
12 taxes by the Peruvian Supreme Court.

13 Has that any impact on the issue of 22.3? I
14 mean, what are we speaking about by "Taxation
15 Measures?"

16 THE WITNESS: I think you are getting into
17 an area of depth way above my head on that one.

18 ARBITRATOR TAWIL: Okay. Thanks.

19 ARBITRATOR CREMADES: You have discussed in
20 your presentation about the fork-in-the-road
21 Article 10.18.4.

22 THE WITNESS: Yes.

1 ARBITRATOR CREMADES: You are aware that
2 Cerro Verde went through different Administrative
3 Courts and Judicial Courts in Perú, going into the
4 Supreme Court. The fact that the Supreme Court has
5 decided something, to what extent it's in
6 contradiction with this Article, and to what extent
7 the Decision of the Supreme Court of Perú,
8 interpreting Peruvian legislation, is somehow very
9 relevant to our Decision?

10 THE WITNESS: I think that in looking at
11 this Article 10.18.4, the question is not really what
12 any court decided, but, rather, what the cause of
13 action was that was presented to them.

14 And we certainly--in our fork-in-the-road,
15 never thought or suggested or stated that the fact
16 that a particular issue is ultimately resolved by a
17 Court has relevance to--the question under the fork
18 was simply whether this same breach was alleged in the
19 first place in the Court's or Administrative
20 Tribunal's or other dispute-resolution proceedings.

21 And so, that would be the question. And so,
22 ultimately I just don't think I see much relevance to

1 the fact that, if a different cause of action is being
2 brought, and a court ultimately decides on that cause
3 of action, there might be a question of deference to
4 that court's Decision. I'm sure there would be in
5 that kind of question, that might be raised. But, it
6 isn't a fork-in-the-road question.

7 ARBITRATOR CREMADES: We might be obliged to
8 enforce Peruvian law, and the question decided by the
9 Supreme Court is either the Concentrator is covered or
10 not by the Stabilization Agreement, and they have
11 decided it's not covered. To what extent it's,
12 really, the same cause of action we are discussing
13 here?

14 THE WITNESS: I might have lost the thread
15 of that question, but, perhaps, this would help, is we
16 would discuss issues such as--and I remember with the
17 Chileans and some other countries, we would discuss
18 the question of--that they would raise to us that,
19 let's say, Chile would say: "We have the same
20 Expropriation Law in substance that the--that is in
21 the FTA, and that, ultimately, we don't want the FTA
22 Tribunal to rule on something that, in substance, is

1 the same as the Chilean Court would rule, and this
2 could overturn the Decision of the Chilean Court."

3 And our answer was that the--at least the
4 fork-in-the-road was only intended to preclude--in
5 that case, when we were discussing Treaty claims
6 because we--the only fork-in-the-road question was:
7 "Are you taking the same bite out of the same apple as
8 in the other proceeding as you are in the TPA
9 proceeding?" And if you are, that was something that
10 should be precluded from the outset.

11 If you aren't, and then brings up other
12 questions of the extent of deference and res judicata,
13 collateral estoppel and the like, but those are
14 questions under those doctrines, and not questions
15 under the fork-in-the-road Article. I'm not sure that
16 answered your question, but if not, maybe I didn't
17 understood your question.

18 ARBITRATOR CREMADES: Well, not totally, but
19 thank you very much.

20 THE WITNESS: Okay.

21 PRESIDENT HANEFELD: I have another question
22 relating to 10.16.1 and 10.28, the reliance. I heard

1 BY MR. UKABIALA:

2 Q. Mr. Sampliner, thank you.

3 You were asked by Ms. Haworth McCandless
4 about what you relied on in preparing your Expert
5 Reports, and also about whether you know Carlos
6 Herrera. Do you have any views about the available
7 record of TPA negotiations in this case,
8 including--given your knowledge of Mr. Herrera's
9 testimony in this case?

10 A. Right. I did hear his testimony, and I was
11 struck by the testimony he gave that there were
12 Reports from, I think, four different agencies on what
13 happened in each of the 13 CAFTA negotiations, and I
14 was surprised to hear that, as I understand it, those
15 had not been produced in the arbitration.

16 Q. Thank you, Mr. Sampliner.

17 MR. UKABIALA: Nothing further.

18 PRESIDENT HANEFELD: Any follow-up questions
19 from the Respondent?

20 MS. HAWORTH McCANDLESS: No. No follow-up
21 questions. Thank you.

22 PRESIDENT HANEFELD: Then this concludes

1 your testimony. Thank you very much. You are
2 released.

3 THE WITNESS: Thank you.

4 (Witness steps down.)

5 PRESIDENT HANEFELD: Shall we make a short
6 break or simply continue?

7 Then we do our break now, and then we
8 continue.

9 (Brief recess.)

10 JAMES OTTO, CLAIMANT'S WITNESS, CALLED

11 PRESIDENT HANEFELD: Welcome back, and good
12 afternoon, Mr. Otto. You have been nominated by
13 Claimant in this proceedings as Expert. I briefly
14 introduce the Tribunal Members. To my left is
15 Professor Tawil, to my right, Dr. Cremades. My name
16 is Inka Hanefeld, I'm the presiding arbitrator in this
17 case.

18 Before we turn to your Expert Reports, under
19 Rule 35.3 of the ICSID Arbitration Rules, you are
20 requested to make a declaration that you will testify
21 in accordance with your beliefs. Can you please read
22 this declaration out for us?

1 THE WITNESS: I solemnly declare upon my
2 honor and conscience that my statement will be in
3 accordance with my sincere belief.

4 PRESIDENT HANEFELD: Thank you very much.

5 Then let us turn to your Expert Reports.

6 Do you have your Reports CER-4 and 9 in
7 front of you?

8 THE WITNESS: No. These are Gary
9 Sampliner's.

10 PRESIDENT HANEFELD: Wonderful. Then we
11 have identified an issue to solve.

12 So, often my questions are obsolete, but at
13 least now we know why I ask them.

14 So, please, now give Mr. Otto the
15 opportunity to have a look at his Report, and the next
16 question, will you give a presentation?

17 THE WITNESS: Yes.

18 PRESIDENT HANEFELD: Has it been already
19 circulated to Professor Tawil? Ah, everyone has it.
20 Perfect.

21 So, now, another look to your Expert
22 Reports, CER-4 and 9. Do we have them now in front of

1 you?

2 THE WITNESS: Yes.

3 PRESIDENT HANEFELD: Perfect. Can you
4 confirm that these are your Expert Reports?

5 THE WITNESS: Yes.

6 PRESIDENT HANEFELD: Do you have any
7 corrections to make or can you just start right away
8 with your presentation?

9 THE WITNESS: No corrections.

10 PRESIDENT HANEFELD: Then please go ahead
11 with your presentation.

12 DIRECT PRESENTATION

13 THE WITNESS: Over the course of the next 30
14 minutes or so, I'd like to talk a little bit about
15 mining fiscal stabilization.

16 Before I get into the Report, let me tell
17 you a little bit about myself. I'm a mineral
18 economist and mining lawyer, and I've got over
19 40 years of experience. I've worked for Governments,
20 the private sector, and multilateral institutions.
21 I've been engaged by Governments in over 30 countries
22 to assist in drafting their mining laws, agreements,

1 and mining policies, and I've assisted over 40
2 countries in the development of their mineral sector
3 fiscal strategies and policies. This includes almost
4 all of the major copper-producing countries that
5 compete with Chile for investment and with Perú for
6 investment.

7 I was engaged by the Peruvian Ministry of
8 Economy and Finance in 2002, and I prepared a
9 comprehensive review of the Peruvian Mining Tax
10 system, and I provided recommendations to Government,
11 many of which were incorporated in the Peruvian laws
12 subsequently in the year 2004.

13 In 2011, I was called back to Lima by the
14 Ministry and prepared a report on Mining Royalty
15 reform options and met with the various officers,
16 politicians, and the President's Office on my findings
17 and recommendations, and again, they adopted my
18 primary--some of my primary recommendations a year
19 later.

20 In my talk, I'm going to cover six topics.
21 I'll start with this brief overview, but then I'd like
22 to delve into terminology before talking about how

1 governments offer stability to an entire Mining Unit,
2 entire Mining Project, to attract continued mining
3 sector investments. Then I'll briefly discuss how
4 countries that Perú competed with at the time for
5 investment offered Stability Guarantees to their
6 Mining Units as a whole.

7 I will then talk about how Peruvian law in
8 practice was consistent with international practice
9 before coming back to my conclusions.

10 A key question, I think, that we have here
11 today is: Do Stability Guarantees apply to an entire
12 mining operation?

13 And it is my belief that comparative
14 practice in competing nations can help answer this
15 question.

16 The conclusions in my Report are that
17 comparative practice shows that Stability Guarantees
18 apply to Mining Units as a whole, that Perú competed
19 with jurisdictions that applied Stability Guarantees
20 to Mining Units as a whole, and that the SMCV's
21 operation, its leaching and concentration facilities,
22 are part of the same integrated mining operation, the

1 Cerro Verde Mining Unit.

2 And that there was nothing in the Peruvian
3 law and regulations at that time that would alter the
4 presumption that Stability Guarantees applied to the
5 entire Mining Unit.

6 And that restricting stabilization to
7 operations described in an initial Feasibility Study
8 is illogical, it fails to recognize that large mines
9 continually evolve, and is counter to the primary
10 purpose of providing stabilization, which is to
11 attract continued investment into the mining sector.

12 First of all, terminology. An integrated
13 mining operation is a common concept in international
14 mining practice. In my Reports, I use the term
15 "Mining Unit," which refers to a single integrated
16 mining operation. Now, what do I mean by that? A
17 mine, a single mine that shares supply administration
18 services. The term for "integrated mining operation"
19 varies from country to country, if you take a look at
20 their laws, and it is often not even defined in the
21 law. Sometimes it is referred to as a "Mining
22 Project," a "mining operation," "an economic Mining

1 Unit," a "mine," or a "Project."

2 In Perú, the term that they use is "Mining
3 Unit," "Economic-Administrative Unit," "single
4 Production Unit," they all convey the same concept of
5 an integrated mining operation.

6 Why is this important? Because comparative
7 practice is that stabilization applies to an
8 integrated mining operation, and Perú's practice was
9 consistent with this.

10 Why isn't the term "Mining Unit" defined in
11 the legislation? Well, having drafted mining laws for
12 many nations, I have firsthand experience in deciding
13 which terms get definitions and which do not.

14 Basically, terms that will have a narrower
15 or different meaning than what a professional, such as
16 a mining engineer, would understand the term to mean,
17 those are the ones that get a definition.

18 I don't believe that a mining engineer would
19 have any trouble understanding what is meant by the
20 law when they refer to a "Mining Unit." It refers to
21 an integrated mining operation.

22 Why do miners seek stabilization? Well, it

1 is to reduce their risks, which are very substantial.
2 First of all, operations evolve. There will be
3 changes to initial assumptions. For example, about
4 limitations on water, power. Most large mines make
5 substantial investments after initial construction,
6 and it would be difficult to identify a major copper
7 mine anywhere in the world that has not evolved to
8 take into account the varying nature of its orebody,
9 infrastructure development, technology. All the mines
10 I talk about in my comparative analysis report had
11 continued investment, including Cerro Verde. Mining
12 companies know that they are going to be making
13 continued investments in their operations and need to
14 know that that's going to be stabilized.

15 I am not aware of any country anywhere where
16 a company is required to get a written confirmation
17 that stability applies to new investment in a
18 stabilized mine and that it's required to get some
19 sort of written assurance that it does. No country.

20 Coming back to risks, mines have high
21 capital costs. There is a lot of money at stake.
22 Many hundreds of millions of dollars, often billions

1 of dollars today. Mines have long pay-back periods,
2 eight, 10, 12 years often, and large mines are
3 financed through loans and lenders will want to see
4 fiscal stabilization during the loan period to reduce
5 inconvertibility and withholding tax risks.

6 Mines are also immobile. If the Government
7 changes the rules of the game, you can't just pick the
8 deposit and mine up and move it to another
9 jurisdiction.

10 Mines are also subject to commodity price
11 cycles. This is a graph that shows copper prices and
12 molybdenum prices over time, and when prices go up, so
13 does the risk that governments will raise taxes, and
14 investors seek stabilization to mitigate this risk.
15 You can see here in around 2002, the copper price took
16 off, and it really peaked around 2012. During this
17 time period, I received numerous requests from
18 Governments to take a look at their tax systems to see
19 how they could get a bigger piece of the pie.

20 Now, most of them were getting a lot more
21 money. Obviously prices went up. Income taxes went
22 up, withholding taxes went up, so their tax take did

1 go up, but they wanted a bigger piece of the pie.

2 If we take a look at this graph, Perú
3 introduced a new royalty in 2004 after prices began to
4 rise, based perhaps on my 2002 Report for the MEF.
5 And as prices began to rise even further, a lot of
6 political pressure was brought to bear in the country,
7 and various senators developed various bills to raise
8 taxes on the mines.

9 I was approached by the MEF to come back to
10 Perú to take a look at some of these bills and to
11 model them for the Government, and I did. And I
12 prepared my Report and recommendations and Report in
13 2011, and in 2012 the Government changed its approach
14 to Royalty.

15 In summary, with regard to risks, investors
16 seek stability for their entire Mining Project to
17 protect against fiscal and administrative risks for
18 all of these reasons.

19 I'd like to talk a little bit about the
20 countries that Perú competed with for investment.

21 During this time period, much of the world,
22 you simply could not invest in it. Places like Russia

1 and China just closed. The former Soviet States in
2 eastern Europe, you could not invest in those places
3 either. They were in transition. Other countries
4 like Iran and Afghanistan had big copper deposits, but
5 politically you could not go there or there was war.
6 Several other countries had big copper deposits, but
7 they had restrictions in place such as requirements
8 for majority equity ownership held by Government or by
9 nationals, and this simply was not acceptable to most
10 mining sector investors. So, with regard to copper,
11 these are the countries that you could invest in.
12 This is where the action was.

13 My Reports conduct a comparative exercise
14 with all of these jurisdictions to take a look at how
15 they approached, how they approach stability. And you
16 can see the list on the left.

17 In taking a look at their systems--and I
18 have experience in all of these countries, all
19 extended fiscal stability to their entire--to an
20 entire integrated mining operation. All provided
21 stability to continued investments in mining
22 operations covered by an existing agreement. The

1 purpose of Feasibility Studies for stabilization
2 purposes was to establish that a minimum threshold was
3 met. That might be an amount or a quantity of
4 capacity.

5 With regard to feasibility, it just doesn't
6 make sense that a Government would limit stability to
7 only a point-in-time project when it knows that the
8 mine is going to continually evolve, investing new
9 money year by year, and it's not realistic to expect
10 that every new thing you add to a Mining Project that
11 is not set out in the Feasibility Study, say a new
12 crusher or a conveyor belt or a new processor, may be
13 subject to a different tax regime. It just doesn't
14 make sense. That is just not the way it was done.

15 I found nothing in the Peruvian Mining Law
16 and Regulations that would alert an investor that the
17 Peruvian approach differed from these findings.

18 Now, the process by which stabilization was
19 granted varied from country to country, but the result
20 was the same.

21 I'm going give to you just one example
22 today. There is others in my Report. This is Chile.

1 Chile uses a statutory and form contract approach, in
2 some ways similar to Perú, but it is done under a
3 special Foreign Investment Law, not under the Mining
4 Act. The contract grants stability for a company's
5 expenditures on activities in an area, and in my
6 Report I provide reference to the Candelaria
7 Project--big copper mine contemporary with Cerro
8 Verde, and it covers all the mining activities during
9 the term of stabilization. Just a typical example.

10 In my experience, Perú looked at Chile
11 because of its success in attracting investment into
12 its copper sector, and in Chile the concept was clear:
13 Stability applied to a company's entire integrated
14 mining operation. Again, the approach to
15 stabilization varied in each country, but the end
16 result was the same: Stability for a defined time
17 period for an entire project.

18 Stability agreements in Perú are not
19 negotiated. The Mining Law and Regulations set out
20 the stability benefits that are available to every
21 mining company that meets a threshold and a form
22 Adhesion Contract is used. In my opinion, this is a

1 good approach because it's efficient, eliminates
2 bureaucratic discretion and corruption, and makes
3 administration and supervision transparent and
4 effective.

5 An investor that meets the procedural
6 requirements is entitled to a standardized stability
7 agreement. There is no negotiation, no cost-benefit
8 analysis, no restrictions on future investment. This
9 is reflected in Mining Law Articles 72 and 86.

10 Perú obligates itself to enter into a
11 non-negotiated form stability agreement with any
12 mining company that submits a Feasibility Study
13 demonstrating that it will meet the minimum investment
14 requirements.

15 Regardless of the approach, the end result
16 is the same in each of these jurisdictions: The
17 entire Mining Unit is stabilized.

18 In my view, Article 2 is the key scoping
19 article in Perú's Mining Law, and it indicates that
20 stabilization applies to an EAU. This is Perú's way
21 of saying "integrated mining operation." Article 82
22 establishes the concept of an EAU as a single

1 production unit sharing supply, administration, and
2 services. And I'd like to illustrate what this means
3 in the next several slides.

4 This EAU definition is consistent with the
5 concept of an integrated mining operation globally.
6 What do they mean by "shared supply, administration,
7 and services?" Well, we've got upstream activities,
8 exploration, mine planning, extraction of the ore,
9 trucking the ore, and various plans that are prepared
10 on an ongoing basis. You've got operational
11 activities, things like administration, employment,
12 electricity supply, water supply, transport;
13 downstream activities, things like sales, market,
14 logistics in EAU. All of these shared costs are
15 associated with the typical integrated Mining Project,
16 an EAU, and they are not attributable to any single
17 part of the operation, such as an individual
18 processing plant.

19 Let's take a look at Cerro Verde, which,
20 like other examples I provide in my Report, is one of
21 the largest--one of the world's largest copper mines.
22 It is obviously a single integrated mine. It

1 operates--single mine, single point of ore extraction.
2 Operations are coordinated from a mine office. If you
3 take a look at the figure on the left, you can see the
4 mine pit and the various processing plants, in plural.

5 If you take a look at the figure on the
6 right, this shows infrastructure that is shared by the
7 various processing facilities including things like
8 water, power, roads, security, et cetera. Any mining
9 engineer, whether from Perú, Chile, or Indonesia,
10 would agree that this is an integrated mining
11 operation, a Mining Unit.

12 This is a picture of the orebody. On the
13 figure on the left we can see three types of ore. The
14 green are the oxides that you've heard about; the red,
15 the secondary sulfides; and the yellow are the primary
16 sulfides. You can see all these different ore types.

17 The lower dotted line shows the eventual
18 extent of the mine pit, after which new investment
19 will be required in order to move underground. The
20 ore types overlap each other, and depending on its
21 attributes, the ore will be sent to one of the various
22 processing plants.

1 The orebody is part of the integrated mining
2 operation, just like the processing facilities, some
3 of which use leaching and some of which use
4 concentration.

5 Wide space drilling is done to obtain data
6 about the ore, and each year the conceptual plan is
7 developed for the next year using a block model, and
8 that's what you see on the right.

9 This is a picture of the mine pit. Where
10 ore will be delivered is decided pretty much on a
11 daily basis. The little holes you see on the right
12 there, those are for blasting, and samples from the
13 drillhole are assayed to determine the nature of the
14 ore. Based on those assays, waste rock is taken to a
15 waste dump, low-grade oxide is taken to a large
16 material leach pad; high-grade oxides to a crusher
17 facility and then to a leach pad; secondary sulfides,
18 well, they go to a leach pad or concentrator; and the
19 primary sulfides, they go to the Concentrator.

20 According to the other Expert Reports that
21 I've read, if the two Concentrators had not been
22 built, a lot of the oxide and secondary sulfide ore

1 would not have been economic to mine.

2 As you can see from these slides, there are
3 not two operations. It's not a concentrator and a
4 leaching facility. It's an integrated operation.

5 Cerro Verde is an EAU: In the international
6 mining lingo, an integrated mining operation. If
7 you're interested in learning more about the mining
8 operation and why it's integrated, I highly recommend
9 that you read Ramiro Aquino's Witness Statement. He
10 goes into a lot of detail. That's where I got most of
11 this information. He's the chief planning engineer
12 for the mine, and he has a superb description of the
13 mine's operations, which clearly show that the mine
14 has never been conceived of a static investment
15 defined by that initial Feasibility Study.

16 ARBITRATOR TAWIL: Mr. Otto, a question on
17 the picture, is it the sulfides already seen here?
18 Are those in the bottom? Where would be the--I mean,
19 the sulfides, if I understand correctly, are on the
20 bottom, and are they already seen here, where they
21 take the sulfides from?

22 THE WITNESS: What they do is--what you see

1 there are--the mine is developed with benches, those
2 layers, and as they mine each bench, they have to
3 break the ore up. They don't know what that ore is in
4 advance. They have a general idea because they have
5 these wide-spaced holes. But each day they will drill
6 these holes, they will prepare a section to be
7 blasted. They will then assay samples that will go to
8 a laboratory, and they will say, oh, this section
9 right here is sulfide. This section over here is
10 oxide. It is not like there is distinct layers like
11 this.

12 ARBITRATOR TAWIL: So, we would not be able
13 to see this in the picture? It will depend on the
14 lab.

15 THE WITNESS: Yes. Yes.

16 ARBITRATOR TAWIL: Okay. Thanks.

17 THE WITNESS: It would be the assays. It is
18 all mixed up. You have a column here that is one, a
19 column here that is another. You really don't know.
20 The ore grade is mixed up.

21 ARBITRATOR TAWIL: Understood. Thank you.

22 THE WITNESS: Okay. Moving on. The

1 Peruvian approach was consistent with international
2 practice, and I'd like to talk just a minute about
3 ring-fencing. Nations that offer stabilization
4 usually ring-fence each stabilized integrated mining
5 operation, and that's the case in Perú also.

6 Ring-fencing is where a company that
7 operates several mines must keep separate books of
8 account for each mine. For example, an investor may
9 have started one mine in 1990, and 20 years later,
10 another mine in a different location. If one of them
11 is stabilized, they're going to have different tax
12 systems. Since two respective stability agreements
13 would stabilize different tax regimes, each mine would
14 need to be taxed separately.

15 Like in other countries that offer
16 stability, Perú has taken a similar approach:
17 Operations in different EAUs are calculated
18 separately. Ring-fencing is addressed in Article 22
19 of the Mining Law. Article 22 says that a mining
20 company that has different EAUs must keep separate
21 books for each.

22 The Article includes information how shared

1 costs can be attributed for tax purposes where there
2 are two or more EAUs, but this does not apply to Cerro
3 Verde because it's a single EAU according to the
4 definition in the Mining Law.

5 This is the same approach that other
6 countries use. I'd like to briefly talk about
7 separating costs. There's a presumption that
8 stability applies to all activities with an integrated
9 Mining Project--an EAU--and there's no reason to
10 allocate shared costs. However, if separate tax
11 systems apply, the division of shared costs for
12 determining taxes would be inherently arbitrary,
13 uncertain, and discretionary. And Perú did not
14 provide any guidance on how shared costs should be
15 allocated.

16 I'm a Tax Policy Expert, and good tax policy
17 aims to provide certainty and predictability. If a
18 Government is going to require a taxpayer to allocate
19 costs within a mining operation, it should provide
20 detailed guidance to taxpayers.

21 As a fundamental taxation policy, principles
22 of certain and predictability, calculations need to be

1 clearly defined.

2 As I mentioned before, after the huge rise
3 in copper prices, and after the introduction of
4 numerous bills by senators, I was invited back by the
5 Ministry of Economy and Finance to analyze bills and
6 make proposals. One of the bills prepared by a
7 senator would impose, individually, a type of tax on
8 each type of metal produced by a company, taking into
9 account revenues and costs attributable to that metal.
10 This would have been an approach that would have
11 required allocating shared costs, in some instances.

12 And in this slide, you can see my advice to
13 Government. It is my understanding when the
14 Government decided that Cerro Verde's Concentrate and
15 Cathode production would be subject to different tax
16 systems, it did not provide any detailed guidance,
17 violating the fundamental tax policy objective with
18 certainty and predictability.

19 Peruvian practice with regard to stability
20 was consistent with international practice. I
21 reviewed the testimony of the Director General of
22 Mining that was in charge of stability agreements, and

1 that of the author of the Consolidated Mining Law.
2 And you've heard their testimony. Their opinion was
3 that the scope of the Stability Agreement extended to
4 the entire integrated Mining Unit, and that's in
5 accord with international practice.

6 To me, the Peruvian Mining Law encourages
7 mine reinvestment, and that stability applies on an
8 EAU Mining Unit basis. Reinvestment tax schemes are
9 not all that common, and obviously Perú wanted to
10 continue to expand and invest. The Government
11 approved the Application to expand the existing
12 Beneficiation Concession, and, like other countries,
13 made no distinction between leaching and
14 concentration.

15 If the Government did not intend to extend
16 stabilization to the Concentrator, why didn't it
17 require SMCV to apply for a separate beneficiation
18 concession?

19 During my many meetings to prepare my
20 comprehensive review of the Peruvian mining fiscal
21 system for the MEF, a limitation of stabilization to
22 only the initial Feasibility Study never came up. It

1 was a nonissue. No one was thinking that way. It
2 would have been a unique position, worldwide, harming
3 Perú's ability to compete for investment.

4 The Concentrator Application was not the
5 first time that Perú expanded the Beneficiation
6 Concession. Here, you can see on this slide all the
7 various changes that took place.

8 In 2002, SMCV expanded the capacity of its
9 Beneficiation Concession by around 30 percent. This
10 expansion was never contemplated in the initial
11 Feasibility Study, but represented a new investment.
12 The Government honored the Stability Agreement with
13 regard to sales from these prior expansions, in line
14 with international practice. These expansions are the
15 type of continuing investment that are typical of all
16 large copper mines.

17 Finally, my conclusions: Comparative
18 practice shows that Stability Guarantees apply to
19 Mining Units as a whole. Perú competed with
20 jurisdictions that applied Stability Guarantees to
21 Mining Units as a whole. SMCV's leaching and
22 concentration facilities are part of the same

1 integrated operation, the Cerro Verde Mining Unit.

2 There was nothing in the Peruvian Mining Law
3 and Regulations that would alter that presumption. And
4 restricting to stabilization--restricting
5 stabilization to operations in an initial Feasibility
6 Study is illogical, and it fails to recognize large
7 mines continually evolve, and is counter to the
8 primary purpose of providing stabilization, to attract
9 continuing investment.

10 In my over 40 years of experience, in over
11 60 nations, this is the first time that I've seen a
12 Government try and limit stabilization in the way that
13 Perú did following the completion of Cerro Verde's
14 \$800 million investment.

15 I urge the Tribunal to reread my First
16 Report. If they want additional details, in
17 particular, Paragraphs 15, 31, and 34--31-34, which
18 set out my main conclusions in reasoning.

19 Thank you.

20 PRESIDENT HANEFELD: Thank you very much,
21 Mr. Otto.

22 Respondent will now make the

1 cross-examination.

2 MS. HAWORTH McCANDLESS: Thank you, Madam
3 President.

4 CROSS-EXAMINATION

5 BY MS. HAWORTH McCANDLESS:

6 Q. Good afternoon, Mr. Otto. We have seen each
7 other before. This is a case of a repeat.

8 A. Deja vu.

9 Q. Deja vu. Exactly.

10 And some of the questions you will--will be
11 familiar to you, and some will be different, but
12 because this is a new Tribunal, it's important to
13 address the issues before this Tribunal.

14 And as in the Cerro Verde Case, and as you
15 are testifying in English and I am speaking in English
16 as well, we'll just have to pause between our
17 statements so that we don't--so, that we're allowed to
18 have the simultaneous translation into Spanish.

19 And thus, if I pause after a question, I'm
20 not--or after you testify a little bit, and I ask a
21 question, it's not necessarily I'm inviting you to
22 continue to speak. It's a matter of just waiting for

1 the translation to catch up.

2 And in light of the fact that we are limited
3 in time, I ask that your answers you provide, they be
4 short so that we don't have to--I don't have to
5 interrupt you, which wouldn't be pleasant on my part,
6 from my end.

7 So, to go over briefly your background, you
8 state in your First Report that you're an Expert in
9 Mining Law and Taxation; correct?

10 A. Correct.

11 Q. And you have 40 years of experience, or over
12 40 years of experience in the study and practice of
13 natural resources law and mineral economics on behalf
14 of Governments, the private sector, and multilateral
15 institutions; correct?

16 A. That is correct.

17 Q. And you were a research professor at the
18 University of Denver School of Law for about 12 years,
19 from 1996 to 2008; is that right?

20 A. That's correct.

21 Q. And for--

22 A. And Director of the Natural Resources Law

1 Program.

2 Q. Okay. At the University of Denver?

3 A. Correct.

4 Q. And for about four years, from 1992 to 1996,
5 you were a senior lecturer at the University of Dundee
6 Center of Energy, Petroleum, and Mineral Law and
7 Policy; is that right?

8 A. Yes. That's the largest natural resources
9 law program in the world. I was also Acting Director.

10 Q. And you have worked as an independent
11 contractor advising Governments on natural resources
12 law and economics; correct?

13 A. That is correct.

14 Q. So, for your professional career, you have
15 been a professor and served as a consultant for
16 Governments on natural resources law and policy; is
17 that right?

18 A. That's correct.

19 Q. And I didn't see on your CV, and I didn't
20 see your Opening Presentation, your Direct
21 Presentation, that you have any experience working for
22 an accounting firm; is that correct?

1 A. That is correct.

2 Q. And you didn't mention anything in your
3 Reports which indicates that you have ever advised
4 private mining companies on how to file their taxes;
5 correct?

6 A. No. I have not advised companies on filing
7 their taxes.

8 Q. No, you have not, just to be clear.

9 A. Just on strategies of where not to invest,
10 based on tax matters.

11 Q. Thank you. And, indeed, you stated in the
12 Cerro Verde Hearing, that you had no accounting
13 experience and that you never advised private mining
14 companies on how to file tax returns. And that--we
15 have that--it's Day 7, Page 1--1941, Lines 9-13. The
16 question was: "And I don't--similar to what I just
17 asked, I don't recall you saying in your Direct
18 Presentation, nor do I recall seeing in your Reports,
19 that you have--or on your CV that you have experience
20 working for an accounting firm; is that correct?"

21 And you answered: "No accounting
22 experience."

1 And I asked: "And neither have you said,
2 either in your Direct Presentation or in your Reports,
3 that you have advised private mining companies on how
4 to file tax returns; is that correct?"

5 And you said: "That's correct."

6 And then I further asked: "Is to just
7 confirm that you--your earlier answer you, yourself,
8 haven't--you don't have any experience preparing or
9 advising companies, mining companies, on how to
10 prepare tax filings; is that correct?" And you
11 answered: "That is correct."

12 And I assume you confirm those answers
13 today?

14 A. Yes.

15 Q. Now, you state in your Reports that
16 Stability Guarantees presumptively apply--and you
17 mentioned this in your direct testimony today as
18 well--to an entire mining unit. So, I first want to
19 discuss the allegation, of a presumption that you
20 mention.

21 And in your Reports, you give examples of a
22 limited number of jurisdictions in the world that you

1 assert provide stability benefits to all investments
2 within a mining unit, but you don't cite in your
3 Reports, and you don't cite in your Direct--you didn't
4 state in your direct testimony any support for the
5 general idea of the existence of a worldwide
6 presumption regarding the scope of stability
7 agreements, and that they presumptively apply to
8 mining units; isn't that correct?

9 A. No, I would say it's not correct.

10 Q. You cite to something in your Reports?

11 A. Well, my Report cites examples of every
12 major copper-producing developing country that--with
13 the exception of México, that--and they all provided
14 stability to the entire Mining Unit, including new
15 investments. So, when you say "you don't cite," well,
16 I've got all the citations demonstrating that each of
17 these countries, they provided stability to the entire
18 integrated mining operation, including new
19 investments, during the period of stability. Those
20 are very specific cites.

21 Q. Let's take a look at some of the--when you
22 make a certain assertion. So, in Paragraph 15 of your

1 First Report, you make an assertion: "Governments
2 presumptively apply stability benefits to all
3 investments within a mining unit," and you don't cite
4 anything in that Statement, do you? You don't have a
5 footnote there, do you?

6 A. No, not in that Statement, no.

7 Q. And then if we turn to Paragraph 32 of your
8 First Report--we'll put that on the screen,
9 momentarily. 32. And you assert there: "All of the
10 stabilization schemes that I am familiar with are
11 granted to either the mining company or a mining unit
12 of that company without regard to the content of the
13 Feasibility Study that it initially submitted to
14 secure a Concession or stability benefit."

15 And you say: "I'm not aware of any
16 jurisdiction, law, or agreement that grants stability
17 to just part of the activities performed within a
18 mining unit."

19 For that first sentence, in particular,
20 you're not citing to anything there, are you? Like
21 citing to a particular document; correct?

22 A. No, not there, but as I mentioned, each of

1 the examples I provided, I did the research, and
2 you've got the citations that demonstrate that.

3 Q. We'll get to the examples that you provide
4 in a minute. I just want to look at what the
5 Statements that you make in your Report, and whether
6 you provide a citation with respect to supports for
7 that.

8 So, you do mention seven countries on which
9 you relied. Is that what you're talking about? The
10 seven countries you relied in your survey, and you
11 identified that in your Opening, in your--sorry, in
12 your direct testimony as well. You referred to on
13 Slide 11--you referred to Argentina, Chile, Democratic
14 Republic of the Congo, Indonesia, Mongolia, Papua New
15 Guinea, and Zambia; correct? Those are the
16 comparative jurisdictions you analyzed?

17 A. Yes, which I selected because they are the
18 countries that Perú competed with for investment
19 during that time period.

20 Q. And you, as we discussed at the beginning of
21 this cross examination, that you've studied and
22 practiced natural resources law and mining economics

1 on behalf of Governments and the private sector for
2 over 40 years; correct?

3 A. Yes.

4 Q. But based on that, you weren't able to
5 identify any independent Authority who agrees with
6 your theory of a worldwide presumption that stability
7 benefits apply to all investments within a mining
8 unit; correct? You only--you're citing to your seven
9 comparative studies that you did, but you're not
10 citing to an independent Authority which agrees with
11 your theory of worldwide presumption, that stability
12 benefits apply to all investments; correct?

13 A. This is a pretty narrow field. There's only
14 a few people that write about it, myself being the
15 primary author of most of the texts on it. So,
16 there's nobody to go to to cite, really.

17 Q. So, it's your theory of the presumption of
18 the worldwide presumption; correct?

19 (Overlapping speakers.)

20 A. Well, I do provide--

21 Q. So, it is your theory that there is a
22 worldwide presumption; correct?

1 A. Yes, it is my theory backed up by my
2 analysis, and all the documentation included in my
3 Report.

4 Q. Thank you.

5 Now, let's--I want to discuss, briefly, the
6 term "mining unit," and you mentioned it again today
7 in your Direct Presentation.

8 In your Second Report you state that the
9 term "Mining Unit" is used by the United States
10 Government in mining regulations and also in legal
11 dictionaries, and that's in Paragraph 26 of your
12 Second Report. It's the last sentence there, the use
13 of the term "mining unit."

14 And then you footnote to--you put a
15 Footnote 91, and looking at Footnote 91, you're not
16 citing to U.S. Government Mining Regulations in
17 support of that assertion, and nor are you citing for
18 definition of "mining unit," per se. Instead, you're
19 citing to another definition, a term "Logical mining
20 unit"; correct?

21 A. It depends on which part of the definition
22 you look at. Logical Mining Unit includes "Mining

1 Unit."

2 Q. But it's a specific term. It's a
3 specifically referenced term, "Logical Mining Unit";
4 correct?

5 A. I saw the term "Mining Unit" used in the
6 Peruvian law. So--

7 Q. That's not my question. My question is--

8 A. What is it again.

9 Q. And the cite that you were--the document
10 that you were citing in support of the concept of
11 "mining unit" being in the U.S. Government Mining
12 Regulations and in legal dictionaries, you're not
13 giving a mine--the definition of "mining unit," per
14 se. You're giving the definition of "Logical Mining
15 Unit," which is a different term; correct?

16 A. It conveys the same meaning, but the wording
17 is slightly different. Yes, I agree.

18 Q. Okay. And you also are citing to a
19 reference to "coal exploration and mining operations,"
20 and referring again there to "Logical Mining Unit."

21 And so, that's in the context of coal
22 exploration, not copper exploration; correct?

1 A. The concept of Mining Unit applies to all
2 mines, of any type.

3 Q. But that's not what you're citing to.
4 You're citing to something specific to coal; correct?

5 A. In this instance, yes.

6 Q. And I assume that you tried to find your
7 best sources in supporting your Statement.

8 Is that a fair assumption?

9 A. I draft mining laws. Every mining law--

10 Q. That's not my question.

11 A. --has a concept of Integrated Mining
12 Project. They use different terms.

13 Q. That's not my question.

14 (Overlapping speakers.)

15 Q. That's not my question. That is not my
16 question. I will repeat my question.

17 My question is--I said, "I assume that you
18 tried to find your best sources in supporting your
19 statement."

20 Is that correct?

21 A. Which statement?

22 Q. The statement that you said in Paragraph 26

1 of your Second Report that states "the use of the term
2 'mining unit' to refer to a single integrated mining
3 operation is consistent with how I have seen the term
4 used in the United States mining regulations and legal
5 dictionaries."

6 I assume when you added that footnote, you
7 were trying to put forward the support--the best
8 support you could find for that statement. Is that
9 correct, or is that not correct?

10 A. Can you show me the--that has got the
11 reference?

12 (Overlapping speakers.)

13 Q. It's right here on the screen. There is the
14 sentence.

15 A. There we go. It "is consistent with how I
16 have seen the term used"--

17 Q. That wasn't my question.

18 A. Yes, it is consistent.

19 Q. My question was not that. My question was,
20 "I assume you tried to find your best source in
21 supporting your statement. Is that correct or not
22 correct?"

1 A. Supporting which statement?

2 Q. That statement at the last sentence of
3 Paragraph 26 that is highlighted in yellow.

4 A. Yes, it does support that statement--

5 Q. But that wasn't my question.

6 A. --it's the only.

7 Q. My question was, that you tried to find your
8 best sources in supporting that statement; is that
9 correct?

10 A. The best source I could find within the
11 United States Mining Regulations is the one that is
12 stated below.

13 Q. Excellent.

14 A. Does that answer your question?

15 Q. That does. Thank you.

16 A. Okay.

17 Q. Let's look at a list of mining terms
18 provided by the Tax Authority in the United States
19 Government and the Internal Revenue Service, which is
20 behind Tab 7. This is Exhibit RE-235. It's talking
21 about--it's the IRS rulings and releases, and it's the
22 revenue procedures, and it identifies there the

1 purpose: "The purpose of this revenue procedure is to
2 index and set forth the definitions of certain mining
3 terms that will be used by the Internal Revenue
4 Service."

5 Do you see that?

6 A. Yes.

7 Q. If we look--then it says, "Objective: The
8 definitions contained in the revenue procedure have
9 been compiled from the regulations or from accepted
10 industry definitions obtained from the sources listed
11 in Section C."

12 And then it goes on to list an index of
13 terms, and if you go see where "mining unit" might
14 fall, which is between numbers 35 and 36, there is no
15 listing of the term "mining unit"; is that correct?

16 A. No, not really.

17 Q. Well, is it there?

18 A. If you read the definition of the word
19 "mining."

20 Q. Yes?

21 A. It has the meaning of "an integrated mining
22 operation, Mining Unit." If you go to the definition

1 of "mining," you'll see that.

2 Q. There is no separate term "mining unit," is
3 there?

4 A. No, because they used the term "mining" to
5 mean "Mining Unit."

6 Q. But my question is, is there a separate,
7 unique term "mining unit" listed there?

8 A. There is no need to because they have the
9 term "mining" defined, which is an integrated Mining
10 Unit.

11 Q. Do you see the term "mining unit" listed
12 there?

13 A. It is not specifically listed because they
14 use a synonym, "mining."

15 Q. You answered my question. You do not see it
16 there.

17 MR. UKABIALA: I think if the question is
18 about what is between "mining" and "mining processes,"
19 it would be fair to show the Expert the actual
20 definitions of "mining" and "mining processes."

21 MS. HAWORTH McCANDLESS: I'm asking if he
22 sees "mining unit" referenced on the list, and he did

1 answer my question eventually, that it is not listed
2 there. And I'm going to move on.

3 BY MS. HAWORTH McCANDLESS:

4 Q. And then later on it identifies "References"
5 in Point 6, and it lists 26 different references
6 there. And Number 19--these are the sources that they
7 used in order to compile the list. In 19 on the list
8 is the "Dictionary of Mining, Mineral, and Related
9 Terms" published by the U.S. Bureau of Mines.

10 Are you familiar with that, or did you
11 consult that when you were trying to find a definition
12 of "mining unit"?

13 A. No.

14 Q. Indeed, when you--in the SMCV-Perú Hearing,
15 you stated that in preparing your Reports you
16 consulted glossaries in your reference library, as
17 well as those on the internet. And you--we can put
18 that up on the screen. That was from Day 7,
19 Page 1935, starting with Line 12. And I asked: "In
20 preparing your Expert Reports, did you look into any
21 of the types of sources of dictionaries that are
22 listed here in this index," which I was just showing

1 you. The answer you said was: "did I look at
2 references from 1923 or 1924? Some of them are old.
3 No, I did not. I do have some glossaries in my
4 reference library. I looked there to see if anybody
5 used that specific term, 'Mining Unit.' They did not."
6 And then I asked--then I said "thank you." And then
7 you continued and you said: "I went to the internet,
8 as everybody does, to take a look to see, and I found
9 two examples of people that were using similar
10 language, but not the exact term 'Mining Unit.'"

11 Do you stand by your testimony from the SMM
12 Cerro Verde unit--Cerro Verde Hearing?

13 A. Yes.

14 Q. Okay. Thank you. Now I want to turn to the
15 issue of separate accounts. And you discussed in your
16 Reports the issue of separating costs between
17 different mining processes and projects, and you
18 talked about that today.

19 Do you recall that?

20 A. Yes.

21 Q. And I understand your position to be that it
22 is difficult to separate costs, and you state that in

1 Paragraph 52 of your First Expert Report. Indeed, you
2 state there, if we get to it, "it is difficult to
3 overstate the challenges associated with attributing
4 shared mining assets and costs to one of two
5 processes, processing circuits in an integrated mining
6 operation for the purposes of calculating a net asset
7 or net profit tax." You confirmed at the SMM Cerro
8 Verde Hearing that a mining company is capable of
9 separating shared costs between projects. It was an
10 answer to a question from President Blanch. She
11 asked--this is in the Transcript, Day 7, starting on
12 Page 1937, Line 12. She asked: "Am I correct in
13 understanding that it can be done but that one Mining
14 Title owner might do it in one way," and then she goes
15 on to say: "And another might choose to do it on the
16 basis of how many days worked, so it would be"--she
17 said, "it would be arbitrary in terms of each would
18 follow a different type of policy," and you answered
19 "yes."

20 And she asked: "So, you could do it? It is
21 just that there may be no consistency between the
22 mines?" And you answered: "Exactly."

1 So, you agree that it is possible to do; it
2 may be difficult, but it's possible to do.

3 You agree with that? You agree with your
4 testimony from the Cerro Verde Hearing; correct?

5 A. Yes. Any method you would come up would be
6 completely arbitrary, and every taxpayer could come up
7 with a different method, and that's why in my
8 presentation and my Report I say that a Government
9 that is going to come up with a unique and novel
10 approach, like Perú did here, is going to need to
11 provide detailed guidance through regulations,
12 guidelines, and then they could do it and not be
13 subject to fines and penalties.

14 (Overlapping speakers.)

15 Q. We'll get to that. We'll get to that.

16 But your testimony is today, as it was at
17 the Cerro Verde Hearing, which is that it is
18 possible--you're saying it is difficult but that it's
19 possible; correct?

20 A. I'm not an accountant, but I assume they
21 could come up with something.

22 Q. Thank you. And let's look, in fact, at

1 Mr. Aquino, who is a witness in this Arbitration, in
2 his First Witness Statement. I believe we talked
3 about this at the last Hearing, but let's take a look
4 at his chart, which is Figure 17. You see here that
5 SMCV, in fact, keeps separate accounting for flotation
6 and for leaching; correct? It's just the top number,
7 which would be "mining" that's the shared cost between
8 the plants; is that correct?

9 A. Give me a second--

10 Q. Sure.

11 A. So does this cover all the costs?

12 Q. This is an example, and he provides--

13 A. Administration, labor, all the--

14 (Overlapping speakers.)

15 Q. It is not necessarily defined what mining
16 that combined one is on the top, but--because this is
17 an example he is giving of how they determine which
18 core ore goes into which processing, but he's saying
19 there is that common mining on top, and then it is
20 divided. I'm just asking you if you understand that
21 as well, and then the flotation is one line and the
22 leaching is another line. So, they are able to divide

1 those separate costs. The one that might be common
2 would be the top line.

3 Is that your understanding as well?

4 A. They have come up with the unit cost for the
5 leaching, the flotation, the mining, but it doesn't
6 tell me anything about most of the shared costs. That
7 would be things like labor, insurance, exploration.

8 Q. It's not going into details, but it has that
9 common--it is splitting up between floating and
10 leaching, the costs; correct? There's a separate line
11 item for each of those; isn't that correct?

12 A. What it does is it tells you the unit cost
13 for, like, say, a ton that is being floated, or the
14 unit cost for a ton that is being leached or a ton
15 that is being mined. But it doesn't tell me what went
16 into that. Does it include the shared costs--

17 Q. Right.

18 A. --of administration and marketing? It
19 doesn't say.

20 Q. Mr. Otto, it has a line item for flotation
21 and it has a line item for leaching. Is that correct?

22 A. Yes, it does.

1 Q. So, it breaks that up.

2 In your judgment, well, in your judgment,
3 those are difficult costs to split up between the
4 Concentrator Plant and the Leaching Plant, but--

5 A. Some costs are not difficult.

6 Q. Some costs are easy to divide.

7 Have you--you have read, I assume,
8 Mr. Ralbovsky's Reports, Expert Reports?

9 A. Yes.

10 Q. And he talks about a method for separating
11 shared costs in both of his Reports. He discusses a
12 methodology that was recommended in a technical advice
13 memorandum issued by the U.S. Internal Revenue
14 Service. And that methodology allocated shared costs
15 on a basis of tons of ore mined. If we could take a
16 look at that, which is RE-49, Tab 9. I will put it up
17 on the screen. It is the Internal Revenue National
18 Office Technical Advice Memorandum. If you turn to
19 Page 14 there, and they are making a recommendation
20 how to split up the costs that are shared. And it
21 says: "Accordingly" in the--second full paragraph and
22 then starting with "accordingly." Down at the

1 bottom--second paragraph. Right there.

2 "Accordingly, absent separately tracking
3 these costs, an allocation based on tonnage reasonably
4 reflects the allocation a taxpayer would have made if
5 the costs of each process were separately tracked.
6 Therefore an allocation of costs based on tonnage is a
7 reasonable method."

8 Do you see that?

9 A. Yes.

10 Q. And according to Mr. Ralbovsky, that
11 methodology has been around for over 30 years.

12 Was that--is the information in this
13 technical advice memorandum, is that new to you?

14 A. It is one of the most obscure documents I've
15 ever seen. Yes. It is new to me. Any allocation
16 that is going to be applied to a type of tax that
17 takes both revenues and costs into account, it is
18 based only on the value of the metal content is--I
19 think that is totally suspect.

20 Q. You're saying that the Internal Revenue
21 Service is totally suspect in recommending this and
22 having been applied for over 30 years? Is that your

1 testimony?

2 A. I can't think of any country anywhere in the
3 world except for the U.S. that would have something
4 like this. It is so obscure.

5 Q. And to confirm your earlier comment, you,
6 yourself, don't have any experience preparing or
7 advising mining companies on how to prepare tax
8 filings; correct?

9 A. That is correct.

10 Q. Now, I want to discuss a couple of
11 statements that you made in your Report and also you
12 made today in your direct testimony.

13 You stated that: "The Peruvian Government
14 did not provide SMCV with sufficient guidance to
15 divide common assets, costs, and expenses between the
16 leaching and flotation operations."

17 If we turn to Paragraph 53 of your First
18 Report, you make that statement, and you also state
19 that in your PowerPoint presentation today on
20 Page 20--Slide 20. You said Perú did not provide
21 guidance on how shared costs should be allocated.

22 You state here, in Paragraph 53, you point

1 to Annex D, and if we could go to Annex D in your
2 Report, your First Report, which is at the back of
3 your First Report. What is Annex D?

4 A. Annex D was a list of facts that were
5 provided to me.

6 Q. A list of facts provided to you. Okay.

7 And if you turn to Paragraph 17 of that
8 annex. 17. There.

9 It states there: "The Government never
10 provided SMCV with any guidance on how to apply both
11 the stabilized and nonstabilized regimes to operations
12 and assets within SMCV's single Integrated Mining
13 Unit."

14 So, that is not some conclusion you have
15 reached on your own. It's a fact that was given to
16 you as assumed; is that correct?

17 A. Yes.

18 Q. You have stated and you state, I think, just
19 recently that you would have--you assert that you
20 would have expected Perú to have provided SMCV to
21 provide shared costs--sorry--a way to divide the
22 shared costs between Leaching and Concentrator

1 Projects. You would have expected the Government to
2 have provided detailed guidelines on that; correct?

3 A. Yes, in line with the recommendation, like
4 you saw in my Second Report to the Ministry of Economy
5 and Finance, on a similar type of tax that would have
6 required sharing of costs. I would have expected it.

7 Q. You would have expected it.

8 Is it your testimony that if a taxpayer does
9 not get that kind of explicit guidance, that in your
10 view it is sufficient for the taxpayer to do what they
11 want, that they do not have to comply with the
12 requirements of the law?

13 Is that your testimony?

14 A. Can you break that question down a little
15 bit?

16 Q. Is it your testimony that if a taxpayer does
17 not get the explicit guidance that in your view is
18 sufficient, that the taxpayer can do what it wants?

19 A. No.

20 Q. And you would agree, would you not, that for
21 a large company like Freeport, if it needed any
22 additional guidance on that particular point or any

1 point concerning tax, for that matter, it could hire
2 tax advisors to help them understand their tax
3 obligation under Peruvian law; is that correct?

4 A. If you've got an EAU, it doesn't even come
5 up. There is no sharing of costs.

6 Q. That's not my question, Mr. Otto. My
7 question was very specific.

8 A. Okay.

9 Q. You would agree, would you not, that for a
10 large company like Freeport, if they needed additional
11 guidance at any point, it could hire tax advisors to
12 help them understand their tax obligations.

13 Would you agree with that statement?

14 A. Yes. Any company can hire a tax advisor.

15 Q. And I assume that you're not advocating that
16 a taxpayer should avoid its tax obligations simply
17 because the Regulations are allegedly not sufficient
18 to provide guidance, in the eyes of a taxpayer, to
19 undertake certain calculations; correct?

20 A. Correct.

21 MS. HAWORTH McCANDLESS: I have no further
22 questions.

1 PRESIDENT HANEFELD: Any questions by
2 Claimant in redirect?

3 MR. UKABIALA: Yeah. Just a very brief
4 redirect, Madam President.

5 MR. UKABIALA: Could we please with the
6 assistance of opposing Counsel go back to Tab 9, which
7 is RE-49, for the record, which was shown to Mr. Otto
8 during the cross-examination?

9 REDIRECT EXAMINATION

10 BY MR. UKABIALA:

11 Q. Mr. Otto, you were shown this document
12 during cross-examination.

13 Do you recognize what this is? Is it--

14 A. I know there was some sort of tax memorandum
15 that Ralbovsky made reference to. I did glance
16 through it. That was a couple years ago.

17 Q. And what jurisdiction is this from?

18 A. United States, I'm told.

19 Q. Did you in your review of the Peruvian
20 Mining Tax Law and Regulations see anything that would
21 authorize a Peruvian Mining Tax payer to use cost
22 allocation methods applicable in the United States?

1 A. No.

2 Q. The next question I have is about Ramiro
3 Aquiño's First Witness Statement, which is on
4 Figure 17. That was also shown to Mr. Otto, I would
5 be grateful if opposing Counsel could also pull up
6 that figure. Thank you.

7 BY MR. UKABIALA:

8 Q. Mr. Otto, during your review of the Peruvian
9 Mining Tax Law and Regulations, did you see anything
10 that would permit a Peruvian taxpayer to use the cost
11 allocation it uses for management purposes for tax
12 purposes?

13 A. No.

14 Q. And in your experience advising on tax,
15 Mining Tax policy globally, what kind of advice do you
16 typically give governments about having sufficient
17 clarity in their tax laws and the risks of not doing
18 so?

19 A. When I develop Reports like I did for the
20 Ministry of Economy and Finance, if they are going to
21 be putting into place unique and novel approaches, I
22 always recommend that they provide detailed guidance

1 on how to proceed, how a taxpayer should proceed, and
2 that would be the case with Cerro Verde taking a look
3 at new investments aren't covered by stability, so you
4 would have one tax system depending on whether it was
5 invested this year, another tax system if it was this
6 year, another tax system if it was this year. So,
7 you'd have to provide detailed guidance for something
8 like that. Regulations, guidelines. You'd have to
9 also provide training within the Ministry on how to
10 handle it.

11 Q. And have you seen anything in the Peruvian
12 tax law regulations that you reviewed that would
13 constitute the kind of guidance that would be required
14 to allow a taxpayer to know how to allocate shared
15 costs in the way that Perú expected Cerro Verde to do?

16 A. No.

17 MR. UKABIALA: That's all we had for
18 redirect.

19 Thank you.

20 PRESIDENT HANEFELD: Any recross?

21 MS. HAWORTH McCANDLESS: No recross.

22 PRESIDENT HANEFELD: Now, on us to ask

1 questions, and with the permission of my
2 co-arbitrators, I will start.

3 QUESTIONS FROM THE TRIBUNAL

4 PRESIDENT HANEFELD: Mr. Otto, I understand
5 from Paragraph 42 of your First Expert Report that,
6 with regard to the facts of this case here in this
7 Arbitration, you have reviewed the factual summary in
8 Annex D of your Report.

9 My question is, this summary of facts was
10 provided by Claimant's Counsel to you. Did you also
11 study underlying specific documents, for example, the
12 1998 Stability Agreement or the Pre-Feasibility Study
13 of 2002 or other official documents from MINEM or
14 SUNAT preceding the investment in the Concentrator?

15 THE WITNESS: I relied on the facts provided
16 by Counsel, but I also relied on--I read through many,
17 many of the documents.

18 PRESIDENT HANEFELD: So, you read through
19 many, many of the documents.

20 THE WITNESS: Many of the documents.

21 PRESIDENT HANEFELD: This is not specified
22 in your Report; right?

1 THE WITNESS: That I read?

2 PRESIDENT HANEFELD: Which documents you
3 consulted?

4 THE WITNESS: Well, you can see all the
5 citation, the ones that I've cited, but I've read
6 through the Mining Law, the Regulations, things that
7 were referred to by Ralbovsky. I read through his
8 citations. I read--I would make requests and they
9 would send me documents, because I would look for
10 certain things that I thought would be useful to the
11 Tribunal, and useful for me to understand the
12 situation too.

13 So, I don't know, I probably received 30,
14 40, 50 different documents, like the Feasibility
15 Study, for example. They sent me some parts of it
16 because I wanted to look at parts of it. So, I did
17 have more at my disposal than the documents or the
18 fact statement that was sent to me.

19 PRESIDENT HANEFELD: Just to fully
20 understand, so you had more at your disposal than the
21 summary of the facts, and what you had in disposal and
22 you relied on is included in your Report in the

1 footnotes?

2 THE WITNESS: What I relied on--I tried
3 to--when I prepared my Reports, I attempted to provide
4 support for my various Statements, as drawn upon on
5 references. And some of those were provided by
6 Counsel, others were from my own collection or my own
7 research.

8 PRESIDENT HANEFELD: Just as an example, for
9 example, we discussed here the 2002 Pre-Feasibility
10 Study, and we noted that there were a lot of
11 redactions in this document, and have you reviewed, in
12 preparation of your Report, the 2002 Pre-Feasibility
13 Study?

14 THE WITNESS: I received part of it, and I
15 think I make reference to that in my Report. So, the
16 only part that I saw was the part that's referenced in
17 my Report. The Feasibility Study is--you know,
18 they're usually hundreds and hundreds of pages long,
19 so I requested a certain part of it that I thought
20 would be useful. The economic evaluation. And so,
21 you can see the exact pages I had access to, if you're
22 interested.

1 PRESIDENT HANEFELD: Thank you. Then the
2 next question I would have relates to what you
3 testified earlier. I understood you testifying: "It
4 is my theory that it is a worldwide presumption that
5 stability agreements cover all investments within a
6 Mining Unit," and you testified this on the basis of
7 your 40 to 60 years' experience in the industry in
8 various countries.

9 Have I understood your testimony correctly?
10 This is your theory in which you truly believe, the
11 theory of presumption?

12 THE WITNESS: Well, I think it's more than a
13 theory. If we take a look at those countries, those
14 are the countries that Perú competed with for
15 investment in copper. In all but one of those
16 countries, I prepared in-depth studies of their Mining
17 Tax systems. Some of those countries, I wrote their
18 Mining Laws. I have in-depth experience in those
19 countries. I know how stabilization worked in those
20 countries. I helped design their stabilization.

21 So, it's more than just a theory. This is
22 actual practice. This is my experience in Mongolia.

1 My experience, in Papua New Guinea. This is how it
2 worked. It's not something based on some academic
3 down in Australia who wrote a report for some academic
4 journal.

5 PRESIDENT HANEFELD: And as you mentioned
6 that you also published a lot.

7 Have you written on this theory, a
8 presumption of scope of stability agreements outside
9 of this arbitration and the SMM Arbitration, outside
10 of your Reports? Can you refer me to any Authority in
11 which you have--independent from this arbitration,
12 stipulated this notion?

13 THE WITNESS: The issue has never arisen
14 anywhere else in the world. It's just not--it's a
15 non-issue. The first time I heard about this was, you
16 know, this Cerro Verde situation. It just has never
17 come up. It's not an issue I would write about
18 because it's not an issue anywhere else, and it wasn't
19 in Perú.

20 You know, prices went up, senators started
21 submitting all these bills, they're looking for a way
22 to earn more money from the sector, and all of a

1 sudden this new and novel approach appears, you know.
2 Nobody has emulated it, that I am aware of, anywhere.
3 It's--it remains unique to Perú.

4 And when I read the Peruvian Mining Law, and
5 in my meetings with Perú, this issue of "new
6 investments aren't covered," it just--it was never
7 discussed. It was never on the table. And I worked
8 with Mr. Polo, you know, so--Marita Chappuis, and the
9 whole economic team, twice, you know, once in 2001 and
10 then, again, in 2011.

11 PRESIDENT HANEFELD: I think my next
12 question relates to a similar Statement in
13 Paragraph 45 of your Expert Report, where you speak of
14 industry expectations that stability benefits apply to
15 a Mining Unit. Can you refer me to any Authority that
16 defines such industry expectations as to the scope of
17 stability agreements in Perú?

18 If you said this was also another common
19 understanding in Perú, or the time except in this
20 case. Can you refer us to any source which supports
21 your opinion?

22 THE WITNESS: No, I couldn't point you to a

1 single source.

2 PRESIDENT HANEFELD: Then another question,
3 in Paragraph 45 of your Expert Report, and also in
4 today's presentation, you state: "Nothing in my
5 review of the Mining Law and Regulations in effect
6 under the Stability Agreement leads me to conclude
7 that Perú's Stability Regime applied to anything less
8 than Cerro Verde's entire Mining Unit."

9 Now, in contrast--and this is what the case
10 is about. And now Perú and the Peruvian authorities
11 and also the Courts rely on the term "exclusively" in
12 the Mining Law in order to say that Stability
13 Agreement relate to an investment project as defined
14 in a Feasibility Study, or somehow defined in a
15 stability agreement or whatever.

16 So, what is your Expert view on that?

17 THE WITNESS: My view when I read those key
18 Clauses, or Articles 82, 83, 85, you know the ones, of
19 course, is that stability applied to Concessions, and
20 there were two types of Concessions: The Mining
21 Concession and the Beneficiation Concession. And it's
22 an Adhesion Contract, which means that you read what's

1 in the Law, and then it's, you know, stability is
2 formalized in this short little Agreement.

3 And what's in the Law is, what are the
4 activities of a mining concession? What are the
5 activities of a beneficiation concession? If you go
6 to Articles 8 and 9 and 17 and 18 in the Mining Law
7 and read those, it tells you, if you have a mining
8 concession or a beneficiation concession, what it
9 authorizes you to do.

10 And in 17 and 18, a beneficiation
11 concession, if you hold that, you have the right to
12 this whole string of different activities. And one of
13 those is to develop processing plants. So, they had
14 these Concessions. So, if you read 17 and 18, they
15 had the right to develop processing plants, plural. I
16 mean, it's really clear there.

17 So, my view is the Stability Agreement is an
18 Adhesion Contract. You have to read it in association
19 with the Mining Law and with the Mining Regulations,
20 and stability applies to the Concessions that are set
21 out in the Stability Agreement, and those are set out
22 in the Stability Agreement, you know, Cerro

1 Verde 1, 2, and 3, the Beneficiation Concession.

2 And then you read what activities are
3 allowed. And you go to 7, 8, and 17, 18. It's all
4 covered. There's no restriction on new investment.

5 PRESIDENT HANEFELD: That is also what I
6 understood from your Second Report and also today's
7 Presentation, that you put a lot of emphasis on the
8 fact that it is an Adhesion Contract that forms the
9 basis--and now, of the Stability Agreement.

10 Are you familiar with the particularities of
11 how such stability agreements are then actually in
12 practice concluded in Perú? And now, who applies for
13 a Contract to filter out what is negotiated, what is
14 not? Do you know about these particularities of the
15 process?

16 THE WITNESS: Only what I can deduce from
17 the law and regulations. I see no room for any
18 negotiation when I read those, if that's your
19 question.

20 PRESIDENT HANEFELD: You just said it's a
21 short little agreement, and, now, what do you mean by
22 that? And now, we heard earlier in this Arbitration

1 that even lawyers were involved in negotiating, and
2 now there's an Agreement.

3 So, I just want to understand from you, as
4 an Expert, how much do you know about the process of
5 how such Agreements come into place in Perú?

6 THE WITNESS: Well, when I read the form
7 Agreement, I saw nothing that was negotiable. The
8 time period is set, the names of the Concessions are
9 set. I saw no terms there that you would actually
10 negotiate over. If you'd like to draw my attention to
11 one or another, I could tell you my view on that, but
12 I saw nothing that was negotiable.

13 Everything--all the various things you might
14 see negotiated in other countries are set out in the
15 Law. You get stabilization of this, this, this, for
16 this number of years. All those terms that might be
17 negotiated in another country aren't negotiated in
18 Perú. The Adhesion Contract, it's take it or leave
19 it. You can't change something that's in the Mining
20 Law. You can't change something that's in the
21 Regulations.

22 You can't all of a sudden, in the Adhesion

1 Contract, add some new obligation or a new right.
2 It's an Adhesion Contract. So, you have to go back to
3 the primary source, the Mining Law, the Regulations,
4 the Adhesion Contract is a way of formalizing
5 the--formalizing the stability. But there's--I saw
6 nothing in there that you would negotiate.

7 PRESIDENT HANEFELD: Thank you.

8 ARBITRATOR TAWIL: Yes. Professor Otto, if
9 I understood correctly, you advised Perú on mining
10 issues and Royalties at that time?

11 THE WITNESS: On two occasions.

12 ARBITRATOR TAWIL: Can you tell us a little
13 bit about that advice, and particularly if it relates
14 to any relation of the discussion here?

15 THE WITNESS: Yes. Perú was interested in
16 attracting investment. It had come out of a period of
17 really tough economic times, basically civil war, and
18 they needed to bring in foreign investment to help
19 rebuild the country. Their mines, which were mainly
20 under State ownership, had failed, and they decided to
21 privatize. So, they undertook an effort to modernize
22 their Mining Law, bring it up to date, to incorporate

1 such features that would be useful to updating it.

2 And a part of what they wanted to do was to
3 have a fiscal system that would provide a fair share,
4 but be attractive to foreign investors. So, I was
5 invited by the Ministry of Economy and Finance to come
6 down, and I spent several weeks meeting with various
7 stakeholders, industry, Government, accountancy firms,
8 whoever they wanted me to meet with, and the people
9 that I requested.

10 So, I met with a lot of different people. I
11 then went back and did a lot of economic modeling to
12 take a look at how does their current system compare
13 with the systems in other countries, and taking a look
14 at different Measures--to take a look at the
15 competitiveness of their system, and to make
16 recommendations, tax type by tax type, about whether
17 they should keep their current system or make changes
18 to it. And I made the recommend--I think two or three
19 recommendations that are pertinent here.

20 One is that they impose a Royalty, that
21 there was room in order to still be competitive. They
22 could get a little bit more money by putting into

1 place a Royalty, and I recommended a cap of around
2 3 percent on the Royalty.

3 ARBITRATOR TAWIL: Could you put that in
4 time? When would that be?

5 THE WITNESS: This would have been, I think,
6 2001. 2001. I took a look at stabilization. I said,
7 "this is really important for the country. You should
8 retain it." There was no question back then about new
9 investments and--versus old investments. It was all,
10 you got the Project, you got it stabilized, and if you
11 read the Report, it does talk about stabilization and
12 they should keep it, they should put in place a
13 Royalty.

14 There was also--

15 ARBITRATOR TAWIL: So--sorry, how would the
16 Royalties work, under your advice?

17 THE WITNESS: Under my advice, I think--it's
18 been a while since I've read that Report, but I
19 believe I recommended putting into place a Royalty not
20 to exceed around 3 percent. What they ended up with
21 was a Royalty that didn't exceed 3 percent, it was a
22 graduated, 1, 2, 3-step Royalty in line, not exceeding

1 my cap.

2 ARBITRATOR TAWIL: What would happen with
3 ongoing Projects with stability clauses, was that
4 discussed at all?

5 THE WITNESS: Yes, it was discussed. It was
6 discussed with the Government. It was discussed with
7 industry. And so, when I met with industry, it's like
8 "what do you guys think about a 3 percent Royalty?"
9 and it was, like, well, we've got stability
10 agreements. It won't apply. And if they try to make
11 it apply, we're all going to sue.

12 And so, that was the view of the industry.
13 If we've got a stability agreement, we're covered.
14 And I think that was pretty uniform. I heard nobody
15 on the industry side--

16 (Overlapping speakers.)

17 ARBITRATOR TAWIL: And what was the position
18 of the Government, of Mr. Polo, and the rest of
19 Government officials with the Projects, with
20 stability, was this issue of the Feasibility Study
21 raised? Can you explain a little bit more in detail?

22 THE WITNESS: Well, I'll have to say that

1 stability was not the main focus of what we were
2 doing, so it--this was a very minor subject. The main
3 discussion--and I wasn't really in the center of that
4 discussion--was whether or not Royalty was a tax or
5 not. So, I sat in on discussions about that.

6 And the--to me, you know, it was obviously a
7 tax, but there were lawyers and economists in the room
8 were saying, oh, well, in Perú, Royalty might not be a
9 tax. It could be, like, an administrative fee. And
10 then the question is, is okay, does stability apply to
11 just taxes or does it apply to administrative matters
12 also?

13 So, I don't think there was ever any sort of
14 resolution, other than me leaving knowing that, if
15 mining companies that had stability agreements were
16 required to pay it, they were all going to sue. It
17 wasn't my--really wasn't a focus of mine other than to
18 advise the Government, yes, stability is good. You
19 should keep it as you reform your system.

20 ARBITRATOR TAWIL: Okay. Thank you. No
21 further questions from my side.

22 ARBITRATOR CREMADES: I read with great

1 interest your two Reports, and I followed your
2 intervention today. I think we are convinced that you
3 have a great global experience in the mining industry,
4 and your advice is very important for States in which
5 you have been acted.

6 My question is, when a foreign investor
7 decides to go into a country, has to make a risk
8 assessment, and one part of the risk assessment is the
9 legal situation. I saw that you were really critical
10 to the situation in Perú. You were criticizing,
11 especially, the Adhesion Contracts, but anyhow, that's
12 what the foreign investor accepted coming to Perú.

13 And we, as arbitrators, we have to apply the
14 concrete Legal Framework and the Contract itself. I
15 mean, how could you advise us, as a Tribunal, who have
16 to take a decision about those questions we are
17 facing, but within the Legal Framework and within the
18 Contract you are criticizing so much?

19 THE WITNESS: Oh, I think, perhaps, there's
20 some misunderstanding. I think the approach they've
21 taken in Perú with putting the main stabilized tax
22 terms and so forth in the Mining Law is excellent. I

1 think the idea of having an Adhesion Contract is
2 excellent. I have recommended the same approach in
3 other countries, because it is such a good approach.
4 It's unfortunate that, you know, this controversy has
5 arisen. It's been extremely successful.

6 If you take a look at how much investment
7 Perú has attracted, and the fact that they still use
8 stability agreements today, you know, is indicative of
9 the success they've had attracting investment to Perú.
10 And tax stabilization, I think, has been an important
11 part of it. It's not, you know, the entirety of it.

12 But, you know, having a reasonable tax
13 system stabilized so that a company can, when it does
14 its Feasibility Study, and determines, you know, is it
15 going to make profits or not, it knows, you know, for
16 that stability period that things are going to
17 be--aren't going to change. That's powerful. In
18 their approach of using a combination of the Mining
19 Law, with formalization through an Adhesion Contract.
20 I fully support and recommend it. I have no problem
21 with that approach at all. Highly successful.

22 ARBITRATOR CREMADES: Thank you very much.

1 PRESIDENT HANEFELD: Any follow-up questions
2 by the Parties?

3 MR. UKABIALA: None for Claimant.

4 Just for the record, the Report that
5 Arbitrator Tawil was asking about is Claimant's
6 Exhibit 19. That's the Report that Mr. Otto provided
7 to Perú in 2002, which is referenced in--I'm sorry.

8 ARBITRATOR TAWIL: Noted.

9 MR. UKABIALA: I'm sorry. It's 381.
10 It's 381. Claimant's Exhibit 19 is Mr. Polo's
11 Presentation that references Mr. Otto's Report.

12 Sorry about that.

13 ARBITRATOR TAWIL: So, it's CE-381?

14 MR. UKABIALA: Yes, Claimant's Exhibit 381.

15 ARBITRATOR TAWIL: Okay. Thanks.

16 PRESIDENT HANEFELD: Any follow-up questions
17 by the Respondent?

18 MS. HAWORTH McCANDLESS: No follow-up
19 questions from Respondent.

20 Thank you, Madam President.

21 PRESIDENT HANEFELD: Thank you, Mr. Otto.
22 This concludes your testimony. You are released as an

1 Expert in this proceeding. Thank you very much.

2 THE WITNESS: Thank you.

3 (Witness steps down.)

4 PRESIDENT HANEFELD: So, shall we make a
5 15-minute break, and then start with your Expert?

6 MS. HAWORTH McCANDLESS: That would be fine
7 with Respondent.

8 (Brief recess.)

9 STEPHEN RALBOVSKY, RESPONDENT'S WITNESS, CALLED

10 PRESIDENT HANEFELD: Good afternoon,
11 Mr. Ralbovsky. Welcome as Expert for the Respondent
12 in this Arbitration.

13 I saw you today, so I think we do not need
14 to introduce ourselves. So, let us start right away.

15 Can you please be so kind to read out the
16 Declaration under Article 35.3 of the Arbitration
17 Rules?

18 THE WITNESS: Of course. I solemnly declare
19 upon my honor and conscience that my statement will be
20 in accordance with my sincere belief.

21 PRESIDENT HANEFELD: Thank you. Do you have
22 your Expert Reports RER-4 and 9 in front of you and

1 can confirm that they are yours and that they are
2 correct?

3 THE WITNESS: Yes, ma'am. I have them here.
4 I see my signature on my First Report. I see the
5 Second Report and my signature as well, and I am
6 sure--I have no changes and I'm sure they are complete
7 and as submitted.

8 PRESIDENT HANEFELD: And do you make a
9 presentation?

10 THE WITNESS: Yes, ma'am.

11 PRESIDENT HANEFELD: Is it already
12 available? Yes, for everyone. Then, please, go
13 ahead.

14 THE WITNESS: Thank you.

15 DIRECT PRESENTATION

16 THE WITNESS: Madam President, Gentlemen
17 Arbitrators, thank you for allowing me to present my
18 direct testimony in this manner. Like the two Reports
19 I've given as well as this presentation, it is my goal
20 to be efficient and effective and provide something
21 useful for you. You can see by the title of this
22 presentation that I'm going to be quite focused on the

1 1998 Stability Agreement throughout my presentation.

2 Let's talk a little bit about.

3 ARBITRATOR TAWIL: A bit slower.

4 THE WITNESS: Thank you. I'm very conscious
5 of my 30 minutes.

6 Let's talk a little bit about me for a
7 minute. Believe it or not, 50 years ago come
8 September, people started paying me to be an
9 accountant. I have built a career in accounting, law,
10 and tax since then, and for 36 of those years, I have
11 been a Mining Tax Expert.

12 I have an undergrad in accounting and a JD
13 in law, and I've gained much of my experience when I
14 joined PwC, then PW, in 1987, working on mining
15 companies, international mining companies, and quickly
16 became the U.S. mining tax leader about six years
17 after I arrived and then the U.S. mining leader cross
18 line of service. And then in 1998 I took over as the
19 global mining leader for PwC until I retired in the
20 year 2014.

21 I've had the privilege of teaching both in
22 PwC's America School of Mines, and I was engaged after

1 retiring the--2014, is when I retired from PwC. I
2 aged out at 60. And I've also had the privilege of
3 teaching a law school class on Global Mining Taxation
4 at the University of Arizona law school.

5 I knew one of the leaders of the mining
6 school there. She asked me to come write--to present
7 a class. I actually wrote a three credit-hour class
8 and then presented it. So, I have a great deal of
9 experience internationally talking about things. But
10 I made my living as a tax practitioner, where my
11 advice often ended up at the end of the day on a tax
12 return where I had to pick up the pen and sign under
13 penalties of perjury, just the same as the taxpayers
14 do.

15 So, what I have seen, the bulk of my
16 approach has been from that angle and working for
17 clients, although also advising Governments. I'm well
18 aware of, you need to know the law. You need to make
19 decisions about how to treat things and not have the
20 luxury of presumptions and undefined terms.

21 Let's start at beginning. The question here
22 is the 1998 Stability Agreement, and the issue under

1 that is, is the Primary Sulfide processed through the
2 Concentrator Project that came online in the year 2007
3 included in the 1998 Stability Agreement? My very
4 clear answer to that is, no. The 1998 Stability
5 Agreement includes the Leaching Project only. Let's
6 pause for just a moment and do a little Mining 101 and
7 talk about how quite different these two types of
8 copper ore are. We have two types of ore, two
9 process, and at the end of it, two products.

10 So, we have the original ore included in the
11 1998 Stability Agreement, which was the oxide and the
12 Secondary Sulfide ore. That was mined, went off to
13 the leach pads, and then through SX/EW, became
14 electrowon cathode copper that is 99.99 percent pure.

15 The later ore, the ore that came on line in
16 2007, when the big Concentrator came on line and was
17 excluded from the '98 Stability Agreement was Primary
18 Sulfide ore. It went through a Concentrator. It was
19 crushed and ground, went through a Concentrator, and
20 when they were done, they had concentrate.
21 Concentrate is a fine black powder. Once it dries, 25
22 to 30 percent copper, a vastly different product. And

1 SMCV did what many mining companies do, they shipped
2 that off to somebody else to be smelted and refined
3 and turned into useful copper.

4 The '98 Stability Agreement was based on and
5 specifically refers to the '96 Feasibility Study. The
6 1996 Feasibility Study detailed the expansion of
7 SMCV's leaching operation of the oxide in the
8 Secondary Sulfide.

9 Remember, this is a couple of years after
10 SMCV was bought from Minera Perú, and they had been
11 leaching and in '96 they were continuing leaching and
12 expanding it.

13 The Stability Agreement that SMCV applied
14 for and their own label of the Agreement was "the
15 Leaching Project of Cerro Verde." Neither the '96
16 Feasibility Study nor the '98 Stability Agreement
17 included the Primary Sulfide or the Concentrator.

18 Again, it is very important to focus on
19 the years we're talking about here. So, why wasn't
20 the Primary Sulfide and the Concentrator included in
21 that '98 Stability Agreement or in the Feasibility
22 Study? It wasn't economic. Mining the sulfide and

1 processing it through a Concentrator in 1996 wasn't
2 economic because for a--good, scientific operational
3 reasons. It wasn't a political thing. There was
4 inadequate power and water. Mills take a lot of power
5 and water, and not only was there not
6 enough--especially the power. It was unreliable at
7 times in that part of Perú.

8 Mr. Davenport, one of Claimant's Witnesses,
9 testified that Phelps Dodge was one of the companies
10 that bid on Minera Perú in '93, and they declined
11 because the returns on the Primary Sulfide were
12 unacceptably low to them in 1993 as they made their
13 analysis. SMCV was offered to 50 companies, Cyprus
14 was the only one that said, yes. So, we have on the
15 record Phelps Dodge saying, no, thank you, because we
16 can't make money. We can't run this Concentrator and
17 mine the sulfide.

18 Mr. Davenport continued, that was still
19 their position at SMCV in the year 2000, when he got
20 there. Further proof that the '98 Stability Agreement
21 excluded the Primary Sulfide and the Concentrator was
22 Mr. Davenport saying in his Report he/they/SMCV/Phelps

1 Dodge were worried that there was an obligation to
2 build a Concentrator and because it was not
3 economical. That was not an obligation that they
4 wanted from the Peruvian Government.

5 He went on further to say that, as they
6 mined the oxide and the Secondary Sulfide--because
7 that's what they were running, a leaching
8 operation--when they encountered Primary Sulfide, they
9 went around it or, if they had to mine through it,
10 they mined it and they threw it away as waste. His
11 word: "Waste." That's what this was in 1996 and 1998.

12 Sulfide in the ground that can't be
13 economically processed is not a worthwhile ore.
14 Notice he also did not say, when we had to mine
15 through it, we stockpiled it. Stockpiling is what
16 miners do when they encounter ore they believe is
17 useful and they can process it, but not right now for
18 one reason or another. They put it aside. They
19 preserve it to go back and get it and use it when it's
20 appropriate. They did not stockpile the Primary
21 Sulfide there at SMCV.

22 Here we have what I think is the most

1 persuasive reason as to why the Primary Sulfide and
2 the Concentrator are not included.

3 This is a letter. It's Exhibit CE-11. This
4 is a letter from Cyprus, who was the majority
5 Shareholder of SMCV at that time, in September of
6 1996, which is the summer of when the original
7 Feasibility Study for the leaching was submitted to
8 Perú's Government Authorities. This is a letter from
9 Jeff Clevenger, who was the President of Cyprus,
10 saying, pursuant to our Share Purchase Agreement and
11 our schedule of investments we are required to make,
12 we are exercising our right to reduce that financial
13 obligation because a mill is uneconomic. It is beyond
14 our control, "our" being Cyprus and SMCV. It is
15 beyond our control to build an economic mine.

16 He mentioned the power and the water, but he
17 also said, "this ore is unusually hard, and the
18 technology to grind it is expensive and separating the
19 copper from the ore is especially difficult, complex,"
20 he said, "complex recovery."

21 So, at the very time that SMCV was applying
22 for a Stability Agreement for the Leaching Plant, they

1 wrote this letter exercising their right under the
2 Share Purchase Agreement to get out of a financial
3 obligation, a most affirmative act, in my view.

4 We have heard about this alleged presumption
5 of inclusion with regard to the Primary Sulfide and
6 the Concentrator. No such presumption exists.
7 Stability agreements define what project or activity
8 or investment is included in the Agreement by
9 specifically describing what is included.

10 Mr. Otto failed to prove that any
11 presumption existed, and I address his seven country
12 examples in my Second Report. Mr. Otto takes this
13 presumption and says, and it applies to mining units,
14 which we've seen he can't really define, and I'm not
15 saying people don't use the term "mining unit," but it
16 does not have--it is not a term of art within the
17 industry. If I say to a colleague, hey, I want to
18 talk to you about the mining unit. He or she is going
19 to say, okay, what do you mean?

20 Now, I think, interestingly, you would need
21 context to know what I meant.

22 Interestingly, the term that he started

1 using, "mining unit," quite clearly in his First
2 Report, by the time he got to the Second Report it was
3 "a single integrated mining operation."

4 I think this is particularly interesting
5 because an integrated miner is a term of art that is
6 used in the mining industry, but it doesn't mean what
7 Mr. Otto says it means. It doesn't mean "mining
8 unit." An integrated miner is a copper miner that
9 mines the ore, processes it, concentrates it, and when
10 it is done, it has concentrate. It's the end of the
11 mining process.

12 An integrated miner also owns a smelter and
13 refinery, the so-called "manufacturing" that you need
14 to turn concentrate into useful copper.

15 SMCV is a nonintegrated miner. It has a
16 mine. It has a Concentrator. SMCV today. It has a
17 mine, it has a Concentrator, but it doesn't have those
18 further manufacturing facilities. So, it is a
19 nonintegrated miner. No big deal. I believe one of
20 the Phelps Dodge documents talked about the fact that
21 more than half of copper miners are nonintegrated. It
22 is truly not a big deal within the industry. But

1 integrated miner is a term of art that means nothing
2 at all what Mr. Otto is suggesting.

3 So, let's talk about how different these two
4 types of ore are. We have heard it talked about a
5 little bit. Let's be clear, the oxide in the Primary
6 Sulfide are identified while still in the ground.
7 They have to be. When you come to a mine face, it's
8 going to be blasted, it's going to be scooped, it's
9 going to go into a haul truck, and whoever is driving
10 that haul truck has to know where it going. Is this
11 sulfide, am I headed to the Concentrator? Is it oxide
12 and I'm heading to the leach dock? So, it's literally
13 separated in everybody's mind before it actually comes
14 out of the earth, and once it comes out of the earth,
15 the oxide goes that way and the sulfide goes that way
16 and they never meet again, in Cerro Verde's case.
17 Again, producing completely different products.
18 Cathode through the leaching, concentrate for the
19 sulfide.

20 I talked about this in my First Report, and
21 in my Second Report I thought, I'm not sure the
22 Tribunal is going to understand the value difference

1 of the original oxide in the '96 Feasibility Study and
2 '98 Stability Agreement and what ultimately happened
3 with the sulfide. I have here on Slide 12 some
4 excerpts from--figures that I had in my Second Report.
5 If you look at the red line, the copper-colored line,
6 in 1996--by the way, I used "salable copper" because
7 that was a term used in both the '96 and the 2004
8 Feasibility Studies. So, that's a common term. This
9 is all the copper we think we're going to be able to
10 produce, based on what we know, when the mine is done.

11 So, in '96, at \$.90, which was the price of
12 copper, \$.90 per pound, the oxide cathode was worth
13 \$1.7 billion.

14 In 2004, when the Feasibility Study was done
15 for the new huge Concentrator, the copper price was
16 still \$.90, and that sulfide that was going to be
17 turned into concentrate was worth \$10.7 billion. That
18 sulfide is about 6.5 times bigger than the original
19 oxide.

20 It takes time to build a Concentrator.
21 Three years later, the Concentrator is built, it gets
22 approved, it goes on line in 2007, and the price of

1 copper is \$3.28 a pound.

2 That value, that saleable copper value is in
3 the green there at the bottom, \$42 billion, about 27
4 times larger than the original value of the saleable
5 copper of the oxide back in 1996.

6 2007 is also a really interesting year
7 because this is when the taxpayer, SMCV, had to put
8 all this on a tax return. That's what they were
9 looking at, those kinds of prices, that magnitude,
10 when they chose to take the position--we don't need a
11 new stability agreement, we're included. We are going
12 to file our return this way.

13 I want to step out for just a moment. We
14 had discussions yesterday about SUNAT and in the years
15 before 2007, and the discussions of, gee, didn't you
16 hear that SMCV thought the Concentrator was in the '96
17 Feasibility Study and the '98 Stability Agreement?
18 Kind of--why didn't you reach out? We heard that from
19 people in the room.

20 Taxpayers communicate with tax Authorities
21 By filing timely, complete tax returns and signing
22 under penalties of perjury. And Tax Authorities

1 respond by accepting it as filed, a desk review, or we
2 know we're going to go audit, which would always
3 happen with a big company like this. Think about this
4 for a moment in your setting, and you're in the middle
5 of an arbitration, you're gathering facts and somebody
6 says, can I just get clarity on this really one
7 important fact? You can't.

8 You need that tax return to know exactly
9 what position that taxpayer is making. If I may,
10 think of it also in terms of your own home country.
11 Whatever SUNAT is to you, IRS to me, whatever it is to
12 you, I don't think any of us really want your version
13 of SUNAT reaching out and saying, hey, I think you
14 were--I heard you were thinking of doing something,
15 and let me tell you how I think that might turn out.

16 Nobody wants that as a taxpayer, and the
17 Governments don't want that. File a return, and I'll
18 judge it from there.

19 Switching gears for just a little bit. We
20 see that there was a pile at Concentrator,
21 "Concentrator Zero," Mr. Aquino called it. That was
22 around for many years and was, interestingly to me,

1 dismantled in 1987.

2 And I say "interestingly," and I don't have
3 a piece of paper to support this, but I do find it
4 very interesting that, during the period of when they
5 applied for the Stability Agreement and sent the
6 letter to Empresa Minera Perú, and said: "We can't
7 build a Concentrator--wait, we've got a Concentrator
8 out back." And I think that's when it got dismantled.
9 But I don't--I have no proof of that. That's just my
10 theory. Very coincidental.

11 Claimant has alleged, well, we were doing
12 Concentrate all along. This Concentrator Zero that
13 started out as, I think, a hundred pounds a day or
14 maybe a thousand MT/d, and its peak was 3,000 MT/d,
15 would have taken, in Mr. Aquino's estimate,
16 3,600 years working 24/7, 365 days a year to process
17 the 4 billion MT of Primary Sulfide Reserves.

18 Mr. Davenport talked about it. He called it
19 "proof of concept," and that makes perfect sense.
20 It's sulfide, and you say: "Oh, that's going to go
21 through a Concentrator." That's all true, but that's
22 all, really, general. People do tend to try to figure

1 out the, well, how might this work exactly?

2 Ladies and gentlemen, I submit that this
3 pilot Concentrator that got dismantled in 1997 is
4 nothing like the 108,000 MT/d Concentrator ultimately
5 built by Cerro Verde and confers nothing with--to it
6 in terms of the Stability Agreement.

7 And we had a lot of talk just a moment ago
8 about separating revenues and costs. So, I'm going to
9 show you that Cerro Verde actually does both. I'm
10 going to show you in their Financial Statements where
11 they separate the revenues, and then we're going to
12 come back to Mr. Aquino's typical separation of costs.

13 So, Cerro Verde's 2010 Financial Statements,
14 it's Footnote 24. You see highlighted there
15 production in thousands of recoverable tons, the
16 comparative years. That's what Financial Statements
17 require. In 2010, the cathodes--remember leaching
18 produces cathodes--the cathodes, 183,000 recoverable
19 tons in 2010. The Concentrates, 484,000 MT. And you
20 see below there the LME, the London Metal Exchange,
21 price for copper for that year, you do the math and
22 you have your revenues.

1 But costs--so, I think we can agree; the
2 revenues are really easy. They tell people about it
3 in their audited Financial Statements. Costs are also
4 really easy to be separated, and as we are about to
5 see, Cerro Verde did it itself, does it in running its
6 business, as it should. So, the example Mr. Acquiño
7 gave is they had some secondary Sulfide that
8 legitimately could go through leaching and get a
9 recovery, or legitimately could go through the
10 Concentrator and become Concentrate.

11 So, the question became, okay, science-wise,
12 this works--I can go either way. I want to know which
13 one makes more money, and that's the exact question
14 they should be asking.

15 So, he shows us in this Figure 17 that he
16 says is the hypothetical block calculation. But he
17 says, it's a typical calculation, and I seriously
18 doubt Mr. Acquiño would have given us numbers that
19 were not representative. And he shows us the data.
20 The blue boxes, those are the shared Mining Costs.
21 The unit costs/ton of \$1.20, 17 percent of the total
22 of all the Costs here. The flotation, very expensive,

1 \$4.50 per MT.

2 The leaching ROM, that means "Run of Mine,"
3 the leaching, \$1.35 per MT. So, they took whatever
4 this block was, and they ran the numbers. And they
5 said, okay. If we run this through, what will the
6 financial numbers look like if we float it. And
7 that's down in the green section and with the
8 flotation. Wow. Revenue, \$91,000. That's good.

9 As compared to the leaching, which is
10 71,000. Then you go to the next column on the right
11 in the costs, the marginal costs on the Concentrator;
12 twice as high, 57,000 versus 25.5 thousand.

13 And so, you get over to the net number, and
14 it's a pretty easy decision, we're going to run that
15 through leaching because our net will be \$45,000
16 instead of \$34,000.

17 In the process that went along with this,
18 Mr. Acquiño talks about--we didn't even run the mining
19 through these calculations because we had to do it
20 either way. And the--all the other costs, Mr. Otto
21 was alluding to, where is HR, where are the tax nerds,
22 where are those other costs?

1 He talks about those other costs, and he
2 said: "Oh, we allocated all those over to the
3 flotation because that was the bigger value." He
4 didn't say: "Well, we simply can't run these
5 calculations because we don't know how to separate
6 these numbers." They did it. They did a perfectly
7 logical thing with respect to both.

8 This is just math, and I'm about to show you
9 a little bit more about that. So, again, Mr. Otto
10 says, not enough guidance: "It doesn't meet his
11 expectations of 'reason, detailed guidance.'" No one
12 is allowed to ignore the law simply because it doesn't
13 meet their expectations.

14 As a tax practitioner, if a client wanted to
15 do something that I didn't approve of, I wouldn't sign
16 the return, and my own people, we never say: "Are you
17 sure we have to follow this?" But it would be
18 taxpayers who sometimes get pretty angry. But they
19 also knew that I signed that return too, and if I
20 wasn't going to sign it, they realize they shouldn't
21 sign it.

22 So, let's talk about the--let me make one

1 other point. If they didn't know how to do it--and I
2 believe this was really well-known within the global
3 mining industry--they should have gone and gotten help
4 from a Mining Tax or an Accounting Methods and Periods
5 Expert. That's all we're talking about here is
6 accounting methods and periods, which is a branch of
7 accounting in preparing your tax return. And this is
8 a really basic calculation.

9 So, let's talk about the tech advice, the
10 TAM, that I cited in my Reports, and I discussed it in
11 terms of the TAM so that, if people wanted to go back
12 and look at it, they could understand better.

13 These facts are very close to what we have
14 here with a couple of interesting twists. So, we'll
15 start with an open-pit mine that has both Primary
16 Sulfide and Oxide, exactly what we have at Cerro
17 Verde. The one twist, number one, in these cases,
18 they were mining for Sulfide first. They were there
19 for the Sulfide, and they were putting the Oxide aside
20 because they didn't know how to effectively process
21 it.

22 As technology got a little bit better, and

1 mining engineers did what they are supposed to do,
2 they came to realize: "Well, we really can leach this
3 and make money from it." So, they started doing that.
4 But there were mining companies that said: "But I'm
5 going to leave all those shared costs over at the
6 Sulfide."

7 And the reason they wanted to do that, when
8 I mine oxide for leach, it goes on a leach pad and
9 gets sprinkled with that weak acidic solution for
10 270 days, and then that solution at the bottom of the
11 PLS, the leachate, pregnant solution gets captured and
12 goes off to the SX plant and the EW plant to get
13 caught in--or turned into Cathode, and then they do it
14 again. You rinse the benches more than once, you let
15 them rest and you rinse them again.

16 So, any costs that get allocated over to the
17 leaching, they get hung up in inventory for quite a
18 while. What taxpayers want is, how can I get my
19 expenses through P&Ls quickly as possible? When it
20 goes to the Concentrator, concentrates fast, in
21 relation, weeks, months, and then you sell it. It's
22 gone. And so, the more costs you allocate over there

1 the more expenses you can get in your taxable income
2 calculation and reduce your taxable income.

3 When you're doing a tax return, you want
4 your expenses to run through as quickly as possible to
5 minimize your taxable income, to pay the lowest amount
6 of tax. That's what the controversy was in these
7 revenue roles.

8 That in late '80s, the IRS--Congress passed
9 a rule that said, you--taxpayers, you have to be much
10 more particular about your costs for inventory and
11 things you build. You need to separate these costs in
12 the situation.

13 And so, taxpayers did it. Some
14 taxpayers--so, that we're talking late '80s, 1990, my
15 clients. Some clients took the approach, we'll wait
16 until the IRS comes in and makes me. A lot of other
17 clients said, I think we would rather develop our
18 numbers, and then go apply for a change in the
19 accounting method. And so, that's what they did.

20 So, these TAMs that came out 20 years
21 later-ish, that detail all this, that was a taxpayer
22 that didn't volunteer to change. They waited for the

1 IRS, and they thought about it. And the IRS agent
2 said: Okay. We're going to send it up for tech
3 advice." And there were two parallel things.

4 Is that my five minutes? Two minutes? Oh,
5 my gosh.

6 (Comments off microphone.)

7 THE WITNESS: They--those calculations can
8 be done. You'll see same thing in my Report, shared
9 costs, just allocated based on tons moved. Perú
10 provides for this. They do provide guidance. It's in
11 Article 2 of the Regulations, because the other common
12 way to do this is allocate it based on the relative
13 revenue that goes around. This Slide 23 talks about
14 all the commentators that had talk about the
15 principles explained in that tech advice.

16 This was a very well-known thing. The
17 expansion of the Beneficiation Concession to include
18 the big new Concentrator did not confer stability on
19 it.

20 Mr. Otto thinks this is an economic debate.
21 I do not. I think this is about the 1998 Stability
22 Agreement and '96 Feasibility Study. Some things I

1 had in my First Report he didn't address. Let's come
2 to the conclusions.

3 Let's go to the second page. Look at the
4 bottom, SMC itself separates the revenues and costs
5 between the Leaching Project and the Concentrator
6 Project. They do it. That's how they run their
7 business. You can absolutely separate these costs by
8 Project. They want to float it back to 1998 because
9 the Royalty got enacted.

10 They are trying to--in '96 to '98, they told
11 Empresa Minero Perú, we can't build this thing. We're
12 afraid of the obligation. And now they want to go
13 back because, well, the rates changed. I mean, who
14 wouldn't want to go back to when prices were cheaper.
15 The Stability Agreement from '98 cannot apply to the
16 2007 Concentrator. Stability agreements are not
17 hold-my-place situations. You can't have a company
18 come in and go, here's \$50 million, not paid as a fee
19 or a Royalty to the Government. I'm going to go spend
20 \$50 million for my own Company, and I want you to
21 stabilize everything I do for 15 years, and I'm going
22 to kick some rocks, see what I can figure out in

1 15 years. Maybe I'll find something--

2 (Overlapping speakers.)

3 MR. UKABIALA: Madam President, I really
4 hate to interrupt. It's just that the Expert has gone
5 over considerably his time, and we don't have a lot of
6 time left for today.

7 PRESIDENT HANEFELD: Marisa, how much
8 overrun does he have?

9 SECRETARY PLANELLS VALERO: 45 seconds.

10 PRESIDENT HANEFELD: 45 seconds. So if you
11 can come to the end of your presentation, please.

12 THE WITNESS: Yes, ma'am.

13 If you look at that last bullet, if the
14 mining companies weren't required to act according to
15 their Feasibility Studies and do what they were
16 supposed to do, this land would just sit. This would
17 not help Perú. Perú wants to give you a stability
18 agreement because you're going to go do something with
19 it and create jobs and buy things from Peruvians and
20 sell things to Peruvians, not just tie the land up for
21 15 years, or whatever the length of the stability
22 agreement.

1 Q. And you've spent your career working in
2 accounting firms?

3 A. No. My early--my very early days I was an
4 Assistant Controller for Sears. After law school I
5 practiced law for a bit, and then in 1979 I joined
6 Arthur Andersen and went into big company tax
7 accounting, yes.

8 Q. Right. And during the course of that
9 career, you signed thousands of tax returns; right?

10 A. I did.

11 Q. And your clients were largely made up of
12 private-sector companies?

13 A. No. I advised private companies, I
14 advised--especially as the Global Mining Tax Leader.
15 I advised governments. I was sought out for
16 commentary about tax policy. I worked for mining
17 industry associations. It was a wide spectrum
18 involving the mining industry.

19 Q. Were you ever retained by a Government to
20 draft a mining law or a regulation?

21 A. I was engaged usually with members of a
22 local office if I was working on something

1 international for tax policy--

2 (Overlapping speakers.)

3 Q. By a Government to draft a mining law or
4 regulation?

5 A. Well, I was hired as a--thank you--lobbyist
6 on behalf of the National Mining Association to go
7 work with the committees that were working on proposed
8 change to U.S. Mining Law. So, pick up a pen and
9 draft? No. Talk to them about what I believe is the
10 a--

11 (Overlapping speakers.)

12 Q. Are there any mining stability agreements in
13 the United States?

14 A. You know, that question was asked in
15 February, and I said no. In mining stability, per se,
16 maybe not so much, but we do have stability agreements
17 in the U.S., more at the local and state level, and
18 there are ways that taxpayers--I would submit that a
19 taxpayer approaching the IRS to change its accounting
20 methods is a bit of a stability agreement. I want to
21 do something. I'm coming and asking for your
22 permission to do this.

1 Q. I'm sorry, Mr. Ralbovsky. Are there mining
2 stability agreements in the United States of America?

3 A. There might be at the state level. I do not
4 know for certain.

5 Q. Okay. When you would work in foreign
6 jurisdictions, did you ever file the tax returns in
7 those jurisdictions?

8 A. I did not. The local office would have done
9 that.

10 Q. Right. The local office.

11 So, when you were advising companies in
12 foreign jurisdictions like Perú, you would have the
13 support of a local office with the local team of local
14 accountants and locally qualified attorneys; right?

15 A. I did, but many of the issues that were
16 involved required both sides, say, the home country as
17 well as the local country, to look at the laws and
18 understand them. So, for example--

19 (Overlapping speakers.)

20 Q. Your Reports don't have both
21 sides--right?--because you didn't have a local team of
22 Peruvians helping you prepare your Reports, did you?

1 A. I'm sorry. I was talking over you.

2 Can you ask me that again, please.

3 Q. Yeah. No, I think that you agreed that you
4 would have both sides including the local--

5 A. Absolutely.

6 Q. --support when you were advising companies
7 in foreign jurisdictions on tax matters?

8 Did you have local support from Perú helping
9 you prepare your Reports in this case?

10 A. I did not.

11 Q. Okay. Now, in his First Report, Mr. Otto
12 described the mining stabilization in various
13 jurisdictions: Argentina, Chile, DRC, Indonesia,
14 Mongolia, Papua New Guinea, and Zambia; right?

15 A. I believe that's correct. That sounds like
16 the countries, yes.

17 Q. And you're aware that Mr. Otto has extensive
18 experience with mining stabilization in those
19 jurisdictions, including drafting some of those laws?

20 A. So he says.

21 Q. Okay. And you didn't respond to Mr. Otto's
22 analysis of mining stabilizations in those

1 jurisdictions in your First Report, did you?

2 A. I did not.

3 Q. You waited until your Second Report so that
4 he could not respond to you in his Second Report?

5 A. I wish I was that clever.

6 I didn't respond to them because we were
7 dealing with a stability agreement in the country of
8 Perú, so--

9 Q. So, why did you respond to it in your Second
10 Report then?

11 A. Because he was still there, and he was
12 claiming--well, "Ralbovsky must have"--

13 Q. But you agree is that the effect is that you
14 deprived Mr. Otto of the ability to respond in his
15 Second Report?

16 A. I didn't deprive Mr. Otto of anything.

17 (Interruption.)

18 MR. UKABIALA: Sorry. I'm going too fast.
19 I'll slow down.

20 BY MR. UKABIALA:

21 Q. So, Mr. Ralbovsky, is it fair to say that
22 the main subject of your testimony--at least one of

1 the principle subjects of your testimony in this
2 case--is your opinion that Cerro Verde's 1998
3 Stability Agreement didn't apply to the Concentrator?

4 A. That is correct.

5 Q. And the scope of a Peruvian Law Adhesion
6 Contract is a question of Peruvian law; right?

7 A. The scope of this Peruvian Adhesion Contract
8 is a matter of the facts. The adhesion element of the
9 Contract defines how the Government operates.

10 Q. I'm sorry. Is this--just if you could just
11 answer my question.

12 The scope of this Contract is a question of
13 Peruvian law; right?

14 A. I disagree.

15 Q. Okay. So I think you agreed at the SMM
16 Hearing in February that a question of Peruvian law
17 has to go to Experts on Peruvian law.

18 A. Sir, that's a different question. That
19 question is asking about Peruvian law and Peruvian Law
20 Experts. You asked me about the scope of a Peruvian
21 stability agreement, and I'm responding to you that
22 the scope is a question of fact.

1 Q. Okay. So your testimony is that--

2 A. Yes, sir.

3 Q. --that the interpretation of a Peruvian law
4 contract does not hinge on the application of Peruvian
5 law?

6 A. That's not at all what I said, and I believe
7 you know that.

8 Q. Okay. Well, does it?

9 A. Does it what?

10 Q. Does the interpretation of a Peruvian law
11 contract hinge on an application of Peruvian law?

12 A. Yes.

13 Q. Okay. And Peruvian law is for Peruvian
14 Experts; right?

15 A. Yes. But as a Tax Expert--

16 (Overlapping speakers.)

17 Q. I think you have answered my question.

18 A. --I think many things across all sorts of
19 agreements, contracts, and I've done this for many,
20 many years.

21 Q. But in your Reports, you didn't cite a
22 single article you ever published on fiscal

1 stabilization, did you?

2 A. I did not. Well, actually--I didn't cite
3 any. In my law school class, I talk about it, and I'm
4 sure I have talked about it in speeches that I have
5 given.

6 Q. But you're not a qualified lawyer in Perú,
7 are you?

8 A. I am not.

9 Q. And you have never given Expert testimony on
10 Peruvian Mining Law in another legal proceeding, have
11 you?

12 A. That is correct.

13 Q. And I know you obtained a JD from Albany in
14 1978, but you are not qualified to practice in any
15 jurisdiction, are you?

16 A. I chose to retire from the practice of law
17 because I was working for an accounting firm.

18 Q. Right.

19 A. But I still use all the skills that I
20 learned while at law school and to this day.

21 Q. Are you qualified in any jurisdiction?

22 A. As?

1 Q. A lawyer.

2 A. I am not.

3 Q. And after you graduated from Albany Law
4 School, you couldn't find a job as a lawyer in New
5 York; right?

6 A. No, that's not true. I worked for a small
7 company as part of their corporate counsel.

8 Q. Was that a mining company?

9 A. It was not.

10 Q. Okay. And so, your experience practicing
11 law is limited to working in the corporate counsel
12 office of a non-mining company almost 30 years ago?

13 A. My experience in law is all the skills that
14 I learned while in law school and while I clerked in
15 law school and while I interned at the New York State
16 Assembly, and taking all those skills and working in
17 large mining--large accounting firms where, for
18 example, at Arthur Andersen here in D.C. down at 16th
19 and K, over half of the people had LLMS.

20 We were in the books constantly. People
21 gave me their time on LexisNexis because I was so good
22 in the library. So, did I charge people using my

1 legal license? No. Was I using all the skills of a
2 lawyer? Absolutely. And I continued to do that
3 today, and I teach a class in the University of
4 Arizona Law School.

5 Q. But do you have any experience negotiating
6 stability agreements in Perú?

7 A. I do not have negotiating experience
8 negotiating stability agreements in Perú. I have a
9 great deal of experience negotiating with Tax
10 Authorities at the State level. I told you I've
11 talked with Senate staff, House staff, State staff--

12 (Overlapping speakers.)

13 Q. Okay. That's going far beyond the scope of
14 my question.

15 Just to sum up here, you're not qualified to
16 practice law in any jurisdiction, you're not qualified
17 in Perú, and you have never negotiated a stability
18 agreement in Perú, but you are before this Tribunal
19 giving Expert Opinions on the negotiation of a
20 Peruvian Law Adhesion Contract?

21 A. I'm here giving advice as an International
22 Tax Expert on how to interpret a Peruvian law as I've

1 been interpreting laws and regulations in cases for
2 36 years.

3 Q. Right. I think we established that the
4 Peruvian law is for the Peruvian Experts, so let's
5 move on.

6 Do you have a computer, Mr. Ralbovsky?

7 A. I do.

8 Q. Mac or Windows?

9 A. One of each.

10 Q. One of each. Nice.

11 So, when Apple or Microsoft updates its
12 operating system on your computer and you get the
13 little pop-up, to agree to the terms and conditions,
14 you click that pop-up; right?

15 A. I do.

16 Q. You don't negotiate that contract with Apple
17 or Microsoft for the use of the operating system, do
18 you?

19 A. I can choose not to accept it.

20 Q. Yeah, but if you do accept it, you don't
21 negotiate with Apple or Microsoft, do you?

22 A. I do not.

1 Q. Right. Because it's an Adhesion Contract;
2 right?

3 A. It's more they have you over a barrel, and
4 we all do it.

5 Q. Now, are you aware that stability
6 agreements--

7 (Overlapping speakers.)

8 A. Actually, it's not really a contract. I'm
9 not--there is no offer and acceptance there. They are
10 asking me if I accept their terms to continue using
11 their product. There is no offer and acceptance as
12 there is in this Stability Agreement.

13 Q. So, you don't agree that that is an Adhesion
14 Contract?

15 A. I don't think it is.

16 Q. Okay. So you've changed on that?

17 A. I did.

18 Q. Okay. Well, you are aware that stability
19 agreements in Perú are Adhesion Contracts; right?

20 A. I am.

21 Q. But you testified that the scope of those
22 stability agreements are negotiated in Perú; right?

1 A. I did.

2 Q. And so, that means, as an American
3 accountant, you disagree with Claimant's Peruvian Law
4 Experts, Dr. Bullard and Ms. Vega, that the scope of
5 stability agreements are not negotiated in Perú;
6 right?

7 A. If that's what they said, I'm not familiar
8 with that.

9 Q. And you disagree with the testimony of
10 Maríta Chappuis, the former Peruvian Director General
11 of Mining, who was responsible for regulating mining
12 stability agreements in Perú that the scope of
13 stability agreements are not negotiated in Perú;
14 right?

15 A. Could you show me that, please?

16 Q. Well, I'll show you something even better.
17 Why don't we show you the testimony of
18 Perú's own Peruvian Law Expert, Professor Eguiguren,
19 that said: "If the Mining Law says that the scope of
20 the Stability Guarantees is X, the Parties could not
21 then negotiate that the scope of the stability
22 benefits be something different." That is Claimant's

1 Exhibit 1140, Day 8 of the Sumitomo Hearing

2 Transcript, for the record.

3 Do you disagree with the Expert Opinion of
4 Perú's own Peruvian Law Expert?

5 A. Let me read it. Let me read it. The Mining
6 Law does not say--Perú's Mining Law does not say the
7 scope of the stability agreement is X.

8 Q. So, is it that you think that the Parties
9 negotiate the scope or that they don't negotiate the
10 scope? I'm sorry. I don't understand.

11 A. They negotiate the scope. It begins with
12 the mining company, A, choosing whether they want to
13 be under a stability agreement or not--yes or no--and
14 they may not. And then they go apply for it, and
15 through the stability--the Feasibility Study, they
16 tell the Government: "Here is what I would like to
17 include in the stability agreement for which I'm
18 negotiating."

19 Q. Right. So then how does that not mean that
20 you disagree with Mr. Eguiguren who said the Parties
21 could not then negotiate that the scope of stability
22 be something different?

1 MS. HAWORTH McCANDLESS: I'm sorry. I'm
2 objecting because he's mischaracterizing
3 Dr. Eguiguren's testimony. Dr. Eguiguren's testimony
4 says there is--the scope--what he's talking about the
5 Contract of Adhesion concerning the Stability
6 Guarantees. That's a very different thing than what
7 he just characterized which was stability. And so,
8 it's a mischaracterization of the testimony of
9 Dr. Eguiguren, and it's an inappropriate question to
10 mislead this particular Expert with a misquote of what
11 Dr. Eguiguren testified to.

12 MR. UKABIALA: I think that it's very clear
13 that Mr. Eguiguren is discussing the scope of the
14 Stability Agreement because--

15 MS. HAWORTH McCANDLESS: He is not. It says
16 "Stability Guarantees." You are misinterpreting that.
17 That is absolutely incorrect.

18 MR. UKABIALA: If I can finish--because it
19 refers expressly to the scope being X and the Parties
20 negotiating something different.

21 MS. HAWORTH McCANDLESS: The phrase there is
22 "Stability Guarantees." That's a different thing than

1 talking about the scope of stability generally, and it
2 says the "scope of stability benefits." There he's
3 talking about Stability Guarantees. It is very, very
4 specific to these guarantees that are provided under
5 law. That's what he's talking about.

6 PRESIDENT HANEFELD: This is what we read.
7 I read "Stability Guarantees and stability benefits,"
8 but maybe it's in a question we should ask to the
9 Expert who had made the statement and continue with
10 another line of questions.

11 MS. HAWORTH McCANDLESS: Yes, we will.

12 MR. UKABIALA: Yes, of course, Madam
13 President.

14 BY MR. UKABIALA:

15 Q. So, if I understand correctly,
16 Mr. Ralbovsky, it is that the Parties can negotiate
17 for the scope to be as large or small as they like; is
18 that correct?

19 A. There are still limits as to certain amounts
20 that they have to commit to, but it begins with the
21 taxpayer choosing what to put in the Feasibility Study
22 and just exactly what we have here, that Cerro Verde

1 has a Feasibility Study for the oxide and the
2 leaching, and very specifically left the Concentrator
3 out and asked to be let out of a contract.

4 So, in my--in that negotiation, they chose
5 what they wanted to see the stability agreement to
6 cover.

7 Q. Okay. So it's that it is--okay. So what
8 provision of the Mining law governs the submission and
9 the approval of the Feasibility Study that you say is
10 part of this negotiation?

11 A. I'm sorry. Ask me that again.

12 Q. Yeah. It seems like you said that the
13 negotiation starts with the Feasibility Study.

14 What provision of the Mining Law governs the
15 submission and approval of the Feasibility Study?

16 A. I don't recall the exact provision, but you
17 get a stability agreement by applying for it. You
18 start it by applying.

19 Q. And so you don't know what provision of the
20 Mining Law governs the commencement of this
21 so-called "negotiation."

22 Do you know how long the parties have to

1 conclude this so-called "negotiation"?

2 A. Again, the negotiation part is what the
3 mining company decides before they submit their
4 application.

5 Q. So, the negotiation happens only internally
6 with the mining company, not with the counterparty?

7 A. Well, it's a contract. It starts with--the
8 mining company asks for stability for a certain thing,
9 and then MINEM reacts to that.

10 Q. The negotiation part is what the mining
11 company decides before they submit their application.
12 That's your definition of a "negotiation"?

13 A. No.

14 Q. That's exactly what it says.

15 A. The negotiation part is both the offer and
16 then the acceptance.

17 Q. Okay. All right. Mr. Ralbovsky, I think we
18 disagree about what "negotiation" means, but I think
19 we also agree that you have never negotiated a
20 stability agreement in Perú?

21 A. We do agree on that.

22 Q. And you've never participated in a stability

1 agreement application in Perú?

2 A. I have not.

3 Q. Okay. Now, you've said that the Government
4 negotiates a narrow scope of stability agreements
5 because the Government would never give up more than
6 it has to; right?

7 A. I'm sorry. Where did I say that?

8 Q. That's paragraph 37 of your Second Report:
9 "Countries do not offer more incentives than what is
10 necessary to encourage investments including and
11 especially in the mining sector"?

12 A. You'll pull that up please.

13 Q. Just a moment.

14 PRESIDENT HANEFELD: Counsel, just for
15 further planning, how much more time do you need today
16 to finish this line of questioning?

17 MR. UKABIALA: I think I could probably
18 finish the entire cross-examination in about 10
19 minutes.

20 PRESIDENT HANEFELD: Would this be okay for
21 the Court Reporters? I mean, we also have questions.
22 I don't know whether you have now questions.

1 MS. HAWORTH McCANDLESS: I won't know until
2 he's completed with his cross.

3 PRESIDENT HANEFELD: Go ahead.

4 MR. UKABIALA: Okay. I'll do my best to
5 wrap it up. If not, I'm hopeful we can continue
6 tomorrow.

7 BY MR. UKABIALA:

8 Q. Did you get an opportunity to review that
9 paragraph from your Report, Mr. Ralbovsky?

10 A. I do see it. Can you scroll up just a
11 little bit. No, I can read the print, but can you
12 scroll up just a little bit, please.

13 So, in this section of my Report, I'm
14 talking about stability agreements, in general, and
15 that countries, in general, that choose to offer
16 stability agreements, they need to figure out what are
17 we giving up here and what are we going to get for it.

18 I've told clients and students throughout
19 years, mining companies do their best to represent
20 their shareholders and other stakeholders. Countries
21 do their best to represent their citizens, and that's
22 as it should be.

1 Each one comes to the table representing
2 their party. And there's another quote in there, I
3 think, from a study I was reading: Mining companies
4 only want to give up what they need to get the
5 investors to come in.

6 Why would they give up more? They
7 shouldn't. They are representing their citizens. So,
8 that's the context in which I wrote that when I was
9 talking about stability agreements, in general.

10 Q. Right. And so the mining company also
11 equally would not give up more than it has to;
12 correct?

13 A. It really depends. So--

14 Q. So, the Government will give up more than it
15 has to--

16 MS. HAWORTH McCANDLESS: He's not finished
17 giving his answer. Let him finish his answer, please.

18 THE WITNESS: There are many ramifications
19 to entering into a stability agreement, and if I
20 may--and I'll tell you the Reader's Digest version of
21 this.

22 Years ago the price of gold went from 800 to

1 1100, and in the U.S., tax assessors at Counties said:
2 "Your assessment is going up. We have to charge you
3 more tax." And that happened. And when the cycle
4 came around to the other side and prices dropped,
5 mining companies went back to the assessors and said:
6 "Hey, our mines are worth less. Lower our assessments
7 and we will pay less."

8 The Counties had to do that. And then the
9 Counties realized they didn't have enough money to run
10 the schools and other things, so they either had to
11 cut services, or they had to raise everybody's rate.
12 So, there were--I had clients who chose not to take
13 advantage of a benefit they knew they would win on
14 because they didn't want the bad press of being the
15 reason the County had a shortfall, and when services
16 were cut, the services at the schools, et cetera,
17 that's where their kids went to school.

18 So, yes, there are instances where mining
19 companies don't take advantage of everything they can
20 because of the broader picture of what's going on in
21 their world.

22 BY MR. UKABIALA:

1 Q. Well, you're talking about the U.S. again,
2 but all of those considerations would equally apply to
3 the Government in this so-called "negotiation"; right?

4 A. I'm sorry. I don't understand your
5 question.

6 Q. Well, it seems that you're acknowledging
7 that stabilization doesn't necessarily mean that you
8 lock in lower tax rates. And so, the guts of the
9 company may not negotiate the broadest stability,
10 according to you, because it doesn't necessarily lock
11 in lower tax rates.

12 Doesn't that equally apply from the
13 Government's perspective?

14 A. I'm sorry. I don't know what that means.
15 Equally apply how?

16 Q. I'm just trying to understand what you're
17 saying, Mr. Ralbovsky.

18 Are you saying that the company will not
19 negotiate the broader scope of stability possible
20 because it may imply locking in a tax rate that is
21 higher than what the tax rate will be, for example,
22 next year?

1 A. That might be. There are tax--you might
2 have a taxpayer that says: "I really think this
3 country is going to respond in a couple of years by
4 lowering their rates. I think that is how they will
5 attract investments."

6 So, I'm not--even though they offer
7 stability agreements right now, I'm not going to go
8 seek that because I'll be locked at this rate, and
9 when it drops to here, I'm stuck. I would rather take
10 my chances and not do it. So, people have to decide
11 what they think is going to happen to decide whether
12 they want to go apply.

13 Q. Right. And so, the Government would also
14 need to know what the tax rate is going to be in the
15 future in order to be able to project whether--what
16 they are giving up by entering into stability; right?

17 A. Obviously nobody knows the future, but
18 people make assumptions and projections based on where
19 they think things are going, not the least of which is
20 what's the value of metal going to be here?

21 So, yes, they have to make some assumptions
22 and projections and make decisions today and hope that

1 they are calculating right how the future is going to
2 turn out.

3 Q. Right. And so, you agree that nobody knows
4 the future. So, any projections about what country is
5 giving up would be based on assumptions?

6 A. It is going to be based on assumptions, but
7 it is based on Mine Plans, the Feasibility Study, in
8 this case, that people turn in. It is not just a spin
9 of the wheel. You've got something to go by.

10 Q. But you've never done this negotiation
11 before, though?

12 A. We worked--I had a project with my staff
13 working for the state of Alaska where we ran
14 projections. We were hired by Alaska to help them
15 project what they thought the Alaska mining--

16 Q. I'm sorry. You might have misunderstood my
17 question.

18 Have you ever done this negotiation in the
19 context of a stability agreement?

20 A. I thought I was answering. I--you're right.
21 I've not negotiated that particular agreement, but
22 I've worked with projections--

1 Q. Have you ever negotiated any stability
2 agreement?

3 MS. HAWORTH McCANDLESS: I'm sorry. Could
4 you let him finish his answer to your question?

5 MR. UKABIALA: The answer is not responsive
6 to the question.

7 MS. HAWORTH McCANDLESS: Well, he was giving
8 a more fulsome answer, if you let him give his full
9 answer to your question.

10 BY MR. UKABIALA:

11 Q. Please. Please.

12 A. We were helping the State of Alaska project
13 what revenues were likely to look like based on the
14 mining activity they had going on at the State and
15 trying to determine how they should--should or should
16 not modify their taxes going forward.

17 Q. Right. But, Mr. Ralbovsky, you've never
18 negotiated a stability agreement?

19 A. Okay.

20 Q. No, that's a question.

21 A. I said. Okay. Yes.

22 Q. Okay. Thank you for confirming that's.

1 A. That's a yes.

2 Q. And Alaska doesn't have stability agreements
3 in the mining sector?

4 A. No, but they have laws.

5 Q. Great. Okay. Mr. Ralbovsky, so it's
6 crystal clear to you, an American accountant, that the
7 1998 Stability Agreement didn't apply to the
8 Concentrator; right?

9 A. Repeat your question.

10 Q. It's crystal clear to you that the 1998
11 Stability Agreement didn't apply to a Concentrator;
12 right?

13 A. Yes.

14 Q. Okay. And you were able to determine that
15 by doing what? Reviewing the Stability Agreement and
16 the record in this case?

17 A. Yes.

18 Q. But you have already admitted that you don't
19 have any experience in interpreting Peruvian Law
20 stability agreements, do you?

21 A. No, I didn't admit that. As a tax
22 professional experienced for 36 years in mining, I

1 think 42 years in big company tax, I am very
2 experienced in interpreting laws from around the
3 world.

4 Q. Peruvian Law stability agreements?

5 A. Well, in this case, I can read it, and it's
6 a Peruvian law Stability--

7 Q. Have you ever interpreted a Peruvian Law
8 stability agreement?

9 A. I did it to write these Reports, yes.

10 Q. Before your testimony in this case?

11 A. I did not have the opportunity to do that,
12 no.

13 Q. So, you seem to be relying so much on your
14 accounting experience.

15 Please explain it to me. Is it that, like,
16 in the course of conducting an audit, you would
17 notice: "Hey, this Stability Agreement doesn't apply
18 the way the Company thinks it does," and then you
19 would tell them that?

20 A. That's not at all what I've been saying. I
21 am a tax accountant. When I was a partner, I had a
22 pen, but I never signed financials. As a tax

1 accountant, I use my skills, which I learned through
2 law school and the practice of law and my law clerking
3 and all those other things, as well as the work as a
4 younger staff at Andersen, to research, write,
5 represent clients at IRS and the state exams, advise
6 Governments, go to appellant referee meetings and
7 represent my clients. Those are all skills as a
8 lawyer. I couldn't charge people as a lawyer because
9 I wasn't licensed as a lawyer because I worked for a
10 CPA firm.

11 Q. I'm sorry. We're really running out of
12 time, Mr. Ralbovsky. That is not my question at all.
13 I'm just trying to understand in what--how it would
14 arise through your accounting practice that you would
15 interpret a foreign stability agreement?

16 How does that happen? Explain it to me.

17 A. I am explaining it to you. In my--I have a
18 tax accounting practice. I read and interpret and
19 influence tax laws all the time.

20 Q. Okay. So if--for example, if you were--if
21 it was a Peruvian stability agreement, you would
22 consult with the PwC team in Perú about the scope of

1 that stability agreement; right?

2 A. No. I feel very competent and confident in
3 when I've read and interpreted and wrote.

4 Q. So, if you were working in Perú, you
5 would--for PwC, you would ignore the local advice of
6 the Peruvian lawyers?

7 A. I didn't say that at all.

8 Q. So, you're now contradicting yourself.

9 I'm sorry. If you were working on behalf of
10 a Peruvian company with a Peruvian Law stability
11 agreement, would you or would you not rely on the
12 Peruvian team with Peruvian qualified lawyers?

13 A. I am not--excuse me--contradicting myself.
14 I'm trying to explain to you that I believe I have the
15 skills to interpret tax laws as I have done here, and
16 that's the work I have done. When I was--that's it.
17 You are concerned about time. Sorry.

18 Q. Mr. Ralbovsky, it's a simple question. If
19 you were called upon in your capacity as a tax
20 accountant to determine the scope of a Peruvian Law
21 stability agreement, would you rely on your local PwC
22 team?

1 A. In what time frame are you talking about?

2 Q. In the relevant time frame.

3 A. No. I interpreted--my Reports are my
4 Reports based on my work.

5 Q. Yeah, but if you were auditing, for example,
6 a Peruvian company during the relevant time frame,
7 would you rely on your local PwC Peruvian-qualified
8 colleagues in determining the scope of a Peruvian
9 stability agreement?

10 A. An audit would never address whether a
11 stability agreement.

12 PRESIDENT HANEFELD: Counsel, I think it's
13 now 15 minutes past 6:00. Our proposal would be that
14 you continue your cross-examination tomorrow and then
15 Respondent has the opportunity for redirect, and we
16 may also have questions.

17 MR. UKABIALA: I think that makes sense.

18 PRESIDENT HANEFELD: Yeah. I think the
19 attention span is somehow now reached.

20 So, we will continue with your testimony
21 tomorrow.

22 THE WITNESS: Yes.

1 PRESIDENT HANEFELD: And we start at
2 9:30 sharp.

3 And do the Parties have any remarks to make
4 today before we close?

5 MR. PRAGER: No remarks from Claimant.
6 Thank you very much.

7 PRESIDENT HANEFELD: Thank you very much.
8 Respondent?

9 MS. HAWORTH McCANDLESS: None from
10 Respondent. Thank you, Madam President.

11 PRESIDENT HANEFELD: Then thank you. We
12 conclude the day. Have a good evening.

13 THE WITNESS: You too. Thank you.

14 (Whereupon, at 6:15 p.m., the Hearing was
15 adjourned until 9:30 a.m. the following day.)

CERTIFICATE OF REPORTER

I, Dawn K. Larson, RDR-CRR, Court Reporter, do hereby certify that the foregoing English-speaking proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the English-speaking proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.


Dawn K. Larson