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

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

Claimant

— *v.* —

REPUBLIC OF PERU

Respondent

ICSID Case No. ARB/20/08

CLAIMANT'S POST-HEARING BRIEF

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CONTENTS

ABBREVIATED TERMS

1994 SPA	Share Purchase Agreement Between Empresa Minera del Perú S.A. and Cyprus Climax Metals Co. (17 March 1994)
1994 Stability Agreement	Agreement of Guarantees and Measures for the Promotion of Investments Between the Peruvian State and SMCV (26 May 1994)
1996 Feasibility Study	Fluor Daniel Wright Ltd., Cerro Verde Expansion Project: Leach Feasibility Study (1996)
2002 Prefeasibility Study	SMCV, Primary Sulfide Preliminary Pre-Feasibility Study (December 2002)
2004 Feasibility Study	Fluor Canada Ltd., Feasibility Study: Cerro Verde Primary Sulfide Project (May 2004)
September 2004 Update to the Feasibility Study	Fluor, SMCV Primary Sulfide Project Feasibility Study Project Update (September 2004)
June 2006 Internal Report	SUNAT *Informe sobre la Aplicación del Contrato de Garantías y Medidas de Protección a la Inversión y la Regalía Minera*
June 2006 Report	MINEM Report No. 156-2006-MEM/OGJ (16 June 2006)
Centromín	Empresa Minera del Centro del Perú
Concentrator	Concentrator Plant at Cerro Verde
Cyprus	Cyprus Amax Minerals Company
DGM	Directorate General of Mining
EAU	Economic-Administrative Unit
EGASA	Empresa de Generación Arequipa S.A.
Freeport	Freeport-McMoran Inc.
GEM	*Gravamen Especial a la Minería*
L.D. 708	Promotion of Investment in the Mining Sector, Legislative Decree No. 708 (6 November 1991)
MEF	Ministry of Economy and Finance
Milpo	Compañía Minera Milpo S.A.A.
MINEM	Ministry of Energy and Mines
Minero Perú	Empresa Minero del Perú S.A.
Mining Law	Single Unified Text of the General Mining Law, Supreme Decree No. 014-92-EM (3 June 1992)
PDAC	Prospectors & Developers Association of Canada

Phelps Dodge	Phelps Dodge Mining Corporation
Regulations	Regulations of Title Nine of the General Mining Law, Supreme Decree No. 024-93-EM
Roundtable Discussion	Roundtable Discussion Between the Committee of the Struggle for the Defense of the Interests of Arequipa and SMCV (2 August 2006)
Royalty Law	Mining Royalty Law No. 28258 (24 June 2004)
2001 Settlement Agreement	Out-of-Court Settlement Between Cyprus Climax Metals Co. and Empresa Minera del Perú S.A. (30 March 2001)
SMCV	Sociedad Minera Cerro Verde S.A.A.
SMMCV Hearing	*SMM Cerro Verde Netherlands B.V. v. Perú*, ICSID Case No. ARB/20/14, Hearing on the Merits, 6-17 February 2023
Southern	Southern Peru Copper Corporation
Stability Agreement	Contract of Guarantees and Investment Promotion Measures Between the Peruvian State and Sociedad Minera Cerro Verde S.A. (26 February 1998)
SUNAT	National Superintendence of Customs and Tax Administration
SX/EW	Solvent Extraction and Electrowinning
Tintaya	BHP Tintaya S.A.
TPA	U.S.-Perú Trade Promotion Agreement
Yanacocha	Minera Yanacocha S.R.L.

I. INTRODUCTION

1. At the Hearing, Freeport-McMoRan Inc. ("Freeport") established that, in the face of intense political pressure, Peru repeatedly breached its obligation to apply stability guarantees to the Cerro Verde Mining Unit after Sociedad Minera Cerro Verde S.A.A. ("SMCV") and its shareholders made one of the biggest investments in Peru's mining industry at the time—the US$850 million Concentrator. Peru did so by secretly devising a novel, restrictive, and ultimately arbitrary interpretation of the scope of stability guarantees that denied coverage to the Concentrator, completely upending the Mining Law and Regulations, Peru's contractual obligations under the 1998 Stability Agreement ("Stability Agreement"), and its own consistent practice of applying stability guarantees to concessions or mining units, including with respect to SMCV's prior investments and other mining titleholders such as Minera Milpo ("Milpo"), Southern Peru ("Southern"), BHP Tintaya ("Tintaya"), and Minera Yanacocha ("Yanacocha"), as reflected in contemporaneous documents that Peru fought tooth and nail to withhold from the Tribunal.

2. The evidence and testimony conclusively showed that the Mining Law and Regulations extended stability guarantees to the entire concessions or mining units in which investors made their qualifying minimum investment. Every witness and expert involved in Peru's reforms to the Mining Law testified that they were designed to attract much-needed foreign investment by simplifying the administrative framework and providing investors with stability guarantees. And every witness and expert that testified on the nature of stability agreements confirmed that they are adhesion contracts that are not subject to negotiations and implement the *full* scope of stability guarantees under the Mining Law and Regulations—no more, no less. SMCV's Stability Agreement thus implemented stability guarantees for the Cerro Verde Mining Unit, including the Concentrator.

3. By the end of the Hearing, it became evident that neither Peru's counsel, nor its experts or witnesses, could present a coherent position on the scope of stability guarantees or why they allegedly did not apply to the Concentrator. At the Hearing alone, Peru and its witnesses and experts offered no less than three different versions of what constitutes the so-called "investment project." Peru's witnesses repeatedly contradicted each other, as well as Peru's counsel—even though they improperly coordinated their testimony. Peru's experts offered no support for their

conclusion that stability guarantees applied to "investment projects," and when pressed, all admitted that they were not mining lawyers, had not considered relevant sources, and lacked knowledge about basic provisions of the Mining Law and Regulations.

4. The Hearing confirmed that the Tax Tribunal violated SMCV's due process rights to ensure the Royalty Assessments would be upheld. But that is not all. The Hearing also revealed that Peru's arbitrary and unlawful attempts to enforce its politically motivated interpretation pervaded throughout all levels of the Government. At the Hearing, Ms. Bedoya confirmed her shocking revelation that SUNAT had issued a secret report regarding the Concentrator (the "June 2006 Internal Report")—never shared with SMCV until this arbitration—and testified that, in blatant due process violations, she had to apply the Report each time she sat as sole decision-maker in several of SMCV's challenges because it "fixed" SUNAT's position on the Concentrator's alleged lack of coverage under the Stability Agreement.

5. The Hearing further made clear that Peru's jurisdictional objections must fail, as already established in Freeport's written submissions. Among others, it demonstrated that Peru's statute of limitations theory is not only contrary to the TPA's text, but also logically absurd, as it would require claimants to immediately bring premature and speculative claims based on the possibility of *future* treaty violations and on administrative acts that are neither final nor enforceable. The Hearing further confirmed that each final and enforceable Assessment was a separate and independent administrative act, giving rise to separate breaches and losses. It also demonstrated that the penalties and interest charged against SMCV in relation to the Tax Assessments are not "taxation measures" under the TPA, that none of Freeport's claims require "retroactive" application of the TPA, that SMCV's administrative challenges to the Assessments before SUNAT and the Tax Tribunal do not bar Freeport's Stability Agreement claims under the TPA's fork-in-the-road provision, and that Freeport satisfies the TPA's requirement that either Freeport or SMCV made a covered investment "in reliance on" the Stability Agreement.

6. Through its egregious conduct, Peru repeatedly breached the Stability Agreement and Article 10.5 of the Treaty, which requires it to treat Freeport's investment fairly and equitably. Peru cannot escape liability for its Treaty breaches by asserting that the Tribunal should abdicate its mandate to independently resolve this dispute, ignore the record before it, and defer to the Supreme Court decision in the 2008 Royalty Case—which the parties agree is not even binding

or precedential under Peruvian law. Accordingly, the time has come for Peru to be held accountable for its repeated failure to comply with its obligations under the Stability Agreement and the TPA.

7. For the above reasons and those explained in Freeport's prior submissions, Freeport respectfully requests that the Tribunal declare that Peru violated the Stability Agreement and Article 10.5 of the Treaty, and order full compensation, calculated as of 13 September 2022 as US$942.4 million, inclusive of pre-Award interest, subject to updating as of the date of the Award, plus post-award interest, for the damage that Freeport and SMCV have suffered as a result of Peru's breaches.

II. FREEPORT DEMONSTRATED THAT THE STABILITY AGREEMENT COVERED THE CONCENTRATOR

A. THE HEARING CONFIRMED THAT THE MINING LAW AND REGULATIONS APPLIED STABILITY GUARANTEES TO ENTIRE CONCESSIONS OR MINING UNITS

8. The Hearing confirmed that the Mining Law and Regulations extended stability guarantees to the entire concessions or mining units in which mining companies made their qualifying minimum investment.[1] This interpretation is consistent with the Government's stated purpose of promoting mining investments and the Mining Law's and Regulations' plain terms.

1. Peru Adopted the Mining Law and Regulations to End Economic Turmoil and Encourage Private Investment

9. Legislative Decree No. 708 ("L.D. 708"), which reformed Peru's existing mining law and provided stability guarantees to entire concessions or mining units, was central to the Government's efforts to attract foreign investment in the mining sector following the massive crises of the 1980s and President Fujimori's election in 1990.[2]

10. *First*, the Hearing testimony confirmed that L.D. 708 was designed to attract much-needed foreign investment during a time when Peru was experiencing a massive economic, political, and security crisis.[3] Ms. María del Carmen Vega, who prepared the Single Unified Text

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1 *See* Memorial § IV.A.2(i); *see also* Reply § II.A.1; **CER-5**, Vega I, § III; **CWS-3**, Chappuis I, § II.B; **CWS-14**, Chappuis II, § III; **CA-448,** Mining Law, Article 83; **CA-432,** Mining Regulations, Articles 2, 22.

2 *See generally* Memorial ¶¶ 43-54, 305-12; Reply and C-Mem. on Jurisdiction ¶¶ 37, 52-54.

3 *E.g.*, Tr. 1265:15-1266:5 (Day 5) (Polo) (L.D. 708 was a "reform[]" to "promote foreign investment"); *see also* **Ex. CE-1137**, *SMMCV* Tr. 1148:7-14 (Polo) (Min. Sánchez Albavera told him to "create a favorable environment for private investment"); Memorial ¶¶ 43-54, 305-307; Reply and C-Mem. on Jurisdiction ¶¶ 37(d), 52(f); **CER-5**,

of the Mining Law, testified that in the 1990s, "Peru was experiencing one of the worst crises we have had thus far," with "terrible macroeconomic indices," "inflation over 7,500 percent," and "contraction of production" due to a chronic lack of investment.[4] Peru was also experiencing a "great deal of corruption" and "a political and social crisis due to terrorist attacks," resulting in an "environment [that] was not at all favorable for investment."[5] Mr. Polo similarly described a "very serious economic crisis at the end of the previous administration" because of "[hyper]inflation," "negative international reserves," and a "default [on] payments."[6] Mr. Polo testified that terrorist organizations "acted in the [high] Andean areas" where mining was "the most important economic force," "target[ing] mining companies," "kill[ing] thousands of Peruvians," and threatening him "twice" with death, creating a "terrible" situation where mining "investments had come to a halt."[7] Reforming the mining regime was thus a matter of "national interest," and so the Government sought "to promote foreign investment by granting investor[s] Stability Guarantees," as Mr. Polo explained at the *SMMCV* hearing.[8]

11. *Second*, to attract the much-needed foreign investment, Peru followed the approach of other mining jurisdictions in applying stability guarantees to entire concessions or mining units.[9] Prof. James Otto testified that all competing mining jurisdictions applied stability guarantees to entire "mining units."[10] As Prof. Otto explained, a "mining unit"—also commonly referred to as a "mining project," "mining operation," "mine," or "project"—is a single integrated mining

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Expert Report of María del Carmen Vega (19 October 2021) ("Vega I"), § II.A; **CWS-3**, Witness Statement of Marita Chappuis (19 October 2021) ("Chappuis I"), § II.B; **CWS-14**, Witness Statement of Marita Chappuis (13 September 2022) ("Chappuis II"), § II.

4 Tr. 2241:15-2242:6 (Day 8) (Vega); **CD-7**, Expert Presentation of Maria del Carmen Vega ("Vega Presentation"), slide 5; **Ex. CE-1140**, *SMMCV* Tr. 2027:2-6 (Vega); *see also* **CER-5**, Vega I, ¶ 22; **CER-4**, Expert Report of James M. Otto (19 October 2021) ("Otto I"), ¶ 22; **CWS-7**, Witness Statement of Hans Flury (19 October 2021) ("Flury I"), ¶ 11; **CWS-18**, Witness Statement of Hans Flury (13 September 2022) ("Flury II"), ¶ 5.

5 Tr. 2241:15-2242:6 (Day 8) (Vega); **CD-7**, Vega Presentation, slide 6; **Ex. CE-1140**, *SMMCV* Tr. 2027:8-12 (Vega); *see also* **CER-4**, Otto I, ¶ 22; **CWS-7**, Flury I, ¶ 11.

6 Tr. 1248:4-1248:22 (Day 4) (Polo); **Ex. CE-1137**, *SMMCV* Tr. 1162:3-16 (Polo); *see also* **Ex. CE-1002**, César A. Polo Robilliard, Mining Reform in the 1990s: Achievements and Limitations (June 2015), pp. 2-3.

7 Tr. 1249:1-21 (Day 4) (Polo); **Ex. CE-1137**, *SMMCV* Tr. 1163:2-7, 1164:13-15 (Polo); *see also* Reply and C-Mem. on Jurisdiction ¶ 53.

8 Tr. 1265:11-1266:1 (Day 5) (Polo); **Ex. CE-1137**, *SMMCV* Tr. 1166:7-11, 1166:20-1167:1 (Polo); *see also* **CWS-10**, Witness Statement of Milagros Silva-Santisteban Concha (19 October 2021) ("Silva I"), ¶¶ 8-9.

9 Reply and C-Mem. on Jurisdiction ¶ 54; Memorial ¶ 312; **CWS-3**, Chappuis I, ¶¶ 12, 23.

10 Tr. 2098:17-22 (Day 7) (Otto) ("in all of these countries, all extended fiscal stability to their entire—to an entire integrated mining operation"); *see also* **Ex. CE-1139**, *SMMCV* Tr. 1902:4-1906:20 (Otto) Reply and C-Mem. on Jurisdiction; **CER-4**, Otto I, ¶¶ 31-41.

operation, which shares supply, administration, and services.[11] Because Peru "competed with jurisdictions that applied stability guarantees to mining units as a whole," Prof. Otto testified that it would have been "illogical" for Peru to restrict stability guarantees to specific "investment projects."[12] One competing jurisdiction was Chile, which as Peru conceded, applied stability guarantees to entire mining units.[13] Mr. Polo testified that he visited Chile "to give [him] a better idea about what the new provisions regarding Stability Agreements" should contain because Chile was "successful in attracting foreign investment" and was considered to be an "important competitor" for Peru.[14] Mr. Polo explained that, to attract foreign investment in the mining sector, MINEM "wanted [the stability regime] to be better from Peru's viewpoint."[15]

12. *Third*, through L.D. 708, Peru created "very clear and precise rules of the game" extending stability guarantees to concessions or mining units.[16] Mr. Polo explained that Peru streamlined the regime through administrative simplification and sought "to reduce the paperwork, reduce discretion[], and to make things as transparent as possible."[17]

13. *Finally*, the testimony confirmed that the basic commercial realities of mining operations require stability guarantees to apply to mining units or concessions.[18] Prof. Otto explained that stability guarantees only serve their "primary purpose" of "attract[ing] continued

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[11] Tr. 2093:18-2094:5 (Day 7) (Otto) ("Sometimes it is referred to as a 'mining project,' a 'mining operation,' 'an economic mining unit,' a 'mine,' or a 'project.' In Perú, the term that they use is 'mining unit,' 'Economic-Administrative Unit,' 'single production unit,' they all convey the same concept of an integrated mining operation"); *see also* Tr. 1252:5-8 (Day 4) (Polo) (Centromín had several "mining units," which grouped "logistics . . . [u]nder a single unit"); **Ex. CE-1139**, *SMMCV* Tr. 1897:8-1898:17 (Otto); Reply and C-Mem. on Jurisdiction ¶ 52; Memorial ¶ 310-12.

[12] Tr. 2093:6-11 (Day 7) (Otto); *see also* **Ex. CE-1139**, *SMMCV* Tr. 1897:2-7 (Otto); **CWS-3**, Chappuis I, ¶ 23.

[13] Tr. 2099:21-2100:9 (Day 7) (Otto); **Ex. CE-1139**, *SMMCV* Tr. 1904:20-1905:7 (Day 7) (Otto); Rejoinder and Reply on Jurisdiction, ¶ 170 ("some mining jurisdictions, such as Chile," "valid[ly]" "grant stability guarantees to all concessions").

[14] Tr. 1267:4-13 (Day 5) (Polo); *see also* **Ex. CE-1137**, *SMMCV* Tr. 1171:4-1173:3 (Polo) (Mr. Polo "learned many things in Chile"—he "was like a little sponge, taking everything in" and "trying to understand everything").

[15] Tr. 1271:7-10 (Day 5) (Polo); *see also* **RWS-1**, Witness Statement of César Augusto Polo Robilliard (18 April 2022) ("Polo I") ¶ 10 ("it was important that the legal regime in Perú be no less favorable than Chile's"); **Ex. CE-1137**, *SMMCV* Tr. 1175:2-9 (Polo); **CWS-3**, Chappuis I, ¶ 23.

[16] Tr. 1282:17-20 (Day 5) (Polo); *see* **Ex. CE-1137**, *SMMCV* Tr. 1148:9-14 (Polo); Memorial ¶ 309(e); Reply and C-Mem. on Jurisdiction ¶ 52; **CWS-7**, Flury I, ¶¶ 17-18.

[17] Tr. 1275:12-16 (Day 5) (Polo); *see* **Ex. CE-1137**, *SMMCV* Tr. 1168:3-22 (Polo) (before L.D. 708, "[t]here was too much red tape" in the stability regime, which "le[d] to a chaotic Government."); *see also* **Ex. CE-1140**, *SMMCV* Tr. 2278:14-20 (Eguiguren) (explaining that administrative simplification "avoid[ed] the discretionality and the arbitrary nature of the Administrations"); **RWS-1**, Polo I, ¶ 27.

[18] *See* Memorial ¶¶ 308-12; Reply and C-Mem. on Jurisdiction ¶¶ 51-53; **CER-5**, Vega I, ¶ 38; **CWS-3**, Chappuis I, ¶¶ 24-25; **CWS-14**, Chappuis II, ¶¶ 11-12; **CER-4**, Otto I, ¶¶ 17, 23.

investment into the mining sector" if they apply to entire concessions or mining units because "mines continually evolve" and companies must continually invest to "take into account the varying nature of its orebody, infrastructure development, technology" and changes in costs and markets.[19] Thus "[a]ll of the stabilization schemes" of which Prof. Otto is aware "extended fiscal stability to . . . an entire integrated mining operation," and he is "not aware of any jurisdiction[] that grants stability to just part of the activities performed within a mining unit."[20]

2. The Mining Law and Regulations Applied Stability Guarantees to Entire Concessions or Mining Units

14. As the Hearing showed, the Mining Law and Regulations sought investment promotion and administrative simplification by granting stability to *all* activities in the concessions or mining units in which a mining investor made its qualifying minimum investment. Peru's continued assertion that stability guarantees applied exclusively to "investment projects" finds absolutely no support under the Mining Law or Regulations—especially because the term did not even exist in the Mining Law or Regulations until the July 2014 amendments to the Mining Law—and is fundamentally inconsistent with their legislative purpose.

15. *First*, the Mining Law's and Regulations' provisions defining the stability guarantees' scope clearly applied to entire mining units or concessions, not specific "investment projects."[21]

(a) Article 82 of the Mining Law set out the legal framework for 15-year stability agreements and granted stability guarantees to "mining activity titleholders" to promote investment within an "Economic-Administrative Unit[]" ("EAU"), defined as a "set of mining concessions . . . the processing plants, and the other assets that constitute *a single production unit* due to sharing supply, administration, and services."[22] As Ms. Vega

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[19] Tr. 2093:6-11, 2095:2-14, 2112:6-9 (Day 7) (Otto); *see also* **Ex. CE-1139**, *SMMCV* Tr. 1899:6-11, 1916:4-9 (Otto); **CER-**4, Otto I, ¶¶ 23-28.

[20] Tr. 2098:17-22, 2119:9-19 (Day 7) (Otto); *see also* Tr. 2148:13-2149:10 (Day 7) (Otto) (until copper "prices went up [and] [congressmen] started submitting all these bills," the idea that stability applied only to investment projects was "not an issue anywhere else [in the world], and it wasn't in Perú," including when Otto "me[t] with Perú . . . and the whole economic team" in 2001); **Ex. CE-1139**, *SMMCV* Tr. 1898:14-17 (Otto) ("[C]omparative practice is that stabilization applies to an integrated mining operation, and Perú's practice was consistent."); **CER-4,** Otto I, ¶ 32.

[21] *See* Memorial ¶¶ 51-57, 303-12; Reply and C-Mem. on Jurisdiction ¶¶ 33-49; **CER-5**, Vega I, § III; **CWS-3**, Chappuis I, § II.B; **CWS-14**, Chappuis II, § III.

[22] **CA-448**, General Mining Law, Supreme Decree No. 014-92-EM (6 May 1996) ("Mining Law"), Article 82; *see* Memorial ¶¶ 53, 303(a); Reply and Counter-Mem. on Jurisdiction ¶ 47; **CER-5**, Vega I, ¶ 35; **CWS-3**, Chappuis I, ¶ 28.

explained, by defining the EAU as a "single production unit," Article 82 created a clear and commercially sensible limitation for the scope of stability guarantees.[23]

(b) As Freeport explained, Article 83 of the Mining Law established the scope of stability guarantees by granting them "exclusively to the activities of the mining company in whose favor the investment is made."[24] Ms. Vega explained that the term "exclusively" referred only to the "activities of the mining company," which under Article 7 of the Mining Law are those "carried out through the Concession system."[25] At the hearing, Ms. Chappuis testified that Article 83—which she drafted alongside Mr. Polo, and which she explained was driven by his concerns about the privatization of the state-owned conglomerate Centromín—"refer[red] exclusively to the *mining activities*" to prevent an investor from obtaining stability for "non-mining activities" and to exclude affiliates of the conglomerate other than the mining company that made the investment.[26] She further explained that Mr. Polo "never mentioned" to her that "stability would be limited to an investment project," and that "had he mentioned it, [she] would have told him: 'You're crazy. You're totally wrong. That's impossible.'"[27]

(c) Article 1 of the Regulations implemented Article 83 of the Mining Law and similarly granted tax and administrative stability to "mining activity titleholders for the performance of their *activities*."[28] At the Hearing, Ms. Vega explained that "activities"

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[23] Tr. 2246:22-2247:15 (Day 8) (Vega); **CER-5**, Vega I, ¶ 38; *see also* **Ex. CE-1140**, *SMMCV* Tr. 2047:5-12, 2049:2-10 (Vega); **CWS-3**, Chappuis I, ¶¶ 20-21, 28.

[24] **CA-448**, Mining Law, Article 83; *see* Memorial ¶¶ 53(b), 307(b-c); Reply and C-Mem. on Jurisdiction ¶¶ 34(a), 36-37, 40-42.

[25] Tr. 2249:6-11 (Day 8) (Vega); **CA-448**, Mining Law, Article 7 ("The exploration, exploitation, beneficiation, general work and mining transport activities are carried out . . . through the concession system."); *see also* Tr. 845:8-9 (Day 3) (Chappuis) ("Mining activities, as we had written even in 708, everything is governed by concessions."); **Ex. CE-1140**, *SMMCV* Tr. 2046:16-2047:12 (Vega); **CER-10**, Expert Report of María del Carmen Vega (13 September 2022) ("Vega II"), ¶ 7; **CER-5**, Vega I, ¶¶ 39, 40.

[26] Tr. 843:8--844:13 (Day 3) (Chappuis) (emphasis added) ("So, in Perú, [] Tax Stability Agreements would only be given to mining. And he said, 'No. If we are doing that, it could be that, when Centromín is privatized, the factories should also receive a Tax Stability Agreement.' And he corrected it and wrote that phrase, or that clause, which said this would be only for mining activities of the mining company."); Tr. 919:10-921:14 (Day 3) (Chappuis); *see also* **Ex. CE-1136,** *SMMCV* Tr. 950:10-952:17 (Chappuis); **CWS-14**, Chappuis II, ¶ 9.

[27] Tr. 844:22-845:7 (Day 3) (Chappuis); *see also* **Ex. CE-1137**, *SMMCV* Tr. 1215:3-13, 1220:10-1221:17, 1222:6-1223:3 (Polo); **CWS-14**, Chappuis II, ¶¶ 8-19.

[28] **CA-432**, Supreme Decree No. 024-93-EM (7 June 1993) ("Mining Regulations"), Article 1 (emphasis added); *see* Memorial ¶ 304(a); **CER-10**, Vega II, ¶ 24; **CER-5**, Vega I, ¶ 44.

under Article 1 are "mining activities" performed "through the concession system."[29]

(d) Article 2 of the Regulations clarified that "when the []titleholder [has] several *concessions* or [*EAUs*]," stability "will only take effect for those *concessions* or *units* that are supported by . . . the [Stability] Agreement."[30] Article 2 thus explicitly confirmed that stability guarantees applied to *entire* concessions or mining units, not to a specific "investment project."[31] The clear and unequivocal language of Article 2 is fatal to Peru's case, so both Peru and its experts have gone to great lengths to avoid it. Indeed, despite its clear relevance, neither Prof. Morales nor Prof. Eguiguren even mention Article 2 in their reports, and Prof. Morales admitted on cross that he "would not be able to tell you the content" of Article 2.[32] Peru itself did not address Article 2 in substance in any of its written submissions, instead addressing it in its Rejoinder only to claim that this clear language "did not exist" in the version of the Regulations in effect at the time—a statement that is completely wrong, as Peru now admits.[33]

(e) When it finally addressed Article 2 at the Hearing, Peru effectively had to concede that Article 2 clearly envisions stability guarantees applying to entire concessions or mining units, but attempted to argue that Article 2 "sets out the parameters" governing stability guarantees, "which cannot extend beyond concessions or units within which there are investments covered by a stabilization agreement."[34] But like the "outer boundaries"[35] theory that Peru advanced in the *SMMCV* hearing and then abandoned, Peru's latest argument is both inconsistent with its previous claim that Article 2 merely "provided certain conditions [to] sign a stabilization agreement" and with its plain text.[36] Article 2

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29 Tr. 2249:6-11 (Day 8) (Vega) (emphasis added); *see also* **Ex. CE-1140**, *SMMCV* Tr. 2050:15-21 (Vega); **CA-448**, Mining Law, Article 7.

30 **CA-432**, Mining Regulations, Article 2 (emphasis added).

31 *See* Tr. 2251:19-2252:3 (Day 8) (Vega) (emphasis added); **Ex. CE-1140**, *SMMCV* Tr. 2050:22-2051:10 (Vega); Memorial ¶¶ 56(a), 304(b); Reply and Counter-Mem. on Jurisdiction ¶¶ 34(a), 38-39; **CER-10**, Vega II, ¶ 24; **CER-5**, Vega I, ¶ 44; **CWS-3**, Chappuis I, ¶ 28.

32 Tr. 2504:11-14 (Day 8) (Morales).

33 *Cf.* Rejoinder and Reply on Jurisdiction ¶¶ 131-32; *see* **CA-432**, Mining Regulations, Article 2 (parties' agreed version in effect in 1998).

34 *Cf.* Tr. 244:22-245:3 (Day 1) (Resp. Opening).

35 *Cf.* **Ex. CE-1133**, *SMMCV* Tr. 226:8-14 (Resp. Opening) ("[O]ur point here is that the Mining Law delineates the outer boundaries of how the Stabilization Agreement is properly interpreted under Peruvian Law.").

36 *Cf.* Counter-Memorial (4 May 2022) ("Counter-Memorial"), ¶ 57.

could not be clearer: it states that stability guarantees will "take effect for those *concessions* or *units*" supported by a stability agreement—not as "parameters," a term nowhere used by Article 2, but for those entire concessions or EAUs, full stop.[37]

(f) Article 22 of the Regulations implemented Article 83 of the Mining Law, providing that stability guarantees "benefit the mining activity titleholder exclusively for the *investments*" it "makes in the *concessions* or *Economic-Administrative Units*" and that titleholders that have *other concessions or EAUs* "different from the ones already stabilized" had to "keep independent accounts."[38] Like Article 2, this provision could not be any clearer that stability guarantees apply to concessions and mining units and is thus fatal to Peru's case. At the Hearing, Peru acknowledged that Article 22 was "consistent with Article 83 of the Mining Law"[39] and conceded that Article 22 "require[d] separate accounting for separate concessions or EAUs," *not* "investment projects."[40]

16. *Second*, other provisions of the Mining Law and Regulations likewise confirm that stability guarantees applied to entire mining units or concessions and refute Peru's claim that guarantees were granted only to specific investment projects—despite Peru's attempts to distort, diminish, or disregard them in support of its restrictive interpretation.[41]

(a) For example, Article 72 of the Mining Law set out the "basic benefits" of stability guarantees granted to mining "*titleholders*"—which, as Ms. Vega explained and Mr. Polo confirmed at the *SMMCV* hearing, refers to mining companies "hold[ing] concessions"—in order "to promote private investment in *mining activity*," *i.e.*, activities permitted under the concession system, including beneficiation and exploitation.[42] Article 18 of the

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37 **CA-432**, Mining Regulations, Article 2 (emphasis added).

38 **CA-432**, Mining Regulations, Article 22; *see* Tr. 2239:11-2340:1, 2253:12-21 (Day 8) (Vega) (emphasis added); **Ex. CE-1140**, *SMMCV* Tr. 2051:19-2052:21 (Vega); Memorial ¶¶ 56(c), 304(d); Reply and C-Mem. on Jurisdiction ¶¶ 38-40, 43-44, 127; **CER-10**, Vega II, ¶¶ 22-23; **CER-5**, Vega I, ¶ 46; **CER-3**, Expert Report of Luis Hernández Berenguel (19 October 2021) ("Hernández I"), ¶¶ 53-61; **CWS-3**, Chappuis I, ¶ 28.

39 Tr. 240:3-8 (Day 1) (Resp. Opening); *see also* **Ex. CE-1133**, *SMMCV* Tr. 242:4-17, 243:9-18 (Resp. Opening).

40 Tr. 242:18-243:1 (Day 1) (Resp. Opening); *see also* **Ex. CE-1133**, *SMMCV* Tr. 243:9-18 (Resp. Opening); **RD-1**, Respondent's Opening Presentation ("Resp. Opening"), slide 49.

41 *See* Memorial ¶¶ 53, 56, 303-304; Reply and C-Mem. on Jurisdiction ¶¶ 45-49; II.B; **CER-10**, Vega II, ¶ 16, 36; **CWS-14**, Chappuis II, ¶¶ 18-19.

42 **CA-448**, Mining Law, Article 72 (emphasis added); *id.* Article 7; Tr. 2314:21-2315:1 (Day 8) (Vega); **Ex. CE-1137**, *SMMCV* Tr. 1222:20-1223:3 (Polo) ("The mining titleholder is the company which holds a concession, or several, and that is mining titleholder."); *see* Memorial ¶ 303(e), 309(a); Reply and C-Mem. on Jurisdiction ¶ 46.

Regulations similarly confirmed that concessions, not "investment projects," were the relevant unit for stability purposes, by requiring titleholders to submit the "[n]ame of the mining rights [*i.e.*, concessions] set out in the application."[43] Article 25 of the Regulations required mining companies to keep demonstrative "annexes" relating to "expansion[s] of facilities or *new investments that contractually enjoy the guarantee of legal stability*"—making clear that stability guarantees applied to *additional* investments in a stabilized mining unit, which would be impossible if they were limited to a feasibility study's investment program.[44]

(b) By contrast, the provisions on which Peru relies lend no support to its restrictive interpretation. Article 84 granted additional benefits to the "*mining activity titleholder*" that executed a 15-year stability agreement, including an increased depreciation rate, without ever purporting to define the scope of stability guarantees.[45] Similarly, other provisions on which Peru relies—including Article 85 of the Mining Law and Articles 19 and 24 of the Regulations—are irrelevant because, as Freeport has repeatedly explained, they relate not to the scope of stability guarantees but rather the *qualification* for stability—in Prof. Bullard's words, they relate to the "key to open the door to stability" but not to the "house, which is the Stabilized Economic-Administrative Unit."[46]

(c) Recognizing that the Regulations refute its position, Peru also argued that the Regulations should be interpreted restrictively because they "c[ould not] grant rights beyond what is provided in the Mining Law."[47] But Peru's argument is entirely circular as it wrongly assumes that the Mining Law limited stability guarantees to investment projects. And there is no question that the Regulations are valid—no Peruvian court has ever held that

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43 **CA-432**, Mining Regulations, Article 18; *see* Memorial ¶ 56(b), 304(c); Reply and C-Mem. on Jurisdiction ¶¶ 48, 49.

44 **CA-432**, Mining Regulations, Article 25; *see* Memorial ¶ 304(e); Reply and Counter-Mem. on Jurisdiction ¶ 48; *see also* **Ex. CE-918**, MINEM, Report No. 487-98-EM-DGM/DPDM (18 August 1998), p. 3 ("[T]he owner who contractually enjoys the guarantee of legal stabilization must keep . . . annexes of the application for the tax regime granted to [] *expansions or new investments*."); *id*. (guarantees "are for the investments made in the concessions or [EAUs]"). *Cf.* Tr. 242 (Day 1) (Resp. Opening).

45 **CA-448**, Mining Law, Article 84 (emphasis added); *see also* Memorial ¶ 303(d); **CER-5**, Vega I, ¶ 29.

46 Tr. 2343:19-22, 2349:10-4 (Day 8) (Bullard); s*ee also* Tr. 2293:12-2296:19 (Day 8) (Vega); **Ex. CE-1140**, *SMMCV* Tr. 2150:5-12 (Vega); Tr. 70-71 (Day 1) (Cl. Opening); Memorial ¶¶ 337-38; Reply and C-Mem. on Jurisdiction ¶¶ 49, 61(c); **CER-5**, Vega I, ¶¶ 30, 50; **CER-10**, Vega II, ¶ 26, 34-35; **CWS-3**, Chappuis I, ¶¶ 22-23. *Cf.* Tr. 238, 2957 (Day 1) (Resp. Opening).

47 *Cf.* Tr. 245:9-12 (Day 1) (Resp. Opening).

the Regulations exceeded the Mining Law, as Prof. Eguiguren acknowledged.[48]

17. *Third*, as the Hearing testimony made abundantly clear, neither Peru nor any of its witnesses has been able to provide a coherent explanation of MINEM's or SUNAT's position on the scope of stability guarantees—let alone provide *any* explanation whatsoever for how their alleged restrictive position could have been implemented in practice without resorting to the liberal use of discretion that the Mining Law sought to abolish.[49]

(a) As Mr. Polo acknowledged, "the Mining Reform [] introduced [the] principle [of] administrative simplification," including to "eliminat[e] discretion," and "reduce opportunities for corruption."[50] Yet Peru's restrictive position would be entirely at odds with this principle, as Mr. Polo's struggle to explain the practical implementation of such a position makes clear. For example, when asked if a stability agreement would cover an investment replacing a drilling machine with a "newer" version that "did not form part of the Investment Program," Mr. Polo refused to answer, stating that "[i]t depends on the circumstances" and that he would "need to think about it, *if* it is a very important investment."[51] He also conceded that "reasonable technological improvements" resulting in production increases would have "no problem . . . enjoy[ing] stability" because "it's not a rigid concept"—but gave no explanation for how either the company or the government would decide what was "reasonable."[52] And when asked about how one could "determine what is stabilized and what is not stabilized," Mr. Polo noted that he would "have to use *criterion* because not everything is etched in stone."[53] But again, he provided no explanation for what criteria were allegedly used and how they were applied—unsurprisingly, as none existed under the Mining Law or Regulations.[54]

(b) Mr. Cruz expressly acknowledged that a stability agreement could cover new investments

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48 **Ex. CE-1141**, *SMMCV* Tr. 2304:2-2307:7 (Eguiguren) (agreeing that the Regulations must be "presume[ed] . . . legal[]" and fully applicable to this dispute).

49 *See generally* Reply and C-Mem. on Jurisdiction ¶¶ 50-54.

50 Tr. 1275:3-1277:4 (Day 5) (Polo); *see also* **Ex. CE-1137**, *SMMCV* Tr. 1200:13-1203:7, 1206:8-21 (Polo); **RWS-1**, Polo I, ¶ 27.

51 Tr. 1377:4-1378:9 (Day 5) (Polo); *see also* **Ex. CE-1137**, *SMMCV* Tr. 1257:14-1259:10, 1265:7-13 (Polo).

52 Tr. 1302:20-1303:9 (Day 5) (Polo).

53 Tr. 1349:2-5 (Day 5) (Polo) (emphasis added); *see also* **Ex. CE-1137**, *SMMCV* Tr. 1262:8-1265:13 (Polo).

54 *See supra* ¶¶ 15-16; *see also* Reply and C-Mem. on Jurisdiction ¶¶ 55-57; Memorial ¶ 350.

not included in the underlying feasibility study, but claimed that SUNAT would have to assess this on "a case-by-case basis," looking at "several factors" and the investment "amount."[55] Mr. Cruz testified that, if there is "a change of machinery[] and it cost a million, then it's *likely* that its stabilized," but he cannot give "a definitive yes or a definitive no" or "a clear-cut yes or no," including because SUNAT had "no specific guidelines that would help an auditor to determine if a new investment is or is not covered."[56] At the *SMMCV* hearing, President Blanch rightly observed that Mr. Cruz's explanation seemed "fluffy," or not "very precise in terms of working out whether something is covered by the Stabilization Agreement or not, where the boundary is."[57] It is also fundamentally inconsistent with the Mining Law's stated purpose of eliminating discretion and "[making] things as transparent as possible," in Mr. Polo's words.[58]

(c) To further complicate matters, Ms. Bedoya then directly contradicted Mr. Polo's and Mr. Cruz's suggestion that the use of broad Government discretion could salvage Peru's restrictive interpretation, testifying that the Stability Agreement only covered the items of the Investment Program amounting to "237 million; not a single additional dollar" more.[59] Ms. Bedoya also testified that "additional investments related to the leaching project that we see in the Feasibility Study [] wouldn't be covered"—a proposition not only contrary to Mr. Cruz's views about SUNAT's so-called institutional position, but also directly in conflict with Mr. Polo's assertion that the "Feasibility Study is a baseline document" and that additional investments could be covered as long as they were "reasonable" and "fair."[60] Ms. Bedoya's testimony is also clearly inconsistent with the documentary record showing SUNAT's application of stability guarantees to SMCV's

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55 Tr. 1807:16-1808:15, 1812:7-14, 1813;10-20, 1815:16-22 (Day 6) (Cruz); **Ex. CE-1138**, Tr. 1626:21-1267:14 (Day 6) (Cruz).

56 Tr. 1811:20-22, 1820:3-9, 1838:8-18 (Day 6) (Cruz) (emphasis added); *see also* **Ex. CE-1138**, *SMMCV* Tr. 1654:10-1655:6 (Cruz).

57 **Ex. CE-1138**, *SMMCV* Tr. 1633:2-7 (Cruz) (President Blanch's Question); *see also id.* at 1653:13-22 (Cruz) (Arbitrator Garibaldi observing inconsistencies because Mr. Cruz initially accepted "that an expansion of the original capability is okay," but later asserted that "the main objective of the Contract is the original investment," and "any other investment would distort the main objective of the contract").

58 Tr. 1275:12-15 (Day 5) (Polo); *see also* **Ex. CE-1140**, *SMMCV* Tr. 2278:14-20 (Eguiguren) (explaining that administrative simplification "avoid[ed] the discretionality and the arbitrary nature of the Administrations"); Reply and C-Mem. on Jurisdiction ¶ 82(c); **RWS-1**, Polo I, ¶ 27.

59 Tr. 1644:10-15, 1652:6-12 (Day 6) (Bedoya).

60 *Cf*. Tr. 1648:3-7 (Day 6) (Bedoya) *with* Tr. 1303:7-21 (Day 5) (Polo), **Ex. CE-1137**, *SMMCV* Tr. 1256:4-14 (Polo).

and other mining companies' additional investments in their mining units even though they were not included in the respective feasibility studies.[61]

18. *Finally*, Peru's experts were unable to rescue Peru's interpretation, since each expert that purported to offer authoritative testimony on the Mining Law and Regulations conceded that they were not qualified to do so, and that they ignored key provisions of the Mining Law and Regulations and failed to consider MINEM's and SUNAT's decisions on other mining companies' stability agreements to arrive at their flawed conclusions.[62]

(a) Prof. Morales, who Peru presented as an expert on "the scope of the Stability Agreement," conceded he "of course" "d[id] not hold [himself] out as a Mining Law Expert."[63] Despite agreeing that "[t]he scope of the Stability Agreement is limited by the Mining Law itself," and purporting to interpret the Mining Law as "expressly restrict[ing]" stability guarantees to specific "investment projects," Prof. Morales could not explain key provisions omitted from his report, including Article 82 of the Mining Law and Article 2 of the Regulations.[64] He was also unfamiliar with the most basic features of stability agreements, including "for what duration [one] can conclude stability agreements under the Mining Law."[65] He also admitted he did not "review[] any decisions" by the DGM or the Mining Council and had not "gotten into an analysis of SUNAT's [d]ecisions" "that go to the issue of the scope of stability agreements."[66]

(b) Prof. Eguiguren recognized he would "never" "hold [himself] out as a Mining Law Expert."[67] When asked about basic questions such as the differences between 10-year and 15-year stability agreements, Prof. Eguiguren conceded he was not a "mining expert" and

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61 *See infra* ¶¶ 31, 43, 47-48.

62 *See also* Reply and C-Mem. on Jurisdiction ¶ 39.

63 Tr. 2499:15-17 (Day 8) (Morales).

64 **RER-2**, Expert Report of Rómulo Morales Hervias (4 May 2022) ("Morales I"), p. 50; Tr. 2499:18-2500:5, 2503:5-18, 2519:18-22 (Day 8) (Morales) ("Q: Is there any reason why you omitted Article 82 of the Mining Law from that list? A. I have not cited certain provisions of the law on the Regulations because I thought these would be relevant to get a key idea . . . Q: Do you know what Article 82 of the Mining Law is about? A. Right now, I don't have it at hand. I would not be able to tell you.").

65 Tr. 2515:1-14 (Day 8) (Morales) ("Do you know for what duration you can conclude Stability Agreements under the Mining Law? A. There is a time frame established by the law.").

66 Tr. 2505:9-2506:6 (Day 8) (Morales); *see also* **Ex. CE-1141**, *SMMCV* Tr. 2342:21-2343:4 (Morales).

67 Tr. 2450:11-13 (Day 8) (Eguiguren).

that he "would tell you to consult a specialist in mining."[68] And when asked about his role as counsel for SUNAT in local proceedings against SMCV, he openly admitted that having that role was a "limitation," that the Tribunal "d[id] not need to believe [him]," and that he would not "be able to contradict SUNAT" in his testimony.[69]

(c) Prof. Jorge Bravo and Prof. Jorge Picón, who Peru also presented as experts on "the scope of the Stability Agreement," likewise readily conceded that they "are not experts in Mining Law" or "specialists in Mining Law."[70] When pressed on cross-examination, they struggled to define the boundaries of the Stability Agreement's scope and admitted not reviewing the 1996 Feasibility Study in full because there were "[s]ome issues" they "d[id] not understand" because "they [were] of a technical nature."[71]

(d) Mr. Stephen Ralbovsky similarly admitted that he did not seek to "interpret[]" the Mining Law or Regulations and did not have any experience entering into or "appl[ying]" for stability agreements in Peru.[72] He also acknowledged that he was not "a qualified lawyer in Peru"—or indeed "in any [] jurisdiction"—and that the Tribunal should "go to Peruvian [law] experts" to resolve questions of Peruvian law.[73]

B. THE HEARING CONFIRMED THAT THE STABILITY AGREEMENT APPLIED TO THE CERRO VERDE MINING UNIT AND THE CONCENTRATOR

19. The Hearing confirmed that the Stability Agreement implemented the Mining Law and Regulations, granting stability to all of SMCV's activities in its Cerro Verde Mining Unit.

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68 Tr. 2452:6-2453:8 (Day 8) (Eguiguren); *see also* **Ex. CE-1140**, *SMMCV* Tr. 2238:12-14 (Eguiguren).

69 Tr. 2424:6-2425:2 (Day 8) (Eguiguren) ("I know that that is a limitation and I stated that in my Report. Now, does that disqualify me to have a legal opinion? That depends on interpretation. You do not need to believe me.").

70 Tr. 2708:16-18, 2709:10-11 (Day 9) (Bravo & Picón); *see also* **Ex. CE-1141**, *SMMCV* Tr. 2406:2-7, 2422-2423 (Bravo & Picón).

71 Tr. 2717:6-13 (Day 9) (Bravo & Picón); *see also* **Ex. CE-1141**, *SMMCV* Tr. 2407-2419 (Bravo & Picón).

72 Tr. 2206:22-2207:2, 2215:18-2217:8 (Day 7) (Ralbovsky); **Ex. CE-1139**, *SMMCV* Tr. 1987:9-11, 1989:10-15 (Ralbovsky).

73 Tr. 2196:6-2197:2, 2194:15-2195:15, 2195:10-15, 2196:6-2197:2 (Day 7) (Ralbovsky) ("Q. Does the interpretation of a Peruvian law contract hinge on an application of Peruvian law? A. Yes. Q. Okay. And Peruvian law is for Peruvian Experts; right? A. Yes"); *see also* **Ex. CE-1139**, *SMMCV* Tr. 1987:15-17, 1991:4-7 (Ralbovsky).

1. Stability Agreements Are Adhesion Contracts That Fully Incorporated the Scope of Stability Guarantees Granted under the Mining Law and Regulations

20. As Peru's own experts and witnesses confirmed, stability agreements *fully* implemented the stability guarantees under the Mining Law and Regulations.

21. *First*, the testimony confirmed that, under Article 86 of the Mining Law, stability agreements are adhesion contracts that fully "incorporate *all* the guarantees established in [the Mining Law and Regulations]," including the substance and scope of such guarantees, without granting any latitude for investors to negotiate.[74]

(a) Prof. Bullard explained that in Peru, "the Mining Law and [R]egulations [] establish the conditions through which stability is granted, the [stability] [g]uarantees, and the scope of such stability."[75] He also explained that stability agreements "cannot go against the [] Mining Law and its Regulations" or "be negotiated" with "a greater or lesser scope than the one established by the Mining Law, the Regulations."[76] He further noted that "as an Adhesion Contract, the [Stability Agreement] cannot move away from what the law says" and that "if the law sets forth a definition, the Contract can't modify it."[77]

(b) Prof. Eguiguren confirmed Prof. Bullard's testimony, explaining that "the parties cannot [] negotiate [a] different scope [] for a stability agreement than the one that's set forth in the Mining Law."[78] He further explained that "any investor that meets the requirements under the law [] has to have access to the same benefits precisely to avoid the under-the-table negotiation[s] with corruption [] or beneficial treatment beyond the letter of the law."[79] This mirrors his testimony at the *SMMCV* hearing that "the purpose of [] having

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74 **CA-448**, Mining Law, Article 86 (emphasis added); *see also* Memorial ¶ 322; Reply and C-Mem. on Jurisdiction ¶¶ 79-82.

75 Tr. 2332:19-2333:1 (Day 8) (Bullard).

76 Tr. 2333:15-22 (Day 8) (Bullard); **CD-8**, Presentation of Alfredo Bullard ("Bullard Presentation"), slides 5-9; *see also* **Ex. CE-1140**, *SMMCV* Tr. 2172:11-16 (Bullard).

77 Tr. 2356:6-11 (Day 8) (Bullard); *see also* **CER-2**, Expert Report of Alfredo Bullard (19 October 2021) ("Bullard I"), ¶¶ 18-21; **CER-7**, Reply Expert Report of Alfredo Bullard (13 September 2022) ("Bullard II"), ¶¶ 17-20.

78 Tr. 2466:8-16 (Day 8) (Eguiguren); *see also id.* Tr. 1400:10-14 ("[W]hat will be covered by the guarantees" is "not negotiable," "there are certain stipulations that are copied from the General Mining Law."); **RER-6**, Reply Expert Report of Francisco Eguiguren Praeli (3 November 2022) ("Eguiguren II"), ¶ 42.

79 Tr. 2431:15-2432:1 (Day 8) (Eguiguren); *see also* **Ex. CE-1140**, *SMMCV* Tr. 2279:2-7 (Eguiguren); **RER-1**, Expert Report of Francisco Eguiguren Praeli (4 May 2022) ("Eguiguren I"), ¶¶ 40, 61; **RER-6**, Eguiguren II, ¶ 112.

Stability Agreements as Adhesion Contracts is to treat all investors equal."[80]

(c) Ms. Chappuis explained that MINEM created a model adhesion contract that applied to "certain [c]oncessions [listed] in Annex 1" and that stability agreements "had to be written up in the same manner" with a few limited "blanks" "to be filled in."[81] She testified that "stability agreements are not negotiated" in Peru but "appl[y] automatically and mandatorily [] to [] entire concession[s]" and that the Mining Law's drafters endorsed the adhesion contract approach "to avoid [being] accused of corruption."[82]

(d) At the *SMMCV* hearing, Mr. Polo acknowledged that the stability regime was designed to "eliminate discretion of Government officials" because "discretion could create corruption,"[83] and that the Mining Law "*eliminate[d] any negotiations*" regarding stability guarantees' "scope."[84] At the *Freeport* Hearing, Mr. Polo confirmed this testimony without any reservations, and conceded that "if the Mining Law says the scope of the Stability Guarantees is X, th[en] the Parties could not then negotiate that the scope of the stability benefits is . . . Y."[85]

22. *Second,* because stability agreements implement the full scope of the Mining Law's and Regulations' stability guarantees, they must be interpreted to conform with the Mining Law.[86]

(a) Prof. Bullard explained that because stability agreements are adhesion contracts, they "guarantee that there is a perfect reflection of what the Law states" and that as a result they "cannot be interpreted contrary to the Mining Law and its Regulations."[87] In

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80 **Ex. CE-1140**, *SMMCV* Tr. 2279:8-15 (Eguiguren).

81 Tr. 847:1-2, 914:16-19 (Day 3) (Chappuis); **Ex. CE-1135**, *SMMCV* Tr. 836:3-5, 837:2-5 (Chappuis); *see also* Tr. 930:11-22 (Day 3) (Chappuis); **CWS-3**, Chappuis I, ¶ 26; **CER-5**, Vega I, ¶ 31; **Ex. CE-778**, Model Stability Agreement, Supreme Decree No. 04-94-EM (3 February 1994) (Model Contract for 15-year stability agreement.).

82 Tr. 914:13-15, 931:19-21, 936:14-22 (Day 3) (Chappuis); *see also* **Ex. CE-1135**, *SMMCV* Tr. 836:5-9, 837:2-5 (Chappuis) (testifying that the adhesion contract was designed to ensure that "no Stabilization Agreement would ever be questioned" on the grounds of corruption or excess government discretion); **CWS-3**, Chappuis I, ¶ 26.

83 Tr. 1276:18-22 (Day 5) (Polo); **Ex. CE-1137**, *SMMCV* Tr. 1203 :17-1204:4, 1206:18-21 (Polo).

84 **Ex. CE-1137**, *SMMCV* Tr. 1209:3-7 (Polo) (emphasis added); *id.* ("The regime would[] be the same for anyone who met the requirements."); *see also* **RWS-1**, Polo I, ¶ 26 ("The fact that the [stability] agreement [] is an adhesion contract means that the mining company adheres to the stability conditions and guarantees previously provided by law and included in the agreement, without the possibility of negotiating.").

85 Tr. 1293:14-1294:14 (Day 5) (Polo).

86 *See* Memorial ¶ 322; Reply and C-Mem. on Jurisdiction ¶¶ 79-82; **CWS-3**, Chappuis I, ¶ 26; **CER-5**, Vega I, ¶¶ 31, 53, 59; **CER-2**, Bullard I, ¶¶ 17-21; **CER-7**, Bullard II, ¶¶ 4-20.

87 Tr. 2333:10-22 (Day 8) (Bullard); **CD-8**, Bullard Presentation, slide 9.

response to President Hanefeld's question about contract interpretation, Prof. Bullard also explained that the Stability Agreement "is a contract, the terms of which come from the law [s]o, it's subject to a strict interpretation based on what the law says."[88]

(b) Prof. Morales agreed, noting that "the interpretation closest to what is provided in the Mining Law must be preferred over one that deviates from [] said law."[89] Prof. Eguiguren similarly explained that the Stability Agreement "has to be interpreted in a strict—restrictive manner," which according to his previous testimony, "refer[red] to [reading] the scope of an agreement based on what has been established under a law."[90]

23. *Finally*, the testimony confirmed that the Model Stability Agreement—through which the Government implemented the full scope of guarantees under the Mining Law and Regulations in accordance with Article 86 of the Mining Law—covered entire EAUs, not specific "investment projects," and did not allow investors to "pick and choose" the scope of their guarantees.[91]

(a) The plain text of MINEM's model contract confirmed that stability agreements covered entire mining units. Clause 1 outlined the "[b]ackground" information pertaining to the titleholder's request for stability guarantees "in relation to [] its concessions consisting of the . . . *Economic-Administrative Unit*(s), hereinafter '. . . Project.'"[92] Similarly, Clause 3 noted that "[a]s stated in [Clause] 1.1, the . . . Project is limited to the '. . .' *Economic-Administrative Unit* consisting of the concessions listed in Annex I."[93] The sole item the Model Stability Agreement left to the investor was selecting the referential name of the EAU for purposes of the stability agreement.[94] Accordingly, Prof. Bullard explained that the model contract "reiterates that what is relevant for stability are the concessions that

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88 Tr. 2358:16-21 (Day 8) (Bullard).

89 Tr. 2508:5-8 (Day 8) (Morales); *see also* **RER-2**, Morales I, ¶ 50 ("The scope of the Stabilization Agreement is limited by the Mining Law itself."); *id.* ¶ 59.

90 Tr. 2396:17-22 (Day 8) (Eguiguren); **Ex. CE-1141** *SMMCV* Tr. 2303:6-10 ("[T]he principle of restrictive . . . . simply refers to the scope of an agreement based on what has been established under a law."); *id.* Tr. 2304:12-20; *see also* **RER-6**, Eguiguren II, ¶ 34.

91 *See* **Ex. CE-778**, Model Stability Agreement, Supreme Decree No. 04-94-EM (3 February 1994) ("Model Contract"); **CER-2**, Bullard I, ¶¶ 19-21; **CER-7**, Bullard II, ¶ 13; **CWS-14**, Chappuis II, ¶ 28; **CER-5**, Vega I, ¶¶ 30-31; *see also* Memorial ¶ 322(a).

92 **Ex. CE-778**, Model Contract, Clause 1 (emphasis added).

93 **Ex. CE-778**, Model Contract, Clause 1 (emphasis added).

94 *See* Tr. 2341:1-22 (Day 8) (Bullard); *supra* nn. 75-76.

are part of the Economic-Administrative Unit."[95] Ms. Vega likewise confirmed that Clause 3 of the model contract "[defines] the scope [] in connection with the concessions that are part of the Mining Unit [] stabilized."[96]

(b) Nor did the Model Stability Agreement give investors the possibility to "pick and choose" whether the stability guarantees applied to an EAU or an "investment project," as doing so would have been contrary to the entire concept of an adhesion contract.[97] As Prof. Bullard explained, the purpose of using a model contract for stability guarantees was to ensure "traceability" between the "scope and guarantees" of the Mining Law and Regulations and the individually-executed stability agreements.[98] He explained that the law required *complete* "traceability" to "guarantee that there is a perfect reflection of what the Law states," and that as a result, a stability agreement "cannot have more or less" but rather "has to have whatever the law provides for."[99] Prof. Eguiguren agreed, expressly conceding that "[i]f the Mining Law said that the [s]tability [g]uarantees apply to a concession or [m]ining [u]nit [] the parties could then not negotiate something different."[100] Similarly, in response to President Hanefeld's inquiry whether a company "could make a choice whether they applied for stability for an administrative unit, for a specific whole concession, or for a specific investment" under the model agreement, Ms. Chappuis unequivocally responded "No. It gave you the mining concession—[t]he tax stability agreement was for all of the concessions indicated in that Annex I, all of them, completely all of them."[101] The parties could not negotiate a different scope—indeed, they could not negotiate at all.

(c) Faced with this clear text, Peru had to concede at the Hearing that the model contract

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95 Tr. 2341:16-18 (Day 8) (Bullard); *see also* **Ex. CE-1140**, *SMMCV* Tr. 2183:9-12 (Bullard) ("The model agreement clearly shows that what is relevant is the EAUs mentioned in the Law, which land in a concrete Stability Agreement.").

96 Tr. 2255:7-10 (Day 8) (Vega).

97 *See* Tr. 73:15-74:13 (Day 1) (Cl. Opening); Tr. 2914:11-2917:12 (Day 10) (Cl. Closing); **CD-11**, Claimant's Closing Presentation ("Cl. Closing"), slides 27-28.

98 Tr. 2333:8-15 (Day 8) (Bullard); *see also* **Ex. CE-1140**, *SMMCV* Tr. 2172:1-7, 2172:8-10 (Bullard); **CER-2**, Bullard I, ¶ 20; **CER-7**, Bullard II, ¶ 13.

99 Tr. 2333:8-16 (Day 8) (Bullard); *see also* **Ex. CE-1140**, *SMMCV* Tr. 2172:8-10 (Bullard).

100 Tr. 2468:8-14 (Day 8) (Eguiguren); *see also id.* Tr. 2400:7-14 ("There is no question about it, there are certain stipulations that are copied from the General Mining Law and no—there can be no discussion of those. They are not negotiable, [including] what will be covered by the [stability] guarantees.").

101 Tr. 933:10-935:7 (Day 3) (Chappuis); *see also* **CWS-14**, Chappuis II, ¶ 29.

applied to "Economic-Administrative Unit(s)" and was not confined to individual "investment projects," as would have been the case had Peru's restrictive interpretation been correct.[102] Peru's concession conclusively confirms that when the Government created the model contract in 1994, it understood that stability guarantees applied to EAUs—despite Peru's longstanding attempts to argue otherwise.[103]

2. The Stability Agreement Fully Incorporated the Scope of Stability Guarantees Granted under the Mining Law and Regulations

24. The Hearing confirmed that, in implementing the Mining Law and Regulations, the Stability Agreement extended stability guarantees to all of SMCV's activities within its Cerro Verde Mining Unit, which comprised the Mining and Beneficiation Concessions.

25. *First*, Clause 3 of the Stability Agreement specifically provided that stability guarantees applied to all of SMCV's activities in its Cerro Verde Mining Unit.[104]

(a) Prof. Bullard explained that Clause 3 "defines the scope" of the Stability Agreement and implemented Articles 82 and 83 of the Mining Law and Articles 2 and 22 of the Regulations by identifying the Mining and Beneficiation Concessions, which comprise the Cerro Verde Mining Unit where SMCV made its qualifying minimum investment.[105] The first paragraph of Clause 3 provided that the "Leaching Project of Cerro Verde *is circumscribed to the concessions*, related in EXHIBIT I."[106] Exhibit I, in turn, listed both SMCV's Mining Concession and Beneficiation Concession, which includes the Concentrator.[107] At the Hearing, Prof. Bullard explained that "is circumscribed" "means to keep within certain limits, to adhere" and that by "circumscribing" the "Cerro Verde Leaching Project" "to the concessions" in Exhibit I, Clause 3 effectively limited the scope of the Stability Agreement to the Mining and Beneficiation Concessions.[108]

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102 *See* Tr. 210 (Day 1) (Resp. Opening).

103 *Cf.* Rejoinder and Reply on Jurisdiction, § II.B.

104 *See* Memorial ¶¶ 323, 325; Reply and C-Mem. on Jurisdiction ¶ 84; *see also* **CWS-14**, Chappuis II, ¶ 29; **CWS-3**, Chappuis I, ¶ 39.

105 *See* Tr. 2334:11-2340:22 (Day 8) (Bullard); **CER-2**, Bullard I, ¶¶ 28-30; **CER-7**, Bullard II, ¶¶ 27, 31..

106 **Ex. CE-12**, 1998 Stability Agreement (26 February 1998), Clause 3 (emphasis added).

107 **Ex. CE-12**, 1998 Stability Agreement, Exhibit I.

108 Tr. 2334:19-2335:11 (Day 8) (Bullard); *see* **CD-8**, Bullard Presentation, slides 14-17; *see also* **Ex. CE-1140**, *SMMCV* Tr. 2175:11-2177:2 (Bullard).

(b) The second paragraph of Clause 3 allowed SMCV to "incorporat[e] *other* mining rights to the Cerro Verde Leaching Project, after approval by the [DGM]."[109] As Prof. Bullard explained, this confirms that the agreement must cover a mining unit—here referred to as the "Cerro Verde Leaching Project"—because while "other" mining rights (*i.e.*, other concessions) may be added to an EAU, "you cannot include that to an investment."[110] Prof. Bullard's testimony is consistent with mining practice: several other companies, such as Consorcio Minero Horizonte and Southern, relied on clause 3 paragraph two of their stability agreements to request the incorporation of additional concessions.[111]

(c) By contrast, neither Clause 3, nor prior mining company practice, supports Peru's assertion that the Stability Agreement applied only to the qualifying minimum investment set forth in the 1996 Feasibility Study. Clause 3 did not contain any mechanism to incorporate additional *investments* made within SMCV's Concessions under the scope of stability—confirming that no such need existed because all investments made within those Concessions during the Agreement's term were already covered.[112]

26. *Second*, the Hearing confirmed that, contrary to Peru's argument, the omission of the term "Economic-Administrative Unit(s)" in Clause 1.1 of the Stability Agreement did not in any way narrow its scope to cover only SMCV's qualifying minimum investment.[113]

(a) As Freeport explained, Clause 1.1 of the Stability Agreement certified that SMCV complied with the steps necessary to obtain "the guarantees of the benefits contained" in the Mining Law and Regulations, including by presenting an application for stability by

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109 **Ex. CE-12**, 1998 Stability Agreement, Clause 3 (emphasis added).

110 Tr. 2335:18-2336:8 (Day 8) (Bullard) ("We can incorporate a concession, a mining right, to an Administrative-Economic Unit, but it is not possible to incorporate a mining right to a concession. And here it says 'others,' other mining rights. Not to an investment."); *see also* **Ex. CE-1140**, *SMMCV* Tr. 2177:3-12 (Bullard); *supra* ¶ 16(a); **CER-2**, Bullard I, ¶ 31; **CER-7**, Bullard II, ¶¶ 32, 38.

111 *See* **Ex. CE-377**, MINEM, Resolution No. 380-2001-EM-CM (16 November 2001), p. 1 (Consorcio Minero Horizonte relying on clause 3 to request to "inclu[de] within the Parcoy Project, that is, within . . . the Stability Agreement, of the other mining rights"); *id.* (DGM confirming that "tax stability [is applicable to] the Parcoy EAU . . . with the company being able to include mining rights that correspond to said EAU and that were not included in Annex I of the Stability Agreement"); **Ex. CE-1122**, Mining Council Resolution No. 224 2006-MEM/CM (17 October 2006), p. 6 (rejecting Southern's request to use clause 3 of the Southern stability agreement to "grant[]" "the benefits of the agreement" to "new . . . Economic-Administrative Units").

112 **Ex. CE-12**, 1998 Stability Agreement, Clause; *see* Tr. 2333:8-22 (Day 8) (Bullard); **CD-8**, Bullard Presentation, slide 21; *see also* **CER-2**, Bullard I, ¶ 31; **CER-7**, Bullard II, ¶¶ 32, 38.

113 *See* Tr. 77:5-78:16 (Day 1) (Cl. Opening); Tr. 2916:17-12 (Day 10) (Cl. Closing); **CD-11**, Cl. Closing, slides 29-31. *Cf.* Tr. 208:17-210:3 (Day 1) (Resp. Opening).

virtue of "the investment *in its concession*: Cerro Verde No. 1, No. 2, and No. 3, hereinafter 'the leaching project of Cerro Verde.'"[114] Prof. Bullard explained that this language mirrors Clause 1.1 of the model contract: "(investment[s] in) its concessions consisting of the … Economic-Administrative Units(s), hereinafter '... Project,'" using the term "Leaching Project of Cerro Verde" to define the relevant EAU.[115]

(b) Peru's suggestion that SMCV unilaterally limited the Stability Agreement's scope—to its significant detriment—with a stroke of the pen by omitting the term "Economic-Administrative Unit(s)" from Clause 1.1 makes absolutely no sense and is contradicted by Peru's own experts.[116] Clause 1.1 and Clause 3 clearly identified as the subject of SMCV's stability guarantees the Mining Concession ("Cerro Verde No. 1, No. 2, and No. 3") and Beneficiation Concession ("Cerro Verde Beneficiation Plant"), which together comprise an Article 82 EAU.[117] As Professor Bullard explained, omission of the language "Economic-Administrative Units(s)" is thus irrelevant, because the EAU is reflected in the reference to the Mining and Beneficiation Concessions.[118] Any contrary interpretation would assume that SMCV claimed "less[] than the [scope] established by the Mining Law, the Regulations, and the model contract"—an assumption that makes no logical sense given that the Parties always anticipated a Concentrator investment and that there would be no reason for SMCV to voluntarily reduce its rights.[119] Moreover, the Parties *could not negotiate* to alter the scope of the contract, even if they wished to, as Peru's own witnesses and experts confirmed.[120] Notably, Peru's own experts completely ignored this so-called "omission"—further confirming that it is immaterial.[121]

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114 **Ex. CE-12**, 1998 Stability Agreement, Clause 1.1 (emphasis added); *see also* Memorial ¶¶ 77(a), 115, 339(a); Reply and C-Mem. on Jurisdiction ¶¶ 85; **CER-2**, Bullard I, ¶¶ 32, 39-40; **CER-7**, Bullard II, ¶¶ 29, 53.

115 Tr. 2341:1-2342:1 (Day 8) (Bullard); **CD-8**, Bullard Presentation, slides 33-34; *compare* **Ex. CE-778**, Model Contract, Clause 1.1, *with* **Ex. CE-12**, 1998 Stability Agreement, Clause 1.1.

116 *Cf.* Tr. 209-212 (Day 1) (Resp. Opening).

117 **Ex. CE-12**, 1998 Stability Agreement, Clauses 1.1, 3; *see also* Tr. 2334:1-2335:17 (Day 8) (Bullard); Tr. 76-77 (Day 1) (Cl. Opening); Memorial ¶¶ 323-25; Reply and C-Mem. on Jurisdiction ¶¶ 47(d), 84-83.

118 Tr. 2334:1-2336:22, 2338:1-2339:10 (Day 8) (Bullard); **CD-8**, Bullard Presentation, slides 35-36; **Ex. CE-1140**, *SMMCV* Tr. 2174:16-2175:2, 2182:1-6, 2183:9-12 (Bullard); (EAU is "a term used in the law, defined in the law . . . in the articles that define the scope of stability [i.e., Article 82 of the Mining Law]" and "conceptually included in the Cerro Verde [Stability] Agreement").

119 Tr. 2333:13-22 (Day 8) (Bullard); *see infra* §§ IV.A-B.

120 Tr. 2333:18-22 (Day 8) (Bullard); *see supra* § II.B.1.

121 *See, e.g.*, Tr. 2392:5-2468:19 (Day 8) (Eguiguren); Tr. 2472:21-2551:19 (Day 8) (Morales).

(c) Moreover, Peru's recognition that the Model Stability Agreement *could* apply to an EAU directly conflicts with its continued assertion that the Mining Law and Regulations limited stability guarantees to the "specific investment project," or with Prof. Morales's testimony that feasibility studies determine the "subject matter of the stabilization agreement."[122] For instance, Peru has not explained how a specific feasibility study could span *all* investments a mining company might undertake in an EAU during a stability agreement's 15-year term, confirming that Peru's theory is impracticable.[123]

(d) The record evidence relating to other mining companies likewise confirms Prof. Bullard's testimony: BHP Tintaya S.A. ("Tintaya"), Minera Yanacocha S.R.L. ("Yanacocha"), and Compañía Minera Milpo S.A.A. ("Milpo") also omitted the phrase "Economic-Administrative Unit(s)" in Clause 1.1 of their respective stability agreements, yet the Government nonetheless applied stability guarantees to their entire mining units, not to the qualifying minimum investment set out in the feasibility study.[124] For example, Clause 1.1 of Milpo's Cerro Lindo Stability Agreement omitted the phrase "Economic-Administrative Unit," stating instead "in relation with the investment and start of operations of its mining concessions detailed in Annex I."[125] Nonetheless, SUNAT and the Tax Tribunal applied the stabilized regime to the whole Cerro Lindo mining unit, including to new investments not contained in the feasibility study.[126]

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122 *Compare* Tr. 212:21-213:2 (Resp. Opening) ("[I]f SUNAT applied the stabilization agreements of other mining companies that refer to Economic-Administrative Units to the Economic-Administrative Units, well, that's fine."), *with* Tr. 2454:9-14 (Day 8) (Morales).

123 *See also* Reply and C-Mem. on Jurisdiction ¶¶ 55-57.

124 *See* **Ex. CE-414**, BHP Billiton Tintaya Stability Agreement ("Proyecto Oxidos de Cobre") (1 December 2003) Clause 1.1 ("con relación a la inversión y puesta en explotación de 'Proyecto Oxidos de Cobre.'") ("*in relation with the investment and start of operations of the 'Copper Oxides Project'*"); **Ex. CE-914**, Magma Tintaya Stability Agreement ("Proyecto Tintaya") (29 Dec. 1995) Clause 1.1 ("en relación a la inversión en sus concesiones: Andres, Carmen … Demasia Aurora Tintaya y la concesión de Beneficio Tintaya, en adelante") ("*in relation with the investment in its concessions: Andres, Carmen … Demasia Aurora Tintaya and the Beneficiation concession Tintaya, hereinafter*"); **Ex. RE-189**, Yanacocha Stability Agreement ("Proyecto La Quinua") (25 July 2003) Clause 1.1 ("en relación a la inversión y puesta en explotación de sus concesiones mineras, en adelante") ("*in relation with the investment and start of operations of its mining concessions, hereinafter*"); **Ex. CE-924**, Milpo Stability Agreement ("Proyecto Cerro Lindo") (26 March 2002) Clause 1.1 ("en relación a la inversión y puesta en explotación de sus concesiones mineras que se detallan en el Anexo I, en adelante") ("*in relation with the investment and start of operations of its mining concessions detailed in Annex I, hereinafter*"); *see also* Tr. 2881 (Day 10) (Claimant's Closing).

125 **Ex. CE-924**, Milpo Stability Agreement ("Proyecto Cerro Lindo") (26 March 2002) Clause 1.1.

126 **Ex. CE-924**, Milpo Stability Agreement ("Proyecto Cerro Lindo") (26 March 2002) Clause 1.1; **Ex. CE-1128**, SUNAT Intendancy Resolution No. 0150140011382 (30 June 2014), p. 11, fn. 5; *id*., p. 29; **Ex. CE-1132**, Tax

(e) Peru's assertion that SMCV allegedly did not have an EAU because it did not register one with MINEM under Article 44 of the Mining Law makes no sense and was also disproven.[127] As Freeport has explained, while Article 44 EAUs required an "approving resolution," Article 82 EAUs were by definition broader—including both mining concessions (which may or may not comprise an Article 44 EAU) *and* beneficiation concession(s) that together comprised an "integrated production unit"—and qualified automatically.[128] This explains why MINEM itself consistently referred to Cerro Verde as an EAU even though SMCV never obtained approving resolution.[129] Peru's argument is also irrelevant, because the Agreement clearly includes *both* the Mining and Beneficiation Concessions, and the latter included the Concentrator.

27. *Third*, the Hearing confirmed that the 1996 Feasibility Study's investment program was a qualifying prerequisite to demonstrate SMCV's compliance with the minimum US$50 million investment requirement for 15-year stability agreements under the Mining Law, but did not define the Stability Agreement's scope.[130] Prof. Bullard explained that the qualifying minimum investment allows an investor to "open the door" "[t]o qualify . . . [for] stability," but "[o]nce those requirements are complied with," "[you] use the key to open the door and get into the house, which is the Stabilized Economic-Administrative Unit."[131] Per Prof. Bullard, Peru's argument wrongly "confuses [] the key to open the door [and the house]" and "all" other

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Tribunal, Resolution No. 06446-3-2022, pp. 10, 23-25; **Ex. CE-1131**, Tax Tribunal, Resolution No. 06111-3-2022 (19 August 2022), p. 8; *see also infra* ¶¶ 41-44; Tr. 2958:21-2959:6 (Day 10) (Cl. Closing).

127 *Cf.* Tr. 210-213 (Day 1) (Respondent's Opening).

128 **CA-448**, Mining Law, Article 44; *see* Tr. 2245:1-2249:5 (Day 8) (Vega); Tr. 2913:5-22 (Day 10) (Cl. Closing); Tr. 432, 599-600 (Day 2) (Torreblanca); **Ex. CE-882**, MINEM, Report No. 019-2003-DGM-DPDM/L (20 January 2003) (Art. 82 EAUs "depart from the classic definition" in Article 44); *see also* Reply and C-Mem. on Jurisdiction ¶¶ 47, 93-96; **Ex. CE-04**, Share Purchase Agreement Between Cyprus Climax Metals Co. and Empresa Minera del Peru (17 March 1994) ("Share Purchase Agreement"), Art. 1 (defining "Unidad Cerro Verde" as "the mining and beneficiation concessions previously known collectively as Unidad de Producción Cerro Verde").

129 *See, e.g.*, **Ex. CE-356**, MINEM, Report No. 708-97-EM/DGM/OTN (30 December 1997) (referring to Cerro Verde EAU); Ex. CE-584, MINEM, Mining Investment Report (2009), pp. 44-45 (describing SMCV's "investment of US$ 48 million its UEA Cerro Verde 1, 2, 3."); **Ex. CE-19**, "Evaluación de Aplicación de Regalías Mineras" (11 March 2004), slide 10 (listing stability agreements in relation to their "mining unit[s]," including "Cerro Verde 1, 2, and 3"); **Ex. CE-4**, Share Purchase Agreement Between Cyprus Climax Metals Co. and Empresa Minera del Peru (17 March 1994), Definitions (referring to "Cerro Verde Production Unit").

130 **CA-448**, Mining Law, Articles 83, 85; **Ex. CE-9**, 1996 Feasibility Study, Executive Summary; *see also* Memorial ¶¶ 78, 336-40; Reply and C-Mem. on Jurisdiction ¶ 49; **CER-5**, Vega I, ¶¶ 49-53; **CER-10**, Vega II, ¶ 33-36; **CWS-3**, Chappuis I, ¶¶ 22-23; **CWS-14**, Chappuis II, ¶¶ 18-19; **CER-7**, Bullard II, ¶¶ 26-31.

131 Tr. 2343:19-2344:10, 2349:1-4, 2357:18-2358:2 (Day 8) (Bullard); **Ex. CE-1140**, *SMMCV* Tr. 2183:16-2184:7 (Bullard); **CD-8**, Bullard Presentation, slide 53.

"stability regimes" under Peruvian law "work[] the same way."[132]

28. *Finally*, the Hearing confirmed that the Stability Agreement's title—the "Leaching Project of Cerro Verde"—was entirely referential and could not have defined its scope.[133]

(a) The record clearly disproves Peru's baseless argument that a stability agreement's referential name "specifically and exclusively" reflected its scope.[134] At the Hearing, Mr. Polo conceded that "the titles do not give you the scope of the Stability Agreement."[135] Ms. Chappuis, former Director General of Mining responsible for ensuring compliance with stability agreements, testified that stability agreements' names were "part of the jargon that we used within the Ministry" to refer to stability agreements and that—because they did not have any importance—she "would have assigned [] each agreement a number."[136] Ms. Chappuis explained that mining companies did not "give a precise name to a [stability] contract," resulting in "strange" names, such as "Cajamarquilla *and others*," which could never be interpreted to define the scope of stability guarantees.[137]

(b) The testimony and evidence likewise confirmed this point with respect to individual agreements, including SMCV's.[138] Ms. Torreblanca testified that the "understanding that we all had in general, Cerro Verde and the Ministry, was that 'Leaching Project' [was] the title of the Contract [that] covered the Concessions listed in Annex I."[139] Ms. Chappuis

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132 Tr. 2343:19-22, 2357:13-2358:3 (Day 8) (Bullard); **Ex. CE-1140**, *SMMCV* Tr. 2184:9-12 (Bullard); *see also* **Ex. CE-1140**, *SMMCV* Tr. 2054:2-6 (Vega).

133 *See* Memorial ¶¶ 114-15; Reply and C-Mem. on Jurisdiction ¶¶ 85, 96; **CWS-3**, Chappuis I, ¶ 46; **CWS-14**, Chappuis II, ¶¶ 8, 28; **CER-7**, Bullard II ¶¶ 29, 31, 53.

134 *Cf.* Rejoinder and Reply on Jurisdiction ¶¶ 195-98; Counter-Memorial ¶¶ 88-90.

135 Tr. 1365:4-5 (Day 5) (Polo).

136 Tr. 926:15-927:17 (Day 3) (Chappuis); *see also* **Ex. CE-1135**, *SMMCV* Tr. 856:9-13 (Chappuis) ("If it were up to me, I would put a series of numbers.").

137 Tr. 926:7-927:17 (Day 3) (Chappuis) (emphasis added); **Ex. CE-1135**, *SMMCV* Tr. 856:5-8 (Chappuis); *see also* **Ex. CE-913**, Sociedad Minera Refinería Cajamarquilla Stability Agreement (15 February 1995), Clause 1; **Ex. CE-916**, Compañía Minera Sipan S.A. Stability Agreement (13 November 1996), Clauses 1, 5; **CD-8**, Bullard Presentation, slide 42.

138 *See, e.g.*, Tr. 2334:1-10 (Day 8) (Bullard) ("If we interpret the Stability Agreement under the Mining Law and its Regulations," and the "Model Contract," "'the Leaching Project of Cerro Verde' means the Cerro Verde Mining Unit, which is an Administrative-Economic Unit, and that means Mining Concessions Cerro Verde 1, 2, 3, and also the Beneficiation Concession. This is the consequence of reading the law, the model contract, and also the Stability Contract all together").

139 Tr. 442:16-20 (Day 2) (Torreblanca); *see also* **Ex. CE-1134**, *SMMCV* Tr. 411:4-11 (Torreblanca).

testified that "Cerro Verde Leaching Project" referred to "the name of the Stability Agreement [SMCV] had [] signed" with "a Mining Concession and a Beneficiation Concession" mentioned in Clause 3 and Annex 1.[140] MINEM itself confirmed this with regard to other mining companies—for example, it explained that the "Parcoy Project," the name of Consorcio Minero Horizonte's stability agreement, referred to "the group of *mining rights* [*i.e.*, concessions] benefited by the Stability Agreement."[141] SUNAT also confirmed this with regard to Yanacocha's [redacted] stability agreement, which it applied to the entire [redacted] EAU in a December 2009 resolution, despite the difference between the stability agreement's referential name and its substantive scope.[142]

(c) In response to President Hanefeld's questions, Mr. Isasi testified that the names of stability agreements appended to his April 2005 report—the official list of stability agreements MINEM sent to SUNAT for purposes of showing which companies would be exempted from royalties—"did not imply an *a priori* pronouncement on the part of [MINEM] regarding the scope of the agreements."[143] When asked about the scope of the stability agreement titled "Centromin"—a holding company with several companies covered by different stability agreements—Mr. Isasi could not articulate a response.[144] Prof. Morales likewise confirmed at the *SMMCV* hearing that the name "Cerro Verde Leaching Project" was "not definitive" for determining the Agreement's scope.[145]

(d) The referential names in SMCV's other Stability Agreements further confirm the irrelevance of a stability agreement's title to its scope. For instance, the referential name in Clause 1.1 of SMCV's 1994 Stability Agreement—the "Cerro Verde Project"—clearly had no relation to the corresponding US$2.2 million qualifying investment consisting of

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140 Tr. 924:8-11, 930:18-22 (Day 3) (Chappuis); *see also* **Ex. CE-1135**, *SMMCV* Tr. 824:12-17 (Chappuis).

141 **Ex. CE-377**, MINEM, Resolution No. 380-2001-EM-CM, (16 November 2001), p. 1; Reply and C-Mem. on Jurisdiction ¶¶ 64, 67(d), 84(c).

142 **Ex. RE-382**, SUNAT Intendency Resolution No. 0150140007925 (30 December 2008), p. 55; *see also infra* ¶¶ 45-49; Tr. 78:17-80:22 (Day 1) (Cl. Opening); Reply and C-Mem. on Jurisdiction ¶ 67; **Ex. CE-1135**, *SMMCV* Tr. 856:5-13 (Chappuis).

143 Tr. 1209:9-14 (Day 4) (Isasi) (emphasis added); **Ex. RE-175**, Administrative File of Report No. 153-2005-MEM/OGAJ (14 April 2005); *see also* Tr. 79:16-80:22 (Day 1) (Cl. Opening); **CD-1**, Claimant's Opening Presentation ("Cl. Opening"), slide 93; Tr. 2919:2-11 (Day 10) (Cl. Closing); **CD-11**, Cl. Closing, slide 34.

144 Tr. 1222:1-7 (Day 4) (Isasi).

145 **Ex. CE-1141**, *SMMCV* Tr. 2374:14-2375:4 (Morales).

minor improvements to SMCV's existing facilities.[146] Yet, under Peru's theory, the 1994 Stability Agreement would have stabilized the entire "Cerro Verde Project," while the much larger investment for the 1998 Stability Agreement would not have done so. Peru likewise does not argue that the referential title of SMCV's 2012 Stability Agreement—the "Cerro Verde Unit Expansion Project"—had any bearing on its scope.[147]

3. The Conduct of the Parties Subsequent to the Execution of the Stability Agreement Confirms That It Applied to the Cerro Verde Mining Unit

29. The Parties' own implementation of the Stability Agreement confirmed that it applied to the entire Cerro Verde Mining Unit and that the expansion of the stabilized Beneficiation Concession to include the Concentrator ensured stability to the investment.

30. *First*, the Parties agree that the Tribunal can and should look at the Parties' implementation of the Stability Agreement as a further factor in determining its scope. Prof. Bullard explained that "Peruvian law recognizes [] contextual interpretation to supplement textual interpretation of a contract," including the subsequent conduct of the parties.[148] Prof. Morales likewise explained that Peruvian law recognizes "the conduct of the parties" during the performance of the contract as a valid contractual interpretation method.[149]

31. *Second*, it is undisputed that before the Concentrator was built, SMCV consistently applied the Stability Agreement to additional investments in the Cerro Verde Mining Unit that were not included in the 1996 Feasibility Study, including investments that expanded the processing capacity of the Beneficiation Concession, and that the Government *never* questioned SMCV's approach until it succumbed to intense political pressure in late 2005.[150]

(a) In 2001, SMCV made a US$10 million investment to optimize its leaching and SX/EW circuits, expanding SMCV's copper cathodes production from 195 to 230 MT/d.[151] At the Hearing, Mr. Davenport and Ms. Torreblanca provided unrebutted testimony confirming

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146 **Ex. CE-344**, 1994 Stability Agreement, Clause 1.1; *see* Reply and C-Mem. on Jurisdiction ¶ 51.

147 **Ex. CE-644**, Stability Agreement between Peru and SMCV (17 July 2012) ("2012 Stability Agreement").

148 **CER-2**, Bullard I, ¶¶ 42, 44.

149 Tr. 2478:20-2479:21, 2485:6-16, 2551:2-6 (Day 8) (Morales).

150 *See* Memorial ¶¶ 87, 350; Reply and C-Mem. on Jurisdiction ¶¶ 56, 90-91; **CWS-5**, Witness Statement of Randy L. Davenport (19 October 2021) ("Davenport I"), ¶¶ 21-24, 27.

151 **CWS-5**, Davenport I, ¶ 22.

that SUNAT treated this investment as stabilized in assessing and confirming SMCV's tax assessments, even though it was not part of the 1996 Feasibility Study.[152]

(b) In 2002, SMCV made a US$15 million investment to expand its leaching Pad 2.[153] The DGM authorized SMCV to extend the geographic area of the Beneficiation Concession from 977.24 to 1,031.94 hectares and its processing capacity from 31,000 to 39,000 MT/d to accommodate the new investment.[154] Mr. Davenport testified, and Peru did not rebut, that the Government never "question[ed] that other additional 8,000 [MT/day] would not be stabilized" even though the investment did not appear in the 1996 Feasibility Study and the processing capacity exceeded the 33,000 MT/day expressly mentioned in Annex I of the Stability Agreement.[155]

(c) Moreover, in 2012, *seven years* after the Government's *volte-face*, SUNAT issued a resolution expressly accepting the application of the Stability Agreement to the Pillones Dam investment, which had not been contemplated in the 1996 Feasibility Study.[156] As Mr. Davenport explained at the Hearing, SMCV made this investment in April 2004 to address the Concentrator's water and power needs.[157] In line with SMCV's understanding

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152 Tr. 707:1-22 (Day 2) (Davenport); Tr. 613:1-22 (Day 2) (Torreblanca); *see also* **Ex. CE-1134**, *SMMCV* Tr. 522:2-5 (Torreblanca); **Ex. CE-1134**, *SMMCV* Tr. 590:2-11 (Davenport); **CWS-1**, Witness Statement of Ramiro Aquiño (19 October 2021) ("Aquiño I"), Annex A (citing **Ex. CE-28**, Ministry of Energy and Mines, Directorial Resolution No. 056-2007-MEM/DGM (26 February 2007)); **CWS-11**, Witness Statement of Julia Torreblanca (19 October 2021) ("Torreblanca I"), ¶ 11; **CWS-16**, Witness Statement of Randy L. Davenport (13 September 2022) ("Davenport II"), ¶ 9(c).

153 **CWS-5**, Davenport I, ¶ 23; **Ex. CE-1134**, *SMMCV* Tr. 457:14-458:12 (Torreblanca); **CWS-1**, Aquiño I, ¶ 32.

154 **CWS-1**, Aquiño I, Annex A (citing **Ex. CE-382**, MINEM, Directorial Resolution No. 151-2002-EM/DGM (21 May 2002)); *see also* **Ex. CE-376**, SMCV, Petition No. 1341243 to MINEM (30 October 2001); **Ex. CE-380**, MINEM, Report No. 056-2002-EM-DGM/DPGM (18 February 2002) (recommending that the DGM approve the request); **CWS-11**, Torreblanca I, ¶ 11; Tr. 87:6-88:2 (Day 1) (Cl. Opening); **CD-1**, Cl. Opening, slides 105-107; Tr. 2921:12-2922:15 (Day 10) (Cl. Opening).

155 Tr. 648:17-20 (Day 2) (Davenport); **Ex. CE-12**, 1998 Stability Agreement (26 February 1998), Annex I; *see also* **Ex. CE-1134**, *SMMCV* Tr. 719:3-6 (Davenport) (President Blanch's Question) ("And there was never any question that—from the authorities that that 8,000 should be treated differently? . . . Oh. No."); *see also* **CWS-16**, Davenport II, ¶ 9(c); **CWS-11**, Torreblanca I, ¶ 11.

156 **Ex. CE-890**, SUNAT, Result of Requirement No. 0522120000066 (23 March 2012) (Income Tax 2007).

157 *See* Tr. 644:4-645:14 (Day 2) (Davenport); **Ex. CE-53**, Empresa de Generación Eléctrica de Arequipa S.A., Final Liquidation of Work: Pillones Dam (30 May 2011), p. 1; **CWS-11**, Torreblanca I, ¶ 14; *see also* **Ex. CE-1134**, *SMMCV* Tr. 526:18-527:3 (Torreblanca) (SUNAT was well aware of the Pillones Dam investment, and held "permanent meetings" with SMCV since it "started building Pillones," to "ke[ep] . . . abreast of the steps [SMCV] w[as] taking regarding [the Concentrator] expansion."); **Ex. CE-430**, EGASA and SMCV, Consortium Contract for the Construction of the Pillones Dam (27 April 2004), Clauses 5.1, 5.3; **Ex. CE-20**, Fluor Canada Ltd., Feasibility Study: Cerro Verde Primary Sulfide Project (May 2004), Vol. I, p. 31 (to address a concentrator's additional water needs, "SMCV has entered into a joint-venture agreement with EGASA to participate in the development of the Pillones reservoir project in the upper Rio Chili watershed").

that the Concentrator would be stabilized, SMCV treated costs attributable to the Pillones Dam as stabilized when determining the applicable depreciation rate for SMCV's 2007 income tax obligations—an approach SUNAT endorsed.[158]

(d) Ms. Chappuis testified that because "the Stability Agreement cover[ed] whatever capacity is ultimately produced" by the Cerro Verde Mining Unit, "[SMCV] had our full support" at the DGM when they inquired whether the expansion of the stabilized Beneficiation Concession would ensure stability to the Concentrator.[159] Ms. Chappuis's testimony is not only consistent with the Government's treatment of SMCV's prior expansions, but also in line with the Government's application of stability guarantees to other mining companies' investments resulting in expansions of production capacity.[160] For instance, Milpo increased the capacity of its stabilized Cerro Lindo unit from the 2,000 MT/day capacity stated in its stability agreement to 10,000 MT/day, and SUNAT continued to apply stability to Milpo's new investments therein even though it did not amend its stability agreement to account for the production increase.[161]

32. *Third*, because SMCV operated as a single mining unit with integrated operations, MINEM endorsed the Concentrator's inclusion in the Cerro Verde Mining Unit—and hence the Stability Agreement—when MINEM approved the expansion of the stabilized Beneficiation Concession to include the Concentrator in October 2004.[162]

(a) As Prof. Bullard explained in response to President Hanefeld's question, the relevant question for stability was "whether the Concentrator is or is not part of an Economic-

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158 **Ex. CE-890**, SUNAT, Result of Requirement No. 0522120000066 (23 March 2012) (Income Tax 2007), p. 29 ("Como puede observarse en el cuadro antes indicado y luego de revisarse la documentación proporcionada por Cerro Verde, no se muestran diferencias en la depreciación de la 'Presa Pillones' por el ejercicio 2007. Por lo tanto, Cerro Verde ha cumplido con sustentar lo requerido en este punto del Requerimiento.") ("*As can be seen in the table above and after reviewing documentation provided by Cerro Verde, there is no difference in the depreciation for the 'Pillones Dam' for the year 2007. Therefore, Cerro Verde has complied with providing required support under this section of the Requirement.*").

159 Tr. 1022:2-1022:9 (Day 4) (Chappuis); *see also* **CWS-3**, Chappuis I, ¶¶ 52-54; **CWS-14**, Chappuis II, ¶ 37.

160 *See supra* ¶ 31; *infra* ¶¶ 43, 47-48; *see also* Memorial ¶¶ 87, 350; Reply and C-Mem. on Jurisdiction ¶¶ 56, 90-91.

161 **Ex. CE-1128**, SUNAT Intendancy Resolution No. 0150140011382 (30 June 2014), pp. 33-35; **Ex. CE-924**, Milpo, Cerro Lindo Stability Agreement, Clauses 1.3, 4.4; *see also* Tr. 2887 (Day 10) (Cl. Closing).

162 *See* Memorial ¶¶ 107-110, 328; Reply and C-Mem. on Jurisdiction ¶¶ 89-92; **CWS-3**, Chappuis I, ¶¶ 50-55; **CWS-14**, Chappuis II, ¶¶ 37-42; **CWS-11**, Torreblanca I, ¶¶ 23-28; **CWS-21**, Torreblanca II, ¶¶ 10-17; **CWS-5**, Davenport I, ¶¶ 35-42; **CWS-16**, Davenport II, ¶¶ 5-17.

Administrative Unit" covered by the Stability Agreement.[163] He thus explained that MINEM's decision to "accept[]" the Concentrator "within the same Beneficiation Concession" "covered" by the Stability Agreement guaranteed it would be stabilized because "[e]verything that is invested [therein] is [stabilized] because that is what's defined by Law."[164]

(b) In submitting its expansion application, SMCV explained to MINEM that the Concentrator would be subject to stability guarantees. Ms. Torreblanca testified that she "attached a detailed description of the Concentrator investment to [SMCV's] request, as well as estimates of mineral reserves and capital costs, which we based on the 2004 Feasibility Study's assumption that the Stability Agreement would apply."[165] In response to President Hanefeld's questions about the implications of the expansion of the stabilized Beneficiation Concession, Ms. Chappuis testified that, to assess SMCV's application, "[MINEM] asked for the cash flows that showed exactly the tax regime" to be given to the new investment.[166] She also testified that "the file submitted by Cerro Verde, [showed] that Cerro Verde was already considering Tax Stabilization" for the Concentrator investment because it reflected the information in the 2004 "Feasibility Study, which was based on the assumption that it was stabilized."[167]

(c) SMCV also explained to MINEM at the time that the Concentrator would form part of the Cerro Verde Mining Unit. SMCV noted that the "coexistence" of flotation and leaching in the Beneficiation Concession was "nothing new" at Cerro Verde given the previous use of the small concentrator under the existing processing rights, and explained that the Concentrator was "needed. . . 'to pursue the scheduled exploitation of [SMCV's] operations'" due to the exhaustion of leaching-only reserves.[168] Ms. Chappuis testified that MINEM "always knew" that Cerro Verde had vast primary sulfides even before the privatization that required a large concentrator investment and that SMCV had already

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163 Tr. 2366:6-2367:1 (Day 8) (Bullard).

164 Tr. 2365:14-2367:1 (Day 8) (Bullard); *see also* **CER-2**, Bullard I, ¶ 59.

165 **CWS-11**, Torreblanca I, ¶ 26.

166 Tr. 1031:6-10 (Day 4) (Chappuis).

167 Tr. 1031:11-17 (Day 4) (Chappuis); *see also* **CWS-3**, Chappuis I, ¶ 44.

168 **Ex. CE-457**, SMCV, Petition No. 1487019 to MINEM (27 August 2004); *see also* **CWS-11**, Torreblanca I, ¶ 26.

processed sulfide ores with a "small Concentrator for 3,000 [MT/day]" since 1974.[169]

(d) MINEM's expansion of the stabilized Beneficiation Concession to include the Concentrator extended its area from 1,031.94 to 1,225.08 hectares and its production capacity from 39,000 to 147,000 MT/d.[170] Mr. Tovar agreed that MINEM's resolution did not distinguish between the Concentrator and the leaching facilities in setting the new capacity level and that the ore feeding the leaching facilities and the Concentrator "was all coming out from the same pits" in the "same deposit."[171] Mr. Tovar also conceded that, with the expansion, "MINEM recognized that Cerro Verde['s]" leaching and flotation "operations formed one unit," each operating "next to each other within the same Mining Unit."[172] This is consistent with Prof. Otto's unrebutted testimony that SMCV's "leaching and concentration facilities are part of the same integrated mining operation, the Cerro Verde Mining Unit."[173]

33. *Finally*, if MINEM believed that the Stability Agreement could not cover the Concentrator, it would have required SMCV to apply for a new, non-stabilized beneficiation concession to operate the Concentrator.[174] It did not. Instead, MINEM itself suggested and then approved expanding the existing stabilized Beneficiation Concession to include the Concentrator.

(a) Mr. Tovar testified that, to operate new processing infrastructure such as the Concentrator, mining titleholders can either expand an existing beneficiation concession or apply for a new one, and that it is not uncommon for titleholders to apply for new beneficiation concessions if that better conforms to their operations.[175] For example, as Mr. Tovar recognized, both Tintaya and Southern "ha[d] built a second plant [and]

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169 Tr. 971:16-21 (Day 3) (Chappuis).

170 **CWS-1**, Aquiño I, Annex A (citing **Ex. CE-28**, Ministry of Energy and Mines, Directorial Resolution No. 056-2007-MEM/DGM (26 February 2007)); *see also* Memorial ¶ 109.

171 Tr. 1521:13-22 (Day 5) (Tovar).

172 Tr. 1521:6-12, 1526:6-12 (Day 5) (Tovar); *see also* **Ex. CE-1137**, *SMMCV* Tr. 1401:12-15 (Tovar); Rejoinder and Reply on Jurisdiction ¶¶ 92, 94; Memorial ¶¶ 326-30.

173 Tr. 2092:16-2093:1 (Day 7) (Otto); *see also* **Ex. CE-1139**, *SMMCV* Tr. 1908: 18-22 (Otto) (Cerro Verde is "obviously an integrated mining operation that satisfies the definition of an EAU"); **CWS-13**, Witness Statement of Ramiro Aquiño (13 September 2022) ("Aquiño II"), ¶¶ 5-15; **CWS-1**, Aquiño I, ¶¶ 21, 30, 57, 63; **CWS-21**, Torreblanca II, ¶ 14; **CWS-16**, Davenport II, ¶ 8; **CWS-5**, Davenport I, ¶¶ 31, 39.

174 *See* Reply and C-Mem. on Jurisdiction ¶¶ 91-92; **CWS-14**, Chappuis II, ¶¶ 39-40.

175 Tr. 1513:9-15 (Day 5) (Tovar) ("There are two possibilities. The first possibility is to ask for a separate beneficiation concession for the second plant; right? A. Yes, sir."); *see also* **Ex. CE-1137**, *SMMCV* Tr. 1388:8-15 (Tovar); **CA-448**, Mining Law, Articles 17, 18.

requested a separate Beneficiation Concession for the second plant," and the activities performed in the new concessions were subject to different stability regimes.[176]

(b) But here, SMCV clearly and repeatedly informed the Government that the Concentrator was intended to form part of the integrated Cerro Verde Mining Unit and the same stabilized regime. And the DGM itself confirmed that the Concentrator investment would be made "in the involved *mining unit*," *i.e.*, the Cerro Verde Mining Unit, when it determined that it was eligible for the profit reinvestment benefit.[177] As Ms. Chappuis testified, "if the DGM had considered the concentrator to be an 'independent unit' from SMCV's existing mining unit, we would have required SMCV to apply for a new beneficiation concession instead of expanding the existing one."[178] Prof. Otto similarly explained that "[i]f the Government did not intend to extend stabilization to the Concentrator," it should have "require[d] SMCV to apply for a separate Beneficiation Concession."[179] But again, that is not what happened. The Concentrator would form part of the integrated Cerro Verde Mining Unit covered by the Stability Agreement and MINEM itself thus suggested and approved the expansion, explicitly confirming that the Stability Agreement would cover the Concentrator.[180]

C. THE HEARING CONFIRMED THAT THE SUPREME COURT DECISION IS ENTITLED TO NO DEFERENCE

34. Each time the Royalty and Tax Assessments became final and enforceable against SMCV, Peru breached its obligations under the Stability Agreement to stabilize the entire Cerro Verde Mining Unit, including the Concentrator. Peru cannot avoid responsibility for these breaches by incorrectly asserting that Freeport is "collaterally estopped" from advancing its Stability Agreement claims or that the Tribunal must ignore the record before it and defer to the Supreme Court decision in the 2008 Royalty Case—which Peru's own experts acknowledged is

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176 Tr. 1514:8-19 (Day 5) (Tovar); *see also* **Ex. CE-1137**, *SMMCV* Tr. 1388:16-1389:11 (Tovar); Reply and C-Mem. on Jurisdiction ¶ 66.

177 **Ex. CE-399**, MINEM, Report No. 510-2003-MEM-DGM-TNO (5 September 2003); *see also* **Ex. CE-398**, MINEM, Report No. 509-2003-MEM-DGM-TNC (8 September 2003); Reply and C-Mem. on Jurisdiction ¶ 96; Memorial ¶ 330(a).

178 **CWS-14**, Chappuis II, ¶ 39.

179 Tr. 2110:15-18 (Day 7) (Otto); *see also* Tr. 613:14-19 (Day 2) (Torreblanca); **Ex. CE-1139**, *SMMCV* Tr. 1914:13-21 (Otto); **Ex. CE-1134**, *SMMCV* Tr. 553:20-554:11 (Torreblanca).

180 *See* Memorial ¶¶ 107-10, 328; Reply and C-Mem. on Jurisdiction ¶¶ 89-92; **CWS-3**, Chappuis I, ¶¶ 50-55; **CWS-14**, Chappuis II, ¶ 37.

not even binding or precedential under Peruvian law or on Peruvian courts.

35. *First*, Peru's insistence that Freeport is "collaterally estopped" or that the Tribunal should otherwise defer to the Supreme Court's 2008 decision is simply wrong.[181]

(a) As Freeport explained at the Hearing, even if collateral estoppel was a general principle applicable in international arbitration—which is by no means settled, including because civil law countries like Peru do not recognize it[182]—there is absolutely no basis for its application based on prior domestic courts decisions.[183] In fact, Peru failed to provide a *single* authority supporting its position—all of the decisions on which it relies dealt with the separate circumstance of whether a party in an international arbitration proceeding could relitigate an issue decided by a *prior* international arbitration proceeding.[184]

(b) By contrast, it is well established that domestic court decisions have no preclusive effect in international arbitration proceedings because international arbitration tribunals are meant to provide a forum independent of national courts.[185] As the *Duke Energy* Tribunal rightly observed, by agreeing to international arbitration, Peru "affirmed Claimant's right to review by an ICSID Tribunal of the matters considered by the Peruvian administration and court system."[186] That the Tribunal must interpret Peruvian law to resolve the Stability Agreement claims does not change the analysis: under Article 10.16.1 of the TPA, the treaty parties explicitly intended for investment agreement claims under Peruvian law to be heard by an *international* tribunal, should the claimant so elect.[187] And Article 10.18.4 and Annex 10-G of the Treaty (the fork-in-the-road provisions for contract and treaty claims, respectively), define the *only* sets of circumstances under

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181 *See* Reply and C-Mem. on Jurisdiction ¶¶ 106-11.

182 *See* Reply and C-Mem. on Jurisdiction ¶ 107 (citing relevant authorities).

183 Tr. 141:1-142:16 (Day 1) (Cl. Opening); *see also* Reply and C-Mem. on Jurisdiction ¶ 108.

184 *See* Tr. 141:1-42:16 (Day 1) (Cl. Opening); **CD-1**, Cl. Opening, slide 202; Reply and C-Mem. on Jurisdiction ¶ 108.

185 Tr. 133:4-135:22 (Day 1) (Cl. Opening); **CD-1**, Cl. Opening, slides 188-90; *see also* Reply and C-Mem. on Jurisdiction ¶¶ 109-10 (citing, *e.g.*, **CA-314**, *Duke Energy* Decision on Jurisdiction ¶¶ 152, 160 (dismissing Peru's argument that claims for breach of a Peruvian stability agreement were inadmissible because "the key issues in dispute have already been fully resolved within the Peruvian tax system by operation of the Peruvian Tax Court"); **CA-189**, *EDF v. Argentina* Award, ¶ 1125 (claims based on governmental measures affecting a contractual concession "are not foreign to this Tribunal and that any decisions made on these issues by Argentine courts do not render these claims *res judicata*"); **CA-349**, *Greentech* Award, ¶¶ 432, 464-466 (Italy's modification of energy tariff scheme breached the ECT, notwithstanding an Italian Constitutional Court decision upholding the tariff).

186 **CA-314**, *Duke Energy* Decision on Jurisdiction ¶¶ 152, 160; *see also* Tr. 133-34 (Day 1) (Cl. Opening).

187 *See* **CA-10**, United States-Peru Trade Promotion Agreement (1 February 2009) ("TPA"), Article 10.16.1.

which a prior domestic court proceeding may deprive the Tribunal of its ability to hear and decide those claims.[188] As explained below in Section V, neither applies here and Peru cannot get around this fact by incorrectly claiming that Freeport is "collaterally estopped" from advancing its contract claims.[189]

(c) There is likewise no support for Peru's assertion that absent a finding of denial of justice or due process violation, an investment treaty tribunal must follow local court decisions on a domestic law issue.[190] All cases Peru has cited concern denial of justice claims, which Freeport does not raise, and none support allowing a state to use its own domestic court decisions to avoid responsibility before an international tribunal.[191] Peru's attempt at the Hearing to portray the U.S. Government's submission as supporting this sweeping approach by mispresenting quotes likewise fails.[192] As Freeport explained, the U.S. Government's statements that tribunals "will defer to domestic courts interpreting matters of domestic law unless there is a denial of justice" and that tribunals should not act as "supranational Appellate Courts" were specifically referring to the U.S. Government's position on direct challenges to judicial measures as violations of the minimum standard of treatment—which is irrelevant to the vast majority of Freeport's claims, which do not challenge judicial measures—and not to "deference" as a general matter.[193] Contrary to Peru's argument, nothing in the U.S. submission or the cases it cites supports tribunals deferring to local courts in relation to any claim involving local law.[194]

36. *Second*, the Supreme Court decision in the 2008 Royalty Case cannot be decisive for the Tribunal because it is not even binding or precedential in Peru on other legal proceedings

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188 **CA-10**, TPA, Article 10.18.4 (precluding submission of investment agreement claims only if a claim for the "same alleged breach" has been previously submitted to certain domestic fora); *id.* Annex 10-G (precluding submission of claims based on violations of the Treaty only if claimant "has alleged that breach of an obligation under Section A [of the Treaty]" before certain domestic fora); *see* Reply and C-Mem. on Jurisdiction ¶ 110; Claimant's Comments on U.S. NDP Submission ¶ 50.

189 *See infra* § II.C.

190 Tr. 142 (Day 1) (Cl. Opening). *Cf.* Tr. 247-48 (Day 1) (Respondent's Opening); **RD-1**, Resp. Opening, slide 56.

191 Tr. 142 (Day 1) (Cl. Opening); Reply and C-Mem. on Jurisdiction ¶ 111 (citing **RA-6**, *Mondev* Award, ¶ 127; **RA-23**, *Liman* Excerpts of Award, ¶ 274; **RA-24**, *Alps Finance* Award, ¶¶ 249-50).

192 *Cf.* Tr. 2960:21-2962:4 (Day 10) (Resp. Closing).

193 Claimant's Comments on U.S. NDP Submission ¶ 51 (citing, *e.g.*, U.S. Submission, ¶ 25 n. 51 (citing **RA-25**, Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW 44 (2005), pp. 81-84 (discussing developments regarding doctrine of substantive denial of justice))).

194 Claimant's Comments on U.S. NDP Submission ¶¶ 48-54.

involving the same parties and legal issues, as Peru conceded at the Hearing.[195] Prof. Bullard explained that, as a matter of Peruvian law, the Supreme Court decision in the 2008 Royalty Case "is not a binding precedent" and "is not *res judicata*" in any other case.[196] It is only "*res judicata* in a contentious administrative proceeding, at the local level . . . about the particular 2008 Royalty Case."[197] Peru's experts agree. Prof. Eguiguren explained that "quite sincerely" "this cassation is [not] a precedent *erga omnes,*" it is "[not] binding on all judges and parties," and thus "there could be a different interpretation in a case other than the 2008 . . . Royalty Case[]."[198] Moreover, he acknowledged that the Supreme Court decision in the 2008 Royalty Case "is not a precedent unless the Supreme Court says so, and it did not say so in this case."[199]

37. The record conclusively demonstrates that neither the Supreme Court, nor the Tax Tribunal, nor SUNAT, accorded any binding or precedential effect to the Supreme Court decision in the 2008 Royalty Case, including in subsequent proceedings.[200] For example, in the 2006-2007 Royalty Case, the five-Justice Supreme Court panel—which included two Justices that decided the 2008 Royalty Case—failed to reach the required four-vote majority to render a decision in the case.[201] Two justices on the panel voted to annul and remand the Appellate Court's decision because it failed to consider whether the expansion of the Beneficiation Concession "exten[ded]" the Stability Agreement to "the Sulfides Plant [Concentrator]."[202] The

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195 *See* Reply and C-Mem. on Jurisdiction ¶¶ 112-18.

196 Tr. 2346:5-2348:1 (Day 8) (Bullard); *see also* Tr. 135:1-20 (Day 1) (Cl. Opening); **CD-1**, Cl. Opening, slide 192; **CD-11**, Claimant's Closing Presentation ("Cl. Closing"), slides 130, 135; **Ex. CE-1140**, *SMMCV* Tr. 2187:1-3, 2185:5-7 (Bullard); **CD-8**, Bullard Presentation, slides 49, 53; **CER-7**, Bullard II, § III; **CER-2**, Bullard I, ¶¶ 76-78.

197 Tr. 2346:5-14 (Day 8) (Bullard); **Ex. CE-1140**, *SMMCV* Tr. 2185:8-18 (Bullard).

198 Tr. 2406:21-2407:4, 2408:20-2409:1 (Day 8) (Eguiguren); *see also* Tr. 2542:7-10 (Day 8) (Morales) (acknowledging that "the Supreme Court Judgment [in the 2008 Royalty Case] does not create a binding precedent."); *id*. Tr. 2546:14-2547:6 ("[T]he current situation is that [the Royalty 2008 Supreme Court decision] doesn't have a binding precedent. It doesn't bind for the future . . . there may be another Supreme Court that interprets differently? Yes."); **Ex. CE-1141**, *SMMCV* Tr. 2310:14-20, 2311:7-10, 2315:1-10 (Eguiguren) (the 2008 decision was "no[t]" precedential "with [respect to] other proceedings that Cerro Verde might have"); *id.* Tr. 2321:18-2322:1 (Morales).

199 Tr. 2407:21-22 (Day 8) (Eguiguren); **Ex. CE-1141**, SMMCV Tr. 2311:7-13 (Eguiguren).

200 Tr. 136:4-137:18 (Day 1) (Cl. Opening); **CD-1**, Cl. Opening, slides 193-96; **CD-11**, Cl. Closing, slide 132; *see also* **Ex. CE-1133**, *SMMCV* Tr. 146:19-149:10 (Day 1) (Cl. Opening); Reply and C-Mem. on Jurisdiction ¶ 118; **CER-7**, Bullard II, ¶ 70.

201 **Ex. CE-739**, Supreme Court, Decision, No. 18174-2017 (2006/07 Royalty Assessments) (20 November 2018), p. 1; *see also* **Ex. CE-1133**, *SMMCV* Tr. 145:8-146:18 (Cl. Opening); Memorial ¶¶ 237-39; Reply ¶ 118*;* **CER-7**, Bullard II, ¶ 73.

202 **Ex. CE-739**, Supreme Court, Decision, No. 18174-2017 (2006/07 Royalty Assessments) (20 November 2018), p. 1; *id.* p. 46, ¶ 2.12; **Ex. CE-1133**, *SMMCV* Tr. 145:19-146:7 (Cl. Opening). *But see* Tr. 264:1-22 (Day 1) (Resp. Opening); **RD-1**, Resp. Opening, slide 79.

two justices would not have reached that conclusion if the 2008 Supreme Court decision "decided as a matter of Peruvian law" that the Stability Agreement did not cover the Concentrator. At the Hearing, Peru made little attempt to reconcile this fact with its continued assertion that this Tribunal should do as no Peruvian court (including Peru's Supreme Court) or administrative body has done: regard the Supreme Court decision as decisive.

38. *Third*, not only is the Supreme Court's decision in the 2008 Royalty Case incapable of having any binding or precedential effect, it also should not be accorded any weight.[203]

(a) Prof. Morales and Prof. Eguiguren conceded that other Peruvian courts hearing claims arising out of the Stability Agreement "may have an interpretation in connection with the Stability Agreement that is different" as long as "there's a justification."[204] Here, reaching a different conclusion is entirely justified. As explained above in Sections II.A and II.B, stability guarantees did not, and could not, apply exclusively to "investment projects" because that would lead to arbitrary results contrary to the text and purpose of the Mining Law and Regulations and the nature of the mining industry. Prof. Hernández also explained that, in practice, it is "not infrequent" for "the same Chambers of the Supreme Court" to reach "different Decisions" "in two case files that [are] exactly the same."[205]

(b) Moreover, the Supreme Court decision was issued on the basis of a wholly inadequate evidentiary record.[206] As Prof. Bullard explained, the proceedings before the Supreme Court concerned administrative law claims—not civil law claims for breach of contract, as is the case here, let alone international law claims for breaches of the TPA.[207] The contentious administrative proceedings did not provide SMCV with an adequate evidentiary forum for contract claims, as in those proceedings "evidence . . . is just

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203 *See* Reply and C-Mem. on Jurisdiction ¶ 119.

204 Tr. 2546:9-15 (Day 8) (Morales); *see also* Tr. 2408:9-10 (Day 8) (Eguiguren) ("It is possible that one might move away from this reasoning? Yes . . . . it would have to be adequately justified."); **Ex. CE-1141**, *SMMCV* Tr. 2340:8-14 (Morales); **Ex. CE-1142**, *SMMCV* Tr. 2313:1-15 (Eguiguren).

205 Tr. 2642:16-2643:8 (Day 9) (Hernández); *see also* Tr. 2961:20-2962:8 (Day 10) (Cl. Closing); **CD-11**, Cl. Closing, slide 131; Tr. 2347:3-2348:17 (Day 8) (Bullard); **CD-8**, Bullard Presentation, slide 54.

206 *See* Reply and C-Mem. on Jurisdiction ¶ 119.

207 Tr. 2346:15-20 (Day 8) (Bullard); *see also* Tr. 138:2-139:20 (Day 1) (Cl. Opening); **CD-1**, Cl. Opening, slides 198-99; **CD-11**, Cl. Closing, slides 133-34; **Ex. CE-1140**, *SMMCV* Tr. 2184:22-2186:20 (Bullard); **Ex. CE-1133**, *SMMCV* Tr. 149:11-150:7 (Cl. Opening); **CER-7**, Bullard II, ¶¶ 67, 69 (citing **CA-318**, Trial Court No. 43, File No, 41531-2006.79 (19 October 2007), p. 2 (distinguishing between breaches of administrative law before the contentious-administrative courts and breaches of a mining stability agreement before the civil courts); **CA-326**, Civil Appellate Court, Case File No. 1289-2009, Decision (14 January 2010), pp. 1-2 (same)).

limited . . . to the case file of the [underlying SUNAT] administrative proceeding."[208]

(c) The Supreme Court did not, and could not, consider the evidence submitted in this proceeding, such as: (*i*) testimony from "witnesses on the execution and performance of the Stability Agreement"; (*ii*) testimony from "witnesses on the interpretation of the [Mining Law and Regulations]"; (*iii*) "evidence [] reflect[ing] the government's contemporary understanding" of stability guarantees; (*iv*) the unredacted SUNAT documents showing that it consistently applied stability guarantees to concessions and mining units for Yanacocha, Milpo, and Tintaya; (*v*) "expert reports on damages"; or (*vi*) expert and witness testimony concerning the purpose of stability guarantees and their presumptive scope in international practice, among others.[209] In fact, SMCV only learned of key evidence of Peru's breaches submitted in this arbitration—such as evidence of the Tax Tribunal and SUNAT's due process violations, Mr. Isasi's April 2005 Report, and the unredacted SUNAT resolutions—long after the Supreme Court proceedings.[210]

III. FREEPORT DEMONSTRATED THAT PERU CONSISTENTLY APPLIED STABILITY GUARANTEES TO CONCESSIONS OR MINING UNITS

39. The Government's own practice makes absolutely clear that the Mining Law and Regulations provided that stability guarantees applied to entire concessions or mining units, *not* "investment projects."[211] For over two decades—from the date of entry into force of the Mining Law, to well *after* the Government's politically motivated *volte face* against SMCV in September 2005—SUNAT, the Tax Tribunal, and MINEM consistently treated entire concessions or mining units of other mining companies as stabilized. To date, Peru has failed to identify a *single* document in the record predating the Government's *volte-face* that supports its purportedly "consistent" position—a complete lack of evidence that is fatal to Peru's claims.

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208 Tr. 2346:21-2324:2 (Day 8) (Bullard); **CD-8**, Bullard Presentation, slides 50-52; *see also* Tr. 138:2-139:20 (Day 1) (Cl. Opening); **CD-1**, Cl. Opening, slides 198-99; **CD-11**, Cl. Closing, slides 133-34; **Ex. CE-1140**, *SMMCV* Tr. 2185:19-2186:5 (Bullard).

209 **CD-8**, Bullard Presentation, slide 52; Tr. 138:2-139:20 (Day 1) (Cl. Opening); *see also* Tr. 2343:2-2344:8 (Day 8) (Bullard); **CD-1**, Cl. Opening, slide 199; **CD-11**, Cl. Closing, slide 133; **Ex. CE-1140**, *SMMCV* Tr. 2186:6-20 (Bullard); **Ex. CE-1133**, *SMMCV* Tr. 151:4-21 (Cl. Opening); Reply and C-Mem. on Jurisdiction ¶ 119; **CER-7**, Bullard II, ¶ 67.

210 *See* Tr. 138:2-139:20 (Day 1) (Cl. Opening); **CD-1**, Cl. Opening, slide 199; **CD-11**, Cl. Closing, slide 133; **Ex. CE-1133**, *SMMCV* Tr. 151:4-21 (Cl. Opening); *see also* Reply and C-Mem. on Jurisdiction ¶ 119.

211 *See generally* Reply and C-Mem. on Jurisdiction ¶¶ 62-29; Memorial ¶¶ 313-19.

A. THE HEARING CONFIRMED THAT SUNAT AND THE TAX TRIBUNAL CONSISTENTLY APPLIED STABILITY GUARANTEES TO OTHER MINING COMPANIES' CONCESSIONS OR MINING UNITS

40. SUNAT's and the Tax Tribunal's resolutions for Milpo, Yanacocha, and Tintaya and SUNAT's advisory opinions demonstrate that the Government consistently applied stability guarantees to entire concessions or mining units, including to new investments not included in the underlying feasibility studies, even well after the Government's *volte-face* against SMCV.

1. The Hearing Confirmed That SUNAT and the Tax Tribunal Applied Stability Guarantees to Milpo's El Porvenir and Cerro Lindo Mining Units

41. The Milpo resolutions show that SUNAT and the Tax Tribunal applied stability guarantees to the entire El Porvenir and Cerro Lindo mining units—*not* to specific "investment projects"—as late as last year, *17 years* after the Government's *volte-face* against SMCV.

42. In 2002, Milpo entered into stability agreements for its "El Porvenir" and "Cerro Lindo" mining units, respectively.[212] The El Porvenir stability agreement stabilized the tax and administrative regime in force in September 2001—including an income tax rate of 20%—for 10 years beginning on 1 January 2003.[213] To qualify for this agreement, Milpo made a US$14 million qualifying minimum investment in a mining shaft and other minor infrastructure.[214] The Cerro Lindo stability agreement stabilized the fiscal and administrative regime in force in July 2001—including a 20% income tax rate—for 15 years beginning on 1 January 2007.[215] To qualify for this agreement, Milpo made a US$63 million qualifying minimum investment in a concentrator and related additional infrastructure.[216]

43. From 2005 to as late as 2022, SUNAT and the Tax Tribunal issued nine resolutions (*i*) stating that stability agreements applied to entire mining units;[217] (*ii*) determining Milpo's

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212 **Ex. CE-924**, Compañía Minera Milpo S.A.A.-Cerro Lindo Stability Agreement (26 March 2002); **Ex. CE-927**, Compañía Minera Milpo S.A.A.-El Porvenir Stability Agreement (27 November 2002); *see also* Tr. 55:19-21 (Day 1) (Cl. Opening); Tr. 2261:5-2262:5 (Day 8) (Vega); Reply and C-Mem. on Jurisdiction ¶¶ 51, 67(b).

213 **Ex. CE-927**, Compañía Minera Milpo S.A.A.-El Porvenir Stability Agreement (27 November 2002), Clauses 2, 8.

214 **Ex. CE-927**, Compañía Minera Milpo S.A.A.-El Porvenir Stability Agreement (27 November 2002), Annex II; *see also* Tr. 1366:17-1367:1, 1368:9-1369:12 (Day 5) (Polo).

215 **Ex. CE-924**, Compañía Minera Milpo S.A.A.-Cerro Lindo Stability Agreement (March 26, 2002), Clauses 2, 8.

216 **Ex. CE-924**, Compañía Minera Milpo S.A.A.-Cerro Lindo Stability Agreement (March 26, 2002), Annex II; *id*., Clause 1; *see also* Reply and C-Mem. on Jurisdiction ¶ 67(b).

217 *See, e.g.,* **Ex. CE-1128**, SUNAT Intendancy Resolution No. 0150140011382 (30 June 2014), p. 11, fn. 5; **Ex. CE-1124**, SUNAT Tax Assessment No. 012-003-0008216 (28 November 2005), p. 2; **Ex. CE-1125**, SUNAT

income tax obligations separately for each of its mining units;[218] and (*iii*) applying the stabilized regime to investments not included in Milpo's qualifying minimum investment, including investments that substantially increased the mining units' production capacity.[219]

(a) For example, in November 2005, SUNAT issued an income tax assessment against Milpo for fiscal year 2003. As shown in the excerpted table below, and as Ms. Vega explained at the Hearing, SUNAT applied the stabilized income tax rate of 20% to the entirety of the El Porvenir EAU and the non-stabilized rate of 27% to Milpo's "Other Units."[220] In other words, SUNAT applied the 2002 stability agreement to the El Porvenir EAU, *not* to a specific "investment project" therein (and not to Milpo's other separate mining units).

ASSESSMENT OF TAXABLE INCOME SUPPORT

SUPPORT		THIRD CATEGORY INCOME TAX		
		UNIT: "EL PORVENIR"	UNIT: "OTHERS"	CONSOLIDATED
Profit or (Loss) before Income Tax according to Annual Income Tax Payment Return		12,857,722.00	37,020,422.00	49,878,144.00
(+) Additions to determine the Taxable Income		23,142,149.00	26,554,581.00	49,696,730.00
(-) Deductions to determine Taxable Income		(10,806.00)	(38,556,012.00)	(38,566,818.00)
Net Income or (Loss) for the fiscal year		35,989,065.00	25,018,991.00	61,008,056.00
Compensable Tax Loss from previous fiscal years		0.00	0.00	0.00
Net Taxable Income or (Net Offsettable Loss)		35,989,065.00	25,018,991.00	61,008,056.00
Profit-Sharing		0.00	0.00	0.00
Net Income or (Loss) for the Fiscal Year before Profit-Sharing and Income Tax		35,989,065.00	25,018,991.00	61,008,056.00
	TOTAL OBJECTIONS	23,201,279.91	0.00	23,201,279,91
	TOTAL TAXABLE NET INCOME BEFORE PROFIT-SHARING AND TAX	59,190,344.91	25,018,991.00	84,209,335.91
	Profit-Sharing (According to Taxpayer)	0.00	0.00	0.00
	TOTAL TAXABLE NET INCOME BEFORE TAX	59,190,344.91	25,016,991.00	84,209,335.91
	Reinvestment (Article 72, Para. b) of S.D. No. 014-92-EM)	(27,286,326.00)	(13,713,674.00)	(41,000,000.00)
		31,904,018.91	11,305,317.00	43,209,335.91
	Applicable Rate	20%	27%	
	INCOME TAX S/.	6,380,803.78	3,052,435.59	9,433,239.37

(b) In June 2009, SUNAT's Claims Division issued a resolution concerning the same 2003 assessment, applying the stabilized regime to Milpo's El Porvenir EAU and the non-

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Intendency Resolution No. 0150140008402 (30 June 2009), p. 22, fn. 24; **Ex. CE-1127**, SUNAT Tax Assessment No. 012-003-0043061 (20 November 2013), p. 29; **Ex. CE-1126**, SUNAT Tax Assessment No. 012-003-0025931 (16 September 2011), p. 3; **Ex. CE-1129**, SUNAT Tax Assessment No. 012-003-0059181 (29 May 2015), p. 2; **Ex. CE-1130**, SUNAT Tax Assessment No. 012-003-0109380 (24 December 2019), p. [4]; **Ex. CE-1132**, Tax Tribunal, Resolution No. 06446-3-2022 (2 September 2022), pp. 9-10; **Ex. CE-1131**, Tax Tribunal, Resolution No. 06111-3-2022 (19 August 2022), p. 7.

218 **Ex. CE-1124**, SUNAT Tax Assessment No. 012-003-0008216 (28 November 2005), p. 2; **Ex. CE-1125**, SUNAT Intendency Resolution No. 0150140008402 (30 June 2009), pp. 22-23; **Ex. CE-1126**, SUNAT Tax Assessment No. 012-003-0025931 (16 September 2011), p. 2; **Ex. CE-1127**, SUNAT Tax Assessment No. 012-003-0043061 (20 November 2013), pp. [3-5] ; **Ex. CE-1128**, SUNAT Intendancy Resolution No. 0150140011382 (30 June 2014), pp. 52-53; **Ex. CE-1129**, SUNAT Tax Assessment No. 012-003-0059181 (29 May 2015), p. 2; **Ex. CE-1130**, SUNAT Tax Assessment No. 012-003-0109380 (24 December 2019), pp. [3-7]; **Ex. CE-1132**, Tax Tribunal, Resolution No. 06446-3-2022 (2 September 2022), pp. 9-10; **Ex. CE-1131**, Tax Tribunal, Resolution No. 06111-3-2022 (19 August 2022), p. 7.

219 *See, e.g.*, **Ex. CE-1128**, SUNAT Intendancy Resolution No. 0150140011382 (30 June 2014), p. 29 (table showing that SUNAT applied the 5% stabilized depreciation rate to the expansion.); **Ex. CE-1132**, Tax Tribunal, Resolution No. 06446-3-2022, pp. 10, 15, 23-25; *see also* Tr. 2920:15-18 (Day 10) (Cl. Closing).

220 **Ex. CE-1124**, SUNAT Tax Assessment No. 012-003-0008216 (28 November 2005), p. 2; Tr. 2261:5-12 (Day 8) (Vega); *see also* Tr. 56:13-17 (Day 1) (Cl. Opening); **Ex. CE-1140**, *SMMCV* Tr. 2058:3-6 (Vega).

stabilized regime to Milpo's other mining units.[221] Consistent with Article 82 of the Mining Law and Articles 2 and 22 of the Regulations, SUNAT's Claims Division expressly confirmed in the resolution that stability guarantees applied to the El Porvenir "*[M]ining [U]nit*, [which] has a tax stability agreement with the State."[222]

(c) In 2009, Milpo made a new S/15.7 million investment in the Cerro Lindo mining unit that was *not* contemplated in the feasibility study submitted to qualify for the stability agreement.[223] This investment significantly expanded the concentrator's infrastructure—involving "new plants with new equipment, machinery and new civil engineering works" [224] —and resulted in a twofold increase in the unit's original processing capacity.[225] In 2014, SUNAT issued a resolution for fiscal year 2010 in which it applied the stabilized 5% depreciation rate for fixed assets to the "10,000 TMs/H Plant Expansion,"[226] stating that "[t]he application of the[] 5% rate[] reflects the provisions of the [stability agreement] in relation to its investments in the Cerro Lindo . . . EAU[]."[227]

(d) As recently as one year ago, the Tax Tribunal confirmed SUNAT's practice of applying stability guarantees to Milpo's entire concessions or mining units, confirming that "the Cerro Lindo and El Porvenir Economic Administrative Units [were] subject to the Income Tax regime in force on [17 July 2001 and 24 September 2001, respectively]" and endorsing SUNAT's application of stabilized depreciation rates to Milpo's new investments in the El Porvenir and Cerro Lindo EAUs.[228]

44. The Milpo resolutions provide such strong support for Freeport's position that Peru

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221 **Ex. CE-1125***,* SUNAT Intendency Resolution No. 0150140008402 (30 June 2009), pp. 22-23; *see also* Tr. 56:7-13 (Day 1) (Cl. Opening).

222 **Ex. CE-1125***,* SUNAT Intendency Resolution No. 0150140008402 (30 June 2009), pp. 22-23.

223 **Ex. CE-1128**, SUNAT Intendancy Resolution No. 0150140011382 (30 June 2014), p. 29; **Ex. CE-1131**, Tax Tribunal, Resolution No. 06111-3-2022 (19 August 2022), p. 33.

224 **Ex. CE-1131**, Tax Tribunal, Resolution No. 06111-3-2022 (19 August 2022), p. 34 ("*Fase 2 consta de la ampliacion de la capacidad de producci6n de las instalaciones actuales de los procesos metalurgicos y otras veces, la instalacion de nuevas plantas con nuevos equipos, maquinarias y nuevas obras civiles*.").

225 **Ex. CE-1131**, Tax Tribunal, Resolution No. 06111-3-2022 (19 August 2022), p. 33; **Ex. CE-1128**, SUNAT Intendancy Resolution No. 0150140011382 (30 June 2014), p. 29.

226 **Ex. CE-1128**, SUNAT Intendancy Resolution No. 0150140011382 (30 June 2014), p. 29 (table showing that SUNAT applied the 5% stabilized depreciation rate to the expansion).

227 **Ex. CE-1128**, SUNAT Intendancy Resolution No. 0150140011382 (30 June 2014), p. 29, n. 25.

228 **Ex. CE-1132**, Tax Tribunal, Resolution No. 06446-3-2022 (2 September 2022), pp. 10, 15, 23-25; **Ex. CE-1131**, Tax Tribunal, Resolution No. 06111-3-2022 (19 August 2022), p. 8.

refused to engage with their substance, seeking instead to diminish their relevance to no avail.

(a) *First*, Peru's argument that Milpo's stability agreements did not expressly identify El Porvenir or Cerro Lindo as mining units misses the point.[229] In practice, SUNAT and the Tax Tribunal identified the "El Porvenir and Cerro Lindo Mining Units" as the subject of the stability agreements when they expressly applied the stabilized tax rate to the mining units themselves—not to any particular "investment project."[230]

(b) *Second*, Peru's argument that Milpo and SMCV are not comparable due to geographic differences is irrelevant.[231] It is undisputed that SMCV has a single mining unit comprising the Mining and Beneficiation Concessions, whereas Milpo has several geographically separated mining units.[232] This has no bearing whatsoever on the fact that SUNAT applied stability guarantees to Milpo's entire mining units—just as it did for the Cerro Verde Mining Unit before the Government's politically motivated *volte-face*.[233]

(c) *Finally*, Peru's argument that these resolutions are somehow immaterial because they "d[o] not analyze the scope of [] stabilization agreements" makes no sense.[234] Contrary to Prof. Bravo and Prof. Picón's testimony at the Hearing, to assess Milpo's income tax obligations, SUNAT and the Tax Tribunal had to identify the applicable legal regime for each mining unit and thus, the scope of each stability agreement.[235] The resolutions reflect exactly that—for example, the Tax Tribunal expressly acknowledged that it had to analyze "the legal framework of the Income Tax applicable to the Cerro Lindo Economic

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229 *Cf.* Tr. 210:10-211:6 (Day 1) (Resp. Opening).

230 *See, e.g.*, **Ex. CE-1126**, SUNAT Tax Assessment No. 012-003-0025931 (16 September 2011), p. 11; **Ex. CE-1124**, SUNAT Tax Assessment No. 012-003-0008216 (28 November 2005), p. 2 ("The 'El Porvenir' Mining Unit has a [] Stability Agreement."); **Ex. CE-1125**, SUNAT Intendency Resolution No. 0150140008402 (30 June 2009), pp. 22-23, n. 24 ("[The 'El Porvenir'] mining unit has a tax stability agreement."); **Ex. CE-1129**, SUNAT Tax Assessment No. 012-003-0059181 (29 May 2015), p. [3]; **Ex. CE-1131**, Tax Tribunal, Resolution No. 06111-3-2022 (19 August 2022), p. 7; **Ex. CE-1132**, Tax Tribunal, Resolution No. 06446-3-2022 (2 September 2022), pp. 9-10.

231 *Cf.* Tr. 218:3-7 (Day 1) (Resp. Opening).

232 *See* Tr. 2262:6-11 (Day 8) (Vega) (Milpo has several geographically separated mining units); Tr. 55:11-17 (Day 1) (Cl. Opening) (same); *see also* Reply and C-Mem. on Jurisdiction ¶ 94 (SMCV has a single mining unit); Memorial ¶ 330 (same).

233 **Ex. CE-1124**, SUNAT Tax Assessment No. 012-003-0008216 (28 November 2005), p. 2; **Ex. CE-1125**, SUNAT Intendancy Resolution No. 0150140008402 (30 June 2009), pp. 22-23; *see supra* ¶ 31.

234 *Cf.* Tr. 328:7-21 (Day 1) (Resp. Opening).

235 *Cf.* Tr. 2741:21-2742:2, 2747:19-2748:2 (Day 9) (Bravo & Picón).

Administrative Unit" and to the "El Porvenir Economic Administrative Unit."[236]

2. The Hearing Confirmed That SUNAT Applied Stability Guarantees to Yanacocha's Mining Units, Including to New Investments

45. The Yanacocha resolutions also unequivocally show that SUNAT applied Yanacocha's stability agreements to entire mining units, including after the Government's *volte face* against SMCV. As Freeport explained, Yanacocha had four EAUs—Chaupiloma Sur; Chaupiloma Norte and Chaupiloma Doce; Carachugo Sur; and La Quinua—and entered into 15-year stability agreements for each.[237] In a December 2008 resolution for fiscal years 2002 and 2003, SUNAT included the table below, which Prof. Hernández explained was "almost impossible to get any clearer,"[238] "consider[ing] that each of the stability agreements applied to the entirety of each EAU," without distinguishing between "investment projects."[239]

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[236] **Ex. CE-1132**, Tax Tribunal, Resolution No. 06446-3-2022 (2 September 2022), pp. 9; **Ex. CE-1131**, Tax Tribunal, Resolution No. 06111-3-2022 (19 August 2022), p. 7; *see also, e.g.,* **Ex. CE-1124**, SUNAT Tax Assessment No. 012-003-0008216 (28 November 2005), p. 2; **Ex. CE-1125**, SUNAT Intendancy Resolution No. 0150140008402 (30 June 2009), p. 22, n. 24 ("This mining unit has a tax stability agreement . . . the Income Tax in force in the 2001 fiscal year w[as] stabilized . . . so the 20% rate . . . applies."); **Ex. CE-1126**, SUNAT Tax Assessment No. 012-003-0025931 (16 September 2011), p. 3 ("The rate of 30% is applied to the Net Taxable Income for the Lima Unit (NON-STABILIZED REGIME) and 20% to the Net Taxable Income for the El Porvenir and Cerro Lindo Units (STABILIZED REGIME)."); **Ex. CE-1128**, SUNAT Intendancy Resolution No. 0150140011382 (30 June 2014), p. 11, n. 5 ("[I]n the 'Cerro Lindo' Project" "the law applicable" "to calculate [] Income Tax" "in relation to the Cerro Lindo [EAU] is" the 2001 rate).

[237] Tr. 60:9-21 (Day 1) (Cl. Opening); **CD-1**, Cl. Opening, slide 62; Tr. 2256:9-14 (Day 9) (Hernández); *see also* **Ex. CE-911**, Compañía Minera Yanacocha S.A.-Carachugo Sur Stability Agreement (19 May 1994); **Ex. CE-919**, Minera Yanacocha - Cerro Yanacocha Stability Agreement (16 September 1998); **Ex. RE-189**, Agreement of Guarantees and Measures for the Promotion of Investments, Compañía Minera Yanacocha S.R.L - Project La Quinua Stabilization Agreement ("Yanacocha - La Quinua Stability Agreement") (25 July 2003); Reply ¶ 67(d).

[238] **Ex. RE-382**, SUNAT Intendency Resolution No. 0150140007925 (30 December 2008), pp. 53-57 (referring to Article 22 of the Regulations); Tr. 2586:15-2587:5 (Day 9) (Hernandez).

[239] Tr. 2586:3-8 (Day 9) (Hernández).

EAU	Project/Agreement Term	Signing Date	Feasibility Study Approval Date	Stabilized Regime (Income Tax)
[redacted]	[redacted] (Term: 15 years)	05/19/1994	11/30/1992	- Single Unified Text of the Income Tax Law, S.D. No. 054-99-EF and amendments, effective as of 10/29/99[41] - Regulations of the Income Tax Law, S.D. 122-94-EF and amendments, in force as of 10/29/99
[redacted]	[redacted] (Term: 15 years)	05/20/1994	05/06/1994	- Income Tax Law, Leg.D. No. 774 and amendments, effective as of 05/06/1994 - Regulations of the Income Tax Law, S.D. 122-94-EF and amendments, in force as of 05/06/1994.
[redacted]	[redacted] (Term: 15 years)	09/16/1996	05/22/1997	- Income Tax Law, Leg.D. No. 774 and amendments, effective as of 05/22/1997 - Regulations of the Income Tax Law, S.D. 122-94-EF and amendments, in force as of 05/22/1997
[redacted]	[redacted]	08/25/2003	08/25/2003	For fiscal years there is no stabilized regime[42]

46. SUNAT's October 2006 assessments concerning Yanacocha's 2002 income tax prepayments also confirmed that stability agreements applied to EAUs, not "investment projects."[240] SUNAT cited Articles 72 and 82 of the Mining Law and Article 22 of the Regulations to conclude that Yanacocha's prepayment obligations should be calculated "separately for *each one of the economic-administrative units* for which a tax stability agreement has been signed."[241]

47. SUNAT also applied Yanacocha's stability agreements to subsequent investments not included in the underlying feasibility studies' investment programs. For instance, as Freeport explained in its Opening, [redacted], Yanaocha made a new [redacted] investment for the purchase of fixed assets.[242] SUNAT identified this investment under the line item [redacted] in the excerpted table below, which outlined all fixed assets subject to Yanacocha's stabilized minimum income tax obligations, [redacted].[243] Prof. Hernández testified that, if stability guarantees did not apply to

240 **Ex. RE-415**, SUNAT Tax Assessment No. 012-003-0010553 (31 October 2006) (Cl. Supplement), p. [2]; *see also* Tr. 61:9-20 (Day 1) (Cl. Opening).

241 *Id.*

242 Tr. 62:17-63:4 (Day 1) (Cl. Opening); Tr. 2589:2-2590:19 (Day 9) (Hernández); **Ex. RE-436**, SUNAT Tax Assessment No. 012-003-0010598 (31 October 2006), p. [25]; *see also* **Ex. RE-380**, SUNAT Tax Assessment No. 012-003-0005518 (9 December 2004), pp. [10-15]; **Ex. RE-415**, SUNAT Tax Assessment No. 012-003-0010553 (31 October 2006) (Cl. Supplement), p. [14].

243 **Ex. RE-415**, SUNAT Tax Assessment No. 012-003-0010553 (31 October 2006), p. [25].

new investments, then "[SUNAT] would have had to show those [redacted]" as "not stabilized."[244] But SUNAT did not. Instead, SUNAT applied the stabilized regime to *all* the fixed assets subject to the [redacted].[245]

II.- ASSESSMENT OF MINIMUM TAX

[redacted]

48. SUNAT's August 2005 resolution regarding Yanacocha's income tax for fiscal years 2000 and 2001 likewise confirmed that stability agreements applied to EAUs. The excerpted table below lists Yanacocha's stability agreements under a column header titled "Project."[246] As in the December 2008 resolution, SUNAT used the word "Project" to reference Yanacocha's four stability agreements (titled [redacted]) and clearly calculated Yanacocha's income tax separately for each of its four *EAUs*.[247] Moreover, SUNAT consistently applied the stabilized income tax rate to Yanacocha's [redacted], including its new [redacted] million investment, again disproving that stability guarantees allegedly covered only the company's initial "investment project."[248]

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244 Tr. 2589:1-19 (Day 9) (Hernández).

245 **Ex. RE-436**, SUNAT Tax Assessment No. 012-003-0010598 (31 October 2006), p. [25]; *see also* **Ex. RE-380**, SUNAT Tax Assessment No. 012-003-0005518 (9 December 2004), pp. [10-15]; **Ex. RE-415**, SUNAT Tax Assessment No. 012-003-0010553 (31 October 2006) (Cl. Supplement), p. [14].

246 **Ex. RE-377**, SUNAT Intendency Resolution No. 0150140003988 (31 August 2005), p. 76.

247 **Ex. RE-377**, SUNAT Intendency Resolution No. 0150140003988 (31 August 2005), p. 76.

248 **Ex. RE-377**, SUNAT Intendency Resolution No. 0150140003988 (31 August 2005), p. 76.

49. Peru's only response at the Hearing was to mischaracterize the scope of Yanacocha's stability agreements. As Freeport explained, two of Yanacocha's mining concessions—"Chaupiloma Dos" and "Chaupiloma Tres"—were split between two mining units and two stability agreements.[249] But this does not mean that stability agreements were therefore granted for individualized "investment projects" rather than entire concessions or mining units, as Peru wrongly claims.[250] As explained, each mining unit included a discrete geographic section of the two split concessions, and each stability agreement expressly covered the entirety of the corresponding mining unit, without one yard of overlap.[251] Yanacocha's case therefore confirms that stability guarantees apply to entire concessions *or* mining units and that a particular mining unit cannot be subject to more than one stabilized regime.

3. The Hearing Confirmed That SUNAT Applied Stability Guarantees to Tintaya's Mining Units

50. SUNAT also unequivocally applied stability guarantees to Tintaya's entire mining units, once again even after the Government's *volte face* against SMCV. Tintaya had two separate mining units: the "Tintaya" EAU and the "Oxides" EAU.[252] In 1995, Tintaya entered

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249 Tr. 60:13-61:14 (Day 1) (Cl. Opening); **CD-1**, Cl. Opening, slide 64 (showing that Yanacocha's stability agreements delineate the area of the mining concessions to which they apply); *see also* Reply and C-Mem. on Jurisdiction ¶ 67(d).

250 *Cf.* Tr. 320:11-20 (Day 1) (Resp. Opening).

251 Tr. 60:17-61:2 (Day 1) (Cl. Opening); s*ee* **Ex. CE-911**, Compañía Minera Yanacocha S.A.-Carachugo Sur Stability Agreement (19 May 1994), Clause 3 (the "Yanachocha-Carachugo Sur Project is circumscribed to the EAU "Chaupiloma Sur" constituted from the concessions [] in Annex I"); *id*. Annex I (mining rights Chaumpiloma Tres, Chaumpiloma Cuatro, Chaupiloma Cinco); **Ex. CE-919**, Minera Yanacocha - Cerro Yanacocha Stability Agreement (16 September 1998), Clause 1.1 (Yanacocha applied for stability in relation to the investment in its concessions "Chaupiloma 1, Chaupiloma 2, and part of the mining right Chaupiloma 3, which form part of the EAU Carachugo Sur"); *id.* Annex I (mining rights Chaupiloma Uno, Chaupiloma Dos, and Chaupiloma Tres); **Ex. RE-189**, Yanacocha - La Quinua Stability Agreement (25 July 2003), Clause 3 ("[T]he 'La Quinua Project' is limited to the concessions noted in Appendix I"); *id.* Annex I (22 mining rights).

252 *See* Tr. 63:15-64:5 (Day 1) (Cl. Opening); *see also* Reply and C-Mem. on Jurisdiction ¶ 66; **RER-3**, Bravo & Picón I, ¶ 174.

into a 15-year stability agreement for the "Tintaya" EAU.[253] In 2003, Tintaya entered into another 15-year stability agreement for the "Oxides" EAU.[254] In December 2006 and 2007, SUNAT issued income tax assessments against Tintaya for fiscal years 2002-2004. In each, SUNAT "calculate[ed] . . . taxes" "*separately* for *each economic administrative unit* [the 'Tintaya' and 'Oxides' EAUs] for which [Tintaya] has entered into a []stability agreement."[255] SUNAT again based its conclusion on "the General Mining Law, as well as the Regulations."[256]

51. In its Opening, Peru conceded that the December 2006 and 2007 assessments "maybe" applied stability guarantees to the entirety of Tintaya's EAUs.[257] But Peru sought to dismiss their relevance by arguing that unlike SMCV's Article 82 EAU, MINEM formally approved Tintaya's Article 44 EAU—a nonsensical argument that again wrongly conflates Article 44 and Article 82 EAUs.[258] As explained above, unlike Article 44 EAUs (comprised only of mining concessions), Article 82 EAUs (comprised of mining and beneficiation concessions) determined the scope of stability agreements and indisputably did *not* require an "approving resolution."[259] Moreover, SUNAT applied the 1995 stability agreement not only to Tintaya's Article 44 EAU but also to the entire "Tintaya" Article 82 EAU, which ultimately determined the scope of that agreement.[260] Likewise, SUNAT applied the 2003 stability agreement to the entire "Oxides" EAU, which was not an Article 44 EAU because it comprised a single beneficiation concession (no mining

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253 **Ex. CE-914**, Compañía Magma Tintaya Sociedad Anonima Stability Agreement (29 December 1995); *see also* Tr. 63:5-14 (Day 1) (Cl. Opening); **CD-1**, Cl. Opening, slide 69; Reply and C-Mem. on Jurisdiction ¶ 66(a).

254 **Ex. CE-414**, Stability Agreement Between BHP Billiton Tintaya and Peru (1 December 2003); *see* Tr. 63:22-64:5 (Day 1) (Cl. Opening); **CD-1**, Cl. Opening, slide 69; *see* Reply and C-Mem. on Jurisdiction ¶ 66(a).

255 **Ex. RE-374**, SUNAT Tax Assessments Nos. 092-003-0001498 to 092-003-0001505 (27 December 2006) (Cl. Supplement), p. [25]; **Ex. RE-193**, SUNAT Tax Assessments Nos. 092-003-0001931 to 092-003-0001942 (28 December 2006), p. [408]; **Ex. RE-370**, SUNAT Tax Assessment No. 092-003-0001919 (28 December 2007), p. [4]; **Ex. RE-370**, SUNAT Tax Assessment No. 092-003-0001918 (28 December 2007), p. [12]; *see also*, Tr. 65 (Day 1) (Cl. Opening).

256 **Ex. RE-374**, SUNAT Tax Assessments Nos. 092-003-0001498 to 092-003-0001505 (27 December 2006) (Cl. Supplement), p. [25]; *see also id*., p. [39] ("the Mining Law allows each *concession* or *EAU* to either stabilize a tax regime or not" so "a titleholder can be subject to several tax regimes at the same time, for the *concessions* it holds.") (emphasis added); **Ex. RE-193**, SUNAT Tax Assessments Nos. 092-003-0001931 to 092-003-0001942 (28 December 2006), p. [408]; **Ex. RE-370**, SUNAT Tax Assessment No. 092-003-0001919 (28 December 2007), p. [4]; **CD-1**, Cl. Opening, slide 72.

257 Tr. 214:13-21 (Day 1) (Resp. Opening).

258 *Cf.* Tr. 214:13-21 (Day 1) (Resp. Opening).

259 *See supra* ¶ 26(e).

260 **Ex. CE-914**, Compañía Magma Tintaya Sociedad Anonima Stability Agreement (29 December 1995), Clause 1.1 ("[I]n relation to the investment in its concessions: [Tintaya EAU] and the Tintaya Beneficiation Concession, referred to hereinafter as the "Tintaya Project.").

concession was needed because the beneficiation concession processed stockpiled ore).[261]

52. Because the December 2006 and 2007 assessments contradict its case, Peru focused on a May 2009 SUNAT resolution that adopted the Government's novel and restrictive position that stability guarantees "only reach[ed] the investments . . . foreseen in the feasibility study."[262] SUNAT issued this resolution nearly four years after the Government's *volte-face* against SMCV. It thus merely reflects SUNAT's belated adoption of the same arbitrary interpretation against Tintaya.

4. The Hearing Confirmed That SUNAT's Advisory Opinions Also Applied Stability Guarantees to Entire Concessions or Mining Units

53. SUNAT's public advisory opinions offer further evidence of the Government's consistent approach, both before and after its politically motivated *volte-face* against SMCV.

(a) The 2002 SUNAT Report confirmed that stability guarantees apply "for those *concessions or units* that are supported . . . by the agreement."[263] Peru ignored this statement in its closing argument and selectively relied on SUNAT's conclusion that stability agreements "only stabilize the applicable tax regime with respect to the investment activities that are the subject matter of the agreement, for their execution in a determined concession or an Economic-Administrative Unit."[264] But that conclusion does not support Peru's position—it clearly states that stabilized activities are "execut[ed] in a determined *concession or [EAU]*" and nowhere mentions "investment projects" or feasibility studies.[265] Moreover, if SUNAT had indeed adopted Peru's restrictive position since back in 2002, Mr. Cruz would not have admitted that when he met with Ms. Torreblanca in 2005 in his capacity as Regional Intendent of SUNAT Arequipa,

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261 **Ex. CE-414**, BHP Billiton Tintaya Stability Agreement (1 December 2003); Clause 3 ("In accordance with subclause 1.1, the Copper Oxides Project is restricted to the beneficiation concession 'Industrial Oxides Plant,' set out in detail in Annex I.").

262 Tr. 325:4-8 (Day 1) (Resp. Opening) (citing **Ex. RE-193**, SUNAT, Intendency Resolution No. 095-014-0000747/SUNAT (20 May 2009), p. 108 (emphasis omitted)).

263 **Ex. RE-26**, SUNAT, Report No. 263-2002-SUNAT/K00000 (23 September 2002), p. 2; *see also* Reply and C-Mem. on Jurisdiction ¶ 72.

264 *Cf.* Tr. 3028:1-7 (Day 10) (Resp. Closing) (citing **Ex. RE-26**, SUNAT, Report No. 263-2002-SUNAT/K00000 (23 September 2002), p. 3).

265 **Ex. RE-26**, SUNAT, Report No. 263-2002-SUNAT/K00000 (23 September 2002), p. 2; *see also* Tr. 2939:19-2940:4 (Day 10) (Cl. Closing); Reply and C-Mem. on Jurisdiction ¶ 72.

"[his] understanding [on the scope of stability agreements]. . . was not crystal clear."[266]

(b) Peru reliance on the 2007 SUNAT Report is also misplaced.[267] That Report was issued two years after September 2005 and is simply further evidence of the Government's *volte-face*.[268] Moreover, the SUNAT Milpo, Yanacocha, and Tintaya resolutions issued after the 2007 SUNAT Report again contradict the Report by applying stability guarantees to entire concessions or mining units.[269]

(c) At the Hearing, Peru essentially ignored the 2012 SUNAT Report. Peru did so likely because the Report confirmed that stability guarantees are "applicable solely to the *concession or economic-administrative unit* for which said agreement has been signed" and that mining companies "should take into account the *stabilized laws* to be applied to *each of the concessions or economic-administrative units*."[270] Peru's only attempt at reconciling the Report with its position was Ms. Bedoya saying that "the question . . . [was] poorly formulated" and the Report did not "discuss[]" "the scope of the Stability Agreements."[271] Ms. Bedoya is wrong. SUNAT expressly issued the report to address an issue that affected "mining-activity [titleholders] that . . . signed [stability] agreements . . . for one or more of their concessions or economic-administrative units."[272] In addressing the issue, SUNAT expressly referenced Articles 82 and 83 of the Mining Law and

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266 Tr. 1830:10-14 (Day 6) (Cruz); *see also* Tr. 2950:2-12 (Day 10) (Cl. Closing).

267 *Cf.* Tr. 3032:2-7 (Day 10) (Resp. Closing).

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

269 *See, e.g.*, **Ex. CE-1125**, SUNAT Intendancy Resolution No. 0150140008402 (30 June 2009), pp. 22-23; **Ex. CE-1126**, SUNAT Tax Assessment No. 012-003-0025931 (30 June 2009), p. 2; **Ex. CE-1127**, SUNAT Tax Assessment No. 012-003-0043061 (20 November 2013), pp. [3-5]; **Ex. CE-1128**, SUNAT Intendancy Resolution No. 0150140011382 (30 June 2014), pp. 52-53; **Ex. CE-1129**, SUNAT Tax Assessment No. 012-003-0059181 (29 May 2015), p. 2; **Ex. CE-1130**, SUNAT Tax Assessment No. 012-003-0109380 (24 December 2019), pp. [3-7]; **Ex. RE-382**, SUNAT Intendency Resolution No. 0150140007925 (30 December 2008), pp. 57-58; **Ex. RE-415**, SUNAT Tax Assessment No. 012-003-0010553 (31 October 2006), p. [3]; **Ex. RE-436**, SUNAT Tax Assessment No. 012-003-0010598 (31 October 2006), p. [5]; **Ex. RE-374**, SUNAT Tax Assessments Nos. 092-003-0001498 to 092-003-0001505 (27 December 2006), p. [27]; **Ex. RE-193**, SUNAT Tax Assessments Nos. 092-003-0001931 to 092-003-0001942 (28 December 2006), p. [409]; **Ex. RE-370**, SUNAT Tax Assessment No. 092-003-0001919 (28 December 2007), p. [5]; **Ex. RE-370**, SUNAT Tax Assessment No. 092-003-0001918 (28 December 2007), pp. [13-15]; *see supra* ¶¶ 41-52; Reply and C-Mem. on Jurisdiction ¶ 69(c) (citing **Ex. CE-966**, SUNAT, Resolution No. 235-2066-SUNAT (28 December 2006) (instructing companies with stability agreements to file tax returns for "each *mining concession or [EAU]*").

270 **Ex. CE-883**, SUNAT, Report No. 084-2012-SUNAT/4B0000 (13 September 2012), p. 3; *id*., p. 4, n. 7; *see also* Tr. 67 (Day 1) (Cl. Opening); **CD-1**, Cl. Opening, Slide 73; Reply and C-Mem. on Jurisdiction ¶ 69(e); Memorial ¶ 318(c).

271 Tr. 1778:5-13, 1779:8-1780:3 (Day 6) (Bedoya).

272 **Ex. CE-883**, SUNAT, Report No. 084-2012-SUNAT/4B0000 (13 September 2012), p. 1.

assessed the scope of stability guarantees, concluding that "mining-activity [titleholders] that ha[ve] signed [stability] agreements . . . for one or more of its *concessions* or *economic-administrative units* . . . may offset the tax losses of one or more of its *concessions* or *economic-administrative units* by using the profits from the other[]" non-stabilized *concessions* or *EAUs*.[273] Thus, even well *after* the Government's politically motivated *volte-face* and SUNAT's first Royalty Assessments against SMCV, SUNAT again took the position that stability guarantees extended to concessions and mining units.

B. THE HEARING CONFIRMED THAT MINEM CONSISTENTLY APPLIED STABILITY GUARANTEES TO CONCESSIONS OR MINING UNITS OF OTHER MINING COMPANIES

54. Before the Government's politically motivated *volte-face* in September 2005, MINEM likewise consistently applied stability guarantees to entire concessions or mining units, including in various DGM and Mining Council resolutions regarding Consorcio Minero Horizonte, Tintaya, and Southern.

1. The Hearing Confirmed That MINEM Applied Stability Guarantees to the Parcoy and Tintaya Mining Units

55. As Ms. Vega explained at the Hearing, the 2001 and 2003 DGM and Mining Council Resolutions confirm that stability guarantees applied to Consorcio Minero Horizonte's entire "Parcoy" EAU and to Tintaya's entire "Tintaya" EAU.[274] For example, the DGM and the Mining Council's 2001 resolutions assessing whether Consorcio Minero Horizonte could include new mining rights under clause 3 of its stability agreement unequivocally confirmed that "tax stability [is applicable to] the Parcoy *EAU*" and "[t]he *concessions* created in the Parcoy EAU and the Parcoy Plant beneficiation concession, which comprise the Parcoy Project, are subject to the Stability Agreement."[275] Similarly, the DGM and the Mining Council's 2003 resolutions assessing Tintaya's request that the DGM include previously stabilized concessions in a new stability agreement confirmed that stability guarantees applied to the entirety of the "Tintaya"

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273 **Ex. CE-883**, SUNAT, Report No. 084-2012-SUNAT/4B0000 (13 September 2012), p. 5 (emphasis added); *id.* p. 2, n. 1 (referencing Articles 82 and 83 of the Mining Law) (emphasis added).

274 Tr. 2255:15-2258:18 (Day 8) (Vega); **CD-7**, Vega Presentation, slide 22; *see also* Tr. 49:10-50:9 (Day 1) (Cl. Opening); Tr. 2930:10-2932:5 (Day 10) (Cl. Closing)

275 **Ex. CE-377**, MINEM, Resolution No. 380-2001-EM-CM (16 November 2001), pp. 1-2 (emphasis added); *see also* Tr. 49:10-18 (Day 1) (Cl. Opening); Tr. 2933:15-2934:3 (Day 10) (Cl. Closing); Memorial ¶¶ 316, 408; Reply and C-Mem. on Jurisdiction ¶¶ 64, 66, 84(c).

EAU.[276] In particular, the DGM and the Mining Council rejected Tintaya's request because "the *concessions* that [were] part of its [existing] Tintaya EAU and the 'Tintaya' beneficiation concession" were already "subject of a stability agreement in effect until 2009."[277] Peru did not even attempt to reconcile its position with these resolutions at the Hearing.

2. The Hearing Confirmed That MINEM Applied Stability Guarantees to Southern's Electrowon Project Mining Unit

56. As Freeport explained at the Hearing, MINEM also applied stability guarantees to Southern's entire "Electrowon Project" mining unit.[278] In 1994, Southern entered into a stability agreement covering: (*i*) several mining concessions, which formed two Article 44 EAUs, "Toquepala" and "Cuajone"; and (*ii*) two new beneficiation concessions, in which Southern constructed leaching facilities to process previously stockpiled ore.[279] Together, these mining and beneficiation concessions constituted an Article 82 EAU or mining unit, known as the "Electrowon Project."[280] Southern applied stability guarantees to the entire "Electrowon Project" mining unit, not specific "investment projects." For instance, in 2004, Southern sought to "incorporate[e] new [Article 44 EAUs]" in the stability agreement to "extend[] the benefits regime of the Agreement to these new [Article 44] *EAUs* and the *concessions* of which they are composed."[281] In 2005 and 2006, the DGM and the Mining Council rejected Southern's request for reasons irrelevant to this dispute but expressly endorsed Southern's interpretation of stability guarantees, concluding that "the benefits granted by [the 1994 stability agreement] are applicable to the . . . *concessions* listed in Annex 1 of the Agreement."[282]

57. Following its usual pattern, Peru sought to dismiss the relevance of the DGM's and Mining Council's authoritative resolutions by claiming that Southern's case actually supports its

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276 **Ex. CE-930**, BHP Billiton Tintaya S.A., Letter to DGM (23 December 2002), p. 4; **Ex. CE-914**, Compañía Magma Tintaya Sociedad Anonima Stability Agreement (29 December 1995); *see also* Tr. 2256:21-2258:14 (Day 8) (Vega).

277 **Ex. CE-882**, MINEM, Report No. 019-2003-DGM-DPDM/L (20 January 2003), p. 2.; **Ex. CE-932**, Mining Council, Resolution No. 182-2003-EM/CM (9 June 2003), p. 4; *see also* Tr. 50:4-14 (Day 1) (Cl. Opening).

278 Tr. 50:10-51:7 (Day 1) (Cl. Opening); **CD-1**, Cl. Opening, slide 48. *But see* Tr. 1209:1-14 (Day 4) (Isasi).

279 **Ex. CE-912**, Southern Peru Copper Stability Agreement (July 12, 1994), Clauses 1, 3.

280 **Ex. CE-912**, Southern Peru Copper Stability Agreement (July 12, 1994), Clauses 1, 3; **CA-1**, Mining Law, Articles 44, 82; *supra* ¶ 26(e) (comparing Article 44 and Article 82 EAUs).

281 **Ex. RE-356**, Letter from Southern Peru Copper Corporation to MINEM (4 May 2004), p. 2.

282 **Ex. CE-1122**, Mining Council Resolution No. 224 2006-MEM/CM (17 October 2006), pp. 2, 5; **Ex. RE-357**, MINEM, Report No. 190-2005-MEM-DGM/PDM (5 May 2005), p. 4 ("[T]he benefit of the guarantees includes the concessions of the project where [Southern] made the investments.").

position because the company sent a letter to MINEM in 1994 "confirming that Southern's [1994] Stabilization Agreement applied exclusively to the Investment Project includ[ed] in the agreement."[283] A single errant remark from one company, however, does not undermine or change decades of consistent Government practice applied to SMCV, Milpo, Tintaya, and Yanacocha.[284] Moreover, as explained above, that errant remark contradicts Southern's, the DGM's, and MINEM's own contemporaneous positions to the contrary.

58. Peru's argument that "Southern actually paid Royalties with respect to their Primary Sulfide Project" although it "was also within the Cuajone and Toquepala [EAUs]" is similarly wrong.[285] No processing or beneficiation activities of any kind could have occurred "within" the "Toquepala" and "Cuajone" EAUs because they are Article 44 EAUs, exclusively comprised of *mining* concessions.[286] Southern processed stockpiled ore in the beneficiation concessions included in the "Electrowon Project" mining unit, an Article 82 EAU, which Southern treated as entirely stabilized.[287] Southern also processed ore extracted from the "Toquepala" and "Cuajone" Article 44 EAUs in *other* beneficiation concessions which were not part of the "Electrowon Project" mining unit and as such were not stabilized.[288] This is of course entirely consistent with Freeport's position: Southern, like SMCV, had a fully stabilized Article 82 EAU (the "Electrowon Project"), which both Southern and the Mining Council treated as stabilized in its entirety, but unlike SMCV, it also had beneficiation concessions that were *not* part of that EAU.

IV. FREEPORT DEMONSTRATED THAT PERU ACTED UNFAIRLY AND INEQUITABLY

A. THE HEARING CONFIRMED THE PARTIES' LONG-HELD UNDERSTANDING THAT THE CONCENTRATOR WOULD BE STABILIZED

59. The Hearing confirmed the Parties' long-held understanding that SMCV was entitled to stability for the entire Cerro Verde Mining Unit, including any eventual concentrator investment

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283 *Cf.* Tr. 3037:17-3038:3 (Day 10) (Resp. Closing); *see also* **Ex. RE-355**, Letter from Southern Peru Copper Corporation to MINEM (15 August 1994).

284 *See supra* ¶¶ 41-52.

285 *Cf.* Tr. 324:4-10 (Day 1) (Resp. Opening).

286 *See* **Ex. CE-1122**, Mining Council Resolution No. 224 2006-MEM/CM (17 October 2006), pp. 3-4 (listing the "39 mining concessions" which "ma[ke] up the 'TOQUEPALA' Economic-Administrative Unit"); *see supra* ¶ 26(e).

287 *See* **Ex. CE-1133**, *SMMCV* Tr. 67:13-15, 68:10-14 (Cl. Opening).

288 *See* **RWS-10**, Tovar II, ¶¶ 64-65; **Ex. CE-682**, Southern Copper Corp., SEC Form 10-K (2014), pp. 33-36; *see also* **Ex. CE-1133**, *SMMCV* Tr. 66:4-68:16 (Cl. Opening).

made within that Unit, which the Government desperately sought for decades.

60. *First*, the Hearing confirmed that, in privatizing SMCV, the Government promised stability for the entire Cerro Verde Mining Unit in exchange for an eventual concentrator investment.[289] The 1994 Share Purchase Agreement ("1994 SPA") reflected the parties' shared understanding that the privatized Cerro Verde formed a single mining unit. It defined the "*Unidad Cerro Verde*" as the "mining and beneficiation concessions previously known collectively as the *Unidad Producción* Cerro Verde."[290] As Mr. Davenport and Ms. Torreblanca testified, the 1994 SPA committed Cyprus to construct a "larger concentrator" to "continue with the development as expected by Minero Perú" and "trigger th[e] great potential that [Cerro Verde] had with [the] Primary Sulfides."[291] Moreover, as Mr. Davenport explained, SMCV's "balance sheet," as annexed to the SPA, listed an "$8 million []asset for pre-stripping the sulfide" to prepare the surface of the mine for the extraction of primary sulfides.[292] The 1994 SPA recognized that any investments SMCV made to exploit the primary sulfides would be stabilized, as would any other operations in the Cerro Verde Mining Unit.[293] And the Government's promise to execute a stability agreement covering SMCV's "business and operations" was a critical prerequisite for Cyprus's acquisition of SMCV—as Mr. Davenport explained, "nobody was going to go to Perú in '94 without some type of Stability Agreement."[294]

61. *Second*, contrary to Peru's assertion that the 1996 Feasibility Study was submitted for the "sole purpose" of the "Leaching Project," the investment program contained investments laying the groundwork for the concentrator, which would operate as part of the Cerro Verde

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289 *See* Tr. 647:8-648:1 (Day 2) (Davenport); **Ex. CE-1134**, *SMMCV* Tr. 588:10-17 (Davenport); Tr. 81:10-82:4 (Day 1) (Cl. Opening); **CD-1**, Cl. Opening, slide 95; Tr. 2910:16-2911:12:13 (Day 10) (Cl. Closing); **CD-11**, Cl. Closing, slide 22; Memorial ¶¶ 66-69, 329(f); Reply and C-Mem. on Jurisdiction ¶ 95.

290 **Ex. CE-4**, Share Purchase Agreement Between Cyprus Climax Metals Company and Empresa Minera del Peru S.A. (17 March 1994) ("Share Purchase Agreement"), Definitions.

291 Tr. 383:2-15, 385:9-386:14 (Day 2) (Torreblanca); Tr. 642:22-645:21 (Day 2) (Davenport); *see also* **Ex. CE-4**, Share Purchase Agreement, Article IV (containing Cyprus's investment to build a concentrator); **CWS-5**, Davenport I, ¶¶ 13, 18; **CWS-16**, Davenport II, ¶ 9(b); **CWS-11**, Torreblanca I, ¶ 12.

292 Tr. 647:8-12 (Day 2) (Davenport); *see also* **CWS-5**, Davenport I, ¶ 31.

293 *See* **Ex. CE-4**, Share Purchase Agreement, Article 3.1(g) (containing Peru's commitment to grant a mining stability agreement); **Ex. CE-341**, Guarantee of the Republic of Peru in Favor of Cyprus Climax Metals (17 March 1994), Art.1.6 (guaranteeing the execution of "any" mining stability agreement related to SMCV's "business and operations" that SMCV qualified for).

294 **Ex. CE-341**, Guarantee of the Republic of Peru in Favor of Cyprus Climax Metals (17 March 1994), Art.1.6; Tr. 647:13-648:1 (Day 2) (Davenport).

Mining Unit alongside the leaching facilities.[295] As Ms. Chappuis explained at the Hearing, the 1996 Feasibility Study detailed works for "stripping . . . to get to the layer of primary sulfides," and included investments of US$2.5 million for a feasibility study of a large concentrator.[296] Ms. Chappuis testified that it "w[ould have been] obvious to any mining engineer who read the 1996 Feasibility Study," that SMCV was seriously "analyz[ing]" the concentrator investment—"[i]t would not make sense for SMCV to design a mine plan with primary sulfides in mind unless it was already clear that it would eventually pursue the construction of a concentrator."[297] The DGM reviewed and ultimately approved the Feasibility Study in May 1996.[298]

62. *Finally*, the Government was so adamant that SMCV invest in a primary sulfide expansion that it initiated an arbitration against Cyprus in 2001 for allegedly breaching the 1994 SPA.[299] The resulting 2001 Settlement Agreement did not, as Peru claims, "release" SMCV from its contractual undertaking—to the contrary, it reaffirmed the parties' continued commitment to a concentrator investment.[300] For example, Clauses 3.1(A) and 4.1 committed Cyprus to make at least US$50 million in further investments in the Mining Unit, including in feasibility studies and electrical infrastructure, technical prerequisites to the Concentrator investment.[301] Moreover, Clause 3.1(B) required Cyprus to "carry out . . . research and technological development" to "exploit[] and process[] the primary sulfides."[302] Ms. Torreblanca testified that after SMCV

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295 *See* Memorial ¶ 350. *Cf.* **RD-7**, Resp. Closing, slide 3.

296 Tr. 946:2-13 (Day 3) (Chappuis); **Ex. CE-9**, 1996 Feasibility Study, p. 124 (investments in "Screening Plant/Crusher Mill," "Agglomerator & Crusher Mill," and "Feasibility Study for a Mill"); *see also* **Ex. CE-1134**, *SMMCV* Tr. 531:11-21 (Torreblanca) (confirming that "the Feasibility Study for the Stability Agreement" "refer[red] to th[e] Feasibility Study for the Concentrator" and that "'[m]ill' is a word that is used to—a synonym of 'Concentrator' by mining people").

297 **CWS-3**, Chappuis I, ¶ 41; *see also* Tr. 970:19-971:10 (Day 3) (Chappuis) (explaining that the 1996 "Feasibility Study in several parts mentions the Sulfide Project," that "[t]here are pushbacks [a required step to exposing the primary sulfides] [] included in the Mining Plan"); Tr. 450:15-451:5 (Day 2) (Torreblanca) (preliminary works were "included in the Feasibility Study [] because we all knew that the Concentrator had to be built").

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

299 *See* Tr. 648:2-13 (Day 2) (Davenport); **Ex. CE-17**, Out-of-Court Settlement Agreement Between Cyprus Climax Metals Co. and Empresa Minera del Perú S.A. (30 March 2001) ("2001 Settlement Agreement"), Article 1.4.1; Memorial ¶¶ 86-88; **CWS-5**, Davenport I, ¶¶ 19-20; **CWS-16**, Davenport II, ¶ 9(a).

300 **Ex. CE-17**, 2001 Settlement Agreement, Clauses 3.1, 4.1, 4.5. *Cf.* **RD-7**, Resp. Closing, slide 14.

301 **Ex. CE-17**, 2001 Settlement Agreement, Clause 3.1(A), 4.1; *see also* Tr. 626:2-5 (Day 2) (Davenport) (to "assess[] . . . the Concentrator, we needed to find water, we need to ensure power contracts."); *id.* Tr. 643:19-646:21 (describing the investment commitment); Tr. 386:3-14 (Day 2) (Torreblanca) (same); Tr. 2920:8-2921:11 (Day 10) (Claimant's Closing); **CD-11**, Cl. Closing, slides 35-36; **CWS-5**, Davenport I, ¶¶ 21-23 (detailing SMCV's investments fulfilling the commitment under the Settlement Agreement).

302 **Ex. CE-17**, 2001 Settlement Agreement, Clauses 3.1(B); *see also* **CWS-5**, Davenport I, ¶ 20.

began carrying out its investment commitment under the 2001 Settlement Agreement, the "premise" of "all of the conversations" with the Government "was that [the Concentrator] was going to be part of the same Production Unit [and] . . . covered by the stability contract."[303]

B. THE HEARING CONFIRMED THAT THE DGM REAFFIRMED THAT THE STABILITY AGREEMENT WOULD COVER THE CONCENTRATOR

63. The Hearing confirmed that SMCV rightly understood that the Stability Agreement would cover the Concentrator. Nevertheless, given the politically charged debates about the Royalty Law, SMCV sought and received confirmation from the DGM that the Government would uphold its commitment to apply the Stability Agreement to its entire Mining Unit.[304]

64. *First*, the 2002 Pre-Feasibility Study and the 2004 Feasibility Study evidence SMCV's well-founded understanding that the Stability Agreement would cover the Concentrator.[305]

(a) Ms. Torreblanca testified that while discussing "electricity issues" and "the steps that we had to take" to prepare the 2002 Pre-Feasibility Study, the Government confirmed that "independent[] of the [processing] technology that [SMCV] would use, [o]ur Production Unit, including the new Concentrator, [was] going to enjoy" "stability."[306] Mr. Davenport testified that SMCV "felt very strongly" that the Concentrator would be stabilized because the Government never questioned SMCV's application of stability guarantees to additional investments in the Cerro Verde Mining Unit, as discussed above.[307]

(b) It is undisputed that the 2002 Pre-Feasibility Study assumed that the Stability Agreement would cover the Concentrator.[308] The financial model's base case assumed the stabilized "Tax Regime" would apply, including the stabilized depreciation rate "available"

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303 Tr. 389:1-12 (Day 2) (Torreblanca).

304 *See* Memorial ¶¶ 111-15, 121-24, 336-38; Reply and C-Mem on Jurisdiction ¶¶ 89-92.

305 Memorial ¶¶ 90, 95-96; **CWS-5**; Davenport I, ¶¶ 19-20; **CWS-16**, Davenport II, ¶¶ 9-10.

306 Tr. 626:2-15, 560:6-20 (Day 2) (Torreblanca); **Ex. CE-1134**, *SMMCV* Tr. 495-22-496:4 (Davenport) (noting that "all the discussions we had with the Government beginning in the year 2000 entailed and said that the Stability Agreement was going to include the Concentrator.").

307 Tr. 648:14-649:1 (Day 2) (Davenport); *see also* Tr. 565:20-566:3 (Day 2) (Torreblanca) ("[T]he Beneficiation Concession . . . had already been expanded in the same way in the past, and it was never questioned by the Ministry of Energy and Mines or SUNAT . . . these additional investments were part of the Production Unit and had the same [stabilized] legal treatment."); **CWS-16**, Davenport II, ¶ 9(c); *see supra* ¶ 31.

308 *See* **Ex. CE-928**, 2002 Pre-Feasibility Study, pp. [296-297] (showing that projections assuming "CV Estabilization" were used in the base case); Tr. 726:20-727:1, 728:12-16 (Day 3) (Davenport); **CWS-16**, Davenport II, ¶¶ 8-9.

pursuant to the "stability agreement."[309] As Freeport explained at the Hearing, *one* of the 140 sensitivities in the 2002 Pre-Feasibility Study, "Peru Current system," assumed that the Stability Agreement would not apply to the Concentrator to account for the risk of Peru violating its commitments.[310] The net present value for the "Peru Current system" sensitivity was higher than that for the base case.[311] In its Closing, Peru argued that the "Peru Current system" sensitivity actually accounted for the risk that "the Profit Reinvestment Program" would not apply and was therefore "not about tax rates" because "[r]oyalties did not exist yet in 2002."[312] That is plainly wrong—the sensitivity clearly applied the non-stabilized tax regime, as it is titled "Peru *Current* system" and appears under the heading "*Tax* Regime," immediately after the "CV Estabilization" assumption that SMCV used in the base case.[313] And although the Government had not yet introduced royalties, SMCV's assumption that it would continue applying the stabilized regime to the entire Mining Unit demonstrates that the Stability Agreement's value was ensuring predictability even if that resulted in higher tax rates.[314]

(c) Contrary to Peru's arguments, the Hearing confirmed that SMCV conducted adequate due diligence.[315] Ms. Torreblanca and Mr. Davenport both testified that SMCV "asked [its] lawyers [] to review whether the Concentrator" "was going to be included in the Stabilization Agreement,"[316] as evidenced by Appendix E of the 2002 Pre-Feasibility Study containing a legal due diligence memo on the Stability Agreement.[317] Contrary to

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309 **Ex. CE-928**, 2002 Pre-Feasibility Study, p. [297] (rows "Base" at "+0%" and "CV Estabilization" present identical net present values, across all concentrator expansion options (columns "Concentrate Option 1," "Concentrate Option 2," and "Concentrate Option 3")); *id.* p. 17 (noting that a 20% stabilized depreciation rate would apply as the "base assumption," which would be "available" with the "stability agreement"); *see also* Tr. 649:17-650:2 (Day 2) (Davenport) (the assumption that the Concentrator was stabilized was "important to the cash flow"); Tr. 2926:9-20 (Day 10) (Claimant's Closing); **CD-11**, Cl. Closing, slides 47-48.

310 Tr. 2926:21-2927:3 (Day 10) (Cl. Closing); **Ex. CE-928**, 2002 Pre-Feasibility Study, pp. [296-297] (listing 140 sensitivities); *see also* Tr. 836:4-837:8, 727:2-9 (Day 3) (Davenport).

311 **Ex. CE-928**, 2002 Pre-Feasibility Study, p. [297].

312 *Cf.* Tr. 3010:1-14 (Day 10) (Resp. Closing).

313 **Ex. CE-928**, 2002 Pre-Feasibility Study, p. [297].

314 *See* Tr. 1706:5-1707:6 (Day 6) (Bedoya).

315 *See* Reply and C-Mem. on Jurisdiction ¶¶ 99-102. *Cf.* Tr. 292:2-8 (Day 1) (Resp. Opening); **RD-7**, Resp. Closing, slides 53-54.

316 Tr. 620:11-18 (Day 2) (Torreblanca); Tr. 832:8-11, 833:21-834:3 (Day 3) (Davenport) (confirming SMCV consulted outside counsel "on all this path to confirmation that the Concentrator would be stabilized").

317 **Ex. CE-928**, 2002 Pre-Feasibility Study, Appendix E ("Review of Stability Agreement by Rodrigo, Elias & Medrano"); *see* Tr. 620:14-18 (Day 2) (Torreblanca); **Ex. CE-1134**, *SMMCV* Tr. 594:10-14 (Davenport).

Peru's complaints, that Freeport invoked privilege over the memo is not a basis for any adverse inferences about its contents—not only because Freeport has every right to invoke privilege, but also because the contemporaneous record clearly shows that the Parties understood that the Concentrator investment would be stabilized.[318]

(d) After completing the 2002 Pre-Feasibility Study, Mr. Davenport was able to "convince" Phelps Dodge—an otherwise "conservative company"—"to do a Feasibility Study" for the Concentrator.[319] The May 2004 Feasibility Study likewise assumed that "no royalties" would apply to the Concentrator until 2013.[320]

65. *Second*, the Hearing confirmed that in light of the heated Royalty Law debates and the resulting "political risk" that the Government would disregard stability agreements, SMCV obtained the DGM's assurance that the Stability Agreement would cover the Concentrator.[321]

(a) Under the Stability Agreement and the Mining Law and Regulations, SMCV was entitled to stability for *any* investments it made in the Cerro Verde Mining Unit during the Agreement's term, irrespective of amount or production capacity.[322] Therefore, as a matter of law, SMCV was not required to obtain additional assurances from the Government that the Concentrator would be covered by the Stability Agreement, nor to amend the Stability Agreement to include the Concentrator, as Peru claims.[323] However, Mr. Davenport explained that in early 2004, the "uptick in the commodity prices" prompted politicians to push for "Royalties on [all] mining companies," irrespective of whether they had stability agreements.[324] Mr. Davenport testified that while he and his

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318 *See* IBA Rules on the Taking of Evidence in International Arbitration (17 December 2020), Article 9(2)(b) (Tribunals "shall, at the request of a Party," "exclude from evidence" any documents due to privilege); *supra* ¶¶ 60-64. *Cf.* **RD-7**, Resp. Closing, slide 53.

319 Tr. 736:7-15, 737:12-17 (Day 3) (Davenport); *see also* **CWS-5**, Davenport I, ¶ 25.

320 **Ex. CE-20**, Fluor Canada Ltd., Feasibility Study: Cerro Verde Primary Sulfide Project (May 2004), Vol. IV, pp. 14-16; *see also* **CWS-16**, Davenport II, ¶ 10; Memorial ¶ 96.

321 Tr. 795:20-21 (Day 3) (Davenport) ("$850 million in Perú . . . is clearly political risk."); *see also* Memorial ¶¶ 106-10; Reply and C-Mem. on Jurisdiction ¶¶ 90-92; **CWS-3**, Chappuis I, ¶¶ 50-55; **CER-5**, Vega I, ¶¶ 62-64; **CWS-11**, Torreblanca I, ¶¶ 25-27; **CWS-21**, Torreblanca II, ¶¶ 16-17; **CWS-5**; Davenport I, ¶ 39; **CWS-16**, Davenport II, ¶ 16.

322 *See supra* §§ II.A-B; *see also* Tr. 1022:2-9 (Day 4) (Chappuis) ("The Beneficiation Concession that Cerro Verde had was fully covered . . . no legal provision imposed a restriction . . . to extend the capacity or the surface area.").

323 *See also* Reply and C-Mem. on Jurisdiction ¶¶ 90-91. *Cf.* **RD-7**, Resp. Closing, slide 35.

324 Tr. 650:3-10 (Day 2) (Davenport); *see also* Tr. 561:14-17 (Day 2) (Torreblanca) ("political environment had changed and the Royalty Law was being approved and many individuals requested for it to be applied to companies with stability agreements."); Memorial ¶ 100 (citing **CWS-7**, Flury I, ¶¶ 30-31).

colleagues understood "all along, for various reasons, [that] the Concentrator would be stabilized," "the political stuff going on in Congress made everybody nervous" and Phelps Dodge pushed for "more clarification or certainty" from the Government that it would honor its contractual obligation to stabilize the Concentrator investment.[325]

(b) SMCV thus held meetings with the DGM, the competent Government authority, to confirm precisely that. As Mr. Tovar testified, pursuant to Article 101 of the Mining Law, the DGM was the authority for "overseeing and auditing mining activities" and "ensuring compliance with Stability Agreements."[326] At the *SMMCV* hearing, Mr. Polo testified that "[f]ollowing up on the Stability Agreements was not part of [his] function,"[327] consistent with Ms. Torreblanca's testimony that, whenever SMCV approached Mr. Polo to discuss the Concentrator investment, he "always" "refer[red] [SMCV] to the DGM as the competent agency."[328] SMCV's reliance on the DGM's confirmation was thus anything but "reckless," as Peru claims.[329]

(c) At these meetings, the DGM, SMCV, and Phelps Dodge discussed options for confirming the Stability Agreement would cover the Concentrator, including by amending the Agreement through the mechanism in Clause 3 to include a new beneficiation concession for the Concentrator.[330] As Ms. Chappuis, Ms. Torreblanca, and Mr. Davenport testified, the DGM ultimately informed SMCV that "there was no need" to amend the Stability Agreement and suggested that SMCV instead expand the already stabilized Beneficiation Concession to include the Concentrator.[331] By including the Concentrator in the

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325 Tr. 789:16-20 (Day 3) (Davenport); *see also* Tr. 511:18-512:11, 515:3-7 (Day 2) (Torreblanca); Tr. 557:15-18 (Torreblanca) ("The Royalty Law was passed in June 2004. That's the reason why we were concerned and we approached them, and when we approached them to ask, they said, 'Well, yes, you can include it expressly.'").

326 Tr. 1508:17-22, 1328:9-18 (Day 5) (Tovar); *see also* **CA-448**, Mining Law, Article 101(a), (e), (j) (outlining the DGM's scope of authority).

327 **Ex. CE-1137**, *SMMCV* Tr. 1240:1-2 (Polo).

328 Tr. 498:18-20 (Day 2) (Torreblanca); **CWS-21**, Torreblanca II, ¶ 19 ("[E]ach time [she] approached Mr. Polo to understand his concerns, he would refer [her] to the DGM as the competent agency.").

329 *See* Reply and C-Mem. on Jurisdiction ¶¶ 90, 93-96, 102; Memorial ¶¶ 370, 408. *Cf.* **RD-7**, Resp. Closing, slides 44-51.

330 *See* Tr. 1009-1012 (Day 4) (Chappuis); *see also* **Ex. CE-1134**, *SMMCV* Tr. 498:9-500:3 (Torreblanca); Reply and C-Mem. on Jurisdiction ¶ 90; **CWS-5**, Davenport I, ¶ 36; **Ex. CE-450**, SMCV, Past, Present, Future (July 2004); **Ex. CE-453**, SMCV, Justification of Request for Formal Inclusion of Benefit Concession in the Current Stability Agreement (August 2004), p. 15.

331 Tr. 1011-1012 (Day 4) (Chappuis); *see also* **Ex. CE-1135**, *SMMCV* Tr. 874:7-20 (Chappuis); **CWS-21**, Torreblanca II, ¶¶ 15-16; Reply and C-Mem. on Jurisdiction ¶ 84(a).

Beneficiation Concession, the DGM therefore expressly confirmed that the Stability Agreement covered the Concentrator.[332] As Ms. Chappuis testified, the DGM's opinion was consistent with MINEM practice and was "based on the consensus of [her] group of attorneys and engineers."[333] Mr. Davenport testified that a "lightbulb went off" for him when the DGM made this suggestion because "that's what [SMCV] did" for prior investments not included in the 1996 Feasibility Study that had enjoyed stability.[334]

(d) After receiving the DGM's confirmation, SMCV and Phelps Dodge retained the assumption that the Stability Agreement would cover the Concentrator in the September 2004 Feasibility Study update.[335] In October 2004, MINEM formally approved the expansion of the stabilized Beneficiation Concession, providing express written confirmation that the Concentrator formed part of SMCV's stabilized Mining Unit.[336] There is thus no merit to Peru's argument that SMCV failed to obtain written confirmation that the Stability Agreement would apply to the Concentrator—the expansion of the stabilized Beneficiation Concession was precisely that.[337]

66. *Finally*, the DGM's confirmation is well-documented in the contemporaneous record.[338]

(a) The August 2004 draft presentation prepared by Phelps Dodge for its Board of Directors reflects what Mr. Davenport testified "would have been" his "precise words" concerning the "most recent developments regarding[] the [S]tability [A]greement"—"[MINEM] has proposed a process to include the [Concentrator] in the facility *covered* by the existing

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332 *See* Tr. 849:3-17 (Day 3) (Chappuis); **CWS-14**, Chappuis II, ¶ 38; *see also* Tr. 85:7-86:20 (Cl. Opening); **CD-1**, Cl. Opening, slides 108-109; Reply and C-Mem. on Jurisdiction ¶¶ 90, 102.

333 Tr. 989:4-5 (Day 4) (Chappuis); *see also* Tr. 1512:21-1513:3 (Day 5) (Tovar) (confirming DGM made decisions "as a team"); **Ex. RE-198**, Email from Maria Chappuis to Rosario Padilla, Jaime Chávez Riva Gálvez, Oswaldo Tovar, and Luis Saldarriaga Colona, and Luis Panizo, "Meeting with Cerro Verde – New CET" (11 June 2004).

334 Tr. 654:1-655:59 (Day 2) (Davenport); Tr. 812:14-22 (Day 3) (Davenport); *see also* **Ex. CE-1134**, *SMMCV* Tr. 594:4-9 (Davenport); Memorial ¶ 87(b); Reply and C-Mem. on Jurisdiction ¶¶ 90(d), 91(c).

335 **Ex. CE-459**, Fluor, SMCV Primary Sulfide Project Feasibility Study Project Update (September 2004), p. 46 ("[N]o royalties will be assessed during the stability agreement" through 2013); *see also* Memorial ¶¶ 111, 117.

336 *See* **Ex. CE-476**, MINEM, Report No. 784-2004-MEM-DGM/PDM and Directorial Order No. 1027-2004-MEM-DGM/PDM (26 October 2004); **Ex. CE-1134**, *SMMCV* Tr. 523:19-21 (Torreblanca) ("[D]irectorate resolution that resulted in the Beneficiation Concession [expansion] was the written guarantee that we were looking for.").

337 *Cf.* **RD-7**, Resp. Closing, slides 37-43.

338 *See* Reply and C-Mem. on Jurisdiction ¶¶ 90(f), 101.

[S]tability [A]greement" and "[t]his will shield the [Concentrator] from the royalty."[339] The September 2004 materials Phelps Dodge provided to its Board to consider before approving the Concentrator investment expressed the same conclusion.[340]

(b) Also in September 2004, during a due diligence meeting with Sumitomo Metal Mining, Mr. Brunk, then-Vice President and Assistant General Counsel of Phelps Dodge, confirmed that the DGM suggested that SMCV "apply for a Beneficiation Concession . . . expansion" to ensure that the "sulfide expansion . . . would be entitled to receive the same tax treatment that [SMCV] received under the stability agreement" "because the S/A [] applies to any operation conducted pursuant to a beneficiation concession."[341]

(c) In March 2005, *after* SMCV began construction of the Concentrator, Mr. Conger of Phelps Dodge unequivocally stated at the PDAC Conference that after "[e]xtensive interaction with [the] government," the "Stability contract provide[d] certainty to make $850 million investment decision."[342] Mr. Conger publicly delivered this message before one of the largest mining industry conferences, on the invitation of MINEM, at a panel organized by MINEM, and in the presence of then-Vice-Minister Polo.[343] It strains credulity that Mr. Conger would deliver such a message if SMCV had not in fact received the confirmation it sought from the Government.

(d) At the Hearing, Peru had nothing to say about the contemporaneous documents reflecting the DGM's confirmation. Instead, Peru argued that the DGM's 8 September 2003 Report in response to SMCV's inquiry about the profit reinvestment benefit "expressly state[d]" that the Stability Agreement "appl[ied] only 'to the Cerro Verde Leaching Project and not

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339 Tr. 807:1-21 (Day 3) (Davenport); **Ex. RE-324**, Email from Dennis Bartlett to Timothy Snider, H. (Red) Conger, and Lowell Shonk, "CV Sulfide Board Update" (Attaching Draft Presentation "PDMC Growth Projects, Cerro Verde Sulfide Update") (25 August 2004), pp. 1, 7.

340 **Ex. RE-314**, Phelps Dodge Corporation, "Cerro Verde Sulfide Project, Background Materials," (22 September 2004), p. 122 ("The application to include the [Concentrator] in the [B]eneficiation [C]oncession *covered* by the existing [S]tability [A]greement" would "avoid any royalties for the life of the original [A]greement.").

341 **Ex. CE-1136**, *SMMCV* Tr. 1023:18-1026:7 (Kawaguchi).

342 **Ex. CE-945**, Phelps Dodge, Peru and Phelps Dodge: Partners in Progress (9 March 2005), pp. 12, 16.

343 **Ex. RE-4**, Email from Alicia Polo y La Borda to Oswaldo Tovar, "Aide Memoire-meetings.doc" (with attachment) (March 4, 2005)**; Ex. RE-5**, Email from César Zegarra to Oswaldo Tovar and César Polo, "Aide Memoire" (with attachment) (March 8, 2005); Tr. 1561:18-1562:1 (Day 6) (Tovar) (explaining that Mr. Polo was present during the 9 March session of PDAC); Tr. 1316:20-1317:4 (Day 5) (Polo) (acknowledging awareness of DGM's confirmation).

to the company.'"[344] Peru's argument is wrong and contradicts the authoritative testimony of Ms. Chappuis, who signed the Report as then-Director General of Mining, explaining that it was issued on the "clear" understanding that the "Stability Agreement [identified by its referential name, 'Cerro Verde Leaching Project,'] applied to all investments that SMCV made in the Cerro Verde mining unit," including the Concentrator.[345] It also contradicts the MEF's recognition that the Stability Agreement was simply named ("*denominado*") the "Leaching Project" in its approval of the benefit.[346] Peru also mischaracterized Ms. Chappuis's June 2004 email to other DGM officials inquiring about "Cerro Verde['s] . . . New SA" and whether it was "legal" as reflecting uncertainty about whether the Stability Agreement covered the Concentrator.[347] But as Ms. Chappuis explained, the email reflects her initial and mistaken assumption that SMCV was seeking a "New S[tability] A[greement]" for the Concentrator.[348] Once it was clear that SMCV simply sought confirmation that the existing Stability Agreement would apply, the DGM unequivocally confirmed that the expansion of the stabilized Beneficiation Concession would include the Concentrator under the scope of the Stability Agreement.[349]

C. THE HEARING CONFIRMED THAT PERU ACTED INCONSISTENTLY AND NON-TRANSPARENTLY

67. The Hearing confirmed that after SMCV received the profit reinvestment benefit approval and began building the Concentrator, Peru adopted its novel and restrictive interpretation in response to unrelenting political pressure to extract additional revenue from SMCV. The Government then deliberately withheld its position from SMCV.

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344 **RD-7**, Resp. Closing, slide 40 (citing **Ex. CE-398**, MINEM, Report No. 509-2003-MEM-DGM-TNC (8 September 2003)).

345 **CWS-3**, Chappuis I, ¶ 45; *see also* Tr. 937:19-938:21 (Day 3) (Chappuis); Reply and C-Mem. on Jurisdiction ¶ 96; **CWS-14**, Chappuis II, ¶ 36.

346 **Ex. CE-22**, MEF, Report No. 209-2004-EF/66.01 (3 December 2004), ¶ 5.

347 *Cf.* **RD-7**, Resp. Closing, slide 47 (citing **Ex. RE-198**, Email from Maria Chappuis to Rosario Padilla, Jaime Chávez Riva Gálvez, Oswaldo Tovar, and Luis Saldarriaga Colona, and Luis Panizo, "Meeting with Cerro Verde – New CET" (11 June 2004)).

348 Tr. 1005:21-1007:9 (Day 4) (Chappuis) (discussing **Ex. RE-198)**.

349 *See supra* ¶¶ 65-66.

1. Peru Arbitrarily Changed Its Position on the Scope of SMCV's Stability Guarantees in the Face of Sustained Political Pressure

68. It is undisputed that in the early 2000s, the Government became the target of intense political pressure to increase revenue collection and disregard stability agreements.[350] Against this background, Peru adopted its novel and restrictive position, capitulating to targeted political pressure against SMCV.[351] Neither Peru's counsel, nor its witnesses, have ever denied Freeport's factual description of the political context at the time SMCV made the Concentrator investment.

(a) This political pressure first culminated in the adoption of the Royalty Law, which proved to be a disappointment, as the Government initially recognized that it did not apply to companies with stability agreements.[352] For example, in April 2005, Mr. Isasi issued a report confirming that the Royalty Law would not apply to "the mining projects [*i.e.*, mining units]" or "the *mining concessions* of . . . the titleholder," provided that they are "part of a project set out in a stability agreement signed prior to the enactment of [the] Law," without distinguishing between specific "investment projects."[353] Politicians thus began pushing the Government to disregard stability agreements so that *all* mining companies, including SMCV, would be required to pay royalties.[354]

(b) In the midst of this political climate, SMCV made one of the largest mining investments in Peru's history with the Concentrator, partially financed with the profit reinvestment benefit.[355] This infuriated politicians as they were eager to extract more revenues from SMCV and even publicly stated, as Mr. Davenport put it: "I don't care if these mining companies are stabilized."[356] Motivated by short-term gains, politicians thus began

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350 *See* Tr. 91:11-92:3 (Day 1) (Cl. Opening); Tr. 306:6-307:2 (Day 1) (Resp. Opening) (acknowledging the political pressure); **RD-1**, Resp. Opening, slide 135 (same).

351 *See* Memorial ¶¶ 374-83; Reply and C-Mem. on Jurisdiction ¶¶ 148-55.

352 Tr. 93:21-94:6 (Day 1) (Cl. Opening); *id.* Tr. 91:11-18; **CD-1**, Cl. Opening, slides 118-119; *see also* **CA-6**, Royalty Law No. 28258 (24 June 2004), Article 2; Tr. 593:13-20, 635:17-636:11 (Day 2) (Davenport); Memorial ¶¶ 99, 104, 327(a); Reply and C-Mem. on Jurisdiction ¶ 68; **CWS-7**, Flury I, ¶¶ 26-28.

353 **Ex. CE-494**, MINEM, Report No. 153-2005-MEM/OGAJ (14 April 2005), ¶ 17; *see also* **CD-1**, Cl. Opening, slides 49-50; **CD-11**, Cl. Closing, slides 85-86. *Cf.* **RD-7**, Resp. Closing, slide 67.

354 Tr. 93:5-20 (Day 1) (Cl. Opening); *see* **CWS-11**, Torreblanca I, ¶ 38; **RWS-2**, Witness Statement of Juan Felipe Guillermo Isasi Cayo (18 February 2022) ("Isasi I"), ¶ 39 (congressmen argued that SMCV should "pay royalties on the Leaching Project").

355 Tr. 95:1-15 (Day 1) (Cl. Opening); *see also* Memorial ¶¶ 115-117; **Ex. CE-505**, *"In Two Years We Will Triple Our Production,"* EL COMERCIO (22 August 2005), p. 2; **Ex. CE-23**, MEF, Ministerial Resolution No. 510-2004-MEM/DM (9 December 2004) (granting the profit reinvestment benefit).

356 Tr. 650:11-17 (Day 2) (Davenport); *see also* Memorial ¶¶ 100-103, 125; Reply and C-Mem on Jurisdiction ¶ 149.

targeting the Government, in particular MINEM, to act against SMCV—this campaign succeeded in September 2005, when then-MINEM Minister Sánchez Mejía announced to the press with no legal justification that SMCV would pay royalties on the Concentrator.[357] Ultimately, however, the politicians' ire was misdirected—SMCV's yearly average tax payments more than *tripled* after the Concentrator investment.[358]

(c) In the summer of 2006, local Arequipa politicians joined the political campaign against SMCV.[359] In June 2006, as thousands of Arequipeños threatened mass regional protest, Mr. Isasi issued the June 2006 Report and SUNAT issued the June 2006 Internal Report, adopting the novel and restrictive position that stability guarantees applied only to the feasibility study's initial investment, finally providing an alleged legal basis for Minister Sánchez Mejía's position that the Stability Agreement did not cover the Concentrator.[360]

(d) Clearly motivated by political pressure, Mr. Isasi's June 2006 Report and the SUNAT June 2006 Internal Report departed from MINEM's and SUNAT's prior application of stability guarantees to SMCV and other mining companies such as Consorcio Minero Horizonte, Milpo, Yanacocha, and Tintaya.[361] At the Hearing, both Mr. Isasi and Ms. Bedoya conceded that they ignored the Government's prior practice when adopting their novel and restrictive interpretations: Mr. Isasi admitted that he "did not review Resolutions by the Mining Council" or ever "consider or look at the practice of the Mining Council" before drafting the June 2006 Report.[362] Ms. Bedoya conceded that she

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357 *See* Tr. 98:10-102:16 (Day 1) (Cl. Opening); **CD-1**, Cl. Presentation, slides 126-32 (citing **Ex. CE-511**, Minister: Cerro Verde Expansion Subject to Royalty, BUSINESS NEWS AMERICAS (20 September 2005)); *see also* Memorial ¶¶ 130-37; Reply and C-Mem on Jurisdiction ¶ 150.

358 **CWS-21**, Torreblanca II, ¶ 49; *see also* **CWS-16**, Davenport II, ¶ 12 (the Concentrator investment brought "economic benefits the Government had long sought to achieve through a primary sulfide expansion," including "increase[s] in . . . the Government's collection of fiscal revenues").

359 *See* **CD-1**, Cl. Opening, slide 135 (citing **Ex. CE-535**, *Cerro Verde Evades Tax Payments by Relying on a Law Repealed in 2000*, LA REPÚBLICA (19 June 2006); **CWS-11**, Torreblanca I, ¶ 49.

360 Tr. 104:18-106:3 (Day 1) (Cl. Opening); **CD-1**, Cl. Opening, slides 135-138; *see also* Reply and C-Mem on Jurisdiction ¶ 150(xxxvi)-51; Memorial ¶¶ 135-37, 142; **Ex. CE-534**, MINEM, Report No. 156-2006-MEM/OGJ (16 June 2006); **Ex. RE-179**, SUNAT, Report on the Application of the Agreement of Guarantees and Measures for the Promotion of Investments and the Mining Royalty with respect to the Expansion of Cerro Verde's Current Operations – Primary Sulfides Project (June 2006); **Ex. CE-952**, Email from Felipe Isasi to Percy Olivas Lazo, Oswaldo Tovar, and Jamie Chavez Riva (19 September 2005, 10:00 AM), Javier Diez Canseco Cisneros, Cerro Verde and its Implications for Arequipa (September 2005), pp. 1, 27, 31; **Ex. CE-511**, Minister: Cerro Verde Expansion Subject to Royalty, BUSINESS NEWS AMERICAS (20 September 2005).

361 *See infra* § III; Memorial ¶¶ 313-19; Reply and C-Mem. on Jurisdiction ¶¶ 63-69.

362 Tr. 1218:4-15 (Day 4) (Isasi).

"ha[d] n[ever] participated in other cases" involving other mining companies before drafting the SUNAT June 2006 Internal Report.[363] Peru had no response at the Hearing.

2. Peru Withheld Its Novel and Restrictive Interpretation from SMCV

69. Peru repeatedly concealed its novel and restrictive interpretation from SMCV and Peru's witnesses had no credible justification for the Government's lack of transparency.

i. MINEM Did Not Inform SMCV of Its Changed Position

70. The Hearing confirmed that MINEM never informed SMCV that stability guarantees were allegedly limited to investment projects.

71. *First*, the hearing confirmed that MINEM did not inform SMCV of its novel and restrictive position at the March 2004 Mining Royalties Forum.[364] Mr. Polo conceded that he *never* "refer[red] to the [term] Investment Project" at the Forum, much less stated that "Stability Guarantees . . . exempted from Royalties" are limited to "investment projects."[365] Mr. Polo also acknowledged that the slides accompanying his remarks listed stability agreements in relation to their "*mining unit[s]*," including "Cerro Verde 1, 2, and 3."[366] Thus, if the Royalties Forum could have put SMCV on notice of any Government interpretation, it would have been of the Government's consistent practice of applying stability guarantees to entire mining units. But Mr. Polo admitted that the event was not public because it was for "members of Congress and their aid[e]s."[367] The Government never informed SMCV of the Forum or invited it to attend.

72. *Second*, Mr. Polo also conceded that he did not inform SMCV that stability guarantees were allegedly limited to "investment projects" "during the 2004-2005 period, and, in particular, on the eve of the enactment of the Mining Royalty Law," when "Cerro Verde officials were constantly visiting MINEM."[368] Although Mr. Polo admitted that he "w[as] aware of Cerro Verde's intention to invest in a Concentrator," that the DGM confirmed that the Stability

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363 Tr. 1761:3-1762:6 (Day 6) (Bedoya); **RWS-11**, Bedoya II, ¶ 40.

364 *See* Tr. 108:10-109:3 (Day 1) (Cl. Opening); **CD-1**, Cl. Opening, slide 144; Reply and C-Mem. on Jurisdiction ¶ 159.

365 Tr. 1429:14-21 (Day 5) (Polo).

366 Tr. 1430:2-9 (Day 5) (Polo); **Ex. CE-1137**, *SMMCV* Tr. 1318:2-17 (Polo); **Ex. CE-19**, "Evaluación de Aplicación de Regalías Mineras" (11 March 2004), slide 10.

367 Tr. 1420:16-21 (Day 5) (Polo).

368 Tr. 1327:6-16 (Day 5) (Polo).

Agreement "applied to the sulfide project," and that he had ample opportunities to inform SMCV of his alleged opinion to the contrary, he never did so.[369] Instead, as Ms. Torreblanca testified, Mr. Polo declined to discuss the matter with SMCV and directed SMCV to the DGM, confirming that the DGM had sole authority to determine whether the Concentrator was stabilized.[370]

73. *Third*, the Government did not inform SMCV of its novel interpretation at the March 2005 PDAC Conference and Mr. Tovar's testimony to the contrary is not credible.[371]

(a) Mr. Tovar's selective disclosure of contemporaneous emails is highly suspect. At the Hearing, Mr. Tovar testified that he "copied the entire hard drive . . . from MINEM," yet admitted at the *SMMCV* hearing that instead of turning *all* his emails over to Peru's counsel, he cherry-picked a subset after running selective searches.[372] Yet, despite Mr. Tovar's self-selected record, he still failed to present a single email showing "what position the DGM or MINEM had with regard to Cerro Verde's Stability Agreement."[373]

(b) Mr. Tovar's unsupported testimony about when MINEM allegedly informed SMCV and Phelps Dodge that "the Concentrator[] would have to pay royalties" is inconsistent and contradicted by the record.[374] For instance, without mentioning Mr. Polo, Mr. Tovar first testified that "we [MINEM representatives], told [Mr. Conger] that . . . the Concentrator project would have to pay royalties" at an 8 March 2005 lunch.[375] At the Hearing, Mr. Tovar suddenly remembered that it was Mr. Polo who actually informed Mr. Conger of MINEM's alleged opinion at the lunch.[376] Yet, Mr. Polo apparently has no recollection of doing so, as he never testified about this. Mr. Tovar also claimed that Mr. Conger "stayed silent" and was "not surprised," despite receiving such shocking news.[377] But it is

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369 Tr. 1326:3-6, 1312:14-1313:1 (Day 5) (Polo).

370 Tr. 498:22-499:1 (Day 2) (Torreblanca); *see supra* ¶ 65(b) (Mr. Tovar and Mr. Polo testifying that the DGM had sole authority to determine whether a particular investment was stabilized).

371 *See* Tr. 110:20-112:6 (Day 1) (Cl. Opening); **CD-1**, Cl. Opening, slide 144-48; Reply and C-Mem. on Jurisdiction ¶ 73.

372 Tr. 1584:4-10 (Day 6) (Tovar); **Ex. CE-1138**, *SMMCV* Tr. 1343:14-1345:1 (Tovar).

373 Tr. 1584:6-10 (Day 6) (Tovar); *see also id.* 1585:2-7 (acknowledging that "[t]here's not a single email that you could find that would anywhere state that Cerro Verde's Concentrator would not be covered by Stability Guarantees").

374 *Cf.* **RWS-3**, Tovar I, ¶ 55; *see* Reply and C-Mem. on Jurisdiction ¶ 73.

375 **RWS-3**, Tovar I, ¶ 55.

376 *See* Tr. 1565:12-1567:8 (Day 6) (Tovar); **Ex. CE-1138**, *SMMCV* Tr. 1455:17-1456:21, 1457:7-9 (Tovar).

377 **Ex. CE-1138**, *SMMCV* Tr. 1461:3-6, 1490:12-14 (Tovar); Tr. 1588:11-16 (Day 6) (Tovar).

not credible that Mr. Conger would stay silent given his presentation the next day.

(c) On 9 March 2005, Mr. Conger made a presentation at PDAC on the invitation of MINEM "to promote Perú as a destination for mining investment,"[378] which recounted that Phelps Dodge had "extensive interaction with the Government" to obtain "certainty of Stability Contract."[379] The presentation concluded that the "Stability contract, provide[d] certainty to make [the] [US]$850 million investment."[380] Remarkably, despite Mr. Conger's unequivocal language, Mr. Tovar claimed that he did not understand the presentation to convey "certainty that [SMCV] w[as] not going to pay Royalties."[381]

(d) Mr. Tovar then testified that Mr. Conger was actually "very surprised" and "very worried" when Mr. Tovar allegedly informed him of the Government's position after this presentation.[382] Yet, Mr. Tovar provided no explanation for why Mr. Conger—who was allegedly "not surprised" to hear MINEM's position just the day before—would have suddenly been "very surprised" and "worried" by a second airing of this news.[383] Nor has Mr. Tovar or Peru provided a shred of evidence in support of these farfetched claims.

74. *Finally*, the Hearing also confirmed that the Government unjustifiably never informed SMCV of its novel and restrictive interpretation at the 23 June 2006 Roundtable Discussion.[384]

(a) MINEM did not inform SMCV at the Roundtable Discussions that the Stability Agreement allegedly did not cover the Concentrator and nothing in the record supports Mr. Tovar's testimony to the contrary.[385] For instance, Mr. Isasi, whom Mr. Tovar insists

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378 Tr. 1551:6-9 (Day 6) (Tovar).

379 **Ex. CE-945**, Phelps Dodge, Peru and Phelps Dodge: Partners in Progress (9 March 2005), p. 16; *see also* Tr. 111:3-8 (Day 1) (Cl. Opening); **CD-1**, Cl. Opening, slide 148; **Ex. CE-1138**, *SMMCV* Tr. 1475:2-13 (Tovar).

380 **Ex. CE-945**, Phelps Dodge, Peru and Phelps Dodge: Partners in Progress (9 March 2005), p. 16; *see also* **Ex. CE-1138**, *SMMCV* Tr. 1480:17-1481:1 (Tovar) (Question from Arbitrator Garibaldi) ("Mr. Conger made a distinction between the reinvestment of profit benefit and the certainty of Stability Contract . . . by saying 'certainty of stability contract,' what else was he thinking about?").

381 Tr. 1593:11-1514:14 (Day 6) (Tovar); *see also* **Ex. CE-1138**, *SMMCV* Tr. 1481:2-13 (Tovar) (Mr. Tovar "did not understand that [Mr. Conger] was talking about the new plant [the Concentrator] not being subject to Royalties").

382 Tr. 1604:9-1606:2 (Day 6) (Tovar); *see also* **Ex. CE-1138**, *SMMCV* Tr. 1486:5-11, 1487:13-16, 1490:1-4 (Tovar).

383 **Ex. CE-1138**, *SMMCV* Tr. 1490:12-14 (Tovar) (Question from President Blanch and Response).

384 *See* Tr. 112:7-114:4 (Day 1) (Cl. Opening); **CD-1**, Cl. Opening, slides 149-51; Reply and C-Mem. on Jurisdiction ¶¶ 158, 160.

385 *See* Tr. 1585:2-6 (Day 6) (Tovar) (acknowledging that "[t]here's not a single email that you could find that would anywhere state that Cerro Verde's Concentrator would not be covered by Stability Guarantees"); **Ex. CE-1138**, *SMMCV* Tr. 1431:19-1432:15, 1439:5-1440:7 (Tovar).

gave a presentation at the Roundtable Discussions stating that the Concentrator was not stabilized, does not "remember" the presentation.[386] As Ms. Torreblanca testified, if what Mr. Tovar asserts "w[as] true, it would have been a headline in Arequipa."[387] Yet, none of the Roundtable Discussion minutes or detailed press reports mentioned this point.[388]

(b) To the contrary, in the subsequent Roundtable Discussion sessions, politicians publicly observed that SMCV "was legally exempt from paying Royalties" and "demanded that the Government order the payment of the Mining Royalties of Cerro Verde I and II [the Concentrator]."[389] When confronted with this inconsistency at the *SMMCV* hearing, Mr. Tovar was unable to provide a direct answer.[390] Instead, he evaded the question, oddly claiming that MINEM was "very open, transparent, clear . . . . [t]hat's why they never sued [us] as public officer[s]" in a constitutional denunciation proceeding.[391]

ii. SUNAT Did Not Inform SMCV of Its Changed Position

75. SUNAT similarly never informed SMCV of its novel and restrictive position, despite also having ample and natural opportunities to do so. At the Hearing, just like in its written pleadings, Peru provided no real explanation for SUNAT's repeated failures of transparency.

76. *First*, the Hearing confirmed that SUNAT had not yet adopted its novel and restrictive position at the March 2005 meeting with Ms. Torreblanca to discuss the Stability Agreement and the Concentrator investment, despite claiming that the Government had always maintained this position—and that even if it had, withholding it was clearly unreasonable and unfair.[392]

(a) On 4 March 2005, SMCV sent a letter to Mr. Cruz explaining that royalties "[were] not

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386 Tr. 1601:15-1603:3 (Day 6) (Tovar); **RWS-2**, Isasi I, ¶ 65.

387 **Ex. CE-1134**, *SMMCV* Tr. 575:16-576:3 (Torreblanca).

388 *See* **Ex. CE-537**, Congress, Pro-Investment Commission, Minutes of the Session of 23 June 2006; **Ex. CE-538,** *Congressional Pro-Investment Commission Seeks Solution to Demand Regarding Payment of Taxes of the Cerro Verde Company*, EL HERALDO (23 June 2006); **Ex. CE-540**, *Arequipa and Cerro Verde Authorities Seek Solutions*, EL HERALDO (28 June 2006); *see also* Reply and C-Mem. on Jurisdiction ¶ 158(g).

389 **Ex. CE-1138**, *SMMCV* Tr. 1448:21-1449:3, 1442:14-1443:13 (Tovar); **Ex. CE-540**, *Arequipa Authorities and Cerro Verde Mining Seek Solutions*, EL HERALDO (28 June 2006), p. 2; *see also* **Ex. CE-538**, *Congressional Pro-Investment Commission Seeks Solution to Demand Payment of Taxes from Cerro Verde*, EL HERALDO (23 June 2006); Reply and C-Mem. on Jurisdiction ¶ 158(g).

390 **Ex. CE-1138**, *SMMCV* Tr. 1449:6-9, 1450:4-1451:4 (Tovar).

391 **Ex. CE-1138**, *SMMCV* Tr. 1446:1-10 (Tovar).

392 Tr. 1847:15-20, 1865:1-15 (Day 6); *see also* Reply and C-Mem. on Jurisdiction ¶ 158(a).

applicable to Cerro Verde by application of the . . . Stability Agreement."[393] Shortly thereafter, Mr. Cruz met with Ms. Torreblanca and she explained that SMCV did not have to pay royalties because the Stability Agreement covered the Cerro Verde Mining Unit.[394] At the Hearing, Mr. Cruz confirmed twice that when he met with Ms. Torreblanca, he knew SMCV was building the Concentrator—one of the biggest mining investments in Peru's history.[395] If SUNAT had truly adopted its restrictive position at the time, the fair and equitable thing for Mr. Cruz to do would have been to alert Ms. Torreblanca that the Stability Agreement would not cover the Concentrator.[396] Yet, Mr. Cruz confirmed his silence in response to Arbitrator Tawil's question, "how could it be that at a meeting where your team is [in] attendance . . . you kept quiet and didn't say anything."[397]

(b) Contrary to his testimony that "the position of SUNAT was clear" since 2002, Mr. Cruz admitted that his understanding was *not* "crystal clear" on the scope of stability guarantees when he met with Ms. Torreblanca in March 2005.[398] That admission is fatal to Peru's argument that SUNAT consistently applied stability agreements to "investment projects": if SUNAT had maintained that position since 2002, then Mr. Cruz, the highest authority for SUNAT Arequipa, surely would have been aware of it.[399]

77. *Second*, even if SUNAT had established its restrictive position as of 2002 and Mr. Cruz and his team somehow overlooked it, Mr. Cruz could have at least told Ms. Torreblanca that he did not have a clear position on the matter—an omission he failed to justify at the Hearing.[400]

(a) Mr. Cruz claimed that "it would not have been appropriate to hold [a] discussion [about the Stability Agreement's scope] without carrying out the . . . audit proceedings provided

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393 **Ex. CE-486**, SMCV, Letter No. SMCV-AL-279/2005 to SUNAT (4 March 2005).

394 Tr. 1841:18-1842:8 (Day 6) (Cruz); **Ex. CE-1138**, *SMMCV* Tr. 1666:6-13 (Cruz); *see also* **CWS-11**, Torreblanca I, ¶¶ 31-32; **RWS-7**, Witness Statement of Colón Haraldo Cruz Negrón (18 February 2022) ("Cruz I"), ¶ 17; **RWS-14**, Second Witness Statement of Colón Haraldo Cruz Negrón (16 September 2022) ("Cruz II"), ¶ 22.

395 Tr. 1842:9-22, 1846 (Day 6) (Cruz); **Ex. CE-1138**, *SMMCV* Tr. 1667:7-16 (Cruz); *see also* **RWS-7**, Cruz I, ¶ 12; **RWS-14**, Cruz II, ¶¶ 11, 21.

396 *See* **Ex. CE-1138**, *SMMCV* Tr. 1677:2-7 (Cruz); *see also* Reply and C-Mem. on Jurisdiction ¶ 158(a).

397 Tr. 1846:9-17 (Day 6) (Cruz); *see also* **CWS-21**, Torreblanca II, ¶¶ 28-32.

398 Tr. 1829:15-1831:10 (Day 6) (Cruz).

399 *Cf. e.g.*, Counter-Memorial ¶ 203. *But see* Tr. 1831:5-1832:5, 1845-1846 (Day 6) (Cruz); *id*. 1863:16-20.

400 **Ex. CE-1138**, *SMMCV* Tr. 1675:10-13 (Cruz) (Question from President Blanch) ("Mr. Cruz do you think you could have said to Ms. Torreblanca 'this is not something that we yet have a firm view on with regard to whether the Royalties applied to the Concentrator Plants.'").

for in the regulations"; and that "the obligation [to pay royalties] was not yet enforceable [as] the Concentrator Plant" was not yet operating.[401] But in June 2006, when Ms. Bedoya and Mr. Guillén prepared SUNAT's Internal Report at Mr. Cruz's request, there also was no formal "audit proceeding" about the Concentrator, it had not yet commenced operations, and SMCV had no obligation to pay any royalties.[402]

(b) Mr. Cruz's excuse that he did not "recall" discussing the Concentrator at the meeting is also not credible, given his prior testimony that "Ms. Torreblanca requested this meeting for the purpose of discussing the scope of the Stabilization Agreement and reiterating her position that Cerro Verde was not subject to the[] mining royalties."[403] Mr. Cruz also admitted that he knew SMCV was building the Concentrator at the time.[404] Given the investment's size and impact on Arequipa, it is implausible Ms. Torreblanca and Mr. Cruz would have omitted it from this discussion, as Peru claims.[405]

(c) Mr. Cruz also cannot excuse his silence by claiming that SMCV should have requested an advisory opinion under Article 93 of the Tax Code—an approach he never suggested to SMCV.[406] As he conceded, SMCV "could not submit a consultation to SUNAT": only labor organizations, trade groups, or government entities can file such requests.[407] These organizations—which "represent a variety of interests"—"decide[] whether or not the inquiry is made," "not a particular taxpayer."[408] Mr. Cruz also conceded that the scope of advisory opinions is limited to a "general inquiry"—*i.e.*, "Cerro Verde could not [have made] a specific inquiry into its Contract" or asked SUNAT to review any relevant documents.[409] He also admitted that "in 2005, [SUNAT's advisory opinions] were not

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401 **RWS-14**, Cruz II, ¶¶ 11, 25; **Ex. CE-1138**, *SMMCV* Tr. 1590:3-13, 1675:14-18 (Cruz).

402 *See* **RWS-14**, Cruz II, ¶¶ 11, 21, 25; **RWS-11**, Bedoya II, ¶ 11; **Ex. RE-179**, SUNAT June 2006 Internal Report, p. 5; **Ex. CE-1138**, *SMMCV* Tr. 1590:3-13, 1675:18-20 (Cruz).

403 **RWS-7**, Cruz I, ¶ 17 (emphasis added); Tr. 1833:21-1834:2 (Day 6) (Cruz).

404 *See* Tr. 1842, 1851 (Day 6) (Cruz); Tr. 1842:19-22 (Day 6) (Cruz) (Arbitrator Tawil's Question).

405 *Cf.* Rejoinder on the Merits and Reply on Jurisdiction ¶ 995.

406 *See* Tr. 1792:3-20 (Day 6) (Cruz); *see also* **RWS-14**, Cruz II, ¶ 9; **CA-4**, Peruvian Tax Code, Supreme Decree No. 135-99-EF (22 June 2013), Article 93.

407 Tr. 1793:2-20 (Day 6) (Cruz); *see also* **RWS-14**, Cruz II, ¶ 9; **CA-4**, Peruvian Tax Code, Supreme Decree No. 135-99-EF (22 June 2013), Article 93.

408 Tr. 1794:17-1796:16 (Day 6) (Cruz).

409 Tr. 1793:10-14 (Day 6) (Cruz).

binding."[410] So even if SMCV had somehow managed to secure an advisory opinion, SUNAT would not have been required to adhere to it. Moreover, as Ms. Torreblanca explained, obtaining an advisory opinion was not "the practice of the [mining] industry," including because SUNAT frequently failed to respond to inquiries.[411]

78. *Finally*, the Hearing also confirmed that SUNAT *never* shared the June 2006 Internal Report with SMCV.[412] SMCV first learned of the Report when Peru submitted it with its Rejoinder in the *SMMCV* arbitration in September 2022—*over 16 years later*. Ms. Bedoya confirmed that "[SMCV] never [got] to see the Report."[413] In fact, when Arbitrator Tawil asked was the "Internal Report made known to the taxpayers so that the party may question it or respond;" was "[SMCV] provide[d] the Internal Report . . . [with] the assessment;" or was "the taxpayer informed that the Report existed," Ms. Bedoya's response was a flat no.[414]

D. THE HEARING CONFIRMED THAT PERU VIOLATED SMCV'S DUE PROCESS RIGHTS

79. At every stage before the tax administration, Peru violated SMCV's due process rights.

1. Testimony Confirmed That SUNAT Violated SMCV's Due Process Rights

80. Testimony confirmed the shocking revelation from the *SMMCV* hearing that SUNAT "fixed" its position that the Stability Agreement did not cover the Concentrator in the June 2006 Internal Report, well *before* SUNAT was authorized to audit SMCV and without *ever* informing SMCV. Moreover, blatantly conflicted auditors at SUNAT's Audit and Claims Division performed SMCV's audits and decided its reconsideration requests. SUNAT deprived SMCV of its right to independent and impartial consideration of its claims, violating SMCV's due process rights each time the Royalty and Tax Assessments became final and enforceable.

81. *First*, the Hearing confirmed that SUNAT "fixed" its interpretation on the Stability Agreement's scope in the June 2006 Internal Report and that it applied that interpretation during

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410 Tr. 1797:9-12 (Day 6) (Cruz).

411 Tr. 629:18-630:12 (Day 2) (Torreblanca).

412 *See* Tr. 109:15-19 (Day 1) (Cl. Opening); **CD-1**, Cl. Opening, slide 145; Tr. 2950:2-2951:4 (Day 10) (Cl. Closing); **CD-11**, Cl. Closing, slide 127.

413 Tr. 1724:11-1725:4 (Day 6) (Bedoya).

414 Tr. 1723:8-1724:3 (Day 6) (Bedoya).

SMCV's audit and reconsideration proceedings.[415]

(a) Ms. Bedoya reaffirmed her admission from *SMMCV* that the June 2006 Internal Report established SUNAT's "position" on the Concentrator's "tax situation."[416] When questioned by Arbitrator Tawil about whether SUNAT "had already fixed a position" in the Report, Ms. Bedoya categorically confirmed that the Report "already had a legal interpretation of the scope of the benefit[s]" and that SMCV's reconsideration requests were futile because that interpretation "was not going to change over time."[417]

(b) Ms. Bedoya similarly conceded that even though it dictated the result for each of SUNAT's decisions against SMCV, the Report was "not part of any administrative proceeding" and that "there was no meeting with [SMCV]" regarding the Report.[418] Rather, SUNAT prepared it outside of any audit or reconsideration request in which SMCV could have explained its position, and "when the [Concentrator] was not yet up and running"—even before SMCV had an obligation to pay royalties on the Concentrator and SUNAT had legal "authority to audit" royalties.[419] All this, despite Mr. Cruz and Ms. Bedoya acknowledging the importance of the audit and reconsideration procedures to ensure due process, because those procedures are necessary "to respect the rights of the taxpayers" and allow "exchange [of] arguments or positions."[420] But because SUNAT deferred to the position in the Internal Report—which was *never* even part of the record in *any* of SMCV's audits or proceedings—instead of considering SMCV's obligations through normal procedures, both the audit and the reconsideration phases were nothing

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415 *See* Tr. 1618, 1640:22-1642:1, 1643:8-1644:15, 1725-1726, 1735:5-1738:17, 1740 (Day 6) (Bedoya); **Ex. CE-1138**, *SMMCV* Tr. 1530:3-9, 1542:9-12 (Bedoya).

416 Tr. 1641:17-1642:1, 1724-1725 (Day 6) (Bedoya); **RWS-11**, Bedoya II, ¶ 14; *see also* Tr. 1735-1736, 1740 (Day 6) (Bedoya); **Ex. CE-1138**, *SMMCV* Tr. 1530:3-9, 1542:9-12 (Bedoya) (acknowledging that SUNAT's "position couldn't change" after the June 2006 Report).

417 Tr. 1736:14-1737:2 (Day 6) (Bedoya); *see also* **Ex. CE-1138**, *SMMCV* Tr. 1526:14-20 (Bedoya) ("ARBITRATOR GARIBALDI: So, what you're saying is that this was a position that was already decided upon in SUNAT internally and therefore, whoever the Adjudicating Auditor, they would resolve it the same way? THE WITNESS: Yes.").

418 Tr. 1715:9-1716:5 (Day 6) (Bedoya); **RD-7**, Resp. Closing, slide 72; *see also* Tr. 1711:16-1713:6 (Day 6) (Bedoya) (acknowledging that the Report was "not part of a file" and "found [] in a box" without a "code").

419 Tr. 1615:9-19 (Day 6) (Bedoya); Tr. 1821:18-1822:4 (Day 6) (Cruz); *see also* Tr. 1726-27 (Day 6) (Bedoya).

420 **RWS-14**, Cruz II, ¶ 11; **Ex. CE-1138**, *SMMCV* Tr. 1508:1-6 (Bedoya).

but a sham and failed to provide any procedural protection whatsoever.[421] As Arbitrator Tawil questioned at the Hearing, if the Report was "not shared with the taxpayer, how can the taxpayer refute that position, that in [her] opinion, was already set, and that no inspector was going to change?"[422] Ms. Bedoya had no real response.[423]

(c) In acting outside the confines of normal administrative practice, SUNAT failed to take account of key documents that Ms. Bedoya admits were necessary for SUNAT to "actually see what the [company's] operations are like."[424] For instance, SUNAT did not consider its prior practice of applying the Stability Agreement to SMCV's additional investments not included in the 1996 Feasibility Study.[425] In issuing the Report and in assessing SMCV's reconsideration requests, Ms. Bedoya also did not consider SUNAT's prior practice of applying stability guarantees to mining units of other companies like Milpo, Yanacocha and Tintaya, nor had she ever "participated in other cases" concerning the scope of stability agreements.[426]

(d) At the Hearing, Peru excused SUNAT's due process violations by arguing that it had the "prerogative" to resolve SMCV's cases on the basis of the Report.[427] But Peru has never substantiated its assertion, which contradicts the testimony above, Ms. Bedoya's concession that she was not aware of similar reports for other companies, and Mr. Cruz's admission that SUNAT's approach was not "usual"—an admission that makes sense given that government officials do not have the "prerogative" to disregard due process.[428]

82. *Second*, Ms. Bedoya and Mr. Guillén drafted the Internal Report and then audited

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421 Tr. 1736-37 (Day 6) (Bedoya); **Ex. CE-1138**, *SMMCV* Tr. 1508:1-6 (Bedoya); *id.* 1510:2-10, 1526:14-22; **RWS-14**, Cruz II, ¶ 19 (confirming that the reconsideration phase provided "opportunity to question SUNAT's findings . . . in exercise of [SMCV's] right of due process").

422 Tr. 1737:3-9 (Day 6) (Bedoya) (Arbitrator Tawil's Question).

423 *See* Tr. 1737:10-1738:7 (Day 6) (Bedoya).

424 **Ex. CE-1138**, *SMMCV* Tr. 1529:5-17 (Bedoya); *see also* Tr. 1721:16-1722:9, 1725 (Day 6) (Bedoya).

425 *See supra* ¶ 31.

426 Tr. 1761:3-10 (Day 6) (Bedoya); *see supra* § III.A; **Ex. CE-382**, MINEM, Directorial Resolution No. 151-2002-EM/DGM (21 May 2002); **Ex. CE-1124**, SUNAT Tax Assessment No. 012-003-0008216 (28 November 2005); **Ex. RE-380**, SUNAT Tax Assessment No. 012-003-005518 (9 December 2004); **Ex. RE-377**, SUNAT Resolution No. 0150140003988 (31 August 2005).

427 *Cf.* **RD-7**, Resp. Closing, slide 72.

428 *See* Tr. 1850:18-1851:4 (Day 6) (Cruz); Tr. 1763:1-9 (Day 6) (Bedoya); *see also* Tr. 1726:10-22 (Day 6) (Bedoya). *Cf.* **RD-7**, Resp. Closing, slide 72.

SMCV and rejected its reconsideration requests.[429]

(a) At the *SMMCV* hearing, Ms. Bedoya recognized that auditors "have to be independent and impartial" in audits and challenges.[430] But auditors who have internally taken a definitive stance on a matter are not.[431] It is undisputed that Ms. Bedoya and Mr. Guillén drafted and signed the June 2006 Internal Report.[432] It is also undisputed that Mr. Guillén was "the auditor in the Royalties Case 2006-2007, and 2008"[433] and that Ms. Bedoya was the sole "auditor that rejected [SMCV's] Request[s] for Reconsideration" in the 2006-2007 and 2008 Royalty Cases, and one of two resolving auditors in the 2006 General Sales Tax Case.[434] Both Ms. Bedoya and Mr. Guillén were therefore directly conflicted and under basic notions of justice and fairness should have recused themselves.

(b) As an adjudicator, Ms. Bedoya was also *obliged* to recuse herself from deciding SMCV's reconsideration requests. The Law on General Administrative Procedure requires recusal if adjudicators have "previously expressed [their] opinion" on the case, "so that it could be understood that [they have] ruled on the matter," expressly recognizing that conflicted decision making *is* entirely "inappropriate," contrary to Peru's claims.[435]

2. Testimony Confirmed That the Tax Tribunal Violated SMCV's Due Process Rights

83. The Hearing confirmed that, instigated by President Olano herself, the Tax Tribunal also committed serious due process violations in deciding SMCV's challenges to SUNAT's

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429 *See* Tr. 119:3-120:1 (Day 1) (Cl. Opening); **CD-1**, Cl. Opening, slide 161.

430 **Ex. CE-1138**, *SMMCV* Tr. 1511:9-12 (Bedoya).

431 *See* **CA-231**, Single Unified Text of the Law of General Administrative Procedure, Supreme Decree No. 006-2017-JUS (1 June 2017), Article 97.2.; **Ex. CE-1138**, *SMCMV* Tr. 1527:9-17 (Bedoya).

432 Tr. 1641, 1709, 1714, 1730 (Day 6) (Bedoya); **Ex. RE-179**, SUNAT June 2006 Internal Report, p. 9.

433 Tr. 1718 (Day 6) (Bedoya); *see also* **Ex. RE-190**, SUNAT, Report No. 221-2010-OTR/SUNAT-2J0200 (2 November 2010) (showing that Mr. Guillén was the "primary auditor" in the "Mining Royalties").

434 Tr. 1718:12-1720:16 (Day 6) (Bedoya); *see also* **Ex. CE-38**, SUNAT Resolution No. 055-014-0001290/SUNAT, 2006/07 Royalty Assessments (31 March 2010) (Royalties 2006/07), p. [61] (listing Ms. Bedoya as a signatory); **Ex. CE-46**, SUNAT Resolution No. 055-014-0001394/SUNAT, 2008 Royalty Assessments (31 January 2011) (Royalties 2008), p. [58] (same); **Ex. CE-604**, SUNAT, Resolution No. 055-014-0001431 (GST for 2006) (27 July 2011), p. [104] (same).

435 **CA-231**, Single Unified Text of the Law of General Administrative Procedure, Supreme Decree No. 006-2017-JUS (1 June 2017), Article 97.2. *Cf.* **RD-7**, Resp. Closing, slide 72.

resolutions, which were already tainted by SUNAT's repeated failures of due process.[436]

(a) The Parties do not dispute that President Olano "c[ould] not interfere in the decision of cases" unless "there are plenaries" and could not "have any relationship with . . . the case file" of the 2006-2007 and 2008 Royalty Cases—yet, as the factual and testimonial record clearly shows, she nonetheless unduly interfered in their resolution.[437]

(b) Contrary to Peru's claims, President Olano had a "rationale or motive" to disregard the rules: "the two Royalty cases involv[ed] large amounts of money,"[438] "[they] were the first cases before the Tax Tribunal that involved the new Royalty Law,"[439] and President Olano sought to ensure that they would be "decided according to the same criteria."[440] However, it appears that Chamber No. 10 may have come to an initial conclusion in the 2006-2007 Royalty Case that was unfavorable for the Government and Ms. Olano therefore took matters into her own hands—President Olano and Mr. Sarmiento conceded that Chamber No. 10 likely had a draft resolution "long before" mid-2013, yet Peru has never disclosed it, as it surely would have done if it were favorable to the Government.[441]

(c) President Olano assigned her personal administrative assistant, Ms. Villanueva, to draft the 2008 Royalty Case decision, even though the assignment was not sanctioned under Tax Tribunal practice and there is no record of "Ms. Villanueva [being] assigned to [draft] another [case],"[442] nor of Chamber No. 1 "request[ing]" Ms. Villanueva's assistance.[443] And although President Olano acknowledged that she did not "normal[ly]" discuss draft resolutions with clerks or *vocales*, she conceded that she met with Ms. Villanueva to

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436 Tr. 120-26 (Day 1) (Cl. Opening); **CD-1**, Claimant's Opening, slides 162-72; Tr. 2960-2962 (Day 10) (Cl. Closing); *see also* Reply and C-Mem. on Jurisdiction § II.C.3.iii; Memorial § IV.B.2.iv.

437 Tr. 1895:8-11, 1951:11-1952:6, 1922:2-12 (Day 7) (Olano); *see also* **Ex. CE-1139**, *SMMCV* Tr. 1750:16-18, 1785:17-1786:3 (Olano); Reply and C-Mem. on Jurisdiction ¶ 166(c).

438 Tr. 1898:4-11 (Day 7) (Olano); *see also* **Ex. CE-1139**, *SMMCV* Tr. 1740:11-13 (Olano).

439 Tr. 1895:12-1896:1 (Day 7) (Olano); *see also* **Ex. CE-1139**, *SMMCV* Tr. 1739:19-1740:3 (Olano).

440 Tr. 1986:9-1987:10 (Day 7) (Olano); *see also* **Ex. CE-1139**, *SMMCV* Tr. 1835:3-14(Olano).

441 Tr. 1916-1917 (Day 7) (Olano); Tr. 2021-2022 (Day 7) (Sarmiento); *see also* Tr. 1120-21 (Day 4) (Estrada).

442 Tr. 1883 (Day 7) (Olano); **Ex. CE-1138**, *SMMCV* Tr. 1711:9-13 (Olano); Tr. 1037 (Day 4) (Estrada); *see also* **CWS-17**, Estrada II, ¶ 30; Tr. 1924 (Day 7) (Olano) (confirming that she "ha[d] not submitted emails" showing "Ms. Villanueva was assigned to another Chamber"); Tr. 1926-27 (Day 7) (Olano) (confirming she did not produce other resolutions "that has Úrsula Villanueva's initials"); *id.* Tr. 1928-29.

443 Tr. 1921, 1924, 1928 (Day 7) (Olano); **RWS-5**, Olano I, ¶ 46; Tr. 1044-1046 (Day 4) (Estrada).

discuss the 2008 Royalty Case.[444] President Olano's efforts were fruitful: Chamber No. 1 ultimately issued a resolution adopting Peru's novel and restrictive interpretation.[445]

(d) Three days after Chamber No. 1 issued the 2008 Royalty Case resolution, President Olano met with Mr. Cayo Quispe and Ms. Zúñiga, *vocales ponentes* of Chambers No. 10 and 1, respectively, to ensure that the 2006-2007 Royalty Case resolution would come to the same conclusion.[446] Chamber No. 1 had already issued its resolution, so all that remained was to force Chamber No. 10 to follow suit. Chamber No. 10 ultimately caved to President Olano's wishes to have the two cases "decided according to the same criteria" and issued what Mr. Sarmiento conceded was a significantly "copy-and-paste[d]" resolution—disregarding their earlier draft that likely took the opposite view.[447] Peru has never denied that the resolutions were 85% identical, even though, as Mr. Sarmiento conceded that, "no two persons write the same way."[448] It is thus clear that Chamber No. 10 did not issue its own draft resolution but simply adopted Ms. Villanueva's resolution without deliberating the 2006-2007 Royalty Case, as also evidenced by Peru's failure to produce documents demonstrating such deliberations.[449]

84. At the Hearing, instead of addressing the wealth of record evidence of the Government's breaches, Peru presented yet another excuse and argued for the first time that the due process violations in the administrative proceedings for the 2006-2007 and 2008 Royalty Assessments did not cause SMCV any "harm" "because the Peruvian judiciary, without any

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444 Tr. 1950-1951 (Day 7) (Olano) (Arbitrator Cremades's Question); *see* **Ex. CE-648**, Email from Villanueva to Olano (22 March 2013, 4:02 PM PET) (asking President Olano to "read the arguments" so that they can "talk about it").

445 *See* **Ex. CE-83**, Tax Tribunal Decision, No. 08252-1-2013 (2008 Royalty Case) (21 May 2013).

446 **Ex. CE-654**, Email from Cayo to Olano and Zuñiga (24 May 2013, 8:31 AM PET); **Ex. CE-655**, Email from Olano to Cayo and Zuñiga (24 May 2013, 10:23 AM PET); *see* Tr. 1988 (Day 7) (Olano).

447 Tr. 1968:9-18 (Day 7) (Olano); Tr. 2009:3-2010:4 (Day 7) (Sarmiento); *see* **CER-3***,* Hernández I, Appendix D (comparing **Ex. CE-83**, Tax Tribunal Resolution No. 08252-1-2013 (21 May 2013) and **Ex. CE-88**, Tax Tribunal Resolution No. 08997-10-2013 (30 May 2013)).

448 Tr. 2009:14-2010:3 (Day 7) (Sarmiento) (Arbitrator Tawil's Question); *see also* Tr. 1049:10-18 (Day 4) (Estrada) ("It's impossible to think that three *vocales* . . .in a different Chamber . . . a different date, deliberate and have the exact same conclusion as another."); **CER-3**, Hernández I, ¶ 212; *id*., Appendix D; **CWS-6**, Estrada I, ¶ 56.

449 Procedural Order No. 2 (4 July 2022), Claimant's Redfern, Requests No. 15-17; **Ex. RE-195**, Chamber No. 10, Deliberation Session Minutes No. 0000070458 (30 May 2013); **Ex. CE-1139**, *SMMCV* Tr. 1864:11-21 (Sarmiento) (conceding that the minutes did not actually "show the deliberation," they merely recorded the *vocales'* votes); *see also* Tr. 1049 (Day 4) (Estrada); Reply and C-Mem. on Jurisdiction ¶¶ 167-68.

alleged due process violations, reached the same substantive result."[450] Peru's new argument is too late. Freeport has maintained due process claims since the Notice of Arbitration and Peru therefore had ample opportunity to raise objections during the written proceedings.[451] Peru cannot introduce new objections at the Hearing, which the Tribunal should reject as untimely.

(a) In any event, contrary to Peru's claim, the "substantive result" that the contentious-administrative courts reached in the 2006-2007 and 2008 Royalty Cases is not instructive. As Prof. Bullard explained at the Hearing, the evidence before the contentious-administrative courts is strictly limited to the administrative record,[452] which was marred by SUNAT and the Tax Tribunal's due process violations.[453]

(b) Even on this flawed record, the Contentious-Administrative Court in the 2008 Royalty Case and one judge in the Appellate Court, and two justices of the Supreme Court in the 2006-2007 Royalty Case, voted in SMCV's favor.[454] Moreover, as Freeport has explained, the Supreme Court did not reach the correct "substantive result" in the 2008 Royalty Case: far from it, as it did not even consider key evidence necessary for understanding the scope of the Stability Agreement, such as SUNAT's own treatment of SMCV's prior investments not contemplated in the 1996 Feasibility Study.[455] So just like Peru cannot rely on the Supreme Court's decision to escape its breaches of the Stability Agreement, it also cannot rely on the decision to escape its breaches of due process.[456]

(c) Further, investment treaty decisions confirm that the existence of harm resulting from administrative due process violations does not turn on the "substantive result" in judicial proceedings and Peru provided no authority to the contrary. For example, in *Teco v. Guatemala*, Guatemala set a tariff rate in administrative proceedings that failed to

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450 Tr. 334:2-8 (Day 1) (Resp. Opening); *see also* Tr. 3036:21-3037:2 (Day 10) (Resp. Closing); Tr. 333:10-334:8 (Day 1) (Resp. Opening); **RD-1**, Resp. Closing, slide 147.

451 *See* Notice of Arbitration § VI.B.1; Memorial § IV.B.2(iv); Reply and C-Mem. on Jurisdiction § II.C.3(iii).

452 Tr. 2346:21-2347:17 (Day 8) (Bullard); **CD-8**, Bullard Presentation, slide 51; *see also* **CER-7**, Bullard II, ¶ 67.

453 *See supra* ¶¶ 80-84.

454 *See* **Ex. CE-122**, Contentious Administrative Court, Decision, No. 07650-2013-CA, 2008 Royalty Assessment (17 December 2014), pp. 25-26, 28, ¶ 34, 38; **Ex. CE-274**, Appellate Court, Decision No. 48, File No. 7649-2013 (12 July 2017), pp. 33-36, ¶¶ 8.1-8.4; **Ex. CE-739**, Supreme Court, Decision, No. 18174-2017, 2006/07 Royalty Assessments (20 November 2018), p. 46, ¶ 2.12.

455 *Id.*

456 *Id.*

afford the claimant due process.[457] The tribunal concluded that the due process violations in the administrative proceedings caused loss even though the Constitutional Court left the tariff rate in place in proceedings "in which all the Claimant's procedural safeguards were respected."[458] Similarly, in *Rumeli v. Kazakhstan*, the Investment Committee held administrative proceedings terminating the investment contract of claimant's local company.[459] The tribunal held that due process violations in those proceedings caused harm to the claimant, even though the Kazakh Supreme Court affirmed a lower court decision granting a compulsory transfer of claimant's shares based on the termination of the investment contract in proceedings that were not "wrong procedurally."[460]

E. THE HEARING CONFIRMED THAT PERU SHOULD HAVE WAIVED PENALTIES AND INTEREST

85. As Freeport explained at the Hearing, Peru violated its obligations under Peruvian law and international principles of fairness and equity each time it failed to waive the exorbitant and punitive penalties and interest that SUNAT assessed against SMCV.[461]

86. As Peru's own tax experts acknowledged, under Articles 92(g) and 170 of the Tax Code, taxpayers have a "right" to waiver of penalties and interest if a provision is objectively ambiguous and thus subject to "reasonable doubt."[462] Across all levels of Government, Peru has never been able to articulate a coherent, consistent position on stability guarantees—not even at the Hearing, after years of pleading the issue.[463] At the very least, the Government's utter lack of consistency demonstrates *objective* ambiguity or reasonable doubt on the scope of stability guarantees under the Mining Law and Regulations—not merely "[a] taxpayer's subjective

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457 **CA-202**, *TECO* Award, ¶¶ 664, 541-45; 677-681.

458 **CA-202**, *TECO* Award, ¶ 386; *see also id.* at ¶¶ 484, 711, 726, 728, 731, 735.

459 **CA-237**, *Rumeli* Award, ¶¶ 10, 113-114, 147-48.

460 **CA-237**, *Rumeli* Award, ¶ 619; *see also id.* at ¶¶ 142-46, 151-55.

461 Tr. 127:3-14 (Day 1) (Cl. Opening); **CD-1**, Cl. Opening, slides 174-75; Tr. 2966:5-2970:11 (Day 10) (Cl. Closing); **CD-11**, Cl. Closing, slides 136-46; *see also* Reply and C-Mem. on Jurisdiction ¶¶ 175-96; Memorial ¶¶ 400-16.

462 Tr. 2675:4-7 (Day 9) (Bravo); Tr. 2751:19-2752:8 (Day 9) (Picón); *see also* Tr. 2429:8-22 (Day 8) (Eguiguren) (recalling a Peruvian Supreme Court case where "there was a margin" of "some obscurity or doubt as to the application of the law" and even though "the taxpayer interpreted it wrong," "there was a reason for the mistake because of the ambiguity in the law, [] we will waive any payment of interest," because "[t]he problem was in the law"); Tr. 2581:8-2582:19 (Day 9) (Hernández); Tr. 127:8-14 (Day 1) (Cl. Opening); **CD-1**, Cl. Opening, slides 174-75; Tr. 2966:5-2970:11 (Day 10) (Cl. Closing); **CD-11**, Cl. Closing, slides 136-46.

463 **CD-12**, slides 1-2 (detailing Peru's varied interpretations); *see also* **CD-9**, Presentation of Luis Hernández ("Hernández Presentation"), slide 27 (listing "facts that objectively prove that the language of Article 83 of the General Mining Law and Article 22 of the Regulations were, at the very least, ambiguous").

understanding of whether . . . a law is unclear," as Peru wrongly claimed.[464] For example:

(a) As explained in Section III, SUNAT, the Tax Tribunal, and MINEM consistently treated entire concessions or mining units of other mining companies, such as Milpo, Yanacocha, Tintaya, Consorcio Minero Horizonte, and Southern, as stabilized. Moreover, well *after* SUNAT issued the first Royalty and Tax Assessments, SUNAT's binding 2012 Report advised that stability guarantees are "applicable solely to the *concession or economic-administrative unit* for which said agreement has been signed."[465]

(b) Further, the Peruvian Legislature itself believed that there was objective ambiguity, as the 2014 Amendments to the Mining Law and the 2019 Amendments to the Regulations were introduced to "establish a *clearer* regulatory framework" and clarify "*mislead[ing]*" text which could "lead one to consider that the contractual guarantees benefit the owner of the mining activity for any investment it makes in the concessions or EAUs."[466]

(c) As explained above in Section II.B.2, at the Hearing, Peru's counsel, witnesses, and experts presented entirely different theories on whether new investments not contemplated in the feasibility study could be covered under the scope of an existing stability agreement, or failed to articulate a standard at all.[467] For instance, Ms. Bedoya adopted an extremely strict standard, stating that stability guarantees covered only the initial qualifying investment—"not one dollar more."[468] Peru's counsel, in turn, took the position that "subsequent investments" could be stabilized, as long as they "intended to further the goal for the [initial qualifying investment] outlined in the feasibility study," without ever defining how a mining company or the Government could determine whether a new investment "further[ed] th[at] goal."[469] Mr. Polo articulated a similarly

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464 *Cf.* Tr. 3038:20-3039:1 (Day 10) (Respondent's Closing); *see* Reply and C-Mem. on Jurisdiction ¶ 69(e); Memorial ¶ 318(c).

465 **Ex. CE-883**, SUNAT, Report No. 084-2012-SUNAT/4B0000 (13 September 2012), p. 3; *see supra* ¶ 53(c).

466 **Ex. CE-823**, Congress, Bill No. 30230, Statement of Legislative Intent, p. 11 (emphasis added); **CA-246**, Supreme Decree amending the Regulations of the Ninth Title of the General Mining Law, No. 021-2019-EM (28 December 2019), Statement of Legislative Intent, p. 9; *see also* Tr. 2701:12-2705:13 (Day 9) (Bravo & Picón) (Arbitrator Tawil's Questions) ("ARBITRATOR TAWIL: How would you respond to the arguments in connection with the 2014 and 2019 reforms? If things were so clear, why was there a reform?"); Reply and C-Mem. on Jurisdiction ¶ 183; **CER-8**, Hernández II, ¶¶ 77-78; **CER-3**, Hernández I, ¶¶ 115-21.

467 **CD-11**, Cl. Closing Presentation, slides 143-44; **CD-12**, slides 1-2.

468 Tr. 1684:9-16 (Day 6) (Bedoya).

469 Counter-Memorial ¶ 612.

amorphous standard, allowing additional investments that "st[u]ck within the original project . . . characteristics," even if "costs might go up or down a little bit," directly contradicting Ms. Bedoya's theory.[470] And Mr. Cruz, Prof. Bravo, and Prof. Picón each struggled to define any "specific" standard at all.[471] As Freeport noted in its Closing, "if that is not proof of reasonable doubt, then what could possibly be?"[472]

87. At the Hearing, Peru made no attempt to reconcile the inconsistent theories it presented, or the Government's entirely conflicting contemporaneous interpretations of the scope of stability guarantees, both before and after its *volte-face* against SMCV.[473] Instead, Peru attempted to justify the Government's failures, arguing that even if there was objective ambiguity, a taxpayer is only entitled to waiver of penalties and interest if the Government of its own discretion issued a formal "clarification" under Article 170.[474] But as Prof. Hernández explained, Article 170 is a peremptory norm—when the Government fails to issue "clear and unambiguous rules," it is *required* to waive penalties and interest to "prevent unfair outcomes" "fully attributable to the Government," although it "may" choose the means through which that clarification is issued.[475] The Government cannot deny at will a taxpayer's "right" to relief from ambiguity that it created—that would be inherently unfair and inequitable and is therefore unsurprisingly wrong as both a matter of Peruvian and international law.[476]

V. THE HEARING CONFIRMED THAT THE TRIBUNAL HAS JURISDICTION OVER FREEPORT'S CLAIMS

88. The Hearing confirmed that Peru's jurisdictional arguments fly in the face of the TPA's plain terms and its negotiating history, investment treaty jurisprudence and Peruvian law. From a policy perspective, it also confirmed that Peru's objections would lead to absurd results, such as

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470 Tr. 1302:18-1303:3 (Day 5) (Polo).

471 *See* Tr. 1808:5-15 (Day 6) (Cruz); Tr. 1813:12-22 (Day 6) (Cruz); Tr. 2724:1-4, 2726:5-20 (Day 9) (Bravo & Picón).

472 Tr. 2968:10-14 (Day 10) (Cl. Closing).

473 *See, e.g., supra* § III; *supra* ¶ 17.

474 *Cf.* Tr. 3039:2-21 (Day 10) (Resp. Closing).

475 Tr. 2581:8-2582:22 (Day 9) (Hernández); **CD-9**, Hernández Presentation, slide 26; *see also* **CER-8**, Hernández II, ¶ 84; Tr. 2583:1-2585:7 (Day 9) (Hernández); **CD-11**, Cl. Closing, slides 145-46; Reply and C-Mem. on Jurisdiction ¶ 186. *Cf. e.g.*, **RD-5**, Expert Presentation of Bravo & Picón, slides 20-21.

476 *See* Tr. 2675:2-7 (Day 9) (Bravo) (acknowledging that waiver of penalties and interest is a taxpayer "right"); Tr. 2751:19-2752:11 (Day 9) (Picón) (same); *see also* Reply and C-Mem. on Jurisdiction ¶¶ 187-88.

requiring investors to bring speculative claims for future and unaudited fiscal periods.[477] Peru's jurisdictional arguments are so far-fetched that Peru itself made only a perfunctory attempt to defend them at the Hearing. Peru dedicated a mere 34 minutes of its Opening and Closing combined to jurisdiction, without even responding to Freeport's Rejoinder on Jurisdiction.[478] Peru also did not cross-examine Prof. Bullard and Prof. Hernández on *any* of their conclusions related to jurisdiction, nor did it cross-examine Mr. Sampliner, a U.S. representative in the TPA negotiations, on the substance of his opinions.[479] And Peru abruptly ended the cross-examination of Mr. Herrera, who negotiated the TPA on behalf of Peru, after it became apparent that Peru's efforts to intimidate him failed.[480] Peru also did not present any witness or expert testimony regarding the TPA's negotiation history. And the testimony by Prof. Morales about when a SUNAT assessment became final and enforceable came undone when he admitted that he was not an expert in Peruvian tax or administrative law, that he oddly based his conclusion on Brazilian law, and that he had not even considered the relevant provisions of the Peruvian Tax Code.[481]

89. The Hearing also revealed that Peru withheld key documents regarding the TPA's negotiating history from the Tribunal. As Mr. Herrera testified, the Ministry of Foreign Trade and Tourism, MEF, and Ministry of Foreign Affairs each prepared reports summarizing each of the 13 TPA negotiation rounds.[482] These reports are in Peru's possession but it did not submit them in this arbitration—presumably because they support Freeport's arguments.

90. In sum, the Hearing has only further highlighted that Peru's objections are nothing but a meritless attempt to escape liability for its breaches of the Stability Agreement and the TPA.

A. ARTICLE 10.18. 1 DOES NOT BAR FREEPORT'S CLAIMS

91. Freeport's claims were all submitted to arbitration within the limitation period in

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477 *See* Tr. 172:12-173:7, 175:10-178:6 (Day 1) (Cl. Opening); **CD-1**, Cl. Opening, slides 234-36, 240-42; Tr. 2894:6-2895:21 (Day 10) (Cl. Closing); **CD-11**, Cl. Closing, slide 2.; Cl. Comments on the U.S. NDP Submission ¶ 6; Rejoinder on Jurisdiction ¶ 28; Reply and C-Mem. on Jurisdiction ¶ 213.

478 *See generally* Tr. 337:7-363:12 (Day 1) (Resp. Opening); **RD-1**, Cl. Opening, slides 153-189; *see generally* Tr. 3039:22-3044:6 (Day 10) (Resp. Closing); **RD-7**, Resp. Closing, slides 81-85.

479 *See generally* Tr. 2373:16-2391:12 (Day 8) (Bullard); Tr. 2615:4-2656:7 (Day 9) (Hernández).

480 *See generally* Tr. 1140:16-1181:12 (Day 4) (Herrera).

481 Tr. 2528:7-2530:16, 2534:1-2535:1 (Day 8) (Morales).

482 *See, e.g.*, **CWS-12**, Herrera I ¶¶ 14, 26 nn. 24-27, 29, 32-33.

Article 10.18.1.[483] The Parties agree that 28 February 2017 is the cut-off date for the limitation period.[484]

92. At the Hearing, Peru did not even attempt to reconcile its arguments with the plain terms of Article 10.18.1. Instead, Peru continued to argue the case as if it involved a single Government measure that caused all of the losses, as in an expropriation case.[485] Specifically, it pretended that the Government's 36 breaches of the Stability Agreement are a single breach, with a single limitation period running from August 2009, when SUNAT notified SMCV of the 2006-2007 Royalty Assessments, without providing any authority showing that a single limitation period applies to separate causes of action just because they are related or share legal reasoning.

1. Under the Terms of Article 10.18.1, the Limitation Period Cannot Start until a Claimed Breach Has Occurred and the Claimant Has Incurred Damage

93. As Freeport explained, the limitation period cannot commence until the breach and loss have *actually occurred* because Article 10.18.1 refers, in the past tense, to knowledge that a claimant or an enterprise "*has incurred loss or damage*."[486] Both Mr. Sampliner and Mr. Herrera unequivocally confirmed that the limitation period does not begin to run "for future breaches or future losses."[487] Otherwise, as Mr. Sampliner testified, the limitation period would "encourage unripe claims," contrary to the U.S.'s intent.[488] Peru did not attempt to reconcile its argument with the testimony or investment treaty decisions, which are uniformly in accord and which Peru concedes "recognize that the limitations period starts to run as of the moment when the alleged breach and loss have occurred and became known to the claimant."[489]

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483 **CA-10**, TPA, Article 10.18.1 (emphasis added).

484 *See* Tr. 146:19-147:1 (Day 1) (Cl. Opening) ; **CD-1**, Cl. Opening, slides 221-22; Tr. 2898 (Day 10) (Cl. Closing); **CD-11**, Cl. Closing, slide 11; Cl. Comments on U.S. NDP Submission ¶ 5; Memorial ¶¶ 355, 429(a); Reply and C-Mem. on Jurisdiction ¶ 211; Tr. 339:13-16 (Day 1) (Resp. Opening); **RD-1**, Resp. Opening, slide 156; Tr. 3040 (Day 10) (Resp. Closing); **RD-7**, Resp. Closing, slide 81; Counter-Memorial ¶ 418.

485 Tr. 168:17-21 (Day 1) (Cl. Opening).

486 *See* Rejoinder on Jurisdiction ¶ 15; Reply and C-Mem. on Jurisdiction ¶ 217; Tr. 146:13-147:13 (Day 1) (Cl. Opening); **CD-1**, Cl. Opening, slide 208; Tr. 2895:10-2896:3 (Day 10) (Cl. Closing); **CD-11**, Cl. Closing, slide 3; Rejoinder on Jurisdiction ¶ 30; Cl. Comments on NDP Submission ¶ 8(b).

487 Tr. 2037:15-16 (Day 7) (Sampliner). *See also* 1178:6-20 (Day 4) (Herrera) ("[W]e discussed this with the U.S." and the "period had to do with the real knowledge of events that have occurred," "the damage must have occurred.").

488 Tr. 2036:7-12 (Day 7) (Sampliner).

489 Rejoinder on the Merits and Reply on Jurisdiction ¶ 736; *see also* **CA-411**, *Eli Lilly v. Canada*, Final Award, ¶¶ 113, 167; **Ex. RA-5**, *Resolute Forrest Products v. Canada*, Decision on Jurisdiction, ¶ 153; **Ex. CA-420**, *Mobil v. Canada II*, Decision on Jurisdiction ¶ 154.

94. Peru's only support for its argument that the limitation period runs for future losses was a footnote in the U.S. Non-Disputing Party Submission citing *Berkowitz v. Costa Rica* saying that "knowledge is triggered by the first appreciation that loss or damage will be (or has been) incurred."[490] But that passage merely reflects the consistent position of the U.S., confirmed by Mr. Sampliner and Mr. Herrera, that "the term 'incurred' broadly means to become liable or subject to" and "[t]herefore, an investor may have 'incurred' loss or damage even if the financial impact . . . of that loss or damage is not immediate."[491] Or as Mr. Sampliner further explained, "a Claimant can only be liable or subject to loss or damage from a Measure that is capable of being enforced."[492] Contrary to Peru's argument, the U.S. thus recognized that Article 10.18.1 requires the claimant to have "*incurred loss or damage*," in the past tense.[493]

2. Freeport's Claims for Breaches of the Stability Agreement Are Timely

95. The Hearing confirmed that: (*i*) Peru breached the Stability Agreement and SMCV incurred loss or damage when each Assessment became final and enforceable;[494] and (*ii*) each final and enforceable Assessment resulted in a separate breach of the Stability Agreement and separate loss to SMCV, giving rise to a separate claim with a separate limitation period.[495] Each Assessment became final and enforceable after 28 February 2017—Freeport could not have acquired knowledge of Peru's breaches or the loss or damage incurred before that date.[496]

i. Peru's Breaches of the Stability Agreement Did Not Occur until Each Assessment Became Final and Enforceable

96. The Hearing confirmed that Peru's breaches of the Stability Agreement occurred and

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490 **RD-7**, Resp. Closing, slide 82 (citing U.S. NDP Submission, n. 17 (citing **RA-2**, *Spence v. Costa Rica* Interim Award ¶ 213)); Tr. 3040:6-3041:8 (Day 10) (Resp. Closing).

491 **RD-7**, Resp. Closing, slide 82; Tr. 3041:4-8 (Day 10) (Resp. Closing); U.S. NDP Submission ¶ 11; Tr. 2037:8-10 (Day 7) (Sampliner); 1180:11-15 (Day 4) (Herrera).

492 Tr. 2038:2-15 (Day 7) (Sampliner).

493 *See* U.S. Submission ¶¶ 11-12; Rejoinder on Jurisdiction ¶ 15; Reply and C-Mem. on Jurisdiction ¶ 217.

494 With respect to Assessments for which SMCV filed withdrawal petitions that Peru has failed to act on, Freeport treats the date of SMCV's withdrawal petitions as the constructive date of breach as is necessary to prevent Peru from delaying the date of breach indefinitely, preventing Freeport from seeking relief in international arbitration. *See* Reply and C-Mem. on Jurisdiction ¶ 122; Memorial ¶ 353.

495 Tr. 161:5-162:14 (Day 1) (Cl. Opening); Tr. 2895:21-2896:18 (Day 10) (Cl. Closing); Cl. Comments on the U.S. NDP Submission ¶¶ 8-9; Rejoinder on Jurisdiction ¶ 12; Reply and C-Mem. on Jurisdiction ¶¶ 214, 220, 224.

496 *See* Claimant's Comments on the U.S. NDP Submission ¶ 5; Rejoinder on Jurisdiction ¶ 12; Reply and C-Mem. on Jurisdiction ¶¶ 220, 227; Memorial ¶ 426, Table A.

SMCV incurred loss when each Assessment became final and enforceable.[497]

97. *First*, the Government breached the Stability Agreement and SMCV incurred loss or damages only once each Assessment became final and enforceable.[498] As Prof. Hernández testified, unlike other administrative acts in Peru, SUNAT assessments are not immediately enforceable.[499] Instead, Article 115 of the Tax Code affords the Tax Administration an opportunity to correct erroneous assessments before they become final and enforceable by allowing the taxpayer to request that SUNAT and the Tax Tribunal reconsider the assessment.[500] As Article 115 provides, SMCV "had no obligation to pay and SUNAT could not coercively collect on the [] amount" until the administrative process for each assessment was complete.[501]

98. At the Hearing, Peru failed to reconcile its time-bar objection with Article 115 or its damages argument that Freeport is not entitled to recover Outstanding Liabilities because "[a] legal obligation can only be considered a 'damage' if that legal obligation will actually result in the victim making the payments; if not, then the victim has not suffered (and will not suffer) any actual damage."[502] Hence, under Peru's own case, the investor incurs a loss (and the limitation period is triggered) only when the investor pays an assessment. Peru also failed to reconcile its position with its previous admissions that "SMCV was under no legal obligation to pay the Assessments before challenging them" and the Tax Administration "might or might not . . . change or correct the Assessment" in the course of the administrative process.[503]

99. The testimony further showed that Peru's argument that the breach and loss occurred

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497 *See* Tr. 151:2-156:1 (Day 1) (Cl. Opening); **CD-1**, Cl. Opening, slides 212-17; Tr. 2897:6-2898:9 (Day 10) (Cl. Closing); Rejoinder on Jurisdiction ¶ 30; Cl. Comments on U.S NDP Submission ¶ 9; Reply and C-Mem. on Jurisdiction ¶ 220.

498 *See* Tr. 149:12-21, 152:12-156:1 (Day 1) (Cl. Opening); **CD-1**, Cl. Opening, slides 219-20; Tr. 2897:6-2898:9 (Day 10) (Cl. Closing); **CD-11**, Cl. Closing, slide 10; *see also* Rejoinder on Jurisdiction ¶ 23; Reply and C-Mem. on Jurisdiction ¶ 220(a).

499 *See* Tr. 2570:11-18 (Day 9) (Hernández); Rejoinder on Jurisdiction ¶ 23(b) (citing **CER-13**, Hernández III, ¶¶ 7-8; **CER-12**, Bullard III, ¶¶ 8, 10; **CER-7**, Bullard II, ¶ 82).

500 *See* Tr. 2570:11-18 (Day 9) (Hernández); Rejoinder on Jurisdiction ¶ 23(b) (citing **CER-13**, Hernández III, ¶ 8; **CER-12**, Bullard III, ¶ 10; **CER-7**, Bullard II, ¶ 82.

501 *See* Tr. 2573:2-4 (Day 9) (Hernández); **CER-13**, Hernández III, ¶¶ 9, 11 (citing **CA-14**, Tax Code, Supreme Decree No. 133-2013-EF (June 22, 2013), Article 115 (a), (c)); **CER-12**, Bullard III, ¶ 10.

502 Rejoinder on the Merits and Reply on Jurisdiction ¶ 1066.

503 Rejoinder on the Merits and Reply on Jurisdiction ¶ 1060, ¶ 716; *see also* Tr. 2681:22-2682:4 (Day 9) (Hernández); **RER-7**, Morales II, ¶ 101; **RER-8**, Bravo and Picón II, ¶ 264; **Ex. CE-1111**, Jorge Bravo, *Debts that Are Not Debts* (29 October 2020); **Ex. CE-1109**, Jorge Bravo, *The Truth About the SUNAT vs. TELEFONICA Dispute* (29 July 2019).

when SUNAT notified SMCV of the 2006-2007 Royalty Assessments is meritless.

(a) Peru argued that the assessment's enforcement is suspended when a taxpayer challenges an assessment. But, as Prof. Hernández explained, it is "[o]nly when an assessment becomes final [that] the amount assessed [] becomes 'enforceable debt,' and the taxpayer's obligation arises."[504] Prior to that moment there is no enforceable debt to suspend. Prof. Bravo and Prof. Picón themselves were unable to identify any Tax Code provision indicating that SUNAT can enforce an assessment before the taxpayer files its challenge.

(b) Peru argued that the payment obligation arises when SUNAT notifies a taxpayer of an assessment because statutory interest accrues during the administrative process.[505] But Prof. Bravo, Prof. Picón, and Prof. Morales admitted that statutory interest does not accrue from the notification date but from the date of the taxable event.[506]

(c) Peru also argued that loss or damage is incurred from the notification date because the assessment is a "valid[] administrative act" from that point in time.[507] While it may be true that the assessment is "valid" at notification, no payment obligation arises until the administrative process is complete.[508]

100. *Second*, Peru did not address the Peruvian law authorities—which are fatal to its case—showing SUNAT assessments can breach a stability agreement only once final and enforceable.

(a) Peru's only response to the *Poderosa* case was a single slide in Prof. Morales's presentation arguing that *Poderosa* is distinguishable because the courts did not decide whether exhaustion of administrative remedies is required for a breach of contract claim.[509] But that misses the point—in the *Poderosa* case, the Peruvian trial and appellate courts both concluded that a SUNAT assessment only breaches a stability agreement when it becomes final and enforceable (in the *Poderosa* case with the notification of the

504 Tr. 2570:19-21 (Day 9) (Hernández).

505 Tr. 2683:10-13 (Day 9) (Bravo).

506 Tr. 2531:4-7 (Day 8) (Morales); Tr. 2570:19-21 (Day 9) (Hernández), Tr. 2680:14-19 (Day 9) (Bravo and Picón).

507 Tr. 2493:21, 2494:21-2495:3, 2532:2-5 (Day 8) (Morales); Rejoinder on the Merits and Reply on Jurisdiction ¶ 699, ¶ 702.

508 Tr. 156:11-15 (Day 1) (Cl. Opening); Tr. 2540:19-21, 2680:14-19 (Day 9) (Bravo and Picón).

509 **RD-4**, Presentation of Rómulo Morales, slide 36.

Tax Tribunal resolutions) and that the limitation period runs from that date.[510]

(b) At the Hearing, Peru still failed to address its own position in the *Gold Fields* arbitration, in which Peru objected to claims on the grounds that a final position by the Tax Administration is required to claim a breach of a stability agreement.[511]

ii. Each Final and Enforceable Assessment Is a Separate Breach

101. Each final and enforceable Assessment gave rise to a separate cause of action for breach of the Stability Agreement with a separate limitation period.[512]

102. *First*, the Hearing confirmed that under Peruvian law, each final and enforceable Assessment is a separate administrative act with a separate cause of action for breach of the Stability Agreement.[513]

(a) As Peru conceded, each assessment constituted an independent administrative act when it became final and enforceable.[514] This is so because (*i*) taxpayers assess their obligations separately for each fiscal period; (*ii*) SUNAT audited each of SMCV's self-assessments separately and notified SMCV of separate assessments for royalties, taxes, or penalties and corresponding interest for each fiscal period; and (*iii*) a separate administrative process applied for each assessment under Article 77 of the Tax Code.[515]

(b) Peru and its experts did not revisit their concessions that (*i*) SUNAT's and the Tax Tribunal's resolutions had no precedential effect,[516] (*ii*) the Government "might [have]

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510 Tr. 154:12-18 (Day 1) (Cl. Opening); *see also* **CER-7**, Bullard II, ¶ 81 (citing **CA-384**, Trial Court No. 43, Decision, File No. 41531-2006-79-1801-JR-CI-43, Decision (8 May 2007), pp. 2-3); **CA-385**, Civil Appellate Court, Case File No. 968-2007, Decision (20 November 2007), pp. 2-3); Rejoinder on Jurisdiction, ¶ 23(g); **RER-7**, Morales II, ¶ 112; Reply and C-Mem. on Jurisdiction ¶ 220(d).

511 Tr. 155:14-16 (Day 1) (Cl. Opening); **Ex. CE-443**, *Gold Fields v. PROINVERSIÓN,* Legal Arbitral Award, ¶¶ 54-55; *see also* Rejoinder on Jurisdiction ¶ 23(h).

512 *See* Tr. 161:10-164:2 (Day 1) (Cl. Opening); **CD-1**, Cl. Opening, slides 225-26; Cl. Comments on the U.S. NDP Submission ¶ 9; Rejoinder on Jurisdiction ¶ 26; Reply and C-Mem. on Jurisdiction ¶¶ 224, 226-27; **CER-7**, Bullard II, ¶ 88; **CER-8,** Hernández II, ¶ 124.

513 Tr. 148:9-149:1,161:10-162:1 (Day 1) (Cl. Opening); Rejoinder on Jurisdiction ¶ 29; Reply and C-Mem. on Jurisdiction ¶ 226; **CER-7**, Bullard II, ¶ 88; **CER-8**, Hernández II, ¶¶ 124-126.

514 *See* Rejoinder on the Merits and Reply on Jurisdiction ¶ 743; **RER-7**, Morales II, ¶¶ 97, 115; **RER-8**, Bravo and Picón II, ¶ 254.

515 *See* Tr. 163:7-11 (Day 1) (Cl. Opening); see *also* Tr. 2354:9-15 (Day 8) (Bullard); **RER-7**, Morales II, ¶ 97; *id.* ¶ 115; **RER-8**, Bravo and Picón II, ¶ 254; Reply and C-Mem. on Jurisdiction ¶ 226 (citing **CER-2**, Bullard I, ¶ 88; **CER-7**, Bullard II, ¶ 88; **CER-8**, Hernández II, ¶¶ 124, 128; **CA-14**, Tax Code, Article 77).

516 Tr. 163:12-14 (Day 1) (Cl. Opening); Rejoinder on Jurisdiction ¶ 29(b); Reply and C-Mem. on Jurisdiction ¶ 226(c).

subsequently change[d] or correct[ed]" the 2006-2007 Royalty Assessments after notifying them,[517] and (*iii*) the Supreme Court's decision in the 2008 Royalty Case was limited to that "specific dispute" and had no "*erga omnes* precedential effect."[518] Thus, the 2006-2007 Royalty Assessments did not predestine future assessments.[519]

(c) Peru did not dispute that SMCV would have been entitled to bring separate breach of contract claims with separate limitation periods based on each Assessment in Peruvian courts.[520] At the Hearing, Peru and Prof. Morales repeatedly referred to "breaches"—in the plural—resulting from SUNAT's Assessments.[521] And Prof. Morales testified that "[t]he First Notice of the Assessment [was] a breach of contract" but admitted that, if there were "other Assessments referr[ing] to different amounts, referr[ing] to different fiscal years, well, that's [] different."[522] That is fatal to Peru's argument because there were 36 "Assessments referr[ing] to different amounts [and] different fiscal years."[523]

(d) Prof. Bullard testified that SMCV could not have brought breach of contract claims based on future assessments under Peruvian law. Using a lease agreement hypothetical, he explained that, "[w]hen they don't pay me for January, there's a breach," but "I cannot bring a claim for breach in respect of February, March, April, May."[524] Prof. Morales completely missed the mark with his response that a claimant could bring a single lawsuit based on 12 *past* failures to pay rent under the lease.[525] That has no bearing on whether each non-payment would constitute a separate cause of action in that lawsuit, nor does it explain how a claimant could bring claims for *future* breaches and losses.

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517 Rejoinder on the Merits and Reply on Jurisdiction ¶ 716.

518 *See* Rejoinder on the Merits and Reply on Jurisdiction ¶ 79; Reply and C-Mem. on Jurisdiction ¶ 226(c); **CER-8**, Hernández II, ¶¶ 126-127.

519 Tr. 163:14-17 (Day 1) (Cl. Opening).

520 Rejoinder on Jurisdiction ¶ 29(a); Reply and C-Mem. on Jurisdiction ¶ 226.

521 *See, e.g.*, **RD-1**, Resp. Opening, slide 159 ("Claimant first acquired knowledge of the alleged *breaches* when SMCV was notified of the first SUNAT Assessment (on August 18, 2009).") (emphasis original); *see also* Tr. 339:4-8; Tr. 339:20-340:3 (Day 1) (Resp. Opening) (same); **RD-1**, Resp. Opening, slides 158, 160-62 (same).

522 Tr. 2494:21-2495:3 (Day 8) (Morales).

523 *Id.*

524 Tr. 2353:8-17 (Day 8) (Bullard).

525 Tr. 2494:12-18 (Day 8) (Morales) ("With the first breach by the tenant, then the tenant has violated the contract, and then according to the Peruvian law, you can ask for compensation, for specific performance, or perhaps the . . . lessee didn't pay for 12 months. And I'm not going to have 12 suits, just one suit is enough.").

103. *Second*, the Hearing confirmed that separate limitation periods apply to separate causes of action such as the 36 causes of action resulting from the Assessments.

(a) As Peru concedes,[526] and as reflected in the U.S. Non-Disputing Party Submission,[527] "when there is a legally distinct injury, i.e., a distinct cause of action, there is a new limitations period."[528] For example, the *Nissan* tribunal concluded that alleged breaches based on payment defaults under a contract that occurred after the cut-off date were timely even though they were virtually identical to defaults that occurred under the same contract before the cut-off date.[529] Peru did not address *Nissan* or the other cases concluding that it is "appropriate . . . to separate a series of events into distinct components, some time-barred, some still eligible for consideration on the merits."[530]

(b) None of the authorities support consolidating the independent causes of action arising from each Assessment into a single cause of action with a single limitation period.[531] At the Hearing, Peru continued to rely on inapposite cases in which a *single* cause of action caused a *single* loss such as *Corona Materials*, where the breach and loss were caused by a final decision denying an environmental permit.[532] Thus, there was a single cause of action and the failure to reconsider the permit denial did not give rise to a new, separate cause of action.[533] It is only for each individual cause of action that "the limitations period does not renew each [] time that the challenged measure occurs because SUNAT's Assessments are part of a 'series of similar or related actions.'"[534] But—as Peru must

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526 Rejoinder on the Merits and Reply on Jurisdiction ¶ 741.

527 U.S. Submission ¶ 10 n.14.

528 Tr. 2039:3-8 (Day 7) (Sampliner); **CER-14**, Sampliner II, ¶ 6; Rejoinder on Jurisdiction ¶ 30; Reply and C-Mem. on Jurisdiction ¶¶ 225, 228.

529 *See also* **CA-243**, *Nissan v. India* Decision on Jurisdiction, ¶¶ 299, 313, 326-28, 329; Rejoinder on Jurisdiction ¶ 32(b); Reply and C-Mem. on Jurisdiction ¶ 228(b).

530 Rejoinder on Jurisdiction ¶ 32(a), (c), (d) (citing **CA-278**, *Clayton v. Canada* Award, ¶ 266; **CA-411**, *Eli Lilly v. Canada* Final Award, ¶¶ 164, 167; **RA-4**, *Grand River v. USA*, Decision on Jurisdiction, ¶¶ 22-24, 84-94).

531 *See* Tr. 168:1-16 (Day 1) (Cl. Opening); *see also* Rejoinder on Jurisdiction ¶ 30; Reply and C-Mem. on Jurisdiction ¶¶ 225, 228.

532 Tr. 169:9-19 (Day 1) (Cl. Opening); **RA-3**, *Corona Materials v. Dominican Republic* Award on Preliminary Objections, ¶¶ 222-23, 227-78.

533 Tr. 169:9-19, 170:1-5 (Day 1) (Cl. Opening); **RA-3**, *Corona Materials v. Dominican Republic* Award on Preliminary Objections, ¶¶ 222-23, 227-78.

534 Tr. 341:11-342:5 (Day 1) (Resp. Opening); *see also* Rejoinder on the Merits and Reply on Jurisdiction ¶¶ 764-65; Counter-Memorial ¶ 421.

recognize—for each different cause of action there is a new limitations period.[535]

(c) At the Hearing, Peru did not repeat its argument that a single limitation period applies for all claims challenging Government decisions that share the same legal reasoning,[536] nor did it address *Eli Lilly,* where the tribunal rejected precisely that argument.[537]

3. Freeport's Claims for Breach of Article 10.5 Claims Are Timely

104. Peru still did not dispute that the same standard applies for determining when a cause of action arose under the Stability Agreement and the TPA.[538] Accordingly, for the same reasons set forth above in Section V.A.2, Freeport's Article 10.5 claims based on the Royalty Assessments, the failure to waive penalties and interest, and the failure to reimburse GEM are timely.

105. Separately, the Hearing confirmed that Freeport's Article 10.5 claims based on due process violations in the Tax Tribunal proceedings for the 2006-2007 and 2008 Royalty Cases are likewise timely.[539] Freeport acquired knowledge of those violations in 2019 when Freeport and SMCV began investigating the Tax Tribunal's decisions in preparation for this arbitration.[540] At that time, an individual familiar with the Tax Tribunal pointed out that the "UV" initials on the 2008 Royalty Case resolution stood for Ursula Villanueva, that Ms. Villanueva was President Olano's assistant, and they should not have been involved in drafting the resolution.[541]

106. At the Hearing, Peru maintained its absurd argument that the due process claims are time-barred because the irregularities on the face of the Tax Tribunal resolutions triggered a duty to immediately investigate.[542] However, the resolutions alone could not have possibly triggered a duty to investigate under the standard of reasonable prudence and diligence.[543] As Freeport

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535 *See* Rejoinder on the Merits and Reply on Jurisdiction ¶¶ 713-14 ("[T]ribunals have held that an alleged breach occurs when (i) a government act forming the basis of the alleged breach is performed, and (ii) that act gives rise to an independent cause of action."); Counter-Memorial ¶ 420 (same).

536 Rejoinder on the Merits and Reply on Jurisdiction ¶¶ 713, 741.

537 Tr. 170:15-172:2 (Day 1) (Cl. Opening).

538 Rejoinder on Jurisdiction ¶ 36; Reply and C-Mem. on Jurisdiction ¶ 234.

539 Tr. 147:12-18, 159:18-21 (Day 1) (Cl. Opening); Rejoinder on Jurisdiction ¶ 39; Reply and C-Mem. on Jurisdiction ¶ 235.

540 *See* Tr. 147:14-20 (Day 1) (Cl. Opening); Rejoinder on Jurisdiction ¶ 40; Reply and C-Mem. on Jurisdiction ¶ 236.

541 Tr. 2899:2-7 (Day 10) (Cl. Closing).

542 *Cf.* Tr. 3033:15-3034:2 (Day 10) (Resp. Closing).

543 *See* Rejoinder on Jurisdiction ¶ 42 (citing **RA-4**, *Grand River v. USA*, Decision on Jurisdiction, ¶¶ 59, 72; **RA-2**, *Spence v. Costa Rica*, Interim Award, ¶ 192; **RA-8**, *Vanessa v. Venezuela*, Decision on Jurisdiction, ¶ 99).

explained, it would be unreasonable to expect taxpayers to cross-check the initials on a Tax Tribunal resolution to confirm whether they really belonged to the Chamber's members.[544] Likewise, taxpayers cannot reasonably be expected to suspect flagrant due process violations and start an investigation based only on receiving virtually identical resolutions.[545] Thus, the Tax Tribunal resolutions alone could not have triggered a duty to take the extraordinary step of filing a transparency request for President Olano's emails in 2013. Peru's argument would result in a flood of transparency requests by dissatisfied taxpayers, crippling Peru's transparency system.[546]

107. Peru's arguments also defy the constructive knowledge standard and basic principles of fairness, and it simply cannot avoid liability by playing hide and seek with the evidence until the limitation period expires.[547] It would be utterly unreasonable to expect Freeport to have learned of Peru's due process violations earlier given the great lengths to which Peru and President Olano went to conceal that wrongful conduct.[548]

108. And the Hearing confirmed that the due process violations in the Tax Tribunal proceedings were only the tip of the iceberg. For instance, Freeport could not have acquired knowledge in 2013 that SUNAT egregiously violated SMCV's due process violations by adhering to the 2006 SUNAT Internal Report in issuing its resolutions—these violations were revealed for the first time by Ms. Bedoya at the *SMMCV* hearing in February 2023.[549]

B. ARTICLE 10.18.4 DOES NOT APPLY BECAUSE SMCV DID NOT SUBMIT CLAIMS FOR BREACHES OF THE STABILITY AGREEMENT TO A PERUVIAN ADMINISTRATIVE TRIBUNAL OR TO ANY OTHER BINDING DISPUTE SETTLEMENT PROCEDURE

109. The Hearing confirmed that Peru's fork-in-the-road objections to Freeport's Stability Agreement claims under Article 10.18.4 claims are meritless.

110. *First*, Peru's Article 10.18.4 objections largely fall away because each Assessment breached the Stability Agreement only when it became final and enforceable at the conclusion of

544 Tr. 2899:9-14 (Day 10) (Cl. Closing).

545 Tr. 2899:15-18 (Day 10) (Cl. Closing).

546 Tr. 2900:2-9 (Day 10) (Cl. Closing).

547 Rejoinder on Jurisdiction ¶ 41; Reply and C-Mem. on Jurisdiction ¶ 237.

548 Rejoinder on Jurisdiction ¶¶ 41-42.

549 Tr. 2900:16-2901:3 (Day 10) (Cl. Closing); *see* **Ex. CE-1138**, *SMMCV* Tr. 1515:8-21, 1530:3-9 (Bedoya); **Ex. RE-179**, SUNAT June 2006 Internal Report; **CD-1**, Cl. Opening, slides 158-61.

the administrative process for that Assessment.[550] SMCV could not have taken the fork-in-the-road by challenging Assessments at the administrative level before SUNAT's Claims Division and the Tax Tribunal *before* Peru breached the Stability Agreement.

111. *Second*, by its plain terms, Article 10.18.4 does not apply to Freeport's Stability Agreement claims because SMCV did not "previously submit[] the same alleged breach[es]."[551]

(a) As both Mr. Sampliner and Mr. Herrera testified, Article 10.18.4 applies only if the claimant or its enterprise previously submitted the "exact same" cause of action for breach of an investment agreement for adjudication.[552] Peru itself conceded that SMCV did not previously submit causes of action for breaches of the Stability Agreement.[553]

(b) In its Closing, Peru falsely alleged that Freeport "admitted" SMCV submitted the "same Alleged Breaches" for adjudication.[554] Freeport has consistently maintained the precise opposite and Peru failed to produce a single quote by Freeport to the contrary.[555]

(c) Peru continued to argue that Article 10.18.4 applies to claims with the same fundamental basis without responding to Freeport's textual arguments, which are fatal to Peru's objection.[556] As Freeport has explained, if Peru were correct, it would make no sense for the TPA to include a waiver provision and separate fork-in-the-road provisions for investment agreement and TPA claims—the TPA would just need a single fork referring to breaches with "the same fundamental basis" instead of "the same alleged breach."[557]

(d) Peru also failed to address the investment treaty decisions, including *Corona Materials*, *Nissan*, *Kappes*, and *RDC*, that declined to expand fork-in-the-road provisions beyond

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550 *See* Tr. 176:4-22 (Day 1) (Cl. Opening); Rejoinder on Jurisdiction ¶ 47.

551 **Ex. CA-10**, TPA, Article 10.18.4; *see* Reply and C-Mem. on Jurisdiction ¶¶ 246, 248, 251.

552 Tr. 2042:6-9 (Day 7) (Sampliner); *see also* Tr. 2039:17-2043:20 (Day 7) (Sampliner); Tr. 1134:20-1135:20 (Day 4) (Herrera); Rejoinder on Jurisdiction ¶¶ 55-56; Reply and C-Mem. on Jurisdiction ¶ 251.

553 Rejoinder on the Merits and Reply on Jurisdiction ¶¶ 825, 849, 851; Counter-Memorial on the Merits and Memorial on Jurisdiction ¶ 505; **RER-6**, Second Eguiguren Report, ¶¶ 105, 121; *see also* **RER-7**, Morales II, ¶ 91.

554 Tr. 3044:7-13 (Day 10) (Resp. Closing); **RD-7**, Resp. Closing, slide 85.

555 Tr. 175:2-4 (Day 1) (Cl. Opening); *see, e.g.*, Rejoinder on Jurisdiction ¶ 51; Reply and C-Mem. on Jurisdiction ¶ 248.

556 *Cf.* Tr. 353:19-354:5 (Day 1) (Resp. Opening); **RD-1**, Resp. Opening, slide 179; Tr. 3007:7-13 (Day 10) (Resp. Closing); **RD-7**, Resp. Closing, slide 85.

557 Tr. 179:12-19 (Day 1) (Cl. Opening).

their express terms to embrace a "fundamental basis" standard.[558]

112. *Finally*, the Hearing confirmed that administrative proceedings before SUNAT's Claims Division and the Tax Tribunal do not qualify as administrative tribunal or binding dispute settlement procedures.[559] As Mr. Herrera confirmed, Article 10.18.4 covers only adjudicative bodies that "have the same level of independence that the International Arbitral Tribunal would have" and that are "capable to resolve issues related to contract violation."[560] SUNAT's Claims Division and the Tax Tribunal are part of the MEF and are not competent to resolve claims for breach of the Stability Agreement.[561] They also do not qualify as administrative tribunals because they are incapable of reviewing final administrative acts as contemplated by Article 19.5.1.[562]

C. FREEPORT'S CLAIMS DO NOT REQUIRE RETROACTIVE APPLICATION OF THE TPA

113. The Hearing confirmed that the rule against the retroactivity of treaties, reflected in Article 28 of the Vienna Convention on the Law of Treaties and reiterated "for greater certainty" in Article 10.1.3 of the TPA, does not bar Freeport's claims.[563] Peru concedes as much for Freeport's Article 10.5 claims concerning due process violations in the administrative proceedings for the Royalty Assessments, though it wrongly insists Article 10.1.3 bars Freeport's remaining claims.[564]

114. *First*, Freeport does not seek to "bind" Peru in relation to any act or fact which took place prior to the TPA's entry into force. As Mr. Sampliner and Mr. Herrera confirmed, Chapter 10 of the TPA contains "bind[ing]" provisions regulating government "measures" and it is these government measures that are the relevant acts, facts, or situations for determining whether a claim seeks to "bind" a TPA party retroactively. [565] The measures that Freeport alleges constitute

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558 *See* Reply and C-Mem. on Jurisdiction ¶¶ 253; 246 n. 1189 (citing **CA-389**, *RDC v. Republic of Guatemala*, ICSID Decision on Objection to Jurisdiction, ¶ 70); Rejoinder on Jurisdiction ¶ 60.

559 Tr. 1136:3-11 (Day 4) (Herrera); *see also* **CWS-12**, Herrera I, ¶¶ 29-30; *see also* Rejoinder on Jurisdiction ¶¶ 62-69; Reply and C-Mem. on Jurisdiction ¶¶ 258-62; **CER-11**, Sampliner I, ¶ 35.

560 Tr. 1136:3-11 (Day 4) (Herrera).

561 *See* Reply and C-Mem. on Jurisdiction ¶¶ 256-257, 261; Rejoinder on Jurisdiction ¶¶ 67-69.

562 **CA-10**, TPA, Article 19.5.1; *see also* Rejoinder on Jurisdiction ¶ 66; Reply and C-Mem. on Jurisdiction ¶ 259.

563 Rejoinder on Jurisdiction ¶ 70 n. 300; Reply and C-Mem. on Jurisdiction ¶¶ 263-70.

564 *See* Counter-Memorial ¶ 484; Tr. 348:9-350:14 (Day 1) (Resp. Opening); Tr. 3043:5-3045:6 (Day 10) (Resp. Closing); *see also* Rejoinder on the Merits and Reply on Jurisdiction ¶¶ 783, 793.

565 *See* Tr. 181:12-20 (Day 1) (Cl. Opening); 1137:4-20 (Day 4) (Herrera); 2044:19-20 (Day 7) (Sampliner); Rejoinder on Jurisdiction ¶ 71 (citing **CA-10**, TPA, Articles 10.1.1, 10.1.3); *see also* Reply and C-Mem. on Jurisdiction ¶ 265.

breaches are the final and enforceable Assessments, arbitrary decisions refusing to waive penalties and interest, due process violations in the SUNAT and Tax Tribunal proceedings, and arbitrary decision denying SMCV's GEM reimbursement requests, which all undisputedly post-date 1 February 2009.[566] Thus, the Tribunal need not reach Peru's non-retroactivity objection.

115. *Second*, Peru's continued reliance on the June 2006 MINEM and SUNAT Reports to support its non-retroactivity objection is deeply misguided. Peru agrees that the non-retroactivity rule is inapplicable so long as Freeport does "not include in its claims" "acts or omissions" "which, considered in *isolation*, could be deemed to be in violation of the Agreement prior to such date."[567] Freeport does not allege that the issuance of the pre-2009 MINEM and SUNAT Reports, which were not even binding on SMCV, violated the Stability Agreement or the TPA without more.[568] Nor has Freeport alleged that "the cause of" and "basis of, all of SUNAT's Assessments" are the June 2006 MINEM and SUNAT Reports.[569] Freeport alleges that SUNAT and the Tax Tribunal adopted the flawed legal reasoning in those Reports instead of independently considering the Stability Agreement's scope.[570] But it's the final and enforceable Assessments that deprived Freeport and SMCV of their rights, and are the measures that breached the Stability Agreement and the TPA.

116. *Finally*, Peru failed to address at the Hearing the investment treaty decisions uniformly confirming that non-retroactivity does not bar claims challenging a post-entry-into-force measure that is sufficient to constitute a breach.[571] Contrary to Peru's argument, the *Spence* tribunal is in

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566 Reply and C-Mem. on Jurisdiction ¶ 266; *see also* Tr. 183:20-184:3 (Day 1) (Cl. Opening).

567 Rejoinder on the Merits and Reply on Jurisdiction ¶ 789(c) (citing **CA-99**, *Tecmed v. Mexico* Award, ¶ 60) (emphasis original).

568 *See* Tr. 184:7-12 (Day 1) (Cl. Opening); Rejoinder on Jurisdiction ¶ 72(b); Reply and C-Mem. on Jurisdiction ¶¶ 266, 268.

569 Tr. 348:18-350:6 (Day 1) (Resp. Opening); *see also* Rejoinder on the Merits and Reply on Jurisdiction ¶¶ 781, 787(a), 789(c), (d) (same).

570 *See* Tr. 117:8-119:2 (Day 1) (Cl. Opening) (SUNAT June 2006 Internal Report), *id.* 105:17-106:3 (MINEM June 2006 Report); Tr. 2947:22-2950:18 (Day 10) (Cl. Closing); *see also* Memorial ¶¶ 201, 212-213, 223, 226, 261, 391(c), 399.

571 Tr. 181:21-182:2, 182:22-183:9 (Day 1) (Cl. Opening); *see also* **CA-285**, *Eco Oro* Decision on Jurisdiction, ¶ 360 (claimant "relie[d] only on post-[entry-into-force] *measures* [and] that is sufficient to found jurisdiction over those measures" but "the Tribunal . . . is entitled to have regard to [pre-entry-into-force] acts in establishing the facts as they occurred" post-entry-into-force) (emphasis added); Rejoinder on Jurisdiction ¶ 75 (citing **RA-11**, *M.C.I. v. Ecuador* Award, ¶ 93; **CA-99**, *Tecmed v. Mexico* Award, ¶¶ 60, 66; **RA-6**, *Mondev* Award, ¶ 70); Reply and C-Mem. on Jurisdiction ¶ 269 (citing **RA-11**, *M.C.I. v. Ecuador* Award, ¶ 84; **RA-2**, *Spence v. Costa Rica* Award, ¶¶ 217, 229, 240).

accord.[572] The *Spence* tribunal's conclusion that the non-retroactivity rule applied to claims that were "deeply and inseparably" rooted in pre-entry-into-force acts or facts is wholly inapposite because those claims were for pre-entry-into-force expropriatory measures, and the only post-entry-into-force conduct were the failures to pay adequate compensation, which unlike the final and enforceable Assessments, were not sufficient to constitute breaches by themselves.[573]

D. ARTICLE 22.3.1 DOES NOT APPLY TO PENALTIES AND INTEREST ON THE TAX ASSESSMENTS

117. The Hearing confirmed Peru's tax exclusion objection is meritless and limited in scope.[574]

(a) Peru has not made a tax exclusion objection to the Stability Agreement claims nor did it revisit its concession that the tax exclusion does not apply to those claims.[575] As Mr. Sampliner explained, Article 22.3.6 contains an exception to the TPA's tax exclusion for claims alleging breach of an investment agreement such as the Stability Agreement.[576]

(b) Peru has also not made a tax exclusion objection to Freeport's Article 10.5 claims challenging the Royalty Assessments and the penalties and interest on those Assessments—rightly so, as the Peruvian Constitutional Tribunal has held in an unconstitutionality proceeding that "Royalties are not a tax" under Peruvian law but rather an "economic consideration" for the extraction of sovereign resources.[577]

(c) Freeport has not submitted Article 10.5 claims challenging the Tax Assessments. As a result, Peru's tax exclusion objection is limited to Freeport's Article 10.5 claims for failure to waive penalties and interest on the Tax Assessments.

118. As Freeport explained, and as the U.S. recognized in its Non-Disputing Party

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572 **RA-2**, *Spence v. Costa Rica* Award, ¶ 240 (the non-retroactivity rule does not bar "a post-entry into force act or fact addressed to the Claimants on which they can rely to found a cause of action" such as post-entry into force "orders or other regulatory measures imposing legal consequences on the Claimants").

573 Tr. 186:10-17 (Day 1) (Cl. Opening); *see also* **RA-2**, *Spence v. Costa Rica* Award, ¶¶ 229, 298.

574 *See* Tr. 2901:5-2902:11 (Day 10) (Cl. Closing).

575 Tr. 2901:9-12 (Day 10) (Cl. Closing); *see* Tr. 2850:14-2851:2 (Day 9) (Kunsman).

576 *See* Tr. 2077:1-2078:6 (Day 7) (Sampliner); *see also* Tr. 2902:3-11 (Day 10) (Cl. Closing).

577 Tr. 2664:22-2665:3 (Day 9) (Bravo and Picón); *see also* Tr. 2666:13-2667:4, 2670:12, 2687:16-21 (Day 9) (Bravo and Picón), 3042:18-22 (Day 10) (Resp. Closing); 2579:7-13 (Day 9) (Hernández); Tr. 2901:13-2902:1 (Day 10) (Cl. Closing); **Ex. CE-490**, Constitutional Tribunal, Decision, Case No. 0048-2004-PI/TC (1 April 2005), ¶¶ 48-56, 71.

Submission, Article 22.3.1 applies to measures "related" to taxation only insofar as those measures constitute "the application of, or failure to apply a tax [or] the enforcement or failure to enforce a tax."[578] As Peru and Prof. Bravo and Prof. Picón conceded, penalties and interest are not taxes under Peruvian law.[579] Accordingly, it is undisputed that Peru's decisions refusing to waive penalties and interest on the Tax Assessments did not "apply" nor "enforce[d]" taxes.

119. *First,* the Hearing confirmed that there is no merit to Peru's argument that decisions failing to waive penalties and interest enforce taxes.[580] As Freeport explained, the means by which the Government enforces a tax is the coercive collection "procedure" for that tax.[581] Penalties and interest may incentivize compliance with tax laws but Article 22.3.1 does not apply to that broad and amorphous category of measures; it applies to taxation measures themselves. If the TPA intended Article 22.3.1 to apply more broadly to measures such as penalties and interest, it would have used language such as "fiscal measures."[582]

120. *Second*, penalties and interest are not taxation measures merely because they are governed by the Tax Code and administered by the tax authorities.[583] As Prof. Hernández testified, that penalties and interest are classified as components of "tax debt" under Article 28 of the Tax Code is irrelevant.[584] The term "tax debt" encompasses a "broad range" of tax and non-tax concepts that the Tax Code bundles together as a "legislative technique" solely for procedural and administrative convenience because they are administered by the Tax Administration and subject to "similar procedures in terms of their administration, payment, and challenge."[585] For example, royalties and GEM are also classified as components of the "tax debt"—yet, Peru and

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578 U.S. Submission ¶ 32; *see also* Claimant's Comments on the U.S. Non-Disputing Party Submission ¶ 24.

579 *See* **RER-8**, Bravo and Picón II, ¶ 255; Rejoinder on the Merits and Reply on Jurisdiction ¶¶ 772, 775.

580 *Cf.* Tr. 347:4-14 (Day 1) (Resp. Opening); **RD-1**, Resp. Opening, slides 166-67; Tr. 3042:2-17 (Day 10) (Resp. Closing); **RD-7**, Resp. Closing, slide 83.

581 Rejoinder on Jurisdiction ¶ 80; *see also* **CA-14**, Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Article 115) ("An enforceable debt will give rise to coercive actions for its collection.").

582 *See* Rejoinder on Jurisdiction ¶ 80 (citing **RA-162**, *SunReserve v. Italy,* Final Award, ¶ 518); Reply and C-Mem. on Jurisdiction ¶ 274.

583 *See* Rejoinder on Jurisdiction ¶ 81(a); Rejoinder on the Merits and Reply on Jurisdiction ¶ 774; **RER-8**, Bravo and Picón II, ¶¶ 259-60.

584 Rejoinder on Jurisdiction ¶ 81(a); *see also* Tr. 2592:16-2593:16, 2579:18-2580:15, 2595:9-2599:17 (Day 9) (Hernández); **CER-13**, Hernández III, ¶ 17.

585 Tr. 2579:7-2580:15, 2597:2-3, 2598:21-2599:4 (Day 9) (Hernández); **CER-13**, Hernández III, ¶ 17; Rejoinder on Jurisdiction ¶ 81(a).

its experts have never argued that these are taxation measures under the TPA.[586]

121. *Finally*, at the Hearing, Peru avoided addressing the investment treaty decisions limiting similar tax exclusions to measures that directly implicate the sovereign power to impose taxes.[587] For example, the tribunal in *Nissan v. India* concluded that "taxation measures" are "measures regulating the *obligation to pay taxes*."[588] Because penalties and interest are not taxes, measures failing to waive them cannot be measures "regulating the obligation to pay taxes."[589]

E. THE STABILITY AGREEMENT IS AN INVESTMENT AGREEMENT ON WHICH SMCV RELIED IN ESTABLISHING ITS INVESTMENT IN THE CONCENTRATOR

122. The Stability Agreement qualifies as an investment agreement under Article 10.28 of the TPA and Freeport is thus entitled to bring Stability Agreement claims on behalf of SMCV.[590]

123. In its Opening, Peru maintained that Freeport is not entitled to bring claims for breach of the Stability Agreement on behalf of SMCV under Article 10.16.1(b)(i)(C).[591] Yet, Peru did not respond to Freeport's arguments or cross-examine Mr. Sampliner's and Mr. Herrera's testimony showing that the objection is detached from the TPA's plain terms and its negotiating history.[592] And Peru omitted this objection from its Closing, no doubt because it has no merit.

124. *First*, the Hearing confirmed that a claimant may bring Article 10.16.1(b)(i)(C) claims for breach of an investment agreement on behalf of an enterprise provided that the enterprise alone relied on the investment agreement in establishing a covered investment. As Freeport explained, the reliance requirement in the Article 10.28 investment agreement definition is disjunctive—it is satisfied if either the claimant *or* the enterprise relied on the investment

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586 Tr. 2550:7-15 (Day 9) (Hernández); *see also* Rejoinder on Jurisdiction ¶ 81(a)-(b).

587 **CA-279**, *Murphy Exploration Murphy v. Ecuador* Partial Final Award, ¶ 165; *see also* **RA-153**, *Infracapital F1 S.à.r.l. v. Spain*, Decision on Jurisdiction, ¶ 377; Rejoinder on Jurisdiction ¶ 78.

588 **CA-243**, *Nissan v. India,* Decision on Jurisdiction, ¶ 384 (emphasis added); *see also* Rejoinder on the Merits and Reply on Jurisdiction ¶ 776(a); **CA-445**, *Antaris v. Czech Republic* Award, ¶¶ 176, 230, 242; **CA-279**, *Murphy v. Ecuador* Partial Final Award, ¶ 191 (citing V. Thuronyi, COMPARATIVE TAX LAW, (2003), pp. 45-54).

589 **CA-243**, *Nissan v. India* Decision on Jurisdiction, ¶ 384. *Cf.* Rejoinder on the Merits and Reply on Jurisdiction ¶ 776(a).

590 *See* Tr. 187:4-191:16 (Day 1) (Cl. Opening); Rejoinder on Jurisdiction ¶ 85; Reply and C-Mem. on Jurisdiction ¶¶ 276, 278-80.

591 *See* Tr. 355:19-360:11 (Day 1) (Resp. Opening).

592 *See* Tr. 2046:16-2052:19 (Day 7) (Sampliner); Tr. 1137:21-1140:9 (Day 4) (Herrera); *see also* Tr. 188:9-190:15, 191:4-16 (Day 1) (Cl. Opening); Rejoinder on Jurisdiction ¶¶ 87-93; Reply and C-Mem. on Jurisdiction ¶¶ 276-84.

agreement in establishing a covered investment.[593] Because Article 10.28 *defines* "investment agreement" "[f]or purposes of [] Chapter" Ten, it necessarily dictates how the term "investment agreement" in Article 10.16.1 is understood.[594] Moreover, Article 10.16.1 nowhere says that the claimant's reliance is required for Article 10.16.1(b)(i)(C) claims on behalf of an enterprise and thus does not modify the "investment agreement" definition in Article 10.28.[595] Instead, Article 10.16.1 imposes only the "direct nexus" requirement that "the subject matter of the claim and the claimed damages directly relate to the covered investment *that was established or acquired, or sought to be established or acquired . . . in reliance* on the relevant investment agreement."[596]

125. As Mr. Sampliner and Mr. Herrera explained, Peru's argument is also inconsistent with the TPA negotiating history.[597] Mr. Sampliner explained that the U.S. did not intend to introduce an additional reliance requirement in Article 24.1(b)(i)(C) of the 2004 U.S. Model BIT, which is identical to Article 10.16.1(b)(i)(C).[598] And Mr. Herrera explained that he sent the U.S. negotiating team an email specifically requesting "them to explain to us in a detailed manner how that paragraph would apply" and participated in the resulting discussion that led to a clear understanding that "the reliance requirement could be met by the investor or [] the Company."[599]

126. *Second*, the Hearing confirmed that SMCV and Phelps Dodge relied on the Stability Agreement in establishing the covered investment in the Concentrator.[600]

(a) Mr. Davenport testified that it was "very important that we were convinced that the Concentrator would be stabilized" due to the political climate in Peru and that in "the presentations I gave [to the Government prior to the investment], I always mentioned that

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593 **CA-10**, TPA, Article 10.28; *see also* Tr. 189:18-190:15 (Day 1) (Cl. Opening); Tr. 2046:16-2047:6 (Day 7) (Sampliner); Tr. 1138:10-1139:1 (Day 4) (Herrera); Rejoinder on Jurisdiction ¶ 89; Reply and C-Mem. on Jurisdiction ¶¶ 278-79.

594 **CA-10**, TPA, Article 10.28.

595 Tr. 190:2-15 (Day 1) (Cl. Opening); *see also* **CA-10**, TPA, Article 10.16.1.

596 **CA-10**, TPA, Article 10.16.1 (emphasis added); Tr. 188:21-190:5 (Day 1) (Cl. Opening); *see also* Rejoinder on Jurisdiction ¶ 86.

597 Tr. 2047:21-2052:19 (Day 7) (Sampliner); Tr.; 1138:18-1139:1 (Day 4) (Herrera).

598 Tr. 2047:22-2052:20 (Day 7) (Sampliner); **CER-14**, Sampliner II, ¶ 15; **CER-11**, Sampliner I, ¶¶ 44-45.

599 Tr. 1138:7-10; 1138:18-19 (Day 4) ((Herrera); *see also* **CWS-12**, Herrera I, ¶ 37(b); **CWS-22**, Herrera II, ¶ 16; Rejoinder on Jurisdiction ¶ 93(a); Reply and C-Mem. on Jurisdiction ¶ 283.

600 *See* Rejoinder on Jurisdiction ¶¶ 98-101; Reply and C-Mem. on Jurisdiction ¶ 285. *But see* Rejoinder on the Merits and Reply on Jurisdiction ¶¶ 878-81; Counter-Memorial ¶¶ 526-35.

. . . the stability of this Concentrator was very important" to Phelps Dodge's decision.[601]

(b) Ms. Torreblanca testified that the Stability Agreement was "very important" to the Concentrator investment decision because "[c]ountry risk was high," and SMCV's shareholders therefore sought "peace of mind" that the Government would respect the Agreement before approving the investment.[602] She explained that SMCV built the Concentrator because it "had the certainty that the stability was going to be applied to all of the operation."[603] When President Hanefeld asked whether confirming that "the income generated by the Concentrator would be stabilized" was "an economic factor which was decisive," Ms. Torreblanca was crystal clear that "[t]he important thing was to have the Production Unit under the same tax regime"—contrary to Peru's attempt to mischaracterize this response in its Closing.[604] Ms. Torreblanca further explained that with respect to income, while the *specific* rate was not a "weighty" consideration, "the part that was [] important was the issue that the rules had to be clear and they had to be respected"—in other words, that the applicable regime be stabilized.[605]

(c) It is undisputed that the base case in the 2002 Pre-Feasibility assumed that the Stability Agreement would cover the Concentrator.[606] As Mr. Davenport explained, ensuring that the Concentrator "would be stabilized" was "important to the cash flow" projections in the 2002 Pre-Feasibility Study.[607]

(d) The 2004 Feasibility Study and the September 2004 Update both explicitly assumed that the Concentrator would be stabilized.[608] SMCV's and Phelps's Dodge's Boards relied on the financial projections in those studies assuming that the Stability Agreement would

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601 Tr. 795:5-8; 787:13-16 (Day 3) (Davenport).

602 Tr. 387:4-87, 525:4-10 (Day 2) (Torreblanca); *see also* **CE-1134**, *SMMCV* Tr. 510:18-21, 520:9-15 (Torreblanca).

603 *See* Tr. 392:20-22, 387:7-8 (Day 2) (Torreblanca); **CWS-11**, Torreblanca I, ¶ 27; **CWS-21**, Torreblanca I, ¶ 17.

604 Tr. 619:3-12, 635:1-8 (Day 2) (Torreblanca). *Cf.* Tr. 3006:14-3007:9 (Day 10) (Resp. Closing).

605 Tr. 635:5-635:16 (Day 2) (Torreblanca).

606 **Ex. CE-928**, SMCV, Primary Sulfide Preliminary Pre-Feasibility Study (December 2002), pp. 297-298 (projections assuming "CV Estabilization" in the base case); Tr. 728:12-729:13 (Day 3) (Davenport).

607 Tr. 649:20-650:2 (Day 2) (Davenport).

608 *See* Tr. 726:20-727:1 (Day 3) (Davenport); **Ex. CE-20**, Fluor Canada Ltd., Feasibility Study: Cerro Verde Primary Sulfide Project (May 2004), Vol. I, p. 14-1; **Ex. CE-459**, Fluor, SMCV Primary Sulfide Project Feasibility Study Project Update (September 2004), p. 46; **CWS-5**, Davenport I, ¶ 40.

apply when they conditionally approved the Concentrator investment.[609]

(e) SMCV's and Phelps's Dodge's Boards conditionally approved the Concentrator investment, "depend[ent] on obtaining the required permits . . . necessary for the project," including "approval of SMCV's request to expand the Beneficiation Concession," which would result in the Stability Agreement covering the Concentrator by operation of law.[610]

127. *Finally*, the Hearing confirmed that there is no merit to Peru's argument that there is a latent temporal restriction in Article 10.16.1(b)(i)(C) requiring reliance on the investment agreement *after* the TPA's entry into force.[611] At the Hearing, Peru did not mention its new objection or deny that it is untimely under ICSID Rule 41.[612] Nor did Peru deny that its objection is inconsistent with the TPA's text, which defines "covered investment" as including investments established before the TPA's entry into force.[613] And Peru did not respond to Mr. Sampliner's and Mr. Herrera's testimony that Peru's argument is inconsistent with the TPA's negotiation history and U.S. investment treaty practice.[614] Various other U.S. treaties expressly impose a temporal limitation on the investments that can be the subject of investment agreement claims by limiting investment agreements to those that "take effect on or after the date of entry into force."[615] Peru proposed including a provision to that effect in the TPA, which would have been superfluous if Peru's argument here is correct.[616] The U.S. rejected that proposal due to concerns about future breaches of existing agreements resulting from SUNAT's actions.[617]

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609 **CWS-5**, Davenport I, ¶ 40; **CWS-8**, Morán I, ¶¶ 26-27; **Ex. CE-901**, Phelps Dodge, SEC Form 10-K (2004), p. 5.

610 **Ex. CE-470**, SMCV, Board of Directors Meeting Minutes (11 October 2004), p. 1, ¶ 1; **CWS-11**, Torreblanca I, ¶ 27; *see also* **Ex. CE-901**, Phelps Dodge, SEC Form 10-K (2004), p. 5; **CWS-16**, Davenport II, ¶ 17; **CWS-5**, Davenport I, ¶ 40; **CWS-8**, Morán I, ¶¶ 26-29.

611 *Cf.* Rejoinder on the Merits and Reply on Jurisdiction ¶¶ 868-69.

612 Tr. 191:4-9 (Day 1) (Cl. Opening); Rejoinder on Jurisdiction ¶ 41.

613 Tr. 189:16, 191:10-12 (Day 1) (Cl. Opening); Tr. 2051:22-2054:19 (Day 7) (Sampliner); Tr. 1138:10-13, 1139:5-12 (Day 4) (Herrera); Rejoinder on Jurisdiction ¶¶ 95-97; **CER-14**, Sampliner II, ¶ 17; **CWS-22**, Herrera II, ¶ 19.

614 *See* Tr. 2049:12-2052:19 (Day 7) (Sampliner); Tr. 1139:4-1140:9 (Day 4) (Herrera).

615 *See* **CER-14**, Sampliner II, ¶ 18 (citing **CA-371**, U.S.-Singapore FTA (2003), Article 15.1(14); **CA-430**, U.S.-Morocco FTA (2004), Article 10.27; **CA-437**, U.S.-Panama FTA (2007), Article 10.29; **CA-376**, CAFTA-DR (2004), Article 10.28); *id*. (citing **CA-372**, U.S.-Chile FTA (2003), Article 10.27); **CWS-22**, Herrera II, ¶ 18 (citing same).

616 Tr. 2047:7-2048:4 (Day 7) (Sampliner); Tr. 1139:13-1140:9 (Day 4) (Herrera); *see also* Rejoinder on Jurisdiction ¶ 97; **CER-14**, Sampliner II, ¶¶ 19-20; **CWS-22**, Herrera II, ¶ 18.

617 *See* Tr. 2051:22-2052:19 (Day 7) (Sampliner); Tr. 191:10-16 (Day 1) (Cl. Opening); **CER-14**, Sampliner II, ¶ 20 (citing **Ex. CE-1079**, MINCETUR, Round XI Summary (Miami, 18-22 July 2005), p. 22; **Ex. CE-1099**, U.S. State Department, Lima Post Cable, *Peru: 2006 Report on Investment Disputes and Expropriation Claims* (1 June 2006)). *See also* **CWS**-22, Herrera II, ¶¶ 11(b), 18.

VI. FREEPORT DEMONSTRATED THAT IT IS ENTITLED TO AT LEAST US$942.4 MILLION IN DAMAGES

128. At the Hearing, Freeport established that it is entitled to full compensation, calculated as of 13 September 2022 as US$942.4 million, inclusive of pre-Award interest, subject to updating as of the date of the Award, plus post-award interest, resulting from Peru's breaches of the TPA and the Stability Agreement (the "Main Claim").[618] In the alternative, Freeport is entitled to at least US$719.9 million, inclusive of pre-Award interest, subject to updating as of the date of the Award, plus post-award interest (the "Alternative Claim").[619] Peru largely agrees with Freeport's approach to calculating damages. The so-called "errors" Peru alleges are plainly without merit.[620]

129. *First*, testimony confirmed that Peru's mitigation defense has no basis in law or fact.[621]

(a) As Freeport has explained, Peru's argument that Freeport was required to mitigate damages by pre-paying the Assessments has no basis in either Peruvian or international law.[622] It is also fundamentally flawed—it assumes that SMCV should have mitigated damages because its position on the scope of stability guarantees was unreasonable, but if the Tribunal reaches damages, it has already decided that SMCV's position was correct or at a minimum reasonable.[623] Moreover, SMCV already paid the penalties and interest to Peru and therefore, as a matter of law, has no duty to mitigate damages resulting from the penalties and interest.[624]

(b) Peru's argument also lacks any economic justification. As Ms. Kunsman acknowledged, her mitigation calculations were based on an "instruction" from Peru's counsel, not an

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618 Tr. 191:22-192:3 (Day 1) (Cl. Opening); **CD-1**, Cl. Opening, slide 280; **CD-10**, Expert Presentation of Pablo Spiller and Carla Chavich ("Spiller-Chavich Presentation"), slides 7, 9; *see also* Reply and C-Mem. on Jurisdiction § IV; **CER-6**, Spiller-Chavich II, ¶¶ 5.

619 *Id.*; **CD-10**, Spiller-Chavich Presentation, slides 10, 12; *see also* **CER-6**, Spiller-Chavich II, ¶ 27, Table 1-3.

620 *See* Tr. 2767:11-2770:2 (Day 9) (Spiller-Chavich); **CD-10**, Spiller-Chavich Presentation, slides 13-14; **CD-1**, Cl. Opening, slides 287-88.

621 *See* Tr. 192:4-193:22 (Day 1) (Cl. Opening); **CD-1**, Cl. Opening, slides 289-95; **CER-6**, Spiller-Chavich II, ¶ 64.

622 Tr. 192:4-193:22 (Day 1) (Cl. Opening) (noting that *Tza Yap v. Peru* tribunal found that pre-paying assessments would amount to granting SUNAT a loan for an indefinite period of time); **CD-1**, Cl. Opening, slides 289-95 (citing **CA-176**, *Tza Yap v. Peru*, ¶ 249); Reply and C-Mem. on Jurisdiction ¶¶ 313-14 (authorities confirming that the mitigation defense does not apply); **CER-8**, Hernández II, ¶¶ 100-101 (SMCV was not required to mitigate damages under Peruvian law, taxpayers do not usually pay challenged assessments, and SMCV did in fact mitigate damages).

623 Tr. 193:7-15 (Day 1) (Cl. Opening); **CD-1**, Cl. Opening, slide 227.

624 *See* Reply and C-Mem. on Jurisdiction ¶ 311.

"independent economic assumption."[625] And as Dr. Spiller explained, allowing Peru to retain the ill-gotten penalties and interest results in a "windfall" to Peru "that it would not have been able to collect had it not breached the TPA and the Stability Agreement."[626]

(c) Moreover, Peru has failed to reliably establish the amount of damages Freeport should have allegedly mitigated. As Ms. Kunsman admitted, her mitigation adjustments were not "precise"—including because she did not use historical exchange rates or accurately "compute the Statutory Interest" "that Cerro Verde is entitled to recover."[627]

130. *Second*, the soundest assumption is that SMCV would have distributed all of the disputed payments resulting from Peru's breaches, following the timing of SMCV's actual dividend payment history.[628] As Ms. Kunsman herself acknowledged, Freeport's assumptions reflect decisions that SMCV's board and management *actually made* about whether to distribute dividends and how much cash it needed to retain for its operations.[629] Moreover, Ms. Kunsman conceded that SMCV "ha[d] a track record of paying dividends in every year since 2005, except in 2020 due to the pandemic and the disputed payments, and between 2011 and 2017 when it was investing in a major expansion."[630] She further conceded that "[i]t's unusual for project companies to retain cash unless they have a very specific reason," and that there is no evidence that any constraints would have affected SMCV's ability to distribute all of the disputed payments in the but-for world,[631] including because SMCV's dividends policy did not contain any such constraints and Ms. Kunsman assumed SMCV would have held the but-for cash flows

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625 Tr. 2848:4-8 (Day 9) (Kunsman); *see also id.* 2872:22-2873:6.

626 Tr. 2770:13-2771:14 (Day 9) (Spiller-Chavich); **CER-6**, Spiller-Chavich II, ¶ 64; *see also* **CD-10**, Spiller-Chavich Presentation, slide 15.

627 Tr. 2876:6-14 (Day 9) (Kunsman); *id.* at 2872:22-2873:9; *id.* at 2873:18-2874:3.

628 *See* **CD-10**, Spiller-Chavich Presentation, slides 17-18; Memorial ¶¶ 447-50; Reply and C-Mem. on Jurisdiction ¶ 296 (explaining irrelevance of Peru's dividend argument because SMCV has incurred damages, as reflected by the fact that Peru's experts have confirmed the reasonableness of the FCFE approach using the FCFF approach); *id.* ¶¶ 295, 297-99; **CER-6**, Spiller-Chavich II, ¶¶ 6, 36-38, 84-87; **CER-1**, Spiller-Chavich I, ¶¶ 93-95, Table 4, Table 8).

629 Tr. 2855:16-2856:2 (Day 9) (Kunsman); **Ex. CE-1141**, *SMMCV* Tr. 2590:22-2591:15 (Kunsman) ("[T]he considerations that were relevant to the Board in the real world are already taken into account in our Damages Model? A. Right."); *see also* **Ex. CE-934**, SMCV, Dividend Distribution Policy (12 December 2003).

630 **Ex. CE-1141**, SMMCV Tr. 2579:3-2584:14 (Kunsman).

631 Tr. 2860:14-16, 2858:6-8 (Day 9) (Kunsman) ("[D]id you identify any economic reason [why SMCV would not have distributed dividends]? A. No."); *see also* **Ex. CE-1141**, *SMMCV* Tr. 2579:3-2584:14 (Kunsman); **RER-5**, Kunsman I, ¶ 107 (SMCV is a "project compan[y]").

until the valuation date based on a "secret" policy that she admitted there is no evidence of.[632]

131. *Third*, Peru's argument that "Claimant has not identified any damages arising out of the" administrative due process violations in the 2006-2007 and 2008 Royalty Cases is also meritless—Dr. Spiller and Ms. Chavich clearly included those damages in the Main Claim.[633]

132. *Finally*, Peru's breaches forced Freeport to suffer delays in dividend distributions from its investment in SMCV.[634] SMCV's cost of equity is the appropriate pre-award interest rate because it is the rate Freeport would have required to accept delayed dividends, most closely corresponds to reality, and is supported by prior investment jurisprudence.[635] Moreover, SMCV's cost of equity closely corresponds to the SUNAT involuntary reimbursement rate—*i.e.*, the interest rate SMCV would have received if it prevailed in Peru, irrespective of whether it pre-paid the Assessments. In fact, Dr. Spiller and Ms. Chavich determined that Freeport would be entitled to *higher* damages if they had used the SUNAT rates instead of SMCV's cost of equity.[636] As Ms. Kunsman admitted at the *SMMCV* hearing, her valuation date is a "random date in the but-for" world and her assumption that SMCV would have held the but-for cash flows in an account earning short-term interest and distributed them as a one-time payment at the valuation date does not reflect "rational economic behavior."[637]

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133. Freeport is entitled to be restored to the situation it would have been in but for Peru's breaches of the TPA. For the foregoing reasons and those explained in its prior submissions, Freeport respectfully reiterates its Request for Relief set forth in Section V of its Reply.

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632 Tr. 2862:8-2864:21, 2858:15-2859:10 (Day 9) (Kunsman) (no restrictions in the company's dividend policy and corporate bylaws); **Ex. CE-1141**, *SMMCV* Tr. 2608:10-2609:3 (Kunsman); *see* **Ex. CE-934**, SMCV, Dividend Distribution Policy (12 December 2003); Reply and C-Mem. on Jurisdiction ¶ 297. *But see* Tr. 2832:17-21 (Day 9) (Kunsman) (alleging she did not "receive" a policy that "the Company follows to decide whether to distribute dividends or not").

633 *See* **CER-1**, Spiller-Chavich Report, ¶ 31, Tables 11-15. *Cf.* **RD-7**, Resp. Closing, slide 75.

634 *See* Memorial ¶¶ 439, 447; Reply and C-Mem. on Jurisdiction ¶¶ 300-307; **CER-6**, Spiller-Chavich II, ¶¶ 57-62; **CER-1**, Spiller-Chavich I ¶ 96.

635 *See* Reply and C-Mem. on Jurisdiction ¶ 307 (citing **CA-242**, *ConocoPhillips* Award, ¶¶ 809-11, 815; **CA-193**, *Phillips Petroleum* Award, ¶ 295); **CD-10**, Spiller-Chavich Presentation, slide 20; *see also* **CER-6**, Spiller-Chavich II, ¶¶ 57-62; **CER-1**, Spiller-Chavich I ¶ 96, Appendix M.

636 Tr. 2813:6-15 (Day 9) (Spiller-Chavich) (the SUNAT rate "is reasonably high, very close to the Cost of Capital"); **CD-10**, Spiller-Chavich Presentation, slide 9; **Ex. CE-1142**, *SMMCV* Tr. 2636:12-2637:8 (Kunsman); *id.* Tr. 2637:2-8 (there is "a less-than-1-percent difference" between SMCV's cost of equity and the SUNAT rate).

637 **Ex. CE-1141**, *SMMCV* Tr. 2611:2-4, 2592:6-13 (Kunsman); *see also* Tr. 2838:8-18 (Day 9) (Kunsman); **RD-6**, Presentation of Isabel Kunsman, slide 11.

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