BEFORE THE
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Freeport-McMoRan Inc. on its Own Behalf and on Behalf of
Sociedad Minera Cerro Verde S.A.A
Claimant,

v.

Republic of Perú,
Respondent.

Case N° ARB/20/8

Respondent's Post-Hearing Brief

July 14, 2023

Counsel for Respondent:

Stanimir A. Alexandrov
Stanimir A. Alexandrov PLLC

Marinn Carlson
Jennifer Haworth McCandless
María Carolina Durán
Sidley Austin LLP

Ricardo Puccio Sala
Oswaldo Lozano
Navarro & Pazos Abogados

TABLE OF CONTENTS

LIST OF DEFINED TERMS

"1993 Regulation" or "Mining Regulations"	Mining Regulations, Supreme Decree No. 024-93-EM, June 7, 1993
"1994 Stabilization Agreement" or "1994 SA"	Mining stabilization agreement signed between Sociedad Minera Cerro Verde S.A.A. and the Republic of Perú on May 26, 1994
"1996 FS" or "FS"	The 1996 Feasibility Study
"1997 DGM Report"	Internal report issued by the DGM to MINEM's Legal Advisory Office on December 30, 1997
"1998 Stabilization Agreement" or "1998 SA" or "SA"	Mining stabilization agreement signed between Sociedad Minera Cerro Verde S.A.A. and the Republic of Perú on February 13, 1998
"2012 Stabilization Agreement" or "2012 SA"	Mining stabilization agreement signed between Sociedad Minera Cerro Verde S.A.A. and the Republic of Perú on July 17, 2012
"Cerro Verde's Mining and Beneficiation Concessions"	The "Cerro Verde No. 1, 2, 3" mining concession and the "Cerro Verde Beneficiation Plant" beneficiation concession
"CIL"	Customary international law
"Claimant's Counter-Memorial"	Claimant's Reply and Counter-Memorial on Jurisdiction dated September 13, 2022
"Claimant's Memorial"	Claimant's Memorial dated October 19, 2021
"Claimant's Notice of Arbitration"	Claimant's Notice of Arbitration dated February 28, 2020
"Claimant's Rejoinder"	Claimant's Rejoinder on Jurisdiction dated December 16, 2022
"DGM"	General Mining Directorate of the Ministry of Energy and Mines
"EAU"	Economic Administrative Unit
"FET"	Fair and equitable treatment
"Freeport" or "Claimant"	Freeport-McMoRan Inc.
"Milpo"	Compañia Minera Milpo S.A.A.

"MINEM"	Ministry of Energy and Mines
"Mining Law"	Single Unified Text ("TUO") of the General Mining Law (*Texto Único Ordenado de la Ley General de Minería*), Supreme Decree No. 014-92-EM, June 3, 1992
"Mining Society"	National Society of Mining, Petroleum, and Energy
"NDP Submission"	The Non-Disputing Party Submission filed by the United States of America dated February 24, 2023
"Perú" or "Respondent"	The Republic of Perú
"PHB"	Post-Hearing Brief
"Respondent's Counter-Memorial"	Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction dated May 4, 2022
"Respondent's Rejoinder"	Respondent's Rejoinder on the Merits and Reply on Jurisdiction dated November 8, 2022
"SMCV"	Sociedad Minera Cerro Verde S.A.A.
"Southern Peru" or "Southern"	Southern Peru Copper Corporation
"Southern's 1994 Letter"	Letter from Southern Peru Copper Corporation to MINEM dated August 15, 1994, signed by Southern's President Mr. Charles G. Pebble, and signed off by Southern's General Counsel, Mr. Hans Flury
"SUNAT"	*Superintendencia Nacional de Aduanas y de Administración Tributaria*
"SUNAT's 2002 Report"	SUNAT's Report No. 263-2002-SUNAT/K00000 dated September 23, 2002
"SUNAT's 2007 Report"	SUNAT's Report No. 166-2007-SUNAT/2B0000 dated September 20, 2007
"SUNAT's 2012 Report"	SUNAT's Report No. 084-2012-SUNAT/4B0000 issued on September 13, 2012
"Tax Tribunal Manual"	Manual for Organizations and Functions of the Tax Tribunal (Ministerial Resolution No. 626-2012-EF/43 dated October 5, 2012)
"Tintaya"	BHP Billiton Tintaya S.A. or Xstrata Tintaya S.A.

"Tintaya SUNAT's Resolution"	SUNAT's Intendency Resolution No. 095-014-0000747/SUNAT dated May 20, 2009
"TPA"	U.S.-Perú Trade Promotion Agreement, entered into force on February 1, 2009
"Yanacocha"	Minera Yanacocha S.R.L.

I. INTRODUCTION

1. As the hearing laid bare, the dispute that Claimant has submitted to this Tribunal arises from a failed attempt by SMCV to game Perú's system of mining stability guarantees.

2. In 1996, SMCV submitted a FS to MINEM for the sole purpose of investing approximately US $238 million to expand its existing facilities for processing oxide and secondary sulfide to produce copper cathodes (the "Leaching Project"). On the basis of that FS, SMCV applied to enter into a stabilization agreement with MINEM for the Leaching Project. In 1998, SMCV and MINEM entered into a 15-year stabilization agreement, which incorporated the FS and limited SMCV's stability benefits to the Leaching Project, as the hearing reinforced.

3. Six years later, in 2004, SMCV started to develop an entirely new and different investment project—one that would involve the processing of a different type of copper ore (primary sulfides) for the production of a different type of product (concentrate) (the "Concentrator" or the "Concentrator Project"). That same year, Respondent enacted the 2004 Royalty Law, which required mining concession holders to pay royalties on extracted ore.

4. As Respondent established at the hearing, SMCV knew that the SA did not apply to the Concentrator and that SMCV would, therefore, need to pay royalties pursuant to the 2004 Royalty Law with respect to ore processed in the Concentrator. Specifically, through cross-examination of Claimant's witnesses in light of the record evidence, Respondent showed that SMCV sought—but never received—written assurances from MINEM that the SA could apply to the Concentrator; that Claimant presented only dubious and controverted evidence of purported oral assurances from MINEM that the SA applied to the Concentrator; and that SMCV and its then-majority shareholder Phelps Dodge (Freeport's predecessor) consciously decided to gamble on investing in the Concentrator while simultaneously recognizing a significant risk that the SA did not apply to the Concentrator. Moreover, as the hearing also demonstrated, Perú consistently and transparently explained throughout the period leading up to SMCV's and Phelps Dodge's decision to invest in the Concentrator, and Freeport's decision to invest in SMCV when it acquired Phelps Dodge, that the SA applied only to the Leaching Project and not to the Concentrator.

5. Faced with this reality, SMCV tried to sneak the Concentrator into the SA through the back door—and got caught. Respondent's tax authority, SUNAT, recognized that SMCV was avoiding paying royalties and taxes with respect to the Concentrator and in August 2009 began issuing Royalty and Tax Assessments against SMCV for unpaid amounts. SMCV challenged those

Assessments before SUNAT, before the Tax Tribunal, before Respondent's first-instance and appellate courts, and, finally, before Perú's Supreme Court. At each stage, SMCV claimed (exactly as Claimant does again here) that the SA applied to the Concentrator. At each stage, SMCV lost. (SMCV lost at every stage, except for a first-instance court decision which was quickly overturned by the appellate court; the appellate court's decision was then confirmed by the Supreme Court.)[1]

6. To be clear, SMCV did not appeal all of the SUNAT Assessments through to the Supreme Court. In order to initiate this and the *SMM Cerro Verde Netherlands B.V. v Republic of Perú* arbitrations, SMCV withdrew or declined to pursue domestic remedies with respect to multiple claims that were pending before the Tax Tribunal and judiciary. By withdrawing its claims, SMCV did not allow them to reach the Supreme Court, which could and surely would have issued yet more consistent rulings against SMCV—confirming its ruling with respect to the 2008 Royalty Assessment, which held that the SA applied only to the Leaching Project.[2] As Respondent showed at the hearing, the decisions that were issued at each stage in SMCV's various appeals were grounded in the text of the SA and consistent with Peruvian law.

7. Without asserting a denial of justice claim, Claimant has shamelessly sought to relitigate the exact same claim before this Tribunal. Claimant alleges in this arbitration that Perú breached the SA, and through that same alleged contractual breach and other related acts, Art. 10.5 of the TPA. As explained at the hearing and in Respondent's written submissions, as an initial matter, this Tribunal lacks jurisdiction to hear almost all of Claimant's claims. But even if the Tribunal had jurisdiction to hear Claimant's claims (it does not), resolution of almost all of Claimant's claims turns on the answer to a simple question: Did the SA that stabilized the Leaching Project extend to the Concentrator, SMCV's new investment made years after the SA was signed? As Respondent has shown, and as Perú's highest court, the Supreme Court, also held as a matter of the governing law of that contract (Peruvian law), the answer is unequivocally "no."

8. In the sections that follow, Respondent highlights elements of the hearing that drove home these points. (In order to focus on these points, Respondent does not recite all the arguments that it made at the hearing. To the extent Respondent does not explicitly reference arguments made at the hearing or in its pleadings, it, of course, maintains those arguments and incorporates them by reference.)

[1] *See* Respondent's Counter-Memorial at paras. 17, 352, 361; Respondent's Rejoinder at paras. 20, 61, 643.
[2] *See* Respondent's Rejoinder at Annex A; *see also* Respondent's Counter-Memorial at paras. 349, 378, 402, 405, 497; Respondent's Rejoinder at paras. 62, 620, 633, 653, n.1757.

II. THE HEARING SHOWED THAT CLAIMANT'S WITNESSES AND EXPERTS ARE NOT CREDIBLE

9. The hearing revealed that the testimony on which Claimant rests its entire case (both factual and expert) is at least questionable and, in several cases, flatly unreliable. Claimant's witness testimony was inconsistent (among its witnesses) and contradicted by contemporaneous documents on the record. Claimant's witnesses could not get their story straight. The hearing also revealed that Claimant's experts have deep ties with Claimant's Peruvian counsel, Estudio Rodrigo, Elías & Medrano ("Estudio Rodrigo"). They are not independent, unbiased experts. They are, rather, friends and former partners of Estudio Rodrigo—or, in the case of the quantum experts, they are almost exclusively "claimant-side" testifiers. While Respondent will discuss aspects of the testimony of Claimant's witnesses and experts throughout this submission, this section focuses on the most egregious examples of their lack of credibility.

10. One of the most striking revelations—and a probable explanation for the witnesses' lack of consistency and abundance of statements that were contradicted by contemporaneous documents—was that most of Claimant's fact witnesses were being paid to testify, in some instances even above their regular hourly rate. Inevitably, then, they faced an economic motivation to testify favorably for Claimant, but not necessarily to tell the truth. Claimant's key fact witnesses—Ms. Chappuis, Mr. Estrada, Mr. Herrera, and Mr. Davenport—all admitted that they were being paid to give their testimony in this arbitration. Notably, Ms. Chappuis, Mr. Estrada, and Mr. Herrera failed to disclose this information in their statements.

11. During cross-examination, **Ms. Chappuis** admitted—for the first time in this arbitration—that she was paid for the time she spent preparing for the hearing and her written statements.[3] When Respondent's counsel asked Ms. Chappuis how much she was paid, Ms. Chappuis was unwilling to reveal any information about her actual compensation as a witness.[4] Even though Ms. Chappuis conceded that she was paid US $250 per hour, she was very reluctant to disclose the total amount of time she spent on her witness statements and preparing for the hearing, which would have revealed the full compensation she received for her testimony.[5]

12. In addition, under cross-examination, Ms. Chappuis revealed—also for the first time in this arbitration—that she has a professional relationship with Raul Benavides, Vice

[3] *See* Eng. Tr. Day 3 at 851:18 – 852:15 (Chappuis); *see also generally* Ex. CWS-3, First Chappuis Statement; Ex. CWS-14, Second Chappuis Statement.
[4] *See* Eng. Tr. Day 3 at 851:18 – 852:22 (Chappuis).
[5] *See* Eng. Tr. Day 3 at 852:8 – 864:19 (Chappuis).

President of Compañía Minera Buenaventura (owner of 19.5% of SMCV) and one of SMCV's directors at the time when the company invested in the Concentrator and when Ms. Chappuis held the position of Director General of Mining at MINEM.[6] When pressed by Respondent's counsel, Ms. Chappuis admitted that they are both members of the same professional network group called "Huascaminas"—which holds regular meetings and keeps an active chat group.[7] Thus, Ms. Chappuis has an ongoing professional relationship with one of the owners of the company at the center of this dispute.

13. **Mr. Estrada's** admission regarding his compensation was particularly concerning. At the hearing—for the first time in this arbitration—Mr. Estrada disclosed (i) that SMCV has been a client of his law firm (*TS Asesores*) for years (exclusively for purposes of this arbitration[8]); and (ii) that he was being compensated for preparing his written testimony and for preparing for and appearing at the hearing.[9]

14. Indeed, Mr. Estrada disclosed that the rate he billed for the time he spent preparing for this arbitration (US $420 or $428 per hour) was double his partners' usual rates.[10] Mr. Estrada also confirmed that his partners helped him write his written testimony, but they did not submit witness statements themselves. Thus, Respondent was deprived of the opportunity to cross-examine some of the authors of Mr. Estrada's witness statement.[11] In any case, and as Respondent shows in Section VIII below, Mr. Estrada's testimony is completely unreliable, as he testified based almost entirely on assumptions, not personal knowledge.[12]

15. During cross-examination, **Mr. Herrera** also admitted—for the first time in this arbitration—that he was being compensated for preparing his witness statements and for preparing for and testifying at the hearing.[13] In fact, Mr. Herrera admitted that the rate he billed for the time he spent preparing for this arbitration was US $250 per hour, which is above his typical hourly rate for his work as a consultant (US $200 per hour).[14] Mr. Herrera also admitted during cross-examination that he was testifying on issues that go beyond his personal and professional

[6] *See* Eng. Tr. Day 3 at 869:22 – 871:12 (Chappuis); *see also* 876:20 – 883:12 (Chappuis).
[7] *See* Eng. Tr. Day 3 at 871:13 – 874:20 (Chappuis).
[8] Eng. Tr. Day 4 at 1059:21 – 1060:7 (Estrada).
[9] *See* Eng. Tr. Day 4 at 1055:22 – 1066:8 (Estrada).
[10] *See* Eng. Tr. Day 4 at 1062:2-9 (Estrada).
[11] *See* Eng. Tr. Day 4 at 1066:20 – 1067:13 (Estrada).
[12] *See* Eng. Tr. Day 4 at 1068:8 – 1069:9 (Estrada).
[13] *See* Eng. Tr. Day 4 at 1173:19 – 1175:4 (Herrera).
[14] *See* Eng. Tr. Day 4 at 1174:9-20 (Herrera).

knowledge.[15] Thus, just as with Mr. Estrada, Mr. Herrera's testimony is unreliable.

16. **Mr. Davenport** admitted at the May 2023 hearing that SMCV is currently his only client in his consulting practice and that he is charging SMCV his "consultant salary."[16] Moreover, throughout the arbitration, SMCV has consistently been one of Mr. Davenport's most important clients. During cross-examination, Mr. Davenport testified that in 2022, his work for SMCV—related to this arbitration—represented 20% of his consulting income.[17] Thus, part of Mr. Davenport's financial well-being is dependent on his testimony in this proceeding.

17. As to **Ms. Torreblanca,** she confirmed that her professional trajectory inside SMCV represents essentially her entire professional career.[18] As Ms. Torreblanca explained at the hearing, she was a junior lawyer when she started working as an attorney in SMCV in 1997.[19] It is not surprising, therefore, that (as she testified) Ms. Torreblanca was not involved in the early stages of the SA, the application for which was submitted before she even began working at SMCV.[20] In fact, at the *SMM Cerro Verde* Hearing, she conceded that she had no prior knowledge of stabilization agreements when she started at SMCV.[21] The entirety of Ms. Torreblanca's legal career since 1997 has been spent working her way up the ladder inside SMCV itself; she claims no other professional experience in the past 26 years. Therefore, Ms. Torreblanca's motivation to appear to testify on SMCV's behalf and the incentives she faces as one of Claimant's main witnesses in this arbitration are inevitably influenced by her long career and position in SMCV.

18. While witnesses are routinely reimbursed for out-of-pocket expenses, it is unusual for them to be paid for preparing their witness statements or presenting their testimony at a hearing—in particular, if they are paid more than their usual rates, as was clearly the case with Mr. Estrada and Mr. Herrera. In light of the fact that the hearing revealed that most of Claimant's witnesses who testified at the hearing were paid for their testimony, Respondent can only assume that all of Claimant's witnesses, even those who were not called for cross-examination, were paid to testify on behalf of Claimant.

19. In stark contrast with Claimant's witnesses, none of Respondent's witnesses was paid to testify. Indeed, Mr. César Polo clarified that he was not being compensated to testify,

[15] *See* Eng. Tr. Day 4 at 1146:12 – 1147:17 (Herrera).
[16] Eng. Tr. Day 2 at 669:2-15 (Davenport).
[17] *See* Eng. Tr. Day 2 at 670:3-14 (Davenport).
[18] *See* Eng. Tr. Day 2 at 382:10-21; 397:12 – 398:1 (Torreblanca).
[19] *See* Eng. Tr. Day 2 at 382:10-16 and 397:10-20 (Torreblanca).
[20] *See* Eng. Tr. Day 2 at 398:2-5 and 424:22 – 425:3 (Torreblanca).
[21] *See* Ex. CE-1134, *SMMCV v. Perú*, Eng. Tr. Day 2 at 411:12-13 (Torreblanca).

because he felt "[t]hat's [his] responsibility."[22] Similarly, at the *SMM Cerro Verde* Hearing he clarified that he was not being compensated to testify because he "fe[lt] that, as a Witness, [he] shouldn't receive anything."[23] He further clarified: "I don't think it's right. I'm responsible for the duties I carried out."[24]

20. In addition to Claimant's witnesses' admissions with respect to their payment arrangements, the responses of Claimant's legal experts under cross-examination revealed their close professional and even personal relationships with Claimant's Peruvian counsel, Estudio Rodrigo. Indeed, both Ms. Vega and Mr. Bullard confirmed that they had been Mr. Luis Carlos Rodrigo's partners.[25] To recall, Estudio Rodrigo has been advising SMCV on issues related to the Concentrator since at least 2002,[26] and Mr. Rodrigo, in particular, acted as SMCV's counsel leading all of its legal proceedings in Perú.[27]

21. Under cross-examination, **Ms. Vega** confirmed that she worked for 17 years at Estudio Rodrigo, was a partner there for 13 years—which is more than half of her entire legal career—and was a member of the Firm's Management Committee together with Mr. Rodrigo.[28] During the time Ms. Vega worked at Estudio Rodrigo, SMCV was a key client of the firm.[29] Ms. Vega testified that she does not recall advising SMCV, but that testimony is questionable.[30] According to Ms. Vega, she was one of the leading experts on stabilization agreements at Estudio Rodrigo. Indeed, Ms. Vega admitted that she advised multiple mining companies with respect to their stabilization agreements.[31] Thus, it is highly likely that Ms. Vega advised SMCV as well. **Mr. Bullard** also confirmed during cross-examination that he was employed by Estudio Rodrigo for 5 years and was a partner for 2 of those years.[32] Given the length of time that Ms. Vega and Mr. Bullard worked for Estudio Rodrigo, including (in Ms. Vega's case) when SMCV was a client, their testimony can hardly be deemed independent and impartial.

22. **Mr. Hernández** conceded at the hearing that he had failed to disclose his close

[22] Eng. Tr. Day 5 at 1433:5-11 (Polo).
[23] Ex. CE-1137, *SMMCV v. Peru*, Eng. Tr. Day 5 at 1156:14-15 (Polo).
[24] Ex. CE-1137, *SMMCV v. Peru*, Eng. Tr. Day 5 at 1156:15-16 (Polo).
[25] *See* Eng. Tr. Day 8 at 2264:16-19 (Vega); *id.* at 2378:3 – 2379:10 (Bullard).
[26] *See* Ex. RE-339, Claimant's Letter to Respondent transmitting Claimant's Ordered Production, July 25, 2022, at pp. 3-7 (PDF). *See also* Ex. CE-513, Master Participation Agreement, Sept. 30, 2005, at pp. v, 24-25, Appendix I-1 (p. 264 PDF).
[27] *See*, *e.g.*, Ex. CE-40, SMCV Appeal to Tax Tribunal, 2006/07 Royalty Assessments, May 12, 2010, at p. 39; Ex. CE-49, SMCV Appeal to Tax Tribunal, 2008 Royalty Assessments, Mar. 10, 2011, at p. 51.
[28] *See* Eng. Tr. Day 8 at 2264:3 – 2265:13 (Vega).
[29] *See* Eng. Tr. Day 8 at 2268:2-5 (Vega).
[30] *See* Eng. Tr. Day 8 at 2268:20 – 2269:20 (Vega).
[31] *See* Eng. Tr. Day 8 at 2265:14 – 2266:3 (Vega).
[32] *See* Eng. Tr. Day 8 at 2377:19 – 2379:10 (Bullard).

personal relationship with partners from Estudio Rodrigo, including Mr. Luis Carlos Rodrigo's father, Mr. Luis Carlos Rodrigo Mazuré.[33] Mr. Hernández also failed to disclose his professional activities with Mr. Rodrigo Mazuré, such as co-owning a weekly legal publication.[34]

23. Finally, Claimant's quantum expert **Dr. Pablo Spiller** confirmed in cross-examination that he has testified on behalf of claimant investors in at least 39 cases, in contrast to only 4 occasions that he could recall in his entire expert career for respondent states.[35] That imbalance presumably explains the aggressively pro-claimant positions in Dr. Spiller and Ms. Chavich's report, such as seeking Claimant's cost of equity as a pre-award interest rate.[36]

24. In sum, Claimant's claims in this arbitration are based on the testimony of fact witnesses and legal experts who are simply not credible. The Tribunal should, therefore, treat their testimony accordingly.

25. During the hearing, Claimant reserved rights on the basis of alleged "shocking admissions" of witness coordination among Respondent's witnesses.[37] As Respondent already showed in its Closing Statement, Claimant's allegation is entirely baseless.[38] First, there was no such "witness coordination" as alleged. Indeed, Respondent's witnesses' answers under cross-examination showed the contrary—each witness testified based on his or her personal knowledge and recollection of the facts, which were not at all synchronized.[39]

26. Second, contrary to Claimant's dramatic (but baseless) assertions, a witness is not sequestered from the moment he or she is identified as a potential witness, and is not prohibited from talking to other witnesses or learning what other witnesses may recall about the case. Sequestration, if ordered, prohibits a witness from hearing the oral examination, and specifically the cross-examination, of other witnesses. Respondent already cited multiple sources by distinguished authorities in international arbitration that define "sequestration" as a procedure that begins during the oral examination of factual witnesses at a hearing.[40] These authorities include Mr. Gary Born, Professor Jan Paulson, Professor William Park, Mr. Albert Jan van den Berg, and

[33] *See* Eng. Tr. Day 9 at 2628:6 – 2631:12 (Hernández).
[34] *See* Eng. Tr. Day 9 at 2625:22 – 2627:13 (Hernández).
[35] *See* Eng. Tr. Day 9 at 2786:13 – 2787:20 (Spiller).
[36] *See* Ex. CD-10, Spiller and Chavich Hearing Presentation at slides 7, 9, 12, 20.
[37] *See* Eng. Tr. Day 5 at 1493:6 – 1493:11 (Tovar).
[38] *See* Eng. Tr. Day 10 at 2976:10 – 2978:15 (Respondent's Closing).
[39] *See* Eng. Tr. Day 10 at 2976:10 – 2977:20 (Respondent's Closing); *see also* Ex. RD-7, Respondent's Closing Presentation at slide 7; Eng. Tr. Day 5 at 1477:9 – 1479:3, 1536:14 – 1538:22 (Tovar).
[40] *See* Eng. Tr. Day 10 at 2978:16 – 2979:8 (Respondent's Closing).

more.[41] In fact, this definition of sequestration was adopted in Procedural Order No. 1, paragraph 19.10, which provides that sequestration starts "[o]nce direct examination begins."[42] Moreover, Claimant's counsel, Debevoise & Plimpton, recently published a comprehensive "International Arbitration Clause Handbook" (2022) whose authors include Claimant's lead counsel Dr. Prager.[43] Nowhere in the 211 pages of the handbook does it say that a witness is sequestered from the moment he or she is identified as a witness.

27. Claimant did not provide any reference to any rule that prohibits a witness from speaking to other persons (including witnesses) to test or confirm his or her recollection or from reviewing others' completed witness statements. There was nothing improper or nefarious for a witness to have attended meetings with counsel together with others in the early stages of case development, to have reviewed (signed and finalized) witness statements of other witnesses after the witness's own statement was completed, or to have attended preparation sessions with counsel in the presence of one or another witness.

III. TESTIMONY AT THE HEARING CONFIRMED THAT THE STABILIZATION AGREEMENT COVERED ONLY SMCV'S LEACHING PROJECT

28. At the hearing, Claimant insisted that the SA covered SMCV's so-called "mining unit," which, according to Claimant, includes the Concentrator.[44] But, as Respondent has demonstrated, neither the Agreement nor its underlining FS refers to any so-called "mining unit." Indeed, at the hearing Claimant appeared largely to abandon its theory that the SA always covered the Concentrator or covered it from the outset, and relied instead on arguments about such coverage being created or added to the SA by the expansion of SMCV's Beneficiation Concession. That latter, newly primary position of Claimant will be taken up in Section VI. First, in this Section, we review briefly the hearing's evidence about the scope of the SA *as written*—none of which supports Claimant's claims.

---

[41] *See* "Chapter 15: Procedures in International Arbitration (Updated August 2022)," in Gary B. Born, *International Commercial Arbitration*, 3rd ed., Kluwer Law International (2021), at p. 2462; "Article 8: Evidentiary Hearing," in Tobias Zuberbühler, Dieter Hofmann, *et al.*, *IBA Rules of Evidence: Commentary on the IBA Rules on the Taking of Evidence in International Arbitration*, 2nd ed., at p. 189 (citing to W. Laurence Craig, William W. Park, and Jan Paulsson, "International Chamber of Commerce Arbitration," 3rd ed. (2001)" at p. 440); Albert Jan van den Berg, "Chapter 9, Organizing an International Arbitration: Practice Pointers," in *The Leading Arbitrators' Guide to International Arbitration*, 2nd ed. at p. 178. *See also* "Part II: The Process of an Arbitration, Chapter 12: General Witness and Expert Evidence," in Jeffrey Maurice Waincymer, *Procedure and Evidence in International Arbitration*, Kluwer Law International (2012), at p. 927.

[42] Procedural Order No. 1, June 17, 2021, at para. 19.10.

[43] *See* Debevoise & Plimpton LLP, Debevoise International Arbitration Clause Handbook, 2022, at p. 192.

[44] *See* Eng. Tr. Day 1 at 19:17-22, 23:4-8, and 24:9-12 (Claimant's Opening).

A. THE 1996 FEASIBILITY STUDY WAS LIMITED TO SMCV'S LEACHING PROJECT

29. As Respondent reviewed during the hearing, when SMCV applied for a 15-year mining stabilization agreement on January 25, 1996,[45] SMCV's application was accompanied by the 1996 FS. It was that FS that identified, explained and analyzed the US $237.5 million project to significantly expand SMCV's leaching facility to increase its "production capacity from 72,000,000 to 105,000,000 pounds (48,000 metric tons) of copper cathodes." The FS itself labels this the "Leaching Project."[46]

30. The 1996 FS analyzed and outlined the investment of only one project—the Leaching Project.[47] It did not analyze or outline a Concentrator, which was not feasible at the time. In fact, construction of the concentrator plant would not even begin for another eight years.[48]

31. At the hearing, Ms. Torreblanca attempted to argue that the Concentrator was somehow envisioned in the 1996 FS, because that study described a US $2.5 million expense to undertake a study of the possibility of building a concentrator.[49] Actually building a Concentrator, however, was not envisioned in 1996. Indeed, as Claimant admitted at the hearing, nine studies were conducted between 1972 and 1998,[50] and all of them concluded that the construction of a concentrator was not feasible or was "uneconomical."[51] In the end, Ms. Torreblanca had no choice but to concede that the 1996 FS neither refers to nor contemplates the Concentrator, recognizing that it only "included an investment for a [FS] to assess [the] Concentrator or [the] mill."[52]

32. In fact, when SMCV signed the SA in 1998, the Concentrator still was not financeable.[53] As Mr. Davenport confirmed during the hearing, SMCV conducted a FS in 1998 that concluded—once again—that the Concentrator was not feasible.[54] Ms. Torreblanca also admitted that SMCV only started thinking about a potential investment of US $50 million for the Concentrator in 2000, two years after the SA was signed.[55] Mr. Davenport echoed

[45] *See* Eng. Tr. Day 1 at 195:8-16 (Respondent's Opening). *See also* Ex. RD-1, Respondent's Opening Presentation at slide 9 (Respondent's Opening).
[46] Ex. CE-7, Stability Agreement Request, Jan. 25, 1996, at p. 2. *See also generally* Ex. CE-9, Feasibility Study, Executive Summary, 1996; Ex. RD-1, Respondent's Opening Presentation at slide 9.
[47] *See* Ex. RD-1, Respondent's Opening Presentation at slide 10; Eng. Tr. Day 1 at 199:8-12, 202:12 – 203:8 (Respondent's Opening).
[48] *See* Ex. RD-1, Respondent's Opening Presentation at slide 11. *See also* Eng. Tr. Day 1 at 204:17-20 (Respondent's Opening).
[49] *See* Eng. Tr. Day 2 at 405:2 – 406:8 (Torreblanca). *See also* Claimant's Memorial at para. 73.
[50] *See* Eng. Tr. Day 1 at 87:14 – 88:2 (Claimant's Opening); Eng. Tr. Day 3 at 704:2-13, 704:18 – 705:7 (Davenport).
[51] *See* Claimant's Memorial at para. 75.
[52] Eng. Tr. Day 2 at 407:18 – 408:1 (Torreblanca).
[53] *See* Eng. Tr. Day 3 at 704:14 – 706:7 (Davenport).
[54] *See* Eng. Tr. Day 3 at 704:14 – 706:7 (Davenport).
[55] *See* Eng. Tr. Day 2 at 388:4-22 (Torreblanca).

Ms. Torreblanca's testimony, stating that SMCV did not believe that an investment in the Concentrator was economically feasible in 2000.[56] Ms. Torreblanca also acknowledged under cross-examination that SMCV had not even completed a feasibility study for the Concentrator in 2003—a year before it decided to invest in that project.[57] Thus, when SMCV entered into the SA in 1998, SMCV clearly did not intend for the Agreement to include the (not-yet-envisioned) Concentrator Project.

33. In its Opening, Claimant emphasized a different aspect of the pre-1998 period (rather than its abandoned argument about the 1996 FS): Claimant alleged that during SMCV's privatization process (1993-1994), Cyprus Amax Minerals Company ("Cyprus") committed to build the Concentrator so long as the seller, Minero Perú, guaranteed stability.[58] Claimant, however, failed to show any *quid pro quo*. Minero Perú did not promise any stability guarantees specifically with respect to the Concentrator—it provided in general terms that such guarantees would be available to mining investors for the "investment."[59] Likewise, the 1994 Share Purchase Agreement between Minero Perú and Cyprus ("SPA") does not mention any stabilization agreement with respect to the Concentrator. To the extent it mentions a stabilization agreement, that reference is related to a 10-year stabilization agreement, which the parties did sign in 1994—which Claimant does not contend covered any type of concentrator—and not to the 15-year SA that the parties signed in 1998 that is at the center of this dispute.[60] Moreover, the concentrator plant that was mentioned in that 1994 SPA was very different from the concentrator that was actually built: most obviously, and as Mr. Davenport testified, it was much smaller than the one that was actually built in 2004 (*i.e.*, a capacity of 28,000 MT/D vs. 147,000 MT/D, using different technology).[61] Finally, Phelps Dodge entered into a settlement agreement with Minero Perú so that it would not be obligated to build any concentrator plant at all pursuant to the SPA.[62] Thus, the Concentrator that was actually built in 2006[63] had no connection to any concentrator that may have

[56] *See* Eng. Tr. Day 3 at 706:8 – 707:13 (Davenport).
[57] *See* Eng. Tr. Day 2 at 444:1-17 (Torreblanca).
[58] *See* Eng. Tr. Day 1 at 81:1 – 82:4 (Claimant's Opening Statement).
[59] *See* Ex. CE-321, Morgan Grenfell & Co. Ltd., *Cerro Verde Copper Mine: Information Memorandum*, Apr. 1993, at p. 1.4 (p. 8 PDF) ("Chief among the benefits to Mining investors are stability contracts offered by the government which guarantee the investor the maintenance of the existing fiscal, administrative and exchange control treatment of the investment") (emphasis added).
[60] *See* Ex. CE-4, Share Purchase Agreement between Cyprus Climax Metals Company and Empresa Minera del Peru S.A., Mar. 17, 1994, at p. 13 (p. 18 PDF). *See also* Ex. CE-344, 1994 Stabilization Agreement.
[61] *See* Ex. RE-100, Aide Memoire (Cyprus), July 9, 1999, at p. 1; Claimant's Memorial at para. 67(d); Eng. Tr. Day 3 at 694:19 – 701:8 (Davenport).
[62] *See* Ex. CE-17, Out-of-Court Settlement Between Cyprus Climax Metals Co. and Empresa Minera del Perú S.A., Mar. 30, 2001.
[63] *See* Ex. RD-1, Respondent's Opening Presentation at slide 11.

been imagined at the time of the 1994 sale between Minero Perú and Cyprus.

34. Thus, (i) when the mine was privatized and Cyprus bought most of SMCV's shares in 1994; (ii) when Perú and SMCV signed the first, 10-year stabilization agreement in 1994; (iii) when SMCV filed an application for a 15-year stabilization agreement in 1996 to stabilize a new, planned investment project (the Leaching Project); and (iv) when Perú and SMCV signed the 1998 SA, only the mine's oxides and secondary sulfides were being processed, and the Concentrator Project was not planned.

35. It is critical to recall that the Concentrator is entirely distinct, technologically and economically, from the Leaching Project—it uses a different process and produces a different product.[64] In Claimant's counsel's own words, "[T]here is a big difference between a lixiviation plant and a concentrator plant."[65] SMCV launched a brand-new line of business when it pursued the Concentrator Project: extracting and processing primary sulfide ore in order to produce copper concentrate, instead of copper cathodes produced from oxides and secondary sulfides.

36. As mentioned, Claimant insisted at the hearing that the SA covered the entirety of any activities that took place within SMCV's so-called "mining unit." Claimant's witnesses even suggested that the name "Cerro Verde Leaching Project" as used in the SA actually meant or should be read to mean "Cerro Verde mining unit."[66] However, Claimant did not question MINEM's contemporaneous understanding that the 1996 FS—on which SMCV's request for a new stabilization agreement was explicitly based—concerned only the Leaching Project.[67] As shown at the hearing, the Resolution that approved the FS and the signing of the SA also made clear that the FS, and thus the granted stability, was limited to the Leaching Project.[68] Notably, none of these contemporaneous documents contain a single reference to a "mining unit" or an EAU—primarily because SMCV did not and does not have "mining unit" or EAU, as discussed in the next sub-section.

37. Thus, the FS, the report by the DGM analyzing the FS, and the Resolution approving the FS all indicated that the investment project was solely for the purpose of expanding SMCV's leaching facilities to increase the production of copper cathodes. None of these

[64] *See* Eng. Tr. Day 7 at 2166:8 – 2168:7 (Ralbovsky).
[65] Eng. Tr. Day 6 at 1661:1-2 (Bedoya).
[66] *See*, *e.g.*, Eng. Tr. Day 2 at 442:8 – 443:15, 456:9-21 (Torreblanca); Eng. Tr. Day 3 at 928:19 – 931:5 (Chappuis).
[67] Ex. RE-25, MINEM, Report No. 033-96-EM-DGM-DFM-DFAE, Mar. 27, 1996, at p. 1 (PDF); Ex. RD-1, Respondent's Opening Presentation at slide 12.
[68] *See* Ex. RE-24, MINEM, Directoral Resolution No. 158-96, at Arts. 1 and 3; Ex. RD-1, Respondent's Opening Presentation at slide 13.

documents outlined, analyzed, or approved any other investments, such as an investment in any type of concentrator plant to produce copper concentrate.

B. THE 1998 STABILIZATION AGREEMENT WAS LIMITED TO SMCV'S LEACHING PROJECT

38. At the hearing, Respondent emphasized the importance of the text of the SA itself. That document refers exclusively to the Leaching Project; it does not refer to or grant stabilization to SMCV's so-called "mining unit." SMCV's SA specifically limits its scope to the project defined in the FS—the Leaching Project.

39. *First*, the SA cannot apply to SMCV's alleged EAU or so-called "mining unit" (as Claimant claims), because SMCV does not even have an EAU. The creation of an EAU requires a special procedure. Art. 44 of the Mining Law provides that a mining company is required to apply for an EAU, which must be approved by the DGM through a Directorial Resolution.[69] Art. 82 of the Mining Law also provides that EAUs created "for the purposes of" stabilization agreements require the approval of the DGM.[70] Moreover, the Mining Regulations provide that if a mining company applying for a mining stabilization agreement has an EAU, it has to submit the Directorial Resolution approving and constituting that EAU together with its application. Claimant does not dispute that SMCV never initiated the procedure to create an EAU.[71]

40. Faced with this reality, Claimant and Ms. Torreblanca came up with a new (but mistaken) theory at the hearing: SMCV allegedly had something that they labeled a *de facto* EAU, which was somehow created with or through the SA itself.[72] According to Ms. Torreblanca, it was not necessary to submit an application to create an EAU or "mining unit" because "there's no procedure established by the Ministry, and that is why [she] was saying, [SMCV] had a *de facto* one, which was the one defined in Annex 1 to the Stability Agreement."[73]

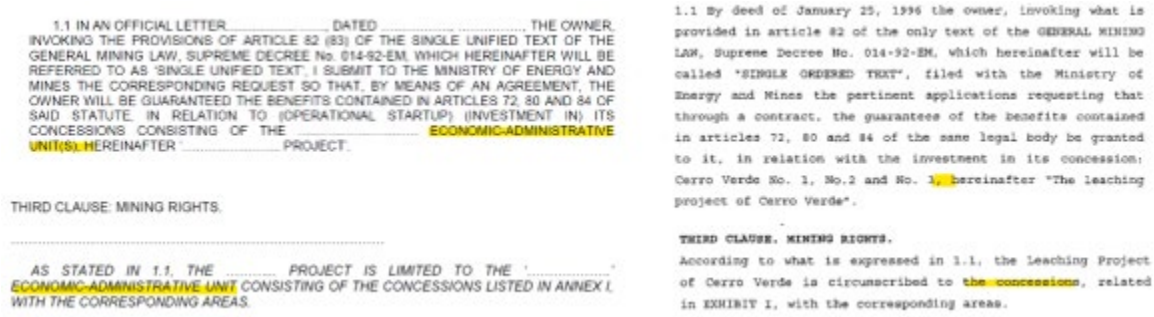
41. Ms. Torreblanca's responses are nonsensical. If the SA had created an EAU or "mining unit," as Claimant and Ms. Torreblanca now allege, then the SA would have said so explicitly. It does not. As Ms. Torreblanca conceded, "Annex 1 does not include in [the 1998 SA] the word 'EAU.'"[74] Indeed, it could not have done so because that is not the purpose of Annex 1

[69] *See* Ex. CA-1/CA-448, Mining Law at Art. 44. *See also* Respondent's Counter-Memorial at para. 45.
[70] *See* Ex. CA-1/CA-448, Mining Law at Art. 82.
[71] *See* Claimant's Reply at para. 39(d). *See also* Eng. Tr. Day 2 at 434:1 – 435:4 (Torreblanca).
[72] *See* Eng. Tr. Day 2 at 431:5-14 (Torreblanca) (A. "Yes, it had one *de facto*, which is the one that forms, or is formed, by having the Stability Agreement, as defined by the Mining Law, which is different from the Economic-Administrative Unit of Article 44.").
[73] Eng. Tr. Day 2 at 434:19-22 (Torreblanca).
[74] Eng. Tr. Day 2 at 436:5-6 (Torreblanca).

(also called "Exhibit I"). As Respondent has explained throughout this arbitration, Annex 1 simply lists the concessions (indicating their geographical locations and surface area) within which the stabilized project (in SMCV's case, the Leaching Project) was going to be developed.[75]

42. Moreover, "*de facto* EAUs" have no legal meaning under Peruvian law and, thus, even if they did exist (they do not), they would bring with them no legal rights. It is certainly not the case, and Claimant has not shown otherwise, that any such *de facto* EAU is created as the result of a party signing a stabilization agreement. Claimant cannot now invent a legal fiction that has no statutory or regulatory basis for purposes of amending the scope of its SA.

43. *Second*, as demonstrated at the hearing,[76] a comparison between Perú's Model SA (left image) and the final version of SMCV's SA (right image) shows (i) that the parties intentionally eliminated any reference to any "EAU" in the SA (and there is no reference to "mining unit" there); and (ii) that the SA was modified to apply to the specific project being stabilized—*i.e.*, the Leaching Project:[77]



1.1 IN AN OFFICIAL LETTER ..... DATED ..... THE OWNER, INVOKING THE PROVISIONS OF ARTICLE 82 (83) OF THE SINGLE UNIFIED TEXT OF THE GENERAL MINING LAW, SUPREME DECREE No. 014-92-EM, WHICH HEREINAFTER WILL BE REFERRED TO AS 'SINGLE UNIFIED TEXT', I SUBMIT TO THE MINISTRY OF ENERGY AND MINES THE CORRESPONDING REQUEST SO THAT, BY MEANS OF AN AGREEMENT, THE OWNER WILL BE GUARANTEED THE BENEFITS CONTAINED IN ARTICLES 72, 80 AND 84 OF SAID STATUTE, IN RELATION TO (OPERATIONAL STARTUP) (INVESTMENT IN) ITS CONCESSIONS CONSISTING OF THE ..... ECONOMIC-ADMINISTRATIVE UNIT(S). HEREINAFTER '..... PROJECT'.

THIRD CLAUSE: MINING RIGHTS.

AS STATED IN 1.1, THE ..... PROJECT IS LIMITED TO THE '.....' ECONOMIC-ADMINISTRATIVE UNIT CONSISTING OF THE CONCESSIONS LISTED IN ANNEX I, WITH THE CORRESPONDING AREAS.

1.1 By deed of January 25, 1996 the owner, invoking what is provided in article 82 of the only text of the GENERAL MINING LAW, Supreme Decree No. 014-92-EM, which hereinafter will be called "SINGLE ORDERED TEXT", filed with the Ministry of Energy and Mines the pertinent applications requesting that through a contract, the guarantees of the benefits contained in articles 72, 80 and 84 of the same legal body be granted to it, in relation with the investment in its concession: Cerro Verde No. 1, No.2 and No. 1, hereinafter "The leaching project of Cerro Verde".

THIRD CLAUSE. MINING RIGHTS.

According to what is expressed in 1.1, the Leaching Project of Cerro Verde is circumscribed to the concessions, related in EXHIBIT I, with the corresponding areas.

44. SMCV deliberately used the terminology "Cerro Verde Leaching Project" throughout the SA and did not use "Cerro Verde Mining Unit" or "Cerro Verde EAU." No doubt it did so because it understood that the SA applied to the Leaching Project, and only the Leaching Project. In its Opening Statement, Claimant explained that the SA "[is] a form contract [that] leaves a blank space in which the investor fills in a referential title for the Economic-Administrative Unit that is covered by the Agreement."[78] Therefore, according to Claimant's own description of the process for obtaining a stabilization agreement, it was SMCV itself that excluded references to any EAU from the SA, and that made no attempt to refer to any so-called "mining unit" in the Agreement. SMCV was the one that revised the language in the Model Stability Agreement and

[75] *See* Respondent's Counter-Memorial, at para. 91. *See also* Respondent's Rejoinder at para. 200.
[76] *See* Ex. RD-1, Respondent's Opening Presentation at slide 17; Ex. RD-7, Respondent's Closing Presentation at slide 12.
[77] Ex. CE-778, Model Stabilization Agreement, Supreme Decree No. 04-94-EM, Feb. 3, 1994, at Clauses 1.1 and 3; *compare with* Ex. CE-12, 1998 Stabilization Agreement at Clauses 1.1 and 3.
[78] Eng. Tr. Day 1 at 77:10-13 (Claimant's Opening).

referred exclusively to the Leaching Project—a fact that is telling about the investment project that SMCV actually intended to stabilize at the time it entered into the SA. Moreover, contemporaneous documentary evidence shows that Ms. Torreblanca understood that the SA only referred to the Leaching Project, which did not include the Concentrator, and not to a larger Cerro Verde Project.[79]

45. In an attempt to salvage its argument, Claimant asserted in its Closing that the mere "fact that the Model Stabilization Agreement says [EAU] proves that the Mining Law and Regulations apply to [EAUs]. . . . If Peru were right, it would say 'Investment Project.'"[80] Claimant also stated that in SMCV's case, the term "EAU" was not necessary since "the [SA] referred in Clause 1.1 to Mining Concession Number 1, Number 2, and Number 3, which is and has to be equivalent to SMCV's single EAU."[81] Claimant's assertions are without merit.

46. Clause 1.1 of the Model Agreement explicitly provides that a stabilization agreement applies "in relation to [an] (operational startup) [or] (investment in) its concessions . . . ."[82] This template was adjusted to SMCV's specific case: Clause 1.1. of the 1998 SA explicitly provides that SMCV applied for a stabilization agreement "in relation with the investment in its concession: Cerro Verde No. 1, No. 2 and No. 3" which investment, in turn, is defined as "[t]he leaching project of Cerro Verde."[83] Clause 1.3 further defines the Leaching Project as the US $238 million investment in leaching facilities to produce copper cathodes, mirroring the language of the 1996 FS that SMCV prepared and submitted to MINEM to apply for a 15-year mining stabilization agreement.[84]

47. Thus, Claimant's argument conveniently ignores the fact that this phrase (*i.e.*, "in relation with the investment in its concession") specifically refers to an "investment," indicating explicitly that the SA was requested with respect to a specific investment—not to "all" future investments, and certainly not to the entire concession or "unit" as a whole. The fact that Clause 1.1 refers to a concession or concessions or EAUs, simply indicates that the investment is going

[79] *See* Ex. CE-394, SMCV, Petition No. 1418719 to MINEM, July 3, 2003, at p. 1; Eng. Tr. Day 2 at 409:3-7 (Torreblanca) ("Question: [Y]ou state here that [the] 1998 Stabilization Agreement makes reference to the Leaching Project, rather than to the Cerro Verde Project as a whole; correct? Answer: Yes."). *See infra* at Section VI.B.1.a.
[80] Eng. Tr. Day 10 at 2916:17-22 (Claimant's Closing).
[81] Eng. Tr. Day 10 at 2917:3-5 (Claimant's Closing).
[82] Ex. CE-778, Model Stabilization Agreement, Supreme Decree No. 04-94-EM, Feb. 3, 1994, at Clause 1.1.
[83] Ex. CE-12, 1998 Stabilization Agreement at Clause 1 (emphasis added). *See also* Ex. RD-1, Respondent's Opening Presentation at slide 16.
[84] *See supra* at para. 29. *See also* Ex. CE-12, 1998 Stabilization Agreement at Clause 1.3; Eng. Tr. Day 1 at 207:5-13 (Respondent's Opening).

to be developed within the physical territory of a concession or concessions, as required under Art. 82 of the Mining Law, nothing more.

48. Moreover, Claimant's allegation that the phrase "investment in its concession: Cerro Verde No. 1, No. 2 and No. 3" identifies the EAU that was the subject of stability guarantees is illogical. Under Claimant's new theory, not even the Leaching Plant would be covered by this phrase in Clause 1.1. This is because Clause 1.1 only lists Cerro Verde's Mining Concession "Cerro Verde No. 1, No. 2 and No. 3;" it does not list Cerro Verde's Beneficiation Concession, where the Leaching Plant operated. Thus, under Claimant's own theory, "Cerro Verde's Mining Unit" (in Clause 1) would only comprise the Mining Concession ("Cerro Verde No. 1, No. 2 and No. 3"), and SMCV's investments in the Beneficiation Concession (including its Leaching Plant) would not be covered. In other words, under Claimant's own (newly invented) argument, its Leaching Project would not be covered under the SA, which shows that its new theory is incorrect.

49. *Third*, Respondent demonstrated in its Opening Statement that numerous clauses in the SA refer specifically to the Leaching Project (Clauses 1, 2, 3, 4, 5, 6, 7 and 8).[85] As shown above, the text of Clause 1 could not be clearer: SMCV signed a stabilization agreement, the application for which was explicitly "in relation with the investment in its concession: Cerro Verde No. 1, No. 2 and No. 3" and which, in turn, defined that investment as "[t]he leaching project of Cerro Verde."[86]

50. At the hearing, Claimant insisted that Clause 1 of the SA is irrelevant because, according to Claimant, it only provides background about the Agreement.[87] Claimant is incorrect. As Dr. Morales explained at the hearing, Clause 1 cannot be ignored—it is a contractual provision that must be considered along with other provisions when interpreting the Agreement.[88]

51. Claimant and its witnesses also maintained at the hearing that the reference to "Cerro Verde Leaching Project" is simply a label or a title created for purposes of the Agreement, and that the words that are used in that label or title do not play any role in defining what is covered by the Agreement.[89] Claimant's argument makes no sense. As discussed above, SMCV was the party that provided the name for the Project.[90] Had SMCV envisioned that the SA would apply to

[85] *See* Ex. RD-1, Respondent's Opening Presentation at slides 16, 22-24, 26-27, 29.
[86] Ex. CE-12, 1998 Stabilization Agreement at Clause 1 (emphasis added). *See also* Ex. RD-1, Respondent's Opening Presentation at slide 18.
[87] *See* Ex. CD-1, Claimant's Opening Presentation at slides 88-89.
[88] *See* Eng. Tr. Day 8 at 2480:16 – 2481:7 (Morales).
[89] *See* Eng. Tr. Day 3 at 924:8-21, 926:19 – 928:18 (Chappuis). *See also* Eng. Day 1 at 77:10-15, 78:11-19 (Claimant's Opening).
[90] *See* Eng. Tr. Day 1 at 77:10 – 77:15 (Claimant's Opening). *See also* Eng. Tr. Day 2 at 425:8 – 426:22 (Torreblanca); Eng. Tr.

more than just the Leaching Project, it could and would have used a title consistent with that (alleged) intent at the time it entered into the Agreement. Moreover, as Dr. Morales explained at the *SMM Cerro Verde* hearing, the title of the SA is of little importance; what defines the scope of the SA is the FS—which, in this case, defined the Leaching Project (an investment on SMCV's leaching facilities to produce copper cathodes).[91]

52. *Fourth*, Claimant did not challenge at the hearing what Respondent explained during its Opening Statement about Clauses 3, 4, 5, 6, 7, and 8 of the SA.[92] In its Opening, Respondent demonstrated that the language in those provisions refers specifically to the Leaching Project.[93] In particular, Clause 3 of the Agreement provides that "[a]ccording to what is expressed in 1.1., the Leaching Project of Cerro Verde is circumscribed to the concessions, related in [Annex] I, with the corresponding areas."[94] As Respondent explained in its Opening, Clause 3 of the SA makes it clear that the Leaching Project is "circumscribed" to the concessions mentioned in Annex I—that is, it cannot physically extend beyond the boundaries of those concessions. However, that does not mean that the SA applies to everything that is or that takes place inside those concession boundaries. This analysis was confirmed by Peruvian Courts.[95]

53. In its Opening, Respondent also showed that Clause 4 of the SA provides that the investment plan included in the FS and approved by MINEM is the "Cerro Verde Leaching Project."[96] Notably, Clause 4 incorporates the Investment Plan that was included in the FS into the SA, as its Annex II.[97] Respondent also explained how Clauses 5, 6, 7, and 8 refer to the investment plan included in the 1996 FS and limit the effects of the SA to the investment outlined in that plan.[98] Respondent relies on its discussion during its Opening presentation regarding these clauses.[99]

54. Claimant asserted in its written submissions—but, notably, refrained from doing so

Day 3 at 771:1-9 (Davenport).

[91] *See* Ex. CE-1141, *SMMCV v. Perú*, Eng. Tr. Day 9 at 2360:2 – 2365:9 (Morales).

[92] *See* Ex. RD-1, Respondent's Opening Presentation at slides 24, 26-29.

[93] *See* Ex. RD-1, Respondent's Opening Presentation at slides 24, 26-29.

[94] *See* Ex. CE-12, 1998 Stabilization Agreement at Clause 1. *See also* Ex. RD-1, Respondent's Opening Presentation at slide 24 (emphasis added).

[95] *See* Ex. RD-1, Respondent's Opening Presentation at slide 75. *See also* Ex. CE-274, Superior Court Decision No. 48, File No. 7649-2013 (2006/07 Royalty Assessment), July 12, 2017, at pp. 21-22 (PDF); Ex. CE-153, Supreme Court Decision No. 5212-2016, 2008 Royalty Assessment, Aug. 18, 2017, at paras. 31-32.

[96] *See* Ex. RD-1, Respondent's Opening Presentation at slide 61. *See also* Ex. CE-153, Supreme Court Decision No. 5212-2016, 2008 Royalty Assessment, Aug. 18, 2017, at para. 32.

[97] Ex. CE-12, 1998 Stabilization Agreement at Clause 4 ("This investment plan, properly approved by the General Direction of Mining for the purposes of the execution of this instrument, forms an integral part of it [*i.e.,* the Agreement] as Exhibit II.").

[98] *See* Ex. RD-1, Respondent's Opening Presentation at slides 27-29.

[99] *See* Ex. RD-1, Respondent's Opening Presentation at slides 27-29.

at the hearing—that Clauses 3, 9, and 10 are the only relevant clauses for understanding the scope of the Agreement.[100] Claimant's reading of the SA is incomplete; as Respondent explained in its Opening, neither Clause 9 nor 10 speaks of the scope of the investment that is stabilized.[101] Claimant conveniently ignored, both in its written submissions and at the hearing, all the other clauses that show that the Agreement is limited to the Leaching Project.

55. *Fifth* a simple comparison across SMCV's three different stabilization agreements confirms that the 1998 SA's scope was limited to the Leaching Project. In contrast with the 1998 SA, SMCV's 1994 SA refers to the "Cerro Verde Project"[102] and the 2012 SA refers to the "Cerro Verde Unit Expansion."[103]

56. To recall, the first time SMCV entered into a stabilization agreement with Perú under the Mining Law was in 1994.[104] The 1994 SA was a 10-year mining stabilization agreement, signed with respect to a US $2.26 million investment project, whose investment program was approved by the DGM on March 2, 1994.[105] The 1994 SA calls that project the "Cerro Verde Project."[106] According to the 1994 SA, that investment project was to be completed in Cerro Verde's Mining and Beneficiation Concessions—which are the same concessions in which SMCV later completed the Leaching Project.[107]

57. Two years after signing the 1994 SA, SMCV submitted the 1996 FS for the Leaching Project to apply for what became the 1998 SA. Consequently, the 1994 and 1998 SA coexisted between 1999 and 2004. As MINEM's Legal Advisory Office explained in a memo dated January 6, 1998, both Agreements could coexist because the 1998 SA refers to a "different investment than the one that was subject-matter of the Agreement dated March 16, 1994."[108]

58. Thus, the fact that SMCV had two mining stabilization agreements in effect at the same time within the same concessions with respect to different investments defeats Claimant's case. This fact is confirmation that stabilization agreements apply to specific projects. If Claimant's theory that stabilization agreements apply to the entire "mining unit" or concessions listed in the agreement were true, SMCV would have had no need to apply for a new agreement in

[100] *See* Claimant's Memorial at paras. 77 and 324; Claimant's Reply at paras. 84-87.
[101] *See* Eng. Tr. Day 1 at 226:1 – 227:6, 253:20 – 254:6 (Respondent's Opening).
[102] *See* Ex. CE-344, 1994 Stabilization Agreement at Clause 1.1.
[103] *See* Ex. CE-644, 2012 Stabilization Agreement, July 17, 2012, Clause 1.1.
[104] *See* Eng. Tr. Day 1 at 78:20-22 (Claimant's Opening). *See also* Eng. Tr. Day 2 at 426:18 – 428:11 (Torreblanca).
[105] *See* Ex. CE-344, 1994 Stabilization Agreement at Clauses 1, 2, 4, 5.1, and Annex II.
[106] *See* Ex. CE-344, 1994 Stabilization Agreement at Clause 1.
[107] *See* Ex. CE-344, 1994 Stabilization Agreement at Clauses 1.3.
[108] Ex. RE-23, MINEM, Report No. 002-98-EM-OGAJ, Jan. 6, 1998, at p. 2.

1996 with respect to a project that was going to be developed within the exact same Mining and Beneficiation Concessions that were listed in the 1994 SA. But, SMCV did have to submit a new application and sign a new agreement, because it understood that it needed a new agreement to cover its new investment.

59. On March 16, 2011, SMCV applied to sign a third stabilization agreement, which was signed on July 17, 2012.[109] The 2012 SA was entered into in order to stabilize a different, new investment project within Cerro Verde's Mining and Beneficiation Concessions and additional mining concessions listed in Annex I of the Agreement. In particular, the 2012 Agreement concerns a US $3.5 billion investment to build, among other things, a second concentrator plant to expand SMCV's copper concentrate production, as well as to improve the existing processing facilities (both the leaching and concentrator facilities), as was described in the accompanying 2011 feasibility study.[110]

60. In short, SMCV's own conduct shows that it understood that each stabilization agreement is granted for a specific investment project; otherwise, it would not have signed three different agreements, two of which overlapped for several years for activities taking place inside the same concessions.

61. In sum, the explicit references to the "Leaching Project" in the Agreement are to a specific project—the Leaching Project—which was established to process a specific type of ore (oxides and secondary sulfides) and produce a specific type of copper end product (copper cathodes). The Agreement does not say that any and all investments made in Cerro Verde's concessions nor any so-called "mining unit" are automatically stabilized for the duration of the Agreement, however much Claimant wishes it had. Nor does the Agreement specifically cover the Concentrator. It is uncontested that the 2006 Concentrator was never mentioned in the Agreement. Further, there is simply no basis for understanding that the Agreement's reference to the Leaching Project somehow mysteriously includes the Concentrator, given that the latter was not even contemplated nor feasible at the time the 1998 Agreement was signed. No testimony by Claimant's witnesses at the hearing established otherwise.

[109] *See* Ex. CE-644, 2012 Stabilization Agreement at Clause 1.1.
[110] *See* Ex. CE-644, 2012 Stabilization Agreement at Clauses 1.2.1, 5.1.

IV. THE HEARING SHOWED THAT PERÚ'S INTERPRETATION OF THE STABILIZATION AGREEMENT IS CONSISTENT WITH THE MINING LAW AND 1993 REGULATION

62. In its pleadings, Respondent explained—clearly and in detail—that Perú's Mining Law and its 1993 Regulation provide that mining stabilization agreements grant stability guarantees for (only) the specific investment projects for which the agreements are entered into. At the hearing, former Vice Minister Polo—who spearheaded the drafting of the relevant provisions of the Mining Law—offered a clear description of the scope of mining stabilization agreements. According to former Vice Minister Polo, the law provides that "the benefits are for the investment project that is the subject of the Agreement and the subject of the Feasibility Study. That is what the law says."[111] He went on to stress that "[w]hat the Claimant is putting forward is a respectable point of view, but that's not what the law says. It's not what the Regulation says. It's not what anything says, based on my view, based on my experience, and based on the experience of many persons."[112]

63. Likewise, as discussed below, Respondent's cross-examination of Claimant's witnesses and experts confirmed that Perú's interpretation of the SA is consistent with Perú's Mining Law (**Section A**) and its 1993 Regulation (**Section B**).

A. TESTIMONY AT THE HEARING SHOWED THAT THE MINING LAW PROVIDES THAT STABILIZATION AGREEMENTS ARE APPLICABLE ONLY TO THE INVESTMENT PROJECT FOR WHICH THE AGREEMENTS ARE ENTERED INTO

64. On June 3, 1992, Perú published the TUO of the Mining Law, which combined Legislative Decrees Nos. 109 and 708.[113] Title Nine of the Mining Law governs SMCV's SA.[114]

65. Claimant's own witness and expert testimony at the hearing showed that the Mining Law does not provide that mining stabilization agreements grant benefits to "concessions" or to so-called "mining units."

1. Claimant's Witness, Ms. María Chappuis, and Claimant's Legal Expert, Ms. María del Carmen Vega, Did Not Play Any Central Role in the Creation of the Mining Law

66. To support its misguided interpretation of the Mining Law, Claimant offered the Tribunal the testimony of Ms. Chappuis and Ms. Vega, whom Claimant tried to characterize as

[111] Eng. Tr. Day 5 at 1288:18-21 (Polo).
[112] Eng. Tr. Day 5 at 1288:22 – 1289:5 (Polo).
[113] *See generally* Ex. CA-1, General Mining Law, Supreme Decree No. 014-92-EM, June 3, 1992 ("General Mining Law"). *See* Ex. RD-1, Respondent's Opening Presentation at slide 35.
[114] *See* Ex. RD-1, Respondent's Opening Presentation at slide 35. *See also*, *e.g.*, Eng. Tr. Day 5 at 1407:14 – 1408:1 (Polo).

key actors in the creation of Legislative Decree No. 708 ("LD No. 708") and the Mining Law. Their testimony at the hearing showed the opposite.

67. During her direct examination, Ms. Chappuis asserted that "[she] wrote, together with Mr. César Polo, all or most of the Articles in Legislative Decree 708, especially those having to do with the Tax Stability Agreements."[115] During cross-examination, Respondent's counsel confronted Ms. Chappuis with the various instances in the *SMM Cerro Verde* hearing where, by contrast, she stated that "[she] wrote [the] law," [116] seeming to claim full authorship for herself alone. Faced with the notable contradiction in her testimony, Ms. Chappuis readily conceded that her statement at the *SMM Cerro Verde* hearing was incorrect:

> Q. So, if I understood your answer correctly, the statement you made three times in February, "I wrote the law," is an overstatement. You and Vice Minister Polo together participated in drafting the law; correct?
>
> A. That's exactly right. He participated, and this legal provision was to be sent to the Minister, who also had a group of lawyers that were going—that was going to review what we were doing.[117]

68. Ms. Chappuis also conceded that it was Vice Minister Polo, and not she, who wrote the provisions of the Mining Law that are directly relevant to this arbitration. Ms. Chappuis only assisted Vice Minister Polo. In particular, Ms. Chappuis admitted that it was Vice Minister Polo who suggested and drafted Art. 83 of the Mining Law.[118]

69. Moreover, when confronted with former Minister Fernando Sánchez Albavera's personal account of LD No. 708's origins in his memoire *Las cartas sobre la mesa*, Ms. Chappuis grudgingly acknowledged that Minister Sánchez Albavera identified Mr. Polo—not Ms. Chappuis—as his coauthor of the law.[119] To recall, Minister Sánchez Albavera was Perú's Minister of Energy and Mines at the time LD No. 708 was enacted. Ms. Chappuis also acknowledged that, in his book, Minister Sánchez Albavera praised Mr. Polo's experience and skills, while barely mentioning Ms. Chappuis.[120]

---

[115] Eng. Tr. Day 3 at 841:13-15 (Chappuis).
[116] *See* Eng. Tr. Day 3 at 893:12 – 897:1 (Chappuis). *See also* Ex. CE-1135, *SMMCV v. Perú*, Eng. Tr. Day 3 at 780:6-11, 782:17-19, 806:5-11 (Chappuis).
[117] Eng. Tr. Day 3 at 896:15 – 897:1 (Chappuis).
[118] *See* Eng. Tr. Day 3 at 920:8-12 ("So, you distinctly remember that it was Vice Minister Polo who suggested including this particular language, the fourth paragraph of Article 83, in the Mining Law; correct? A. Yes.") (Chappuis).
[119] *See* Eng. Tr. Day 3 at 905:7 – 906:2, 906:16 – 907:5 (Chappuis). *See* Ex. CE-311, Fernando Sánchez Albavera, *Cards on the Table* (1992), at pp. 28-29.
[120] *See* Eng. Tr. Day 3 at 906:10 – 907:5 (Chappuis).

70. Likewise, Ms. Chappuis had no explanation[121] for Mr. Sánchez Albavera's similar statement made in 2004, at the 2004 Royalties Forum, where he stated that "[he] fe[lt] responsible together with Engineer César Polo, who was the Vice-Minister of Mining, in fact [they] defend[ed] the validity of Law 708 because [they were] the authors of that law."[122] (To recall, the 2004 Royalties Forum was an event organized by Congress, convening private and public sector stakeholders to discuss the possibility of imposing mining royalties).[123] Indeed, Ms. Chappuis had no response when confronted with the fact that Minister Sánchez Albavera did not even mention her in that statement.[124] In sum, it is evident that Ms. Chappuis did not have the principal role in the drafting of LD No. 708 that she had tried to claim in her statements.

71. Similarly, Claimant's legal expert Ms. Vega was shown not to have single-handedly authored the TUO of the Mining Law, as she had claimed in her expert report and during her direct-examination.[125] First of all, the TUO is a mechanical compilation of the extant and in-effect statutory texts – it is not "authored" by anyone, other than by the Executive Branch (delegated by the Congress of Perú) when it enacts the laws that are subsequently compiled. Second, Ms. Vega had to acknowledge that, at the time of the TUO's compilation, she was only a junior lawyer who had just completed her legal studies only one year earlier.[126] Despite what she had admitted at the *SMM Cerro Verde* hearing, at the *Freeport* hearing, Ms. Vega tried to elevate her role in putting together the TUO by alleging that the TUO of the Mining Law was somehow exceptional and required innovative and interpretative work.[127] Ms. Vega's assertion is simply absurd and contrary to law. A junior lawyer does not have the power to amend legislative decrees and laws that were consolidated into a TUO—those decrees could only be amended by the same kind of legal instrument that was used to create them (*i.e.,* by subsequent legal decrees). Ms. Vega's responsibility was simply to consolidate the texts of the existing norms.[128] In the end, Ms. Vega had to concede that she had no power to interpret or modify the underlying laws and decrees.[129]

[121] *See* Eng. Tr. Day 3 at 902:21 – 903:13 (Chappuis).
[122] *See* Ex. RE-183, Audio of Minister Fernando Sánchez Albavera's Response, Mining Royalties Forum, Congress of the Republic, Mar. 11, 2004 (excerpts), at timestamps 00:00:40 – 00:01:02.
[123] *See*, *e.g.*, Eng. Tr. Day 5 at 1310:3-20 (Polo).
[124] *See* Eng. Tr. Day 3 at 903:6-13 (Chappuis).
[125] *See* Eng. Tr. Day 8 at 2240:16-22 (Vega); Ex. CER-5, First Vega Report at para. 5.
[126] *See* Eng. Tr. Day 8 at 2273:12 – 2276:2 (Vega). *See also* Ex. CER-5, First Vega Report at paras. 3, 5 and Annex B.
[127] *See* Ex. CE-1140, *SMMCV v. Perú*, Eng. Tr. Day 8 at 2074:19 – 2075:1 (Vega); *see also* Eng. Tr. Day 8 at 2279:5 – 2281:8 (Vega).
[128] *See* Eng. Tr. Day 8 at 2281:9-13 (Vega).
[129] *See* Tr. Day 8 at 2281:14 – 2282:16 (Vega) (" A. . . . I am not saying that things were changed as provided in the laws to be consolidated, just that clarification. Q. So, you cannot draft new rules? A. I cannot modify anything. Q. So, you cannot modify. You cannot modify the two Legislative Decrees that were consolidated under one document A. I cannot modify, ...") (emphasis

Ms. Vega also conceded that, while she was compiling the TUO, she did not consult the individuals who drafted LD No. 708.[130] This is telling and reinforces the mechanical nature of her assignment.

72. Thus, the hearing served to show that neither Ms. Chappuis nor Ms. Vega were authors of the Mining Law, and therefore neither could claim any special powers or authority to try to interpret that Law. Instead, it was former Vice Minister Polo who led the drafting of the provisions of LD No. 708 and Title Nine of the Mining Law, and thus who has particularly strong authority from which to explain its meaning and effect.[131]

2. The Mining Law Provides that Mining Stabilization Agreements Apply Exclusively to Specific Investment Projects

73. As shown at the hearing, the language of the Mining Law reveals that stabilization agreements protect only the specific project for which the mining titleholder signs the agreement. The relevant provisions regarding the scope of 15-year mining stabilization agreements are Arts. 82, 83, 84, and 85. These Articles must be read and interpreted jointly.[132]

74. **Art. 82** provides that stabilization agreements are meant to "promote investment and facilitate the financing of mining projects."[133] Under cross-examination, former Vice Minister Polo explained that the purpose of mining stabilization agreements was to guarantee to the investor that the rules under which he/she calculated a particular investment's rate of return (profitability) and decided to invest were not going to change.[134] Similarly, Minister Sánchez Albavera explained in his memoire *Las cartas sobre la mesa* that:

> [t]he granting of these guarantees [*i.e.*, stability guarantees] constitutes an important incentive for mining companies by not altering the criteria that guided investment decisions, since their recovery is long-term. The mining reform [*i.e.*, LD No. 708] also considers that stability contracts are not only applicable to new investments but also to those made by existing companies.[135]

75. Thus, stabilization agreements are intended to stabilize the criteria under which an investment decision—*i.e.*, a decision to invest in a specific project—is made. Minister Sánchez Albavera explained that those agreements were available to two types of investment projects: (i) "new investments," meaning investments made by a mining titleholder to start production; or

added).
[130] *See* Eng. Tr. Day 8 at 2283:14 – 2284:22 (Vega).
[131] *See* Eng. Tr. Day 4 at 1230:21 – 1232:1 (Polo).
[132] *See*, *e.g.*, Eng. Tr. Day 8 at 2402:7 – 2403:21 (Eguiguren).
[133] Ex. CA-1/CA-448, TUO General Mining Law at Art. 82.
[134] *See* Eng. Tr. Day 5 at 1283:4-10 (Polo).
[135] Ex. CE-311, Fernando Sánchez Albavera, *Cards on the Table* (1992), at p. 81.

(ii) investments "made by existing companies," meaning investments made for purposes of expanding/increasing the production of existing mining operations. Ms. Vega acknowledged under-cross examination that those two possibilities are reflected in Arts. 82 and 83 of the Mining Law.[136] These types of investments are also reflected in Art. 25 of the 1993 Regulation, as explained in Section B below.

76. Specifically, Art. 82 explains that the two types of investment projects that could benefit from stability are (i) new investments to achieve an initial capacity of at least 5,000 MT/day, or (ii) expansions intended to increase existing capacity to at least 5,000 MT/day. Moreover, Art. 82 provides that the 15-year stability period starts to run from the moment (i) the new investment or (ii) the expansion was completed and accredited, depending on the specific project for which the agreement is entered into. Respondent reproduces the first paragraph of Art. 82 below, marking in red each time the two types of investment projects are discussed:

> In order to promote investment and facilitate the financing of mining projects with an [1] initial capacity of not less than 5,000 MT/day or [2] expansions intended to reach a capacity of not less than 5,000 MT/day referring to one or more Economic-Administrative Units, mining activity titleholders shall enjoy tax stability that shall be guaranteed through an agreement entered into with the State for a term of fifteen years, starting from the fiscal year in which the execution of the [1] investment or [2] expansion, as the case may be, is accredited.[137]

In sum, Art. 82 provides that stability is intended to promote specific investment projects, be it a new investment or an expansion.

77. Contrary to Claimant's assertions, Art. 82 does not provide that stabilization agreements are granted to concessions or so-called "mining units." Claimant has attempted to interpret the term "mining project" used in Art. 82 as a synonym of (variously) "concession," "EAU," or "mining unit."[138] But, the text of the article does not say that stabilization agreements are available to "concessions," "EAUs," or "mining units"—instead, Art. 82 specifically states that the agreements are given to "projects," (that is, to either (i) new investments or (ii) expansions), which defeats Claimant's argument that any mining activity within the "unit" or "concession" is covered.[139] Moreover, Art. 82 provides that the production capacity intended to be reached through

[136] *See* Eng. Tr. Day 8, at 2293:6 – 2297:3 (Vega).
[137] Ex. CA-1/CA-448, TUO General Mining Law at Art. 82 (emphasis added).
[138] *See* Eng. Tr. Day 1 at 33:15 – 34:9 (Claimant's Opening); *see also* Eng. Tr. Day 2 at 442:8 – 443:1, 456:9-21 (Torreblanca); Eng. Tr. Day 8 at 2245:1 – 2246:2 (Vega).
[139] *See* Ex. CA-1/CA-448, TUO General Mining Law at Art. 82; *see*, *e.g.*, Eng. Tr. Day 1 at 19:17-22, 20:14-20 (Claimant's Opening).

the mining project may be achieved from one or more "Economic Administrative Units," which may consist of a set of mining or beneficiation concessions. In other words, to qualify for a 15-year stabilization agreement, a given project—the investment in a mining activity—must aim to reach at least a production capacity of 5,000 MT/day. As former Vice Minister Polo explained at the hearing, those 5,000 MT may be generated through activities in one or more concessions.[140] That, of course, does not mean that each and every activity or investment that could possibly be conducted within those concessions or that EAU during the span of 15 years is stabilized.

78. Notably, the Model Stabilization Agreement also reflects the fact that stabilization agreements are granted for the two specific kinds of investment projects (either investments to start operations or investments to expand operations) set out in Art. 82 of the Law. As shown on the image below, in the blank that the investor had to fill in for Clause 1.1, the investor had to specify the name of the project, the concessions in which the project would be developed, and whether the project in relation to which the stabilization agreement had been requested was an "operational startup" or an "investment" (*i.e.,* an investment to expand operations).[141]

> 1.1 IN AN OFFICIAL LETTER....., DATED ....., ..., THE OWNER, INVOKING THE PROVISIONS OF ARTICLE 82 (83) OF THE SINGLE UNIFIED TEXT OF THE GENERAL MINING LAW, SUPREME DECREE No. 014-92-EM, WHICH HEREINAFTER WILL BE REFERRED TO AS 'SINGLE UNIFIED TEXT', I SUBMIT TO THE MINISTRY OF ENERGY AND MINES THE CORRESPONDING REQUEST SO THAT, BY MEANS OF AN AGREEMENT, THE OWNER WILL BE GUARANTEED THE BENEFITS CONTAINED IN ARTICLES 72, 80 AND 84 OF SAID STATUTE, IN RELATION TO (OPERATIONAL STARTUP) (INVESTMENT IN) ITS CONCESSIONS CONSISTING OF THE ..... ECONOMIC-ADMINISTRATIVE UNIT(S), HEREINAFTER '..... PROJECT'.

79. In sum, Art. 82 provides that mining stabilization agreements are granted to specific mining projects (*i.e.*, investment projects which may be projects either to initiate operations or to expand existing operations).

80. **Art. 83** also explains that, depending on the type of investment project to be stabilized (be it an investment to initiate operations or to expand existing operations), the investment has to be of a certain minimum dollar value. In order to benefit from a mining stabilization agreement, investments to initiate operations had to be of at least US $20 million, and investments to expand operations of existing companies has to be of at least US $50 million.[142] The intended investment has to be detailed in an "investment program." Ms. Vega conceded at the

[140] *See*, *e.g.*, Eng. Tr. Day 5 at 1395:15 – 1396:3 (Polo).
[141] Ex. CE-778, Model Stabilization Agreement at Clause 1.1.
[142] *See* Ex. CA-1/CA-448, TUO General Mining Law at Art. 83.

hearing that those investment programs describe an investment in a specific project.[143]

81. Immediately after stating that mining companies have to submit an investment program describing the investment project, Art. 83 clarifies that "[t]he effect of the contractual benefit shall apply exclusively to the activities of the mining company in whose favor the investment is made."[144] In other words, Art. 83 explicitly provides that stability guarantees apply exclusively to the mining company's activities related to the investment project under discussion.

82. Respondent's counsel's discussion with Ms. Vega regarding this provision put an end to Claimant's (incorrect) assertions that the stability benefits are granted to a concession or so-called "mining unit." Ms. Vega conceded that nowhere in the text of Art. 83 does it say that stability benefits are granted to "concessions."[145] Moreover, Ms. Vega admitted that the word "exclusively" qualifies the word "activities."[146] Ms. Vega also admitted that "activities" are mining or beneficiation activities (*i.e.*, exploration, exploitation, leaching, etc.)[147]—not concessions, not "mining units." Ms. Vega also agreed that mining companies are able to conduct those activities only if they are granted the right to do so through mining or beneficiation concessions.[148] In other words, the concessions simply grant a right to do the activity—provided the company complies with all additional permits and licenses[149]—but the concession is not the activity itself. To conduct those activities, mining companies have to make investments (*i.e.*, in layman's terms, dig the mining pit, build the plant, buy equipment, etc.), which are described in an investment program.[150] Thus, those investment projects and their related activities are what exclusively benefit from stabilization—the concessions themselves are not stabilized.[151]

83. Respondent also notes that the 2014 amendment of the Mining Law confirmed that mining stabilization agreements applied only to the investment that was described in the feasibility

[143] *See* Tr. Day 8 at 2316:22 – 2317:22 (Vega) ("Q. And the Feasibility Study do[es] not describe a specific investment in a Company; right? They describe the investment in a Project; correct? A. Yes.").
[144] Ex. CA-1/CA-448, TUO General Mining Law at Art. 82.
[145] *See* Eng. Tr. Day 8 at 2313:5-12 (Vega).
[146] *See* Eng. Tr. Day 8 at 2307:21 – 2308:5 (Vega) ("Q. . . . But, Ms. Vega, Line 4 of the Article does not say--well, let's see. When it says that it refers exclusively to mining activities, you're trying to draw a difference that--in the sense that these can only be the mining activity companies--of the company? A. Yes, mining activities of the mining company.").
[147] *See* Eng. Tr. Day 8 at 2315:20 – 2316:5 (Vega) ("Q. This issue of mining activities. In your presentation you said that mining activity in general is regulated; correct? A. Yes. Q. And there are certain types of activities: Exploration, exploitation, beneficiation, amongst others; right? A. That's correct."). *See also* Eng. Tr. Day 8 at 2248:21 – 2249:11 (Vega).
[148] *See* Eng. Tr. Day 8 at 2316:6-17 (Vega).
[149] *See* Eng. Tr. Day 8 at 2316:12 – 2317:3 (Vega) ("Q. Apart from obtaining the concession, the titleholder must obtain certain licenses, permits, environmental licenses, et cetera; correct? A. Correct. Q. It's not that automatically with the concession you can exploit the geographical area where the concession is in; correct? A. Correct.").
[150] *See* Eng. Tr. Day 8 at 2317:4-12 (Vega).
[151] *See* Ex. CA-1/CA-448, TUO General Mining Law at Art. 82. *See*, *e.g.*, Eng. Tr. Day 5 at 1287:6-15 (Polo).

study. In particular, the Statement of Reasons submitted by the Executive shows unequivocally that the scope of Art. 83 was changed—broadened—to include not only the original investment or expansion but also "additional activities that are performed after the execution of the investment program[.]"[152] Notably, the Statement of Reasons cites to legal doctrine from 1998 to support its understanding of the limited scope of the law prior to the 2014 amendment.[153] Thus, the Statement of Reasons reflects Perú's consistent understanding of the law between 1992 and 2014. Notably, Perú did not amend the relevant phrase in Art. 83 that provides that stability benefits apply exclusively to the activities related to the investment.

84. **Art. 84** provides that mining stabilization agreements will guarantee to the mining titleholder the stability guarantees set out in Art. 80 of the Mining Law and will potentially permit the titleholder to increase the annual depreciation rate up to 20%, "according to the characteristics of each project."[154] Notably, the law provides that the depreciation rate shall be set in accordance with the characteristics of the project—*i.e.*, the investment project—with no reference to the concession or the "mining unit" (or any characteristics thereof). Claimant does not rebut this.

85. **Art. 85** provides that for 15-year stabilization agreements—like the 1998 SA—"investment programs" should be set out in a technical-economic feasibility study that is submitted to and approved by MINEM. Contrary to Claimant's allegations, the feasibility study does not serve only as a formal prerequisite for executing a stabilization agreement.[155] It is a meaningful, indeed critical, part of the stabilization agreement. For one thing, the date of the feasibility study's approval fixes the stabilized regime applicable to the investment project.[156]

86. More importantly, the feasibility study contains the description of the specific investment project for which the stabilization agreement will be entered into. Respondent's counsel's discussion with Ms. Vega under cross-examination about a law journal article authored by Mr. Antonio Pinilla—a leading mining expert, according to Claimant's own experts, Ms. Vega and Dr. Bullard[157]—was enlightening. Specifically, Mr. Pinilla states:

> [T]he Feasibility Study developed and approved by the Ministry of Energy and Mines contains the economic basis on which the investment in the mining project has been structured . . . . The stability of this regime is a key factor in determining

[152] Ex. CA-1, General Mining Law at Art. 83-B (amended by Art. 7 of Law No. 30296, Dec. 31, 2014); *see also* Eng. Tr. Day 1 at 236:2 – 237:22 (Respondent's Opening).
[153] *See* Ex. RE-50, Executive Power, Statement of Reasons for Bill No. 3627/2013-PE, 2014, at pp. 9-10, n.5.
[154] Ex. CA-1/CA-448, TUO General Mining Law at Art. 84 (emphasis added).
[155] *See* Eng. Tr. Day 1 at 220:20 – 223:4 (Respondent's Opening).
[156] *See* Ex. CA-1/448, TUO General Mining Law at Art. 85.
[157] *See* Eng. Tr. Day 8 at 2324:6-14, 2326:13-14 (Vega).

> the destination of the investment insofar as it affects the calculation of the return of the investment . . . . In other words, it eliminates (or should eliminate) concerns about constant variations in the tax regime, and it eliminates the concern that the legal regime will be modified, the legal regime that was taken into account, when planning the investment.[158]

87. At the hearing, Ms. Vega visibly struggled when she was confronted with this article, which shows clearly the intended close connections between the feasibility study's investment plan and stabilization of the economic variables that make the investment feasible, and which she herself submitted with her first expert report. At first, Ms. Vega tried to explain away the text by stating that it was simply referring to the feasibility study as a prerequisite to enter into a stabilization agreement (*i.e.*, an analysis of the initial investment required to sign the agreement).[159] Unconvinced by her own explanation, she then tried to dismiss Mr. Pinilla's commentary on the feasibility study by stating that (i) she cited to his article only in her discussion on *contratos-ley*;[160] and (ii) she "[didn't] agree with some of the drafting of certain portions" of his study.[161] Despite Ms. Vega's attempts to distance herself from Mr. Pinilla's analysis, she failed to provide a reasonable explanation of how Mr. Pinilla could be wrong. He is not wrong—the feasibility study shows the variables taken into account by an investor to make his or her investment decision with respect to a specific project. If that "initial" investment were a mere "entry ticket", it would be unnecessary for the investor to prepare a feasibility study (containing the detailed economic, technical, and legal analysis for the specific project), submit it to MINEM for approval, and incorporate it into the stabilization agreement. As Respondent explains in Section B below, this understanding is confirmed by Arts. 18, 19, and 24 of the 1993 Regulation.

88. Finally, at the hearing Claimant's witnesses and experts had no choice but to admit that their invented concept of "mining unit" is not defined in the law. Ms. Torreblanca conceded that there is no definition of "mining unit" or "production unit" in the Mining Law.[162] Mr. Otto also openly acknowledged this in his direct presentation.[163] This fact is noteworthy. If mining stabilization agreements were meant to apply to "mining units," the Law surely would have defined that concept in order to avoid any confusion on the scope of the agreement. It does not.

---

[158] Ex. CA-114, Antonio Pinilla Cisneros, "The Need for Stability Agreements for Mining Investment: A Specific Case of Mining Royalties" at p. 177 (emphasis added).
[159] *See* Eng. Tr. Day 8 at 2325:20 – 2326:12 (Vega).
[160] *See* Eng. Tr. Day 8 at 2326:13-17 (Vega). ("I also consider that he's a very good lawyer. I cite in my Report Mr. Pinilla. Mr. Pinilla was talking about *contratos-ley*. The stability agreement is a *contrato-ley*, and I cited him in that context.").
[161] Eng. Tr. Day 8 at 2326:18-19 (Vega).
[162] *See* Eng. Tr. Day 2 at 412:12-18 (Torreblanca).
[163] *See* Eng. Tr. Day 7 at 2094:10-11 (Otto).

89. The Mining Law does not grant unlimited benefits for entire companies, concessions, EAUs, "mining units," or "production units." It provides that stabilization agreements will benefit exclusively the investment projects for which they are entered into, as defined in the underlying feasibility study.

3. The Mining Law Delineates the Parameters of Mining Stabilization Agreements

90. Claimant would have this Tribunal believe that the scope of the investment project that is stated in the SA and its incorporated FS is irrelevant because (on Claimant's theory) the Mining Law defines (differently) the scope of stabilization agreements.[164] But if Claimant's theory were correct (it is not), there would be no need to submit a feasibility study to define an investment project, no need to obtain approval for that investment project, nor even a need for the stabilization agreement to refer to a specific investment project described in the feasibility study. And that cannot be the case.

91. The Mining Law establishes the legal framework—the maximum and minimum parameters—applicable to mining stabilization agreements. The Mining Law sets the parameters for: (i) who can apply for the benefit: mining titleholders, not any type of company (Art. 82); (ii) what types of investments can benefit: mining projects (*i.e.*, investments in mining activities—not investments in other economic sectors) seeking a production capacity of at least 5,000 MT, for a minimum amount of US $20 or $50 million, depending on whether it is an investment project to initiate operations or one to expand operations (Arts. 82 and 83); (iii) where those investments should be made: within concessions, which are the legal instruments that grant the right to mining companies to develop mining activities and indicate the geographical area where those activities may be developed (Art. 82); and (iv) what legal regime will be stabilized: tax, administrative, and currency stability (Art. 80). But the specific investment project that triggers and then benefits from a specific mining stabilization agreement is defined in each agreement—not in the Mining Law—and that definition is set by cross-referencing and incorporating the corresponding feasibility study (Art. 85). As former Vice Minister Polo stated during cross-examination, the law

> doesn't refer to the specific project, investment project, or how much is to be invested. That is defined by the investor. They have to say: "This is for an investment project." That's what 83 says, and 7 and 11. That is clear. Now, what project, what investment? Well, bring in your Feasibility Study. We'll review it, we'll approve it, and then we'll fix the Stability Regime. That is what would be

[164] *See* Claimant's Reply at para. 88(a).

done.[165]

B. TESTIMONY AT THE HEARING SHOWED THAT THE MINING REGULATIONS ALSO PROVIDE THAT STABILIZATION AGREEMENTS ARE APPLICABLE ONLY TO THE INVESTMENT PROJECT FOR WHICH THE AGREEMENTS ARE ENTERED INTO

92. Respondent also showed at the hearing that the Mining Regulations similarly support Respondent's interpretation of SMCV's 1998 SA. Likewise, Claimant was unsuccessful in challenging Respondent's arguments on these Regulations at the hearing.

93. The 1993 Regulation implements the Mining Law's provisions relating to mining stabilization agreements; thus, it must be read and interpreted in accordance with the Law's provisions. Claimant particularly focuses on Arts. 2 and 22 of the Mining Regulations to try to allege that mining stabilization agreements provide stability guarantees to every investment conducted within a concession or so-called "mining-unit."[166] As Respondent showed at the hearing, however, for purposes of 15-year stabilization agreements, these articles of the 1993 Regulation cannot be read in isolation—they must be read with reference to the language of Arts. 82, 83, 84, and 85 of the Mining Law and in conjunction with other provisions of the 1993 Regulation, in particular, Arts. 18, 19, 24, and 25.

94. **Art. 2** of the 1993 Regulation does nothing to define the scope of mining stabilization agreements. In its Opening, Claimant misquoted the language in this provision—as has become its practice—in an effort to support its assertion that the last paragraph of Art. 2 "states that when a titleholder <u>that entered into a stability agreement</u> has several concessions or EAUs, <u>then the stability agreement</u> will only take effect to those concessions or [u]nits that are supported by the stability agreement."[167] But that is not what the article says—contrary to Claimant's wishes, the article does not contain the underlined words above, and it does not define the scope of a "stability agreement." Art. 2 simply provides that Title Nine of the Mining Law applies to mining titleholders (which are companies that perform mining activities within one or more concessions or EAUs), provided that they have signed a mining stabilization agreement and provided that the "qualification" of mining titleholders for these purposes only applies with respect to the concessions referred to in the stabilization agreements. In other words, Art. 2 provides that a mining company cannot be considered a "mining titleholder" for purposes of Title Nine of the Mining Law with respect to concessions that are not referred to in the agreements. The article does

[165] Eng. Tr. Day 5 at 1288:1-10 (Polo).
[166] *See* Ex. CD-1, Claimant's Opening Presentation at slides 37-38.
[167] Eng. Tr. Day 1 at 43:15-19 (Claimant's Opening) (underlining added).

not state that stability benefits extend beyond an investment project to automatically cover an entire concession or EAU.

95. **Art. 22** of the 1993 Regulation copies the language of Art. 83 of the Mining Law, which provides that the benefits of a stabilization agreement "shall apply exclusively to the activities of the mining company in whose favor the investment is made."[168] Art. 22 of the 1993 Regulation provides that the stability guarantees "shall benefit the mining activity titleholder exclusively for the investments that it makes in the concessions or Economic-Administrative Units."[169] Thus, both the Mining Law and the Mining Regulations limit the scope of the stabilization agreements to a specific investment project.

96. Similarly, **Art. 18** of the Mining Regulations states the requirements to apply for a mining stabilization agreement. The applicant must submit to the DGM: (i) the name of the applicant; (ii) the names and geographical location of the mining and beneficiation concessions where the stabilized investment will be located, and, if applicable, the Resolution that established the EAU where the investment is going to be located; and (iii) the feasibility study that describes the investment for which the agreement will be entered into.[170]

97. Requirements (ii) and (iii) are noteworthy. First, the applicant is required to submit the names of the concessions involved, indicating their geographical location. Thus, as Respondent showed in its pleadings and at the hearing, the listed concessions are relevant only to indicate the geographical location where the stabilized investment project will be located.[171] Second, if the applicant has an EAU, it has to submit the Resolution that approved and constituted the EAU. It is undisputed that SMCV never applied for or established an EAU for its concessions. This article makes no mention of a so-called "mining unit." If stabilization agreements were to apply to "mining units," the applicant surely would be required as part of the application to identify that "mining unit" and describe its composition, so that MINEM could understand the scope of the agreement. No such requirement exists, putting an end to Claimant's allegations about so-called "mining units". Third, this provision reinforces the fact that the feasibility study and its investment plan is a key requirement in a stabilization agreement's application process, as it defines the

[168] *See* Ex. RD-1, Respondent's Opening Presentation at slide 47. *See also* Ex. CA-1/448, Mining Law at Arts. 79 and 83.
[169] Ex. RD-1, Respondent's Opening Presentation at slide 47 (emphasis added). *See* also Ex. CA-2/CA-432, Mining Regulation at Art. 22.
[170] *See* Ex. RD-1, Respondent's Opening Presentation at slide 45. *See also* Ex. CA-2/CA-432, Mining Regulation at Art. 18.
[171] *See*, *e.g.,* Eng. Tr. Day 1 at 2987:5 – 2989:5 (Respondent's Closing); Respondent's Rejoinder at para. 153.

investment that will be covered.[172]

98. In the same vein, **Art. 19** of the 1993 Regulation imposes specific requirements for the contents of the feasibility study. Specifically, the mining company has to identify the amount of the investment, how long it will take to complete, expenses, expected production, projections of sales, the equipment to be used, the mineral reserves to be used, etc. This level of detail and specificity would be pointless if the dollar amount of the investment were the only criterion for an entry ticket to unlimited stabilization (as under Claimant's theory). It also means that Claimant's allegation that it is burdensome to differentiate between investment projects within the same concession[173] is without merit.

99. Moreover, the language of Art. 19 puts an end to Claimant's (unsubstantiated) theory that "project" (as used in Clause 1.1 of the SA) is merely a synonym of "concession" or so-called "mining unit." In particular, the following information required under Art. 19 shows that the word "project" refers to a particular investment project and that the feasibility study serves to identify the project (*i.e.*, the mining investment project) that will benefit from stability guarantees:

- "Expansion or improvement of existing facilities or works, whether its own or others', usable for the purposes of the agreement."[174] Thus, if the investment project detailed in the feasibility study involves the expansion or use of existing facilities, the mining company is required to explain how the change will be used for purposes of the stabilization agreement. If the agreement were applicable to the entire "mining unit" or concession, this requirement would make no sense.

- "The acquisition of machinery and equipment to be used in the project."[175] As Ms. Vega admitted, the mining company has to indicate which machinery and equipment is going to be used in the specific project for which the feasibility study is prepared.[176]

- The "profitability of the project."[177] As Ms. Vega conceded, a feasibility study describes and outlines a specific investment project.[178] The word "project" here can

[172] *See supra* at paras. 86-87. *See also* Ex. CA-114, Antonio Pinilla Cisneros, "The Need for Stability Agreements for Mining Investment: A Specific Case of Mining Royalties" at p. 177.
[173] *See* Eng. Tr. Day 1 at 41:2-5 (Claimant's Opening).
[174] Ex. CA-2/CA-432, Mining Regulations at Art. 19 (emphasis added).
[175] Ex. CA-2/CA-432, Mining Regulations at Art. 19 (emphasis added).
[176] *See* Tr. Day 8 at 2322:21 – 2323:15 (Vega).
[177] Ex. CA-2/CA-432, Mining Regulations at Art. 19 (emphasis added).
[178] *See* Eng. Tr. Day 8 at 2323:16-20 (Vega).

only mean "investment project," not "concession," and not "mining unit."

100. In sum, the whole point of stabilization agreements is to ensure that the regulatory framework under which that profitability was calculated is stabilized.

101. **Art. 24** explicitly provides that the feasibility study serves to define the "subject matter" of mining stabilization agreements. Notably, Art. 24 makes no reference to "mining unit" or "production unit." This article is fatal for Claimant's case. The investment project is the subject matter of the agreement, not "concessions" or so-called "mining units."

102. **Art. 25** is similarly devastating for Claimant. According to Art. 25, mining companies are required to have available, for the tax authority, documents that demonstrate the application of the stabilized regime to the specific investment project for which the stabilization agreement was approved.[179] Specifically, Art. 25 tracks the concept explained by Minister Sánchez Albavera that two types of investment projects could benefit from mining stabilization agreements: (i) "new investments"; or (ii) "expansions."[180]

103. Thus, Art. 25 tracks the language included in Arts. 82 and 83 of the Mining Law providing that stabilization agreements are granted with respect to specific mining projects. As former Vice Minister Polo explained in response to a question by President Hanefeld, Art. 25 clarifies that separate accounts must be kept for each specific stabilized investment project (be it a project to initiate operations or one to expand existing operations), precisely to demonstrate how the stabilized tax regime is applied to the project that contractually enjoys legal stability.[181] Claimant's case, accordingly, falls short.

104. According to Claimant, Art. 22 of the 1993 Regulation shows that stability guarantees apply to an entire concession or "mining unit," and that SMCV had no obligation to separate its accounts between the Leaching Project and the Concentrator, because they were allegedly part of the same "unit."[182] Claimant reads this provision in isolation. To understand the scope of Art. 22 it must be read together with Art. 25.[183] On that basis, SMCV had the obligation to keep separate accounts for its stabilized project (the Leaching Project). Perú's tax law experts confirmed this at the hearing.[184]

[179] *See* Ex. RD-1, Respondent's Opening Presentation at slide 49.
[180] Ex. CA-2/CA-432, Mining Regulations at Art. 25.
[181] *See* Eng. Tr. Day 5 at 1438:5 – 1439:12 (Polo).
[182] *See* Eng. Tr. Day 1 at 44:2 – 46:12 (Claimant's Opening).
[183] *See* Ex. RD-1, Respondent's Opening Presentation at slide 49. *See also* Ex. CA-2/CA-432, Mining Regulations at Art. 22.
[184] *See* Eng. Tr. Day 9 at 2677:7 – 2678:18 (Bravo and Picón).

105. Notably, Claimant's experts did not challenge Respondent's experts' assertion that SMCV had to keep separate accounting pursuant to Peruvian Law and that there were methods at its disposal that allowed it to do so. In cross-examination, Claimant's international mining law expert, Dr. Otto, admitted that it is possible for a mining company to separate shared costs.[185] In fact, Claimant admitted in its Closing that "investors could have used some accounting rules to separate different investments within a concession[.]"[186]

106. Moreover, as Respondent's international mining tax expert, Mr. Ralbovsky, explained at the hearing, SMCV actually separates (i) its revenues for each product (the cathodes and the concentrate) in its Financial Statements; and (ii) its shared costs by type of processing in its managerial accounting.[187] First, Mr. Ralbovsky showed how SMCV had divided its revenue between the cathodes and the concentrates in its 2010 Financial Statement.[188] Then, he pointed out that in his first witness statement, Mr. Ramiro Aquiño (SMCV's Chief Engineer of Long-Term Planning) provided an explanation of how SMCV would typically carry out a calculation to determine whether it is more profitable to process some of its secondary sulfides through the Leaching Plant or the Concentrator.[189] Based on the hypothetical calculations that Mr. Aquiño provided in his statement, Mr. Ralbovsky demonstrated that SMCV knew how to separate its shared costs. As Perú's expert was right to point out, Mr. Aquiño effectively admitted that the company simply chose not to do so.[190]

107. Dr. Otto also acknowledged that SMCV could have sought outside expert assistance to prepare its tax returns[191]—but evidently chose not to do so. Claimant has alleged that it did not receive any guidance from the law, the regulation, or the Tax Administration on how to separate its accounts. But Claimant did not deny that it could hire an outside tax advisor to determine how to proceed. SMCV apparently chose not to do so. As Respondent's Peruvian tax experts, Drs. Bravo and Picón explained, when SUNAT asked for information from SMCV to determine what expenses and costs were covered in the stabilized project, SMCV refused to submit

[185] *See* Eng. Tr. Day 7 at 2131:7 – 2132:21 (Otto).
[186] Eng. Tr. Day 10 at 2909:14-16 (Claimant's Closing).
[187] *See* Eng. Tr. Day 7 at 2178:7-12 (Ralbovsky); Ex. RD-2, Ralbovsky Hearing Presentation at slide 14.
[188] *See* Eng. Tr. Day 7 at 2178:13 – 2179:3 (Ralbovsky); Ex. RD-2, Ralbovsky Hearing Presentation at slide 15. *See also* Ex. CE-606, SMCV Financial Statements 2010 at para. 24, p. 44.
[189] *See* Eng. Tr. Day 7 at 2179:3 – 2181:7 (Ralbovsky); Ex. RD-2, Ralbovsky Hearing Presentation at slides 16-17. *See also* Ex. CWS-1, First Aquiño Statement at para. 56, Fig. 17.
[190] *See* Eng. Tr. Day 7 at 2181:1-7 (Ralbovsky). *See also* Ex. CWS-1, First Aquiño Statement at para. 57.
[191] *See* Eng. Tr. Day 7 at 2139:20 – 2140:14 (Otto).

it to SUNAT.[192]

108. Finally, Claimant's (and SMCV's) incorrect interpretation of Peruvian law does not entitle SMCV to the waiver of penalties and interest under Peruvian law, as Claimant and its tax law expert allege.[193] A taxpayer's incorrect interpretation of a legal provision is not sufficient to trigger the application of Art. 170.1 of the Tax Code. As Mr. Bravo explained at the hearing:

> Article 170 establishes requirements for the State to be able to exercise that power, and those requirements presuppose first that there is a mistaken interpretation of the provisions; second, that the debt has not yet been paid; and, three, that there is a clarifying provision. But not just any clarifying provision. It has to be a clarifying provision that says that Article 170(1) applies, and it has to be a provision through one of the vehicles expressly indicated by Article 170, Legislative Decree Supreme Decree—or Resolution of clarifying observations.[194]

109. Thus, under Peruvian law, the waiver of penalties and interest on the grounds of "reasonable doubt" (Art. 170.1) only applies if a law or rule is subsequently clarified through a special legal procedure. However, the Peruvian government has never issued such a clarification pursuant to Art. 170.1 with respect to Art. 83 of the Mining Law or Art. 22 of its Regulations—and it did not have to, because the law was clear. As shown in Section VII below, MINEM and SUNAT have consistently understood that mining stabilization agreements apply to specific investment projects.

110. In sum, the contract, the Mining Law, and the Mining Regulations are clear: the SA was, like all mining stabilization agreements, intended to apply to the investment that was defined in the FS and the Agreement itself. In this case, that investment was the Leaching Project. The Concentrator, which was an entirely new and distinct investment, was not included.

V. TESTIMONY AT THE HEARING DEMONSTRATED THAT THERE IS NO BASIS FOR THIS TRIBUNAL TO QUESTION, MUCH LESS OVERTURN, THE SUPREME COURT'S RULING ON THE SCOPE OF THE STABILIZATION AGREEMENT

111. Claimant's (or SMCV's) breach of contract claims are all premised on alleged breach of the 1998 SA between MINEM and SMCV. As an initial matter, as discussed in Section IX, the Tribunal does not have jurisdiction to hear those claims. But even if that were not the case, Claimant can only succeed in its breach of contract claim in this arbitration if it can prove that, according to the governing law of the contract, Perú did breach the SA. Importantly, as discussed

[192] *See* Eng. Tr. Day 9 at 2678:19 – 2679:3 (Bravo and Picón); Ex. RD-5, Bravo and Picón Hearing Presentation at slide 26.
[193] *See* Eng. Tr. Day 10 at 2966:5 – 2967:2 (Claimant's Closing); Eng. Tr. Day 9 at 2580:19 – 2582:3 (Hernández).
[194] Eng. Tr. Day 9 at 2755:18 – 2756:7 (Bravo and Picón) (emphasis added).

in Section III, the SA does not extend to the Concentrator Project and, thus, Perú did not breach its obligations under the Agreement. But the Tribunal need not independently determine the correct interpretation of that Agreement, because the question of the Agreement's breach is expressly one of Peruvian law—and one that the highest court in Perú has already squarely answered in the negative. There is simply no basis for this Tribunal to disregard the Peruvian Supreme Court's final decision on this dispositive question of Peruvian law, applied to this Peruvian-law contract. All the Tribunal in this arbitration need and should do is recognize that the Peruvian law question has been answered. And doing so is fatal to Claimant's claim. The United States agrees. As it explained in its NDP Submission:

> [A]s a matter of customary international law, international tribunals will defer to domestic courts interpreting matters of domestic law unless there is a denial of justice . . . [i]t is well-established that international arbitral tribunals, such as those established by disputing parties under the U.S.-Peru TPA Chapter 10, are not empowered to be supranational courts of appeal on a court's application of domestic law . . . *A fortiori*, domestic courts performing their ordinary function in the application of domestic law as neutral arbiters of the legal rights of litigants before them are not subject to review by international tribunals absent a denial of justice under customary international law.[195]

112. Thus, the Tribunal should not lose sight of the bedrock principle that international tribunals do not sit as supranational courts of appeal to hear challenges to, or to reverse, a respondent state's domestic court's judgments.[196] That is precisely what Claimant wishes this Tribunal would do—act as a court of appeal sitting above Perú's highest court (the Supreme Court) and reverse the Supreme Court's legal and factual holding that the SA did not cover the Concentrator. But, this Tribunal cannot do that. Absent a denial of justice claim (which Claimant has not alleged with respect to the Peruvian courts' decisions), this Tribunal must respect the judiciary's decision(s) on a matter of Peruvian law. Testimony at the hearing confirmed this.

113. *First,* as Respondent explained in its pleadings and at the hearing, SMCV thoroughly litigated the very same issues that Claimant raises in this arbitration—*i.e.*, the scope of the SA and its correct interpretation—before the highest courts in Perú and lost.[197] Those courts—including Perú's Supreme Court—repeatedly held that a mining stabilization agreements' scope is

[195] NDP Submission at paras. 25-26 (emphasis added).
[196] *See*, *e.g.*, Ex. RA-6, *Mondev v. USA*, Award at para. 126 (referencing investment tribunals' lack of competence to determine whether domestic courts' judgments have been rendered in conformity with the applicable domestic law); Ex. RA-58, *Arif v. Moldova*, Award at para. 441; Ex. RA-25, Jan Paulsson, *Denial of Justice in International Law* (2005) (excerpts), at pp. 7, 82, 84; *see also* NDP Submission at paras. 25-27.
[197] *See* Ex. RD-1, Respondent's Opening Presentation at slides 55-81.

limited and that such an agreement grants stability benefits exclusively to the activities related to the investment project for which the agreement was signed.[198] Moreover, the courts—including Perú's Supreme Court—specifically found that the scope of SMCV's 1998 SA was limited to the Leaching Project, as outlined in the 1996 FS.[199] At the hearing, Claimant did not claim otherwise.[200] Claimant simply disagrees with the Peruvian courts' conclusions.

114. *Second*, Claimant does not argue in this arbitration that these Peruvian court decisions were procedurally defective or in any way denied SMCV justice. Instead, Claimant argued that the Peruvian court decisions—including the Peruvian Supreme Court's decision—were wrong on the merits, and that this Tribunal somehow should feel itself free to entirely ignore those decisions.

115. Regardless of Claimant's opinions about the merits of the Supreme Court's decision, the Tribunal cannot ignore that judicial decision. The Supreme Court is the highest-level court in Perú and as a result, it has the authority to rule on a cassation appeal—which, as Dr. Eguiguren explained at the hearing, "is a special appeal—it's not a regular appeal—before the highest judicial body approved, the Supreme Court."[201] Moreover, the cassation appeal has two purposes: "to ensure the proper application of the objective law to the matter in question and the unification of domestic case law."[202] Thus, a cassation ruling by the Supreme Court is no ordinary decision—it aims to maintain consistency and uniformity throughout Peruvian caselaw and, on that basis, other courts must consider it when deciding cases that touch upon similar legal matters. Claimant did not challenge this at the hearing.

116. Likewise, Dr. Eguiguren explained at the hearing the referential value of the Supreme Court's decision with respect to the scope of the SA. As Dr. Eguiguren explained, even though the Supreme Court's ruling on the 2008 Royalty Assessment case is not—strictly speaking—a binding judicial precedent, it is a reference that parties and other courts are obliged to take into account in similar cases. In particular, Dr. Eguiguren explained that if a party or a judge wants to depart from a cassation ruling, they must provide reasons as to why that ruling does

[198] *See*, *e.g.*, Ex. CE-153, Supreme Court Decision No. 5212-2016, 2008 Royalty Assessment, Aug. 18, 2017, at para. 167; Ex. CE-274, Superior Court Decision No. 48, File No. 7649-2013 (2006/07 Royalty Assessment), July 12, 2017, at p. 20 (PDF).
[199] *See*, *e.g.*, Ex. CE-153, Supreme Court Decision No. 5212-2016, 2008 Royalty Assessment, Aug. 18, 2017, at para. 170; Ex. CE-274, Superior Court Decision No. 48, File No. 7649-2013 (2006/07 Royalty Assessment), July 12, 2017, at pp. 22, 25 (PDF).
[200] *See*, *e.g.*, Eng. Tr. Day 1 at 136:10 – 140:6 (Claimant's Opening); *see also* Ex. CD-5, Bullard Presentation at slides 55-58; CD-11, Claimant's Closing Presentation, slides 131-35.
[201] Eng. Tr. Day 8 at 2407:12-14 (Eguiguren).
[202] Ex. RE-313, Single Unified Text of the Code of Civil Procedure (updated), Approved by Ministerial Resolution No. 10-93-JUS, Art. 384. *See also* Ex. RER-6, Second Eguiguren Report at para. 93.

not apply to their case.[203]

117. In this case, there are no justifiable reasons for which the Tribunal may depart from the Supreme Court's decision, and Claimant identified none at the hearing. The Tribunal is dealing with the same set of facts and the same law as the Supreme Court. Thus, the Tribunal must follow the Supreme Court's decision and find that the SA was limited to the Leaching Project, as defined in the 1996 FS—which did not include the Concentrator.

118. Moreover, as both Dr. Morales and Dr. Eguiguren pointed out at the hearing, there have been no rulings changing the interpretation of Title Nine of the Mining Law.[204] In fact, as Dr. Eguiguren stated, the Supreme Court's 2008 decision "has been serving as 'precedent.'"[205] After the Supreme Court issued its decision, other adjudicators in Perú have referred to it and followed it.[206] Thus, absent a contradictory decision in Perú on the matter (there is none), this Tribunal must follow the Supreme Court's interpretation of the SA and the Mining Law and Regulations.

119. In sum, the Tribunal should not allow Claimant to re-litigate—for the sixth time—this settled question of Peruvian law in these proceedings. This Tribunal is not a supranational court of appeal on the Peruvian Supreme Court's application of domestic law. Accordingly, (absent a denial of justice claim and finding, not made here) the Tribunal must respect the Peruvian judiciary's decision on this question of Peruvian law.

VI. TESTIMONY AT THE HEARING CONFIRMED THAT SMCV, PHELPS DODGE, AND FREEPORT KNEW THAT THE STABILIZATION AGREEMENT DID NOT COVER THE CONCENTRATOR PROJECT

120. In light of the weakness of Claimant's claim that Perú breached its obligations under the SA, Claimant attempts to assert that the State frustrated Claimant's alleged legitimate expectations by supposedly arbitrarily changing its position on the scope of mining stabilization agreements as a result of purported political pressure (this is Claimant's *volte-face* argument). Claimant's allegations are without merit. Contrary to Claimant's allegations, Perú has consistently maintained that a mining stabilization agreement applies to the specific investment project for which the agreement was entered into, as outlined in the feasibility study incorporated into each stabilization agreement.[207]

[203] *See* Eng. Tr. Day 8 at 2408:5 – 2409:5 (Eguiguren).
[204] *See* Eng. Tr. Day 8 at 2408:13-15 (Eguiguren); *id.* at 2489:17-19 (Morales).
[205] *See* Eng. Tr. Day 8 at 2408:16-19 (Eguiguren).
[206] *See* Respondent's Rejoinder at paras. 82-85.
[207] *See infra* Section VII.

121. Moreover, Claimant did not have (and could not have had) any expectations that its interpretation of the SA would prevail, because SMCV and Claimant's predecessor (*i.e.*, Phelps Dodge) knew or should have known of Perú's understanding that the Concentrator was not covered by the Agreement. And, even if Claimant had any legitimate expectations (it did not), as Respondent discusses further in its pleadings, those expectations impose no obligation on the State under the CIL minimum standard of treatment, which is the standard applicable under the TPA.[208] Claimant gambled that Perú would not discover that SMCV treated the SA as if it applied to both the Leaching and the Concentrator Projects or that it would be able to convince Perú that its interpretation was correct. It lost that bet. Perú should not be held internationally liable for Claimant's own miscalculations.

122. The hearing showed the fatal defects in Claimant's claim that the State arbitrarily changed its position on the scope of the mining stabilization agreements in violation of Perú's Treaty obligations. Indeed, as Respondent had previewed in its written submissions,[209] Claimant's witnesses' testimony under cross-examination demonstrated (i) Claimant's lack of adequate due diligence (**Section A**) and (ii) Claimant's knowledge (and that of its related companies, *i.e.*, SMCV, Phelps Dodge) that the SA did not cover the Concentrator (**Section B**). Those facts are devastating for Claimant's case. At the very least, not having done any adequate due diligence on the scope of the SA and knowing of the significant risk that the Concentrator would not be covered, the best that can be said of Claimant is that it took a chance in proceeding with the Concentrator. Although it is unhappy that its gamble failed, Claimant cannot be heard to complain about the government's entirely foreseeable actions.

A. TESTIMONY AT THE HEARING MADE CLEAR THAT SMCV, PHELPS DODGE, AND FREEPORT FAILED TO CONDUCT ADEQUATE DUE DILIGENCE REGARDING THE SCOPE OF THE STABILIZATION AGREEMENT

123. In its Opening, Claimant asserted that "[m]ore than adequate due diligence was conducted, including by obtaining an express assurance from MINEM's Directorate General of Mining, that the Concentrator was stabilized."[210] To be clear, during the hearing, Claimant did not even attempt to allege that Freeport (Claimant in this case) conducted any due diligence on the scope of the SA prior to its acquisition of Phelps Dodge and its interest in SMCV in March 2007;

[208] *See* Respondent's Counter-Memorial at paras. 617-23; Respondent's Rejoinder at paras. 917-31; Respondent's Comments on U.S. NDP Submission at paras. 48-52.
[209] *See* Respondent's Counter-Memorial at Section II.C; Respondent's Rejoinder at paras. 241-89; Eng. Tr. Day 1 at 267:21 – 296:8 (Respondent's Opening).
[210] Eng. Tr. Day 1 at 132:3-6 (Claimant's Opening).

instead, Claimant tried to rely on alleged oral assurances provided to Phelps Dodge and SMCV years before Freeport came into the picture.

124. The hearing illustrated that SMCV and Phelps Dodge, in turn, failed to undertake adequate due diligence into the scope of the SA before investing in the Concentrator. In its written submissions, Respondent pointed out the large gaps in Claimant's evidence. Throughout this arbitration, Claimant has failed to produce or submit any documents prepared for it by internal or external counsel about the scope of the SA or the Mining Law and the 1993 Regulation, nor a single document showing any due diligence previously conducted by anyone from SMCV or Phelps Dodge regarding these matters.[211] Claimant's witnesses' testimony at the hearing conclusively demonstrated that no such documents exist—or, if they do, Claimant has failed to produce them in violation of its document production obligations.[212] Indeed, when pressed on cross-examination, Claimant's witnesses (i) were unable to point to any contemporaneous document that showed that MINEM assured SMCV or Phelps Dodge (even orally) that the Concentrator would be covered by the SA (**Sections 1 and 2**); and (ii) tried to hide behind a claim of privilege to avoid discussing any due diligence conducted at the time (**Section 3**). Respondent discusses each of these points below.

1. Ms. Torreblanca's Testimony about the Alleged Understanding of "the Industry" Demonstrated SMCV's Lack of Adequate Due Diligence

125. When questioned about the due diligence (if any) conducted by SMCV or Phelps Dodge to understand the scope of the SA prior to investing in the Concentrator, Ms. Torreblanca and Mr. Davenport did not claim that they sought expert advice on the matter. Instead, in an attempt to provide support for SMCV's interpretation of the scope of the SA, Ms. Torreblanca invented on the stand a claim that SMCV's interpretation was consistent with an alleged "understanding of the industry."[213] Ms. Torreblanca's responses under cross-examination regarding this supposed "understanding of the industry" show, however, that no such understanding exists.

126. *First,* when asked by Respondent's counsel if there were any documents on the record that might show this alleged industry understanding, Ms. Torreblanca answered: "There is quite a bit of literature. . . . I don't have it right here. We haven't presented it, as far as I know."[214]

[211] *See* Respondent's Counter-Memorial at Section II.C; Respondent's Rejoinder at Section II.D.
[212] To recall, the Tribunal ordered Claimant to produce any document containing Claimant's, SMCV's, Phelps Dodge's or Freeport's due diligence on the scope of the Stabilization Agreement. *See* Procedural Order No. 2, July 4, 2022, Respondent's Redfern Schedule, Document Request Nos. 3, 6 to 11 at pp. 13-14, 26-60.
[213] *See* Eng. Tr. Day 2 at 413:22 – 415:16 (Torreblanca).
[214] Eng. Tr. Day 2 at 417:2-4 (Torreblanca) (emphasis added).

Thus, there is no document on the record that supports Ms. Torreblanca's assertions.

127. *Second,* to test Ms. Torreblanca's claims, she was confronted during cross-examination with a letter from Southern—one of the biggest mining companies in Perú and a long-time client of SMCV's local counsel, Estudio Rodrigo—that shows that that company's understanding of the scope of stabilization agreements directly contradicts the purported industry understanding described by Ms. Torreblanca ("Southern's 1994 Letter"). Claimant's counsel immediately objected to the line of questioning concerning Southern's 1994 Letter on the grounds that it was allegedly "evidence outside the witness's knowledge."[215] Given that Southern is one of the biggest mining companies in Perú, Claimant was effectively admitting that any "industry" understanding (which would necessarily include the understanding of Southern) was, in fact, outside Ms. Torreblanca's knowledge.

128. Counsel was anxious for good reason: Southern's 1994 Letter is devastating for Claimant's case. To recall, on August 15, 1994, Southern's President, Mr. Charles G. Preble, sent a letter to MINEM reflecting the company's understanding of the scope of its 1994 Stabilization Agreement. The letter shows not only the understanding of Southern, but also that of Claimant's own witness, Mr. Hans Flury, who signed off on the letter's content as Southern's General Counsel.[216] At the time, Mr. Flurry was also an active participant in the mining industry, as he was Director of the Mining Society in 1991 and was Chairman of its Board of Directors between 1997-1999 and 2009-2011.[217]

129. In the letter, Southern states in unequivocal terms that the benefits of its 1994 Stabilization Agreement were exclusively limited to the project for which it had entered the Agreement—namely its "Leaching-Electrowon Project."[218] As Respondent explained in its Opening, the purpose of that project was to build leaching facilities to process oxide and secondary sulfide from the *Toquepala* and *Cuajone* mines, which are located in Southern's *Toquepala* and *Cuajone* EAUs.[219] When Southern entered into that 1994 Stabilization Agreement, it already operated concentrator plants to process the primary sulfides from the same mines.[220] Thus, within

[215] *See* Eng. Tr. Day 2 at 417:14 – 419:17 (Torreblanca).
[216] *See* Ex. RE-355, Letter from Southern Peru Copper Corporation to MINEM, Aug. 15, 1994.
[217] *See* Ex. CWS-7, First Flury Statement at paras. 6-7.
[218] *See* Eng. Tr. Day 1 at 322:6 – 324:18 (Respondent's Opening); *see also* Respondent's Letter to the Tribunal Re Hans Flury Witness Statements, Apr. 30, 2023.
[219] *See* Eng. Tr. Day 1 at 322:6 – 324:18 (Respondent's Opening); *see also* Ex. CE-912, Southern Peru Copper Corp. Stabilization Agreement, July 12, 1994, at Clause 1.1-1.4; Ex. RWS-10, Second Tovar Statement at para. 65.
[220] *See* Ex. RWS-10, Second Tovar Statement at para. 64.

the same EAUs, Southern operated both stabilized mining activities (the leaching activities) and non-stabilized activities (the concentrator activities), and Southern understood—contrary to SMCV—that by signing the Stabilization Agreement, its EAUs would not be automatically stabilized as a whole. This understanding was set out in the letter, which, after citing to the Mining Law and Regulations, states:

> For this reason the contractual guarantees will benefit SOUTHERN PERU exclusively for (i) the construction Project of the Leaching-Electrowon Plants, (ii) the additional production that will be obtained from the operation of the aforementioned Plants, and (iii) the income it obtains from the exportation and sale of said additional production of SX-EW Cathodes.
>
> In consequence, and in application of the provisions included in the second paragraph of Article 22 of the Supreme Decree No. 024-93-EM, SOUTHERN PERU, to determine the results of the operation of the Leaching-Electrowon Plants, will keep separate accounting and will reflect in separate results the operations of the sales of the other products resulting from its mining activity.[221]

130. In other words, Southern—and Claimant's own witness, Mr. Flury—understood in 1994 that stabilization agreements applied exclusively to the investment projects for which they had entered into and that mining companies had to separate the accounts for their stabilized projects from those of the companies' other operations—even if such projects were carried out within the same EAU.

131. The Southern Letter also shatters Ms. Torreblanca's description of the alleged "understanding of the industry." Had SMCV and Ms. Torreblanca done any adequate due diligence, they would have understood that SMCV's SA—like Southern's Agreement—was limited to the investment project for which the agreement was entered into.

2. SMCV Failed to Submit Any Contemporaneous Evidence Demonstrating the Alleged Oral Assurances from MINEM

132. Ms. Torreblanca also testified that, prior to SMCV's investment in the Concentrator, MINEM allegedly assured SMCV multiple times from 2000 to 2004 that the Concentrator would be covered under the 1998 SA (Respondent discusses the substance of these assertions in Section VI.B.3 below).[222] However, it is telling that Claimant has never been able to bring forward any contemporaneous documents that corroborate Ms. Torreblanca's testimony.

133. During her testimony, Ms. Torreblanca came up with various (unconvincing)

[221] *See* Ex. RE-355, Letter from Southern Peru Copper Corporation to MINEM, Aug. 15, 1994 (emphasis added).
[222] *See*, *e.g.*, Eng. Tr. Day 2 at 390:8-22, 519:7-20, 576:3-14 (Torreblanca).

excuses regarding why she did not submit any contemporaneous document that proved that MINEM had in fact given oral assurances to SMCV about the scope of the SA. When Ms. Torreblanca was pressed on cross-examination whether she memorialized in any way the meetings in 2004 in which MINEM allegedly gave SMCV oral assurances that the Concentrator would be covered, Ms. Torreblanca testified that she had written a single email to Mr. Davenport reporting the alleged assurances.[223] However, neither Claimant nor Ms. Torreblanca has submitted into the record any such email. President Hanefeld also asked Ms. Torreblanca if there were "any written record" on the oral confirmation that Ms. Torreblanca allegedly received in 2003 from MINEM officials, to which Claimant's witness responded: "I do not have it because I do not have the emails, they are no longer available."[224]

134. Ms. Torreblanca's excuse for not having the email is unconvincing. During the *SMM Cerro Verde* Hearing, Ms. Torreblanca testified on the witness stand that the email was deleted based on SMCV's alleged 10-year document retention policy.[225] During the *Freeport* Hearing, however, Ms. Torreblanca testified that the email, conveniently, "[was] not available anymore," because "[a]ll [of SMCV's] emails were erased" in 2014 due to "changes in the system."[226] When confronted with this contradiction during cross-examination, Ms. Torreblanca departed from her testimony in the *SMM Cerro Verde* Hearing and confirmed there was no written policy, claiming instead that, in practice, whenever an SMCV employee asked her if they could destroy a document, she would recommend that they keep the document for 10 years.[227]

135. Moreover, Ms. Torreblanca's allegation that all of SMCV's emails were erased in 2014 is contradicted by the record and Claimant's Privilege Log. Claimant submitted with its Reply twelve emails exchanged between Ms. Torreblanca and other SMCV employees from 2011, *i.e.*, before the alleged change in systems.[228] Claimant's Privilege log also shows that other SMCV emails from the 1997-2004 period are still available to Claimant.[229] Notably, Claimant listed 14

[223] *See* Eng. Tr. Day 2 at 524:13 – 527:12 (Torreblanca) ("Q. Did you send an email to your boss, Mr. Davenport, to say: 'Today we received this answer. We don't need to worry.' Where did you record that answer? A. Yes, an email was sent at least to Mr. Davenport indicating that all of the participants in the meeting--that there was consensus, and that, in effect, the Concentrator would be part of the same Cerro Verde Production Unit.").
[224] Eng. Tr. Day 2 at 560:21 – 561:8 (Torreblanca).
[225] *See* Ex. CE-1134, *SMMCV v. Perú*, Eng. Tr. Day 2 at 525:14 – 526:9 (Torreblanca).
[226] Eng. Tr. Day 2 at 528:3-10 (Torreblanca).
[227] *See* Eng. Tr. Day 2 at 534:9-20 (Torreblanca); *see also id.* at 529:4-16 (Torreblanca).
[228] *See*, *e.g.*, Ex. CE-1043, Emails exchanged between Julia Torreblanca and H. (Red) Conger (Nov. 10-11, 2011, 5:38 AM PET); Ex. CE-1044, Emails exchanged between Julia Torreblanca, *et al.* (Oct. 3-13, 2011, 4:21 PM PET); Ex. CE-1048, Emails exchanged between Julia Torreblanca, *et al.* (Sept. 30, 2011, 7:12 PM PET).
[229] *See* Ex. RE-341, Claimant's Letter to Respondent regarding Document Production, Nov. 3, 2022, at pp. 5-9 (PDF).

SMCV/Phelps Dodge emails from 2004 (of which three are between Ms. Torreblanca and Mr. Davenport) in its privilege log.[230]

136. Thus, the only logical conclusion is that either (i) Ms. Torreblanca did not report to Mr. Davenport or her other superiors about the alleged oral assurances obtained from MINEM in 2004—because she had nothing to report—or (ii) Claimant violated its document production obligations and withheld documents that the Tribunal ordered it to produce. Under either scenario, the Tribunal should draw adverse inferences and conclude that MINEM officials did not assure SMCV that the Concentrator would be covered under the SA.

137. Mr. Davenport's testimony at the hearing further confirmed that Claimant lacks contemporary documents to support the claim that, after months of meetings with MINEM officials, SMCV received assurances that the Concentrator would be covered by the SA. At the hearing, President Hanefeld asked Mr. Davenport how he reported to Phelps Dodge the achievement of obtaining such assurances, and if he recalled any celebratory correspondence to that effect,[231] to which he responded:

> THE WITNESS: How I communicated that to Phelps Dodge, I don't remember. I probably either sent them an email or called them or they were there. They knew that that's what our direction was. So, I don't remember specific--I mean, I don't remember going out and saying: "Hey, let's go out and have a few beers. We just succeeded in this." I don't remember that part, but I'm sure I communicated in some manner with them.
>
> PRESIDENT HANEFELD: So, you cannot refer us to any written documents and how, so to say, this understanding within the company was shared and celebrated?
>
> THE WITNESS: Well, I guess the written document is, you know, mostly, I guess, these presentations that said we met with--we're doing an addendum, we've met with MINEM, and they said: "Well, you can do that, but here's a better path to do it than the expansion."
>
> Whether there was a written document--I didn't see it in the materials that I reviewed. I don't remember that, other than the presentations I made.[232]

138. Mr. Davenport's response speaks volumes. It is not credible that after months of alleged meetings with MINEM's officials to try to seek confirmation that the Concentrator would be covered by the Agreement, Mr. Davenport and Ms. Torreblanca do not have any internal records capturing or even noting in passing such a significant accomplishment. The only logical

[230] *See* Ex. RE-341, Claimant's Letter to Respondent regarding Document Production, Nov. 3, 2022, at pp. 6-7 (PDF).
[231] *See* Eng. Tr. Day 3 at 830:12-20 (Davenport).
[232] Eng. Tr. Day 3 at 831:7 – 832:7 (Davenport) (emphasis added).

explanation is that it was never reported—because MINEM did not provide any such assurances.

139. In sum, the hearing confirmed Claimant's lack of adequate due diligence, and the absence of any contemporaneous documentary record of the (inadequate) due diligence that SMCV and Phelps Dodge claim to have conducted. The testimony of Claimant's witnesses showed that Claimant did not have a single document showing any due diligence conducted by it or any of its related entities about the scope of the 1998 SA (on which Claimant allegedly relied before investing in the Concentrator).

3. Claimant Failed to Submit Any Evidence Demonstrating that It Obtained Advice Assuring It that the Concentrator Would Be Stabilized

140. The hearing also demonstrated how Claimant is engaging in an elaborate dance around the legal advice obtained by SMCV at the time it invested in the Concentrator. While alleging that it received favorable advice, Claimant has strategically chosen not to disclose that advice, using legal privilege as a shield. Ms. Torreblanca and Mr. Davenport confirmed during the hearing that SMCV consulted with external counsel regarding the scope of the 1998 SA when preparing the 2002 Pre-Feasibility Study.[233] Unfortunately, although it of course had the option to waive privilege, Claimant has not allowed the Tribunal or Respondent to see what advice was actually provided, because the 2002 Pre-Feasibility Study allegedly discussing the advice has been heavily redacted. Claimant, instead, expects the Tribunal to take Ms. Torreblanca and Mr. Davenport's word that the advice was favorable, without allowing Respondent to see the documents or question Claimant's witnesses on the content of those documents. The Tribunal cannot and should not allow Claimant to simply assert that it obtained supportive legal advice, but then refuse to disclose the actual contents of that advice. Claimant cannot use the claim of having obtained legal advice as a sword, but then deny access to the contents of that advice, using privilege as a shield. If Claimant wishes to assert that it performed adequate due diligence—that is, that it sought and obtained favorable legal advice—then Claimant must waive privilege and disclose that legal advice. Given that Claimant has refused to do so, then the Tribunal is obliged to deliberately disregard and consciously not rely on the suggestion that Claimant obtained any such advice—indeed, the Tribunal should go further and assume that adverse advice was obtained, because there would have been no need to shield positive advice.

[233] *See* Eng. Tr. Day 2 at 620:10-17 (Torreblanca); Eng. Tr. Day 3 at 838:1-8 (Davenport).

141. In its Closing Statement, Claimant tried to defend its position by stating, "[W]e had to redact the memo to preserve privilege but I just wanted to be very clear: Redacting for privilege does not mean hiding."[234] Claimant's comment does not help its case. *First,* Claimant's redactions were not limited to the 2002 Pre-Feasibility Study, but also included withholding relevant annexes from the 2004 Feasibility Study, and all contemporaneous communications exchanged between SMCV, and Phelps Dodge on this issue.[235] Thus, there is not a single document on the record that demonstrates that Claimant actually received legal assurances that the Concentrator would be covered.

142. *Second*, and most importantly, Claimant's actions show the opposite. As Respondent stated in its Closing Argument, if Claimant had, indeed, received legal advice saying "the Concentrator is covered by the 1998 SA," Claimant would not have hesitated to waive privilege and disclose those reports and emails.[236] In fact, Mr. Davenport's testimony reveals that SMCV did not receive such supportive advice, as Claimant's witnesses claim. When President Hanefeld asked Mr. Davenport if he had "s[ought] legal assurance from Outside Counsel that [MINEM's] oral commitment was enough," he responded:

> THE WITNESS: Well, we used Outside Counsel. Luis Carlos Rodrigo was my main contact there, and we were working with them to what--what process do we need to do to make sure the Concentrator is stabilized? And so, it was in discussions with them: Well, let's do an addendum.[237]

Mr. Davenport's response is telling: Local counsel did not tell SMCV that there was no doubt that the Concentrator would be covered; instead, there were doubts and counsel recommended that SMCV seek an addendum to the Agreement.

143. For the above reasons, the Tribunal has to assume that if any due diligence were conducted, it yielded a result not favorable to Claimant, which is why Claimant has not submitted any documents.

B. IT IS CLEAR FROM WITNESS TESTIMONY AT THE HEARING THAT SMCV AND PHELPS DODGE KNEW THAT THE STABILIZATION AGREEMENT COVERED ONLY THE LEACHING PROJECT AND NOT THE CONCENTRATOR PROJECT

144. In addition to Claimant's lack of adequate due diligence, Claimant's witness testimony at the hearing confirmed that Claimant actually knew that the 1998 Stabilization

[234] Eng. Tr. Day 10 at 2925:20-22 (Claimant's Closing).
[235] *See* Ex. RE-341, Claimant's Letter to Respondent regarding Document Production, Nov. 3, 2022, at pp. 5-9 (PDF).
[236] *See* Tr. Day 10 at 3018:6 – 3019:15 (Respondent's Closing).
[237] Eng. Tr. Day 3 at 832:8-17 (Davenport) (emphasis added).

Agreement was limited to the Leaching Project and did not cover the Concentrator, and that the expansion of SMCV's beneficiation concession did not expand the scope of the 1998 Stabilization Agreement to cover the Concentrator.

1. The 1998 Stabilization Agreement's Reference to the Leaching Project Was the "Elephant in the Room" for Phelps Dodge

145. The hearing brought into sharp focus the fact that (at a minimum) Phelps Dodge had serious doubts about the scope of the 1998 SA when it decided to invest in the Concentrator. Mr. Davenport admitted under cross-examination that the fact that the 1996 FS and the 1998 SA expressly refer only to the Leaching Project was "the elephant in the room" for SMCV's majority shareholder.[238] In Mr. Davenport's own words: "[S]ome people, particularly in Phelps Dodge sa[id], well, how can you build a Concentrator, it's called a Stabilizing Leaching Project."[239] This admission is devastating for Claimant's case—it shows that, at a minimum, Phelps Dodge had very serious doubts that the scope of the 1998 SA extended beyond the Leaching Project.

146. Moreover, Mr. Davenport confirmed that, around the time SMCV and Phelps Dodge were undertaking the 2002 Pre-Feasibility Study, they ran a sensitivity assuming that the Concentrator was not stabilized under the 1998 Stabilization Agreement because, according to Mr. Davenport, "somebody asked the question, and so [SMCV] said, yeah, this is the effect it will have on it," meaning the effect it will have on the Concentrator Project.[240] When asked by President Hanefeld if the question that was asked was the "elephant in the room,"[241] he answered:

> I don't know if the elephant was there at that time or it became--or the elephant became more clear in the Feasibility Study. But the elephant in the room was always people, and Phelps Dodge, I think, was the first one that always said, you know, it's called the "Leaching Project." . . . . So, the elephant in the room was, why in the heck did they call it the "Leaching Project."[242]

147. Mr. Davenport's testimony is revealing. *First*, the fact that SMCV ran alternative calculations in the financial model shows that SMCV and Phelps Dodge knew there was a risk that the Concentrator would not be covered by the SA and that that risk had to be economically assessed. *Second*, the fact that they undertook the alternative calculations also signals that SMCV did not receive sufficient legal assurances from its outside counsel that the scope of the SA would

[238] Eng. Tr. Day 3 at 770:12- 20 (Davenport) (emphasis added).
[239] Eng. Tr. Day 3 at 770:17-19 (Davenport) (emphasis added).
[240] Eng. Tr. Day 3 at 836:22 – 837:8 (Davenport).
[241] *See* Eng. Tr. Day 3 at 837:9-12 (Davenport).
[242] Eng. Tr. Day 3 at 837:13 – 838:2 (Davenport) (emphasis added).

cover the Concentrator—at a minimum, there were serious doubts about the scope of the SA.

148. As Respondent discusses in the following subsections, the facts that unfolded in the years after SMCV completed the 2002 Pre-Feasibility Study and how SMCV acted with respect to the "elephant in the room" show that (i) SMCV and Phelps Dodge not only had doubts about the scope of the SA but knew that the Concentrator would not be covered; and (ii) SMCV and Phelps Dodge knew how to ask for written confirmation from MINEM regarding relevant issues related to the Concentrator, but chose not to do so with respect to its status under the SA.

2. In 2003, MINEM Informed SMCV that the Stabilization Agreement Was Limited to the Leaching Project

149. In 2003, SMCV asked MINEM whether it could use the profit reinvestment program to build its new investment project—the Concentrator.[243] To recall, under the laws as they stood when stabilized by the 1998 SA, mining companies were entitled to request approval from MINEM to reinvest their undistributed profits, free of tax, into other new investment projects ("profit reinvestment program").[244] As shown at the hearing, the 2003 exchange of letters between SMCV and MINEM regarding SMCV's application for the profit reinvestment program demonstrates that: SMCV understood at the time that the 1998 SA only made reference to the Leaching Project, that the Leaching Project did not include the Concentrator, that MINEM explicitly told SMCV that the 1998 SA was limited to the Leaching Project, and that SMCV was particularly interested in obtaining answers in writing from MINEM on the availability of the profit reinvestment program to build the Concentrator.[245] All that, of course, is in sharp contrast to how SMCV and Phelps Dodge conducted themselves when questions later turned to a different issue: whether the Concentrator itself would be stabilized.

a. The July 3, 2003 Letter from SMCV to MINEM

150. In the first letter ("July 3 Letter")—signed by Claimant's witness Ms. Torreblanca—SMCV asked the Ministry to confirm whether the profit reinvestment program was available, notwithstanding the fact that the program had been repealed in 2000.[246] In its inquiry, SMCV conceded that its new investment project (*i.e.*, the Concentrator) was not outlined or even mentioned in the 1998 SA, nor was it included within the Leaching Project:

> Given that the executed stability agreement makes reference therein to the Leaching

[243] *See* Ex. CE-394, SMCV, Petition No. 1418719 to MINEM, July 3, 2003.
[244] *See* Ex. CA-1, Mining Law at Art. 72(b).
[245] *See* Eng. Tr. Day 1 at 268:5 – 275:3 (Respondent's Opening); Eng. Tr. Day 10 at 3001:17 – 3002:19 (Respondent's Closing).
[246] *See* Ex. CE-394, SMCV, Petition No. 1418719 to MINEM, July 3, 2003.

> Project rather than to the Cerro Verde Project, which also includes the Primary Sulfides Project, we request clarification that the Investment Program using Non-Distributed Profits to be submitted would be approved regardless of the fact that it is not confined to the Leaching Project.[247]

151. At the hearing, Ms. Torreblanca tried to explain away the clear language of the letter, but failed. According to Ms. Torreblanca, when the letter referred to the "Leaching Project," it meant Cerro Verde's "production unit," because that is how Minero Perú allegedly considered it.[248] But that explanation makes no sense. If that were the case, the first part of the sentence in the quoted text above would not have needed to make a distinction between the "Cerro Verde Project" and the "Leaching Project." In that sentence, SMCV recognizes that the 1998 SA was limited to the Leaching Project.

152. Moreover, Ms. Torreblanca failed to provide any viable explanation regarding the meaning of the last part of the sentence of the above-quoted text. When asked what the letter meant when it stated that the Concentrator was not "confined" or "circumscribed" to the Leaching Project, Ms. Torreblanca stated:

> What we are saying here is, although literally "the Project," which is capitalized as we saw in February, refers to the Cerro Verde Production Unit and to the heading of the Contract, and it doesn't refer to the Cerro Verde Project, as Minero Perú saw it. So, we wanted confirmation that the Ministry of Energy and Mines still agree[d] that it also includes the Concentrator <u>in spite of the fact that in the literality of "Leaching Project," the Concentrator is not included</u>. That's what we were asking for.[249]

Ms. Torreblanca's explanation, however, is not supported by the text of the letter. SMCV was not asking about what the words "Leaching Project" meant—SMCV was asking whether it could use the profit reinvestment program to build the Concentrator, despite the fact that the SA (which provided the means of accessing the otherwise defunct reinvestment program) does not mention that project and that the Leaching Project as such (*i.e.*, the project to expand SMCV's leaching facilities) did not include the Concentrator. Moreover, Ms. Torreblanca's response in the *Freeport* Hearing is contradicted by her response at the *SMM Cerro Verde* hearing, where she testified that "[w]hat we are saying there is that, taking into account that <u>the Concentrator was not foreseen</u> originally <u>in the Leaching Project as a synonym of the Production Unit</u>, we were asking whether

[247] Ex. CE-394, SMCV, Petition No. 1418719 to MINEM, July 3, 2003, at p. 1.
[248] *See* Eng. Tr. Day 2 at 408:7 – 411:6 (Torreblanca).
[249] Eng. Tr. Day 2 at 410:18 – 411:6 (Torreblanca) (emphasis added).

we could include it in the Production Unit."[250] That is, at the *SMM Cerro Verde* hearing, Ms. Torreblanca conceded that the Concentrator was not originally included in the 1998 SA.

b. MINEM's Report No. 510-2003 of September 8, 2003

153. MINEM responded to SMCV's July 3 Letter through Report No. 510-2003 ("Report No. 510"), dated September 8, 2003.[251] At the hearing, Ms. Torreblanca confirmed that this report constituted a legal opinion authored by DGM's lawyers, on which Ms. Chappuis signed off as Director of DGM.[252] MINEM's Report No. 510 states that the Concentrator Project "could be eligible for [the profit reinvestment] benefit, there being no requirement that the agreement giving rise to the benefit should have previously contemplated [the Concentrator] as a project."[253] That is, the profit reinvestment program was available thanks to the SA's stabilization of the Leaching Project, but there was no requirement that the reinvested profits be used for projects that were part of the SA and the Leaching Project. Importantly, MINEM's response confirmed that the Concentrator was a new investment and was not included in the Leaching Project or the SA.

154. Under cross-examination, Ms. Torreblanca acknowledged this important fact and reluctantly conceded that the Concentrator was not originally foreseen in the 1996 FS either.[254] This admission directly contradicts one of Claimant's many (inconsistent) arguments—namely, that the Concentrator was included in the FS and was always envisioned as part of the Leaching Project.[255] Indeed, Claimant has had several theories with respect to the scope of the SA to try to justify its attempt to include the Concentrator within the stabilized regime through the back door—none of which is correct.

c. SMCV's Second Letter to MINEM of July 8, 2003 and MINEM's Second Report of September 8, 2003

155. On July 8, 2003, SMCV sent a second letter to MINEM regarding certain specific aspects of the profit reinvestment program ("July 8 Letter"). For example, SMCV wanted to know if a prohibition of reducing capital within the next four years after the profits were reinvested "[was] not applicable to [the] company" considering that the provision was "not included within

[250] Ex. CE-1134, *SMMCV v. Perú*, Eng. Tr. Day 2 at 410:8-14 (Torreblanca) (emphasis added).
[251] *See* Ex. CE-399, MINEM, Report No. 510-2003-MEM-DGM-TNO, Sept. 8, 2003.
[252] *See* Eng. Tr. Day 2 at 441:3-8 (Torreblanca).
[253] Ex. CE-399, MINEM, Report No. 510-2003-MEM-DGM-TNO, Sept. 8, 2003, at p. 2.
[254] *See* Eng. Tr. Day 2 at 451:14-21 (Torreblanca) ("Q. So, the Ministry says, essentially, the Concentrator Project is not contemplated as a project in the 1998 Stabilization Agreement; isn't that correct? A. Correct, as the initial investment that was described in the Feasibility Study originally, but we all knew that, no matter what, that Concentrator had to be built.") (emphasis added).
[255] *See* Claimant's Memorial at paras. 7-8; Claimant's Reply at Section II.A.3.

[its] stabilized system."[256] Thus, SMCV reiterated its hope at the time that the 1998 SA allegedly covered the company as a whole.[257]

156. MINEM responded to SMCV's July 8 Letter through Report No. 509-2003 ("Report No. 509"), dated September 8, 2003.[258] At the hearing, Ms. Chappuis and Ms. Torreblanca confirmed that this report also constituted a legal opinion authored by DGM's lawyers, on which Ms. Chappuis signed off as Director of DGM.[259] MINEM's Report No. 509 stated in the most unambiguous way that "the application of the Stabilized Regime [was] granted to the Cerro Verde Leaching Project and not to the company and the Regime is the one described in the aforementioned agreement."[260]

157. On cross examination, Ms. Torreblanca attempted to explain the content of Report No. 509. In her view MINEM was clarifying that the profit reinvestment program was available for the "'Leaching Project' [that was] defined by the Concessions listed in Annex I of the Stability Agreement," but no for "another Production Unit that is not defined in the [SA]."[261] In other words, according to Ms. Torreblanca, when MINEM referred to the "Leaching Project" it was allegedly referring to a "mining unit" or "production unit." However, Ms. Torreblanca's interpretation is implausible, because the Report did not state that stabilization was granted to the "mining unit," to the "mining concession," to the "EAU," to the "mining project," to "Cerro Verde's Concessions 1, 2, 3 and the Beneficiation Concession," or to "any mining projects within the same production unit" as Claimant wished it did—the Report referred to the Leaching Project specifically.[262] The bottom line is that, in September 2003, DGM's lawyers and Ms. Chappuis—Claimant's own witness in this arbitration—explicitly told SMCV that the SA had been granted exclusively to the Leaching Project, which, as Ms. Torreblanca admitted, did not include the Concentrator Project.

158. Moreover, when questioned at the hearing about the content of Report No. 509, Ms. Chappuis essentially admitted that the language of the letter defeats Claimant's theory regarding the scope of the Stabilization Agreement. Ms. Chappuis first tried to explain away the language by stating that the words "Cerro Verde Leaching Project" meant "the 1998 SA." In light of that response, Ms. Chappuis was confronted with her witness statement where she said that "the choice

[256] Ex. CE-395, Letter from SMCV to the DGM, July 8, 2003, at p. 2.
[257] *See*, *e.g.*, Ex. CE-395, Letter from SMCV to the DGM, July 8, 2003, at p. 2.
[258] Ex. CE-398, MINEM, Report No. 509-2003-MEM-DGM-TNO, Sept. 8, 2003.
[259] *See* Eng. Tr. Day 2 at 455:14-21 (Torreblanca); Eng. Tr. Day 3 at 923:15-20 (Chappuis).
[260] Ex. CE-398, MINEM, Report No. 509-2003-MEM-DGM-TNO, Sept. 8, 2003, at para. 4 (emphasis added).
[261] *See* Eng. Tr. Day 2 at 456:16 – 470:14 (Torreblanca).
[262] *See* Eng. Tr. Day 2 at 457:20 – 458:7, 461:16- 22, 469:21 – 470:6 (Torreblanca).

of words" in Report No. 509 was "not entirely clear in expressing [MINEM's] conclusion" because what she meant was that "the scope of the stability applie[d] to the Cerro Verde mining unit."[263] Specifically, Ms. Chappuis was asked, in hindsight, what language would she have used to make the report entirely clear. She answered: "I would have added what I say here: 'The scope of Stability applies to the Cerro Verde Mining Unit rather than to the company as such.'"[264]

159. Ms. Chappuis's answer speaks volumes. *First*, Claimant has failed to show a single document from MINEM or any other government entity that confirms that Claimant's so-called "mining unit" as a whole was called by the name, or understood to be included within the term, "Cerro Verde Leaching Project." The Leaching Project was a mining investment project built with the purpose of expanding SMCV's leaching plant, as provided for in the 1998 SA and its underlying FS. Claimant's and its witnesses' attempt to expand that clear language to include a concept that is not even defined in the Mining Law is entirely without merit.

160. *Second*, while Ms. Chappuis now wishes she had used the words "mining unit," that is not what the letter states. MINEM's letter was not prepared in a rush—Ms. Chappuis and her team took two months to prepare the letter. Thus, the words in the letter are well-thought out, and Ms. Chappuis cannot now change them in an attempt to support Claimant's case.

161. In sum, the 2003 exchange of letters shows that SMCV knew well and was told directly by MINEM at the time that the SA was limited to the Leaching Project, which did not include the Concentrator.

d. MINEM's December 9, 2004 Resolution Approving SMCV's Application

162. This understanding was further confirmed on December 9, 2004, when MINEM approved SMCV's application for the profit reinvestment program, giving SMCV permission to reinvest the stabilized Leaching Project's undistributed profits tax-free into the project of building the Concentrator.[265] In the resolution approving the profit reinvestment program, MINEM explicitly stated that the undistributed profits to be reinvested in the Concentrator, free of tax, had to be "exclusively generated by the 'Cerro Verde Leaching Project.'"[266] In other words, the resolution explicitly indicated that only the profits from the Leaching Project were stabilized—not those generated by the new Concentrator into which the profits would be reinvested.

[263] Ex. CWS-6, First Chappuis Statement at para. 42; Eng. Tr. Day 3 at 924:8 – 929:15 (Chappuis).
[264] Eng. Tr. Day 3 at 929:10-12 (Chappuis).
[265] *See* Ex. CE-23, MINEM, Ministerial Resolution No. 510-2004-MEM/DM, Dec. 9, 2004, at Art. 1.
[266] Ex. CE-23, MINEM, Ministerial Resolution No. 510-2004-MEM/DM, Dec. 9, 2004, at Art. 1.

163. Claimant has argued in this arbitration that the fact that SMCV was allowed to reinvest its undistributed profits, free of tax, from the (stabilized) Leaching Project into the Concentrator somehow confirmed that the Concentrator would receive the same stabilization benefits as the Leaching Project.[267] Ms. Torreblanca, however, could not explain why MINEM used the word "exclusively" in the resolution designating the stabilized Leaching Project as the only authorized source of profits that could be reinvested.

164. Instead of facing the fact that MINEM's language indicated that the only undistributed profits to benefit from the profit reinvestment program were those generated from the stabilized Leaching Project, Ms. Torreblanca testified that she assumed that MINEM meant the earnings that would benefit from the profit reinvestment program had to be generated from SMCV's so-called "mining unit" (and not from other hypothetical operational mining units that SMCV might acquire in the future).[268] Ms. Torreblanca's response is unavailing. When Ms. Torreblanca was asked if she had arrived at that conclusion based on her own reading of the resolution, she testified that (i) she received advice from third parties; (ii) shared the content of the resolution with local counsel; and (iii) discussed the content "informally" with a lawyer of MINEM to confirm her understanding.[269] Ms. Torreblanca (or Claimant's counsel), however, was not able to point to any contemporaneous document on the record to substantiate those all-too-convenient claims that appeared for the first time at the hearing.

165. In sum, the record shows that, at the time that SMCV and Phelps Dodge decided to invest in the Concentrator, they knew (and MINEM confirmed) that the SA only applied to Cerro Verde's Leaching Project. Consequently, it did not have, nor could it have had, any expectation that stabilization benefits would extend to the Concentrator.

3. Claimant's Witnesses Confirmed that Phelps Dodge Had Doubts About the Scope of the Stabilization Agreement and Sought Written Assurances that the Concentrator Would Be Covered by the Stabilization Agreement, But Failed to Obtain Any

166. Aware that the Concentrator was not part of the Leaching Project and was, therefore, almost certainly not covered by the SA, SMCV and Phelps Dodge sought a written statement from the government that the SA would nevertheless cover the new investment—that was needed, in their view, to address "the elephant in the room." Neither SMCV nor Phelps Dodge

[267] *See* Claimant's Memorial at paras. 91-94, 115, 123.
[268] *See* Eng. Tr. Day 2 at 481:17 – 484:4 (Torreblanca).
[269] *See* Eng. Tr. Day 2 at 485:22 – 486:8, 486:12 – 487:1, 492:17-21, 497:11 – 498:5, 500:14 – 501:1 (Torreblanca).

was ever able to obtain any such written assurances—because Respondent held the opposite view.

167. Ms. Torreblanca[270] and Mr. Davenport[271] confirmed at the hearing that, in 2004, Phelps Dodge demanded that SMCV obtain written assurances from MINEM that the Concentrator would be covered. Despite Phelps Dodge's express request, SMCV (and Phelps Dodge) failed to even ask for those written assurances. Claimant's witnesses' explanations at the hearing on this issue were contradictory and differed significantly.

168. **Ms. Torreblanca:** When asked in cross examination why she did not send a letter to MINEM asking if the Concentrator would be covered, her first explanation was that SMCV did submit an inquiry in writing regarding whether they could take advantage of the profit reinvestment program. According to Ms. Torreblanca, "It is not usual for the Ministry to answer these types of questions, or to issue these kinds of opinions."[272] Ms. Torreblanca's testimony, however, is incorrect because MINEM did answer SMCV's inquiry as discussed above in Section VI.B.2. Thus, MINEM would have answered SMCV's inquiries about its stabilized regime—if asked. The reality is that SMCV chose not to make any similar written inquiry on the scope of the stabilization agreement, despite knowing full well how to do so (as demonstrated by its actions in 2003).

169. During cross-examination, Ms. Torreblanca tried to explain away this obvious omission by claiming that SMCV did not request a written assurance about the scope of the SA and did not insist on an amendment to the Agreement to explicitly include the Concentrator "because all [MINEM's] evaluating team was there and in agreement."[273] She described the circumstances: "[W]e were in mid-2004, and we needed to move forward quickly, and we devoted ourselves to also building the file for the Beneficiation Concession as well."[274] Thus, according to Ms. Torreblanca, SMCV decided not to make a formal inquiry, and decided not to pursue an amendment after all, because SMCV and Phelps Dodge were in a rush to start construction of the Concentrator and could not wait for a formal response. To Claimant's detriment, Ms. Torreblanca's response confirmed that SMCV and Phelps Dodge knowingly took a calculated risk

[270] *See* Eng. Tr. Day 2 at 557:11-14 (Torreblanca) ("We approached [the DGM] and said: 'We would like to get confirmation that the Concentrator--please put it in writing--that the Concentrator will be stabilized."). *See also id.* at 517:21 – 518:5 (Torreblanca).
[271] *See* Eng. Tr. Day 3 at 746:19-22 (Davenport) ("And so, it even made Phelps Dodge and us nervous, and so we said, okay, we need to make sure we have some type of written confirmation that if we build this concentrator it will be stabilized."). *See also id.* at 778:8-779:4 (Davenport).
[272] Eng. Tr. Day 2 at 580:20-22 (Torreblanca).
[273] Eng. Tr. Day 2 at 587:19-20 (Torreblanca).
[274] Eng. Tr. Day 2 at 588:1-4 (Torreblanca).

by deciding to go ahead with the Concentrator without obtaining any written assurance from the government that the SA would apply to it.

170. Arbitrator Cremades asked Ms. Torreblanca, as the head of SMCV's legal department, whether she thought it was credible that no written assurances were needed about something as important as tax benefits.[275] In response, Ms. Torreblanca gave a long speech attempting to convey the idea that the approval of the profit reinvestment program and the expansion of the beneficiation concession somehow constituted the desired assurances in writing.[276] However, the hearing showed that these approvals are far from an adequate means of confirming, in a legally binding manner, that the Concentrator would be stabilized under the SA—most significantly, none of the documents referenced by Ms. Torreblanca even mentions the 1998 SA.

171. **Mr. Davenport:** According to Mr. Davenport, he could not get any written assurances, because (he assumed) a Minister would not be willing to sign a letter confirming that the Concentrator would be stabilized. In Mr. Davenport's words: "I knew at the time and it was pretty obvious that, you know, a Minister, Mining Minister or Finance Minister, if they didn't have to, they are not going to go on a limb and say: 'You build a Concentrator. You're stabilized.'"[277] Mr. Davenport's response is noteworthy for what he does not say. By stating that he understood that the Ministry was not going to issue a letter confirming explicitly that the Concentrator was covered, Mr. Davenport admitted (i) that he never asked for such a letter and (ii) that he knew that, if pressed to put an official position in writing, MINEM would say that the Concentrator would not be covered. Mr. Davenport was right. The Ministry was not going to sign a letter confirming that the SA covered the Concentrator—not for political reasons, as Mr. Davenport suggested at the hearing, but because such a statement would have been contrary to Peruvian law. As Mr. Oswaldo Tovar, the former Director of Mining Promotion and Development for MINEM, explained at the hearing:

> It's not legal. It's not possible. The regulations are very explicit. The Mining Regulations are very explicit when they say that, yes, there may be variations of the Feasibility Study without changing the subject matter of it; this during the execution of investment stage before the operation. As public officials, we went to the law, to

[275] Eng. Tr. Day 2 at 564:11-15 (Torreblanca) ("ARBITRATOR CREMADES: What I'm asking is: you were in charge of Legal back then, do you think that it was credible for you to say that you would not require in writing any assurances about the tax benefits?").
[276] Eng. Tr. Day 2 at 564:16 – 567:18 (Torreblanca).
[277] Eng. Tr. Day 2 at 651:6-10 (Davenport).

the regulations, to have a clear position as to what is it that we had to do.[278]

Thus, SMCV did not dare to ask the Ministry, because they knew they were not going to get a favorable answer.

172. Mr. Davenport also conceded at the hearing that SMCV never asked for nor received any express assurance from the Ministry that SMCV would not pay royalties for the Concentrator. President Hanefeld asked Mr. Davenport if he heard MINEM expressly stating to SMCV that the expansion of the beneficiation concession "will shield the sulfide operation from the Royalty."[279] Mr. Davenport answered: "Yeah. To me it was implied."[280] As President Hanefeld correctly noted, "'Implied' is something different."[281] "Implied" is not confirmation that the Concentrator would be shielded from royalties. And "implied" messages cannot (contrary to Claimant's wishes) create legitimate expectations; to the contrary, reliance on "implied" messages further confirms an investor's lack of adequate due diligence. As the *Glamis Gold* tribunal explained, expectations must be based on specific "definitive, unambiguous and repeated" assurances or commitments made by the host State to the investor.[282] Perú never gave any such assurances to SMCV.

173. **Ms. Chappuis:** Ms. Chappuis admitted to Arbitrator Cremades that she was the one responsible for telling SMCV not to file a request seeking a clear statement that the Concentrator was stabilized. She claimed she gave that advice because they were covered; confirmation wasn't needed.[283] However, Ms. Chappuis's answer to Arbitrator Cremades is at odds with the one she provided in at the *SMM Cerro Verde* Hearing. Ms. Chappuis testified in February that she told Ms. Torreblanca and Mr. Davenport that it was better if they did not request a written confirmation: "[T]hey asked [] if they could send a letter, and I said, I think not. And Dra. Padilla, Dra. Menéndez [were] here, Engineer Saldarriaga, all of us, and we [were] all in agreement."[284]

174. Ms. Chappuis's answer at the February *SMM Cerro Verde* Hearing speaks volumes.

[278] Eng. Tr. Day 5 at 1452:7-15 (Tovar).
[279] Eng. Tr. Day 3 at 810:21 – 811:2 (Davenport).
[280] Eng. Tr. Day 3 at 811:3-4 (Davenport).
[281] Eng. Tr. Day 3 at 811:6 (Davenport).
[282] Ex. RA-30, *Glamis Gold v. USA*, Award at para. 802.
[283] *See* Eng. Tr. Day 4 at 1011:17 – 1012:4 (Chappuis) ("ARBITRATOR CREMADES: The impression that Cerro Verde gives is that they wanted to ask in writing for a confirmation, and you had told them or insinuated to them that there was no need because it was covered by the '98 Agreement. Is that right? Did you give them enough reasons to think that? You assume the personal responsibility that it was not presented in writing despite their willingness to do so? [A.] Yes, that is true.").
[284] Ex. CE-1136, *SMMCV v. Perú*, Eng. Tr. Day 4 at 946:16 – 947:2 (Chappuis) (emphasis added).

First, had SMCV asked for a confirmation in writing, it would have received the Ministry's position in writing. SMCV does not have a written response from the Ministry, because it never requested one. *Second*, after meeting with Ministry officials—including Ms. Chappuis—Ms. Torreblanca and Mr. Davenport asked Ms. Chappuis if they could send a letter to confirm their discussions. Ms. Chappuis told them not to do so. If Ms. Chappuis were truly confident about the legality of the oral assurances she allegedly provided to SMCV, as she asserted in her written testimony and at the hearing, then she would not have had reason to reject Ms. Torreblanca's and Mr. Davenport's suggestion. It is obvious that Ms. Chappuis told SMCV that it should not submit a written request, for one simple reason: As Mr. Tovar explained in his witness statements, Ms. Chappuis knew that it was not possible to give SMCV the answer it wanted in writing, because any such statement would go against the law and MINEM's well-established position.[285]

175. In sum, contrary to Phelps Dodge's original instructions, neither SMCV nor Phelps Dodge ever formally asked for or managed to obtain any written assurances from the government. Instead, knowing—at a minimum—that there was a significant risk that the Concentrator would not be covered by the SA, they decided to go ahead with their investment in the Concentrator, relying (at best) on alleged oral assurances from one government official, Ms. Chappuis, who she advised them not to seek such assurances in writing, discrediting the validity of any such assurance.

4. SMCV's and Phelps Dodge's Reliance on MINEM's Alleged Oral Assurances Was Reckless

176. Evidently realizing the weakness of its arguments that the SA already, always, or automatically covered the Concentrator, Claimant's fallback argument that took center stage at the hearing is that, whatever its original coverage, the SA was expanded to include the new Concentrator through the expansion of the Beneficiation Concession in late 2004. According to Claimant, the Ministry (*i.e.*, Ms. Chappuis) allegedly told SMCV and Phelps Dodge that it was not necessary for them to directly amend the SA to include the Concentrator. Instead, they could just expand the Beneficiation Concession to include the Concentrator, and that would somehow also bring the Concentrator not only within the scope of the Concession but also within the scope of the SA.[286] This story, however, crumbled at the hearing.

[285] *See* Ex. RWS-3, First Tovar Statement at para. 14; Ex. RWS-10, Second Tovar Statement at paras. 35-39.
[286] *See* Eng. Tr. Day 1 at 86:1 – 87:5 (Claimant's Opening).

a. Ms. Chappuis's June 2004 email shows that she did not know whether the Concentrator could be included within the Stabilization Agreement

177. Ms. Chappuis initially testified that MINEM's understanding about the scope of stabilization agreements "has always been that it's based on concessions."[287] However, Ms. Chappuis's own email of June 11, 2004 proves that, at the very least, Ms. Chappuis did not know whether it was legal to consider that the Concentrator was covered under the 1998 SA:[288]

From: Chappuis Maria (DG Mineria)
Sent: Friday, June 11, 2004 6:15 PM
To: Padilla Rosario (D Tec. Normativa); Chavez Riva Galvez Jaime; Tovar Oswaldo (D Promocion Minera); Saldarriaga Colona Luis; Panizo Luis (DG Asuntos Legales)
Subject: Meeting with Cerro Verde - New SA

Can you come to my office on Tuesday 15, at 11:00 am
Matter: Request for inclusion of the Sulfides Project in SA of [Cerro Verde]…is this legal?

Ing. Maria Chappuis
Directora General de Mineria
Ministerio de Energia y Minas
http://www.minem.gob.pe
Av. Las Artes 260, Lima 41 - Perú
Telf. 51.1.4750336, Fax 51.1.2258304
==========
The content of this message may contain the private views and opinions of the sender and does not constitute a formal view and/or opinion of the ministry unless specifically stated. The contents of this email and any attachments may contain confidential and/or proprietary information, and is intended only for the person/entity to whom it was originally addressed. Any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this email in error please notify the sender immediately by return e-mail and delete this message and any attachments from your system.

==========

178. During the *SMM Cerro Verde* Hearing, Ms. Chappuis admitted that she did convene the team meeting referenced in the email above in order to discuss the legality of SMCV's request to include the Concentrator under the SA.[289] This admission means that Ms. Chappuis—the person who, by Claimant's account, allegedly wrote the Mining Law[290]—did not know whether the Concentrator legally could be included within the scope of the SA or not, and needed to consult within the Ministry to answer that question.

179. At the *Freeport* Hearing, President Hanefeld asked Ms. Chappuis what conclusion the team reached at the end of the meeting. In response, Ms. Chappuis answered that her team, including the DGM lawyers, confirmed her view that the expansion of the Beneficiation Concession would bring the Concentrator under the scope of the SA.[291] Ms. Chappuis's response cannot be accepted at face value. *First*, her recollection of the June 15 meeting is at odds with the testimony of Mr. Tovar, who also participated in that meeting, and stated in his second witness

[287] Eng. Tr. Day 3 at 846:14-19; 849:14-15 (Chappuis).
[288] *See* 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," June 11, 2004.
[289] *See* Ex. CE-1135, *SMMCV v. Perú*, Eng. Tr. Day 3 at 901:11-19 (Chappuis) ("MR. ALEXANDROV: The question to be addressed at that meeting was whether--and I'm reading the line from your email--the request for inclusion of the Sulfide Project in the Stabilization Agreement was legal. Was that the question to be discussed at that meeting? PRESIDENT BLANCH: That you can answer with a yes or no. [A.]: Yes.").
[290] *See* Eng. Tr. Day 1 at 22:14-15 (Claimant's Opening).
[291] *See* Eng. Tr. Day 4 at 1024:15-21 (Chappuis).

statement: "I can confirm that this discussion never took place, and I never stated (nor could have stated) that this expansion could have included the Concentrator under the scope of the Stabilization Agreement."[292] When Ms. Chappuis was confronted with Mr. Tovar's characterization of the email and the meeting, her response was: "I am not going to opine on other witnesses."[293] It is telling that Ms. Chappuis chose not to dispute Mr. Tovar's testimony—not even to claim that it was inaccurate.

180. *Second*, Ms. Chappuis's reply about this June 15 meeting is also at odds with the facts. Had her team confirmed that the expansion of the Beneficiation Concession was sufficient, SMCV would not have needed to continue having meetings at the Ministry to try to obtain assurances on the matter. As will also be explored in the next section, in July and August 2004 (*i.e.*, after Ms. Chappuis's team supposedly agreed on June 15 that expanding the Beneficiation Concession would stabilize the Concentrator), SMCV made various presentations to the DGM seeking to amend the SA to include the Concentrator. Those July and August meetings about amending the SA would have been entirely pointless if Ms. Chappuis had delivered the claimed message about expanding the Beneficiation Concession in June. Thus, Ms. Chappuis's testimony is not supported by the facts or contemporaneous documents.

b. Claimant's witnesses' testimony confirmed that SMCV sought to amend the Stabilization Agreement to include the Concentrator, because they understood it was not otherwise covered

181. As noted above, according to Mr. Davenport, SMCV's local counsel suggested that, to include the Concentrator within the scope of the SA, SMCV had to ask for an amendment to the Agreement.[294] That is precisely what SMCV did ask for, in mid-2004. On July 8, 2004 and in August 2004 SMCV made two PowerPoint presentations to MINEM to discuss bringing the Concentrator within the SA.[295] As Respondent demonstrated at the hearing, these presentations show that, at the time, SMCV knew that the Concentrator was not included and thought it needed an amendment to the 1998 SA in order to include the Concentrator.[296]

182. At the hearing, Mr. Davenport was unable to explain why they were considering an

[292] Ex. RWS-10, Second Tovar Statement at para. 17.
[293] Eng. Tr. Day 4 at 1039:18-22 (Chappuis).
[294] *See supra* at para. 142.
[295] *See* Ex. CE-450, Sociedad Minera Cerro Verde S.A.A., "Past, Present, Future," July 8, 2004 ("SMCV's July 2004 Presentation"); Ex. CE-453, SMCV, Justification of Request for Formal Inclusion of Benefit Concession in the Current Stabilization Agreement, Aug. 2004 ("SMCV's Aug. 2004 Presentation"); Ex. CWS-16, Second Davenport Statement at para. 12; Ex. CWS-21, Second Torreblanca Statement at para. 15.
[296] *See* Eng. Tr. Day 1 at 279:19 – 281:4 (Respondent's Opening); *see also* Ex. CE-450, SMCV's July 2004 Presentation at slides 21, 45; Ex. CE-453, SMCV's Aug. 2004 Presentation at slides 1, 11.

amendment to the Stabilization Agreement in July/August 2004, if it were clear (as Claimant claims in this arbitration[297]) that the Concentrator would be included in the Stabilization Agreement, either automatically (because it would be included within the so-called "mining unit" that was allegedly already covered) or through the expansion of the Beneficiation Concession. Under cross-examination, Claimant's witness testified that SMCV and Phelps Dodge "originally [] were going down the path of amend[ment]" to make sure that the SA expressly stated that it applied to the Concentrator.[298] In other words, SMCV and Phelps Dodge—at a minimum—had significant doubts that the SA would cover the Concentrator unless it was expressly included in the text of the Agreement.

c. Claimant's witnesses admitted at the hearing that Ms. Chappuis's position was at odds with the position of Vice Minister Polo

183. Testimony at the hearing showed that Ms. Chappuis's alleged view of the scope of the SA was at odds with that of other officials at the Ministry, including her superior, Vice-Minister Polo. At the hearing, Mr. Davenport confirmed that he was aware that Vice-Minister Polo had a different view.[299] Likewise, Ms. Chappuis acknowledged that she knew her boss held the view that the Concentrator could not be included in the existing SA. However, instead of discussing the issue with Mr. Polo, she opted to disregard that information and characterize it as mere gossip.[300]

184. Mr. Davenport's and Ms. Chappuis's testimony is revealing. It establishes that SMCV and Phelps Dodge decided to gamble and act upon Ms. Chappuis's personal view—which she was not willing to put in writing, and which was contrary to the view of her superior at the Ministry. That was reckless, and it was legally unfounded.

d. Ms. Torreblanca admitted that any oral assurances provided by Ms. Chappuis were not valid under Peruvian law

185. Ms. Torreblanca confirmed at the hearing testimony that she originally gave at the *SMM Cerro Verde* Hearing regarding the value of oral assurances under Peruvian law. In February, Ms. Torreblanca admitted that, even if SMCV had received oral assurances from someone at the

[297] *See* Eng. Tr. Day 3 at 797:14 – 798:8, 798:14 – 799:7 (Davenport).
[298] Eng. Tr. Day 3 at 797:21-22 (Davenport).
[299] *See* Eng. Tr. Day 3 at 785:5-22 (Davenport) ("I guess it was one of those things. César--again, we got along. We were fine. We were both mining guys, but on this, we did not agree.") (emphasis added).
[300] *See* Eng. Tr. Day 4 at 1002:14 – 1003:1 (Chappuis) ("Q. And I'm asking you, Ms. Chappuis, when you heard from third parties that Minister Polo believed Cerro Verde should pay Royalties on the Concentrator Plant, did you go and tell him, 'César, you're wrong.' Yes or no? A. When I heard that, it seemed strange because he was against charging Royalties. So, my first impression was just to listen and say, this person that comes with that gossip, piece of gossip, may be wrong, and I did not attach any importance to it . . . .").

Ministry, such oral statements are not valid or binding on the State as a matter of Peruvian law.[301] When confronted with that February hearing transcript, Ms. Torreblanca confirmed her testimony: "it is true, an opinion in a conversation doesn't have any value."[302] Ms. Torreblanca tried to soften her admission by stating that, in SMCV's case, the claimed oral assurances were accompanied by administrative acts that (purportedly) reflected what had been discussed, suggesting that that made such assurances more reliable.[303] As discussed above, however, in this case, Ms. Chappuis's alleged oral assurances were not accompanied by a single administrative act that confirmed explicitly that the Concentrator was covered by the SA. Thus, Ms. Torreblanca's response is noteworthy—it shows the extent of the risk that SMCV and Phelps Dodge (and Claimant) knowingly took with respect to the scope of the SA when they decided to proceed with the investment in the Concentrator. They knew that oral assurances provided by MINEM had no legal value.

e. Claimant's expert confirmed that SMCV's reliance on oral assurances was reckless

186. Finally, at the hearing Arbitrator Cremades asked Dr. Bullard, Claimant's expert on contract law: "Had your client said, I'm going to make an $800 million investment, there are doubts as to whether or not this is covered by stability. You would have advised them to ask the Administration to recognize in writing that it was covered, that it did enjoy the protection of that coverage?"[304] In response Mr. Bullard stated: "So I might have advised my client, take other precautions, and see if that could improve or not."[305] In other words, Claimant's own expert recognized that the most prudent course of action was to "take . . . precautions" about the coverage of its investment. But SMCV failed to do so.

5. The Expansion of the Beneficiation Concession Did Not Have the Effect of Bringing the Concentrator under the Coverage of the Stabilization Agreement

187. Given SMCV's inability to obtain any written assurances from the government that the Concentrator would be covered by the SA, nor to amend the SA to obtain that coverage, Claimant (and its related entities) decided to hang their hats on the dubious theory that the expansion of SMCV's Beneficiation Concession somehow would bring the Concentrator into the

[301] Eng. Tr. Day 2 at 549:13 – 550:11 (Torreblanca).
[302] Eng. Tr. Day 2 at 550:3-4 (Torreblanca) (emphasis added).
[303] *See* Eng. Tr. Day 2 at 550:2 – 551:6 (Torreblanca).
[304] Eng. Tr. Day 8 at 2371:6-14 (Bullard).
[305] Eng. Tr. Day 8 at 2372:7-9 (Bullard).

scope of the SA. Claimant's theory is without merit.

188. If the expansion of a concession were a legitimate mechanism to bring a new, unrelated investment into the coverage of a mining stabilization agreement, SMCV would have pursued that course of action from the beginning. It did not. Moreover, if that were the (legitimate) purpose of the expansion of the Beneficiation Concession, then the request for and approval of that expansion would have explicitly referred to the SA and to that purpose and effect. It did not. Claimant's theory makes no sense. A State does not amend contracts through implicit acts. If the State were going to approve the expansion of the SA, it should and would do so in a straight-forward manner. The fact that there is no mention in the approval of the Beneficiation Concession expansion to the supposed impact on the SA is telling—the silence speaks volumes.

189. Claimant's witnesses' testimony at the hearing demonstrated that, contrary to its current claims, SMCV knew at the time that the expansion of the Beneficiation Concession had no effect on the scope of the SA.

190. *First*, Ms. Torreblanca,[306] and Mr. Davenport[307] confirmed at the hearing that, regardless of the SA, under Peruvian law, SMCV could not build and operate the Concentrator without obtaining an expansion of the Beneficiation Concession. The expansion approval had to be obtained for reasons entirely separate from any claimed connection to the SA. Therefore, Claimant cannot derive a right from an administrative approval for the Beneficiation Concession expansion that has nothing to do with the SA.

191. *Second*, it was established at the hearing that neither (i) the application for the expansion of the Beneficiation Concession nor (ii) the resolution approving its expansion make any reference at all to the SA, much less to any expansion of that Agreement.[308]

192. *Third*, Ms. Chappuis's testimony at the *SMM Cerro Verde* hearing rebutted a claim by Ms. Torreblanca in her witness statement that the Ministry would have rejected the expansion of the beneficiation agreement if it considered that the SA did not apply to the Concentrator.[309] To recall, Ms. Chappuis testified that the expansion of the Beneficiation Concession "is an administrative procedure which is not subject to restrictions. No company is going to be denied

[306] Eng. Tr. Day 2 at 613:10-13 (Torreblanca) ("Q. You needed an expansion of the Beneficiation Concession to cover the Concentrator Plant whether or not you had a stabilization agreement; correct? A. Yes . . . . ")
[307] Eng. Tr. Day 3 at 713:16-21 (Davenport). *See also* Ex. CE-1135, *SMMCV v. Perú*, Eng. Tr. Day 3 at 877:9-13; 884:4-8 (Chappuis).
[308] Eng. Tr. Day 10 at 3017:21 – 3018:5 (Respondent's Closing); Ex. RD -7, Respondent's Closing Presentation at slide 58.
[309] *See* Ex. CE-1135, *SMMCV v. Perú*, Eng. Tr. Day 3 at 879:6-14 (Chappuis).

expansion of its concession."[310] In other words, the Ministry was not evaluating the scope of the 1998 SA when it reviewed and approved the expansion of SMCV's Beneficiation Concession. The two analyses are entirely unrelated. Ms. Chappuis also confirmed to President Hanefeld that the executive decree that governs the expansion of beneficiation concessions, "does not concern Stability Agreements."[311] Thus, it is not correct that MINEM would have rejected SMCV's request to expand the Concession if it had not agreed that the Concentrator would be covered by the SA.

193. *Fourth,* former MINEM officials testified at the hearing that, under MINEM's regulations and procedures, the expansion of a beneficiation concession does not and cannot change the scope of mining stabilization agreements.

194. Mr. Tovar, the person responsible in MINEM for authorizing the expansion of SMCV's Beneficiation Concession in 2004, explained that the application and procedure to expand a beneficiation concession was an independent procedure, unrelated to the SA.[312]

195. Mr. Isasi, MINEM's former Legal Director, confirmed in an exchange with President Hanefeld, that the approval to expand a beneficiation concession did not have the effect of amending a stabilization agreement.[313] Moreover, Mr. Isasi testified that, if a company were to modify a stabilization agreement, then that procedure would have required his approval as the head of MINEM's Legal Department, and more importantly, the approval and signature of the Minister.[314] SMCV obtained no such approvals or signature.

196. Mr. Polo, who was Vice Minister of Mines when MINEM authorized the expansion of SMCV's Beneficiation Concession, explained in response to a question from Arbitrator Tawil that (i) the DGM cannot amend stabilization agreements; and (ii) a third-level official (Ms. Chappuis) cannot act beyond the powers she is granted by law, and thus, cannot change what higher ranking officials have approved (an agreement signed by the Minister or Vice Minister).[315]

---

[310] Ex. CE-1135, *SMMCV v. Perú*, Eng. Tr. Day 3 at 879:11-14 (Chappuis) (emphasis added).
[311] Eng. Tr. Day 4 at 1030:10 – 1031:17 (Chappuis).
[312] *See* Eng. Tr. Day 5 at 1449:19 – 1450:9 (Tovar) ("A. When I was at the Ministry, I assessed and managed more than 50 applications for modification of a beneficiation concession or for beneficiation concessions. The processing of a beneficiation concession never activated automatically any process that had to do with a stabilization agreement, so much so that, when we looked at the list of procedures that were available at the MINEM, we identified that these were independent cases. They had independent requirements. They had different fees that had to be paid, different signatories, different terms for response. Well, these were different and independent procedures.").
[313] *See* Eng. Tr. Day 4 at 1201:20 – 1202:9 (Isasi) ("The expansion of operations, mining operations and the--well, the only effect is to authorize that one carry out the activity. But one cannot amend the Agreement.").
[314] *See* Eng. Tr. Day 4 at 1202:2-9 (Isasi) ("One would have had to have incorporated that expansion in order for it to enjoy stability. It would have had to have been included in the Agreement. And, on that, no doubt they would have had to consult with me because in that case, they would be compromising--or involving the Minister of the sector, and it's likely that I would have been consulted.").
[315] *See* Eng. Tr. Day 5 at 1332:1 – 1333:8 (Polo) ("ARBITRATOR TAWIL: You said that it wasn't within the powers of the DGM? [A.] No, it's not their power to approve Stability Agreements or to modify them or to treat them. Those Agreements are entered

197. *Finally,* Phelps Dodge's and SMCV's own actions show that they understood that the expansion of the Beneficiation Concession did not guarantee that the Concentrator would be stabilized under the SA and, thus, that there was a possibility that SMCV would have to pay royalties on that Project. As highlighted in Respondent's Opening, the record shows that Phelps Dodge's contemporaneous filings with the U.S. Securities Exchange Commission evidenced that, even after the government approved the expansion of the Beneficiation Concession, Phelps Dodge questioned whether SMCV would be required to pay royalties with respect to the Concentrator.[316] Phelps Dodge's 10-K Form for fiscal year 2004, dated March 2005, stated that "it is not clear what, if any, effect the new royalty law will have on operations at Cerro Verde."[317] That statement was repeated in the form for fiscal year 2005.[318]

198. Likewise, the Master Participation Agreement into which SMCV entered with creditors in 2005 evinced similar doubts about the scope of the SA.[319] Both the Master Participation Agreement and the 10-K Forms mentioned above post-date when SMCV and its related entities decided to invest in the Concentrator. Thus, Phelps Dodge and SMCV knew—at the time—that there was a significant risk that the SA did not apply to the Concentrator; yet SMCV went ahead and made that investment anyway.[320]

6. Because Claimant Knew that the Stabilization Agreement Did Not Cover the Concentrator the Applicability of the Agreement Was Not a Decisive Factor in Making the Investment

199. Finally, contrary to Claimant's allegations,[321] a simple comparison between SMCV's conduct when it sought assurances about the profit reinvestment program (described above in Section VI.B.2) and its conduct when it had concerns about the scope of the SA shows that SMCV and Phelps Dodge did not consider the applicability of the Agreement to the Concentrator to be a decisive factor in its decision to invest in the Concentrator.

200. *First*, SMCV sought confirmation from MINEM—in writing—on two separate occasions to validate that the profit reinvestment program was available to the company.[322] It did

into by the Minister or the Vice Minister . . . . So, you cannot really take it upon yourself other powers that you don't have. . . . If we want to make a change, there are procedures to make a change, and that is via contractual amendments. . . . A third level official cannot take upon himself functions [he] does not have, much less interpret things that are perfectly provided for in the law.").

[316] *See* Eng. Tr. Day 10 at 3026:10 – 3027:2 (Respondent's Closing).

[317] Ex. CE-901, Phelps Dodge, SEC Form 10-K for 2004, Mar. 7, 2005, at p. 80 (emphasis added).

[318] *See* Ex. RE-184, Phelps Dodge, SEC Form 10-K for Fiscal Year 2005 (excerpts), at p. 83.

[319] *See* Ex. CE-513, Master Participation Agreement, Sept. 30, 2005, at Art. V.

[320] *See* Respondent's Rejoinder at Section II.D.3.

[321] *See* Eng. Tr. Day 1 at 88:20-89:5 (Claimant's Opening).

[322] *See* Ex. CE-394, SMCV, Petition No. 1418719 to MINEM, July 3, 2003.

so because "it [was] essential to know with absolute certainty the scope and characteristics of the profit reinvestment system."[323] Had stabilization been as important to SMCV, it surely would have proceeded in the same manner to obtain "absolute certainty" from MINEM about the SA.

201. *Second*, Claimant's witnesses emphasized the significance of the profit reinvestment program.[324] And according to Ms. Torreblanca "[I]t was a key element that helped the economic assessment of the feasibility of the expansion."[325] She explained to President Hanefeld that as "the copper prices started going down, [ ] it was important for the Shareholder to have the reinvestment of profits to finance this project."[326] In contrast, when asked by President Hanefeld if having the Concentrator stabilized under the 1996 regime was an economically decisive factor, Ms. Torreblanca responded: "As far as I know, no."[327] Ms. Torreblanca then clarified that it was important for SMCV "that the rules had to be clear," but she conceded that having the 1996 stabilized regime "was not the more weighty thing for the Shareholder at the time."[328] In other words, the 1996 stabilized regime *as such* was not "weighty" for SMCV; what was key was only that the applicable regulations were clear and stable. Ms. Torreblanca's response is important, because it shows that SMCV could have (and should have) simply applied for a new stabilization agreement in 2004 to get that clarity and stability. Nonetheless, SMCV then chose not to do so, presumably in order to avoid stabilizing a regime that (by 2004) included the payment of royalties.

202. *Third*, the magnitude of the expansion and the projected revenues of the Concentrator rendered the issue of stabilization (*i.e.*, the payment of royalties) essentially irrelevant to SMCV's or Phelps Dodge's investment decision. Respondent's international mining tax expert, Mr. Ralbovsky, explained at the hearing that with the copper prices that were known in 2004, the Concentrator turned SMCV's US $1.7 billion mining operation into a US $10.7 billion operation.[329] In the words of Ms. Torreblanca, the US $800 million investment made it possible to "triple the number of jobs," "triple also the production."[330] Therefore, whether or not the Concentrator was covered by the SA was not the decisive factor in SMCV's decision to invest in

[323] Ex. CE-395, Letter from SMCV to the DGM, July 8, 2003, at p. 1.
[324] *See* Eng. Tr. Day 2 at 387:17-20 (Torreblanca); Eng. Tr. Day 3 at 774:1-12 (Davenport).
[325] Eng. Day 2 at 452:7-14 (Torreblanca).
[326] Eng. Day 2 at 634:3-14 (Torreblanca).
[327] Eng. Day 2 at 635:4 (Torreblanca).
[328] Eng. Day 2 at 634:21 – 635:15 (Torreblanca).
[329] *See* Eng. Tr. Day 7 at 2174:14-19 (Ralbovsky).
[330] Eng. Tr. Day 2 at 383:11, 545:15-16 (Torreblanca).

the Concentrator. SMCV would have pursued the investment to secure a US $10.7 billion operation, irrespective of any uncertainty surrounding the coverage of the SA. In the end, even though SMCV and Phelps Dodge knew they were taking a risk, the Concentrator Project was so lucrative that it was well worth the stabilization gamble in order to proceed.

203. In sum, the hearing showed that SMCV, Phelps Dodge, and Claimant failed to conduct any serious or adequate due diligence on the scope of the SA. Evidence on the record shows that SMCV and Phelps Dodge when dealing with critical matters, like the profit reinvestment program, insist on written assurances and obtain them. In contrast, for less-critical matters, such as the payment of royalties for the Concentrator, they take a gamble in light of the immense profitability of the Project, regardless of the outcome. Respondent should not be held liable for Claimant's risky choices.

VII. TESTIMONY AT THE HEARING CONFIRMED THAT ALL RELEVANT PERUVIAN AUTHORITIES, INCLUDING SUNAT, MINEM, AND MEF, WERE CONSISTENT AND TRANSPARENT IN THEIR INTERPRETATION OF THE STABILIZATION AGREEMENT

A. TESTIMONY AT THE HEARING CONFIRMED THAT PERÚ'S INTERPRETATION OF THE SCOPE OF MINING STABILIZATION AGREEMENTS HAS BEEN CONSISTENT

204. Respondent set out in its Rejoinder a series of events and documents showing that SUNAT, MINEM, and MEF were consistent and transparent in their interpretation of the scope of mining stabilization agreements, including SMCV's 1998 SA.[331] The hearing confirmed each of these facts, as discussed in greater detail below.

205. **SUNAT's 2002 Report (September 23, 2002).** In this public report, SUNAT stated that "Tax Stability [Agreements] . . . only stabilize the applicable tax regime with respect to the investment activities that are the subject matter of the agreements, for their execution in a determined concession or an Administrative-Economic Unit."[332] At the hearing, Ms. Bedoya explained that this report constituted a binding precedent at the time she was preparing the June 2006 Report (below) in which SUNAT analyzed the scope of SMCV's SA, in particular.[333] She emphasized that, in its 2002 Report, SUNAT "concluded that all that was covered [under a Stabilization Agreement] was the investment, the investment project which is contained in the Feasibility Study that is part of the Agreement, and nothing more."[334]

[331] *See* Respondent's Rejoinder at para. 305.
[332] Ex. RE-26, SUNAT, Report No. 263-2002-SUNAT/K00000, Sept. 23, 2002, Conclusion (emphasis added).
[333] *See* Eng. Tr. Day 6 at 1615:20 – 1616:5; 1617:5 – 1618:1 (Bedoya).
[334] Eng. Tr. Day 6 at 1617:19 – 1618:1 (Bedoya) (emphasis added).

206. Claimant opted to misquote the report in its Closing and attempted to challenge its content by saying that it "does not even contain the words 'Investment Project.'"[335] But the report unequivocally confirms Ms. Bedoya's and SUNAT's understanding of the scope of stabilization agreements. In the Report, SUNAT reviews Arts. 82, 83, and 84 of the Mining Law and Arts. 22 and 25 of the Regulations and concludes that stabilization agreements apply exclusively to the "the investment activities that are the subject matter of the agreements."[336] SUNAT also explains that taxpayers can conduct various activities at the same time, some stabilized and some not stabilized, and that they will be taxed accordingly.[337] Finally, when answering the specific question of whether a mining company had to apply stabilization benefits related to workers' compensation, SUNAT confirmed that "stability shall only operate in relation to the workers who were employed in the activities involved in the project with respect to which the contract was signed."[338] Thus, Claimant's allegation that the report does not refer to the term "Investment Project" is simply beside the point. SUNAT's Report—read in full and in context—shows SUNAT's straightforward understanding of the scope of stabilization agreements.

207. Claimant also claimed in its Closing that if the language of the 2002 Report were so clear, Mr. Cruz should have informed Ms. Torreblanca about the Report at their March 2005 meeting.[339] As shown at the hearing, Claimant's argument fails legally and factually. *First,* as Mr. Cruz has explained, the Peruvian tax system is self-determinative, meaning that it is the taxpayer's responsibility to properly calculate its taxes and timely file its own tax returns.[340] It is not within SUNAT's functions pre-emptively to instruct taxpayers (especially sophisticated ones) on how to file their taxes, at in-person meetings or otherwise .[341] *Second*, if SMCV had doubts about which tax regime applied to the Concentrator, it could have (and should have) submitted a formal inquiry to SUNAT (through the Mining Society), in response to which SUNAT would have issued a written statement that would be public and binding on SUNAT.[342] To recall, both SMCV and its 20% shareholder Buenaventura were very active in the Mining Society—at the time, for example,

[335] Eng. Tr. Day 10 at 2938:19-22 (Claimant's Closing); Ex. CD-11, Claimant's Closing Presentation at slide 76.
[336] Ex. RE-26, SUNAT, Report No. 263-2002-SUNAT/K00000, Sept. 23, 2002, at paras. 4-6, Conclusion.
[337] Ex. RE-26, SUNAT, Report No. 263-2002-SUNAT/K00000, Sept. 23, 2002, at paras. 5-6.
[338] Ex. RE-26, SUNAT, Report No. 263-2002-SUNAT/K00000, Sept. 23, 2002, at para. 8 (emphasis added).
[339] *See* Eng. Tr. Day 10 at 2940:5-14 (Claimant's Closing).
[340] *See* Eng. Tr. Day 6 at 1786:11-16; 1852:11 – 1853:2 (Cruz).
[341] *See* Eng. Tr. Day 6 at 1788:7 – 1789:5; 1853:3 – 1854:13; 1860:14-20 (Cruz) ("SUNAT does not have any obligation to tell the taxpayer what the obligations are. The obligations are stated under the law. That's where each taxpayer finally makes their own assessment and declaration and return. That is a concept. It is not that SUNAT has to tell a taxpayer what they have to do or not.").
[342] *See* Eng. Tr. Day 10 at 3019:20 – 3020:3 (Respondent's Closing).

the General Counsel of Buenaventura was the President of the Mining Society.[343] SMCV's passivity—at a minimum—shows its lack of due diligence. *Third,* and most importantly, SMCV was already aware of the 2002 SUNAT Report at the time that it met with Mr. Cruz in 2005. In an August 2004 presentation made to MINEM, SMCV quoted SUNAT's 2002 Report.[344]

208. **MINEM's Report No. 509-2003 (September 8, 2003).** As discussed in Section VI, MINEM clarified in no uncertain terms in Report No. 509 that "the application of the Stabilized Regime [was] granted to the Cerro Verde Leaching Project and not to the company and the Regime is the one described in the aforementioned [stabilization] agreement."[345] MINEM's position regarding the limited scope of the SA stated in its 2003 report is consistent with its current position.

209. **Vice Minister Polo's Presentation at the Mining Royalty Forum (March 11, 2004).** In this March 2004 presentation, then-Vice Minister Polo stated that stabilization agreements apply exclusively to a specific "investment, for that development, not for the whole company."[346] In the course of cross-examination, Mr. Polo was asked if, when he referred to "mining units" in his PowerPoint presentation used at the Forum, he understood that stabilization applied to "mining units." Mr. Polo responded: "Never. Never. And I have repeated this a million times at all the fora, all the fora that I have attended everywhere."[347] Mr. Polo's response confirms that at the time, *i.e.*, in March 2004, MINEM had a very clear understanding that the scope of stabilization agreements extended to the investment projects on which they were based, and not to "mining units" or EAUs or the companies as a whole.

210. **The Approval of the Reinvestment Benefit Program and the Expansion of the Beneficiation Concession (October 26, 2004 and December 9, 2004)**. As discussed in Section VI, the hearing also showed that neither of the approvals that lie at the heart of Claimant's claims in these proceedings indicate that the SA's scope included the Concentrator.[348] Thus, neither of these resolutions gave rise to or validated SMCV's or Claimant's claimed understanding that the

[343] *See* Ex. CE-391, Buenaventura, SEC Form 20-F for 2002, at pp. 65-66 (PDF).
[344] *See* Eng. Tr. Day 1 at 281:10 – 282:4 (Respondent's Opening) (citing to Ex. CE-453, SMCV, Justification of Request for Formal Inclusion of Benefit Concession in the Current Stability Agreement, Aug. 2004, at slide 39).
[345] Ex. CE-398, MINEM, Report No. 509-2003-MEM-DGM-TNO, Sept. 8, 2003, at para. 4 (emphasis added). *See supra* at paras. 155-61.
[346] Ex. RE-185, Audio of César Polo's Presentation, Mining Royalties Forum, Congress of the Republic, Mar. 11, 2004 (excerpts), at timestamps 00:09:37 – 00:10:03 ("Stabilization agreements are not granted per company, that is important to clarify. A company can have [a] stabilization agreement for one project and not have it for another [project], or [can] have an old activity that does not have a stabilization agreement and a new one that does. That's how it is, it is not granted for the whole company. An investment above 20 million or above 50 is made, depending on the case, and it grants the right to stabiliz[e] for that investment, for that development, not for the whole company.") (emphasis added).
[347] Eng. Tr. Day 5 at 1431:15 – 1432:1 (Polo).
[348] *See supra* at paras. 162-65, 187-96.

Agreement covered the Concentrator.

211. **The Toronto Meetings (March 2005).** On March 8, 2005, after SMCV had sent a letter to SUNAT stating that it would not pay royalties because it was covered by the SA, Mr. Tovar met with Phelps Dodge's President, Mr. Harry Conger, in Toronto during a meeting of the Prospectors & Developers Association of Canada. Mr. Tovar testified at the hearing that, at this meeting, he told Mr. Conger that the Concentrator was not covered by the SA and, therefore, SMCV would have to pay royalties on its production.[349]

212. Claimant attempted to discredit Mr. Tovar's statement by confronting him with a presentation given by Mr. Conger a day after the March 8 meeting, which stated: "The Stability Contract provides certainty to make $850 million Investment Decision."[350] Mr. Tovar clarified at the hearing that he saw no contradiction between Mr. Conger's presentation and his testimony about the March 8 meeting, because it was true that SMCV's access to the profit reinvestment program (which enabled it to use undistributed profits from the Leaching Project to build the Concentrator) was stabilized. In Mr. Tovar's view, it was not clear, based on the generic language of the presentation referring only to "certainty," that Mr. Conger was stating an expectation that the Concentrator would not pay royalties.[351] Notably, Claimant chose not to submit any testimony from Mr. Conger about the meeting or the presentation, leaving Mr. Tovar's testimony unrebutted.

213. **Mr. Isasi's April 2005 Report (April 14, 2005).** As discussed in Respondent's pleadings, Mr. Isasi explained in his report of April 14, 2005, that only investment projects are stabilized under stabilization agreements.[352] Claimant insists that the 2005 Report somehow supports its interpretation of the Agreement. It does not. The only way Claimant can claim that the report supports its interpretation is to misquote and misrepresent the report by omitting key language that states just the opposite of what Claimant asserts.

214. Mr. Isasi testified in his direct examination that, in the April 2005 Report, he concluded that mining stabilization agreements applied exclusively to the specific project that is described by the feasibility study.[353] Despite having called him to appear at the hearing, Claimant

[349] *See* Eng. Tr. Day 6 at 1565:9 – 1567:8 (Tovar).
[350] Eng. Tr. Day 6 at 1591:18 – 1593:11 (Tovar).
[351] *See* Eng. Tr. Day 6 at 1593:11 – 1596:3 (Tovar).
[352] *See* Respondent's Rejoinder at paras. 377-87.
[353] Eng. Tr. Day 4 at 1191:22 – 1192:12 (Isasi) ("Q. [I]n the Opinion that you expressed in the Report of April 2005—I'm sorry--is that consistent with MINEM's view of the scope of Mining Stabilization Agreements during the time you worked at MINEM? A. That's right. The institutional opinion by the Ministry has always been that Stabilization Agreements only protect the company within the limit of the investment project. You have a specific investment project, and the purpose of it is that the Rate of Return expected by the investor is not distorted by an act of the prince, by a supervening act.") (emphasis added).

then reversed course and chose not to examine Mr. Isasi at all.[354] Claimant evidently was afraid that Mr. Isasi would continue to correct Claimant's misrepresentations of the April 2005 Report. In its Closing, Claimant similarly decided to entirely ignore Mr. Isasi's testimony and continued to misquote and misrepresent the content of the Report.[355] These facts cannot go unnoticed. The Tribunal should not countenance or fall prey to such objectionable tactics.

215. Claimant's decision not to cross examine Mr. Isasi not only leaves Mr. Isasi's testimony unrebutted, but also leaves uncontested the following events in which Mr. Isasi participated, which Respondent described in its pleadings[356] and its Opening:[357] (i) Mr. Isasi's presentation before the Energy and Mines Congressional Committee on June 8, 2005;[358] (ii) Mr. Isasi's further report dated September 22, 2005;[359] (iii) the letter Minister Sánchez sent to Congressman Oré on October 3, 2005, forwarding Mr. Isasi's September 22, 2005 Report;[360] and (iv) the letter that Minister of Mines Sánchez sent on November 8, 2005 to Congressman Díez Canseco.[361] These documents evidence Respondent's consistent understanding that the SA was limited to the Leaching Project. These documents and events also confirm that Claimant did not want the Tribunal to hear Mr. Isasi's story because his testimony is detrimental to its case.

216. **Mr. Isasi's Presentations before the Cerro Verde Working Group in Congress and the Energy and Mines Congressional Committee (May 3, 2006).** Mr. Isasi made a presentation to the Cerro Verde Working Group in Congress on May 3, 2006, in which he explained that the Leaching Project—but not the Concentrator—was covered by the SA, and that the Concentrator would have to pay royalties.[362] In a separate presentation before the Energy and Mines Congressional Committee made on the same day, Mr. Isasi again explained that stabilization agreements only cover specific investment projects.[363] Mr. Isasi's testimony on these facts also remains unrebutted. Understandably, Claimant did not want to draw any attention to these presentations at the hearing.

---

[354] *See* Eng. Tr. Day 4 at 1192:18-22 (Isasi).
[355] *See* Eng. Tr. Day 10 at 2942:9 – 2943:9 (Claimant's Closing); Ex. CD-11, Claimant's Closing Presentation at slide 85.
[356] *See* Respondent's Counter-Memorial at paras. 167-200; Respondent's Rejoinder at paras. 286-445.
[357] *See* Eng. Tr. Day 1 at 303:1 – 314:5 (Respondent's Opening).
[358] Ex. RE-29, Energy and Mines Congressional Committee, Congress of the Republic, Meeting Minutes, June 8, 2005 (excerpts), at p. 29.
[359] Ex. CE-512, MINEM, Report No. 385-2005-MEM/OGJ, Sept. 22, 2005, at paras. 3.2.1, 3.2.3.
[360] Ex. CE-515, MINEM, Report No. 1725-2005-MEM/DM, Oct. 3, 2005.
[361] Ex. CE-519, MINEM, Report No. 2004-2005-MEM/DM, Nov. 8, 2005, at para. 1.
[362] Ex. RE-3, MINEM, "Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project," May 2006, at slide 12.
[363] Ex. RE-88, Audio of the Session of the Energy and Mines Commission, Congress of the Republic, May 3, 2006, at timestamps 01:42:10 – 01:42:34.

217. **SUNAT's June 2006 Internal Report.** In June 2006, Ms. Bedoya, a lawyer in SUNAT's Claims Division in Arequipa, issued a report concluding that the Concentrator was not covered by SMCV's SA. Consistent with the 2002 SUNAT Report, Ms. Bedoya's June 2006 Report explained that stabilization agreements "must only be applied to activities related to the investment developed in a given concession or [EAU], that was the subject of the respective agreement, that is, the investment related to the project for which the agreement was entered into."[364]

218. Despite being in possession of this June 2006 SUNAT Report since Respondent's Ordered Production (*i.e.*, since July 25, 2022, prior to Claimant's submission of its Reply), Claimant chose not to submit this Report with its Reply nor to present any arguments or complaints about the Report. However, Claimant switched tactics at the hearing and argued that Ms. Bedoya's participation in the preparation of SUNAT's June 2006 Internal Report and in the resolution of the administrative challenges (*recursos de reclamación*) to the 2006-2007 and 2008 Royalty Assessments somehow "deprived SMCV of its right to [an] impartial [and independent] consideration."[365] Claimant's claim is untimely and, more importantly, entirely unsupported.

219. At the hearing, President Hanefeld asked Ms. Bedoya if it is "the regular course of action [within SUNAT] that someone who has established a report [ ] on a specific question will later then be assigned now to decide on a Request for Reconsideration."[366] Ms. Bedoya explained, that "[i]t was completely natural and normal for the Tax Administration, within its powers, to investigate this matter" and then resolve the reconsideration because "there are no impediments," "there was no limitation."[367] Ms. Bedoya clarified that there were no competing interests, as SUNAT officials "only have a single interest, which is to ensure that all tax obligations are established correctly and then to conduct audits."[368] Ms. Bedoya further explained that, at the time that she was preparing the 2006 Internal Report, there was no ongoing audit, which meant that SUNAT had no duty to share the report or its conclusions with SMCV.[369] Ms. Bedoya's explanation is clear and there was no conflict of interest or an impermissible predetermination regarding the applicability of the SA to the Concentrator. To the contrary, the report shows that

[364] Ex. RE-179, SUNAT June 2006 Internal Report at p. 5.
[365] Eng. Tr. Day 1 at 119:3-6 (Claimant's Opening).
[366] Eng. Tr. Day 6 at 1621:16 – 1622:1 (Bedoya).
[367] Eng. Tr. Day 6 at 1622:7-21 (Bedoya).
[368] Eng. Tr. Day 6 at 1622:21 – 1623:6 (Bedoya).
[369] Eng. Tr. Day 6 at 1623:17 – 1624:10 (Bedoya).

the State consistently understood that stabilization agreements applied to specific projects, and it defeats Claimant's allegations that SUNAT started assessing royalties for the Concentrator due to any alleged *volte face* by MINEM.

220. Moreover, Claimant's last-minute objections are contradicted by SMCV's own actions at the time. Had SMCV considered that it was objectionable for Ms. Bedoya to resolve a challenge when she had previously reviewed the matter, SMCV would have challenged Ms. Bedoya's participation in deciding SMCV's challenges against the 2006-2007 Royalty Assessment and the 2008 Royalty Assessment.[370] SMCV was fully aware that Ms. Bedoya had decided both of those challenges, and it did not raise any objection during the administrative proceedings, nor before the Peruvian courts—confirming there was no impermissible bias (or at the very least, waiving any objection on that basis). More centrally, as the *Glencore* tribunal explained, "In administrative proceedings, . . . the decision-maker is often the investigator, the accuser, and the adjudicator, and a related officer (who may be the senior officer of the decision-maker) is often the one who rules on appeal. Due process does not require strict separation of these functions – provided that the final administrative decision is subject to full judicial review."[371] Peruvian audit proceedings at SUNAT are no exception.[372]

221. **Mr. Isasi's June 2006 Report (June 16, 2006)**. In his June 2006 Report, Mr. Isasi once again concluded that the Concentrator was outside the scope of the SA.[373] In the initial stages of this arbitration, Claimant alleged that this June 2006 MINEM report marked a *volte-face* by MINEM and SUNAT, due to alleged political pressure, to change the State's position on the scope of mining stabilization agreements.[374] Faced with facts that were incompatible with that claim (including all the events listed above), Claimant shifted its story to try to find a different, earlier point in time where the State allegedly changed its mind. By the time of its Reply and at the hearing, Claimant had shifted the timing of the alleged *volte-face* by nearly a year, now claiming that it happened sometime in October or November 2005.[375] Respondent called out this

[370] *See* Ex. CE-46, SUNAT Resolution No. 055-014-0001394/SUNAT, 2008 Royalty Assessments, Jan. 31, 2011, at p. 58 (PDF); Ex. CE-38, SUNAT Resolution No. 055-014-0001290/SUNAT, 2006/07 Royalty Assessments, Mar. 31, 2010, at p. 62 (PDF).
[371] Ex. CA-245, *Glencore Int'l A.G. et al. v. Colombia*, ICSID Case No. ARB/16/6, Award, Aug. 27, 2019, at para. 1319.
[372] *See* Ex. CA-4, Peruvian Tax Code, Supreme Decree No. 135-99-EF, Provision IX and Art. 100; Ex. CA-231, Single Unified Text of the Law of General Administrative Procedure, Supreme Decree No. 006-2017-JUS, Art. IV-1.2.
[373] Ex. CE-534, MINEM, Report No. 156-2006-MEM/OGJ, June 16, 2006, at para. 5.2.
[374] *See* Claimant's Memorial at paras. 10-12.
[375] *See* Claimant's Reply at paras. 150(xxix)-(xxx); Eng. Tr. Day 1 at 108:9 – 109:10 (Claimant's Opening).

inconsistency at the hearing, which Claimant did nothing to refute.[376]

222. **The Arequipa Roundtable Presentation (June 23, 2006).** A MINEM official gave a presentation during the Roundtable Discussions held by ProInversión's Congressional Committee in which MINEM reiterated its position that the Concentrator was not covered by the SA.[377] Significantly, SMCV representatives attended this meeting. Respondent, in its Rejoinder and at the hearing, showed that a contemporaneous court document—an *amicus* brief[378] presented by local activist Mr. Felipe Raymundo Domínguez, who attended the Roundtable Discussions[379]—explicitly stated that in the June 23, 2006 session of the Roundtable Discussions, a PowerPoint presentation made by MINEM stating that the Concentrator was not covered by the SA and that that PowerPoint was distributed to all of the Roundtable attendees.[380] Mr. Dominguez attached as Exhibit A6 to his brief the PowerPoint presentation that he received at that session. In redirect examination, Mr. Tovar confirmed that the presentation exhibited by Mr. Dominguez was indeed the presentation that he remembered handing out at the Roundtable Discussions.[381]

223. **SUNAT's 2007 Report (September 20, 2007).** SUNAT's 2007 Report reiterates the position that stabilization agreements apply only to the investment activities that are the subject matter of the agreements, as explained as early as in the 2002 Report.[382] It is undisputed that this 2007 SUNAT Report constitutes a binding precedent that must be followed by the Tax Administration.[383] Unsurprisingly, Claimant has not questioned the content of this report.

224. Faced with the compelling evidence of the State's consistency over time shown in the above-mentioned documents, Claimant opted to focus instead at the hearing on trying to show that Respondent and its witnesses and experts held inconsistent views on the scope of stabilization agreements when they were confronted with assorted hypotheticals about mining companies

[376] *See* Respondent's Rejoinder at para. 420.
[377] Ex. RE-107, MINEM, "Profit Reinvestment and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project," June 2006, at slide 15.
[378] *See* Respondent's Rejoinder at paras. 447-51; Eng. Tr. Day 1, at pp. 314:10 – 315:21 (Respondent's Opening).
[379] *See* Ex. CE-537, Congress, Pro-Investment Commission, Minutes of the Session of June 23, 2006; Ex. RE-51, Meeting Minutes, Proinversión Commission, Congress, June 29, 2006.
[380] *See* Ex. RE-233, FREDICON's Amicus in Dante Martínez's Complaint to SUNAT, Nov. 12, 2007, at Annex A-6, pp. 8, 27 (PDF).
[381] *See* Eng. Tr. Day 6 at 1601:1 – 1603:3 (Tovar); *see also* RWS-10, Second Tovar Statement at para. 104.
[382] *See* Ex. RE-27, SUNAT, Report No. 166-2007-SUNAT/2B0000, Sept. 20, 2007, at p. 6 ("The tax stability guaranteed through an agreement signed with the State under Title Nine of the TUO of the General Mining Law benefits the mining activity titleholder for a period of 15 years only for the investment activities that are the subject matter of the agreements and that were indicated in the Feasibility Study, taking into account the definitive amount required for its performance in a given concession or Administrative Economic Unit.") (emphasis added).
[383] *See* Ex. CER-8, Second Hernández Report at para. 11.

making additional investments.[384] But Claimant's proposition was pointless if not flatly misleading. Claimant's hypotheticals did not help its case, because all of the examples used by Claimant in those hypotheticals differed significantly from SMCV's US $800 million investment of an entirely new and separate project. As was established at the hearing, the Concentrator was not a mere additional investment of a similar kind to the original Leaching Project, it was a "new investment program"[385] not covered by the SA—a fact on which Perú and all of its witnesses and experts emphatically agree.[386]

B. CLAIMANT FAILED TO PROVE ITS CONSPIRACY THEORY

225. Claimant asserted in its pleadings that a series of events allegedly show that Perú changed its interpretation regarding the scope of the SA "for political reasons."[387] These claims are not supported by the documentary record nor by witness testimony. Indeed, Mr. Davenport testified that "nobody told [him]" of any change of treatment to the Concentrator from the Peruvian government.[388] This admission puts an end to Claimant's allegation. Claimant's witnesses only testified that due to political pressure, Phelps Dodge required SMCV to obtain confirmation in writing from MINEM that the SA would apply to the Concentrator. Nothing more.[389] In contrast, Respondent has shown in its written submissions and at the hearing that Claimant's allegations are unsubstantiated and meritless—mere conspiracy theories.

226. The various communications between certain Congressmen and MINEM officials, on which Claimant focuses its assertions, do not prove that MINEM changed its mind nor that it did so as a result of alleged political pressure. Members of Congress, in a legitimate exercise of their role as legislators, have the right to question actions of government officials and to request explanations from them regarding subjects of national interest. But that does not mean that government officials changed their views, or acted outside the law whenever they received such inquiries. That is an incredible—and unsupported—logical leap.

227. The evidence actually shows that MINEM officials consistently defended SMCV's

---

[384] *See* Eng. Tr. Day 10 at 2955:4-20 (Claimant's Closing); Ex. CD-11, Claimant's Closing Presentation at slide 115.
[385] *See supra* Section VI.B.2.
[386] *See*, *e.g.*, Eng. Tr. Day 4 at 1199:5-9 , 1202:9-12 (Isasi); Eng. Tr. Day 5 at 1451:3 – 1452:15 (Tovar), 1308:17 – 1309:9 (Polo); Eng. Tr. Day 6 at 1616:12-22 (Bedoya), 1809:12-15 (Cruz); Eng. Tr. Day 7 at 2006:14 – 2007:3 (Sarmiento); Eng. Tr. Day 8 at 2410:19 – 2411:6 (Eguiguren); 2485:21 – 2486:3 (Morales); English Tr. Day 9 at 2668:3-15 (Bravo and Picón).
[387] *See* Claimant's Memorial at paras. 165-75; Claimant's Reply at paras. 138-42, 146-47, 150.
[388] *See* Eng. Tr. Day 3 at 822:14-22 (Davenport) ("Q. And at what point did you hear that not all was well with the treatment of the Concentrator Plant? A. You know, not sure I did. And to be honest, I'm not sure I really did until these guys called me and said, you know, hey, would you be willing to be a Witness? I really didn't keep up on what was going on with, as far as, you know, stability, and, actually, I still don't even know what was done. So, no, I did not keep up--I mean, nobody told me.").
[389] *See*, *e.g.*, Eng. Tr. Day 2 at 557:2-14 (Torreblanca); Eng. Tr. Day 3 at 746:2-22 (Davenport).

Leaching Project's stabilized status before Congress—there was no *volte face*.[390] Indeed, Mr. Tovar and Mr. Polo testified that despite the discontent from the Arequipa community, MINEM officials never succumbed to political pressure. To the contrary, MINEM went to Congress to explain why they had approved SMCV's Profit Reinvestment Program and defended SMCV's Agreement.[391]

C. PERÚ HAS BEEN CONSISTENT IN ITS TREATMENT OF STABILIZATION AGREEMENTS OF OTHER MINING COMPANIES

228. Respondent maintains that Perú, including SUNAT and other government agencies, has consistently interpreted the scope of mining stabilization agreements as applying to specific investment projects of companies rather than to concessions or EAUs as a whole.[392]

229. In its Opening, Claimant alleged that SUNAT resolutions regarding other mining companies show (i) that "SUNAT applied stability guarantees to entire concessions and Mining Units, and not to specific investment projects,"[393] and (ii) that SMCV was treated differently than other companies, considering that they were issued after Mr. Isasi's June 2006 Report.[394] As a threshold matter, Claimant has not submitted a discrimination claim in this arbitration as it recognized in its March 29, 2023, letter.[395] Thus, any allegation that SMCV was treated differently is inappropriate, and the Tribunal should not rule on it. Moreover, SUNAT's resolutions of other companies added to the record on April 2023, do not show any inconsistent treatment by SUNAT.

230. To understand the scope of these assessments, it is important to take into account that, as Mr. Cruz testified at the *SMM Cerro Verde* Hearing, SUNAT's audits are not comprehensive over all the taxpayer's activities; usually the auditors focus on a handful of critical issues and, based on SUNAT's review of those issues, the auditors decide whether to issue an assessment.[396] Significantly, Mr. Cruz explained that if the Tax Administration does not review a

---

[390] *See*, *e.g.*, Ex. RE-3, MINEM, "Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project," May 2006, at slide 4.
[391] *See* Eng. Tr. Day 4 at 1244:17 – 1245:8 (Polo); Eng. Tr. Day 5 at 1479:19 – 1480:1 (Tovar).
[392] *See* Respondent's Counter-Memorial at paras. 138-41; Respondent's Rejoinder at paras. 536-61.
[393] Eng. Tr. Day 1 at 21:11-13 (Claimant's Opening).
[394] Eng. Tr. Day 1 at 21:17 – 22:3, 55:5-7 (Claimant's Opening).
[395] *See* Claimant's Letter to the Tribunal, Mar. 29, 2023, at p. 2 ("Peru devotes a significant part of its letter to opposing discrimination claims that Freeport has not yet made and could not yet make because of Peru's obstructionist conduct") (emphasis added).
[396] *See* Ex. CE-1138, *SMMCV v. Perú*, Eng. Tr. Day 6 at 1601:11-20 (Cruz) ("Well, in an audit process, what you do is to verify situations regarding the taxes being audited. We establish some critical baselines on which the verification is done, and the auditors are in charge of verifying that information. And on that basis, it goes to the supervisor for verification--the supervisor of the division--and then a resolution is signed at the Intendency, and they explain what they just analyzed, and in a verification, or audit process, not all details are seen.") (emphasis added).

specific issue or fact, it does not mean that SUNAT has validated the taxpayer's conduct.[397] With this in mind, Respondent addresses below the recently added resolutions concerning Milpo (**subsection 1**); Yanacocha (**subsection 2**); Tintaya (**subsection 3**); and Southern (**subsection 4**).

1. Milpo's Intendency Resolutions (Income Tax 2003 and 2010)

231. In 2002, Milpo signed two stabilization agreements with respect to two different investment projects: the "Cerro Lindo Project"[398] and the "*Ampliación el Porvenir* Project."[399] Milpo also owns the Chapi mine which does not have a stabilization agreement. Unlike SMCV's projects, the Cerro Lindo Project, the *Ampliación el Porvenir* Project, and the Chapi mine are located in separate geographical areas and have independent mining and beneficiation concessions. Thus, Milpo's circumstances are very different than those of SMCV.

232. On June 30, 2009, SUNAT's Claims Division issued a resolution which reviewed the 2003 Income Tax and Income Tax-Prepayment assessments of Milpo prepared by the Audit Division.[400] In response to Milpo's request for of reconsideration, SUNAT's Claims Division reviewed Milpo's calculation method of its gross income, specifically whether SUNAT should accept as deductions rollbacks arising out of changes in the Incoterms negotiated for the sale and export of minerals and whether the mining company provided sufficient supporting documentation to justify the deductions. The resolution, like the underlying Assessment Resolution,[401] did not analyze—nor does it even mention—whether Milpo's agreements had been correctly applied. Significantly, SUNAT's Claim Division could not have analyzed this, because it was not part of the objections raised by Milpo; the auditor can only re-examine matters that were claimed by the taxpayer, not new issues.[402]

233. The same can be concluded with respect to the Intendency Resolution that reviewed Milpo's 2010 Income Tax Assessment. At the hearing, Respondent's tax expert, Mr. Picón explained that SUNAT did not address the scope of the stabilization agreement in any of the assessments.[403] Mr. Picón clarified under cross examination: "If you review what SUNAT is

[397] *See* Ex. CE-1138, *SMMCV v. Perú*, Eng. Tr. Day 6 at 1601:19-22 (Cruz) ("[I]n a verification, or audit process, not all details are seen. Maybe this issue is not considered, but that doesn't mean it is correct or incorrect, it simply wasn't seen.").
[398] *See* Ex. CE-924, Compañía Minera Milpo S.A.A. - Proyecto Cerro Lindo Stability Agreement, Mar. 26, 2002.
[399] *See* Ex. CE-927, Compañía Minera Milpo S.A.A. - Proyecto de Ampliación Mina El Porvenir Stability Agreement, Nov. 27, 2002.
[400] *See* Ex. CE-1125, SUNAT Intendency Resolution No. 0150140008402, June 30, 2009.
[401] *See* Ex. CE-1124, SUNAT Tax Assessment No. 012-003-0008216, Nov. 28, 2005.
[402] *See* Ex. CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, at Art. 127.
[403] *See* Eng. Tr. Day 9 at 2747:19 – 2748:2 (Picón) ("When I read these resolutions, the first I can say is that they don't address the subject matter you're talking about, none of them. And we could review all of them, and we could show you that none of them address the issue that you're talking about.").

discussing in these cases, such as bonuses for managers or characterizing investment in a building as an asset or not as an asset, the Agreement is not relevant. Therefore, if what you want is to establish the scope of the Agreement, obviously it's going to review it. But these are totally different issues that are raised in these cases."[404] Therefore, Claimant cannot rely on Milpo's resolutions to support its case.

2. Yanacocha's Income Tax Assessments (2000-2001 and 2002-2003)

234. Yanacocha's stabilization agreements defeat Claimant's interpretation of the Mining Law and Regulations.[405] Yanacocha has entered into four stabilization agreements for different investment projects: Yanacocha–Carachugo Sur, Maqui (not on the record), Cerro Yanacocha, and La Quinua. In the table below, Respondent summarizes the three agreements that are relevant to show that Claimant's interpretation of the SA is without merit.

Project	Date of Agreement	Concessions	Name of EAU
Yanacocha–Carachugo Sur[406]	1994	Chaupiloma Tres; Chaupiloma Cuatro; Chaupiloma Cinco	Chaupiloma Sur
Cerro Yanacocha[407]	1998	Chaupiloma Uno; Chaupiloma Dos; Parte del Derecho of Chaupiloma Tres	Carachugo Sur
La Quinua[408]	2003	Chaupiloma Dos; Chaupiloma Once; Chaupiloma Trece	Quinua

235. The Yanacocha agreements show that mining stabilization agreements are not granted for entire concessions.[409] If that were the case, Yanacocha would not have needed to execute the second stabilization agreement with respect to Chaupiloma Tres in 1998, because its 1994 agreement would have already stabilized the entirety of the Chaupiloma Tres concession. The same applies to the Chaupiloma Dos concession which overlaps between the Cerro Yanacocha Project and the La Quinua Project.

236. Likely aware of the flaw in its argument, Claimant at the hearing argued that the mining company entered into a stabilization agreement with respect to each "mining unit" as

[404] Eng. Tr. Day 9 at 2749:9-13 (Picón).
[405] *See* Respondent's Rejoinder at paras. 532-41.
[406] *See* Ex. CE-911, Compañía Minera Yanacocha S.A. – Proyecto Yanacocha Carachugo Sur Stabilization Agreement, May 19, 1994 ("Yanacocha 1994 Stabilization Agreement – Project Carachugo Sur").
[407] *See* Ex. CE-919, Minera Yanacocha S.A. – Proyecto Cerro Yanacocha Stabilization Agreement, Sept. 16, 1998 ("Yanacocha 1998 Stabilization Agreement – Project Cerro Yanacocha").
[408] *See* Ex. RE-189, Agreement of Guarantees and Measures for the Promotion of Investments, Compañía Minera Yanacocha S.R.L – Project La Quinua Stabilization Agreement, July 25, 2003 ("Yanacocha 2003 Stabilization Agreement – La Quinua Project").
[409] *See* Respondent's Rejoinder at paras. 308, 536, 548-53.

opposed to each investment project.[410] This is not true. The agreements were signed with respect to specific investment projects. For example, the first 1994 agreement identified in the chart above was signed "in relation to the investment in [Yanacocha's] concessions constituted in the [EAU] Chaupiloma Sur."[411] Similarly, the 1998 agreement was signed "in relation to the investment in [Yanacocha's] concessions: Chaupiloma 1, Chaupiloma 2 and part of the Chaupiloma 3 mining right, which are part of the [EAU] Carachugo Sur."[412] In addition, SUNAT, MINEM, and Yanacocha itself refer to these agreements by the names of the projects, not by the names of a so-called "mining unit."[413] For example, the aforementioned 1994 agreement is referred to as the "*Proyecto Yanacocha-Carachugo Sur*."[414] Similarly, the 1998 agreement is referred to as the "*Proyecto Cerro Yanacocha*."[415]

237. Claimant also attempted to explain that the same concessions apply in various agreements because each of the Stability Agreements "clearly delineate the mining concessions between the Units. There is not a single yard of mining concession that overlaps."[416] Claimant's attempted explanation is misleading and contradicts its own theory that stabilization agreements automatically apply to the entire concession in which the investment described in the corresponding feasibility study is made. For example, contrary to Claimant's assertions, Yanacocha's 1994 stabilization agreement lists the "Chaupiloma Tres" concession, without carving out any geographical area.[417] If Claimant's allegations with respect to the scope of mining stabilization agreements were correct (they are not), Yanacocha would have had no need to sign—merely four years later, in 1998—a separate agreement for a different project that was also located in the "Chaupiloma Tres" concession. The fact that the 1998 stabilization agreement lists "Part of the Chaupiloma [Tres] Right" in Clause 1.1[418] instead of the entire concession is irrelevant—it

[410] *See* Eng. Tr. Day 1 at 57:17 – 58:6 (Claimant's Opening).
[411] Ex. CE-911, Yanacocha 1994 Stabilization Agreement – Project Carachugo Sur, at Clause 1.1 ("*en relación con la inversión en sus concesiones constituidas sobre la Unidad Económica Administrativa Chaupiloma Sur*") (emphasis added) (translation provided by Respondent).
[412] Ex. CE-919, Yanacocha 1998 Stabilization Agreement – Project Cerro Yanacocha, at Clause 1.1 (emphasis added); *see also* Ex. RE-189, Yanacocha 2003 Stabilization Agreement – La Quinua Project, at Clause 1.1.
[413] Ex. RE-175, Administrative File of Report No. 153-2005-MEM/OGAJ, Apr. 14, 2005, at p. 4 (PDF); Ex. RE-380, SUNAT Tax Assessment No. 012-003-0005518, Dec. 4, 2004, at Annexes 2.1-2.4; Ex. RE-415, SUNAT Tax Assessment No. 012-003-0010553, Oct. 31, 2006, at Annex 2.
[414] *See* Ex. CE-911, Yanacocha 1994 Stabilization Agreement – Project Carachugo Sur, at Clause 1.1; Ex. RE-415 SUNAT Tax Assessment No. 012-003-0010553, at Annex 2.1; Ex. CE-918, MINEM, Report No. 487-98-EM-DGM/DPDM, Aug. 18, 1998.
[415] *See* Ex. CE-919, Yanacocha 1998 Stabilization Agreement – Project Cerro Yanacocha, at Clause 1.1; *see also* Ex. RE-189, Yanacocha 2003 Stabilization Agreement – La Quinua Project, at Clause 1.1; Ex. RE-31, MINEM List of Stabilization Agreements.
[416] Eng. Tr. Day 1 at 60:21 – 61:1 (Claimant's Opening).
[417] *See* Ex. CE-911, Compañía Minera Yanacocha S.A. - Proyecto Yanacocha Carachugo Sur Stabilization Agreement, May 19, 1994, at Annex 1.
[418] Ex. CE-919, Minera Yanacocha S.A. – Proyecto Cerro Yanacocha Stabilization Agreement, Sept. 16, 1998, at Clause 1.1.

still overlaps with the concession listed in the 1994 agreement. Moreover, Annex 1 of both the 1994 and 1998 agreements lists the "Chaupiloma Tres" concession with an extension of 1,000 hectares without carving out any geographical area.[419]

238. The 1998 and 2003 agreements have a similar situation with respect to the "Chaupiloma Dos" concession. The 1998 agreement refers generally to the "Chaupiloma Dos" concession without making any carve out. Thus, under Claimant's theory, Yanacocha would not have had to include that concession in the 2003 agreement. While the 2003 agreement does state that it refers to the portion of the "Chaupiloma Dos" concession not included in the 1998 agreement, it still undermines Claimant's theory, because both agreements relate to the same concession. The consequence is that multiple stabilization agreements can, indeed, be signed concerning the same mining right.

239. The SUNAT resolutions in the record also do not support Claimant's assertion that stability guarantees were granted to "specific mining units."[420] These resolutions discuss SUNAT's assessments of Yanacocha's income tax for the 2000-2001 and 2003-2004 periods. The resolutions, as well as the underlying assessments, show that SUNAT applied different legal regimes to Yanacocha's different investment projects.

240. In the case of Intendency Resolution dated August 31, 2005, SUNAT had to determine whether Yanacocha's projects could benefit from a tax exemption that allowed the deduction of accrued interest from the income tax base. For this purpose, SUNAT analyzed which tax regime was applicable to each of the projects.[421] In its assessment, SUNAT determined that Projects [redacted] were subject to the Income Tax regime provided in Legislative Decree No. 774, while Project [redacted] was subject to the general regime established in Supreme Decree No. 054-99-EF.[422] Thus, Claimant's assertion is without merit.

241. Moreover, in SUNAT Intendency Resolution dated December 30, 2008, SUNAT stated that the agreements apply to the "project" and the "investment":

> [T]he tax assessment must be done according to the tax regime applicable to each **investment**, which relates to the regulations in force on the date of approval of the investment program, if applicable, on the date of approval of the technical-

[419] *See* Ex. CE-911, Compañía Minera Yanacocha S.A. – Proyecto Yanacocha Carachugo Sur Stabilization Agreement, May 19, 1994, at Annex 1; Ex. CE-919, Minera Yanacocha S.A. – Proyecto Cerro Yanacocha Stabilization Agreement, Sept. 16, 1998, at Annex 1.
[420] Eng. Tr. Day 1 at 57:8 – 58:2 (Claimant's Opening).
[421] *See* Ex. RE-377, SUNAT, Resolution No. 0150140003988, Aug. 31, 2005, at p. 68.
[422] *See* Ex. RE-377, SUNAT, Resolution No. 0150140003988, Aug. 31, 2005, at p. 68.

> economic feasibility study and, likewise, that the aforementioned regime **applies exclusively to the project that enjoys the benefit**; therefore, the mining activity titleholders that make investments in various **projects**, when entering into the respective tax stability agreements, can guarantee a different tax regime for each **project**, depending on the year in which the investment program was entered into; in other words, it is possible for the same tax debtor to be subject to different tax regimes, depending on each of its **projects**.[423]

242. Thus, SUNAT understood that it is the investment project (and not the concessions or "mining units") that is the subject of the stabilization agreement.

3. Tintaya's Income Tax Assessments (2003 – 2004)

243. Tintaya has signed two mining stabilization agreements, one for "Project Tintaya" (a 15-year mining stabilization agreement signed in 1995) and one for the "Copper Oxides Project" (a 15-year mining stabilization agreement signed in 2003, for which the stabilization regime started to apply in 2004).[424] In Tintaya's SUNAT Resolution dated May 20, 2009, Tintaya and SUNAT discussed whether Tintaya could consolidate the year-end financial results of its two projects for purposes of covering its losses and submitting its income tax return. The Tintaya Resolution dealt with the fiscal year 2003, when the Oxides Project was in operation but had not yet been stabilized.

244. In its analysis of Tintaya's case, SUNAT repeatedly explained that the benefits of stabilization agreements are limited to the investments for which the agreements were entered into. More specifically, SUNAT (i) concluded that taxes must be assessed in accordance with the laws applicable to each "investment" that was in force at the time the to-be-stabilized investment program was approved by the MINEM;[425] (ii) explained that the same mining company may be subject to different tax regimes for different projects, depending on their stabilized or non-stabilized status;[426] and (iii) clarified that the investment project that benefits from a mining stabilization agreement is the one that has been identified in the feasibility study that the investor

[423] Ex. RE-382, SUNAT Intendency Resolution No. 0150140007925, Dec. 30, 2008, at p. 54 (emphasis added, underline in the original).
[424] *See* Ex. CE-414, Stability Agreement Between BHP Billiton Tintaya and Peru; Ex. CE-914, Compañía Magma Tintaya Sociedad Anónima Stability Agreement, Dec. 29, 1995.
[425] *See* Ex. RE-193, SUNAT, Intendency Resolution No. 095-014-0000747/SUNAT, May 20, 2009, at p. 101 ("On the basis of these provisions [Articles 82, 85 of the General Mining Law and Article 22 of the 1993 Regulation], the following and immediate conclusion to be drawn is that the calculation of the audited taxes must be carried out in accordance with the provisions applicable to **each investment**, which corresponds to the regulations in force on the date of approval of the investment program, and that the information on the aforementioned disaggregation (**by investment**) must be available to this Administration.") (emphasis in original).
[426] Ex. RE-193, SUNAT, Intendency Resolution No. 095-014-0000747/SUNAT, May 20, 2009, at p. 102 ("This rule, taken together with the previous two provisions allows us to establish in the first place that the same tax debtor may find itself — as occurs in the case of the claimant — subject to different tax regimes as a function of their projects, which does not mean that it is intended to grant the status of tax debtor to each one of them.").

submitted to MINEM at the time it applied for a mining stabilization agreement.[427]

245. Contrary to Claimant's allegations, this example neatly illustrates the fact that SUNAT has ruled consistently with respect to the scope of mining stabilization agreements—they are limited to the investment defined by the mining investor in the feasibility study.

4. Southern's 2006 Mining Council Resolution

246. As discussed in Section VI.A, in 1994, Southern signed a stabilization agreement to develop the "Electrowon Leaching Project." The ore processed in the Electrowon Leaching Plant came from the mining concessions that contained two EAUs, the Toquepala EAU and the Cuajone EAU.[428] In addition, Southern had a concentrator plant—that was not stabilized—that also processed ore from the Toquepala and Cuajone EAUs.[429] As a result, within the Toquepala and Cuajone EAUs, stabilized leaching activities (*Proyecto de Lixiviación Electrowon*) and non-stabilized concentration activities (in the primary sulfide plants) co-existed.[430]

247. Unable to dispute this fact, Claimant alleges that a 2006 Mining Council Resolution confirms that "Southern['s] Stability Agreement applied to Mining Units and not to investment projects."[431] Claimant's reliance on this resolution is misplaced. Claimant takes the Mining Council Resolution out of context to distort its content.

248. The resolution deals with Southern's request to include in the stabilization agreement certain newly-created EAUs that had been constituted under Art. 44 of the Mining Law (which permits the consolidation of mining—not beneficiation—concessions depending on their location for administrative purposes) and that replaced the Toquepala and Cuajone EAUs.[432] Importantly, in that request, Southern reiterates its understanding—as it did in the 1994 Letter discussed in Section VI.A—that its 1994 Stabilization Agreement was "applicable to the investment in the development and installation of the Leaching Electrowon Project, which purpose was the construction of the Leaching Plant in the vicinity of the Toquepala mine, among others."[433]

249. The Mining Council denied Southern's request, because the company had failed to

---

[427] Ex. RE-193, SUNAT, Intendency Resolution No. 095-014-0000747/SUNAT, May 20, 2009, at p. 108 ("In this vein, THE BENEFIT WILL ONLY REACH THE INVESTMENTS MADE THAT WERE FORESEEN IN THE FEASIBILITY STUDY, taking account of the final amount required for implementation thereof. We therefore make reference to the provisions set forth in article 25 of the aforementioned Regulations we have glossed in point 4.1.2.2. of this report.") (emphasis in the original).
[428] *See* Ex. CE-912, Southern Peru Copper Corp. Stabilization Agreement, July 12, 1994, at Clauses 1.3, 3.
[429] *See* Ex. CE-912, Southern Peru Copper Corp. Stabilization Agreement, July 12, 1994, at Clause 1.3. *See also* Ex. RWS-10, Second Tovar Statement at paras. 64-68.
[430] *See* Ex. RWS-10, Second Tovar Statement at para. 68.
[431] Eng. Tr. Day 1 at 51:1-7 (Claimant's Opening).
[432] *See* Ex. RE-356, Letter from Southern Peru Copper Corporation to MINEM, May 4, 2004.
[433] *See* Ex. RE-356, Letter from Southern Peru Copper Corporation to MINEM, May 4, 2004, at p. 1.

obtain proper authorization from the DGM before archiving and replacing the Toquepala and Cuajone EAUs with the new EAUs.[434] In that context, the resolution states that the 1994 stabilization agreement was intended to "grant benefits for the investment made in the Leaching-Electrow[on] Project in an approximate amount of US $118,443,000.00, in the 'TOQUEPALA' and 'CUAJONE' [EAUs]."[435] In stating that the agreement was applicable to the Toquepala and Cuajone EAUs, the resolution was describing the mining rights to which the *Proyecto de Lixiviación – Electrowon* applied, to conclude that Southern was not allowed to replace those mining rights without the proper authorization—it was not discussing the scope of the stabilization agreement itself.

D. NO TESTIMONY AT THE HEARING SUPPORTED CLAIMANT'S ALLEGATIONS THAT THE PERUVIAN GOVERNMENT SOMEHOW MISLED SMCV INTO PARTICIPATING IN THE VOLUNTARY CONTRIBUTION PROGRAMS

250. Notably, at the hearing, Claimant decided not to address any of the issues related to the voluntary contribution programs. Even Ms. Torreblanca refrained from testifying that SMCV was induced to participate in the voluntary programs on the premise that the Concentrator was stabilized.[436] In contrast, Respondent explained in its Opening Statement that there is no evidence of a *quid pro quo* between the Peruvian government and SMCV. Contrary to Claimant's allegations, the evidence on the record shows that SMCV's Concentrator would not be exempt from royalty payments under the SA if SMCV participated in the Voluntary Contribution Programs (the Roundtable Agreement, the Voluntary Contribution Agreement, and the GEM Agreement).[437] Moreover, Respondent showed that SMCV entered into those voluntary agreements while well aware (or, at least, while it should have been aware) of the government's understanding that the SA covered only the Leaching Project. No testimony presented at the hearing indicated otherwise.

VIII. CLAIMANT'S ALLEGATIONS THAT THE TAX TRIBUNAL VIOLATED SMCV'S DUE PROCESS RIGHTS REST ENTIRELY ON UNSUBSTANTIATED CONSPIRACY THEORIES, AND GAINED NO WEIGHT IN THE HEARING

251. As anticipated by Respondent in its Opening, testimony at the hearing showed that Claimant's assertions with respect to alleged Tax Tribunal violations of due process are entirely unsubstantiated.[438]

---

[434] *See* Ex. CE-1122, Mining Council Resolution No. 224-2006-MEM/CM, Oct. 17, 2006, at p. 6.
[435] Ex. CE-1122, Mining Council Resolution No. 224-2006-MEM/CM, Oct. 17, 2006, at p. 5.
[436] Eng. Tr. Day 2 at 393:10-13 (Torreblanca) ("We were extremely disappointed. We felt deceived by the Government, because by then we had undertaken commitments and additional investments because we were not paying those Mining Royalties.").
[437] *See* Eng. Tr. Day 1 at 334:8 – 336:21 (Respondent's Opening).
[438] *See* Eng. Tr. Day 1 at 200:17-20, 328:21 – 333:1 (Respondent's Opening); *see also* Eng. Tr. Day 10 at 3035:8 – 3037:2

252. Claimant's allegations regarding actions taken by the Tax Tribunal rely entirely on innocuous facts—Claimant fills in the rest with pure speculation from its witness, Mr. Estrada, a former employee of the Tax Tribunal who, as discussed in Section II, was hired by Claimant's counsel to give his opinion and conjecture about facts on which he has no direct knowledge.[439] Moreover, as confirmed at the hearing, and discussed in greater detail below, each of Claimant's arguments with respect to the Tax Tribunal is groundless. Notably, during the hearing, Claimant focused only on the Tax Tribunal Resolutions for the 2006-2007 and the 2008 Royalty Assessments; it did not raise any arguments with respect to the Tax Tribunal's handling of the 2009, 2010-2011, or Q4 2011 Royalty Assessments or the Tax Assessments. Thus, Claimant seems to have abandoned any claim regarding the Tax Tribunal's actions with respect to those latter Assessments. Consequently, Respondent will not discuss any allegations regarding those Assessments in this submission and, instead, relies on its earlier pleadings to show why those decisions were also reasonable and procedurally sound.[440]

A. CLAIMANT'S KEY WITNESS ADMITTED THAT HE TESTIFIED BASED ON DOCUMENTS PROVIDED BY COUNSEL RATHER THAN PERSONAL KNOWLEDGE

253. One of the most compromising admissions during the hearing was made by Claimant's key witness, Mr. Estrada, who purported to testify about alleged due process violations by Respondent's Tax Tribunal.

254. During cross-examination, Mr. Estrada confirmed on numerous occasions that he had no direct knowledge of the very Tax Tribunal cases about which he complains in his witness statement, nor any direct knowledge of the alleged misconduct of Ms. Olano.[441] Indeed, Mr. Estrada confirmed that he did not participate in any of the SMCV cases, nor did he ever raise any complaints with respect to Ms. Olano nor about the general functioning of the Tax Tribunal during the years in which he worked at the Tax Tribunal as a law clerk.[442] Mr. Estrada also admitted that the documentation he cited in his witness statements was provided to him by Claimant's counsel and that he did not conduct any diligence on the veracity of the documentation nor did he discuss its contents with the authors of the documents.[443]

(Respondent's Closing).
[439] *See supra* at paras. 13-14.
[440] *See* Respondent's Counter-Memorial at paras. 321-47; Respondent's Rejoinder at paras. 591-602.
[441] Eng. Tr. Day 4 at 1080:17-20, 1092:6-9, 1123:18 – 1124:2 (Estrada).
[442] *See* Eng. Tr. Day 4 at 1053:17 – 1054:1, 1093:22 – 1094:17, 1123:18 – 1124:2, 1128:20 – 1129:6 (Estrada).
[443] Eng. Tr. Day 4 at 1069:5-9 (Estrada) ("Q. The documents that you cite to were provided to you by the Debevoise lawyers; right? A. Yes. Q. Claimant's lawyers? A. Umm-hmm.").

255. Moreover, as discussed in Section II, Mr. Estrada is a hired witness. To recall, in 2019, SMCV and its counsel engaged a small law firm in Perú (TS Asesores) to "facilitate the location of former members of the Tax Tribunal" to discuss "their experience at the Tax Tribunal."[444] TS Asesores apparently was able to find only Mr. Estrada, a former law clerk at the Tax Tribunal with no direct knowledge of any of the facts related to the SMCV cases. Mr. Estrada is now TS Asesores's highest paid partner—whose hourly rate is double that of the founding partners of that firm and whose hourly rate for testifying in this arbitration is the highest among all of Claimant's witnesses and legal experts. These admissions by Mr. Estrada at the hearing confirm that his testimony is no different than a party submission—it consists of *post hoc* arguments constructed from documents by a lawyer with no personal involvement in the key events—and, thus, should be given zero evidentiary weight by the Tribunal.

B. HEARING TESTIMONY CONFIRMED THAT PRESIDENT OLANO HAD THE AUTHORITY TO DESIGNATE MS. VILLANUEVA AS A TEMPORARY LAW CLERK TO CHAMBER NO. 1

256. Claimant alleged in its Opening that Respondent had failed to identify the law or regulation that authorized President Olano to appoint Ms. Villanueva as a temporary law clerk.[445] That is not true. President Olano in her witness statements and at the hearing explained that the Tax Tribunal Manual gives her "a very broad mandate . . . . that establishe[s] that [she] need[s] to supervise [and] coordinate administrative-technical work," which provides her the authority to "manage resources whenever needed."[446]

257. Tellingly, when cross-examining President Olano, Claimant's counsel chose not to question her on her understanding of the Tax Tribunal Manual, but instead focused on the fact that Ms. Olano did not submit (i) any documents showing that *Vocal* Zuñiga requested the assistance of Ms. Villanueva;[447] or (ii) other Tax Tribunal resolutions with the initials of Ms. Villanueva showing that she participated as law clerk for other cases.[448] That, however, does not prove any improper behavior on the part of President Olano. Ms. Olano explained at the hearing that the most likely reason that she had not found such a document was because coordination with the *vocales*

[444] Eng. Tr. Day 4 at 1059:21 – 1060:17 (Estrada).
[445] *See* Eng. Tr. Day 1 at 122:10-15 (Claimant's Opening).
[446] Eng. Tr. Day 7 at 1883:18-22 (Olano). *See also* Ex. RWS-5, First Olano Statement at para. 46; Ex. RWS-12, Second Olano Statement at para. 8; Ex. CA-186, Manual of the Operation and Functions of the Tax Tribunal, Ministerial Resolution No. 626-2012-EF/43, Oct. 5, 2012, at p. 4.
[447] *See* Eng. Tr. Day 7 at 1924:4-6; 1928:10-14 (Olano).
[448] *See* Eng. Tr. Day 7 at 1926:20 – 1927:4 (Olano).

is often made over the phone or in-person.[449] She also explained that, because not all Tax Tribunal resolutions include the initials of the law clerk who assisted the *vocal ponente*, the fact that there are no other resolutions on the record with Ms. Villanueva's initials is uninformative.[450]

258. More importantly, Ms. Olano highlighted during cross-examination that Ms. Villanueva's initials were included in the 2008 Royalty Case Resolution as "a matter of transparency," to indicate "[t]hat she participated there."[451] This fact poses a substantial obstacle to Claimant's allegation of impropriety. It shows that the Tax Tribunal had nothing to hide. The Tax Tribunal transparently disclosed Ms. Villanueva's involvement in the 2008 Royalty Case from the moment it notified SMCV of the decision (*i.e.*, on June 20, 2013).[452] Moreover, there is no question that Ms. Villanueva was an experienced law clerk (*asesora*), making her well qualified to provide such temporary assistance.[453]

259. If SMCV believed that Ms. Villanueva's assistance was somehow inappropriate, it could have challenged the decision on that ground. As just discussed, Ms. Villanueva's initials were included on the copy of the Tax Tribunal Resolution that was sent to SMCV, and it was no secret that Ms. Villanueva was an *asesora de Presidencia* at the time.[454] Yet, SMCV did not raise any complaint about this issue when it challenged the 2008 Royalty Case resolution of the Tax Tribunal before the Peruvian Courts.[455] SMCV's failure to complain about this issue before the Peruvian courts is telling—evidently, it did not believe at the time that there was a sufficient basis to bring the claim that Claimant is now raising before this Tribunal almost 10 years later.

260. The truth is that there was no impropriety in President Olano appointing Ms. Villanueva as a temporary law clerk to Chamber No. 1. Claimant's allegation is frivolous.

C. THE *VOCALES* FROM CHAMBER NO. 1 DECIDED THE 2008 ROYALTY CASE

261. At the hearing, as in its written submissions, Claimant placed great weight on an email that Ms. Villanueva sent to President Olano stating: "I am sending you the arguments of both sides, as well as the main clauses of the stability agreement. There are good arguments for both sides. I am more or less leaning to one side. Please read the arguments when you can and we

[449] *See* Eng. Tr. Day 7 at 1928:15-18 (Olano).
[450] *See* Eng. Tr. Day 7 at 1927:8-10 (Olano).
[451] Eng. Tr. Day 7 at 1927:6-8 (Olano) (emphasis added).
[452] *See* Ex. CE-88, Tax Tribunal Decision No. 08252-1-2013, May 21, 2013, at p. 24; *see also* Ex. CE-89, Receipt Notice of the Resolutions 08252-1-2013 and 08997-10-2013, June 20, 2013, at p. 2 (PDF).
[453] *See* Ex. CE-1136, *SMMCV v. Perú*, Eng. Tr. Day 4 at 1096:2-6 (Estrada).
[454] *See* Ex. CE-83, Tax Tribunal Resolution No. 18397-10-2013; *see also* Eng. Tr. Day 7 at 1926:18 – 1927:14 (Olano); Ex. CE-1136, *SMMCV v. Perú*, Eng. Tr. Day 4 at 1096:2-6 (Estrada).
[455] *See* Ex. CE-97, SMCV, Administrative Court Appeal of the Tax Tribunal Decision, 2008 Royalty Assessments, Sept. 18, 2013.

can talk about it. I'll continue working on this."[456] President Olano responded: "Ok, thank you."[457] That is the entirety of the evidence on which Claimant relies to allege that Ms. Olano purportedly instructed Ms. Villanueva to write a decision dismissing SMCV's appeal, and that that imagined instruction to a temporary law clerk somehow overrode the functions of all three of the *vocales* of Chamber No. 1. Again, the testimony at the hearing confirmed that Claimant's allegation is nothing but pure speculation.

262. *First*, President Olano testified at the hearing that she had no involvement in the merits of any of SMCV's cases. She stated: "I never interfered with the resolution of the dispute, and I never guided [Ms. Villanueva] to make one decision, for that [r]esolution to be one way or the other, because it would be the '*vocal ponente*,' the one making a decision";[458] noting that "as President, I do not decide on [r]esolutions [reviewed by] the [Tribunal's] Chambers."[459]

263. President Olano testified that she did not recall why Ms. Villanueva sent her the email in question, but President Olano recalled recommending to Ms. Villanueva that she review the file, including the arguments from both parties, exhaustively.[460] When Claimant's counsel pressed Ms. Olano on why she would give such a recommendation to an experienced law clerk like Ms. Villanueva, President Olano explained that, in her opinion, one can never give too many recommendations.[461]

264. *Second*, Ms. Olano emphasized the obvious point—which is fatal to Claimant's invented complaint—that, however any particular drafting process might unfold, ultimately the *vocales* are the ones who decide the cases.[462] Claimant's witness Mr. Estrada during cross-examination corroborated Ms. Olano's testimony. He acknowledged that is the *vocales* (not the law clerks) who adopt a decision and have the final word on the text of the resolutions.[463] Mr. Estrada's admissions undermine Claimant's assertion that Ms. Villanueva, a temporary law clerk assigned to assist Chamber No. 1, could have controlled and ultimately decided the case instead of the Chamber *vocales* who issued the decision. In the end, the Tax Tribunal Resolution regarding the 2008 Royalty Assessment was unanimously approved and signed by three *vocales*.

[456] Ex. CE-648, Email from Úrsula Villanueva Arias to Zoraida Alicia Olano Silva (Mar. 22, 2013, 4:02 PM PET).
[457] Ex. CE-648, Email from Úrsula Villanueva Arias to Zoraida Alicia Olano Silva (Mar. 22, 2013, 4:02 PM PET).
[458] Eng. Tr. Day 7 at 1884:16-21 (Olano); *see also* Ex. CE-1139, *SMMCV v. Perú*, Eng. Tr. Day 7 at 1780:8-11 (Olano).
[459] Eng. Tr. Day 7 at 1895:2-3 (Olano).
[460] Eng. Tr. Day 7 at 1942:11-17 (Olano).
[461] Eng. Tr. Day 7 at 1945:2 – 1946:6 (Olano).
[462] Eng. Tr. Day 7 at 1946:9-22 (Olano).
[463] Eng. Tr. Day 4 at 1077:10 – 1078:21 (Estrada).

Notably, Claimant has not claimed that any of those three *vocales* engaged in any wrongdoing.

265. *Third,* Claimant failed to prove that the *vocales* did not decide SMCV's appeals. In fact, Mr. Estrada clarified in cross-examination that there was no evidence on the record (other than his own testimony) that supported his assertion that President Olano had "improperly intervened to influence the resolution of cases of high interest to her."[464] Respondent's counsel asked Mr. Estrada whether he had any documentary support for his assertion that he had allegedly witnessed President Olano unduly influencing the resolution of SMCV's—or any taxpayer's—cases. Mr. Estrada's only response was: "No. It is just my conviction."[465] Unfortunately for Claimant, evidence-free opinion is not sufficient to support an international treaty claim.

266. *Finally,* the hearing showed there was no political agenda behind the decisions issued by the Tax Tribunal. When Ms. Olano was asked by Arbitrator Cremades if she ever received any political pressure to resolve SMCV's case one way or the other,[466] she emphatically answered: "I have not had any political pressure. Here, there was only a Resolution based on the technical and legal issue."[467] And when Arbitrator Cremades asked whether she had received any calls or any other intervention by someone "that may move the decision one way or the other," President Olano responded: "No. I have not received any phone calls, and I can say that throughout my tenure as President, the Ministers were very respectful of the independence, of the operational independence of the Tribunal. I never received any call regarding the resolution of a case."[468]

267. In addition, Mr. Sarmiento, one of the *vocales* from Chamber No. 10 who decided the 2006-2007 Royalty Case, confirmed to President Hanefeld that he never experienced any interference by Ms. Olano in the resolution of that case, nor did he receive any political pressure related to SMCV's cases or any other case during his career at the Tax Tribunal.[469]

268. In sum, Claimant's assertions regarding alleged improprieties by the Tax Tribunal rest on fiction, not evidence.

D. EVIDENCE FROM THE HEARING DEMONSTRATED THAT CHAMBER NO. 10 PROPERLY DELIBERATED THE 2006-2007 ROYALTY CASE

269. At the hearing, as in its pleadings, Claimant could not make a case that Chamber No. 10 somehow abdicated its duty to deliberate independently and reach its own decision in the

[464] Ex. CWS-6, First Estrada Statement at para. 33.
[465] Eng. Tr. Day 4 at 1092:17 – 1093:3 (Estrada).
[466] Eng. Tr. Day 7 at 1962:4-10 (Olano).
[467] Eng. Tr. Day 7 at 1962:11-13 (Olano).
[468] Eng. Tr. Day 7 at 1962:16 – 1963:2 (Olano).
[469] *See* Eng. Tr. Day 7 at 2024:13 – 2025:11 (Sarmiento).

2006-2007 Royalty Case. The testimony of *Vocal* Sarmiento put an end to Claimant's allegation.

270. *Vocal* Sarmiento explained at the hearing that the similarity between the text of the resolution in the 2008 and the 2006-2007 Royalty Cases in no way implies there was a lack of independent analysis from, or an independent decision by, Chamber No. 10.[470] More importantly, *Vocal* Sarmiento testified that, before receiving the resolution that Chamber No. 1 prepared for the 2008 Royalty Case, Chamber No. 10 had already listened to the parties and had a sense of how they were going to decide the case.[471] *Vocal* Sarmiento's explanation undermines Claimant's theory that Chamber No. 1 somehow imposed its resolution upon Chamber No. 10. His explanation demonstrates that the latter had already formed an opinion on the case, which happened to coincide with the draft prepared by Chamber No. 1.

271. At the hearing, Claimant's counsel attempted to suggest that *Vocal* Cayo had prepared a draft resolution prior to the oral hearing, and that *Vocal* Moreano was upset because he found out that Chamber No. 1 already had a draft resolution ready for the 2008 Royalty Case.[472] Claimant has provided no support for such an assertion; instead, its assertion is pure conjecture based on vague language in an email.[473]

272. Moreover, Respondent's witnesses quickly dispelled Claimant's theory. Ms. Olano clarified that Claimant's counsel was speculating by stating that Chamber No. 10 had a draft ready before Chamber No. 1 circulated its own draft, as she never made any such assertion.[474] Ms. Olano explained that ideally the *vocal ponente* would have a pre-draft before the oral hearing, but it was not always the case, and she did not know whether *Vocal* Cayo (the *vocal ponente* of Chamber No. 10) had prepared one.[475] She also clarified that (i) *Vocal* Moreano never stated in his emails to Ms. Olano that he had a draft resolution; and (ii) *Vocal* Moreano would not have had a draft resolution in any case, because he was not the *vocal ponente* in that case.[476] Mr. Sarmiento also

[470] *See* Eng. Tr. Day 7 at 2004:14 – 2007:3 (Sarmiento); *see also* Ex. CE-1139, *SMMCV v. Perú*, Eng. Tr. Day 7 at 1849:15 – 1850:19 (Sarmiento).
[471] Eng. Tr. Day 7 at 2003:20 – 2004:8 (Sarmiento) ("[T]he deliberation process starts much earlier; for example, in our case, with the oral hearing. The oral hearing was carried out two months before the date of the Session, and, as part of this hearing, we had the Administration and the taxpayer, and they presented their arguments, and also the rules and regulations that they deemed applicable, and we could see what the controversial issues were, and from that moment onwards we could have a clear idea as to what would be the sense, the meaning behind the Resolution that we would issue."); *see also* Ex. CE-1139, *SMMCV v. Perú*, Eng. Tr. Day 7 at 1867:10-18 (Sarmiento).
[472] *See* Eng. Tr. Day 7 at 1979:15-22, 1981:15 – 1982:4 (Olano).
[473] *See* Eng. Tr. Day 4 at 1128:13 – 1129:6 (Estrada).
[474] *See* Eng. Tr. Day 7 at 1980:1-5 (Olano) ("A. No, you are speculating that there was a prior resolution. I cannot assert that because I don't know that. He never said here that he had a draft. He was not the '*ponente*,' Cayo was the '*ponente*.'").
[475] *See* Eng. Tr. Day 7 at 1980:14 – 1981:7, 1982:5 – 1983:7 (Olano).
[476] *See* Eng. Tr. Day 7 at 1980:14 – 1981:7, 1982:5 – 1983:7 (Olano).

testified that he did not know if *Vocal* Cayo had prepared a draft resolution prior to the oral hearing.[477] He clarified that he received only the draft resolution that was discussed and approved in the deliberation session.[478]

273. Regardless of whether there was a draft resolution prior to the oral hearing, President Olano demonstrated that *Vocal* Moreano was not likely upset regarding the outcome of the resolution as drafted by Chamber No. 1. Indeed, *Vocal* Zuñiga had informed Ms. Olano that *Vocal* Cayo had told her that "[all the vocales from Chamber No. 10] were in agreement" with the results of the resolution drafted by Chamber No. 1.[479] Moreover, Ms. Olano explained that *Vocal* Moreano never stated to her that he was in disagreement with the Resolution issued by Chamber No. 1.[480] In any case, had *Vocal* Moreano been in disagreement with the outcome made by Chamber No. 10 (which was consistent with that of Chamber No. 1), he could have voted against it and issued a dissenting opinion—as he did in other cases, as corroborated by Mr. Estrada.[481] *Vocal* Moreano did not issue any such dissenting opinion.

274. *Finally*, Mr. Estrada attempted to discredit *Vocal* Sarmiento's testimony about the independence of the deliberations of Chamber No. 10, suggesting that *Vocal* Sarmiento should be assumed to be testifying consistent with President Olano because to do otherwise could endanger his confirmation as a *vocal*.[482] Mr. Estrada relied on the fact that, as part of President Olano's official functions, she submits to a confirmation commission a report on the efficiency-efficacy of the *vocales* and another report on the quality of the resolutions that affects 60 percent of the evaluation that decides if a *vocal* is confirmed or not.[483] Testimony at the hearing once again demonstrated that Claimant's allegation is meritless.

275. To begin with, Mr. Estrada admitted at the hearing that he has never participated in a confirmation commission;[484] therefore, he has no first-hand knowledge regarding what takes place in such commissions. More importantly, his assumption regarding what is considered in confirmation proceedings is incorrect. President Olano, who has attended such confirmation commissions, explained at the hearing that the quality of the *vocales'* resolutions is assessed by

[477] Eng. Tr. Day 7 at 2021:12-13 (Sarmiento).
[478] *See* Eng. Tr. Day 7 at 2021:22 – 2022:4 (Sarmiento).
[479] Ex. CE-653, Email from Licette Isabel Zuñiga Dulanto to Zoraida Alicia Olano Silva (Mar. 22, 2013, 9:55 AM PET).
[480] Eng. Tr. Day 7 at 1984:6-13; *see also id.* at 1985:1-10 (Olano). *See also* Ex. CE-992, Email from Carlos Hugo Moreano Valdivia to Zoraida Alicia Olano Silva (May 22, 2013, 11:09 AM PET).
[481] *See* Eng. Tr. Day 4 at 1079:9-12 (Estrada).
[482] *See* Eng. Tr. Day 4 at 1048:7-15 (Estrada).
[483] *See* Eng. Tr. Day 4 at 1115:21 – 1116:7 (Estrada).
[484] *See* Eng. Tr. Day 4 at 1094:18 – 1096:5 (Estrada).

third party experts while the efficiency and efficacy evaluation for which she is responsible is based on objective criteria, mainly statistics—for example, the number of resolutions issued compared to other *vocales*, participation in the analysis commission in the Plenary Chamber, *etc*.[485] Therefore, regardless of *Vocal* Sarmiento's participation in this arbitration, President Olano could not favor or disfavor *Vocal* Sarmiento in that objective and mostly statistical evaluation.

276. In sum, testimony at the hearing reinforced that the Tax Tribunal provided SMCV fully appropriate and more than adequate due process in SMCV's challenges to SUNAT's Royalty Assessments. Claimant's allegations to the contrary that imagine nefarious schemes orchestrated by President Olano against SMCV are frankly absurd, and have no evidentiary foundation.

IX. JURISDICTIONAL OBJECTIONS

277. As detailed below, the hearing confirmed that the Tribunal lacks jurisdiction to hear almost all of Claimant's claims, as a result of five jurisdictional objections under the TPA. The very few claims that survived these objections (that is, certain claims related to the alleged Tax Tribunal due process violations[486]) fail on the merits in any event, as discussed in Respondent's written submissions and Section VIII above.[487]

A. THE HEARING SHOWED THAT CLAIMANT'S CLAIMS FALL OUTSIDE THE TPA'S LIMITATIONS PERIOD (ART. 10.18.1)

278. Claimant's claims fall outside the TPA's limitations period under Art. 10.18.1, and, thus, fall outside the Tribunal's jurisdiction. The Parties agree that, under Art. 10.18.1, if Claimant first knew (or should have known) of the alleged breaches, and knew that it (for breach-of-TPA claims) or SMCV (for breach-of-SA claims) incurred loss or damage, more than three years before the date of Claimant's Notice of Arbitration (*i.e.*, before February 28, 2017 (the "cut-off date")), then Claimant's claims are time-barred.[488] The hearing showed that Claimant first knew (or should have known) of the alleged breaches and the related loss well before the cut-off date.

279. *Breach-of-SA claims.* "The earliest possible date"[489] on which Claimant knew (or should have known) of the alleged breaches of the SA and related loss is August 18, 2009, *i.e.*,

[485] *See* Eng. Tr. Day 7 at 1886:19 – 1888:7 (Olano).
[486] *See* Respondent's Rejoinder at n.1395 (referring to the Tax Tribunal's (i) alleged failure to recuse a "conflicted decision maker"; (ii) alleged copy-and-paste of portions of the 2008 Royalty Case decision into the 2990 Royalty Case decision; and (iii) alleged improper assignment of the Q4 2011 Royalty Case to Ms. Villanueva).
[487] *See* Respondent's Counter-Memorial at Section IV; *see also* Respondent's Rejoinder at Section IV.
[488] *See* Eng. Tr. Day 1 at 146:11-21 (Claimant's Opening); *see also id.* at 338:4-20 (Respondent's Opening); Claimant's Reply at para. 211; Respondent's Counter-Memorial at para. 412.
[489] Ex. RA-3, *Corona Materials v. Dominican Republic*, Award on Preliminary Objections at para. 198; *see also* Eng. Tr. Day 1 at 338:13-20 (Respondent's Opening).

years before the cut-off date. On that date, SMCV was notified of the first SUNAT Assessment requesting royalty payments for the Concentrator, and, thus, as of that date, SMCV (and Claimant) knew that SUNAT interpreted the SA contrary to SMCV's interpretation, *i.e.*, the SA did not stabilize the Concentrator.[490] As of that date, SMCV (and Claimant) also knew (or should have known) that it incurred loss, as the Assessment stated both the amount of royalties that SMCV owed for the Concentrator, and the penalties and interest that SMCV owed for having failed to timely pay those royalties.[491] As Respondent's experts confirmed at the hearing, under Peruvian law, the amounts stated in the Assessment were immediately due to SUNAT and, thus, immediately became liabilities of SMCV.[492]

280. The hearing confirmed that the term "incurred" includes loss or damage that is due even if it has not been paid. At the hearing, the United States confirmed that it "[stood] by the interpretations set forth in its written submission,"[493] which included the *Spence* tribunal's understanding that knowledge of loss incurred is "triggered by the first appreciation that loss or damage will be (or has been) incurred."[494] The United States' understanding directly contradicts the testimony of Claimant's (paid) witness,[495] Mr. Herrera, who claimed that the TPA Parties understood "incurred" to mean "actual loss."[496]

281. Despite this record, Claimant maintained at the hearing that it only knew of the alleged breaches and losses years later when the Assessments became "final and enforceable," which Claimant argues occurred when the Tax Tribunal issued its decision regarding the Assessments (in the case of challenged Assessments).[497] Claimant's arguments are meritless. *First*, enforceability is not a requirement under Art. 10.18.1, as discussed in Respondent's written submissions and at the hearing.[498] *Second*, even under Claimant's theory that the alleged breach

[490] Ex. CE-31, SUNAT 2006/07 Royalty Assessments, Aug. 17, 2009, at p. 1 (PDF) (stating that "the benefits granted in administrative matters are only related to the 'Cerro Verde Leaching Project.' Hence, regarding the exploitation of mining resources destined for the 'Primary Sulfide Project,' as they are not within the scope of protection of the [SA], the payment of the mining royalty is required … .").
[491] *See* Ex. CE-31, SUNAT 2006/07 Royalty Assessments, Aug. 17, 2009, at p. 2 (PDF) (Total Calculated Royalty US $138,879.45 (Dec-2006); *see also id.* at p. 4 (PDF) (Total Calculated Royalty US $30,949,760.25 (Jan-2007-Dec-2007), at pp. 5-46 (PDF) (stating, *e.g.*, that for the month of December 2006, SMCV owed penalties in the amount of 44,511 soles and interest charges of 16,939 soles and 7,036 soles and that the amount of interest would be updated over time while payment remained outstanding).
[492] *See* Eng. Tr. Day 8 at 2494:6-7 (Morales); Eng. Tr. Day 9 at 2682:8 – 2683:4 (Bravo and Picón); *see also* Ex. RER-2, First Morales Report at paras. 106-07; Ex. RER-3, First Bravo and Picón Report at paras. 61-62.
[493] Eng. Tr. Day 2 at 379:16-18 (U.S. Statement).
[494] *See* NDP Submission at para. 11, n.17 (emphasis added).
[495] Eng. Tr. Day 4 at 1174:14-20 (Herrera) (admitting that he is being paid $250 an hour (above his typical rate of $200) for his testimony in this arbitration).
[496] Eng. Tr. Day 4 at 1178:11 – 1179:7 (Herrera).
[497] *See* Eng. Tr. Day 1 at 151:2 – 159:4 (Claimant's Opening); *see also* Claimant's Reply at para. 122.
[498] *See* Ex. CA-10, U.S.-Perú TPA at Art. 10.18.1; *see also* Respondent's Rejoinder at paras. 718, 725; Respondent's Counter-

occurred only when SUNAT's Assessments became "final and enforceable" (it does not), Claimant's claims are still time-barred. The Tax Tribunal issued its decision regarding the 2006-2007 Royalty Assessment on May 30, 2013, and according to Claimant, the Assessment became "final and enforceable" on that date.[499] Claimant was notified of that decision on June 20, 2013.[500] Thus, even under Claimant's theory, it still knew of the alleged breaches and loss many years before the cut-off date.

282. Claimant's assertion that the "final and enforceable" SUNAT Assessments are separate breaches with separate limitations periods has no merit. *First*, it contradicts case law and the TPA Parties' understanding of how Art. 10.18.1 operates. The United States agrees that, under Art. 10.18.1, "where 'a series of similar and related actions by a respondent State' is at issue, a claimant cannot evade the limitations period by basing its claim on 'the most recent transgression' in that series. To allow a claimant to do so would 'render the limitations provision ineffective[.]'"[501] Here, SUNAT's Assessments are surely "a series of similar and related actions by a respondent State": SUNAT performed the same act (applied the non-stabilized regime to the Concentrator Project) based on the same interpretation of the same agreement (the SA covered only the Leaching Project), all under the same regulatory framework (Art. 93 of the Mining Law and Art. 22 of the Mining Regulations). Therefore, the alleged breaches of the SA based on SUNAT's Assessments must be traced to the first Assessment in the "series of similar and related" Assessments.

283. *Second*, Claimant's insistence at the hearing that the Assessments are separate breaches because they constitute "36 separate and independent acts"[502] that caused "36 separate losses in the form of 36 separate payment obligations for different fiscal period"[503] as a result of "separate audits"[504] makes no sense. SUNAT issued the Assessments based on the fiscal periods in which it completed its audit, as Claimant admitted at the hearing.[505] At various times, SUNAT (i) issued a single Assessment spanning two years (*e.g.*, 2006-2007 Royalty Assessment); (ii)

Memorial at para. 420 (citing to, *e.g.*, Ex. RA-2, *Spence v. Costa Rica*, Interim Award at para. 210; Ex. RA-1, *Infinito v. Costa Rica*, Award at para. 247); Eng. Tr. Day 8 at 2493:14-16; 2496:14-15 (Morales); Ex. RER-2, First Morales Report at paras. 97-98, 103.

[499] Ex. CE-88, Tax Tribunal Decision No. 08997-10-2013, May 30, 2013 (notified to SMCV on June 20, 2013).

[500] Claimant's Memorial at para. 211; *see also* Ex. CE-88, Tax Tribunal Decision No. 08997-10-2013, May 30, 2013.

[501] NDP Submission at para. 10 (quoting Ex. RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81).

[502] Eng. Tr. Day 1 at 148:9-10 (Claimant's Opening).

[503] Eng. Tr. Day 1 at 148:13-15 (Claimant's Opening).

[504] Eng. Tr. Day 1 at 162:22 (Claimant's Opening).

[505] Eng. Tr. Day 1 at 162:21 – 163:3 (Claimant's Opening) (admitting that "SUNAT [] conducted separate audits" and "as a result of those audits issued separate assessments" for royalties and taxes).

issued multiple Assessments for the same year (*e.g.*, in 2011, SUNAT issued the 2010-2011 Royalty Assessment (covering 21 months) and then issued the Q4 2011 Royalty Assessment (covering a quarter (3 months)); and (iii) combined the assessment of different types of taxes in a single Assessment (*e.g.*, 2007 GST and Additional Income Tax Assessment).[506] By Claimant's logic, if SUNAT had chosen to issue the Assessments on a per-quarter basis, or per-month basis, or per type of taxes, or some combination thereof, the number of alleged breaches would be in the hundreds, resulting in hundreds of limitations periods. Claimant's reading cannot be correct, as the *Spence* tribunal explained: "Such an approach would [] encourage attempts at the endless parsing up of a claim into ever finer sub-components of breach over time in an attempt to come within the limitation period. This does not comport with the policy choice of the parties to the treaty."[507] The Tribunal must see through Claimant's attempt at "parsing up" its claims into "finer sub-components of breach," and reject it.[508]

284. *Breach-of-TPA claims*. Because Claimant also knew (or should have known) of the alleged breaches and the related losses years before the cut-off date for each of its TPA claims, the Tribunal lacks jurisdiction over these claims, as explained in Respondent's written submissions.[509]

B. THE HEARING SHOWED THAT CLAIMANT'S TREATY-BREACH CLAIMS BASED ON PENALTIES AND INTEREST IMPOSED AND MAINTAINED ON TAX ASSESSMENTS FALL OUTSIDE THE SCOPE OF THE TPA (ART. 22.3.1)

285. Claimant does not even make breach-of-TPA claims based on the Tax Assessments themselves, because it knows it cannot do so in the face of TPA Art. 22.3.1's exclusion of claims based on "taxation measures."[510] Claimant does try to claim breach of the TPA based on Perú's imposition of and refusal to waive penalties and interest on those Tax Assessments. However, those claims are also barred because they likewise constitute "taxation measures," which are excluded from the scope of the TPA pursuant to Art. 22.3.1.[511]

---

[506] *See* Ex. CE-31, SUNAT 2006/07 Royalty Assessment, Aug. 17, 2009; Ex. CE-142, SUNAT 2010/11 Royalty Assessment, Apr. 13, 2016; Ex. CE-700, SUNAT, Assessment No. 012-003-0092685 (Q4 2011 Royalty Assessment), Dec. 29, 2017; Ex. CE-60, SUNAT Assessments No. 052-003-0008024 to No. 052-003-0008035, Dec. 27, 2011; Ex. CE-163, Assessment No. 012-003-0092658, Dec. 29, 2017 (Q4 2011-2012 Special Mining Tax); Ex. CE-75, SUNAT Assessments No. 052-003-0009549, No. 052-003-0009591 to No. 052-003-0009602, Dec. 20, 2012 (2008 GST and Additional Income Tax Assessment).

[507] Ex. RA-2, *Spence v. Costa Rica*, Interim Award at para. 208.

[508] *See also* NDP Submission at para. 9 (stating that knowledge of alleged breach and loss "cannot *first* be acquired at multiple points in time or on a recurring basis" (emphasis in original), citing Ex. RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81 ("[S]ubsequent transgression[s] by a Party arising from a continuing course of conduct do not renew the limitations period once an investor knows, or should have known, of the alleged breach and loss or damage incurred thereby.")).

[509] *See* Respondent's Counter-Memorial at paras. 446-63; *see also* Respondent's Rejoinder at paras. 753-68.

[510] *See* Claimant's Reply at para. 271.

[511] *See* Eng. Tr. Day 1 at 346:21 – 348:1 (Respondent's Opening); *see also* Respondent's Counter-Memorial at paras. 456-58; Respondent's Rejoinder at Section III.B.

286. Claimant argued at the hearing that the "penalties and interest [imposed on the Tax Assessments] are not taxes under Peruvian law, so they cannot be taxation measures under the TPA."[512] However, "taxation measures" in the TPA are broader than "taxes." The United States agrees, explaining in its Non-Disputing Party Submission that "[a]ny 'practice' related to 'taxation' is therefore addressed by Art. 22.3.1. A 'practice' in this context includes not only the application of … a tax, but also the enforcement [of] a tax."[513] Enforcing taxes by applying and maintaining penalties and interest on the taxes owed is, surely, a "practice related to taxation."

287. Importantly, the TPA's definition of "measure," and the United States' submission of what constitutes "taxation measures" under Art. 22.3.1, are decisive on this matter.[514] Thus, the Tribunal should find that penalties and interest on the Tax Assessments are "taxation measures," and that it lacks jurisdiction over Claimant's related claims.

C. THE HEARING SHOWED THAT CLAIMANT'S CLAIMS BASED ON PRE-TPA ACTS OR FACTS FALL OUTSIDE THE SCOPE OF THE TPA (ART. 10.1.3)

288. Claimant's own telling of the facts, including at the hearing, shows that SUNAT's Assessments (the basis of most of Claimant's claims) are rooted in acts or facts that occurred before the TPA entered into force on February 1, 2009. As TPA Art. 10.1.3 bars claims rooted in pre-entry-into-force acts or facts, most of Claimant's claims fall outside the Tribunal's jurisdiction.

289. *First*, the *Spence* tribunal interpreted a CAFTA provision identical to Art. 10.1.3 and held that a tribunal lacks jurisdiction to hear a claim under that provision if the post-entry-into-force conduct allegedly giving rise to the claim is "deeply and inseparably rooted" in pre-entry-into-force conduct.[515] Notably, Claimant agrees with this interpretation of Art. 10.1.3 but then tries to argue that *Spence* does not apply, because it is allegedly factually different from this case: "But *Spence* doesn't help Perú. Let me tell you what *Spence* is really about. *Spence* is about pre-entry-into-force expropriations … ."[516] However, Respondent's counsel—who successfully secured the favorable jurisdictional decision for Costa Rica in *Spence* based on CAFTA's non-retroactivity (and limitations period) provisions, and, thus, are better placed than Claimant's counsel to assess the relevance of *Spence* to this case—have explained in Respondent's written

[512] Eng. Tr. Day 10 at 2902:9-11 (Claimant's Closing).
[513] NDP Submission at para. 32 (emphasis added).
[514] *See* Eng. Tr. Day 2 at 375:17-19 (U.S. Statement) (stating that "the Tribunal must take the TPA[] Parties' common understanding of the provisions of their Treaty into account").
[515] Ex. RA-2, *Spence v. Costa Rica*, Interim Award at paras. 246, 298.
[516] Eng. Tr. Day 1 at 186:1-11 (Claimant's Opening).

submissions why *Spence* is indeed instructive here.[517]

290. *Second*, it is clear that Art. 10.1.3 bars Claimant's claims here. At the hearing, Claimant itself—perhaps without thinking of the jurisdictional implications—repeatedly emphasized that various episodes of post-TPA conduct that gave rise to Claimant's claims (*i.e.*, SUNAT's Assessments) were rooted in and the result of the following pre-TPA acts or facts:

- **MINEM's** June **2006 Report**, which Claimant argued (a) directly caused SUNAT to issue the first Royalty Assessment on the Concentrator ("MINEM sent to [] SUNAT Mr. Isasi's June 2006 Report, … just a few months after receiving Mr. Isasi's Report, SUNAT initiated the first audit of SMCV. This audit culminated in SUNAT's 2006-'07 Royalty Assessment . . . ."[518]); and (b) formed the basis of SUNAT's Assessments ("that audit explicitly relied on MINEM's interpretation and, … Mr. Isasi's Report."[519]); and
- **SUNAT's** 2008 **audit**, which Claimant itself described as having resulted in SUNAT's Assessments ("This audit culminated in SUNAT's 2006-'07 Royalty Assessment."[520]).

Claimant argued the same in its written submissions, proclaiming that MINEM's June 2006 Report held "the interpretation at the heart of the dispute" and that it "formed the basis for SUNAT's Assessments."[521] Indeed, Claimant's own words show that the above-listed pre-entry-into-force acts are the *sine qua non* of SUNAT's Assessments that, in turn, gave rise to Claimant's claims.

291. As Claimant's claims are based on SUNAT's Assessments, which in turn are "deeply and inseparably rooted" in pre-TPA acts or facts, they fall outside the Tribunal's jurisdiction.

D. THE HEARING SHOWED THAT CLAIMANT'S BREACH OF CONTRACT CLAIMS CANNOT BE SUBMITTED TO ARBITRATION UNDER THE TPA (ART. 10.18.4)

292. Because SMCV previously submitted the same alleged breaches of the SA (as those submitted here) to administrative tribunals (SUNAT's Claims Division and the Tax Tribunal) and to the courts (the Superior Court of Lima (the appellate court) and the Peruvian Supreme Court),

[517] *See* Respondent's Counter-Memorial at paras. 472, 479; Respondent's Rejoinder at paras. 779, 785-787(a).
[518] Eng. Tr. Day 1 at 107:4-11 (Claimant's Opening).
[519] Eng. Tr. Day 1 at 107:11-13 (Claimant's Opening).
[520] Eng. Tr. Day 1 at 107:10-11 (Claimant's Opening); *see also* Ex. CE-577, SUNAT, Inductive Letter, May 30, 2008.
[521] Claimant's Memorial at paras. 423(b), 314 (emphasis added); *see also* Claimant's Memorial at paras. 13, 142, 162-63, 170, 175-76, 267, 280, 377(d); Claimant's Notice of Arbitration at paras. 52-53, 57; Respondent's Counter-Memorial at para. 476; Respondent's Rejoinder at paras. 780-83.

all of which are also binding dispute settlement procedures, Art. 10.18.4 bars the submission of same alleged breaches to this Tribunal.[522] Claimant's defense fails based on two flawed premises.

293. *First*, Claimant argues that SMCV did not submit "the same alleged breaches" of the SA to any dispute resolution forum in Perú.[523] However, the record shows that SMCV alleged breaches of the SA before multiple fora in Perú. In its appeals to the **Tax Tribunal** (for the 2006-2007, 2008, and 2009 Royalty Assessments), SMCV alleged that SUNAT's resolution confirming the Assessments "expressly violates a Contract-Law entered into by our company with the Peruvian State."[524] SMCV made the same allegation in its appeals to the **Superior Court of Lima**,[525] and also to the **Supreme Court**.[526] As Claimant's expert Mr. Sampliner testified, "[T]he question under the fork [in-the-road provision] was simply whether this same breach was alleged in the first place in the [c]ourt's or [a]dministrative [t]ribunal's or other dispute-resolution proceedings."[527] As shown above, SMCV expressly (and repeatedly) alleged breaches of the SA in the applicable fora under Art. 10.18.4. Thus, Claimant's breach-of-SA claims are barred here.

294. *Second*, Claimant asserts that neither SUNAT's Claims Division nor the Tax Tribunal are an "administrative tribunal" or a "binding dispute settlement procedure" under Art. 10.18.4. (To be clear, Claimant does not dispute that the Superior Court of Lima and the Supreme Court are "court[s] of the respondent" and "binding dispute settlement procedure[s]" under Art. 10.18.4.) To Claimant, the terms "administrative tribunal" and "binding dispute settlement procedure" refer only to fora that can resolve contractual claims.[528] This argument must fail, as it is neither supported by the TPA's text nor contemporaneous evidence as shown in Respondent's written submissions.[529]

---

[522] Ex. CA-10, U.S.-Perú TPA at Art. 10.18.4.
[523] Eng. Tr. Day 1 at 179:3-4 (Claimant's Opening); *see also* Eng. Tr. Day 1 at 174:20 – 175:4 (Claimant's Opening).
[524] Ex. CE-40, SMCV Appeal to Tax Tribunal, 2006/07 Royalty Assessments, May 12, 2010, at p. 1; *see also* Ex. CE-49, SMCV Appeal to Tax Tribunal, 2008 Royalty Assessments, Mar. 10, 2011, at p. 1; Ex. CE-62, SMCV Appeal to Tax Tribunal, 2009 Royalty Assessment, Jan. 16, 2012, at p. 3 (PDF).
[525] *See* Ex. CE-144, SMCV Appellate Court Appeal of the Administrative Court Decision, May 2, 2016, at para. 1.1 (alleging that the Tax Tribunal's and SUNAT's resolutions confirming the Assessments "are in breach of … the clauses of the Investment Guarantees and Promotion Measures Agreement that CERRO VERDE entered into with the Peruvian State … .").
[526] *See* Ex. CE-697, SMCV Appeal to the Supreme Court of the Appellate Court Decision (2006/07 Royalty Assessment), Aug. 9, 2017, at para. 1.1 (alleging that the Tax Tribunal's and SUNAT's resolutions confirming the Assessments "have violated … the clauses of the Agreement for Promotion and Guarantee of Investments that CERRO VERDE entered into with the Peruvian State … ."); *see also* Ex. CE-138, SMCV Supreme Court Appeal of the Appellate Court Decision No. 7650-2013, 2008 Royalty Assessment, Feb. 23, 2016, at para. 1.1 (same).
[527] Eng. Tr. Day 7 at 2083:17-20 (Sampliner) (emphasis added).
[528] *See* Claimant's Reply at paras. 255-62.
[529] *See* Respondent's Rejoinder at paras. 822-23; *see also* Eng. Tr. Day 4 at 1136:7-11 (Herrera) (failing to cite to relevant contemporaneous evidence); Ex. CWS-12, First Herrera Statement at paras. 29-31 (same); Ex. CWS-22, Second Herrera Statement at paras. 9-12 (same); Eng. Tr. Day 7 at 2040:1-5 (Sampliner) (same); Ex. CER-11, First Sampliner Report at para. 35 (same); Ex. CER-14, Second Sampliner Report at paras. 7-9 (same).

295. Indeed, Claimant itself agreed that the Tax Tribunal and SUNAT's Claims Division are administrative tribunals when Claimant admitted to that at the hearing ("As the last-instance decision-maker in the administrative process, the **Tax Tribunal** was supposed to set things right."[530]; "As the first-instance decision-maker in the administrative process, **SUNAT's Claims Division** was supposed to be independent … ."[531]) Respondent also showed in its written submissions that Claimant agrees that the Tax Tribunal, SUNAT's Claims Division, and the Peruvian courts are "binding dispute settlement procedure[s]."[532]

296. Thus, under Claimant's own understanding of what constitutes "binding dispute settlement procedures," Claimant's breach-of-SA claims are barred by Art. 10.18.4.

E. THE HEARING SHOWED THAT CLAIMANT MAY NOT SUBMIT CLAIMS FOR BREACH OF THE 1998 STABILITY AGREEMENT UNDER THE TPA (ART. 10.16.1)

297. Because Claimant failed to prove that it relied on the SA when it acquired its covered investments on March 19, 2007, it may not submit claims for breach of an investment agreement based on the SA pursuant to Art. 10.16.1 of the TPA. *First*, there is no question that Art. 10.16.1 requires Claimant's reliance on the investment agreement in order for Claimant to be entitled to submit a claim for breach of that agreement under the TPA, as explained in Respondent's written submissions. *Second*, the hearing confirmed that Freeport failed to prove that it relied on the SA when it acquired its covered investments in 2007, as discussed in Section VI above. *Third*, Claimant's alternative arguments based on the alleged reliance by SMCV or Phelps Dodge do not help its case, as discussed at the hearing and in Respondent's written submissions.[533]

298. In sum, the Tribunal lacks jurisdiction over almost all of Claimant's claims.

X. MERITS

299. Even if the Tribunal were to find that it has jurisdiction over any of Claimant's claims (it should not), those claims must nevertheless fail on the merits, as discussed in Respondent's written submissions and below.[534]

300. *Breach-of-SA claims*. Respondent showed at the hearing that it did not breach the SA when SUNAT applied the non-stabilized regime to the Concentrator by assessing royalties and taxes, because the SA provided stability guarantees only to "The leaching project of Cerro

[530] Eng. Tr. Day 1 at 116:22 – 117:3 (Claimant's Opening) (emphasis added); *see also* Claimant's Reply at paras. 226(b), 242, 259.
[531] Eng. Tr. Day 1 at 120:5-7 (Claimant's Opening) (emphasis added); *see also id.* at 151:8-11; 153:18-20 (Claimant's Opening); Claimant's Memorial at para. 196; Claimant's Reply at paras. 20, 226(b), 242, 259.
[532] *See* Respondent's Counter-Memorial at para. 500; *see also* Respondent's Rejoinder at paras. 818-20.
[533] *See* Respondent's Counter-Memorial at Section III.D; Respondent's Rejoinder at Section III.E.
[534] *See* Respondent's Counter-Memorial at Section IV; Respondent's Rejoinder at Section IV.

Verde."[535] The Peruvian courts, including Perú's highest court, the Supreme Court, have decided as a matter of Peruvian law and contract interpretation that the SA covered the Leaching Project only. Claimant, however, asks this Tribunal to ignore the Peruvian courts' decisions, or worse, reach an opposite conclusion.[536] It should not. The United States noted in its NDP Submission that, "as a matter of customary international law, international tribunals will defer to domestic courts interpreting matters of domestic law unless there is a denial of justice."[537] It went on to state that "it is well-established that international arbitral tribunals, such as those established by disputing parties under U.S.-Peru TPA Chapter 10, are not empowered to be supranational courts of appeal on a court's application of domestic law."[538] Claimant did not allege denial of justice with respect to the Peruvian court proceedings. Hence, this Tribunal must respect the Peruvian courts' decisions on matters of Peruvian law, find that the SA covered the Leaching Project only, and conclude that Respondent did not breach the SA.

301. *Breach-of-TPA claims.* Claimant's allegation that Respondent breached its FET obligations provided under Art. 10.5 of the TPA must also fail, because it alleged beaches of protections that have not been shown to be provided in the TPA (except for its due process claim). The United States made clear at the hearing and in its NDP Submission that Art. 10.5 of the TPA prescribes the CIL minimum standard of treatment, which protects only obligations that have crystallized into CIL.[539] The United States explained that the TPA's FET obligation explicitly recognizes only one rule that has crystallized into CIL: "the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings."[540] In other words, they recognize claims of denial of justice only, which Claimant did not assert. The United States further clarified that "the concepts of legitimate expectations and transparency are not component elements of 'fair and equitable treatment' under customary international law and do not give rise to independent [h]ost State obligations."[541] Thus, the FET obligations under Art. 10.5 do not protect against frustration of legitimate expectations, arbitrary, inconsistent, and non-transparent actions. Additionally, Claimant's claims of due process violations based on the Tax Tribunal's handling of the Royalty Cases do not come close to reaching the high bar of "'notoriously unjust or 'egregious'

[535] Ex. CE-12, 1998 Stability Agreement at Clause 1.1; *see also* Eng. Tr. Day 1 at 207:14-21 (Respondent's Opening).
[536] *See* Eng. Tr. Day 1 at 23:16-20; 132:8 – 133:2; 135:3-16 (Claimant's Opening).
[537] NDP Submission at para. 25 (emphasis added).
[538] NDP Submission at para. 26.
[539] *See* Eng. Tr. Day 2 at 375:22 – 376:11 (U.S. Statement); *see also* U.S. Non-Disputing Party Submission at paras. 14, 21.
[540] NDP Submission at paras. 21, 23; *see also* Eng. Tr. Day 2 at 375:22 – 376:11; 377:7-10 (U.S. Statement).
[541] NDP Submission at para. 28 (emphasis added); *see also* Tr. Day 2 at 378:20 – 379:4 (U.S. Statement).

administration of justice" required to find denial of justice.[542]

302. Even if the Tribunal were to find that CIL includes the protections Claimant hopes to find there (it should not), Claimant's claims would still fail as explained in Sections VI-VIII.

XI. DAMAGES

303. The hearing confirmed that, even if the Tribunal were to decide that it has jurisdiction to hear all of Claimant's claims and that Respondent breached the BIT or the SA (it should not), the Tribunal must reject Claimant's significantly inflated damages calculations. Those calculations suffer from numerous defects, the most significant of which are depicted in the following chart from the second expert report of Respondent's damages expert, Ms. Isabel Kunsman,[543] and are expanded upon below.

USD Million, %		Main Claim	Alternative Claim
Compass Lexecon's Updated Calculation	**Damages**	**942.4**	**719.9**
A. "Mitigation of Penalties & Interest"	**Damages**	**357.5**	**198.6**
	Change in Damages	(584.9)	(521.3)
	% Change	-62.1%	-72.4%
B. "Taxes Not Allowed for Damages Under the Treaty"	**Damages**	**569.5**	**461.3**
	Change in Damages	(372.9)	(258.6)
	% Change	-39.6%	-35.9%
C. "But-for Cash Flows Distributed at Valuation Date"	**Damages**	**828.2**	**636.6**
	Change in Damages	(114.2)	(83.4)
	% Change	-12.1%	-11.6%

304. *First*, Claimant's damages claims disregard SMCV's failure to mitigate more than one half of its damages by well-known, readily available, and entirely reasonable means. After SMCV received its first Royalty Assessment and first Tax Assessment for each type of tax that applied to the Concentrator (if not before), SMCV was fully on notice of SUNAT's position that the SA did not apply to the Concentrator.[544] As of those dates (at the latest), SMCV could and should have taken the following steps to stop incurring additional penalties and interest: (i) paid its outstanding obligations, under protest, to keep additional penalties and interest from accruing; and (ii) timely filed its future returns, under protest, according to SUNAT's position.[545] Importantly, SMCV knew very well how to, and did, make these same kinds of mitigating payments under protest for some of its tax obligations,[546] a fact that Claimant's damages expert Dr. Pablo Spiller acknowledged at the hearing.[547] Nonetheless, SMCV's management freely chose

[542] NDP Submission at para. 24.
[543] *See* Ex. RER-10, Second AlixPartners Report at Table 8.
[544] *See* Ex. RER-10, Second AlixPartners Report at para. 43.
[545] *See* Respondent's Rejoinder at para. 1052.
[546] *See* Ex. CD-1, Claimant's Opening Presentation at slide 295.
[547] *See* Eng. Tr. Day 9 at 2812:6 – 2812:19 (Spiller).

not to mitigate US $572.2 million in penalties and interest.[548] Indeed, when asked at the hearing whether SMCV chose not to avoid penalties and statutory interest, Dr. Spiller responded "[r]ight."[549] (He later attempted, through speculation, to walk back that concession with respect to penalties, but not statutory interest.)[550]

305. *Second*, Claimant incorrectly assumes that penalties and interest charged on tax assessments can breach Article 10.5 of the TPA. As Respondent established in its pleadings and again at the hearing, tax-related penalties and interest are taxation measures under Article 22.3.1 of the TPA.[551] This understanding is consistent with that of the U.S. government regarding the meaning of Article 22.3.1, as discussed in its NDP Submission.[552] Thus, tax-related penalties and interest are carved out from the scope of Article 10.5 of the TPA. Nonetheless, Claimant assumes that precisely these penalties and interest breached Article 10.5 and resulted in corresponding damages. At the hearing, Mr. Spiller acknowledged (i) that Compass Lexecon did not present calculations for a scenario in which tax-related penalties and interest did not breach Article 10.5 of the TPA;[553] and (ii) that whether Claimant can claim that tax-related penalties and interest breached Article 10.5 of the TPA is a "jurisdictional issue."[554]

306. *Third*, Claimant assumes, without support, that SMCV would have distributed 100% of the disputed payments as dividends at SMCV's next-actual dividend distribution dates. For this assumption, Compass Lexecon relied primarily on SMCV's distribution history, which Compass Lexecon contends shows "a well-established practice of distributing available cash holdings as dividends."[555] Under cross-examination, however, Ms. Carla Chavich, Claimant's other damages expert, revealed that this interpretation of SMCV's distribution history was inaccurate:

> Q: Right. In fact, the Company had more cash than it distributed; correct? So, it did not distribute all of its available cash during that time period?
>
> A: Correct. They distributed what is excess cash, correct.[556]

[548] *See* Ex. CD-10, Spiller and Chavich Hearing Presentation at slide 15 (Kunsman's Avoidable Penalties and Interest).
[549] Eng. Tr. Day 9 at 2815:8-13 (Spiller).
[550] *See* Eng. Tr. Day 9 at 2816:11 – 2817:7 (Spiller).
[551] *See* Respondent's Counter-Memorial at 811; Respondent's Rejoinder at para. 1063; Respondent's Opening Statement at slide 167; Respondent's Closing Statement at slide 83.
[552] *See* NDP Submission at para. 32.
[553] *See* Eng. Tr. Day 9 at 2790:7-16 (Spiller).
[554] Eng. Tr. Day 9 at 2790:1-6 (Spiller).
[555] *See* Ex. CER-6, Second Compass Lexecon Report at para. 37 (emphasis added).
[556] Eng. Tr. Day 9 at 2805:12-17 (Chavich).

307. Given that SMCV did not, in fact, distribute all available cash as dividends on its actual distribution dates, it is unreasonable to assume that SMCV would have automatically distributed all additional available cash (*i.e.*, the amount of the disputed payments) as dividends on those dates. Instead, because SMCV exhibited no consistent dividend distribution pattern, and because Claimant provided no SMCV documents containing affirmative guidance about when SMCV should distribute dividends, it is more reasonable to make Ms. Kunsman's alternative, more conservative assumption that SMCV would have distributed the disputed payments at a later date (for convenience, she used Compass Lexecon's assumed date for the award).[557]

308. *Finally*, even if SMCV would have distributed the disputed payments on SMCV's next-actual distribution dates (which cannot be assumed), Claimant proposes a non-market, company-specific, and remarkably high pre-award interest rate—SMCV's cost of equity—that ignores the TPA's mandate to use a "commercially reasonable rate."[558] As Ms. Kunsman explained in her second expert report, a commercially reasonable rate is a short-term rate that is accessible to all market participants, such as the rate on a one-year U.S. Treasury Bill, plus two percentage points.[559] As shown in the table below, in each of the years from 2018 to 2021, SMCV's cost of equity exceeded that rate by at least three percentage points.[560]

%	2018	2019	2020	2021
Compass Lexecon Cost of Equity	8.6%	7.9%	7.9%	7.9%
1-Year US T-Bill + 2%	4.4%	4.0%	2.4%	2.1%

309. Confronted with the significant difference in these rates at the hearing, Dr. Spiller questioned whether the TPA's mandate to use a commercially reasonable rate applied to calculating pre-award interest[561]—contradicting his own and Claimant's assertions in their written submissions that SMCV's cost of equity could be called a commercially reasonable rate.[562]

XII. REQUEST FOR RELIEF

310. For the foregoing reasons, and those stated in Respondent's written submissions and at the hearing, Respondent respectfully requests that the Tribunal find that it has no jurisdiction over Claimant's claims or, in the alternative, that Claimant's claims have no merit, and award Respondent the costs and fees, including attorneys' fees, that it has incurred in this arbitration.

[557] *See* Ex. RD-6, Kunsman Hearing Presentation at slide 11; Ex. RER-10, Second Compass Lexecon Report at para. 71.
[558] Ex. CA-10, U.S.-Perú TPA at Art. 10.7.3.
[559] Ex. RER-10, Second AlixPartners Report at para. 95.
[560] Ex. RER-5, First AlixPartners Report at Table 13 (using one-year U.S. Treasury rates).
[561] *See* Eng. Tr. Day 9 at 2826:7 – 2827:17 (Spiller).
[562] *See* Ex. CER-6, Second Compass Lexecon Report at para. 59; Claimant's Reply at paras. 302-03.

Respectfully submitted,

Stanimir A. Alexandrov
Stanimir A. Alexandrov PLLC

Jennifer Haworth McCandless
Marinn Carlson
María Carolina Durán
Sidley Austin LLP

Counsel for Respondent