

BEFORE THE INTERNATIONAL CENTRE FOR THE SETTLEMENT
OF INVESTMENT DISPUTES

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In the Matter of Arbitration between: :
:
FREEPORT-MCMORAN INC., :
:
: Claimant, : Case No.
: ARB/20/8
v. :
:
REPUBLIC of PERÚ, :
:
: Respondent. :
:
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HEARING ON JURISDICTION, MERITS, AND QUANTUM

Thursday, May 11, 2023

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

The Hearing in the above-entitled matter
came on at 9:27 a.m. before:

MS. INKA HANEFELD
President of the Tribunal

MR. GUIDO SANTIAGO TAWIL
Co-Arbitrator

MR. BERNARDO M. CREMADES
Co-Arbitrator

ALSO PRESENT:

On behalf of ICSID:

MS. MARISA PLANELLS VALERO
ICSID Secretariat

MS. CHARLOTTE MATTHEWS
Assistant to the Tribunal

Realtime Stenographers:

MS. DAWN K. LARSON
Registered Diplomat Reporters (RDR)
Certified Realtime Reporters (CRR)
B&B Reporters/Worldwide Reporting, LLP
529 14th Street, S.E.
Washington, D.C. 20003
United States of America

SR. LEANDRO IEZZI
D.R. Esteno
Colombres 566
Buenos Aires 1218ABE
Argentina
(5411) 4957-0083

Interpreters:

MR. CHARLES ROBERTS

MS. SILVIA COLLA

MR. DANIEL GIGLIO

APPEARANCES:

On behalf of the Claimant:

MR. DIETMAR W. PRAGER
MS. LAURA SINISTERRA
MR. NAWI UKABIALA
MR. JULIO RIVERA RIOS
MR. SEBASTIAN DUTZ
MR. FEDERICO FRAGACHÁN
MS. MICHELLE HUANG
MS. ASTRID MEDIANERO BOTTGER
MS. LUCIA RODRIGO
MR. PEDRO FERRO
MS. MARY GRACE MCEVOY
MR. REGGIE CEDENO
MR. THOMAS MCINTYRE
MR. ORRIN CASE
MR. GREGORY A. SENN
MR. CHRISTOPHER V. TRAN
Debevoise & Plimpton LLP
66 Hudson Boulevard
New York, New York 10001
United States of America

MR. LUIS CARLOS RODRIGO PRADO
MR. FRANCISCO CARDENAS PANTOJA
MR. LOURDES CASTILLO CRISOSTOMO
MR. JOSÉ GOVEA
MR. ALEJANDRO TAFUR
Rodrigo, Elias & Medrano
Av. Pardo y Aliaga 652
San Isidro 15073
Perú

Party Representatives:

MR. DAN KRAVETS
MR. SCOTT STATHAM
Freeport-McMoRan Inc.

MS. PATRICIA B. QUIROZ PACHECO
Sociedad Minera Cerro Verde S.A.A.

APPEARANCES: (Continued)

On behalf of the Respondent:

MR. STANIMIR A. ALEXANDROV
Stanimir A. Alexandrov, PLLC
1501 K Street, N.W.
Suite C-072
Washington, D.C. 20005
United States of America

MS. JENNIFER HAWORTH McCANDLESS
MS. MARINN CARLSON
MS. MARÍA CAROLINA DURÁN
MS. COURTNEY HIKAWA
MS. ANA MARTÍNEZ VALLS
MS. VERONICA RESTREPO
MS. ANGELA TING
MR. NICK WIGGINS
MS. NATALIA ZULETA
MR. GAVIN CUNNINGHAM
MR. KEVIN DUGAN
MS. ARA LEE
MS. SADIE CLAFLIN
MR. NOAH GOLDBERG
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
United States of America

MR. RICARDO PUCCIO
MR. OSWALDO LOZANO
MS. SHARON FERNANDEZ TORRES
MS. ANDREA NAVEA SÁNCHEZ
MR. RENZO ESTEBAN LAVADO
Navarro & Pazos Abogados SAC
Av del Parque 195
San Isidro 15047
Lima
Perú

APPEARANCES (Continued)

Party Representatives:

MS. VANESSA DEL CARMEN RIVAS PLATA
SALDARRIAGA

MR. MIJAIL FELICIANO CIENFUEGOS FALCON
Ministry of Economy and Finance

MR. EDMÓSTINES MONTOYA JARA
SUNAT, Republic of Perú

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P R O C E E D I N G S

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2 LUIS HERNÁNDEZ BERENGUEL, CLAIMANT'S WITNESS, CALLED

3 PRESIDENT HANEFELD: Good morning. Welcome
4 to Day 9 of our Hearing.

5 As tomorrow is already the final day, the
6 Tribunal discussed yesterday evening about the
7 post-Hearing steps, and we would kindly invite the
8 Parties to consult with each other and inform us
9 tomorrow after the Closing Statements whether they
10 have any joint ideas on the following aspects: First
11 one, the finalization of the Transcript; second, the
12 timing, number, sequence, content, possible page
13 limits for the Post-Hearing Briefs; and then as the
14 next item, the Cost submissions also here, number,
15 sequence, timing, and content.

16 So, if the Parties can inform us tomorrow
17 about their ideas, this would be appreciated, and we
18 will then move it from there.

19 Are there any other housekeeping matters the
20 Parties wish to address?

21 MR. PRAGER: Good morning, Members of the
22 Tribunal.

1 We will have those conferrals regarding the
2 next procedural steps. Regarding today, you will
3 remember that you instructed the Parties to reach an
4 agreement on how to ensure that we finish the day
5 timely. We agreed that each Party would have
6 three hours today, which is less than the remaining
7 allocated time, which I think--I don't have the exact
8 number in front of me. I think it was in excess
9 of--yeah, it was about five--over five hours, so we
10 reduced the time.

11 We think that it's workable, even if we were
12 to finish at 5:30. We would proposes, if the Tribunal
13 were agreeable to that, to reduce the lunch break to
14 30 minutes, and also make the coffee breaks shorter,
15 with our apologies, but we are in your hands,
16 obviously.

17 The position that we as Claimant have is
18 there's enough--there should be enough room to finish
19 at 5:30, but if, for whatever reason, we could not
20 finish our three hours, we don't want sort of to be
21 told at 5:30 that we have to stop the
22 cross-examination because it's 5:30. It probably

1 would, under those circumstances, only last, like,
2 five or 10 minutes longer, but I think each Party
3 should have those three hours that are allocated.

4 That's our position.

5 PRESIDENT HANEFELD: Does the Respondent
6 wish to comment, or can we just take note?

7 MS. CARLSON: Just to confirm, I believe
8 that the Parties have discussed this; I think the
9 three hours for each side is ambitious, but doable, if
10 we are all conscientious and try to make sure that we
11 move the calendar along, including with the shorter
12 breaks that Counsel for Claimant has identified.
13 Obviously, we will operate in a rule of reason. We
14 may reassess at the lunch break, if need be.

15 We're just trying to ensure that the Parties
16 are not--and the Tribunal, are not eating into their
17 own preparation times for the Closing by running late
18 tonight.

19 So, again, we think it's doable with
20 conscientious effort on all sides.

21 PRESIDENT HANEFELD: This is noted, and we
22 will then reduce the lunch to 30 minutes and the

1 coffee breaks to 10 minutes each, and we will also try
2 to be efficient with our questions, and now maybe we
3 even start questioning the Peruvian Tax Expert with a
4 couple of questions, and so--okay. Let's move it from
5 there.

6 (Comments off microphone.)

7 PRESIDENT HANEFELD: Okay. I think then we
8 can call in the Expert for Claimant.

9 MS. SINISTERRA: He will be in momentarily.
10 Thank you, Madam President.

11 (Pause.)

12 MS. SINISTERRA: Madam President, just
13 before the Expert begins, I want to note briefly that
14 he will discuss at some point protected information,
15 just so Marisa can take that into account for purposes
16 of the video recording.

17 PRESIDENT HANEFELD: Good morning,
18 Mr. Hernández. Can you hear us well?

19 Welcome to this Hearing. I briefly
20 introduce ourselves. My name is Inka Hanefeld. I'm
21 the presiding arbitrator in this case. I'm sitting
22 here with my co-arbitrators, Professor Tawil and

1 Dr. Cremades.

2 You have been called by Claimant as the
3 Peruvian Tax Law Expert, and I kindly request you to
4 read out the Declaration that should be in front of
5 you.

6 THE WITNESS: Expert Declaration: I
7 solemnly declare, upon my honor and conscience, that
8 my statement will be in accordance with my sincere
9 belief.

10 PRESIDENT HANEFELD: Thank you. Do you have
11 your Expert Reports, CER-3, 8, and 13, in front of
12 you?

13 THE WITNESS: I do have three, but I do not
14 see the number of the document. But I have my three
15 Reports: The Expert Report, the Rejoinder Report and
16 the "Informe Pericial."

17 PRESIDENT HANEFELD: So, these are your
18 three Reports, and you can confirm that these are
19 yours?

20 THE WITNESS: Pardon?

21 PRESIDENT HANEFELD: So, you have your three
22 Reports in front of you?

1 THE WITNESS: Yes. I'm looking at them.

2 Yes, indeed, these are my Reports.

3 PRESIDENT HANEFELD: Perfect. And I
4 understand that you will now give us a presentation,
5 and afterwards you will receive questions from the
6 Parties and the Tribunal, so please start with your
7 presentation.

8 DIRECT PRESENTATION

9 THE WITNESS: Good morning, Members of the
10 Tribunal. It is a pleasure to be here before you. My
11 name is Luis Hernández Berenguel, and I have been
12 called by Freeport as an Expert on Tax Law. That's my
13 specialty.

14 I am a lawyer with over 50 years, in fact,
15 over 52 years of experience in tax and corporate
16 matters. 30 years ago I founded the law firm called
17 Hernández y Compañía, where I currently work still. I
18 have been a professor of tax law at the Pontificia
19 Universidad Católica del Perú, the oldest university
20 that is private in Perú, and I've done that for
21 46 years.

22 During all my career, I have provided advice

1 to hundreds of companies on tax matters. I've also
2 participated in the drafting of draft laws or bills.
3 I have been the person in charge, primarily, of
4 preparing the Single Unified Text of 1982. I also was
5 part of the committee in charge of preparing
6 regulatory tax rules for the Mining Law in 1993.

7 In my presentation, I'm going to touch on
8 five topics specifically.

9 First, Cerro Verde incurred a loss only when
10 each Assessment became final and enforceable.

11 Two, Cerro Verde suffered a separate loss
12 with each final and enforceable Assessment.

13 Three, failure to waive Penalties and
14 Interest is not a taxation measure under Peruvian law.

15 Four, the Government should have waived
16 Penalties and Interest to Cerro Verde because there
17 was a reasonable doubt.

18 Five, SUNAT applied the Stability Guarantees
19 to the entire Economic-Administrative Units, UEAs, of
20 Yanacocha.

21 I'm going to talk about the first topic:
22 Cerro Verde suffered a damage only when each

1 Assessment became final and enforceable.

2 The assessment is only enforceable when it
3 becomes final. An assessment is also known as a
4 "assessment resolution or penalty resolution,"
5 according to the case, is only enforceable--that is to
6 say, is only coercively collectable--when it becomes
7 final. In Peruvian Law, an assessment becomes final
8 when it is not challenged by the taxpayer or, if
9 challenged, the SUNAT or the Tax Tribunal dismisses
10 the challenge.

11 And finally, it becomes--forgive the
12 redundancy--final when it was challenged and appealed
13 and the Tax Tribunal decides against the taxpayer.
14 The fact that the assessment is unenforceable until it
15 becomes final ensures that the Government does not
16 coercively collect the assessed amount while the
17 taxpayer challenges its legality. This is a
18 fundamental right in the Peruvian system.

19 Only when an assessment becomes final, the
20 amount assessed by SUNAT becomes "enforceable debt,"
21 and the taxpayer payment obligation arises. Before
22 the assessment becomes final, there is no payment

1 obligation. The debtor does not have to pay anything
2 and the creditor cannot request payment. Only when
3 the assessment becomes final, the amount assessed by
4 SUNAT becomes "enforceable debt," and the taxpayer's
5 payment obligation arises. When the debt becomes due,
6 SUNAT may coercively collect on the debt--that is to
7 say, enforce the assessment--if the taxpayer refuses
8 to pay it.

9 Article 115 of the Tax Code is the key
10 provision on this matter. The article establishes
11 when the assessment becomes enforceable. That is the
12 difference between the Peruvian system and other
13 systems. In the Peruvian system, the assessment
14 becomes enforceable only when we are dealing with the
15 provisions of Article 115 of the Tax Code. This
16 Article 115, says that: Only the enforceable debt is
17 due when it is established in a final assessment. And,
18 therefore, is enforceable at that time.

19 Here we see the provisions of Article 115 of
20 the Tax Code, and it says that: "An enforceable debt
21 will give rise to coercive actions for its collection.
22 To this end, the following are considered to be

1 enforceable debts:" a) A debt created by means of an
2 assessment resolution or penalty resolution that is
3 not claimed against within the legal deadline; c) the
4 one established under resolution that is not
5 challenged during the legal deadline or the one
6 established by resolution of the Tax Tribunal.

7 Perú's position is incorrect--I'm sorry, I
8 think I skipped one.

9 Cerro Verde suffered a damage only when each
10 assessment became final and enforceable. Then, and
11 only then, did the assessed amount become enforceable,
12 because it was determined with certainty, the payment
13 obligation arose, and, therefore, SUNAT could have
14 enforced the assessment if Cerro Verde refused to pay
15 it. Cerro Verde could not have suffered any damage
16 before the assessment became final because the
17 assessed debt was not enforceable and, therefore,
18 there was no obligation to pay.

19 The position of Perú is incorrect. Cerro
20 Verde, as we saw, could not have suffered a damage
21 when SUNAT notified each assessment because, as we
22 saw, the assessment was not yet final, and

1 consequently the amount of the assessment was not
2 enforceable debt. Cerro Verde had no obligation to
3 pay and SUNAT could not coercively collect on the
4 assessed amount.

5 The arguments by Perú do not support Perú's
6 position. Perú alleges that the prepayments and the
7 accrual of interest support its position, but Perú is
8 wrong. Prepaying an assessment is simply a taxpayer
9 right. It's not an obligation.

10 Also, the obligation hadn't yet arisen.
11 Interest accrues from the deadline for filing the tax
12 return, and not from the notification of the
13 assessment, as Perú's Experts say.

14 You can see here there is a timeline, and
15 according to Perú's position, interest began accruing
16 from the notice of the assessment. This has no
17 support in any legal provision whatsoever.

18 At any rate, if it were consistent, Perú's
19 position should have been that interest begins
20 accruing from the tax return filing that should have
21 been filed.

22 The second issue is that Cerro Verde

1 suffered a separate loss with each final and
2 enforceable assessment.

3 Each assessment is a unique and separate
4 administrative act. SUNAT conducted separate audits
5 for each fiscal period, and, as a result of these
6 audits, issued separate Assessments for Royalties, for
7 each type of tax, and for Penalties, for each tax
8 period. Each Assessment was based on different
9 accounting records, different purchases, sales of
10 assets, depreciation, and sales of mineral, and each
11 assessment resulted in different amounts.

12 Cerro Verde had to challenge each Assessment
13 independently before SUNAT and the Tax Tribunal. None
14 of SUNAT's Assessments or the Tax Tribunal's
15 Resolutions had binding effects on subsequent
16 Assessments, the ones that came after. SUNAT and the
17 Tax Tribunal had to decide on each of Cerro Verde's
18 challenges independently without being bound by their
19 prior decisions.

20 One could say, "Okay, the taxpayer is right
21 in Assessment 1, but in Assessment 2, on the basis of
22 the same tax or royalty for a different period, then

1 the decision could have been in a different way."

2 SUNAT and the Tax Tribunal never indicated that they
3 were bound to adopt the criterion of the first
4 Assessment in resolving Cerro Verde's challenges to
5 the subsequent Assessments.

6 After the 2006-2007 Royalty Assessments,
7 SUNAT applied Stability Guarantees to the entire EAUs.
8 SUNAT issued a Report in 2012, Report No. 084 of 2012,
9 in which it clearly stated, without any doubt
10 whatsoever, and it expressly said so, that the
11 Stability Guarantees applied to Concessions and EAUs.
12 It did not say that it applied only to Investment
13 Projects approved or included in the stability
14 agreement. It expressly indicated that the stability
15 agreements applied to Concessions and EAUs.

16 SUNAT and the Tax Tribunal had issued
17 Resolutions in other cases--Milpo, Yanacocha, and
18 Tintaya--in which they clearly applied Stability
19 Guarantees to the entire Concession and EAUs, unlike
20 what SUNAT did with Cerro Verde.

21 Let us look at a practical example. A
22 person signs a loan agreement with a bank without an

1 acceleration clause, and the person has to pay the
2 amount loaned in different installments and under
3 different deadlines. The fact that there is a breach
4 and there is nonpayment of one installment and the
5 creditor can enforce payment, that does not mean,
6 because there is no Acceleration Clause, that the
7 creditor is going to sue them for payments for the
8 other installments that are not yet due.

9 This debtor then does not pay the second
10 installment and is therefore sued, but pays, the third
11 and the fourth, and suddenly stops paying the fifth.
12 Then, the creditor can sue the debtor again, but for
13 the non-payment of the fifth installment.

14 So, this is the same that happens in tax
15 matters. In tax matters, SUNAT can issue assessments
16 on the same matter for different periods, and each
17 assessment is different. And SUNAT and the Tax
18 Tribunal, as I was saying, have the duty to look at
19 each assessment and to decide on each assessment and,
20 in practice, perhaps different positions may be taken
21 in connection with one assessment vis-à-vis another
22 assessment.

1 The third issue. The failure to waive
2 Penalties and Interest is not a taxation measure under
3 Peruvian law.

4 I understand that the phrase "taxation
5 measure" is a technical term under the Treaty, but not
6 from a Peruvian law perspective. In Peruvian law,
7 there is no definition of "taxation measure." There
8 is no provision that contains that definition.

9 What is absolutely clear and undisputed is
10 that Penalties and Interest are not taxes and they are
11 fundamentally different in their nature and purpose.
12 Taxes are the result of the power that the State has
13 to impose levies, and when exercising that power, the
14 State obtain revenues and can meet public needs and
15 provide public services. Penalties are sanctions.
16 They are punishments to those that break the law, and,
17 at the same time, serve to discourage people from
18 committing those infractions in the future.

19 But all of the scholastic definitions of
20 tax, without exception, and, in the Peruvian system,
21 the Constitutional Tribunal and the Tax Tribunal, have
22 clearly said that a penalty is not a tax because a tax

1 can never be a sanction.

2 Interest, of course, has to do with the
3 right that the State has to receive compensation for
4 having failed to obtain opportune payment of the taxes
5 that should have been paid. So, Penalties and
6 Interest, well, they are not taxes.

7 Article 28 of the Tax Code defines, however,
8 "tax debt," but it does so only as a legislative
9 technique.

10 Article 28 of the Code has this idea of "tax
11 debt" that includes Penalties and Interest only as a
12 legislative technique. This does not change the
13 nature of each one of these concepts. We have
14 Penalties, on one side, Interest, on another side, and
15 taxes, on another side. Because of legislative
16 technique and because SUNAT has the authority on
17 Royalties and GEM, Peruvian legislation has classed
18 Royalties and GEM as tax debts, but it is obvious that
19 they are not that.

20 Royalties are original revenue of the State.
21 The State collects money because natural resources are
22 going to be extracted from the soil, and these are

1 finite, and there is, of course, consideration. There
2 is consideration because the State is giving up a
3 portion of its assets to a third party under a
4 concession to exploit it, and then the State collects
5 this consideration. It is an original revenue. It is
6 not a derivative revenue, like taxes.

7 Nobody argues, and Perú agrees with that,
8 that Royalties and GEM are not taxes. But because of
9 the legislative technique and because the
10 administration of these concepts and their collection
11 is in the hands of SUNAT, well, they are included in
12 this concept of "tax debt," but this does not mean
13 that Royalties are taxes and that GEM is a tax.

14 It would be repetitive and inefficient to
15 mention Tax, Royalties, GEM, Penalties, and Interest.
16 The Tax Code mentions "tax debt" 124 times. Without
17 this concept, they would have had to say 124 times,
18 "Tax, Royalties, GEM, Penalties" and in the case of
19 the Tax Code "Tax, Penalties and Interest." And it is
20 simply a legislative technique that has been used to,
21 amongst other things, avoid repetition of concepts
22 such as Tax, Penalties, and Interest. So, what they

1 did is they grouped these concepts together under this
2 legal fiction of tax debt, to simplify procedures as
3 well, so that different procedures are not regulated
4 separately in connection with Taxes or Penalties.

5 This is, as I mentioned, only a legislative technique
6 issue.

7 Although these concepts of Penalties and
8 Interest are not taxes--they are not tax measures
9 under Peruvian law--evidently this term "tax debt" is
10 simply a shorthand for various concepts related to
11 SUNAT's authority. Although the concepts of Penalties
12 and Interest follow similar procedures in terms of
13 their administration, payment, and challenge, they are
14 not considered taxes, let alone taxation measures,
15 under Peruvian law.

16 Fourth topic. The Government should have
17 waived Penalties and Interest charges against Cerro
18 Verde because there was a reasonable doubt.

19 Article 83 of the General Mining Law and
20 Article 22 of its Regulation, I believe, were clear,
21 absolutely clear, but, at the very least, there was a
22 reasonable doubt.

1 My opinion is that Article 83 of the General
2 Mining Law and Article 22 of its Regulation were
3 clear. I think that they clearly established--you
4 simply have to read them--that the mining stability
5 agreements covered the whole of the EAUs. However,
6 even so, at the very least there was reasonable doubt
7 about their correct interpretation.

8 When there is reasonable doubt, the
9 taxpayers have the right to a waiver of Penalties and
10 Interest, this under (g) of Article 92 of the Tax
11 Code, according to which, if reasonable doubt exists
12 regarding the interpretation of a provision, taxpayers
13 have the right to a waiver of Penalties and Interest.

14 The purpose of the provision is to avoid
15 punishing the taxpayer for reasons fully attributable
16 to the Government because it issued an imprecise
17 provision and, therefore, there is more than one
18 reasonable interpretation of it. Perhaps the one that
19 the taxpayer applies is not the final one. So, if is
20 not the final one, the taxpayer cannot be imposed
21 Penalties or Interest because it acted under a
22 reasonable interpretation of an imprecise provision

1 passed by the Government. So, when the provision is
2 imprecise, the Government has the duty and the
3 obligation to clarify it.

4 What is important is that the provisions
5 are--even more, in connection with tax matters there
6 is the principle of certainty--what should not be is
7 that the taxpayer acts in a wrong manner because of
8 the imprecision of the provision. And, because, this
9 guarantees predictability or ensures avoiding
10 unnecessary challenges. So, the Government has the
11 obligation to issue the rule that clarifies the
12 imprecise provision.

13 Article 170 of the Tax Code is a peremptory
14 norm, and therefore the Government has the obligation
15 to issue a clarification rule when it determines that,
16 based on verifiable facts, based on facts that
17 determine that there is an imprecise rule and,
18 therefore, that doubt exists. So, the Government has
19 an obligation to issue a clarifying rule.

20 When Article 170 uses the term "may," it
21 simply does so to say that there are a number of
22 alternatives for the clarification rule to be issued.

1 One alternative is a law, and the other one is a
2 supreme decree, obviously when there is law or a
3 supreme decree there is no taxpayer who asks for it.
4 The Government simply says: "Okay, this law is
5 imprecise, and I'm going to pass another Law to
6 clarify it or a Supreme Decree to do so."

7 In other cases, the alternative is the
8 Resolution by SUNAT or the Tax Tribunal. In the case
9 of the Tax Tribunal, the Tax Code is allowing for it
10 to issue a clarifying rule, and the only way to do so
11 is through a Resolution on a specific case.

12 The Tax Tribunal doesn't issue norms with a
13 general scope. The Resolutions that the Tax Tribunal
14 issues are those that are heard by the Tribunal on
15 appeal. And in that case, the Tax Tribunal applies,
16 and has applied in countless opportunities,
17 Articles 127 and 129 of the Tax Code that allow it to
18 expressly rule on matters, although those matters were
19 not raised by the taxpayers.

20 So, this "may" only refers to the
21 alternatives for that clarifying rule to be issued.
22 The reasonable doubt exists from the moment that the

1 provision is not precise, and if that is the case, the
2 Government has to recognize it immediately and issue a
3 clarifying rule. It cannot refuse to issue a
4 clarifying rule; otherwise, the provision of
5 Article 170 would just be paying homage to the flag,
6 as we say it in our country. It would mean it
7 wouldn't have the purpose it's supposed to have.

8 So, here are some facts, several facts, even
9 7 facts, and more facts within those 7, that show
10 that, objectively, there is reasonable doubt. They
11 show that Article 22 of the Regulations and also
12 Article 83 of the General Mining Law were imprecise,
13 were inaccurate, at a minimum.

14 Finally, I will discuss Item 5: SUNAT
15 applied the Stability Guarantees to all of Yanacocha's
16 [REDACTED]. Recently I have received some Resolutions that
17 Debevoise and Rodrigo's law firms received from Milpo,
18 Yanacocha, and Tintaya, and all of them clearly show
19 that SUNAT acted contrary to what they applied to
20 Cerro Verde.

21 In all the cases, stability was applied to
22 all of the EAUs at Milpo, Yanacocha, and Tintaya. And

1 even if there were investments after the execution of
2 the Feasibility Study, and that according to SUNAT's
3 position as applied to Cerro Verde's case they should
4 have been considered as not stabilized, [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED].

8 If the Tax Administration had acted the same
9 way they did with Cerro Verde, they should have
10 reflected in their Assessment Resolution two different
11 results in each EAU, one showing the stabilized result
12 and a different one for the items that were not
13 stabilized. All of these Resolutions show that there
14 was only one result per concession.

15 In the case of Yanacocha, we have four
16 Concessions, each with a stability agreement. We have
17 the very first Economic-Administrative Unit,
18 Chaupiloma South; second one, Chaupiloma North; then
19 Chaupiloma 12; the third one, Carachugo South; and the
20 fourth one, La Quinoa.

21 For each of those Agreements, Yanacocha--
22 rather, for each of those EAUs, Yanacocha entered into

1 a stability agreement, and all of those Agreements had
2 a 15-year duration.

3 SUNAT applied to each stability
4 agreement--applied a stability agreement to each of
5 [REDACTED]. For example, in a Resolution of December
6 2008 of tax years 2002 and 2003, we clearly see how
7 SUNAT considered that each of the stability agreements
8 applied to the entirety of [REDACTED].

9 There you see--there you see to the left the
10 EAUs, [REDACTED]
11 [REDACTED]. And we
12 see how SUNAT considered each of the--that each of the
13 stability agreements applied to [REDACTED]. They did
14 not discriminate.

15 SUNAT expressly stated that each stability
16 agreement at Yanacocha applied to [REDACTED]. When
17 assessing for the prepayments of 2002 Income Tax,
18 SUNAT expressly indicated that prepayments had to be
19 calculated separately for each of the EAUs that had a
20 stability--tax stability agreement signed, and they
21 cited as legal basis Article 72 and Article 82 of the
22 General Mining Law, Article 22 of the Regulations, and

1 the Stability Agreement for the "[REDACTED]."
2 And so, it is almost impossible to get any clearer,
3 here SUNAT acted differently in one case with Cerro
4 Verde and in an absolutely contrary way in the other
5 cases.

6 SUNAT, indeed, determined the prepayments
7 for [REDACTED]. If you look at the chart, you
8 will see the [REDACTED] that are identified with
9 [REDACTED] [REDACTED]
10 [REDACTED].

11 SUNAT had determined the results for each
12 [REDACTED], and they also used for
13 those prepayments the coefficient for each of the [REDACTED]
14 [REDACTED], for each of the [REDACTED], if SUNAT had
15 acted the same way they did with Cerro Verde, there
16 would be two results with Carachugo, two with Maqui
17 Maqui, two with Cerro Yanacocha and two with La
18 Quinoa, because--

19 (Overlapping interpretation and speakers.)

20 MS. HIKAWA: It has been over 30 minutes
21 now.

22 MS. SINISTERRA: Madam President, we granted

1 the courtesy of an additional minute to both
2 Mr. Sarmiento and Mr. Ralbovsky. He has two slides
3 left. We ask for the same courtesy.

4 MS. HIKAWA: It's been 31 minutes.

5 MS. SINISTERRA: It's been 30 minutes.

6 PRESIDENT HANEFELD: So, we are not going to
7 waste time with discussing about minutes, please.

8 If you come to the end at some point.

9 THE WITNESS: Yes. I am getting to the end
10 of my presentation.

11 All in all, we see in the chart that, if
12 SUNAT had acted as they did with Cerro Verde and they
13 had said the investment project, as included in the
14 Feasibility Study for each EAU, only stabilizes that,
15 and the rest, whatever happens with that EAU does
16 not--is not protected by the Agreement, they would
17 have needed to show two different results per EAU:
18 Loss or profit based on the stabilized portion and
19 loss or profit for the non-stabilized portion. Each
20 Concession would have shown two different results, and
21 we do not see that in Tintaya's Resolutions,
22 Yanacocha's Resolutions, or Milpo's Resolutions.

1 SUNAT--and, with this, I conclude; I am
2 close to finishing--SUNAT also applied the Stabilized
3 Regime to [REDACTED]
4 [REDACTED]
5 [REDACTED], in 2001, [REDACTED]
6 [REDACTED], Yanacocha
7 invested [REDACTED] in the purchase of fixed assets
8 not contemplated in the underlying Feasibility Study.

9 Then, based on the position applied to Cerro
10 Verde, they should have considered the [REDACTED]
11 as non-stabilized. And, then, in [REDACTED], where
12 the investment took place, they should have reflected
13 two different results, because, if there are non-
14 stabilized operations within a Concession, it means
15 that, in connection with that Concession, there should
16 be two different accountings and results, and,
17 therefore, they would have had to show those
18 [REDACTED], if you will, as "[REDACTED] stabilized"
19 and "[REDACTED] not stabilized."

20 To conclude, SUNAT should have applied
21 Stability Guarantees to the Concentrator, or at the
22 very least, waived Penalties and Interest due to

1 reasonable doubt.

2 In conclusion, without a doubt, SUNAT
3 applied Stability Guarantees to Yanacocha's entire
4 [REDACTED], including to [REDACTED]. SUNAT and
5 the Tax Tribunal did the same for Milpo and Tintaya,
6 most recently in December 2022.

7 So, this is not something of one opportunity
8 where SUNAT acted in a different way.. SUNAT has been
9 acting differently between 2005 and 2022.

10 There are Tax Tribunal Resolutions where one
11 result per EAU is recognized. There are Resolutions
12 from 2022. SUNAT did not treat Cerro Verde in the same
13 way, excluding the Concentrator from the scope of the
14 Stability Agreement, despite it being part of its
15 single EAU.

16 Finally, SUNAT should have applied the
17 stabilized regime to the Concentrator, because
18 Article 83 of the General Mining Law and Article 22 of
19 the Regulation were clear. But, in the worst-case
20 scenario and at the very least, as I already
21 mentioned, it should have waived Penalties and
22 Interest due to reasonable doubt.

1 Thank you very much.

2 PRESIDENT HANEFELD: Many thanks for your
3 presentation, Mr. Hernández, and I take the
4 opportunity to ask some few questions, just in order
5 to get some concepts on the Peruvian tax law a little
6 bit clearer before we start with the cross.

7 MS. HIKAWA: Yes. I'm so sorry to
8 interrupt, but just before you move to your questions,
9 I want to note that in PO1 and PO4, it requires
10 demonstratives to have citations to references to the
11 sources of the information, and I didn't want to
12 interrupt the presentation, but the vast majority of
13 his slides do not, and no references to his Reports,
14 either.

15 PRESIDENT HANEFELD: We would kindly request
16 the Claimant to add in their references and resubmit.

17 MS. SINISTERRA: Absolutely, Madam
18 President. I believe it is only conclusion slides
19 that do not contain an exhibit, but we will
20 double-check, and, if needed--this is fully supported
21 by the record--we would be delighted to add additional
22 exhibit numbers to the presentation and recirculate.

1 PRESIDENT HANEFELD: I hope this solves the
2 problem.

3 MS. HIKAWA: Yes. Thank you.

4 PRESIDENT HANEFELD: Okay. Thank you.

5 QUESTIONS FROM THE TRIBUNAL

6 PRESIDENT HANEFELD: And when we ask
7 questions as the Tribunal, they are certainly without
8 prejudice to our Decision, whether we have
9 jurisdiction or not on certain aspects.

10 And so, I have one really important thing to
11 better understand, which concerns the question whether
12 Penalties or Interest constitute taxation measures.
13 This Penalties and Interest Claim is 662 million, so,
14 for us, it's really important to understand the
15 Peruvian law concept on these Penalties and Interest.

16 And I understand your colleagues, the
17 Respondent's Experts, Mr. Bravo and Mr. Picón, saying
18 in their Second Report, in Paragraphs 259 and 260,
19 that they say Penalties and Interest are clearly
20 taxation measures under the Peruvian Tax Code. They
21 quote there Article 28 of the Tax Code, which states
22 that: "Components of the tax debt are Tax, Penalties,

1 and Interest."

2 And I see now on your Slide 18 of today that
3 you say, no, there is no definition of taxation
4 measures, and this is more a legislative technique
5 rather than a qualification.

6 Can you please explain again now what you
7 mean with this "legislative technique" rather than
8 qualification of the nature?

9 THE WITNESS: Would you please show me the
10 text that you are citing from Bravo and Picón?

11 PRESIDENT HANEFELD: It's in their Second
12 Report, RER-8, and it's their Paragraphs 259 and 260.

13 THE WITNESS: I don't have it here with me.

14 PRESIDENT HANEFELD: The Parties will show
15 it on screen, and please in Spanish and English
16 language.

17 MS. HIKAWA: We can show it. If we can get
18 control of the screen, we can show the Reports.
19 Paragraphs 259, did you say, to 260?

20 PRESIDENT HANEFELD: 259 and 260. It's
21 Page 137 in the English version of the Second Report.

22 MS. SINISTERRA: I would propose that you

1 please show Paragraph 260, which contains the text of
2 Article 28 of the Tax Code.

3 MS. HIKAWA: We'll show what the President
4 requests.

5 MS. SINISTERRA: Just make sure to show both
6 paragraphs.

7 I think there's a problem because the
8 Spanish and the English don't match. So, if it's 259
9 and 260 in the English, then it appears to be 260 and
10 261 in the Spanish, which is what Mr. Hernández will
11 look at.

12 PRESIDENT HANEFELD: And please look at,
13 then, the Spanish version, 260 and 261, including the
14 Footnote. There was reference made to an
15 Exhibit RE-328, an MEF press release.

16 THE WITNESS: Pardon. The number is 261? It
17 is 261, from my perspective...

18 MS. SINISTERRA: Can you please show 260 of
19 the Spanish? They are showing you Article 28 of the
20 Tax Code, Mr. Hernández.

21 THE WITNESS: Yes. This is Article 28 of
22 the Tax Code, that simply says that the Tax Authority

1 shall require payment of the tax debt that consists of
2 the Tax, Penalties, and Interest. And then it
3 establishes that there is a statutory interest for
4 late payment of the tax to which Article 33 refers.
5 Second, the statutory interest applicable to Penalties
6 to which Article 181 refers, and interest for deferral
7 and installment of the payments as provided for in
8 Article 38.

9 In other words, as I already pointed out in
10 my presentation, Article 28 of the Tax Code simply and
11 plainly as a matter of legislative technique
12 fundamentally adopts a legal fiction, under which the
13 concept--under the term "debt"--under the expression
14 "tax debt" groups elements, or components, that
15 clearly do not all refer to the tax itself. It's
16 distinguishing between Tax, Penalty, and Interest, and
17 then it groups them together under the concept of "tax
18 debt." So, the goal here is to avoid that, in the Tax
19 Code, every time there is a reference to the three
20 concepts globally, it is not necessary to discriminate
21 and mention Tax, Penalties, and Interest.

22 As I said it, there were over 100

1 references so they just say "tax debt," to make the
2 taxpayer understand, or a third party understand, that
3 that includes Tax, Penalty, and Interest. But clearly
4 the penalty is not a tax. As I mentioned before and
5 repeat now, in all the definitions of tax, I have
6 never found anything that says that a tax can be a
7 penalty.

8 By definition, a tax could never be a
9 sanction. Therefore, the penalty can never be part of
10 the tax. And, on the other hand, it is completely
11 clear under the Peruvian system that the interest to
12 which the law refers, has a compensatory nature, that
13 is the way in which the State compensates itself for
14 not having obtained the tax payment in time. It
15 imposes this kind of compensation called statutory
16 interest.

17 So, again, this concept of "tax debt," I
18 would say, is a legal fiction, and it is used, among
19 other things, not to mention in procedures, for
20 example, whenever facilities are granted for the
21 payment of a debt. There is no need to refer Tax,
22 Penalties, and Interest, when, under this concept as

1 "tax debt," that listing can be avoided.

2 And on the other hand, undoubtedly, this
3 also avoids having to have different proceedings.

4 For example, in the case of Royalties that
5 are clearly not taxes, because they are not.--Taxes
6 are derived revenue. Within public resources, we have
7 two kinds of revenues: original revenues and derived
8 revenues. The derived revenues are the ones that the
9 State obtains by going to the pocket of the
10 individuals, taxes are in here; but original revenues
11 come from the wealth of the State, the assets of the
12 State, the State is the owner. For example, the State
13 has real estate. They sell that real estate to me. I
14 pay a price, and that is an original revenue, not a
15 tax. That's why Royalties are not taxes, as it is
16 clearly stated in the Constitutional Tribunal's
17 Resolution.

18 The Constitutional Tribunal has said that it
19 is a consideration and that whenever we're talking
20 about natural resources that are in the hands of a
21 third party, the State will charge a consideration, or
22 a good-standing fee or a validity right, this last

1 specifically in the mining case. These have nothing to
2 do with taxes. These are ways in which the State, by
3 allocating the use and the enjoyment of assets that
4 belong to the State, obtains a consideration.

5 So, could someone really say that the
6 Royalties are a tax debt? But if the Royalties are
7 not taxes. The Royalties are an original revenue
8 obtained by the State by allowing a third party to
9 exploit natural resources, and since they will be
10 depleted, then they have the right to charge.

11 Then, the fact that the Royalty was
12 incorporated under the idea of a tax debt is clearly a
13 legal fiction. This does not respond to the nature of
14 things. This is a legislative technique that has
15 allowed them to simplify, to avoid, for example, the
16 existence of dispersed regulations.

17 Because of the legal fiction it was not
18 necessary to say, for example, "that this is the
19 process to challenge royalties" and to issue a whole
20 regulation about it. One goes straight to the Tax
21 Code. So, this has been a way, a legal fiction that
22 has allowed to simplify the legislation. And also,

1 this allows us to avoid unnecessarily mentioning these
2 three concepts separately--that is to say, Tax,
3 Penalties, and Interest, by putting them under the
4 same concept.

5 And I think that the case that most reflects
6 this situation is the Royalties and the GEM situation
7 because, in both cases, we are talking about original
8 resources. We're not talking about tax resources that
9 are derived resources.

10 I don't know if I am answering your
11 question, but, at any rate, this also leads me to say,
12 how about Tax Measures? While the concept of tax debt
13 that, once again, is a legal fiction, is part of the
14 code as to Tax Code; as to Tax Measures, there is
15 nothing like that. Keep in mind, that the Tax Code in
16 Perú is the one that gathers the main concepts to be
17 applied to tax issues for all sorts of levies.

18 When someone would like to introduce a key
19 issue in connection with taxes, they introduce an
20 amendment to the Tax Code by inserting whatever is
21 relevant. Neither the Tax Code, nor any other rule ,
22 includes this concept of "tax measures." And we are

1 going to find some regulations, such as the 30230,
2 cited by Bravo, and the 30506, also cited by Bravo,
3 which is a delegation rule, that refer to Taxation
4 Measures, but without it having a specific
5 significance.

6 PRESIDENT HANEFELD: Thank you.

7 Any follow-up questions by my colleagues?

8 ARBITRATOR TAWIL: I have one.

9 Good morning. In connection with the
10 Royalties, you said at Paragraph 86 of your First
11 Report that, for the purposes of the Royalty, the
12 extraction process is not relevant. Pardon, not the
13 extraction process, rather the contrary. The
14 processing of the ore is not relevant for the Royalty,
15 but the extraction.

16 Briefly, because I know that we don't have
17 much time. Could you please explain why, from the
18 point of view of Royalties and tax?

19 THE WITNESS: Yes, the Constitutional
20 Tribunal Judgment, given a claim, expressly
21 established that the Royalty Law, which created the
22 Royalty, was not unconstitutional.

1 So, the Constitutional Tribunal expressly
2 said that the Royalties levy the extraction of the
3 minerals. In other words, the exploitation of
4 minerals. Whenever we look at Article 8 of the Mining
5 Law, "exploitation" means "extraction," among other
6 things.

7 So, the judgment of the Constitutional
8 Tribunal clearly indicates that Mining Royalties are
9 paid--what it levies is the extraction. And,
10 therefore, if it's a levy on extraction, then the
11 processing is simply a way to calculate the amount of
12 the Royalty. But the Royalty is actually a levy on
13 extraction.

14 And so, even under the assumption that SUNAT
15 were right, and that the only thing stabilized here
16 was the investment project contained in the Agreement
17 signed by Cerro Verde, it wouldn't have to pay
18 Royalties under this clear clarification by the
19 Constitutional Tribunal and under the Law on Royalties
20 itself, which says that Royalties are paid for
21 extraction of ore, because in the case of Cerro Verde
22 all of the ore was extracted from the only Mining

1 Concession it had.

2 The problem here lies in establishing
3 whether the Concentrator did or did not enjoy
4 stability. But the Concentrator is at the
5 Beneficiation Plant. It's not a mining concession.
6 One doesn't extract ore from there. Ore is only
7 extracted from the only Mining Concession,
8 Concession "1, 2, and 3," to which reference is made
9 in the Stability Agreement in Annex 1, Cerro Verde's
10 Stability Agreement, and that's where all the ore
11 comes from. And that is stabilized.

12 So, to round out, the Law says that Royalty
13 is a levy only on extraction of ore. This is
14 reaffirmed by the Constitutional Tribunal in its
15 judgment, and the question of processing, well, that's
16 simply a way of saying, well, if I have to pay
17 Royalties because I'm extracting them from this
18 Concession, which is not stabilized, say in an ideal
19 example, then I have to, now, calculate the amount of
20 the Royalty, and that is what the law spells out.

21 How is it to be calculated? And that is
22 where processing comes in, because it is calculated

1 based on the value of the Concentrate or its
2 equivalent, says the Law in its original wording.

3 But even if somebody could extract ore and
4 must pay the Royalties, supposing it's not stabilized,
5 but they don't process it, well, as the Law says, that
6 Royalties are paid for extraction, nonetheless, in
7 order to calculate it, it says, what is of interest is
8 the processing because it's going to be determined on
9 the basis of the market value--pardon, on the basis of
10 the value of the concentrate or its equivalent.

11 Now, anticipating that somebody who extracts
12 must pay Royalties, but they don't process it, well,
13 the Regulation covers that possibility by saying "or
14 the value declared by the seller." It's not been
15 processed, but one must bear in mind the value that
16 you declare for the sale of that ore that you've
17 extracted, and upon which a Royalty is levied, but
18 it's not been processed.

19 So, processing, specifically, is simply the
20 way of calculating the amount of the Royalty. Notice
21 that--

22 ARBITRATOR TAWIL: That's--I think that's

1 fine. That's very clear.

2 THE WITNESS: Well, I would just like to add
3 one small point to say that as of 2011, the Law
4 changed, and to determine the amount of the Royalty,
5 one no longer had to look at the value of the
6 concentrate, but, rather, it was based on operating
7 profit.

8 PRESIDENT HANEFELD: Mr. Hernández, let me
9 ask on a different topic, this is this waiver of
10 Penalties and interest, if there was reasonable doubt
11 about the meaning of the relevant rule, you already
12 testified on that.

13 And let me just put a hypothetical to you.
14 Should the Tribunal--and it is really a hypothetical,
15 but should the Tribunal come to the conclusion that
16 the Stability Agreement and the rules were clear,
17 establishing a clear obligation, now, to pay Royalties
18 for the Concentrator, is there, nevertheless, room for
19 this reasonable doubt and now rule on Penalties and
20 Interest under Peruvian law, in your view?

21 THE WITNESS: Well, according to my view,
22 the Law and the Regulation were crystal clear. If we

1 could put them up on the screen.

2 PRESIDENT HANEFELD: I fully understand that
3 this is your position, but now I would like your
4 answer on my hypothetical. I really want to
5 understand.

6 THE WITNESS: Well, in the hypothetical that
7 you put forward, the Tax Tribunal, what I say, would
8 have held in the negative. But I'm--I'm sorry, I don't
9 understand the question Madam President.

10 PRESIDENT HANEFELD: My hypothetical that I
11 put to you is: If the Tribunal came to the conclusion
12 that the Concentrator did not enjoy stability, and
13 clearly did not enjoy stability, but Royalties were to
14 be paid, is there, nevertheless, still room for this
15 reasonable doubt rule under Article 170 and 92 of the
16 Tax Code that Penalties and Interest should be waived?

17 THE WITNESS: The waiver of Penalties and
18 Interest takes as its assumption or as a starting
19 point that there is an imprecise rule. So, first we
20 have to determine whether or not there actually is an
21 imprecise rule because, if there is an imprecise or
22 vague rule, if there's a rule that allows for more

1 than one reasonable interpretation, then it's not
2 clear.

3 And the Government, in one way or another,
4 has accepted that Article 82, in its original version,
5 which was in force when Cerro Verde signed the
6 Stability Agreement, and Article 22 of the Regulation,
7 which was in force in its original version when Cerro
8 Verde signed the Agreement, the Government has
9 admitted that in 2014, it modified Article 82, and it
10 introduced Article 83-B. And in 2019, it amended
11 Article 22 of the Regulation.

12 And if you look at the Statement of
13 Legislative Intent for both of these changes, you will
14 be able to see that the Government has recognized that
15 the provision was not clear, and if it recognized that
16 the rule was not clear, it's because it accepts that
17 it's imprecise. Because what is not clear is
18 imprecise.

19 So, this is quite simply one of the facts
20 that I didn't want to read because of lack of time.
21 From what I read you in my presentation, I said here
22 there are a series of facts that show that,

1 objectively speaking, it was an imprecise rule, and an
2 imprecise rule automatically triggers reasonable
3 doubt.

4 And in that presentation, I said here, there
5 are up to seven different types of facts that I'm not
6 going to explain that objectively show the existence
7 of reasonable doubt. And among those is precisely the
8 change in the rule, in the Mining Law, which in 2014
9 was adopted by the Government through Law 30230, and
10 in 2022 when it amended Article 22 of the Regulation
11 through a Supreme Decree--I think it's 021/2019.

12 So, if one reads the statement of
13 Legislative Intent, the terms used clearly lead one
14 to see that--to the Government recognized that the
15 rules were not clear.

16 If the rule is not clear, then it's
17 imprecise, and if it's imprecise, then--I think that
18 in the hypothetical case that you put to me, Madam
19 President, the Tax Tribunal should waive Penalties and
20 Interest because there was reasonable doubt. And
21 because the rule, when solving, it had to adopt the
22 clarifying provision declaring that there was, indeed,

1 reasonable doubt, in the only way in which the Tax
2 Tribunal could do it, that is when solving the case
3 file, when solving the appeal.

4 PRESIDENT HANEFELD: Then I have only one
5 additional question. This relates to Paragraph 19 of
6 your Witness Statement where it's about the division
7 of accounts. So, it's about the question whether
8 there was a duty to maintain separate accounts for the
9 Leaching Facility and the Concentrator, and you state
10 there: "SUNAT itself could have divided SMCV's
11 accounting, as it already possessed all of SMCV's
12 accounting information."

13 And can you just explain to us where in
14 Peruvian tax law SUNAT is authorized to divide a
15 company's accounting and which criteria apply for
16 that? And now, the Experts for Perú say Article 63 of
17 the Tax Code contain only very limited and specific
18 sets of circumstances in which SUNAT can act this way,
19 and can you explain to us why you think SUNAT would
20 have, ex officio, so to say, had to separate the
21 accountings and do not charge their unstabilized
22 regime to the Leaching Facility?

1 MS. SINISTERRA: Madam President, can we
2 make sure that he has the paragraph in front of him?
3 Paragraph 19 of your first Report, Mr. Hernández.

4 PRESIDENT HANEFELD: It is the 17, 18, 19 of
5 his Expert Report 8, Number 8.

6 MS. SINISTERRA: Correct.

7 MS. HIKAWA: Of the Second Report. Correct.
8 That's what we have on the screen. We can put a
9 different paragraph, if you'd like.

10 THE WITNESS: 19; right? Paragraph 19. I'm
11 going to read it, please.

12 PRESIDENT HANEFELD: Yes, please.

13 THE WITNESS: Very well. First of all, this
14 Paragraph 19, it covers the situation in which, in
15 effect, Cerro Verde would have had to show separate
16 accounts in its accounting and separate its
17 accounting. What I have argued is that there was no
18 reason for it to separate its accounting.

19 It did not need to show separate accounts,
20 because Article 22 of the Regulation clearly states
21 that the Application to maintain separate accounts is
22 only triggered when one has more than one Concession

1 or Economic-Administrative Unit, which is not the case
2 of Cerro Verde. Cerro Verde had a single
3 Economic-Administrative Unit. And that clearly stems
4 from Annex 1 to its Stability Agreement.

5 So, in my opinion as an Expert, it did not
6 have to maintain separate accounts because the entire
7 Concession was stabilized.

8 Now, when in Article 19 I refer to "separate
9 accounts," this is where I'm saying, well, if SUNAT's
10 position was valid, that not the entire Unit was
11 stabilized, but only the project; in that
12 understanding, then Cerro Verde would not have been
13 able to act to comply with what the rule supposedly
14 said, because there were no methods for doing so.

15 Please bear in mind, Distinguished Members
16 of the Tribunal, that this aspect must necessarily be
17 expressly regulated in the law because depending on
18 the method or methods that the Law requires be
19 applied, one will obtain a different result. One is
20 going to reflect different profits, and, therefore,
21 the taxation will be different.

22 If I apply because I want to--but the Law

1 doesn't prescribe it--if I apply method X, then I
2 might come up with my tax obligation being 100. But
3 if I apply method Y, I might find that my tax is 40
4 and not 100.

5 So, necessarily, had the rule been applied
6 to Cerro Verde that said that it needed to maintain
7 separate accounts, which, when it comes down to it,
8 means separate accounting, one for the stabilized part
9 and the other for the non-stabilized part, had that
10 been the case, then the question is, where are the
11 rules that would have enabled me, Cerro Verde, to
12 determine with certainty, absolutely sure that the
13 Administration is not going to object. Where are the
14 offered methods--pardon, regulated methods?

15 Article 22 of the Regulation, in its
16 original version, which is the one that was stabilized
17 by Cerro Verde, well, the only method that it
18 establishes is the method of sales. But that is a
19 method that is established, based on sales, and based
20 on the hypothesis that Cerro Verde would have had to
21 have maintained separate accounts.

22 And the sales-based method would not have

1 sufficed. It would not have sufficed--and this is the
2 important point--even if Cerro Verde were under an
3 obligation to maintain separate accounts and separate
4 accounting and would have to apply the third paragraph
5 of Article 22 of the Regulation, that says that the
6 sales-based method must be applied; this would have
7 been insufficient.

8 That one method would have been clearly
9 insufficient to--determine a profit that would not be
10 subject to any objection at all by the Administration,
11 because what--how can I do, for example--well, if I
12 have X number of trucks, let's say, that are serving
13 indistinctly the leaching plant, which was what was
14 stabilized, the only part stabilized, according to
15 SUNAT, and the Concentrator.

16 Well, the Law would have had to have said,
17 in those cases, what--you'll have to have a
18 system--well, let's say, whereby each day how much
19 time was the truck working for the leaching plant and
20 how much time was it working for the Concentrator.

21 It's crystal clear that the single reference
22 in the third paragraph of Article 22 of the Regulation

1 to the sales-based method would not have been of any
2 use for a taxpayer to be able to determine, with
3 absolute certainty and free of any objection, what its
4 results would have been. The Administration would
5 have always been able to say: "Why did you apply this
6 for the trucks, and you're giving me different
7 statement of earnings?"

8 So, being the application methods--being
9 these methods elemental to be able to determine net
10 earnings with certainty, the profit, and, finally, the
11 tax, if we're talking, say, of Income Tax, it would
12 have had to have been expressly regulated, and that is
13 why Messrs. Bravo and Picón in their Report, well,
14 what they say is, for example, recognizing that the
15 provision did not say exactly how I had to establish
16 my earnings, if I had to maintain separate accounts.

17 Messrs. Bravo and Picón say: "Well, you
18 could have used, for example, the transfer pricing
19 method." And then the question is: "What does the
20 transfer pricing method have to do with this issue?"
21 The transfer pricing method is useful for determining
22 the Market Value of goods or assets, and is used when

1 the operation is between related Parties.

2 So, what does the transfer pricing method
3 have to do with this situation? Nothing at all, plus,
4 the question of transfer pricing wasn't current when
5 Cerro Verde signed its Stability Agreement. But not
6 only that, Bravo and Picón recognized that the
7 provision was incomplete and that it should have been
8 complete and sufficient. They recognized it so much
9 so that they say that one could have applied the
10 method of assignment of goods and services that the
11 Law establishes in cases of business collaboration
12 agreements.

13 But here, we're not talking about assignment
14 of yields--of goods and services, nor is there any
15 business collaboration contract. It's not that I can
16 say, well, this is similar and I'm going to apply it.
17 No, it has to be in the Law.

18 PRESIDENT HANEFELD: I read your Report and
19 understand your opinion.

20 My question was slightly different, but I'm
21 fine for the moment. So, I want to give Respondent,
22 now, the chance to cross-examine.

1 MS. HIKAWA: Thank you, Madam President.

2 CROSS-EXAMINATION

3 BY MS. HIKAWA:

4 Q. We'll get started and circulating binders,
5 and I'll take the time--take advantage of the time to
6 introduce myself.

7 Hello, Mr. Hernández. My name is Courtney
8 Hikawa. I'm part of the legal team representing Perú,
9 and I'm going to ask you some questions about your
10 Reports today.

11 I'm going to ask my questions in English,
12 and I understand you're going to respond in Spanish;
13 correct?

14 A. Yes, that's right.

15 Q. Your CV says you speak English, though;
16 correct?

17 A. It's not my first language, and that's why I
18 prefer Spanish.

19 Q. Great.

20 So, wonderful, you're going to listen to the
21 translation. We need to agree to proceed slowly, in a
22 manner with lots of pauses in between my questions and

1 your answers, and that's for the translation and the
2 transcription. So, please, note that, if I don't
3 respond immediately or ask another question after one
4 of your answers, I'm not waiting for you to say more.

5 I'm just waiting for the transcription.

6 And, for the most part, as we've said repeatedly, we
7 have very little time, so I would be grateful if you
8 could keep your answers as concise as possible, also
9 so that I don't have to interrupt you, which I don't
10 want to do.

11 Okay. Do we agree?

12 A. Yes, fine. Perfect.

13 Q. Okay. Excellent.

14 Okay. Mr. Hernández, you provided a very
15 long and detailed CV as Appendix A of your First
16 Report. I just want to go through a few of those
17 points. So, it is correct that you graduated with
18 your law degree from Pontificia Universidad Católica
19 de Perú in 1967?

20 A. That's right.

21 Q. And you've been teaching there as a law
22 professor since 1974; correct?

1 A. Correct. That's right.

2 Q. And you also teach in a master's or tax law
3 program?

4 A. I taught in a master's program at the
5 Catholic University and at the University of Lima.

6 Q. Thank you. I'd like to look at Paragraph 2
7 of your First Report, just to confirm it. And I will
8 put it on the screen so you can see it.

9 In this paragraph, you say: "Since 1977,
10 I've held the position of Senior Professor at the
11 Universidad Católica." So, 1977 is a couple years
12 later than 1974. That's when you started teaching tax
13 law; is that right? And 1974 is when you started in
14 commercial law?

15 A. I recall not with total accuracy with
16 respect to the dates, that at some point in time I
17 gave a course on securities, and, therefore, when I
18 speak of tax law, I started in 1977, but I have my
19 certification from the Catholic University that I am a
20 Professor, not necessarily of this or that course
21 since 1974.

22 Q. I just wanted to clarify.

1 Okay. So, you further say in this paragraph
2 that you taught courses in master's or tax law
3 program, and then you say that several members of
4 Rodrigo, Elías & Medrano Abogados, Estudio Rodrigo,
5 Counsel to Claimant, and Estudio Navarro, Counsel to
6 Respondent, are also Professors at the same
7 university, but you have no social contact with them.
8 And several members of Studio Navarro have been your
9 students during the more than 40 years that you have
10 taught law in Perú; correct?

11 A. Correct.

12 Q. Thank you. Then at Paragraph 11, if you can
13 go down to Paragraph 11.

14 A. Umm-hmm.

15 Q. Sorry. You say you are being "compensated
16 in this matter at a rate of USD 350 per hour. Your
17 compensation is not contingent on the content of your
18 opinion, nor on the outcome of this matter. You have
19 no relationship with the Parties to this arbitration,
20 their Legal Advisors, or the Members of the Tribunal,
21 other than my engagement in this matter and the
22 aforementioned relationships."

1 So, the "aforementioned relationships" are
2 the students and the faculty at the university;
3 correct?

4 A. Yes, and coinciding, for example, at
5 different congresses, at conferences in institutes,
6 strictly a professional relationship.

7 Q. Thank you.

8 And do you confirm these Statements in your
9 Report?

10 A. Yes, I confirm them. Of course.

11 Q. You didn't mention, however, that you were
12 also professor to Ms. Olano, the President of the Tax
13 Tribunal; right?

14 A. I did not mention that. Actually, I
15 teach--as I said in my presentation, I've been a
16 professor for 46 years, and, quite honestly, I don't
17 remember who all my students have been.

18 Q. I imagine you had a lot of students. Yes.

19 Okay. So, you do not, yourself, have a
20 master's degree? It looks like you completed four
21 courses towards a master's degree in civil law in
22 1988, but you didn't complete the program; correct?

1 A. That is not correct. I completed the
2 master's in civil law, but I did not obtain the degree
3 because I had to present a thesis that I never did
4 present.

5 Q. Okay. Understood.

6 But you also do not have a doctorate degree;
7 correct?

8 A. No, and I do not have a doctorate. That is
9 correct.

10 Q. You are the founding partner of the Law
11 Office of Luis Hernández Berenguel; correct?

12 A. Yes, I'm the founding partner of that law
13 firm.

14 Q. And that law firm in 2001 became the law
15 firm of Hernández y Cía; correct?

16 A. Yes, at some point in time. Right now, I
17 don't--can't tell you the exact dates. At one point
18 in time it was just a law firm in Perú. You don't
19 need to be incorporated to operate as a law firm. And
20 then it became incorporated.

21 Q. And you are a managing partner of that law
22 firm, to date; correct?

1 A. No, I'm not the managing partner. The firm
2 today has 150 people, we are more than 90 lawyers. It
3 has its own management, its own administration. I'm
4 not manager or administrator of that law firm.

5 Q. Okay. Your CV, just to explain my
6 confusion, your CV says that you are a managing
7 partner from 2001. But, understood.

8 Okay. So, at this point in your long and--

9 A. I was, but I'm not.

10 Q. Yes.

11 A. It's been many years since--that I've not
12 been.

13 Q. Okay. Understood.

14 At this point in your long and, I would say,
15 very prolific career, I assume that you have
16 assistants or law clerks that help you in drafting
17 your Reports and your Articles; correct?

18 A. Are you talking about the drawing up of
19 these Reports, or other situations, generally
20 speaking?

21 (Overlapping interpretation and speakers.)

22 (Interruption.)

1 Q. These Reports specifically.

2 A. Fine. In these Reports, obviously, I had
3 the support of members from the law firm who work in
4 the taxation area, who have helped me, because of how
5 extensive the issues are that are involved. So, yes.

6 Q. Understood.

7 A. All of them lawyers from my law firm.

8 Q. So, the process, if I understand it, would
9 be your associates or junior associates or law clerks
10 would write the first drafts of your Reports and, in
11 collaboration with you, would go on refining the
12 Reports until the final version, which you review and
13 sign; correct?

14 A. Let's say that they have assisted me in the
15 preparation in connection with certain topics. The
16 determination of background information, the review of
17 provisions that have to do with this issue, and then
18 the drafts started to be drawn up, which, in the end,
19 I have drafted and they fully express my position.

20 Q. You did not explain that process in the
21 Reports, though; correct?

22 A. I didn't think I had to. Nobody told me

1 that I had to explain how I prepared my Report or who
2 assisted me.

3 Q. That's okay, I'm just confirming that you
4 did not explain that process in Reports, because it
5 was, you felt, not necessary; correct? Because the
6 information is--you take full responsibility and
7 ownership of what's in the Reports; correct?

8 A. That's exactly right. I assume full
9 responsibility in my Reports because the contents of
10 my Report are the expression of what I've done, in the
11 end.

12 Q. Understood.

13 Okay. I'd like to turn back to your
14 Appendix A--excuse me, your CV. And this goes through
15 your appearances at conferences and the like, and it
16 goes through 2021; correct? The year 2021.

17 A. Umm-hmm.

18 Q. I assume the list of your publications,
19 then, also goes through the year 2021; correct?

20 A. Yes. I'm not sure that all of the
21 publications that I have prepared are there, but the
22 idea was to have a CV that was closest to all the work

1 that I've done.

2 Q. Well, I thought that was strange because it
3 doesn't look like you published anything since 2008,
4 based on your CV, what's there. The last things are
5 in 2008. So, I think that is incomplete because, in
6 fact, I found several publications by you later on,
7 which are not included in your CV. So, I have the
8 names in Spanish, I'll just read the names if you can
9 confirm that you did--

10 A. Well, probably the CV may be incomplete, but
11 I don't think that has much relevance. After 2008 I
12 have not many, but some publications.

13 Q. Okay. Let me confirm with you. I'll say
14 them in Spanish, determination of the tax obligation
15 that was presented in due course and the statute of
16 limitation of the action to demand payment?

17 A. Yes, I remember that.

18 Q. Delivery of goods to contractors for
19 self-consumption and its tax effects?

20 A. Yes, I remember.

21 Q. Responsibility expenses--

22 MS. SINISTERRA: Excuse me. Are any of

1 these documents on the record?

2 MS. HIKAWA: They are not. He has not
3 included them in his CV, and I'm just confirming that
4 they're missing from his CV.

5 PRESIDENT HANEFELD: Would this be a good
6 time for a break for the Court Reporters, or do you
7 want to continue this line of questions and then we
8 have our 10-minute break?

9 We promised the Court Reporters.

10 MS. HIKAWA: I can break now. I was going
11 to read a few more titles that were missing from his
12 CV, but I can break now. That's fine.

13 PRESIDENT HANEFELD: Yeah.

14 (Brief recess.)

15 MS. HIKAWA: Thank you.

16 BY MS. HIKAWA:

17 Q. Hello again, Mr. Hernández. I'm not going
18 to go through and read any more titles that are
19 missing from your CV, since we've already established
20 it's not complete. But there is one more thing that
21 I'd like to ask about that is not on your CV.

22 You were author and director of a legal

1 publication called "Informativo Legal Rodrigo y
2 Hernández Berenguel"; correct?

3 A. That's right. That's correct.

4 Q. And that was an annual subscription
5 publication known in the market as "Informativo
6 Rodrigo"; correct?

7 A. That's exactly right. That's correct.

8 Q. I understand it was published in 1961 and
9 ran for more than 40 years; right?

10 A. If memory serves, in 2002 the publication
11 stopped and the company dissolved itself; 2001, 2002.

12 Q. And your partner in that Company was--the
13 Company that published Informativo was Mr. Luis Carlos
14 Rodrigo Mazuré; correct?

15 A. The Informativo was always the property of
16 Mr. Rodrigo, and then in 2001, I bought some stakes in
17 it, and I became a partner in it, and I ceased to be a
18 member until 2002. So, I only had it for only a year,
19 before selling my participation.

20 Q. In addition to being co-director of the
21 Informativo with you, Mr. Rodrigo Mazuré was also the
22 founding partner of Estudio Rodrigo, the Claimant's

1 Counsel in this case; correct?

2 A. That is indeed right.

3 (Overlapping interpretation and speakers.)

4 (Interruption.)

5 (Stenographer clarification.)

6 BY MS. HIKAWA:

7 Q. And Mr. Rodrigo Mazuré is the father of
8 Mr. Luis Carlos Rodrigo Prado, who is Claimant's
9 Peruvian Counsel in this case, participating in this
10 Hearing; correct?

11 A. That's exactly right. We are talking about
12 a publication, or a company, rather, that I was a
13 partner of 22 years ago.

14 Q. And Mr. Rodrigo Mazuré is also the
15 grandfather of Ms. Lucia Rodrigo, who is a foreign
16 lawyer in the international arbitration practice at
17 Debevoise, Claimant's Counsel in this case, who is
18 also participating in this Arbitration; correct?

19 A. Yes, but I repeat: This relationship that I
20 had is 2001, 22 years ago.

21 Q. Well, Mr. Rodrigo Mazuré and you are both
22 members of the Peruvian Institute of Tax Law and the

1 International Fiscal Association of Perú chapter,
2 sorry, sorry, Perú chapter; correct?

3 A. Yes, as are Mr. Bravo and Mr. Picón, who are
4 Experts of Perú. That is to say, all tax lawyers
5 registers with the Institute.

6 Q. So, you've interacted with Mr. Rodrigo in
7 social and academic events organized by those
8 associations; correct?

9 (Overlapping interpretation and speakers.)

10 (Interruption.)

11 (Stenographer clarification.)

12 BY MS. HIKAWA:

13 Q. So, you've interacted with Mr. Rodrigo in
14 social and academic events organized by those
15 associations; correct?

16 A. Well, this relationship was exclusively on
17 the basis of this company, and, I recall that in my
18 participation as a partner there was a social
19 gathering where people were invited to indicate that
20 we were coming together in this Company.

21 (Overlapping interpretation and speakers.)

22 Q. --a Perú chapter granted you the distinction

1 of Honorary Member in 2009; correct?

2 A. The Perú chapter recently did that, an
3 Honorary Member, quite recently. In a session two
4 weeks ago, when I wasn't in the country. So, it's not
5 2009. It is 2023, very recently, at a meeting that
6 was held, if memory serves, in early April this year,
7 or perhaps in April this year, I should say, not in
8 2009.

9 Q. I'm referring to the 25th anniversary of IFA
10 in Perú, which took place in September of 2009, and I
11 know this because I found a video on the internet
12 where Mr. Rodrigo gave a speech about you.

13 A. That is a different institution. Initially
14 you talked about the Peruvian Institute of Tax Law,
15 and that's the one that gave me a Notary title in
16 April. The other one, it's the International Fiscal
17 Association, Peruvian chapter.

18 Q. Thank you.

19 A. That is a different institution.

20 Q. I think you answered my question. Thank
21 you.

22 So, do you remember Mr. Rodrigo referring to

1 you in that speech that he gave as "an unforgettable
2 character," and he talked about your frugal eating and
3 drinking habits and your appreciation for feminine
4 beauty, referring to your first and your second wife?

5 Do you remember that?

6 MS. SINISTERRA: Madam President, objection.
7 What is the relevance to the Merits in this
8 Arbitration?

9 MS. HIKAWA: Mr. Hernández has declared that
10 he has no relationships with Counsel or advisors in
11 his Report, and he recently confirmed that, and I'm
12 asking him questions to impeach that statement.

13 MS. SINISTERRA: How are any eating or
14 drinking habits relevant to what is being discussed in
15 this Arbitration? You have one of the most
16 authoritative--

17 (Overlapping speakers.)

18 MS. HIKAWA: It's not about his eating or
19 drinking habits. It's about his relationship with
20 Mr. Rodrigo Mazuré, which was clearly very close.

21 MS. SINISTERRA: You have one of the most
22 authoritative tax lawyers in Perú in front of you. I

1 think you should ask questions that are relevant to
2 the case, and not selective--

3 (Overlapping speakers.)

4 MS. HIKAWA: This is my cross examination,
5 and I'm examining statements that he has made here in
6 this Arbitration, and I'm testing them and impeaching
7 his credibility based on his statements.

8 PRESIDENT HANEFELD: But, indeed, such more
9 private remarks we do not need to learn more about.

10 MS. HIKAWA: Understood. I'll move on.

11 THE WITNESS: Also, I don't drink, just
12 saying, in passing.

13 BY MS. HIKAWA:

14 Q. Okay. So, Mr. Hernández, I'd like to
15 discuss the process you undertook in writing your
16 Reports.

17 In Appendix C of your Report, you include
18 the factual background on which you base your Legal
19 Opinions; correct?

20 A. That's exactly right.

21 Q. You state that Claimant's Counsel provided
22 you with this set of facts; correct?

1 A. That's correct.

2 Q. So, you did not prepare that document?

3 A. No. I received it and obviously verified
4 everything that was included there. That is to say, I
5 verified whether what was indicated there was correct.

6 Q. That document, I believe, is identical to
7 the one attached to Reports by Mr. Otto, Mr. Bullard,
8 Ms. Vega.

9 Did you coordinate with Mr. Otto,
10 Mr. Bullard, or Ms. Vega on your Reports?

11 A. Never. Never. I didn't speak to any of the
12 three in this connection.

13 Q. You say, though, that you reviewed the
14 Exhibit Appendix C that Claimant gave you.

15 So, did you check or verify that the facts
16 included in that appendix were correct or supported?

17 A. Yes, of course I did.

18 Q. That appendix does not include an assertion
19 that Cerro Verde's Stability Agreement covered the
20 Concentrator Project as well as the Leaching Project;
21 correct?

22 A. Are you asking me whether those events were

1 not there written? Is that what you're asking?

2 Well, yes, but I saw other documents:

3 Obviously the Agreement, the approval of the profits
4 reinvestment regime, and other documents that were not
5 necessarily there. But I tried to include everything
6 that was relevant.

7 Q. Yes. Actually, we'll get to that point.

8 You made an assumption on which you based
9 your analysis of Cerro Verde's Royalty Assessments.
10 So, at Paragraph 51 of your First Report, you state
11 that: "To evaluate these Assessments, I have assumed
12 that the Mining Law established that Stability
13 Guarantees apply to the entire production unit in
14 which the mining concession holder carries out the
15 Investment Plan described in the Feasibility Study
16 required to enter into a Mining Stability Agreement."

17 Do you see that?

18 A. I'm going to look at it.

19 MS. SINISTERRA: Doctor Hernández, your
20 Reports are printed out if you can't look at the
21 screen.

22 THE WITNESS: Yes. Yes. I can look at the

1 screen. I can see the screen.

2 (Pause.)

3 THE WITNESS: Yes. That's correct.

4 BY MS. HIKAWA:

5 Q. So, you do not provide an analysis on the
6 scope of stability agreements in your Report; rather,
7 you state this as an assumption based on what you
8 include here in this paragraph. Correct?

9 A. Yes. Let's see. But I indicate that I have
10 analyzed those Assessments and I have, of course,
11 examined the relevant Regulations, the Mining Law and
12 the Regulations. The relevant ones, because I'm not an
13 Expert in Mining Law.

14 Q. The citation here to this sentence cites to
15 Articles 83 and 86 of the Mining Law.

16 So, I understand from your testimony, then,
17 that you reviewed Articles 83 and 86, and this is what
18 you understood from them.

19 And you did not review--

20 A. That's right.

21 Q. --the other article--

22 (Overlapping interpretation and speakers.)

1 (Interruption.)

2 (Stenographer clarification.)

3 BY MS. HIKAWA:

4 Q. Articles 82, 84, or 85 of the Mining Law?

5 A. In general, obviously, I saw all of the
6 relevant articles of Title Nine of the Mining Law and
7 the Regulations.

8 Q. So, you do not cite them here? So, you
9 considered that they were not relevant for your
10 analysis; is that correct?

11 A. I do not cite them here
12 because I didn't feel that they were to
13 be considered in connection with the
14 central matters that I had to look at,
15 whether the Concentrator was stabilized
16 or not.

17 (Overlapping interpretation and speakers.)

18 (Interruption.)

19 (Stenographer clarification.)

20 BY MS. HIKAWA:

21 Q. In the next sentence there at Paragraph 51,
22 you qualify your assumption by saying that you are not

1 a mining lawyer and that you were honorary external
2 advisor to the Ministry of Economy and Finance in
3 1993, when the Ministry was preparing the Mining
4 Regulations; correct?

5 A. That's correct.

6 Q. So, I understand when you say that you are
7 not a mining lawyer, that means you are not an Expert
8 in the Mining Law and Regulations; is that right?

9 A. As a Tax Law Expert, of course I know the
10 relevant portion that refers to tax matters, but I'm
11 not an Expert in Mining Law.

12 Q. Okay. And you say "honorary external
13 advisor."

14 Does "honorary" mean that that was on a
15 pro bono basis?

16 A. That is exactly right. I received no
17 remuneration whatsoever. As I was ad honorem--for
18 example, from '81 onwards I was a consultant for the
19 Ministry of Economy and Finance and I never received
20 any kind of remuneration.

21 Q. As an honorary external advisor in 1993, and
22 that was when the Ministry was preparing the

1 Regulation, does that mean that you were specifically
2 advisor on the preparation of those Regulations?

3 A. Exactly, this was a committee that was not
4 appointed by a Resolution. Simply, a number of
5 individuals was included, including, my former
6 partner that participated a lot in this topic,
7 Mr. Alfonso Rubio Feijó, who has passed away. And I
8 was called a number of times to provide information in
9 connection with specific tax matters related to the
10 Title Nine of the Law that were going to be included
11 in the Supreme Decree, regulatory provision of that
12 title.

13 Q. Despite that experience at MEF, you do not
14 cite to the Mining Law and Regulations in this
15 sentence in Paragraph 51 to support your assumption;
16 correct?

17 A. That was the Regulations; right?

18 The Supreme Decree--well, Article 22, which
19 I have mentioned so many times, is part of that set of
20 Regulations. It is part of those Regulations, but I
21 did not author it. I did not write it.

22 Again, I was consulted in connection with

1 certain tax provisions of that set of Regulations that
2 finally was the approved set of Regulations.

3 Q. For your assumption in Paragraph 51, though,
4 you do not cite to the Regulations. So, I understand
5 that to mean that your assumption is not based on an
6 interpretation of the Regulations; correct?

7 A. Obviously, when I offer my opinion, I am
8 interpreting the provisions, so I don't know
9 specifically what your question is.

10 Sorry. I don't think I understand.

11 Q. You did not provide the Regulations as a
12 citation to support this statement, so I understand
13 that to mean that your assumption in this paragraph is
14 not based on your analysis or understanding of the
15 Regulations themselves. But I believe you've answered
16 my question, so we can move on.

17 So, you state from that moment in 1993 when
18 you were external advisor, you formed this assumption
19 regarding the scope of the stability agreements and
20 you've held that assumption since 1993; correct?

21 A. What I state is that I participated as an
22 advisor in the preparation of these provisions, but I

1 also say that, in particular, I did not receive any
2 requests for an opinion in connection with Article 22
3 of the Regulations specifically.

4 Q. So, 1993 was before Cerro Verde conducted
5 its Feasibility Study for the Leaching Project and
6 before it entered into a Stabilization Agreement for
7 that Project.

8 And you do not cite here in Paragraph 51
9 where you state your assumption, you do not cite Cerro
10 Verde's Stabilization Agreement; correct?

11 A. At Paragraph 51, no. I do not cite it, no.

12 Q. So, I understand your assumption is not
13 based on a review of the Stabilization Agreement;
14 correct?

15 A. To draft my Report, as I said before,
16 obviously I had to review the Stability Agreement and
17 obviously I had to review Article 22 and also the
18 provisions.

19 So, my opinions are not based on the lack of
20 knowledge of one document or the other, or the
21 Regulations that you cite. Quite the contrary: The
22 fact that I didn't cite them is just because I didn't

1 think it was relevant to cite them. But I did review
2 the Agreement, the Law, the Regulations, and
3 everything that could be relevant to the case.

4 Q. Okay. So, you reviewed all of those things
5 and you did an analysis, but none of that is described
6 here in your Report; correct?

7 MS. SINISTERRA: You're talking about one
8 paragraph, just to be clear, not his entire Report.

9 MS. HIKAWA: This is the paragraph in which
10 he states his assumption on which he bases his review
11 of the Royalty Agreements, and there is no other
12 analysis on his assumption.

13 MS. SINISTERRA: There's an annex of the
14 documents, legal documents, that he relied on. So, it
15 is misleading to base those questions on one paragraph
16 and not the entire Report.

17 MS. HIKAWA: I'm referring him specifically
18 to where he states what his assumption was based on.

19 PRESIDENT HANEFELD: But I think we heard
20 the Expert testifying that he has reviewed the
21 Stability Agreement and the Mining Law and
22 Regulations. I think this is what is now the

1 testimony.

2 BY MS. HIKAWA:

3 Q. Okay. So, I understand you reviewed the
4 Stability Agreement, although you didn't cite it here
5 in your analysis, to come to an assumption.

6 Did you review the Supreme Court Decisions
7 in order to come to this assumption or to reinforce or
8 challenge the assumption that you made in 1993?

9 A. Yes, of course. I reviewed the Decision by
10 the Supreme Court of Justice as to 2006-2007 Royalty
11 Case. That was the only one issued on the subject
12 matter of Royalties for Cerro Verde.

13 Q. You're aware that the Supreme Court in the
14 2000 Royalty Case interpreted the Mining Law and
15 Regulations and found that they were limited to the
16 scope of an investment project, and specifically the
17 Cerro Verde Leaching Project; correct?

18 My question is: You are aware of that;
19 correct?

20 A. I must--but that requires an explanation,
21 because the Decision of the Supreme Court of
22 Justice--the Chamber that decided this, has five

1 *vocales*. Two of those *vocales* said that the point of
2 view of Cerro Verde had not been analyzed.

3 Q. I'm speaking about the 2008 Royalty Case.
4 I'm speaking about the 2008 Royalty Cases.

5 There was no dissent.

6 A. I apologize, then. I was talking about
7 2006-2007. Okay, but let's see--

8 Q. Please answer my question. Thank you.

9 A. We're talking about Royalties, and the
10 positions are contradicting, to say the least.

11 Q. You're aware that a cassation ruling like
12 that of the Supreme Court has the purpose of providing
13 the correct application and interpretation of the law
14 and the unification of domestic jurisprudence;
15 correct?

16 A. That is the theory. I can show you several
17 examples. I can show you. Unfortunately, I haven't
18 brought them, but, for example, the Supreme Court
19 recently, this same Chamber, in two case files that
20 were exactly the same in which a taxpayer is
21 requesting the reimbursement of a tax paid on losses
22 as a result of the liquidation of financial

1 derivatives, asks for the reimbursement for fiscal
2 year 84, pardon, 2004--

3 Q. Mr. Hernández, we don't have time. My
4 question was simply: You're aware of that; correct?

5 A. But it does not agree with Peruvian
6 situation and what I am trying to clarify. There are
7 different Decisions by the same Chambers of the
8 Supreme Court, and this is not infrequent.

9 Q. So, you were aware that the Supreme Court in
10 the 2008 Royalty Case interpreted the Mining Law and
11 Regulations and found it limited to investment
12 projects.

13 And, despite the fact that you're not an
14 Expert in Mining Law and that Court's Opinion, you did
15 not--this did not affect the assumption that you came
16 to in 1993; correct?

17 A. Exactly. And the same one that I reach in
18 my Report.

19 Q. And that assumption also was unaffected, I
20 take it, by your review of the facts of the case--for
21 example, Mr. Isasi's Report? You reviewed Mr. Isasi's
22 Report?

1 A. Yes. I can tell you that Dr. Isasi has a
2 Report of April 2005, if I recall correctly, that says
3 exactly the contrary. And I can also mention that
4 when Dr. Isasi presented before the Congress
5 Commission, I think it was, on May 3, May 4, 2006,
6 even though he changed his position, he said there
7 that the companies that have stability agreements only
8 stabilize investment projects, he also said something
9 very important on the subject matter of Royalties,
10 because he confirms that, for example, in the case of
11 Royalties, only the ore extracted from the relevant
12 Concession shall be levied.

13 Therefore, basically, what he's saying in
14 2006, a year after, when he has changed his criterion
15 and said that in principle--rather, that stability
16 only covers the investment project, he ends up saying
17 that Royalties are not levied for Cerro Verde because
18 all of the mineral has been extracted from the
19 Concession that has been stabilized.

20 Q. Yes. Okay. So, you've referred to
21 Mr. Isasi's Report, not on the subject about which I
22 was asking you, but since you've referred to it, we'll

1 show you a paragraph from his Report.

2 And my question would be--

3 MS. SINISTERRA: Is that in the binder? Can
4 you direct him to the document, please?

5 MS. HIKAWA: It's not in the binder, I
6 believe. It is not in the binder.

7 We are showing it on the screen. You can
8 see it.

9 ARBITRATOR TAWIL: Could you identify the
10 exhibit for the record?

11 MS. HIKAWA: Yes. It's 494, CE-494. And
12 we'll highlight the relevant part on the screen for
13 you.

14 THE WITNESS: May I please see the document?
15 Because I only see here a conclusion, but that doesn't
16 allow me to see the context.

17 BY MS. HIKAWA:

18 Q. Yeah. Sorry, we do not have a printed-out
19 copy of this for now, but you've already made clear
20 that you're familiar with Mr. Isasi's Report.

21 So, I just want to understand: You saw this
22 conclusion, and that didn't affect your opinion--the

1 conclusion on the screen didn't affect your opinion--

2 MS. SINISTERRA: He asked for the document,
3 Madam President, and under the Rules we've
4 established, if he asks for the document and he's
5 going to be cross-examined on specific language, I
6 believe it's fair for him to be able to look at the
7 document.

8 MS. HIKAWA: Certainly we can print out a
9 copy for him.

10 BY MS. HIKAWA:

11 Q. But, since we don't have much time, I will
12 move on. We'll give you a copy of the document for
13 you to review.

14 Okay. So, just to make sure I understand,
15 summarize your testimony, you made an assumption in
16 which in your Report you only explain as deriving from
17 your analysis of Articles 83 and 86 of the Mining Law,
18 yet you reviewed everything and nothing that
19 contradicted that opinion affected the assumption that
20 you made in 1993; correct?

21 A. Indeed. That is correct.

22 Q. Okay. I'd like to return to Paragraph 51 of

1 your First Report, and there in the last sentence of
2 that paragraph, you say: "Additionally, I have worked
3 for more than 30 years on tax matters involving mining
4 companies, and, in my experience, mining companies
5 typically kept a single set of accounts for each of
6 their production units, since each unit was governed
7 by the same legal regime (some mining companies, such
8 as SMCV, have only one unit, but other mining
9 companies, such as Southern Perú Copper Corporation,
10 Perú branch, have several)."

11 Here you say "typically"; correct?

12 Q. Typically, kept a single set of accounts.

13 (Overlapping interpretation and speakers.)

14 (Interruption.)

15 BY MS. HIKAWA:

16 Q. Typically kept a--in English, the English
17 translation is typically--

18 (Overlapping interpretation and speakers.)

19 THE WITNESS: I do not find expression
20 "typically" here. You are telling me that here it
21 says "typically." Or generally?

22 BY MS. HIKAWA:

1 Q. In Spanish it says "normalmente."

2 A. Yes. That is correct. That's what I said.

3 Q. So, that does not mean "always" kept;
4 correct?

5 A. That is in--based on my experience, this is
6 what I have been able to verify, and we see it with
7 Tintaya Resolutions, Milpo--

8 Q. Please, just answer my question, briefly, if
9 possible.

10 A. Umm-hmm.

11 Q. Okay. So, you give an example of Southern
12 as a Company that kept a single set of accounts for
13 their production unit; correct?

14 A. I only mention that in the case of one
15 Company that had more than one Concession, or more
16 than one Economic-Administrative Unit.

17 Q. Okay. So, you are speaking here in this
18 sentence as from your experience as a Legal Advisor to
19 mining companies; correct? So, you were a Legal
20 Advisor to Southern; is that right?

21 A. No. No. No. I was not an advisor. I was
22 never Southern's advisor. Simply--but I knew that

1 Southern had more than one Economic-Administrative
2 Unit, that this why I mentioned it. But I'm not saying
3 that I was Southern's advisor. The only purpose of
4 that paragraph is, basically to mention that, contrary
5 to Cerro Verde, there are some other companies that
6 have more than one Economic-Administrative Unit.

7 Just like Southern I could have mentioned
8 others like Tintaya, Yanacocha, Milpo. Simply--but I
9 am not Southern's lawyer.

10 (Overlapping interpretation and speakers.)

11 BY MS. HIKAWA:

12 Q. So, your example in this paragraph of
13 Southern--

14 A. but I am not Southern's lawyer.

15 Q. Mr. Hernández, please. So, your example of
16 Southern, in this paragraph, is to show that
17 companies have multiple production units; correct?

18 A. Yes. That there are companies that have
19 more than one Unit, unlike Cerro Verde.

20 (Overlapping interpretation and speakers.)

21 Q. So, it's your assertion here that Southern
22 kept a single set of accounts for each of its mining

1 units?

2 (Interruption.)

3 BY MS. HIKAWA:

4 Q. Is your assertion here that Southern kept a
5 single set of accounts for each of its mining units?

6 A. No. That's not what I said. I am going to
7 read the paragraph. Also, I have been working--

8 Q. Thank you. I have already read it.

9 Okay. So, are you saying, then, that
10 Southern--

11 (Overlapping interpretation and speakers.)

12 THE WITNESS: Yes. But what it--yes.

13 (Overlapping interpretation and speakers.)

14 Q. did not keep a set of accounts.

15 (Interruption.)

16 BY MS. HIKAWA:

17 Q. Yes, sorry. Please wait for my question,
18 Mr. Hernández.

19 A. What I am simply saying, and what I would
20 like to repeat and reiterate is that in my experience,
21 mining companies only had one accounting for each of
22 their Production Units, since each Unit had to be

1 ruled by the same legal regime. Some mining companies
2 have only one Unit, such as Southern, but others have
3 more. So, I do not share the Opinion that you just
4 said.

5 Q. So, is your assertion here--Is your
6 assertion here that Southern kept separate
7 accounts--or a single set of accounts for each of its
8 mining units? Yes or no.

9 A. My conclusion here--my reference here is
10 just to say that if Southern has more than one
11 Concession, clearly, they should have a set of
12 accounts for each Unit.

13 Q. Okay. I'd like to show you Exhibit RE-355.
14 This is a letter from Southern Perú to MINEM,
15 explaining its position on the scope of its
16 Stabilization Agreement. It's Tab 15 in your binder.

17 A. Yes. I've got it.

18 Q. Okay. So, if we can put on the screen the
19 paragraph, and highlight the paragraph where it
20 says: "For this reason, the contractual guarantees."
21 And I'll read the Paragraph.

22 It says: "For this reason, the Contractual

1 Guarantees will benefit Southern Perú exclusively for
2 the construction Project of the Leaching-Electrowon
3 Plants, (ii), the additional production that will be
4 obtained from the operation of the aforementioned
5 Plants and (iii) the income it obtains from the
6 exportation and sale of said additional production of
7 SX/EW Cathodes."

8 Do you see that?

9 A. Yes, I do see that.

10 Q. In the text, it's clear that
11 Southern--Southern's understanding is that its
12 Stabilization Agreements apply to its Project of the
13 construction of the Leaching-Electrowon Plants?

14 A. As I stated already, I am not Southern's
15 lawyer, and, indeed, I am reading what you are
16 mentioning. But, at the end the day I do not know
17 what this paragraph is referring to, what was
18 concluded as a consequence of the request presented
19 before the Minister. I do not have any evidence, so I
20 do not know what to tell you about this.

21 Q. Southern also had Concentrator Projects
22 under beneficiation concessions that were separate

1 from the beneficiation concession for their Leaching
2 Plant?

3 MS. SINISTERRA: The Expert has already
4 confirmed that he's not aware of the factual
5 circumstances of Southern Perú Copper, so if you want
6 to ask him questions, please direct him to specific
7 documents and specific exhibits in the record
8 supporting what you're saying.

9 MS. HIKAWA: I will. I am directing him to
10 the document that supports what I'm saying.

11 BY MS. HIKAWA:

12 Q. Let's take a closer look at the Paragraph.
13 "In consequence," and I'll read it. It says: "In
14 consequence, and in application of the provisions
15 included in the second paragraph of Article 22 of the
16 Supreme Decree Number 24-93-EM, Southern Perú, to
17 determine the results of the operation of the
18 Leaching-Electrowon Plants, will keep separate
19 accounting, and will reflect in separate results the
20 operations of the sales of the other products
21 resulting from its mining activity."

22 Do you see that?

1 A. Yes, indeed. That's what Southern says by
2 means of his President, but, once again, I am not
3 aware of the result of this request or this letter.

4 Q. Yes, Mr. Hernández. Thank you.

5 Would it surprise you to know that Southern
6 paid Royalties on its Concentrator Plant? Plants?

7 A. I would be surprised, let's say, if we are
8 talking that with just one mining concession, Southern
9 had an investment project that was stabilized, and
10 Southern interpreted that the stabilization did not
11 cover all of the Mining Unit because what I have
12 seen--and this is what I said in the paragraph that
13 you mentioned before--that I have not known of cases
14 of companies that have stability agreements that, by
15 having just one Concession, they would establish the
16 separation.

17 Q. Thank you.

18 I just want to--one last question, because
19 the President had asked you about separating accounts,
20 and you had referred to Article 22. And I would
21 like--you didn't mention at all Article 25, and I'd
22 like to just look at Article 25, briefly.

1 A. Umm-hmm.

2 Q. We'll put it on the screen. It's Tab 6 of
3 your binder, if you'd like to look.

4 A. Okay.

5 Q. I'll read the English.

6 (Comments off microphone.)

7 Q. I'll read the English for the record,
8 starting with: "The Mining Activity Titleholder must
9 submit in cases of expansion of facilities or new
10 investments that contractually enjoy the guarantee of
11 legal stability, said Titleholder must make available
12 to the Tax Administration the Annexes that demonstrate
13 the application of the tax regime granted to the
14 aforementioned expansions or new investments."

15 So, does that--my question is very small,
16 short, concrete: Does that change your analysis or
17 your response to the President's question?

18 A. Here it is referring to Demonstrative
19 Exhibits, and I would like to mention that when the
20 Tax Administration is requesting this, it's not
21 referring to separate accounts, and neither to
22 separate accounting. In current audits, SUNAT may

1 tell a taxpayer "please show your demonstrative
2 annexes," and the taxpayer prepares them at that
3 moment. It does not demonstrate that they keep
4 separate accounts or different accounting systems. A
5 Demonstrative Annex is something that I prepare, as an
6 accountant, in a specific point in time, if I am
7 requested certain information.

8 Q. I understand. Thank you.

9 MS. HIKAWA: No further questions at this
10 time.

11 PRESIDENT HANEFELD: Thank you.

12 Ms. Sinisterra, questions in redirect?

13 MS. SINISTERRA: One moment. Thank you,
14 Madam President.

15 (Pause.)

16 MS. SINISTERRA: No further questions.
17 Madam President, thank you.

18 PRESIDENT HANEFELD: Thank you. The
19 Tribunal has no further questions either. So, you are
20 released with thanks as Expert in these proceedings.

21 THE WITNESS: I thank you, Madam President,
22 Members of the Tribunal. Goodbye.

1 (Witness steps down.)

2 PRESIDENT HANEFELD: So, we continue now
3 with the Respondent's Experts?

4 MS. HIKAWA: Yes. We'll try and make
5 transition as quick as possible.

6 JORGE ANTONIO BRAVO CUCCI and JORGE LUIS PICÓN
7 GONZALES, RESPONDENT'S WITNESSES, CALLED

8 PRESIDENT HANEFELD: Welcome, Mr. Bravo, and
9 Mr. Picón. You have already followed, now, the
10 questioning of Mr. Hernández, so I think we do not
11 repeat much. Now, it's just about on you to make your
12 Declarations, if you could, in turn, please read out
13 the Declaration for us.

14 THE WITNESS: Good afternoon, Madam
15 President. I'm going to read Expert Declaration.

16 SPANISH REALTIME STENOGRAPHER: Could you
17 identify yourselves first?

18 THE WITNESS: (Mr. Bravo) Yes. I am Jorge
19 Bravo. I'm a Professor of Tax Law, and I appear
20 before this Tribunal as an Expert in Tax Law on behalf
21 of the Peruvian State.

22 So, I will read out the Expert Declaration.

1 I solemnly declare upon my honor and
2 conscience that my statement will be in accordance
3 with my sincere belief.

4 THE WITNESS: (Mr. Picón) Good morning. My
5 name is Jorge Picón, and I solemnly declare upon my
6 honor and conscience that my statement will be in
7 accordance with my sincere belief.

8 PRESIDENT HANEFELD: Do you have your Expert
9 Reports, RER-3 and 8 in front of you?

10 THE WITNESS: (Mr. Picón) Yes, we do.

11 PRESIDENT HANEFELD: And I'm sure that
12 Counsel has advised you of the process of examination,
13 and so that the cross-examination questions will be
14 directed primarily to one Expert, so please go ahead
15 with your presentation.

16 THE WITNESS: (Mr. Picón) Thank you.

17 MS. SINISTERRA: Can we receive a copy,
18 please.

19 SPANISH REALTIME STENOGRAPHER: I'm the
20 Stenographer. Let me take this opportunity to let you
21 know, if you're going to switch speaking, since I
22 can't see you, since I'm sitting behind you, if you

1 could just let me know when that happens so I can
2 register it in the minutes.

3 THE WITNESS: (Mr. Picón) Of course.

4 PRESIDENT HANEFELD: Are we ready? Good.
5 Please go ahead.

6 THE WITNESS: (Mr. Bravo) Thank you very
7 much, Madam President, Distinguished Arbitrators,
8 Members of the Tribunal, all lawyers present.

9 DIRECT PRESENTATION

10 THE WITNESS: (Mr. Bravo) Good afternoon to
11 all. As I've indicated, my name is Jorge Bravo Cucci.
12 I'm a Professor of Tax Law. I'm accompanied by Jorge
13 Picón, who is also a Professor of Tax Law, and both of
14 us are going to make a very succinct presentation of
15 the main conclusions that we've reached in our two
16 Reports, which have been submitted to this Tribunal.

17 The topics we're going to cover are
18 basically what you see here in the table of contents,
19 and given time considerations, I'm not going to read
20 through it right now. I'm going to go straight into
21 the presentation of the first topic, and I give--yield
22 to Jorge Picón.

1 THE WITNESS: (Mr. Picón) The first topic
2 we're going to discuss is to determine whether the
3 Stability Agreement did or did not cover the Primary
4 Sulfides plant. To understand stability agreements,
5 it's important to understand the context in which this
6 legislation was adopted. This topic has been
7 addressed by several Experts.

8 In the 1990s, Perú had a major crisis, and
9 in order to attract investors, it adopted a number of
10 Measures. The tax stability agreements were one of
11 these, but it's important to bear in mind that not
12 only is there Mining Stabilization Agreement, there
13 were three types of Stabilization Agreements, legal
14 stabilization, mining stabilization, and hydrocarbon
15 stabilization.

16 This will be important at a certain point in
17 time, because the reading of the Mining Law in that
18 context, well, we'll see that there are several
19 mentions in the Mining Law of the Company that
20 receives the investment. Nonetheless, the logic is
21 quite simple. As State, I'm going to give you
22 guarantees, that means I'm going to waive my capacity

1 to change the tax regime in exchange for you making a
2 commitment to a certain investment.

3 That investment should always be contained
4 in the Agreements that granted the benefits, whether
5 it was mining, legal, or hydrocarbons. The sequence
6 of the legal provisions adopted in the 1990s, as has
7 been discussed, the Constitution gave constitutional
8 rank to what are called "contratos-ley." As the name
9 indicates, these are contracts in which the State
10 undertakes to something which often goes beyond what
11 the law could change afterwards.

12 So, the Single Unified Text and the
13 Regulations have a sequence. They say the Mining
14 Titleholder has to have a minimal level of investment,
15 has to present a stability agreement to me, and then
16 I'm going to grant the stability in a stability
17 agreement. And it's important to mention that the
18 first clause of the Cerro Verde Agreement is
19 incredibly specific.

20 It says, expressly, that the Agreement
21 guarantees the benefits, specifically for the Cerro
22 Verde Leaching Project. As other Experts have

1 indicated, it is mentioned more than eight times in
2 the Contract, these specific words. And that is
3 corroborated by Article 82 which says, that in order
4 to promote the investment, the Mining Titleholder
5 shall enjoy stability, which is granted by the State
6 through the Agreement signed.

7 Now, it's important to clearly understand
8 that, when the law speaks, it speaks of investment, it
9 doesn't talk about mining unit, it doesn't talk about
10 Economic-Administrative Unit, it doesn't talk about
11 Concession. And we understand, as a matter of logic,
12 that the Mining Project is the investment project that
13 is contained in the Feasibility Study, because that's
14 what the Agreement says. Any other interpretation
15 would expand the effect of said Agreement.

16 Now, specifically, Article 83 is determinant
17 to figure out the scope of the Agreement. If
18 Article 83 says the Mining Activity Titleholders,
19 well, the effect of the contractual benefit shall
20 apply exclusively to the activities of the mining
21 company and in whose favor the investment was made.

22 So, it was asked a moment ago, why does the

1 Law make mention such as this? And the thing is, when
2 you see provisions adopted in tandem, the legal
3 stability agreement could guarantee the Company that
4 makes the investment or the investor behind the
5 investor, so two types of agreement were signed for
6 each investment.

7 In this case, in the case of mining,
8 stability was only given to the company that received
9 the investment, not the investor as such.

10 As happened in--as was the case of the legal
11 stability agreement. In Article 82, which regulates
12 this is extremely clear.

13 The contractual guarantees shall benefit the
14 Mining and Titleholder exclusively for the investment
15 that it makes in the Concessions.

16 When one interprets tax issues, one
17 interprets it in a very literal and exact manner. Had
18 the legislative wanted to say the contrary, they would
19 have said activity--the Mining Titleholder for the
20 activities on the Concession.

21 And then one would have clearly understood
22 this applies to the Concession or to the Unit. But in

1 this case, it's quite the contrary, it's for the
2 investment, and the investment has to be made in some
3 place. Now, I'm not going to give one a Concession
4 or, rather, a stability agreement, if someone buys a
5 building for \$10 million. No. The investment has to
6 be made in some place. Specifically, in the
7 Concession or in the Economic-Administrative Unit.
8 Basic conditions.

9 In our understanding, the Stability
10 Agreement applies only to the Leaching Project. It
11 cannot be extended to any other investment made by
12 Cerro Verde, independent of said investment being
13 carried out in the Concession or the
14 Economic-Administrative Unit or the mining unit.

15 Now, Mr. Bravo will take it at this point.

16 THE WITNESS: (Mr. Bravo) Thank you.

17 On this second point we're going to analyze
18 and develop our conclusion as to why we argue that
19 SMCV was required to pay Mining Royalties with respect
20 to the activities that it carried out at the Primary
21 Sulfides Plant.

22 And the first thing--and this is very

1 important to bear in mind and to develop and to
2 explain--is that Mining Royalties are not a tax. We
3 agree on this point with the Claimant's Expert.

4 Here one must explain the relationship of
5 taxes to Mining Royalties. In both cases, one speaks
6 of State revenues. Therefore, we are talking about
7 public finance. State revenues, and this has also
8 been said by Claimant's Expert, may be original
9 revenues when they are obtained from the wealth of the
10 State; in this case, natural resources and
11 exploitation thereof by a third party. And, on the
12 other hand, we have the revenues--the derivative
13 revenues, which are those that the State collects from
14 the wealth of private persons. So, we understand here
15 that these are not taxes, but, rather, original
16 revenues.

17 The Constitutional Court more than a decade
18 ago resolved a discussion about whether Royalties are
19 or are not a tax, and what they said is that this is
20 a--this is consideration for the usufruct that the
21 mining concession holder obtains from the resources
22 which are State-owned and that are extracted from

1 mining concessions.

2 Mining Royalties have their own rules. They
3 are similar in many ways to or related to the rules
4 for taxes, but they are not taxes. So, first of all,
5 Law 28258--which is the Mining Royalty Law, the law
6 that creates them, this was modified in a fundamental
7 way in 2011, but it continues to be the same
8 law--Supreme Decree 157-2004 Mining Royalty Law
9 Regulations, and another third provision which is very
10 important, Law 28969.

11 This Law has a series of procedural
12 articles, operational articles, that make it possible
13 to audit or oversee this State Resource. Article 3
14 specifically of this Law builds a bridge to the Tax
15 Code, and this also has a point of connection with
16 what has been indicated by Claimant's Expert, the
17 context of tax debt.

18 This Article 3 specifically states what the
19 provisions of the Tax Code are that apply to
20 Royalties, and it notes--and this must also be
21 indicated--that Royalties fall within the concept of
22 tax debt. This is a--is this a legal fiction? Well,

1 I take issue with what has been indicated by the
2 Claimant's Expert, that it's not a legal fiction.
3 It's a Regulation that is specifically stated in the
4 Mining Legislation.

5 Very briefly, the definition of "Mining
6 Royalty" is set out at Article 2, but it's important
7 to bear in mind what Article 3 indicates. During the
8 time of the Assessments by SUNAT of Cerro Verde, years
9 2006to 2011, this was the text that was in force, and
10 basically what it said was that Royalties shall be
11 paid on the value of the concentrate.

12 So, if what we are talking about is a use of
13 a natural resource, it is true that the act that gives
14 rise to the Royalty is extraction, but it's not just
15 extraction, but also the usufruct that the Concession
16 holder makes of that ore, and that usufruct, that
17 value, that earning or profit, is going to be
18 generated at the moment of sale.

19 That is why, tying into what Article 3 says,
20 the value of the concentrate, the interpretation up
21 until 2004 was that it was necessary for what to be
22 sold, not to be specifically the unprocessed ore, but,

1 rather, the mineral concentrate or its equivalent,
2 which is what the legislation about Royalties states.

3 Now, to conclude, Mr. Picón already
4 explained, our Opinion is that Cerro Verde had
5 stability only in respect of the Leaching Plant, not
6 the investment made in the Primary Sulfides Plant--I'm
7 not going to go on with the arguments in this regard;
8 I think you've already heard them--and, therefore, the
9 investment project for the Primary Sulfides Plant,
10 which was never included in the contractual guarantee,
11 in our view, did not have the--was not covered by the
12 Stabilization Regime, and, therefore, Mining Royalties
13 were applicable to the sales of the processed ore,
14 which obviously had the--was the value of the
15 concentrate.

16 And I will now yield back to Mr. Picón to
17 take up the next point.

18 THE WITNESS: (Mr. Picón) In the Expert
19 Report, it's indicated--imagine I have to pay the
20 royalty. At least one would not charge interest and
21 they raise--he raises three--we have three arguments
22 in response. I will develop two of them and Mr. Bravo

1 the third one.

2 The first argument is that, look, Article 33
3 of the Tax Code says that you have to apply to the
4 inflation if the Tax Tribunal takes time or is delayed
5 in providing its Resolution.

6 Now, what the Expert fails to analyze is
7 that the Law 28969, which regulates which provisions
8 of the Tax Code are applicable to Royalties, expressly
9 indicates that Article 33 does not apply. That
10 mention has no legal basis. And, to the contrary,
11 Article 7.3 of the Royalties Regulation expressly
12 states you are going to apply an interest as from the
13 moment when you were supposed to pay. This reference
14 to article 33 has no legal basis, contrarily it runs
15 against what is contained in the Regulation on
16 Royalties.

17 The second argument: He says, well, imagine
18 that one has to pay Royalties. Don't apply interest
19 to me, because the Constitutional Court has already
20 stated in some Judgments that--

21 (Interruption.)

22 SPANISH REALTIME STENOGRAPHER: If you could

1 speak a little more slowly, please.

2 THE WITNESS: (Mr. Picón) Of course.

3 The second argument is that there are
4 Judgments of the Constitutional Court that indicate
5 that one should suspend the application of interest in
6 tax cases. Is the background that's been cited
7 applicable? Are the Judgments of the Constitutional
8 Court for violation of reasonable terms for the
9 Royalty Cases?

10 No, first because they are issued only with
11 respect to taxes, and as we clarified a moment ago,
12 Royalties are not a tax.

13 Second, they are not general judgments.
14 They are judgments for particular situations. And,
15 according to the Constitutional Court itself, they
16 require an analysis of the criteria that are set forth
17 in the overhead: The complexity of the case,
18 procedural conduct of the Company, conduct of the
19 public administration, and consequences of the delay.
20 Only when one analyzes that on a case-by-case basis
21 can one reach the conclusion of waiving interest in
22 the particular case.

1 It's important to note that among the
2 documents submitted by the Claimant are some videos
3 from a YouTube channel that I handle with--that I run
4 with Mr. Bravo where we touch on interest, and I would
5 just clarify that these videos are made for the
6 general public and in colloquial language and bear no
7 relationship whatsoever to our Expert Reports which
8 address the specific case of Cerro Verde and not
9 generic public statements that have been made for
10 nonspecialists in any event.

11 And, Mr. Bravo will handle the next topic.

12 THE WITNESS: (Mr. Bravo) Thank you very
13 much, Jorge.

14 On this next point, we are going to address
15 a conclusion that I think is crucial for this
16 proceeding, which is the Claimant's allegation that
17 the exemption of Penalties and Interest under
18 Paragraph one of the Article 170 of the Tax Code
19 wasn't applied. Reference is made to this in relation
20 to reasonable doubt. I put that here because of the
21 text of the Article 170 that I'm going to refer to is
22 important. It's relevant.

1 The Claimant and its Expert have indicated
2 that there would be an obligation by the State to
3 apply, or to waive, rather, on its own initiative,
4 Penalties and Interest at the request of one who
5 alleges that there is a vague provision or ambiguous
6 provision.

7 We need to note that Article 170, section 1
8 sets forth a power of the State, and it's relevant
9 because we are talking about Interest and Penalties
10 that have accrued, that have arisen, and that,
11 therefore, are part of the expectation in respect of
12 collection of revenue on the part of the State. We're
13 talking about revenues for the public fiscal, and
14 we're talking about a general principle which is the
15 waiver of State--of interest for the State.

16 Once there is revenue that the State is not
17 collecting, then there needs to be a very good
18 justification for this. It's been indicated
19 throughout this process that the base--the basis for
20 applying this Article 171 is the ambiguity of a
21 provision. And there's a big mistake there, and I'd
22 like to indicate it.

1 In the article--and you have the first
2 paragraph highlighted in yellow--it speaks more of a
3 misinterpretation. Now, this is important, because a
4 misinterpretation is not necessarily going to flow
5 from an ambiguous provision. Here, we are all lawyers
6 except the Interpreters, and the lawyers know
7 perfectly well that we in our day-to-day work life
8 face ambiguous provisions, because the language with
9 which the provisions are drafted is human language,
10 and there may be evident ambiguity. Nonetheless, we
11 don't always get confused when it comes to
12 interpretation.

13 Now, behind this mechanism or this power of
14 the State there's not just a vague or ambiguous
15 provision. There might be provisions that are
16 excessively convoluted--I'm not going to get into more
17 examples, but basically what one requires is a
18 misinterpretation. That means that one who alleges,
19 one who seeks to have interest waived, is based on an
20 assumption that their interpretation was mistaken; it
21 wasn't the correct one.

22 If we analyze Article 170, what is actually

1 required for the State to implement this power and not
2 charge Interest and Penalties, well, there needs to be
3 a misinterpretation, first of all; second, there must
4 have been failure to pay by the taxpayer; three, what
5 is required is that the State decide whether to apply
6 the exemption of waiver and to do so through a
7 clarifying provision, a clarifying provision which
8 could be a law.

9 Obviously, we are talking about State
10 revenue. So, it would have to be a law of the
11 Congress or a provision of similar rank, which we
12 would call a legislative decree in Peruvian law; a
13 Supreme Decree from the Ministry of the Economy and
14 Finance; a SUNAT Resolution, at Superintendency level.
15 It would have to be that, or, at any rate, an
16 observation by the Tax Tribunal of similar rank.

17 We reiterate: This is a question of
18 availability of public revenues, and, therefore, there
19 need to be very well-founded reasons for the State to
20 apply this mechanism of waiver, and not simply the
21 interest of a private company.

22 Now, analyzing some of arguments that are

1 put forward when it comes to this sua sponte
2 application of Article 170, well, the lawyers for
3 Claimant, such as its Expert in Tax Law, argue that
4 this is, indeed, an obligation. They say that it is a
5 right, and, therefore, if one exercises that
6 right--and this is in the Tax Code, and we don't fail
7 to recognize that--automatically the State should
8 waive the corresponding interest and Penalties.

9 And, for this, they rely on two articles,
10 127 and 129, which I'm going to try to explain in very
11 summary form.

12 What Article 127 indicates that the bodies
13 that resolve an administrative dispute have the
14 power--once again, it's not an obligation; it's the
15 power--to review the facts and the law. So, it's not
16 a pure legal review, but it's also a review of the
17 facts. Is that sufficient legal basis for saying that
18 the State, SUNAT, or the Tax Tribunal should sua
19 sponte have applied the mechanisms set out in
20 Article 170? No, it is not.

21 And then Article 129, which they cite, well,
22 it says that administrative rulings must address all

1 the questions raised by the parties as claims in the
2 case. And they cannot--an administrative body cannot
3 rule on issues that have not been put before it.

4 In the specific case of Mining Royalties
5 analyzing the Claims and appeals on Royalties, we note
6 the following: That the Claims and Appeals from
7 2006-2009, well, Cerro Verde has argued that waiver of
8 interest before the Tax Tribunal. What the Tax
9 Tribunal responded was that it is not appropriate at
10 that point to rule on an issue that has not been
11 raised from the outset.

12 Now, in the 2010-2011 request for
13 reconsiderations, Cerro Verde did raise from the
14 beginning a request that such interest be waived. And
15 what both SUNAT and the Tax Tribunal responded was
16 that, for them, there is no reasonable doubt. Their
17 arguments are set out in the respective Resolutions,
18 and, therefore, they do comply with Article 129.

19 In conclusion, there is no obligation to
20 exempt one who seeks a waiver of interest or penalties
21 because of the doubt one may have in the
22 interpretation. There is not necessarily an

1 obligation of the State to do so.

2 And, to conclude, I will give the floor back
3 to my colleague.

4 ARBITRATOR TAWIL: Let me ask for
5 clarification, please.

6 THE WITNESS: (Mr. Bravo) Of course.

7 THE WITNESS: (Mr. Picón) Now, was Cerro
8 Verde under an obligation to maintain separate
9 accounts for its stabilized and nonstabilized
10 investment project in this case?

11 Our understanding is that the answer is yes.

12 One of the big arguments raised by the
13 Claimant's Expert was that the State should have given
14 Cerro Verde the rules for being able to exercise such
15 separate accounting, but this makes no sense, because
16 all mining companies--construction companies,
17 education companies; we work with all these types of
18 companies--end up keeping records of their costs based
19 on accounting rules.

20 Cost accounting has its own accounting
21 rules. Financial accounting has its own accounting
22 rules. The Income Tax provision at Article 33 in the

1 Regulation says that you should pay your taxes based
2 on general accounting principles, and if I at the Tax
3 Tribunal see otherwise, then we'll so indicate, but in
4 principle one should apply accounting standards.

5 So, in this case the determinative articles
6 for determining the obligation, well, it would be
7 Article 22 of the Regulation, which expressly
8 indicates that, if you make new investments--or
9 Article 25, rather, that have different tax
10 implications, well, Article 25 speaks of investments,
11 not Concessions, not Economic-Administrative Units.
12 It doesn't talk about mining units. It talks about new
13 investments, expansions of investments, and it says
14 you have to have control so that you can be audited by
15 the SUNAT. That's obvious, because the Tax
16 Administration in any country faces more than a
17 million taxpayers, and the premise is that everyone
18 needs to respect the rules in force at that time.

19 Now, if you tell me that they don't apply to
20 you to keep--maintain these controls for determining
21 obligations based on the tax regime, then you're
22 saying it explains to you--that it pertains to you,

1 and that's what should happen here. Since there could
2 not be in a review of a tax situation, well, they
3 carried out--they abided by these controls.

4 It's important to point out that when citing
5 the background, the Claimant--and Mr. Hernández
6 mentioned this a moment ago. He spoke of three
7 companies. Well, if you review these rulings, you see
8 that the Tax Administration never had a different
9 criterion, and we can easily determine this, but we
10 don't really have enough time. And so, we will leave
11 that to any questions we have on the subject matter.

12 And Mr. Bravo will take up the next point.

13 THE WITNESS: (Mr. Bravo) Very well.

14 Mindful of the time, which we understand is
15 quickly running out, I'm going to get into our
16 conclusions with regard to taxes, no Royalties.

17 We obviously conclude, and based on our
18 conclusions, that all the Assessments made by SUNAT of
19 the activities carried out with the Primary Sulfides
20 Plant, which was not stabilized, were correct. That
21 is basically it.

22 And I'd like to conclude my presentation on

1 the analysis made in this proceeding of the supposed
2 or alleged nonexistence of an obligation to payment
3 until such time as the administrative stage for tax
4 matters culminates.

5 It's been said here, and repeatedly, that
6 the debtor only has an obligation once the proceeding
7 before the Tax Tribunal concludes, obviously against
8 its interests, and actually that's not correct, and
9 I'm going to explain it.

10 The graph that you have up on the screen
11 summarizes very briefly where a tax obligation arises
12 and how it is that it becomes effective and
13 enforceable.

14 The first thing we need to realize is that,
15 for there to be a tax obligation, there needs to be a
16 triggering event. The triggering event in respect to
17 both Royalties and tax obligations is the law. The
18 law sets what is levied--subject to levies and what is
19 not.

20 And once the triggering event occurs, the
21 tax obligation arises, the taxpayer or the
22 administration has the obligation to determine the tax

1 or Royalties, as the case may be. If the taxpayer
2 doesn't make the determination, it's the Tax
3 Administration that must do so or that may do so.

4 The determining act by the Tax Authority,
5 well, which it does after an audit, which is to
6 provide guarantees, well, if it determines that
7 there's a debt, if it determines that there's an
8 obligation that wasn't paid, then it indicates that
9 the obligation exists, and not only that, not only
10 does it determine the existence of something that has
11 been omitted, but, rather, it quantifies the
12 obligation, turns it liquid, and it--which makes it
13 due on the taxpayer.

14 And, not only that, but from that moment it
15 begins to generate the effects particular to an
16 administrative Act, that efficacy that the
17 determination Act has in the Peruvian case is
18 suspended for 20 days, which is the time frame
19 indicated in the Tax Code for the taxpayer to be able
20 to make use of the right to defense, to decide whether
21 or not to file a request for reconsideration.

22 Now, if the taxpayer who's been notified

1 with an Assessment Resolution decides not to challenge
2 the act of assessment, then it gives rise to an
3 obligation that is enforced coercively. There is no
4 major discussion a relevant issue in that scenario.

5 Now, let us look at the possibility of the
6 taxpayer challenging the determination Act at both
7 levels.

8 So, first does the obligation exist? Yes,
9 it exists. Is there an obligation in which the debtor
10 has the legal duty of performance. Here, we the
11 lawyers perfectly know what that is, the legal duty of
12 performance, i.e. the content of the obligation, and
13 on the side of the creditor, what exists? a right to
14 require performance. That right to require
15 performance, which is called " exigibilidad" in
16 Peruvian law, is suspended.

17 That right is suspended, but what that does
18 not mean is that there is no obligation, nor that
19 there's no legal duty of performance. What does this
20 mean? Well, if during the request for reconsideration
21 and appeal stage, the debtor of the Royalty or taxes
22 opts not to pay, it's not that they don't have an

1 obligation not to pay, but, rather, they are deciding
2 to fail to comply, and that failure to comply creates
3 damage for the State which is compensated you know
4 how? With the statutory interest.

5 The Expert for the Claimant--and we fully
6 agree on this point--has indicated that the legal
7 nature of statutory interest is a compensatory nature.
8 Why? Because there's a default, and what is that
9 default? It is the failure to pay the tax obligation
10 in the time frame indicated. If it were true that
11 there's no payment obligation until it is subject to
12 coercive enforcement, then how could statutory
13 interest in respect of that event arise?

14 So, here, what we're indicating is that one
15 must draw a distinction between the existing
16 obligation and the exigibilidad, which is different.

17 I know that I'm running short on time, and
18 basically what I want to indicate is that from our
19 standpoint as Tax Experts, we're not Damages Experts
20 and we don't claim to be so, if there is some harm,
21 that which can be gauged through the statutory
22 interest, which may--compensates for harm, has arisen

1 from the moment of determination act.

2 And as Tax Law Experts--and Mr. Hernández
3 knows this perfectly well as well, a company doesn't
4 recognize harm in its Financial Statements, only when
5 they are coercively forced to pay. All attorneys,
6 even those of us who are not Tax Law Experts, and to
7 whom represent clients in proceedings, know perfectly
8 well that there are contingencies, there are degrees
9 of contingency, and those contingencies must be
10 reflected by a company depending of, the IAS 37 points
11 it out, I'm talking about the International Accounting
12 Standards, if it's remote, likely, or possible. If
13 there is a probability of greater than 50 percent that
14 the case will not turn out favorably, however good we
15 consider our arguments to be, there is an obligation
16 to recognize a contingent liability in the Company's
17 books, and to not wait for there to be coercive
18 collection.

19 And with that, I conclude. I beg your
20 indulgence, Madam President, if I've gone on so long.
21 This is now Tax Measures--it's been said with respect
22 to Tax Measures that there's no concept, it's--such

1 concept in Peruvian law. There isn't. But that
2 doesn't mean that we cannot interpret what a "Tax
3 Measure" is?

4 Well, I disagree with that. I disagree with
5 the other Party's Expert. Measure is an action, is a
6 decision by the Government. Decisions by the
7 Government don't tax matters.

8 Well, how are they shown regularly? By
9 a--regulations, procedures, rules. These are Acts of
10 power. The Government decides on tax matters, whether
11 it's going to create taxes, apply interests, waive
12 interests, apply penalties, et cetera.

13 Why is it that we need to reduce the concept
14 of tax to the tax itself? That resists no analysis.
15 I'm not saying, and I've never said that Statutory
16 Interest or Penalties are taxes. That's not
17 acceptable. What is the nature of the statutory
18 interest? Evidently, they are compensatory element
19 that the State applies due to the not compliance of
20 the tax obligation. Is part of the tax regulations?
21 Yes, of course. Tax regulations and the Tax Code is
22 one of them, the Tax Code in particular, do not create

1 any kind of a tax. Is the Tax Code not a tax rule,
2 not a tax measure? We have to think about this.

3 From our standpoint, the breach--and I will
4 finish with this, I'm not an Expert in Damages--but I
5 would think that with the exhibition of the opinion
6 that the State would have, the alleged harm, I insist,
7 in considering that the Concentrator was not
8 guaranteed, that would mean that there was,
9 hypothetically, a breach.

10 Thank you for your attention.

11 PRESIDENT HANEFELD: Thank you very much to
12 the two of you. We would like to proceed as we did
13 with the Claimant's Expert and ask some initial
14 questions, and then the Parties will enter into their
15 set of questions.

16 QUESTIONS FROM THE TRIBUNAL

17 PRESIDENT HANEFELD: And I start, and I know
18 you will not be surprised by my questions, they are
19 very similar to the ones I had for Mr. Hernández. So,
20 my first question relates to the question whether the
21 Penalties and Interest constitute Taxation Measures.

22 And just to better understand, if one takes

1 the position--and this is undisputed. You just
2 confirmed it--that Royalties are not taxes, one could
3 arguably think, okay, Penalties and Interest, which
4 are also a civil law, whatever, in our concept, are
5 separate, and like an Annex only to this nontax. So,
6 there can be no Taxation Measures if one imposes
7 Penalties and Interest. And I understand you saying,
8 oh, no. They are, nevertheless, taxation measures.

9 Do I understand correctly that you base this
10 on Article 3 of the Mining Royalty Law? Because you
11 say--and now on your last slide, this is the term "Tax
12 Measures refers to decisions of the State that may
13 hand it down through its legal or regulatory
14 provisions," and Article 3 of the Royalty Law exactly
15 constitutes such legal provisions?

16 THE WITNESS: (Mr. Bravo) Yes, Madam
17 President, indeed. What we said is that one must not
18 confuse a "tax" with Taxation Measures. There's
19 something that needs to be clear, first and foremost.
20 Royalties, in principle, are not taxes. That's true.
21 They're not taxes.

22 Does that mean that there are no tax

1 regulations that govern certain aspects of Royalties?
2 No, because they exist. And you made mention of them.
3 Article 3 of that Law indicates, expressly, what the
4 tax rules of the Tax Code are that are applicable to
5 the Royalties, and that transforms the Royalties in
6 taxes. Of course not. But there are certain tax
7 rules that apply to Royalties, and that is the
8 explanation.

9 ARBITRATOR TAWIL: Let me see if I
10 understand you correctly. You say that there are tax
11 rules, and you're saying that Royalties are not taxes.
12 Those tax provisions turn Penalties and Interest into
13 Taxes?

14 THE WITNESS: (Mr. Bravo) No, we're not
15 saying that at all.

16 ARBITRATOR TAWIL: Okay. So, they are not
17 taxes either?

18 THE WITNESS: (Mr. Bravo) No, they're not.

19 PRESIDENT HANEFELD: They are not taxation
20 measures; right?

21 THE WITNESS: (Mr. Bravo) Please repeat your
22 question. Repeat your question. I think that there

1 was an issue with the translation.

2 PRESIDENT HANEFELD: My apologies. Now, I
3 think you said they are not taxes, the Penalties and
4 Interest, but, nevertheless, they qualify as Taxation
5 Measures. Is my understanding correct?

6 THE WITNESS: (Mr. Bravo) Yes, you
7 understood that correctly. That is what I was saying.
8 Although they are not taxes, taxes may not exist by
9 themselves. They need, for example, procedural rules,
10 a penalty regime. They need also other kinds of rules
11 so that the tax may be complied with. And formalities
12 may comply with. And they had that nature as taxation
13 norms.

14 ARBITRATOR TAWIL: I don't think that this
15 is clear. We have to clarify this. What you are
16 saying is that they need a penalty-imposing regime and
17 regulatory norms, but this does not change the nature
18 of the Penalty. They're not taxes.

19 Some tax regulations may be applied in the
20 periphery, as to how something is calculated. But the
21 nature is not changed. They are not taxes?

22 THE WITNESS: (Mr. Bravo) No. They're not

1 taxes, because, fundamentally, they are trying to
2 bring compensation for a breach but, we're not saying
3 that they are taxes.

4 ARBITRATOR TAWIL: Okay. They are
5 accessories. If Royalties are not taxes, penalties
6 neither could be taxes.

7 THE WITNESS: (Mr. Bravo) Yes. In the case
8 of Income Tax, it is not. So, that is not the
9 discussion. It is clear to us that there are
10 provisions that regulate "the periphery," so the
11 periphery of the tax phenomenon, with the existence of
12 the Income Tax and Value-Added Tax Law, well, then a
13 tax regime wouldn't really be possible.

14 PRESIDENT HANEFELD: My second question
15 relates to Article 170. You explained that in your
16 view, Article 170 of the Tax Code does not only
17 require an existence of an ambiguous rule, but much
18 more, so you do not consider it applicable in this
19 case. But let us also ask to the hypothetical that we
20 already posed to Mr. Hernández.

21 So, just going on the purely hypothetical
22 assumption that the Tribunal would get to the

1 conclusion that the Concentrator was not stabilized
2 and so--and now a payment of Royalties were due, on
3 this purely hypothetical assumption, would a waiver of
4 Penalties and Interest be even an option under the
5 Peruvian Tax Code, or would such misinterpretations or
6 reasonable doubts in that become obsolete by this
7 Decision?

8 THE WITNESS: (Mr. Bravo) So, the first
9 element would be complied with--that is to say, that a
10 conclusion was reached, that the interpretation that
11 the Company had was erroneous. It was an erroneous
12 interpretation. The first element is met.

13 The second element would be, did the
14 taxpayer pay the debt? If it did so, then the
15 Government cannot really get what has been paid
16 already--or condone it. If these are debts that were
17 not paid because of whatever circumstance, then we
18 would have a third level of analysis, the State's
19 decision.

20 The Peruvian State would assess the
21 situation, and it would have to decide whether there
22 is room for failing to collect Penalties and Interest

1 from this Company. The law does not state this, but
2 evidently, it has to go through a matter related to
3 provide support for the grounds of the State's
4 decision. The State cannot issue through a law, a
5 benefit addressed to a single company. It would have
6 been necessary to have an abstract group of people
7 that have misunderstood the law. This is quite
8 important since we are talking about disposing of the
9 funds of the State. When a State authority decides
10 through a resolution or law not to collect something
11 that had accrued in favor of the State, then it's
12 going to have to justify to the State oversight
13 agencies, why is it that a collection was not made?
14 So, you have to have good justification for your
15 actions, and I think that Claimant's Expert
16 understands this the same way as we understand it.

17 These are very specific situations. It's
18 not like the taxpayers are able to get this effect at
19 all times. Sometimes the Decision is automatic.
20 There is no need to ask for anything else.

21 ARBITRATOR TAWIL: In connection with
22 Article 170, what you are saying is that Penalties and

1 Interest do not proceed here.

2 Is this the only case? Only if these
3 requirements are met, then the Penalties and Interest
4 are not going to be applied? Has there been no other
5 case in Perú in connection with the application of
6 Interest and Penalties if it doesn't meet these
7 assumptions?

8 THE WITNESS: There are some cases in which
9 the case law has indicated that there is a waiver of
10 these interests when there is an act of God or force
11 majeure. This is not the case. It's just an example,
12 a pandemic situation.

13 ARBITRATOR TAWIL: So, these are not the
14 only cases. These are the ones regulated, regulated
15 by Article 170.

16 THE WITNESS: (Mr. Bravo) Yes, that's right.

17 ARBITRATOR TAWIL: But there could be other
18 cases.

19 THE WITNESS: (Mr. Bravo) Yes.

20 ARBITRATOR TAWIL: Act of God or force
21 majeure, for example.

22 THE WITNESS: (Mr. Bravo) Yes, for example.

1 PRESIDENT HANEFELD: Now let me come to the
2 last set of questions which concerns this double
3 accounting. On Slide--let me see which slide this
4 is--Slide 24 of your presentation, you said there are
5 precedents in Perú mining companies that keep
6 independent accounts for the different tax regimes
7 they apply to investment projects, and here you refer
8 to the example of Tintaya.

9 We earlier heard today that there seems to
10 have been also an example for Southern Perú. So,
11 please explain in more detail what are these examples
12 that you refer to?

13 THE WITNESS: (Mr. Picón) Of course. The
14 idea of oversight helps us determine the tax regime to
15 be applied. Stability agreements create an atypical
16 situation. Taxpayers are governed by a single law,
17 but there are certain taxpayers that have signed
18 stability agreements, and they have a number of tax
19 regimes that they need to apply; for example, they
20 have different Income Tax rates and other tax rates
21 for other taxes.

22 So, the law says you have to separate the

1 accounting out, because how I at SUNAT will know what
2 to apply to each stability agreement? Article 25 of
3 the Regulations of the Mining Law, Title Nine,
4 specifically indicates that, when new investments are
5 made that are subject to a tax regime that is
6 different, the taxpayer must keep the accounts, so it
7 can explain to SUNAT why is it that it is paying taxes
8 differently in connection with one project versus
9 another project.

10 Mr. Hernández said that it is not keeping of
11 accounts, but for those controls to take place, they
12 have to be accounting controls in nature.

13 So, in the case of Southern, what we have
14 is, in a single administrative unit, you can have two
15 projects with different tax regimes applied to each of
16 them. If that's the case, the Company is going to
17 have separate accounts. And he asks himself: How can
18 this be done? Well, cost accounting is very simple,
19 and the Experts on the matter have indicated this.
20 Cost accounting identifies indirect costs, direct
21 costs, and shared costs that should be assigned.
22 That's basically what you do to separate things out.

1 So, identifying direct costs and indirect
2 costs in each Project will need additional oversight.
3 But is it possible to separate these things out? Yes.
4 Were they obligated to do that? Well, if there were
5 two different tax regimes applied to them, yes, of
6 course they were obligated to do it.

7 Again, the Tax Administration is always
8 going to start from the premise that the general rule
9 applies, and the taxpayer is the one who is going to
10 have to say, "Okay, no. This is governed by Agreement
11 A, this by Agreement B, and this is the manner in
12 which things are determined."

13 In none of the cases that we cited has there
14 been Regulation, because we're talking about
15 accounting rules. If SUNAT disagrees with the
16 application of the accounting rule, that's going to be
17 the matter of a different dispute. But the
18 possibility of separating out accounts, well, that is
19 ruled--that is governed by accounting rules, general
20 accounting rules.

21 PRESIDENT HANEFELD: But Claimant made the
22 argument that SUNAT should have divided somehow, then,

1 between leaching and Concentrator. And so, is it then
2 on SUNAT to apply some sort of a split to the best of
3 its estimate, or is there no legal basis for this and
4 this does not happen in practice?

5 THE WITNESS: (Mr. Picón) Both in practice
6 and in the Regulation of the Agreements, if a company
7 has a number of tax regimes--and, in this case, the
8 Agreements allow for this--the Company is obligated to
9 show why is it that it's not applying the general
10 regime.

11 So, SUNAT is going to say: "How have you
12 calculated Project A, B, or C?" And SUNAT is going to
13 say: "I'm going review this." Of course the Tax
14 Authorities are not going to do the accounting for the
15 Company. They are only going to put forth a request.
16 And this happens every day in the tax fields.

17 We, our practice is, we normally work
18 against the Tax Administration--more of 95 percent of
19 what we do has to do with cases against the Authority
20 in connection with cases where they say: "Okay, well,
21 provide support about the deductions of this expense."
22 "Ok, look, I have brought papers and additional

1 support" "You didn't do it in a compelling way so I
2 will not recognize it." And this applies to all tax
3 obligations.

4 So, tax obligations start from the premise
5 that the taxpayer must show the Tax Authorities the
6 reasons why it's doing A or B. If it doesn't do so,
7 the Tax Authority of Perú or for any other country is
8 going to say, "Okay, look, I asked you the question.
9 You either didn't really provide support for this, or
10 the support you provided did not convince me, and that
11 is why I am applying this tax effect to you."

12 PRESIDENT HANEFELD: Thank you. This
13 concludes my questions.

14 Dr. Cremades, do you have questions?

15 ARBITRATOR CREMADES: I simply would like to
16 ask a question in connection with this concept of
17 reasonable doubt, ambiguous provisions. You also talk
18 about Franciscan rules. I never heard that expression
19 before; "Franciscan rules," you said. That's
20 something that I never heard before.

21 In this specific case, Articles 82 and 83 of
22 the Law and 22 of the Regulations allow for Claimant

1 to have a reasonable doubt, or is it simply that they
2 didn't want to comply and then, as they breached they
3 said, "Okay, well, I'm going to try to defend myself
4 if something comes against me before the Tax
5 Tribunal"?

6 Was there a reasonable doubt or not in this
7 case?

8 THE WITNESS: (Mr. Bravo) I think that the
9 law was interpreted in the wrong manner. So, 170.1
10 talks about a wrongful interpretation, an erroneous
11 interpretation.

12 In lawyer parlance, I spoke about Franciscan
13 rules that means very brief wording, in this specific
14 case that we're talking about, the tax lawyers talk
15 about "reasonable doubt," because we're saying that
16 the interpretation of the provision was erroneous.

17 On the basis of these explanations, I think
18 that the interpretation by Cerro Verde was erroneous.
19 And that is why they try to say that the State has to
20 waive interest, and also Penalties.

21 THE WITNESS: (Mr. Picón) And I would like
22 to supplement the answer.

1 In the private activity we do, we look at
2 different operations, financial institutions, and
3 right now we have a case pending for hundreds of
4 millions of dollars, and the Tax Authority, we believe
5 that there should be a waiver, the audit companies
6 believes that should be a waiver, the company believes
7 that should be a waiver, but it seems that SUNAT
8 considers that no waiver is applicable, and SUNAT is
9 asking for information. And we have told the Company,
10 "Okay, you can believe whatever you want to believe,
11 but you need to support everything," because the tax
12 law is quite rigid. The article 141 of the Tax Code
13 states: "If you do not provide the evidence when I
14 required it, then you cannot do it later, unless you
15 pay the tax debt first." And the taxpayers know that
16 that that's the rule.

17 We are convinced that we should really pay
18 no taxes. In this case, it is clear that the Tax
19 Administration thinks the opposite.

20 So, should I not submit anything and go to
21 the Tribunal? No, no, no, of course not. So, we tell
22 our clients, "Submit all the supporting documentation

1 and everything can then be analyzed by the Tribunal to
2 be able to put up a good fight," because if I do not
3 submit documents during the audit, later on I cannot
4 submit them.

5 And the article 141 of the Tax Code is a
6 very strict rule, and all of the Tax Code in Latin
7 America have--and in other countries as well--have
8 rules like that.

9 ARBITRATOR CREMADES: Okay. I'm sure that
10 the Franciscan order wouldn't want to be included in
11 this discussion.

12 ARBITRATOR TAWIL: How would you respond to
13 the arguments in connection with the 2014 and 2019
14 reforms? If things were so clear, why was there a
15 reform?

16 THE WITNESS: (Mr. Bravo) When you're
17 talking about the reforms, are you talking about the
18 reforms in connection with Royalties and tax regime
19 created under the Humala Administration?

20 ARBITRATOR TAWIL: Yes, I'm talking about
21 the Mining Law, Article 83(b), and then Article 22 of
22 the Regulations.

1 THE WITNESS: (Mr. Bravo) Okay. So, you're
2 talking about the amendment of the Single Unified Text
3 and the Regulations. Okay.

4 What we have indicated in our Report is that
5 these are rules that broaden the scope of the tax
6 regime. It's not that these regulations, you know,
7 specify something or provide restrictions.
8 Effectively, there you have a different opinion.

9 I think Jorge wants to say something.
10 That's his issue.

11 THE WITNESS: (Mr. Picón) Working in the tax
12 administration, I have worked for over six years in
13 connection with the preparation of tax rules for
14 Income Tax, Tax Code, value added tax, et cetera.

15 I frequently have this kind of discussion:
16 "We need to include something in the legal provisions
17 since taxpayers are acting in this particular way."
18 So, the fact that, you know, I have issued a rule in
19 '98 or '99, does that change things before? No. I
20 have to interpret the rules at that time. So, why do
21 I do that? Well, because I don't want any more
22 problems, because I know that there are a couple of

1 taxpayers that think the opposite and I would like to
2 avoid problems in the future.

3 ARBITRATOR TAWIL: Well, if things are so
4 clear why the change? What we are discussing here is
5 whether things were clear. You're saying, okay, if
6 you didn't want problems, the problems existed because
7 things were not clear. If things were clear, you
8 didn't really need any kind of change.

9 We're not saying if this is correct or
10 incorrect. We're talking about if this is clear or
11 not.

12 THE WITNESS: (Mr. Picón) One of the
13 provisions that was cited by the Claimant has to do
14 with: Since when is it that the SUNAT Reports are
15 binding? And it was said 2012 as stated in the Tax
16 Code. False, the Tax Code may have indicated that in
17 that moment in time but there are rules in the 1990s
18 that said that there was a hierarchy. There are more
19 than 100 Reports that were signed by me as well, but
20 the hierarchy was mandatory.

21 (Overlapping interpretation and speakers.)

22 (Interruption.)

1 THE WITNESS: (Mr. Picón) The fact that, in
2 2012, the binding nature of SUNAT's Report was
3 incorporated, did that mean that they were binding?
4 No. They were binding since 1990.

5 ARBITRATOR TAWIL: No. We are talking about
6 something else, sir.

7 THE WITNESS: (Mr. Picón) The same applies
8 to taxes. Oftentimes, when you have legislation, you
9 do not think about the five taxpayers in the past, but
10 the thousands of taxpayers in the future.

11 So, you would want to have a rule that's
12 crystal-clear, but that does not mean that there is a
13 reasonable amount.

14 ARBITRATOR TAWIL: But if you need
15 crystal-clear situations, it means that in the past it
16 wasn't crystal-clear.

17 THE WITNESS: (Mr. Picón) Well, when
18 clarifying a language, there's a difference between
19 crystal-clear and the concept of reasonable doubt
20 according to the Tax Code. We could have doubts in
21 many cases.

22 Again, the tax regulations are specific in

1 nature because they apply to millions of situations.
2 It is impossible for a provision to regulate
3 everything that happens in the economy and every
4 single event that the taxpayer does, but of course
5 there are effects; right?

6 So, you need to adjust the provision. And
7 those adjustments cannot be chalked up to the fact
8 that the other rule was vague. Simply, the legal
9 provision must be clarified taking in consideration
10 future situations. You must think about the hundreds
11 or thousands of cases you're going to have in the
12 future without setting a precedent saying, well,
13 whatever happened in the past was wrong.

14 PRESIDENT HANEFELD: No further questions
15 from the Tribunal for this moment.

16 So, it seems to be a perfect time for a
17 lunch break, and we will see us back at 1:30.

18 (Luncheon recess at 12:59 until
19 1:30 p.m.)

20 AFTERNOON SESSION

21 PRESIDENT HANEFELD: Are we ready to
22 continue? Yes? Claimant and Respondent?

1 MS. SINISTERRA: I think people might be
2 trickling in, but we are happy to start, Madam
3 President.

4 PRESIDENT HANEFELD: Okay. Then we hand
5 over to the Claimant for cross-examination.

6 MS. SINISTERRA: Thank you, Madam President.
7 I'm going to turn to Spanish.

8 CROSS-EXAMINATION

9 BY MS. SINISTERRA:

10 Q. Good afternoon, Mr. Bravo, Mr. Picón.

11 I don't know if you recall me. My name is
12 Laura Sinisterra, and I represent Claimant in this
13 case. I will be asking you some questions.

14 Just to remind you of two very important
15 rules: First, today is the last day for
16 cross-examination. We don't have much time. I
17 apologize ahead of time, but if you don't answer
18 briefly and precisely I need to interrupt you because,
19 simply, we do not have the time. Your attorneys will
20 have the time to ask you additional questions. So, if
21 you want more context, more details, you are in the
22 hands of your attorneys, but I need to be quite strict

1 and have brief answers.

2 The other rule that I ask you to remember is
3 that only one can answer each question. When the
4 Tribunal asks you questions, both of you answered; you
5 supplemented the answer. Those were the questions by
6 Tribunal, but the rules say that when I'm asking you
7 questions, it is one person, the one who responds.

8 Okay?

9 A. (Mr. Picón) Agreed.

10 Q. Do you have your folders?

11 MS. HIKAWA: Sorry, just to clarify, if they
12 do want to add to one's response, they can request
13 leave from the Tribunal.

14 MS. SINISTERRA: Correct.

15 BY MS. SINISTERRA:

16 Q. We are going to start with an extremely
17 basic question. I asked you this question during the
18 Hearing of Sumitomo in February.

19 Your presentation, the one you gave us
20 today, says--

21 PRESIDENT HANEFELD: My apologies, I will be
22 ready in a second.

1 (Comments off microphone.)

2 MS. SINISTERRA: No need to apologize. We
3 apologize for the large binders.

4 PRESIDENT HANEFELD: Sorry. Please go
5 ahead.

6 MS. SINISTERRA: Thank you, Madam President.

7 BY MS. SINISTERRA:

8 Q. In your presentation today, you introduced
9 yourselves as Experts on Tax Law. Your Reports, as we
10 can see, the cover page also says "Experts in Tax
11 Law."

12 But you also have several sections in which
13 you analyze the General Mining Law and also opine on
14 the scope of a Stability Contract in the mining
15 sector.

16 Are you Experts on Mining Law?

17 A. (Mr. Picón) We are not Experts in Mining
18 Law.

19 Q. But, in spite of that, you have two sections
20 in your Reports opining exclusively on the scope of a
21 Mining Stability Contract?

22 A. (Mr. Picón) As we said in the previous

1 session, we are Experts on the application of the Tax
2 Law, and often cases we have seen legal stability
3 cases, tax stability cases, and hydrocarbon stability
4 cases.

5 Q. And mining, too?

6 A. (Mr. Picón) Well those are the second
7 category. Tax stability is for mining.

8 Q. So, it is valid to ask you about mining--tax
9 Mining Law; correct?

10 A. (Mr. Picón) We are not specialists in Mining
11 Law, but I imagine you can ask the questions.

12 Q. I just wanted to clarify for the record that
13 you are not specialists in Mining Tax law and this is
14 clear now.

15 Second question. I don't know if you recall,
16 but in February I explained to you that the date when
17 the regime was stabilized--that is to say, the tax
18 regime applied--is relevant. It is important because
19 it determines the provisions that apply based on your
20 stabilized regime.

21 Do you recall that discussion?

22 A. (Mr. Picón) Yes.

1 Q. In February--and here we have the
2 Transcript--it was clear that there was a small
3 confusion, and you contradicted yourselves, and
4 finally it seems that you said the date, the relevant
5 date to determine when that stabilized regime was
6 fixed, is the date of the Contract. And that is what
7 you say in your Reports, but at that Hearing I showed
8 you that 9.5 of the Contract, the General Mining Law,
9 Article 85, and also the Regulations, state the
10 opposite.

11 They state that the relevant date to
12 determine the regime that was stabilized under the
13 Agreement is the date of approval of the Feasibility
14 Study of 1996, and then in February you said that,
15 indeed, that was the case. It is black and white in
16 the Agreement.

17 My question is: Why is it that you didn't
18 correct that in this Report? Why don't you tell the
19 Tribunal: "You know what? I need to introduce a
20 correction, because my Reports say that the relevant
21 date and the date that I considered is the date of the
22 Agreement, but the Agreement itself and the Law state

1 that the relevant date is the date of approval of the
2 Feasibility Study"?

3 Did you consider that there were mistakes
4 that were not important to correct, or why is it that
5 you did not correct your Report considering that in
6 February we established that there was a mistake?

7 A. (Mr. Picón) I think that you're
8 misinterpreting what you are saying, because our
9 Reports at 12 and 21 indicate the date for stability.

10 Indeed, given the mechanics, our system in
11 which we work, there was a problem, a communication
12 problem, but the Reports are quite clear.

13 Just to clarify, there are three relevant
14 dates.

15 Q. My question was very clear. So, you
16 consider that there is no mistake in your Reports.
17 For example, at Paragraph 196, it says: "At the date
18 of the signing of the Agreement, February 1998, the
19 provision to be applied was, for example, IGV of
20 Decree 775, and then this was the legal provision
21 stabilized."

22 We're not going to discuss this--we can all

1 watch the video, read the Transcript--but at that
2 Hearing, you recognized that maybe there was a
3 clarification we needed.

4 So, you thought it was not important to make
5 that clarification here?

6 A. (Mr. Picón) As I mentioned before, at 2 and
7 21 we state the date of the Feasibility Study.

8 Q. Yes, but there are other paragraphs that
9 state the opposite, and you are not correcting those
10 paragraphs.

11 Let me help you. And we are going to look
12 at this on the screen.

13 You reviewed your Reports, and did you make
14 sure that there are no other mistakes that need to be
15 corrected?

16 A. (Mr. Picón) Is that a generic question, or
17 are you speaking about something in particular?

18 Q. In my opinion, there is a clear mistake. In
19 the February hearing you recognized that.

20 So, I want to know: Did you review your
21 Reports and are you certain that there are no other
22 mistakes?

1 Did you review and are you certain that
2 there are no other mistakes? Yes or no.

3 A. (Mr. Picón) The mistakes you found were
4 corrected in the Second Report, such as the IGV
5 provision.

6 Q. So did you correct all of the mistakes?

7 A. (Mr. Picón) Yes, before the Hearing.

8 Q. Let us talk again about the Hearing.

9 During the Hearing, I asked you about the
10 Feasibility Study. You told me--and here I am citing
11 what you said--that "the detail of the Feasibility
12 Study was not relevant," "the detail of the
13 Feasibility Study was not relevant for the conclusions
14 you reached."

15 A. (Mr. Picón) Would you please show me?

16 Q. Yes. This is at Tab 3. This is my question
17 to you.

18 A. (Mr. Picón) What page?

19 Q. 2554 in Spanish; Tab 3, Page 2554, Line 20.

20 A. (Mr. Picón) Here it says in the tab--but the
21 question is very easy.

22 Q. Yes, I will be reading this to you.

1 I asked you: "Do you assert that the scope
2 of the Contract is defined by the Feasibility Study"?
3 And then my question is: "Did you review the
4 Feasibility Study to define the scope? Yes or no."

5 And this was your answer: "We reviewed all
6 the information that we had been given, including the
7 Feasibility Study, but"--and my question is going to
8 be about this part of the answer--"but the detail of
9 the Study was not relevant to our conclusions."

10 Do you see that?

11 A. (Mr. Picón) Yes.

12 Q. Do you maintain that, that the Study, the
13 Study was not relevant?

14 A. (Mr. Picón) The Feasibility Study has 223
15 pages, and the last 73 pages include graphs and
16 pictures, and we are talking about the study in
17 detail, we were referring to a large amount of
18 information that was not going to change our opinion.

19 Q. What parts, then, were relevant to you?
20 What did you review to share your opinion about the
21 scope of the Stability Contract?

22 A. (Mr. Picón) The Feasibility Study was

1 reviewed completely--

2 Q. My question is specific. What portion--

3 (Overlapping interpretation and speakers.)

4 SPANISH REALTIME STENOGRAPHER: You need to
5 space and you need to slow down.

6 BY MS. SINISTERRA:

7 Q. I understand that your position is that not
8 everything is relevant in the graphs. I understand
9 all of that, but what portion did you think was
10 relevant? What part of that Feasibility Study was
11 reviewed to reach the conclusions in your Report in
12 connection with the scope of the Agreement to make
13 sure that the Concentrator was not covered?

14 What is it that you reviewed?

15 A. (Mr. Picón) My colleague Mr. Bravo will
16 answer that part.

17 A. (Mr. Bravo) Thank you.

18 The portion that we reviewed is not
19 technical, an engineering part that, as lawyers, we do
20 not understand. But, all in all, we saw the purpose
21 of the Investment Plan, what is it that was presented
22 for approval as an Investment Plan, and what is it

1 that the General Mining Office or General Mining
2 Directorate later on approves?

3 This is what we were referring to when
4 Mr. Picón indicates that it was not relevant to
5 determine the detail, he is referring to the technical
6 portion, not the object of the plan.

7 This is what I wanted to say.

8 Q. The technical portion may be important. So,
9 my colleague is sharing with you the Feasibility
10 Study. You are saying that you read it. You are
11 citing this in your Report. You are saying that it is
12 important.

13 Would you tell me what is it that you
14 reviewed and what you think is relevant to reach your
15 conclusions?

16 I just want to know what portion. You don't
17 need to describe it or sum it up.

18 What portion?

19 A. (Mr. Bravo) To begin with, 1.1; 1.2; the
20 Executive Summary is something that we reviewed; 2.1,
21 2.2; 2.3.

22 Q. How can you be certain that this Feasibility

1 Study does not refer to the Concentrator or nothing
2 related to the Concentrator, if you just reviewed the
3 Executive Summary, some pages, you don't seem to be
4 familiar with this document, or in detail as you
5 mentioned?

6 A. (Mr. Bravo) Well, this is a
7 cross-examination. We don't have much time. We are
8 giving a document that we did review. It is long.

9 Yes, we did review. We did review. Some
10 issues we do not understand--they are of a technical
11 nature--but, clearly, with the review of the document,
12 the plan proposed to be approved is the one that does
13 not include the Concentrator, but only the leaching.

14 Q. Let us explore what you just said, that, at
15 any rate, I think you said it is evident or it is
16 clear that it was for the Leaching Project, rather
17 than the Concentrator. That is what you told us.

18 You are saying something similar in your
19 Report when you're analyzing the scope, and you
20 conclude that it did not cover the Concentrator, but
21 let me tell you that I read every detail extremely
22 carefully, both of your Reports from beginning to end,

1 and honestly, it is not completely clear what your
2 position is. It is not clear what your specific
3 position is as Experts regarding the scope of
4 Stability Agreement under the General Mining Law and
5 the Regulations.

6 So, let me ask you something very specific.
7 I will be facilitating this for you. I thought that
8 you were saying one of four things upon reading your
9 Reports, and I am going to read to you. I think we
10 gave you English and Spanish. These are the four
11 potential positions that I think would be viable from
12 your Report.

13 MS. HIKAWA: I'm sorry, this also doesn't
14 have any citations. Could you tell us the paragraph
15 numbers and the Report numbers, where you got this?

16 MS. SINISTERRA: One second. I will
17 specifically point them to the specific sort of
18 paragraphs in the Reports, but here I'm not citing to
19 the Reports. I'm just asking generally what's their
20 position.

21 MS. HIKAWA: What is the source of this
22 information on the slide?

1 MS. SINISTERRA: Well, it's mostly based on
2 Paragraph 35 of the Report, but I'm not asking them
3 about the Report specifically. I'm asking a general
4 question. I just want to know what their
5 understanding generally is about the Mining Law.

6 MS. HIKAWA: So, this slide is not from
7 their Reports?

8 MS. SINISTERRA: No.

9 MS. HIKAWA: Okay.

10 BY MS. SINISTERRA:

11 Q. So, Mr. Bravo and Mr. Picon, again to
12 understand. You are here appearing as Experts. You
13 have shared your Opinion as Experts, Mining Tax
14 Experts, on the scope of the Stability Agreement, and
15 you're saying that it did not cover the Concentrator.

16 And I said your opinion is not clear. And I
17 would like to understand it, because you are the
18 Experts that Perú called for on this issue. I would
19 like to know, based on your Expert Opinion, what your
20 position is, given the General Mining Law and the
21 scope of a stability agreement.

22 I would like to ask you about four

1 possibilities.

2 Possibility 1: Stability agreements under
3 the General Mining Law only cover the specific amount
4 in the Investment Program included in the Feasibility
5 Study--that is, the amount of the Investment Program.
6 That is possibility Number 1.

7 Possibility 2: Stability agreements also
8 cover not only the amount in the program, but any
9 replacement of the assets listed in the Investment
10 Program. That includes the replacement of the assets
11 listed in the Investment Program.

12 Possibility 3: Stability agreements under
13 the General Mining Law cover all of the investments
14 related to the investment project included in the
15 Feasibility Study.

16 Or, possibility 4: What investments are
17 covered by stability agreement depending on various
18 factors must be decided on a case-by-case basis.

19 And so, as Experts, which of those four is
20 your position, or is there a fifth one? And, in that
21 case, which one is it?

22 MS. HIKAWA: I would just like to clarify,

1 you keep referring to them as Experts in Mining Law
2 and they clarified they're not specialists in this.
3 So, they can give you their view from a Tax Expert
4 perspective.

5 MS. SINISTERRA: Two entire sections of the
6 Report are about the scope of stability agreements,
7 and they interpret the Mining Law. So, I'm happy--

8 MS. HIKAWA: From the perspective of Tax
9 Experts, yes.

10 MS. SINISTERRA: Fine. From the perspective
11 of Tax Experts. They are the Experts you have
12 presented in this case on the scope of the Stability
13 Agreement.

14 THE WITNESS: (Mr. Picón) Are you going to
15 show us where this is cited in our Reports?

16 BY MS. SINISTERRA:

17 Q. I am not saying this cited. I just want to
18 understand your opinion in general terms.

19 Your opinion as an Expert is that the scope of the
20 Contract -- I mean under the General Mining Law, what
21 is the right position? What is it that the stability
22 agreements cover and do not cover? Is your Opinion

1 Position 1, 2, 3, or 4?

2 A. (Mr. Picón) Our position is that this was
3 included in the Stability Contract--that is to say,
4 the investment made--and that it is described as part
5 of the Stability Contract or Agreement.

6 As we said, this is a "contrato-ley"--that
7 is, whatever the Contract says is to be applied.

8 Q. Yes. But what does it mean in practice? I
9 saw that in the Report. Are you describing
10 Positions 1 or 3?

11 A. Let me read what you are saying to be able
12 to answer.

13 Here you are saying that the Contract only
14 covers the specific amount in the investment, but then
15 it says, in 3, all investments related to the
16 investment project included in the Feasibility Study.

17 Q. Because--what is the difference, in your
18 Opinion? Because one has to do with the specific
19 amount and the other one with the concepts.

20 (Overlapping interpretation and speakers.)

21 (Interruption.)

22 (Stenographer clarification.)

1 MS. SINISTERRA: I thought it was a simple
2 question.

3 (Overlapping interpretation and speakers.)

4 (Stenographer clarification.)

5 BY MS. SINISTERRA:

6 Q. A mining company presents an Investment Plan
7 for \$100 million, and that it is the amount in the
8 Investment Plan and, according to the General Mining
9 Law and according to your understanding, that Contract
10 would only cover those 100 million? That is position
11 1. The position 2 is the 100 million, but if that
12 Investment Program included many assets—and those
13 assets, for example, are replaced, or there is a new
14 technology and a better asset was bought but it is a
15 replacement, an improvement of the assets listed under
16 the Investment Program, is that covered?, Or, if new
17 investments are made, but they are linked to the
18 investment project. Let's say, in the case of Cerro
19 Verde, Cerro Verde makes new investments, but they are
20 related to the leaching project, are they covered, or,
21 once again, we need to analyze these on a case-by-case
22 basis, because there are several factors to consider?

1 A. (Mr. Picón) When we indicate the Position 4,
2 that you state here, that we need to analyze case by
3 case, we need to analyze the contents of the
4 Agreement. So, in a hypothetical case as the one you
5 are saying--

6 Q. Well, let's bring it back to Cerro Verde.

7 In the case of Cerro Verde, you said that
8 you read the Contract and that you read the
9 Feasibility Study.

10 In the case of Cerro Verde, which of these
11 four positions is the one that you are presenting the
12 Tribunal? Which one is the right one?

13 A. (Mr. Picón) The Contract is referring to the
14 leaching process--Project.

15 Q. Yes, and you say that in the Report, but I
16 want to know what it means in practice.

17 The "Leaching Project" includes new
18 investments related to the leaching project? Or does
19 it only include 237 million, as reflected in the
20 Investment Program?

21 What is your Opinion?

22 A. (Mr. Picón) In principle, and strictly, as

1 we said before, the method to interpret the Agreement
2 has to be restricted and literal.

3 Q. Please let me know: I think that you are
4 Tax Experts. I'm asking you something valid. I would
5 like to understand. I would like to understand what
6 your position is so that we can have a conversation
7 today.

8 I'm asking you: Be specific, because you
9 were not in your Reports. Be specific. I want to
10 understand your position.

11 Only the amount, only the 237 million, or
12 new investments but related to the Leaching Project
13 would they be included because it is the same project,
14 or do we need to understand this investment by
15 investment, or only if it is a replacement of the
16 assets listed there?

17 I would like to understand your position.
18 Is it 1, 2, 3 or 4? Please be specific.

19 A. (Mr. Picón) The literal interpretation is
20 the one that would lead us to say that it is a project
21 and any investment would have to be analyzed.

22 Q. So, that means that it is 1, 2, 3, or 4?

1 That it is case by case?

2 It is not a difficult question. You have
3 opined on this topic. I see you are confused, and I
4 want you to answer my question.

5 Be specific. Which of the four positions is
6 your position as an Expert?

7 A. (Mr. Picón) As drafted here, I would say
8 Position 3: investments related to the investment
9 project included in the Feasibility Study.

10 Q. Okay. So, Position 3. Understood. In
11 fact, other individuals have said that. And so,
12 Position 1 is wrong, according to you? That is, that
13 it is only the 237 million? That is not correct, in
14 your Opinion, because you just told us that Position 3
15 is the one that is correct?

16 A. (Mr. Picón) Investments related to the
17 investment project included in the Feasibility Study?
18 It seems reasonable to think that that is what the law
19 says. But if you have a specific case, clearly we can
20 analyze it.

21 Q. We are talking about Cerro Verde. And I
22 would like to confirm that, and this is also similar

1 to what you said in your Reports.

2 Your position is Position 3?

3 A. (Mr. Picón) Yes.

4 Q. And the other positions, again, I imagine
5 you confirm that your Position is 3 and you do not
6 agree with the other ones?

7 A. Well--

8 Q. They are mutually exclusive positions. You
9 already told me that your Position is Number 3. If
10 you want, we can continue, but just to confirm, is 3
11 and not the other ones?

12 A. (Mr. Picón) Position 3. Unfortunately, I
13 need to clarify, when one looks at tax issues, we look
14 at the timeline and case by case, as indicated, tax
15 matters looks a million possibilities, and when you
16 are--have a case you have to compare with--against
17 another case.

18 Q. But in the case of Cerro Verde, it is
19 Number 3?

20 A. (Mr. Picón) Yes, it is.

21 Q. And I understand that, regarding tax issues,
22 there are a million possibilities, and a high number

1 of cases, but we are talking about a law and some
2 specific articles, it shouldn't be that difficult, but
3 Position 3, understood. Thank you for clarifying your
4 position.

5 Now, the other Party asked me to--opposing
6 Party asked me to explain whether there was support in
7 the record for the other Positions that I was
8 representing to you. And I would like to share with
9 you that this week we heard these four Positions from
10 various Witnesses, including Perú's Counsel.

11 Ms. Bedoya told us that it was Position 1,
12 Mr. Polo told us it was Number 2, Perú's Memorial says
13 it is Number 3, that at least coincides with you, and
14 Mr. Cruz told us it was Number 4. But even Perú and
15 its own Witnesses--we're not even talking about all of
16 the documents and all of the evidence submitted by
17 Claimant, but just--

18 (Overlapping interpretation and speakers.)

19 MS. HIKAWA: This is way outside the scope
20 of their Reports.

21 MS. SINISTERRA: Their Report is about the
22 scope of the Stability Agreement.

1 MS. HAWORTH McCANDLESS: The Report is not
2 about the scope of the Stability Agreement. The
3 Report goes into issues with respect to tax. That's
4 the main essence of their Report. You keep on
5 mischaracterizing that. It's not appropriate.

6 MS. SINISTERRA: I mean, the fact that I
7 have to take you to the Report to show what they've
8 analyzed, and that we saw it on the slides this
9 morning, I mean, you are impeaching your own Experts,
10 which I just find a little puzzling, but I'm very
11 happy to refer you to the sections of the Reports that
12 I am basing this on.

13 So, Section 3 of the First Report is called
14 the Stability Agreement of Cerro Verde did not cover
15 the Concentrator. And they analyzed: Stability
16 Agreement generally, stability agreements under the
17 Mining Law, Analysis of the specific case: the object
18 of the contract of the Stability Agreement. This
19 morning, they made a presentation about that the
20 Stability Agreement did not cover the Primary Sulfide
21 Project.

22 THE WITNESS: (No interpretation.)

1 MS. HIKAWA: Yes, we can all read what is in
2 their Reports, and it's clear that they've said what
3 their specialty is, what their expertise is, and their
4 perspective that they're giving as Tax Experts on
5 these issues.

6 MS. SINISTERRA: Are you saying that we--can
7 we go back to the Report, please? Are you saying that
8 we can strike from the record the sections of the
9 Report that refer to the Mining Law, and that analyze
10 the Stability Agreement with reference to provisions
11 exclusively in the Mining Law?

12 MS. HIKAWA: No, I'm not.

13 (Overlapping speakers.)

14 MS. HIKAWA: I'm saying that they can
15 analyze that as Experts in the application under taxes
16 of those laws.

17 MS. SINISTERRA: Okay. So, then they can
18 answer based on their understanding, just on taxes.

19 (Overlapping speakers.)

20 MS. HIKAWA: The question is not the scope
21 of their knowledge here. It's that this is outside
22 the scope of their Expert Reports, these questions,

1 this table.

2 PRESIDENT HANEFELD: I think I agree. I
3 mean, and it does not appear too helpful for us if the
4 Experts now comment on the testimony and Witness
5 Statements that we have heard the last day.

6 MS. SINISTERRA: So, I'm not going to ask
7 them to comment on the different positions. I just
8 wanted to understand what their position is, because
9 they have submitted an Expert Report on the scope of
10 the Stability Agreement, and they have opined as
11 Experts that it excluded the Concentrator. And they
12 say in the Report the Stability Agreement was limited
13 to the Project, to the Leaching Project, and I'm
14 trying to understand what that means.

15 They have now specified what it is that they
16 mean, and I'm just showing them that others have
17 interpreted the Mining Law differently. But we do not
18 need to go into a detailed discussion of what other
19 sort of Witnesses have said.

20 PRESIDENT HANEFELD: Yeah. It would be
21 appreciated. We take note of your argument, but I
22 think we are to hear the Experts.

1 MS. SINISTERRA: Yeah. Though I do think
2 it's fair, Madam President, with all due respect, to
3 confront their Tax Experts on the scope of the
4 Stability Agreement with inconsistent positions that
5 we've heard in the Hearing to try and clarify,
6 ultimately, what position is it that we're sort of
7 being confronted with, when it comes to the right
8 reading of the Mining Law.

9 But let me ask my next question.

10 BY MS. SINISTERRA:

11 Q. Gentlemen, Messrs. Picón and Bravo, I asked
12 you your opinion. I showed you that we have heard
13 different opinions. In our view, we have heard and we
14 have been presented with different interpretations.
15 And so, we have been presented with what our--what, in
16 our view--well, we are categorically in disagreement
17 with those positions, to be clear, but we have been
18 presented, at least, what appear to be different
19 interpretations of a single law.

20 So, the question I wish to put to you is
21 related to Tab 10, if you could please turn to Tab 10.
22 For the record, this is CE-823.

1 Indeed, the Tribunal put questions to you
2 about this document. We are looking here--once again,
3 for the record, CE-823, is the Statement of Reasons of
4 the Law that incorporated 83(b) into the Law of Mining
5 in 2014. I'm going to read a paragraph there, and
6 then I'm going to show you the Supreme Decree that
7 amended the Regulation, and then I'm going to put a
8 question to you.

9 So, here--okay. I'll slow down. I wanted
10 to take you to Page 11. You can also see it up on the
11 screen. And I want us to take a look at exactly what
12 the Legislature said.

13 They said: "The effect of the various
14 proposed changes to the General Mining Law will make
15 it possible to establish a clearer Regulatory
16 Framework in accordance with the principle of legal
17 certainty in favor of the investor." That is what is
18 there, textually. And now I'm going to put my--I'll
19 be putting my question to you in just a second. I'd
20 ask you to first, please, turn to Tab 11.

21 For the record, this is CA-246, Page 9. And
22 this is the Supreme Decree that modified the

1 Regulation of the General Mining Law in 2019. It'll
2 be up on the screen in just a second. Point 1 under
3 issues says: "The literalness."

4 This is at Tab 11. Sorry. Tab 11. Do you
5 have it? Very well.

6 At B(1) it says, "the literal reading of the
7 text, or the literalness of the text of the first
8 paragraph of Article 22 could misleadingly lead one to
9 consider that the contractual guarantees benefit the
10 mining activity titleholder for any investment it
11 makes in the Concessions or the
12 Economic-Administrative Units." And if you, then,
13 turn to Page 10, at C(6). It's Page 10.6, tell me
14 when you have it.

15 A. (Mr. Picón) Yeah, we have it.

16 Q. Okay, perfect, it says--this is a Supreme
17 Decree of 2019 that amended the regulations of the
18 General Mining Law, and it reads: "The amendment,
19 this amendment will contribute to clarifying"--
20 clarifying--"what emerges from the rules contained in
21 the Single Unified Text of the General Mining Law and
22 its Regulations."

1 And so, we just saw, expressly, that the Law
2 and the Decree used the words "to establish a clearer
3 framework" and they used the words "juridical
4 security" or "legal certainty" and they used word
5 "clarify." And we saw that different Witnesses have
6 provided us with different interpretations, and
7 interpretations that vary with your own, or are
8 different from your own views as Experts.

9 So, my very specific question--please be
10 honest in your response--at a minimum, are we not
11 looking at a provision that might be subject to
12 different interpretations and which, therefore--well,
13 and, therefore, a clearer framework is needed, greater
14 legal certainty is needed, and clarification is
15 needed? Yes or no.

16 Is this based on what I have showed you and
17 the different interpretations we've been given and the
18 statement of purpose, in your opinion, is--are these
19 provisions that might be subject or could be subject
20 to different interpretations and, therefore, need to
21 be clarified? Yes or no.

22 A. (Mr. Picón) The interpretations that you've

1 showed us did not reach different conclusions in this
2 specific case, to be quite sincere.

3 Q. Truth be told, they do, but could you answer
4 my question?

5 A. (Mr. Picón) As we were saying when asked by
6 the arbitrator, the amendment of a legal provision
7 cannot be used to interpret the past.

8 Q. No, Mr. Picón, please don't go off on a
9 tangent. My question is very specific.

10 The Legislature, in a Decree--well, they are
11 saying that they're going to amend it because "there's
12 a need to establish a clearer framework," "there's a
13 need for legal certainty," "there's a need for
14 clarification." If one clarifies, it's because
15 there's a provision that is ambiguous or imprecise and
16 requires clarification; correct?

17 A. (Mr. Picón) Not necessarily.

18 Q. It doesn't one, clarify--one clarifies
19 what's already clear?

20 A. (Mr. Picón) One clarifies in the face of new
21 situations. As I have mentioned, I have prepared the
22 legislation for years, and the adjustments to legal

1 provisions which are made every year aren't always
2 made because--well, the provision was obscure, but,
3 rather, we were thinking about taxpayers of the future
4 so that they not have potential doubts that some might
5 have or said they have.

6 But I don't think that's enough to reach the
7 conclusion that the provision was obscure, if that's
8 what you say.

9 Q. So, you were saying clarifications with
10 respect to new issues, and here this Law and this
11 Decree are clarifying provisions that already existed
12 in the General Mining Law and the Regulations, and to
13 do so, they're using the words:--"there's a need to
14 establish a clear framework," "there's a need for
15 greater legal certainty," "there's a need to clarify."

16 So, my question is quite basic. You're here
17 as Experts. Here, the Peruvian Legislature, is he not
18 telling us that they want to clarify a provision
19 because the provision wasn't clear; correct?

20 A. (Mr. Picón) To characterize this as the
21 position of the Peruvian Legislature, well, is
22 important to have clear that the Peruvian Legislature-

1 -these are drafts that are presented by the Executive?
2 Yes, and when they are then presented to the Congress
3 and Congress debates them. That's how it's been done
4 thus far.

5 Q. So, your opinion is that in the Supreme
6 Decree, when they said that Article 22 could
7 mistakenly lead to--one to consider the contractual
8 guarantees benefit the Mining Titleholder for any
9 investment carried out in the Concessions,
10 Economic-Administrative Units, when it recognizes that
11 it could lead to such an interpretation, and then it
12 says "clarify."

13 You're saying your position as an Expert is
14 that they were not clarifying?

15 A. (Mr. Picón) Well, let's see. These
16 statements of purpose--and these have been done for
17 many years--do not have as their aim to being the key
18 document for interpreting the provision in the future.

19 Q. Mr. Picón, if you don't want to answer my
20 question, no problem. Let's continue looking at other
21 documents.

22 A. (Mr. Picón) Fine.

1 Q. So, to recapitulate, I've showed you what
2 the Witnesses have said, I've showed you what the
3 Peruvian Legislature has said with respect to these
4 provisions, I've highlighted three or four times that
5 they use the word "clarify."

6 Now, if you maintain that there was nothing
7 to clarify, then let us take a look at it. Perhaps
8 the SUNAT and--were the SUNAT and the Tax Tribunal
9 consistent in their application of the provisions?

10 Let's see.

11 (Overlapping interpretation and speakers.)

12 MS. SINISTERRA: Marisa, I am now going to
13 refer to protected information, for the record. I'm
14 going to refer to protected information.

15 SECRETARY PLANELLIS VALERO: That is well
16 noted. We don't have any representatives in the
17 hearing room, or in the individual hearing rooms.

18 So, you can proceed.

19 (End of open session. Attorneys'
20 Eyes Only information follows.)

21
22 CONFIDENTIAL SESSION

1 BY MS. SINISTERRA:

2 Q. I would like to put up on the screen this
3 Paragraph 123 of your First Report. No, Paragraph 123
4 of your First Report, please.

5 This is your Report, and these are your
6 words: "Specifically, Article 83 of the Mining Law
7 and Article 22 of the Regulation of the Mining Law
8 were clear." So, we saw that the Legislature said
9 there was a need to clarify, but then you said that
10 they're clear. "So, much so that the Tax
11 Administration and the Government always maintained
12 the same interpretation."

13 Do you see that?

14 A. (Mr. Picón) Yes.

15 Q. Okay. I was just waiting for the
16 interpretation.

17 Recently in this case, documents were
18 introduced relating to the Companies Milpo, Yanacocha,
19 and Tintaya. These are SUNAT resolutions and Tax
20 Tribunal resolutions.

21 Did your attorneys provide you with those
22 documents?

1 A. (Mr. Picón) Yes.

2 Q. Did you review them?

3 A. (Mr. Picón) Yes.

4 Q. And do you maintain your opinion that both
5 the Tax Administration and the Government always
6 maintain the same interpretation?

7 A. (Mr. Picón) Clearly, we've not only reviewed
8 the resolutions, we've looked at what they're about
9 and we've reached the conclusion that they're not
10 relevant.

11 Q. We'll see. So, do you maintain this
12 assertion that they've always--always--maintained the
13 same interpretation? Yes or no.

14 A. (Mr. Picón) As far as we know, yes.

15 Q. Based on the new documents that you
16 reviewed, do they maintain it or not?

17 A. (Mr. Picón) The antecedents don't go to the
18 issue.

19 Q. I don't know what antecedents you are
20 referring to.

21 A. (Mr. Picón) Oh, the resolutions of the SUNAT
22 regarding Milpo, Yanacocha, and so forth, we've

1 reviewed them and they don't touch on the issues that
2 are present in this Arbitration.

3 Q. We'll see. But they are resolutions of the
4 SUNAT and the Tax Tribunal. You've reviewed them, and
5 you continue to maintain that that's always been the
6 position of the Tax Administration and the Government,
7 correct?

8 A. (Mr. Picón) We don't know any pronouncement
9 different from these.

10 Q. So, you maintain your position?

11 A. (Mr. Picón) Yeah, having reviewed
12 these--this background, yes, we maintain our position.

13 Q. And I told you this at the outset, but I
14 want to be very clear: Unfortunately, we have very
15 little time. And so, I would be delighted to review
16 in detail all of these documents with you. But
17 because of time considerations I can't do so.

18 So, I'm going to show you certain documents
19 and certain Statements by SUNAT and the Tax Tribunal,
20 and if your lawyers would like to go back to those
21 documents and get into more detail and discussion of
22 factual issues, then they're free to do so on the

1 redirect. But I am going to ask you specific
2 questions about statements that you're going to see on
3 the screen, and, once again, you'll have an
4 opportunity to discuss it in greater detail. I would
5 be delighted for you to do so.

6 The first document that we are going to see,
7 for the record, is CE-1124. It's an Assessment
8 Resolution of the Company, the Mining Company Milpo
9 from 2005.

10 Do you see it on the screen?

11 A. (Mr. Picón) Yes.

12 Q. There, SUNAT said the El Porvenir Mining
13 Unit has a Tax Stability Agreement. "The El Porvenir
14 Mining Unit." It doesn't say "the Milpo Project." It
15 doesn't say "the El Porvenir Project." It says "the
16 El Porvenir Mining unit."

17 And now let's look at another document. For
18 the record, this is CE-1128. It's also an -Assessment
19 Resolution in respect of Milpo from 2014. Now, what
20 did SUNAT say here? It makes reference to the
21 Agreement of Guarantees and Measures for the Promotion
22 of Investments in the Cerro Lindo Project, and then it

1 says: "The law applicable to the appellant to
2 calculate the income tax is in relation to the Cerro
3 Lindo Economic-Administrative Unit, and it is," and
4 they cite a particular Decree.

5 For the record, this is Page 11 of the PDF,
6 and Footnote 5 is also relevant--and, once again, this
7 is CE-1128.

8 Now let's look at another document.

9 For the record, this is RE-415. This is an
10 Assessment Resolution in respect of Yanacocha from
11 2006, and we'll see it in just a second.

12 Perfect. This is Page 1 and, I think,
13 Page 2 of the PDF, for the record.

14 And what does SUNAT say here? I'm going to
15 read it. "The assessment of the taxes must be done
16 separately for each of the Economic-Administrative
17 Units for which a Tax Stability Agreement has been
18 signed."

19 "Each of the Economic-Administrative Units
20 for which a Legal Stability Agreement has been
21 signed."

22 It nowhere says "for each of the investment

1 projects for which a Tax Stability Agreement has been
2 signed." It says, once again, "for each of the
3 Units."

4 Now let's look at another document.

5 For the record, this is RE-382. This is an
6 Intendency Resolution with respect to Yanacocha from
7 2008, Page 56 or 57 of the PDF. And here it
8 says: "Article 22 of the Regulations indicates that
9 the Mining Titleholder independently calculates the
10 results obtained for each of the Concessions or
11 Economic-Administrative Units."

12 Now, once again, it doesn't say "the results
13 obtained for each investment project." It says "for
14 each of the Concessions or Economic-Administrative
15 Units." And now let us look at yet another document.
16 For the record, this is CE-1132.

17 This is a Tax Tribunal Resolution with
18 respect to Milpo from 2022.

19 MS. HIKAWA: I assume when you're done
20 reading all this you are going to have a question.

21 MS. SINISTERRA: Absolutely.

22 MS. HIKAWA: Okay.

1 BY MS. SINISTERRA:

2 Q. Pages 9 and 10 of the PDF. And it says:

3 "The Cerro Verde and El Porvenir Economic-
4 Administrative Units are subject to the Income Tax
5 Regime in force on the aforementioned dates."

6 So, once again, it refers to the
7 "Economic-Administrative Units Cerro Lindo and El
8 Porvenir," and does not say "investment project."

9 And let us look at yet another document. For
10 the record, this is CE-1132, a Tax Tribunal Resolution
11 in the Milpo Case from 2022.

12 So, this is a recent document, after the
13 Cerro Verde resolutions. This is in 2022.

14 What is the Tax Tribunal saying? And just
15 to clarify, this is with respect to stability
16 agreements to which the same General Mining Law
17 applicable to Cerro Verde applied. What does it say
18 there? The Tax Tribunal recognizes the Stabilized
19 Regime for each Economic-Administrative Unit. The
20 exact words are: "The Cerro Lindo and El Porvenir
21 Economic-Administrative Units are subject to the
22 Income Tax regime in force on the aforementioned

1 dates."

2 Once again: "The Cerro Lindo and El Porvenir
3 EAUs."

4 So, we have just seen six documents, at
5 least six documents in the record, but there are many
6 more, but we don't have so much time, that expressly
7 say that the stability agreement applies to
8 Economic-Administrative Units without making any
9 mention of "investment project"; correct?

10 A. (Mr. Picón) The phrases that you have taken
11 out say what you say, but you've taken them out of
12 context. But, yes, what you say is what is up on the
13 screen.

14 Q. Now, a specific question. You can search
15 for context. When you read these Resolutions, at
16 anywhere did they say the General Mining Law does not
17 apply to Economic-Administrative Units, it applies
18 specifically to investment projects? Yes or no.

19 A. (Mr. Picón) When I read these resolutions,
20 the first I can say is that they don't address the
21 subject matter you're talking about, none of them.
22 And we could review all of them, and we could show you

1 that none of them address the issue that you're
2 talking about.

3 Q. Well, fortunately the Tribunal has them in
4 the record, and I've just shown that they refer
5 expressly to stability agreements, and they expressly
6 state that they apply to Economic-Administrative
7 Units.

8 A. (Mr. Picón) I would need four or five
9 minutes to explain why they are relevant and how the
10 Tribunal can easily reach that conclusion.

11 (Overlapping interpretation and speakers.)

12 BY MS. SINISTERRA:

13 Q. You can do that on the redirect, but I
14 suppose that you would agree that when the SUNAT
15 carries out an assessment in respect of a Company and
16 mentions the stability agreement, it looks at the
17 stability agreement and renders its assessment mindful
18 of what it says?

19 A. (Mr. Picón) I think that you are confused
20 about what exactly SUNAT does. Let me put it as
21 follows: if--

22 Q. So, your position is that when the SUNAT is

1 going to assess a taxpayer, and you say--when they
2 have a stability agreement, SUNAT asks to see it;
3 right?

4 A. (Mr. Picón) They might not.

5 Q. So, what you are affirming before the
6 Tribunal is that the SUNAT sometimes audits a taxpayer
7 without even knowing whether it has a stability
8 agreement? Is that your opinion?

9 A. (Mr. Picón) If you review what SUNAT is
10 discussing in these cases, such as bonuses for
11 managers or characterizing investment in a building as
12 an asset or not as an asset, the Agreement is not
13 relevant.

14 Therefore, if what you want is to establish
15 the scope of the Agreement, obviously it's going to
16 review it. But these are totally different issues
17 that are raised in these cases.

18 Q. We have seen--and I see this is an attempt
19 from you to take out of context, but this should be
20 clear for the record--but in these documents SUNAT
21 made express--it made express reference to the
22 stability agreements and it made a reference to Income

1 Tax to know what tax would apply.

2 To know what tax applies, what is the
3 applicable regime, it needs to bear in mind the
4 stability agreement; correct? Is that correct?

5 A. (Mr. Picón) In some of the cases that you
6 cite, yes, it mentions the different rates.

7 Q. So, we've just seen resolutions that clearly
8 speak of the Economic-Administrative Units, and not
9 investment projects; correct?

10 A. (Mr. Picón) I should note that the subject
11 matter of the litigation is that the investment lies
12 outside--and here there's no litigation about an
13 investment being outside of the
14 Economic-Administrative Unit that is not covered by
15 the agreement.

16 SUNAT has not ruled on what you've just said
17 in any of these cases, which is what is at issue here.

18 Q. Very well.

19 The Tribunal, once again, has the documents,
20 and will be able to see specifically what they say and
21 what they don't say.

22 You told us in your Reports--and it's

1 Paragraph 115, to be specific.

2 A. (Mr. Picón) First or Second Report?

3 Q. Second. Very specific; I just want you to
4 confirm your testimony there.

5 You say that when a primary legal provision
6 is drafted in an obscure, ambiguous, imprecise, or
7 contradictory fashion, making it difficult to
8 accurately interpret it or its scope, that it could
9 apply Article 170 of the Tax Code; correct?

10 It's a very simple assertion. I'm asking
11 you: Do you confirm what you said in Paragraph 115 or
12 not?

13 A. (Mr. Bravo) Well, if you look carefully,
14 there's a footnote on that paragraph, which is of the
15 author that we've cited.

16 Q. But can you confirm what you've said in that
17 paragraph?

18 A. (Mr. Bravo) Yes. That is correct.

19 Q. And I also would suppose that you confirm
20 what you told us this morning regarding Article 92 of
21 the Tax Code, that taxpayers have a right to waiver of
22 interest in cases of reasonable doubt.

1 You said this at minute 12:21, that you
2 recognize that, under Peruvian law, taxpayers have the
3 right to waiver of Penalties and Interest where--in
4 those cases where there is reasonable doubt.

5 Can you confirm what you told us this
6 morning? Yes or no.

7 A. (Mr. Picón) They do have the right, yes,
8 indeed. But there is a power that has to be
9 exercised.

10 Q. I just wanted to confirm that you ratified
11 that that right exists.

12 So, you just mentioned the power of the
13 State. Let us turn to that point. I'm going to take
14 you, to try to be quick, to Paragraphs 153 and 154 of
15 your Second Report.

16 There you refer to the power of the State
17 that you've just mentioned, and you say: "The power
18 of the State should be exercised under the parameters
19 of the law and the legal principles set forth in the
20 Political Constitution."

21 And at Paragraph 154, you said that the
22 power of the State and the exercise by the State of

1 those powers should be respectful of the
2 constitutional tax principles and the laws.

3 Do you confirm this part of your testimony?
4 Yes or no.

5 A. (Mr. Picón) I'm sorry. What paragraph is
6 it?

7 Q. It's up on the screen, Paragraphs 153 and
8 154. And I can repeat for the record.

9 There you say that a power of the State
10 should be exercised under the parameters of the law
11 and the legal principles set forth in the Political
12 Constitution. That's Paragraph 153. And at 154, you
13 say the power of the State, the exercise by the
14 Government of this power, should be respectful of--or
15 must be respectful of constitutional tax principles
16 and the laws.

17 Do you confirm this testimony? Yes or no?

18 A. (Mr. Bravo) That is right. And, as it also
19 indicates there, the power mustn't be understood as an
20 arbitrary act of Government without objective
21 criteria.

22 Q. Thank you, Messrs. Bravo and Picón.

1 MS. SINISTERRA: I have no further
2 questions.

3 PRESIDENT HANEFELD: Thanks.

4 Do you have questions?

5 MS. HIKAWA: I do. If I could just have one
6 minute to confer with my colleagues.

7 (Pause.)

8 MS. HIKAWA: Thank you. Just a few,
9 hopefully very brief, questions.

10 REDIRECT EXAMINATION

11 BY MS. HIKAWA:

12 Q. The President and Arbitrator Tawil asked you
13 about the application of Article 170 of the Tax Code
14 and the waiver of interest and Penalties.

15 Do you remember that?

16 And there was some discussion about a
17 clarifying provision, one of the requirements of
18 Article 170 in order for it to apply.

19 I'd like to show you in your Reports--sorry,
20 your First Report at Paragraph 73, what you said about
21 the requirements for a clarifying act.

22 If you could explain to us what you are

1 saying in this paragraph.

2 MS. SINISTERRA: I don't really--is this in
3 response to the cross?

4 MS. HIKAWA: It's in response to the
5 Tribunal's questions and several of your questions
6 regarding clarification.

7 MS. SINISTERRA: Well, it is not
8 specifically with regards to my cross, but if the
9 Tribunal wishes for them to address it, given the
10 questions, then of course go on.

11 MS. HIKAWA: Thank you.

12 BY MS. HIKAWA:

13 Q. Please. So, it's on the screen. You can
14 see the section of your Report.

15 Could you explain what you're saying here
16 about the requirements for a clarifying provision for
17 Article 170 to apply?

18 A. (Mr. Bravo) Yes. Article 170 establishes
19 requirements for the State to be able to exercise that
20 power, and those requirements presuppose first that
21 there is a mistaken interpretation of the provisions;
22 second, that the debt has not yet been paid; and,

1 three, that there is a clarifying provision.

2 But not just any clarifying provision. It
3 has to be a clarifying provision that says that
4 Article 170(1) applies, and it has to be a provision
5 through one of the vehicles expressly indicated by
6 Article 170, Legislative Decree Supreme Decree--or
7 Resolution of clarifying observations.

8 Q. Thank you.

9 Now, my second question is also in response
10 to one of the President's questions. She asked you
11 about the example of the Company Tintaya, about
12 keeping separate accounts. And I'd like to bring you
13 to your Reports again, your Second Expert Report at
14 Paragraph 57 to Paragraph 59.

15 Here you cite and quote from a SUNAT
16 Resolution in the case of Tintaya. And if you could,
17 just explain to us why you quote to that Resolution
18 and what is relevant there.

19 A. (Mr. Picón) Right. In the case of Tintaya,
20 when you have an Economic-Administrative Unit, you
21 could find more than one investment project with
22 different tax regimes applied to them.

1 In this case, it was established that, since
2 the benefits were different, the accounts had to
3 be--had separately to make sure that you knew what tax
4 regime was applicable to each one of the Projects.

5 MS. HIKAWA: Thank you.

6 No further questions.

7 PRESIDENT HANEFELD: Thank you.

8 From the Tribunal's side, there are no
9 further questions, so you are released as Experts in
10 these proceedings.

11 So, thanks. Thank you.

12 THE WITNESS: (Mr. Bravo) Thank you.

13 THE WITNESS: (Mr. Picón) Thank you.

14 (Witnesses step down.)

15 PRESIDENT HANEFELD: Shall we, then, right
16 away continue with the Claimant's Damages Expert, or
17 would the Court Reporters prefer that we have a short
18 break? Because they will probably have a presentation
19 again and this will extend the 90 minutes of our Court
20 Reporter. So--

21 (Comments off microphone.)

22 PRESIDENT HANEFELD: Then we make the

1 10-minute break now and continue at a quarter to 3:00.

2 MS. SINISTERRA: Thank you, Madam President.

3 (Brief recess.)

4 PABLO S. SPILLER AND CARLA CHAVICH,

5 CLAIMANT'S WITNESSES, CALLED

6 PRESIDENT HANEFELD: Good afternoon. We
7 come to the final part of our evidentiary Hearing for
8 today, the Quantum.

9 Welcome to our Quantum Experts nominated by
10 Claimant, Mr. Pablo T. Spiller--so, Mr. Spiller--and
11 Ms. Carla Chavich.

12 Do I pronounce it correctly? Okay.

13 You have seen us, I think, before on screen;
14 otherwise, I introduce ourselves. My name is Inka
15 Hanefeld, presiding arbitrator; Professor Tawil; Dr.
16 Cremades.

17 Can you please be so kind to read out the
18 Declarations under Article 35(3) of the Rules?

19 THE WITNESS: (Mr. Spiller) Good afternoon.
20 My name is Pablo Tomas Spiller. I solemnly declare,
21 upon my honor and conscience, that my statement will
22 be in accordance with my sincere belief.

1 THE WITNESS: (Ms. Chavich) Good afternoon.
2 I'm Carla Chavich. I solemnly declare, upon my honor
3 and conscience, that my statement will be in
4 accordance with my sincere belief.

5 PRESIDENT HANEFELD: Thank you very much.

6 I expect you have your Expert Reports, CER-1
7 and 6, in front of you.

8 Is there anything you wish to correct?

9 THE WITNESS: (Mr. Spiller) No, nothing at
10 all.

11 PRESIDENT HANEFELD: Perfect. Then we can
12 proceed with the presentation.

13 DIRECT PRESENTATION

14 THE WITNESS: (Mr. Spiller) Okay. Very
15 good. First of all, good afternoon, Madam President,
16 Members of the Tribunal. Pleasure to share a few
17 minutes with you.

18 In today's presentation, which you have in
19 front of you, we will start with a description of how
20 we assessed Damages in this case and then about--the
21 rest to talk about our agreements and disagreements
22 with Ms. Kunsman, the Expert of Respondent.

1 So, if we go to Slide 3 there, you
2 have--there you have our instructions, main
3 instructions. Claimant, as you know, filed Claims on
4 its own behalf and on behalf of SMCV, and we were
5 instructed to compute Damages at the level of SMCV.

6 Now, the--there are two Claims in this
7 Arbitration presented by Claimant, the Main Claim and
8 the Alternative Claim. All these Claims come--arise
9 from a series of Assessments or Royalties on New
10 Taxes, Penalties, and Statutory Interest that Perú
11 imposed on SMCV.

12 The Main Claim consists of all those
13 Royalties and New Taxes, Penalties and Statutory
14 Interest, while the Alternative Claim focuses on the
15 Penalties and Statutory Interest, as well as incorrect
16 calculations of tax assessment, as well as
17 unreimbursed GEM overpayments related to the
18 Concentrator.

19 There are, in total, USD 1.2 billion in
20 Assessments--and when I talk about Assessments, it
21 always includes Royalties and New Taxes--as well as
22 there are Penalties and Statutory Interest; a bit more

1 than half on the latter, and Royalties and New Taxes
2 around 600 million.

3 Now, as it relates to the Alternative Claim,
4 there are unreimbursed GEM expenses for 64 million and
5 19 million and what--some inappropriate or incorrect
6 tax calculations.

7 Now, as you may have heard, SMCV already
8 paid 97 percent of the Assessments, remaining only
9 33 million in PTU obligations.

10 Now, let's move to the next slide.

11 In this Arbitration, given the equivalence
12 in financial-economics of two ways of measuring the
13 value of a firm, whether via the lost Cash Flows to
14 the Firm or via the accounting identity that says that
15 the value of a firm equals the sum of its debt and its
16 equity, we implement Damages by looking at both sides
17 of the equation. We assess Damages on the left side,
18 on the right side, and we'll tell you in more detail
19 on the next slide.

20 In the prior Arbitration where the--the
21 Sumitomo Arbitration, SMCV Arbitration, the Claimant
22 was a Shareholder, and here the difference is that the

1 Claimant is claiming for itself and also for SMCV.

2 But in the prior Arbitration, we only
3 assessed Damages based on equity.

4 Now, why do we do this here as well?

5 Because the Assessments had no impact on the value of
6 SMCV debt. SMCV continued making its payments in a
7 normal fashion. It never entered into arrears or
8 default. And, as a consequence, the Measures had very
9 little impact--had no impact on the value of the debt,
10 and, as a consequence, all the impact of the Measures
11 translated into a reduction in, essentially, the
12 equity component, and, therefore, we can assess
13 Damages to SMCV by looking at how the reduction in the
14 equity component of SMCV came; in other words, by
15 reduction in cash flows to equity.

16 Now, in this Arbitration we also look, in
17 the next slide, at the reduction in cash flows to
18 SMCV. And, as the identity will suggest, the two
19 results should be very similar; in theory, identical.
20 They are, in practice, similar, and very little
21 difference between the two, as we'll show soon.

22 So, let's--in the next slide, let's go to

1 how we go from Assessments to Damages.

2 As mentioned, there are \$1.2 billion in
3 Assessments, but not all \$1.2 billion translate into
4 Damages. Why is that?

5 Well, because the payment of such
6 Assessments, it has tax savings. When you pay
7 Royalties, you deduct that from your Income Tax. As a
8 consequence, that--there is a substantial
9 reduction--given that the Income Tax is 30 percent, is
10 a substantial reduction in that component. At the
11 same time, Perú reimbursed some of the GEM payments
12 associated with the Concentrator, not all. So, that's
13 GEM mitigation.

14 And some of the Income Tax Assessments that
15 SMCV had had a consequence that started with those
16 Assessments, or, later on, the SMCV was able to--was
17 forced to depreciate some of its assets on 20 years
18 rather than 5 years, and that implies that there is
19 some depreciation mitigation down the road.

20 In sum, from \$1.2 billion in Assessments, in
21 the--the nominal cash that they had, they would have
22 saved but for the Measures, is 400--813. In other

1 words, there are \$400 million that do not translate
2 into Damages.

3 Now, when looking at the lost--the loss in
4 the equity component of SMCV, we focus on when
5 the--the money saved in the But-For Scenario, when
6 these payments would not be done, we assume that SMCV
7 would have distributed those in terms of dividends or
8 available for dividend distribution in the next time
9 that SMCV actually distributed dividends, which
10 started in 2018, and that, in the interim, we assume
11 that SMCV would put that money into short-term
12 instruments, obtaining a return, a very short-term
13 deposit rate. So, that brings you 813 to 819 as of
14 the date at which those cash available would have been
15 distributed or available for distribution.

16 Now, this 819 are at a very different point
17 in time, and since we have been instructed to value
18 Damages as of date of the Award, which is a proxy in
19 our Reports by the date of our Report, we bring
20 forward these undistributed dividends to the date
21 of--the putative date of the Award at the Cost of
22 Capital of dividends, which is the Cost of Equity of

1 SMCV. That gives us Damages for 942 million.

2 Now, if we look at the cash flow, those Cash
3 Flows to the Firm Approach, we start with the same--in
4 the next slide, 8, we start with the same 1.2 billion.
5 We get the same tax savings, depreciation, GEM
6 mitigation, to move from 1.2 billion Assessment to
7 additional cash available as 813.

8 Now, this additional cash available are as
9 of the date that the payments took place. To bring
10 those 813 to date of valuation, we bring it at the
11 relevant Cost of Capital of Cash Flows to the Firm,
12 which is the Weighted Average Cost of Capital, and we
13 obtain, therefore, Damages of 1.43 billion, slightly
14 different from what we obtained under the Free Cash
15 Flow to Equity approach.

16 Now, in Slide 9, we compare these two
17 Measures and these two Damage Assessments, and also
18 provide some sensitivities to the--and lost Cash Flows
19 to the Firm Approach by bringing forward the payments
20 at two different update rates, the reimbursement
21 rate--these are SUNAT reimbursement rates that would
22 have been applicable to the payments affected by SMCV,

1 and, as you can see, the average reimbursement rate,
2 which is normally for involuntary payments, is very
3 close to the WACC, to the WACC of 7 percent, and that
4 would, as a consequence, lead to Damages very similar
5 to what we estimated for this approach.

6 If we bring those payments to date of
7 valuation using Perú's Cost of Debt, which for that
8 period was 3.1 percent, then Damages are 4.6 less than
9 our Best Case of 942.4.

10 Overall, as I mentioned, the Damages
11 assessed by one or the other way ought to be very
12 similar. They are. Our Best Case is the lost Cash
13 Flows to Equity approach.

14 Now, we--this is done for the Main Claim.
15 We also do the same exercise for the Alternative
16 Claim. I won't repeat everything, but you get that in
17 Slide 10, which is where--one application of the lost
18 Cash Flows to Equity approach where we look at Damages
19 from the perspective of looking just at the equity
20 component of SMCV. The Damages are 17--
21 719 million--720 million.

22 Looking at the lost Cash Flows to the Firm

1 Approach, we see, Slide 18, we get 785 million--again,
2 10 percent above or so--and in Slide 12, we provide
3 the same comparison that we did for the Main Claim,
4 and the results are qualitatively the same. The
5 Damages are around the Assessment under the Cash Flow
6 to Equity approach of 720.

7 Okay. That deals with how we compute
8 Damages, our two approaches.

9 Now let's move to agreements and
10 disagreements.

11 In this slide, 13, we show you that,
12 essentially, there are not a lot of disagreements
13 between the Claimant's and Respondent's Experts,
14 between both sides. We both agree on what the
15 Assessments are and the dates. We agree on the
16 payments, the magnitude and the dates. We agree on
17 the netting of tax savings, both Income Tax and PTU
18 savings. We agree on the applicability of the
19 depreciation and the GEM mitigation. We agree on the
20 Damages Methodology: Lost Cash Flow to Equity to
21 SMCV. And we also agree on the term deposit rate that
22 will be used until dividend declaration.

1 So, there isn't much that we disagree. And,
2 in fact, in the next slide we show you that the only
3 significant differences are two, economic differences,
4 but let's start with the very minor differences.

5 There are three very minor differences,
6 those that appear in the bottom relating to
7 Ms. Kunsman claiming that the outstanding liabilities
8 are not Damages, that the tax corrections that we
9 implement are not applicable, and that the mitigation
10 depreciation--the depreciation mitigation ought to be
11 discounted at a different rate.

12 Overall, even the three together have around
13 3 percent. It's not really a significant difference,
14 and I'm not going to spend more time on that.

15 There are two economic differences that
16 relate to, essentially, either the updating rate or
17 the date of the dividend distribution.

18 Ms. Kunsman claims that, in the Cash Flows
19 to Equity approach, the reasonable assumption is that
20 SMCV would have distributed the but-for dividends, or
21 would have these but-for dividends for distribution,
22 as of the date of the Award, meaning sometime in the

1 future, which will explain to you why this is
2 economically wrong.

3 In the case, Ms. Kunsman says that you, the
4 Tribunal, accept our approach to dividend distribution
5 as reasonable; then she disagrees on the application
6 of the Cost of Equity from the date of distribution,
7 dividend distribution, to the date of the Award, and
8 instead advocates for a one-year Treasury bill plus
9 2 percent. Now, that has around a 10 to 12 percent
10 reduction in the Damages. We say it's significant,
11 but it's not extreme.

12 The way that Ms. Kunsman reduces Damages
13 significantly is by--in two ways, which are not
14 economic, but rather legal.

15 One is that she introduces what she calls a
16 "Treaty Claim," which means that taxes cannot be
17 claimed in this Arbitration, and, therefore, that
18 would lead to a reduction in Damages of around
19 40 percent; and also that SMCV should have mitigated
20 Penalties and Interest by paying all the Assessments
21 much sooner, which has the significant implication
22 that our Damages are reduced by 60 to 70 percent,

1 which means that Perú would retain 60 to 70 percent of
2 the Damages.

3 Now, my colleague Ms. Chavich will continue
4 with the presentation.

5 THE WITNESS: (Ms. Chavich) Thanks,
6 Professor Spiller, Madam President, Members of the
7 Tribunal.

8 I will cover the areas of disagreement,
9 starting first with these two adjustments that have
10 the larger impact and are related to legal issues, but
11 just to see the implication on the economics. The
12 third argument relates to the mitigation scenario.

13 Ms. Kunsman assumes that Cerro Verde could
14 have saved most of the Penalties and Interest, and,
15 that Perú should not reimburse that amount to Cerro
16 Verde. In particular, she assumed that over
17 90 percent of the Penalties and Interest already paid
18 should not be refunded to Cerro Verde.

19 As we see here, that implies that Perú will
20 retain \$572 million, and will only refund Claimant's
21 with 44 million of the Penalties and Interest paid.

22 While this is an economic issue, it has also

1 an economic argument behind, and it has its flaws.

2 The idea of mitigation in this context is
3 for Claimant to take actions that would reduce harm
4 that, if compensated by Respondent, it would result in
5 a harm for Respondent, Respondent paying a
6 compensation higher than the damage inflicted. But
7 that is not the case here. Perú is not going to be
8 harmed. Perú is already in possession of this money.
9 Perú is already in possession of this 572 million
10 here.

11 Thus, Kunsman's adjustment in this
12 mitigation of Penalties and Statutory Interest will
13 just result in a windfall in Perú retaining that money
14 paid by Cerro Verde.

15 The second difference refers to
16 Ms. Kunsman's Treaty Claim. In this Claim, and in
17 this Treaty Claim, per legal instruction, Ms. Kunsman
18 removes all the New Taxes and the related Penalties
19 and Statutory Interest.

20 As Ms. Kunsman notes, this adjustment will
21 not apply to the Main Claim, if the Tribunal finds a
22 breach in the Stability Agreement.

1 We don't opine on this issue. We compute
2 Damages based on the Main and the Alternative Claim,
3 as defined by Claimant and as explained by Professor
4 Spiller before.

5 Now, getting into the economic differences,
6 I will start with the issue of the update. And the
7 update has two sides of it: One is when the dividends
8 would have been distributed and until when we start
9 updating those dividends, and the other discussion is
10 alternatively, is the update rate to use.

11 So, the first position of Ms. Kunsman is
12 that Cerro Verde would have not disputed as dividends
13 the additional cash it would have had but-for the
14 disputed payment. Her assumption is that Cerro Verde
15 would just upkeep all this additional cash with no use
16 in a certain deposit until a future date, until the
17 date of Award, getting around 1 percent per year of
18 interest.

19 But that is not reasonable for a business to
20 do. And let's look into this in Slide 18.

21 First, it's important to note that the
22 Shareholders of Cerro Verde, or any investor, will

1 expect to receive a return; otherwise, they wouldn't
2 invest in a company. They are not going to accept for
3 a company just to hold cash, excess cash with no use,
4 for a number of years without getting a reasonable
5 return for it.

6 And this is consistent with Cerro Verde's
7 history. As we see here, the blue bar shows when
8 dividends were paid by the Company. We see that Cerro
9 Verde actually paid dividends, with the exceptions of
10 periods in which it was saving and for undertaking a
11 big investment--for example, the expansion between
12 2011 and 2016--that would generate a return in the
13 future, giving that expansion to the Shareholders.

14 Cerro Verde didn't distribute dividends also
15 in 2020, due to COVID uncertainty, and then resumed
16 dividend distribution in 2021.

17 So, we know that between 2019 and 2022,
18 despite the disputed payments, Cerro Verde was
19 distributing dividends. That means that Cerro Verde
20 set aside the cash that it needed to operate and
21 distribute that excess cash as dividends, despite
22 making these payments.

1 There is no reason to assume that in the
2 but-for, but for the disputed payment, this additional
3 cash could not have been distributed to the
4 Shareholders.

5 For that reason, in our Free Cash Flow to
6 Equity approach, we assume that Cerro Verde would have
7 distributed the additional cash in the dates when it
8 actually distributed dividends. That's why we don't
9 do any second-guessing on when that dividend would
10 have happened; we just follow the actual dividend.
11 But the additional cash would have been distributed on
12 that date.

13 Alternatively, Ms. Kunsman says that, even
14 if you assume that dividends could have been
15 distributed in the dates in which dividends were
16 actually distributed, as we did for the reasons
17 discussed before, those dividends should be updated to
18 the date of Award, to the Date of Valuation, at a
19 one-year Treasury bill plus 2 percent.

20 This rate, however, fails to compensate
21 Claimant.

22 In Slide 20 we show the difference where it

1 is discussed in this case. As we mention it, the
2 impact of the assessment is to relay dividends to
3 Shareholders. Cerro Verde was not able to pay this
4 additional cash as dividends in the dividend
5 distribution dates, and it will be--we update--

6 (Interruption.)

7 (Stenographer clarification.)

8 THE WITNESS: (Ms. Chavich) I can repeat.
9 Sorry about that.

10 Cerro Verde was not able to distribute the
11 additional cash as dividends at the time of the
12 dividend distribution.

13 And, thus, we update those dividends to the
14 date of Award and the Cost of Equity.

15 This is the minimum return that the
16 Claimants could have--or the Shareholders could have
17 accepted for that delay in the dividends. The
18 Shareholders of Cerro Verde would have only accepted a
19 delay in their dividends for a return that is at least
20 the Cost of Equity. It's the minimum return a
21 Shareholder requires to invest in a Mining Project
22 such as Cerro Verde.

1 In the Free Cash Flow to the Firm approach,
2 we consider the WACC--that is the Weighted Average
3 Cost of Capital. So, we considered both sources of
4 financing, the equity and the debt.

5 As we see here, those rates are in line with
6 SUNAT's statutory rate. That is the rate that SUNAT
7 has to pay to refund companies that made overpayments
8 due to SUNAT's improper assessments.

9 On the contrary, Ms. Kunsman's rate--that is
10 the U.S. Treasury bill plus 2 percent; that was around
11 3.4 percent during the 2018-2022 period--fails to
12 compensate Claimant, and it does not reflect the
13 Financial Cost faced by the Company.

14 And now let me touch briefly on two minor
15 differences that have less than 3 percent of impact in
16 Damages.

17 The first one is the outstanding
18 liabilities. Ms. Kunsman excludes them from Damages.
19 The outstanding liabilities are PTU--that is the
20 employee profit-sharing, and it refers to 33 million.
21 That implies around 3 percent of all the Assessments.
22 These obligations are regarded in Cerro Verde's WACC

1 and still pay interest until paid.

2 We understand further that they are
3 enforceable and that Cerro Verde would have to pay
4 them regardless of the outcome of this Arbitration,
5 and thus we continue to include them as Damages to the
6 Company.

7 The second minor difference affects only the
8 Alternative Claim. In this claim, Ms. Kunsman, based
9 on the Opinion of Perú's Tax Experts, excludes the tax
10 corrections and doesn't include them in this Claim.
11 That results in the leaching facilities being affected
12 by the New Taxes.

13 So, we understand that there is no
14 disagreement that the leaching facilities were
15 stabilized and should not be affected by the New
16 Taxes. However, some of SUNAT's Assessments were
17 applied to the whole activity of Cerro Verde,
18 affecting also the leaching facilities. For example,
19 the Complementary Mining Pension Fund was assessed
20 over Cerros Verde's taxable income entirely, including
21 the income of the Leaching Facility.

22 To correct for that, in this scenario, we

1 applied the same criteria that SUNAT applied to
2 separate between stabilized and allegedly non-
3 stabilized activities for Royalties and Special Mining
4 Tax based on the percentage of sites.

5 So, to conclude, Claimant presents two
6 claims, the Main and the Alternative Claim. We
7 assessed Damages based on the lost Cash Flows to
8 Equity, which is in line with the Damages that arise
9 from applying the lost Cash Flow to the Firm and its
10 sensitivities. We assessed damages as of the date of
11 Award; in our Second Report, we present Damages as of
12 September 22, that as a proxy of the date of the
13 Award.

14 We have agreement with Respondent's Expert
15 on the value of the Assessment at 1.2 billion on the
16 disputed payments that are over 90 percent of this
17 Assessment and how we go from those Assessment to
18 Damages.

19 We have minor difference, that are less than
20 3 percent, as the last issues that we discuss. We
21 have a difference that have around 10 percent impact
22 that relates to the updating, the rate or the timing,

1 but the main difference that we have in the scenarios
2 is the Penalties and Interest mitigation, that has an
3 impact of 60 and 70 percent, in which Ms. Kunsman
4 assumes that Perú should retain money that was already
5 paid by Cerro Verde.

6 And, with that, we conclude our
7 presentation.

8 PRESIDENT HANEFELD: Thank you very much for
9 your presentation. This was very helpful, and it
10 summarized in a--very well the main areas on which
11 also our questions now would focus.

12 QUESTIONS FROM THE TRIBUNAL

13 PRESIDENT HANEFELD: So, just in order to
14 get it in a--precise, a very big economic difference
15 now lies in the Penalties and Interest in our Claim
16 under the alternative scenario; right?

17 So, in the Main Claim, and now there is at
18 least no jurisdictional debate.

19 And in the Alternative Claim, if I
20 understand it correctly--and now Ms. Kunsman states
21 that taxes are not allowed for Damages Claims under
22 the Treaty, but this exclusion does not apply under

1 Article 22.3.6 to the breach. So, I understand Main
2 Claim has no jurisdictional issue; Alternative Claim
3 has, according to Mrs. Kunsman, but you did not opine
4 on that; right? Is this correct?

5 THE WITNESS: (Mr. Spiller) We didn't opine
6 on legal issues, no.

7 PRESIDENT HANEFELD: Okay. And then there
8 is another, a major question that I would have, and
9 this concerns the double-recovery aspect with regard
10 to the other arbitration. I wonder, is it your
11 position that we should award Claimant 100 percent of
12 those Damages that you identified, if any, or is it
13 just 53.56 percent shareholding?

14 THE WITNESS: (Mr. Spiller) Okay. As it
15 relates to the double recovery, my experience in
16 arbitrations where there are multiple claims is that
17 the Tribunals issue Decisions that condition the
18 payments so that double recovery will not take place.
19 So, it's completely up to you how to do it, and I
20 believe that's the appropriate way, as each
21 arbitration is on its own, but you can condition.

22 Now, as it relates to the Claims and how to

1 compute that, the--here, they are making--Claimant is
2 claiming on its behalf, but also on behalf of Cerro
3 Verde.

4 On behalf of Cerro Verde, obviously you
5 could say that there could be, if you make an award on
6 behalf of Cerro Verde, it could be double recovery, if
7 the other arbitration also grant one Shareholder a
8 particular award for that. But you can stipulate in
9 your Decision how to prevent that.

10 So, that if the other--you can condition
11 your award, or you can stipulate some monies will be
12 held on escrow, and depending on the other award, et
13 cetera, et cetera. You can do that.

14 But my understanding is that, here, Claimant
15 is claiming on SMCV, on their behalf of SMCV. So, you
16 have to determine whether that's an appropriate Claim,
17 independent of the double recovery, and then you can
18 make a stipulation concerning double recovery.

19 As it relates to the Claimant itself,
20 obviously he has a share of the equity, and this is, I
21 imagine, would complete your discretion. I won't--I
22 don't know exactly what the legal ramifications are.

1 We were not instructed to compute Damages to
2 54 percent. We were going to assess, as we say in
3 Slide 3, to compute Damages at the level of SMCV.

4 Would you compute Damages at the level of
5 Freeport, then, it will be, more or less, 54 percent.
6 But that's a different--I'm not sure how that relates
7 to the Claim here. It's beyond my expertise.

8 Now, if you ask us, you tell us: "Okay.
9 Experts, compute Damages for this or that," we can
10 always do that.

11 PRESIDENT HANEFELD: Then we stop for the
12 moment with our questions to give the Parties enough
13 time to do their questioning.

14 MS. CARLSON: Thank you, Madam President.

15 CROSS-EXAMINATION

16 BY MS. CARLSON:

17 Q. Good afternoon, Dr. Spiller, Ms. Chavich.

18 You're experienced as Experts and
19 experienced in this sequence in particular, so I will
20 just very quickly spin through a couple of logistical
21 parameters. One is you already know the importance of
22 focusing on a short answer. We are on an

1 ever-shrinking clock in this case.

2 And because you are appearing together in
3 this proceeding, as you know, we've agreed that the
4 rules are that one of you will decide who answers the
5 question, only one of you will answer the question,
6 unless you specifically ask the Tribunal for
7 permission to chime in, or to add on to the first
8 answer.

9 And, for convenience, I'm going to direct
10 most of my questions to Dr. Spiller, and, of course,
11 Dr. Spiller, you can say if you'd prefer for
12 Ms. Chavich to answer the questions instead.

13 Also, I assume that you've had the chance to
14 review the Transcript from our exchange in February
15 when we last met in the other related arbitration;
16 correct?

17 A. (Mr. Spiller) Yeah, I reviewed it. Yes.

18 Q. Okay. So, I will caution that part of this
19 may feel like something you've seen before, because
20 we'll be covering some of the same territory, but, of
21 course, the most important people in this room are the
22 ones who weren't with us in February. And so, we will

1 be covering--

2 (Overlapping speakers.)

3 A. (Mr. Spiller) I won't answer déjà vu, no.

4 Q. Exactly. Assume déjà vu, and we'll go from
5 there?

6 A. (Mr. Spiller) We go from there.

7 Q. Right.

8 Okay. So, just one question on that sort of
9 allocation of responsibilities. Dr. Spiller, could
10 you explain why you asked Ms. Chavich to coauthor the
11 Report with you? Are there particular areas in the
12 Report, or subjects on which you didn't feel
13 comfortable opining and wanted her expertise? Or what
14 was the reason for the Joint Report?

15 A. (Mr. Spiller) We work together very well,
16 and we normally write Reports together. It's our
17 normal practice within our practice to coauthor with
18 colleagues. So, it is not different here.

19 Q. Is there a division of responsibilities in
20 the subject matter, or in who gets into which level of
21 detail, for example?

22 A. (Mr. Spiller) Not really. No. We work as a

1 team. We are responsible for everything.

2 Q. So--just so, I can anticipate, then, how do
3 you plan to decide whether you'll answer a question or
4 whether you'll pass it over?

5 A. (Mr. Spiller) That we'll see how it goes,
6 and it depends on, you know, divide more or less the
7 time. And we'll come, we'll decide.

8 Q. Okay. All right. Just a couple of
9 questions on background, and then also on the
10 parameters because I do think on one of the questions
11 that even the President posed there, they suggest that
12 there may be some confusion.

13 But first, on your respective backgrounds,
14 in the interest of time, when we met in February,
15 Dr. Spiller, I went--we discussed your background in
16 investment treaty arbitrations, which is extensive. I
17 think your Annex suggests--I counted somewhere in the
18 neighborhood of 50 cases in which you've appeared as
19 an Expert in investment treaty arbitrations; is that
20 correct?

21 A. (Mr. Spiller) I don't know how many cases.

22 Q. Okay.

1 A. (Mr. Spiller) Maybe more. I don't know.

2 Q. We established in February that three of
3 those cases are cases in which you've been retained to
4 appear as an Expert testifying for the Respondent, the
5 State; is that correct?

6 A. (Mr. Spiller) That was correct. I failed to
7 mention that I also had an engagement with Poland
8 in--on the Serbia v. Poland pharmaceutical Case. I
9 forgot about that. I'm sorry about that.

10 Q. Okay. So, four then?

11 A. (Mr. Spiller) Yeah, although one, I believe
12 were two cases. But yes, more or less like that.

13 Q. And in February I read out--and I will not
14 take the time here--the names of some 32 cases that I
15 had been able to identify in the public record where
16 you had appeared as an Expert engaged by Claimant.
17 And then, since then, with better research, I've
18 identified seven more. So, that would bring our total
19 up to 39 that I found, and four that we've discussed
20 for Respondent. So, 39 for Claimants and four for
21 Respondents; is that right?

22 A. (Mr. Spiller) Well, I don't know about that.

1 Q. Okay. Well, that's fair. I should tell
2 you--

3 A. (Mr. Spiller) When you mentioned the cases
4 last time, they were all appropriate, so I imagine the
5 additional seven will also be. I don't have a problem
6 with that.

7 Q. But, your--but to be fair, I shouldn't force
8 you to assume something that's not in front of you.

9 So, just quickly, those cases are
10 HydroEnergy v. Spain, BSG v. Guinea, Windstream
11 Energy v. Canada, Global Telecom v. Canada,
12 Crompton v. Canada, Odyssey Marine
13 Exploration v. México, and Sanum Investments v. Laos.

14 Do those all sound like cases in which you
15 are engaged as an Expert?

16 A. I don't think Worldcom v. Canada. I don't
17 recall that case.

18 Q. Not Worldcom, Global Telecom v. Canada?

19 A. (Mr. Spiller) Global Telecom. Yeah, it
20 could be. Yeah.

21 Q. And then, Ms. Chavich, again, sort of based
22 on what I could find in the public record, I think

1 we--and I think in February we identified six cases in
2 which you had appeared as a testifying Expert in
3 investment treaty arbitration, all of which were for
4 Claimant. That was Alicia Grace v. México,
5 Lopez-Goyne v. Nicaragua, Gabriel
6 Resources v. Romania, Glencore v. Bolivia,
7 Total v. Argentina, and Eco Oro v. Colombia.

8 Are those correct?

9 A. (Ms. Chavich) No, they are--I was not a
10 testifying Expert in Eco Oro or Total--and Gabriel
11 either. I think. So, those, I...

12 Q. I see. So, those were not cases in which
13 you tested--you were a testifying Expert. Okay.

14 And I was not able to identify any
15 Respondent's side testifying engagements; is that
16 correct?

17 A. (Ms. Chavich) In treaties, is correct.

18 Q. Okay. Thank you. All right. So, then
19 moving to instructions and sort of how you proceeded
20 with the calculations that you did. So, we've got the
21 Main Claim and then the Alternative Claim. The Main
22 Claim is assuming that each and every Royalty

1 Assessment, each and every Tax Assessment, and the
2 Penalties and Interests associated with those
3 Assessments are a breach of the Stabilization
4 Agreement and a breach of the Investment Treaty;
5 correct?

6 A. (Mr. Spiller) I believe so, that these
7 are--you know, we were instructed to--all those
8 Assessments were breaches, and I believe that Claimant
9 explains that they are breaches of the Stabilization
10 Agreement and/or the Treaty.

11 Q. Right. And if we were to focus exclusively
12 on treaty claims, and here I'm going to speak
13 exclusively of claims under Article 10.5 of the
14 Treaty, your calculations still include all Tax
15 Assessments and Penalties and Interest in the Main
16 Claim; correct? Even if we are speaking only of
17 Treaty breach.

18 A. (Mr. Spiller) Yes, but with the caveat that
19 we were not asked to perform that assessment. We were
20 not given a list, exactly of what this Treaty, what
21 this statutory--sorry, Stability Agreement in detail.

22 So, it's not part of our instructions.

1 Okay. So, our instructions is to--these are the
2 breaches of the Treaty and/or--of the Stability
3 Agreement and/or the Treaty, and these are--compute
4 Damages based on that. So, we were not instructed to
5 look in detail of--that's jurisdictional issue,
6 whether SMT or a Stability Agreement.

7 Q. Okay. So, again, focusing still on the Main
8 Claim, if the Tribunal were to decide that taxes--and
9 let's be comprehensive--taxes and the Penalties and
10 Interest on the taxes were outside of their
11 jurisdiction for purposes of a treaty Claim, they
12 could not look to your Report to find the correct
13 number for what should be claimed in the Main Claim;
14 correct?

15 A. (Mr. Spiller) Our Report will not provide
16 that. Our model could provide, because our model has
17 each and every Assessment in it.

18 So, if the Tribunal makes a determination
19 concerning that, and we get the list--an appropriate
20 list of each--which each Assessment corresponds to
21 which breach, then we can exclude certain--whatever
22 Assessments corresponded, and whatever Penalty and

1 Interest, if so, the Tribunal determines.

2 So, our model on which Ms. Kunsman's model
3 is also based is extremely detailed, extremely
4 detailed. It goes through incredible detail. So, you
5 can view--you, the Tribunal can order--more or less,
6 whatever you want, we can do with the existent model.

7 Q. Okay. But on the face of your Report, that
8 number is not available to them?

9 A. (Mr. Spiller) No.

10 Q. Okay. And on the Alternative Claim, which
11 is only for the Penalties and Interest, both on Taxes
12 and on Royalties, again, you do not--you continue to
13 include tax Penalties and Interest in that Claim,
14 regardless of the jurisdictional question that's been
15 in front of Tribunal; correct?

16 A. (Mr. Spiller) Correct.

17 Q. Okay. So, that jurisdictional question
18 affects both the Main Claim and the Alternative Claim
19 calculations; correct?

20 A. (Mr. Spiller) It may. It may affect. It
21 depends, really, on how the Tribunal interprets that
22 jurisdictional issue.

1 My understanding on the Penalties and
2 statutory--and that is something that Claimant
3 explained relates more to the Penalties and Statutory
4 Interest and should not have implemented or imposed
5 for reasons of uncertainty. But the--that's a
6 different thing. And it's an area that I don't want
7 to go beyond that, because that's the extent of my
8 understanding. So...

9 Q. All right. We can leave that jurisdictional
10 question to the lawyers for now.

11 All right. And then the other thing that I
12 just want to establish is that, again, if the Tribunal
13 were to find liability for, maybe, say--let's put
14 ourselves in the Alternative Claim.

15 If the Tribunal were to find liability for
16 some, but not all, of the Penalties and Interest--for
17 example, if it upheld Penalties and Interest where
18 SMCV had an untimely waiver request--your Report won't
19 help them segregate different categories of the
20 Penalties and Interest. You say your model would do
21 that, if asked, but that your Report will not; is that
22 correct?

1 A. (Mr. Spiller) That's correct.

2 Q. Okay. And did you do any calculation to try
3 to attach a Damages figure or liability specifically
4 to Claimant's Claims about procedural issues in the
5 Tax Tribunal?

6 A. (Mr. Spiller) No.

7 Q. Okay. And if the Tribunal were to find that
8 SMCV could and should have mitigated to avoid some of
9 the Penalties and Interest, but on a different date
10 than, for example, Ms. Kunsman used, they would not be
11 able to use your model to adjust for that; correct?

12 A. (Mr. Spiller) Oh, yes, they could.

13 Q. They could use your model. Could they use
14 your Report?

15 A. (Mr. Spiller) Well, the same way they cannot
16 use Ms. Kunsman's Report. You know, if they found
17 different dates, it had to be tinkered.

18 So, the model can be used for--really, for
19 almost anything that the Tribunal wants to do
20 concerning taxes, Penalties, Royalties, et cetera.

21 Q. Okay. And then just a question about the
22 overall approach.

1 I have seen in multiple places in your
2 Report references to the--taking the approach
3 that--sorry. Hold on. Switching to another page in
4 my notes.

5 So, the framework you're applying is to
6 answer the question--what we call the but-for
7 question: That is, to put SMCV in the position that
8 it would have been in but for the Alleged Breaches of
9 the Treaty or the Stabilization Agreement; correct?

10 A. (Mr. Spiller) Yes. Correct.

11 Q. Okay. And that is just, for reference--I
12 don't think we need to go look at it, but we would
13 find that in your first Expert Report at Paragraph 96.
14 We would find that, then, echoed in Claimant's Briefs.

15 Well, let's very quickly confirm. Let's go
16 ahead to Tab 1--your First Expert Report is at Tab 1
17 if you need to look at it.

18 We'll also throw it up on the screen, and
19 Paragraph 96, which is Page 56 of the PDF, where you
20 explain that your objective is restore SMCV to the
21 position it would have been in but for Perú's
22 breaches; correct?

1 A. (Mr. Spiller) That's correct.

2 Q. And that's the sort of fundamental question
3 that we should ask ourselves with each of these steps,
4 with each of these categories of Damages; right?

5 A. (Mr. Spiller) For each of what?

6 Q. For each of the elements of the Damages that
7 you've calculated; correct?

8 A. (Mr. Spiller) "The elements" being exactly
9 what?

10 Q. Well, it is the overall question that you're
11 asked to answer in your calculations. What would the
12 situation--you have to assess, what would be the
13 situation have been but for the Damages, compare that
14 to the Actual Situation, and then calculate the
15 Damages from the difference; correct?

16 A. (Mr. Spiller) Yeah, but for the payments.
17 That's what you're saying; right?

18 Q. Right. Okay.

19 So, let's move--I'd like to spend just a few
20 minutes talking about this question about dividend
21 distribution.

22 A. (Mr. Spiller) Okay.

1 Q. And here, as you've explained in your direct
2 examination, there is the question of when we should
3 assume the dividends would have been distributed, and
4 then, if necessary, at what interest rate; what
5 interest rate should be applied to bring those
6 dividend distributions forward in time.

7 Correct?

8 A. (Mr. Spiller) Okay.

9 Q. Okay. Now, and this is--as you identified
10 in your Direct Presentation, this is an issue with a
11 substantial impact. There's about \$114 million at
12 stake in the Main Claim and \$83 million at stake in
13 the Alternative Claim.

14 Now, you're not here as a lawyer, but I
15 assume you're familiar with the rule that it's
16 Claimant's burden to prove its Damages?

17 A. (Mr. Spiller) Sorry, I couldn't hear the
18 last words.

19 Q. Sorry. I assume that you are familiar with
20 the rule that it is the Claimant's burden to prove its
21 Damages?

22 A. (Mr. Spiller) Yeah.

1 Q. So, it's Claimant's burden, we submit, to
2 put on the table the information that would prove what
3 would have happened, and, in the case of this
4 particular question, what dividends would have been
5 distributed and when they would have been distributed
6 in the but-for world.

7 A. (Mr. Spiller) Okay.

8 Q. Okay.

9 A. (Mr. Spiller) I will let Ms. Chavich to
10 handle this line of questioning.

11 Q. Okay. All right. And you have assumed for
12 the purposes of this modeling that SMCV would have
13 distributed 100 percent of the cash flows that it
14 would have received, had it not had to pay the
15 Assessments and Penalties and Interest, that it would
16 have distributed 100 percent of those funds as
17 dividends; correct?

18 A. (Ms. Chavich) Like the additional payment
19 net of all the mitigation explained, that additional
20 cash, that excess cash that the Company would have
21 had, yes, would have been distributed as dividends the
22 same days when the Company actually paid dividends,

1 despite these disputed payments; correct.

2 Q. So, you're summing that, if SMCV had this
3 additional money in hand, it would not have retained
4 any of it for additional capital projects, for
5 additional Reserves; if it had had that extra money,
6 it would have gone directly to the Shareholders on the
7 next available dividend distribution date?

8 A. (Ms. Chavich) Correct, because this is extra
9 money, extra to the money that they already saved when
10 they decided to pay dividends.

11 PRESIDENT HANEFELD: May I ask one question
12 in this regard?

13 Is this a categoric "yes," or is it "it
14 depends"? Because I could assume if they operated
15 under a reinvestment of profits Stabilized Regime,
16 they would have a greater incentive, maybe, to keep it
17 rather than distribute it.

18 So, can you qualify your...?

19 THE WITNESS: (Ms. Chavich) Yes. And that's
20 why we follow the dates on which they actually
21 distributed dividends despite making the payments.

22 So, that means that at that point they

1 already set aside the cash that they will need, for
2 example, to pay debt, or if they have a CapEx in a
3 plan, they already set that cash and additional to
4 that they distributed dividends.

5 So, this is just extra new cash, in a sense,
6 and that is why we follow the actual dividend dates,
7 to avoid having the problem of saying, "Look, maybe
8 they have the cash available before, but they could
9 have--make another use? No. Let's focus just on the
10 actual dividend dates that we know that, at that
11 point, the cash needs to fork over and they paid
12 dividends." So, they would have used this additional
13 cash as additional dividends.

14 THE WITNESS: (Mr. Spiller) Madam President,
15 if I may elaborate, if you wish.

16 There is no evidence of a significant
17 capital project in the books. At least at the time
18 that these dividends were actually paid in 2018 to
19 '22, there is no evidence that the Company had or was
20 planning to do an additional Concentrator or anything
21 like that. There is just not evidence about that.

22 So, the money would have stayed in the

1 Company with no particular real use.

2 PRESIDENT HANEFELD: Thank you.

3 Sorry for the interruption.

4 BY MS. CARLSON:

5 Q. Well, if I may follow up on Dr. Spiller's
6 add-on, because that's interesting: You didn't
7 mention any such analysis of the Company's operating
8 plans or any investigations that you performed to
9 determine whether the Company had been considering
10 additional capital activities in the 2018-and-onwards
11 period. And I don't see any mention of that in your
12 Expert Report.

13 Could you tell us, please, how you
14 investigated the Company's operating plans before you
15 prepared your Report?

16 A. (Ms. Chavich) We have an understanding by
17 the financial of what is the payments that are coming,
18 for example, for that.

19 If there is a plan of expansion--as, for
20 example, when you have the expansion that we show here
21 between 2011 and 2016, it was explained in the
22 Financial Statements that the Company was undertaking

1 first the Feasibility Study and then the plans. So,
2 that is explained in the Financial Statements of the
3 Company.

4 But the main--the main point here is that
5 dividends were distributed in any case, so the cash
6 hold was sufficient to cover the operational and
7 capital needs that they have, with the exception of
8 2020, that the Company, if I am not mistaken--we cite
9 to the release--dividends were not paid due to
10 uncertainty during that year, not because there was an
11 Investment Plan, but, given the uncertainty of that
12 year, dividends were not paid.

13 But in the others--in all the other years,
14 dividends were paid, despite the payments.

15 Q. I'd like to look at how you actually
16 explained your reasoning in your Report. So, let's
17 look at your Second Expert Report at Paragraph 37.
18 So, that's Tab 2 in the binder and Page 28 of the PDF.

19 And here you've explained and you've given
20 two reasons why you are assuming that the dividend
21 distribution will happen--would have happened, excuse
22 me--would have happened on the dividend distribution

1 dates and that it would have been a complete
2 pass-through.

3 I don't see any discussion here of your
4 extensive analysis of the Company's operating plans.
5 I see here two reasons given: One that you talk about
6 the history of their dividend distribution practice,
7 and then you also talk about their dividend
8 distribution policies.

9 Is that correct? Because I'd like to ask
10 first about the dividend distribution practice that
11 you're citing.

12 A. (Ms. Chavich) Yes. So, the first reason
13 that you see here is the practice, and the fact that
14 when we assumed the dividends would have been
15 distributed is when dividends were distributed, so in
16 2018-2022, exception 2020, and those dividends were
17 distributed even after the disputed payment.

18 So, even after not having this cash, the
19 Company was able to set aside the cash need that they
20 have and pay dividends.

21 Q. Right.

22 A. (Ms. Chavich) And what we explained is that

1 there is no reason to--and what we follow is, in
2 reality, there is no reason to assume that more cash
3 will increase your limitations to distribute
4 dividends. And then we go to the policies.

5 Q. Right. But you describe--you say here in
6 the language that we're looking at that there is a
7 well-established practice of distributing available
8 cash as dividends, except in the years when the
9 Company was accumulating cash for capital investments.

10 And you mentioned that also in your slide
11 presentation, which I think is a--it's Slide--

12 A. (Ms. Chavich) 18.

13 Q. --18, which is a copy of Figure 1 from
14 your--let's see--First or Second Expert Report. One
15 of the two. It's from your Second Expert Report. So,
16 if we could take a look at that figure.

17 So, I'm curious about the word "except"
18 because, if I count correctly here, we have 18 years
19 on this chart, and in nine of them, half of them, no
20 dividends are distributed. So, that doesn't sound
21 like an exception. That sounds like just as much as a
22 rule as the dividend distribution practice.

1 A. (Ms. Chavich) The Company, when they have
2 excess cash that it doesn't have any use to, it
3 distributed it. So, that is what you see between 2007
4 and 2010.

5 Between 2011 and 2016, there was an
6 expansion taking place. The Concentrator was
7 expanded; a new Concentrator was expanded.

8 Those years, what you are doing is you are
9 saving money and not distributing dividends to your
10 Shareholders, because they are expecting to have a
11 higher return due to this investment in the future.
12 So, it's a savings that you are doing now to then
13 further have additional dividends in the future. You
14 know that the revenues of the Company and the profit
15 increase after an expansion that triplicates their
16 capacity.

17 So, the logic is that when you have money
18 available and when you are a single-project company,
19 when you have money available and you don't have a
20 plan on expansion, that money, if it doesn't have any
21 use, should be distributed to your Shareholders,
22 because you have to give a return to your

1 Shareholders.

2 So, the practice of this Company is, when we
3 have a project, like an expansion, that money could be
4 reinvested, because we are going to get a return that
5 is at least the cost of equity. Otherwise, we are
6 distributing dividends. And that is what we show
7 here.

8 And we see here also, and that, I think, is
9 the most relevant period, the period in which payments
10 were made. And in any case, the Company had available
11 cash to distribute dividends.

12 Q. Right. In fact, the Company had more cash
13 than it distributed; correct?

14 So, it did not distribute all of its
15 available cash during that time period?

16 A. (Ms. Chavich) Correct. They distributed
17 what is excess cash, correct.

18 Q. Right. But if we look at, for example,
19 Ms. Kunsman's Second Report at Table 9, which is
20 Page 23 of the PDF--that's also at Tab 5 of the binder
21 in front of you--and we look at those same years she's
22 put on this chart in Table 9, then in Table 9 she's

1 shown the cash balance. So she's shown that, in fact,
2 they have more cash than they distributed. So,
3 they're obviously not distributing everything they
4 have got available.

5 Likewise, if we look at Table 11, we see the
6 difference between retained earnings and dividends,
7 and they've got retained earnings in excess of their
8 dividends as well. So, they're not distributing
9 everything they have available to them?

10 A. (Ms. Chavich) There are two different things
11 here, and--sorry--I will have to respond to them
12 separately.

13 Retained earnings is an accounting concept.
14 So, retained earnings are the amount of earning that a
15 company has generated during the past. It doesn't
16 consider the investment at all.

17 So, for example, here you see that it says
18 that the Company has, like, 4 billion of retained
19 earnings. That is the blue line. When you see the
20 cash available under--in 2014, if you go to the
21 previous chart that you were showing me, the available
22 cash was almost zero, or very low.

1 Q. Sorry. Just so we will--we'll show you that
2 chart.

3 A. (Ms. Chavich) Yeah. If you see, 2014, you
4 almost don't have cash, because you were investing all
5 the cash in the expansion.

6 So, retained earnings really is not
7 something that can be used to measure availability of
8 any fund. It's just an accounting concept that
9 accumulates accounting earnings without taking into
10 consideration investments and other cash outflows.
11 But just to be clear, I think that we shouldn't
12 consider it.

13 Now, regarding cash, as you see here, you
14 have your accumulated cash for the first expansion;
15 then you don't have it for the expansion of 2011-2016.
16 You don't have cash those years because you're using
17 it for the expansion. And then, yes, you accumulate
18 additional cash. And not all the cash is distributed.
19 You have to set aside cash for issues like, I have a
20 payment coming for operative reasons; prices are
21 volatile, so I need to have cash. So, the management
22 decides that there is cash that they need to hold.

1 The cash that they distributed is excess
2 cash. They already had that excess cash despite the
3 payment. That is the yellow bar there. What we are
4 saying is that when you have the net additional
5 payments, that additional cash will go on top of that
6 excess. It is more excess cash available and should
7 have been distributed at that point.

8 Q. Right. And so, you just mentioned the
9 management decision-making. Management decides how
10 much cash they need to save. Management decides how
11 much cash that they can send out the door.
12 Management, I assume, decides whether they should
13 pursue the capital expansion programs that we saw in
14 the 2012-2017 period; right?

15 Those are free choices by the management at
16 every point in time; right?

17 A. (Ms. Chavich) No--they are free choices
18 within reasonable business; right? You cannot do an
19 expansion plan that is not going to--it's not expected
20 to generate a return, because otherwise the Board and
21 the Shareholders are not going to approve--

22 (Interruption.)

1 (Stenographer clarification.)

2 A. (Ms. Chavich) Otherwise the Shareholders
3 will not accept that. Sorry.

4 Q. Okay. And you did not cite--or find, I
5 assume, because I assume if you'd found it you would
6 have said so--any policy that either directs the
7 Company to distribute all available cash or any rule
8 of thumb or policy that creates a default that they
9 will distribute a certain percentage of cash
10 available; the only policies that you cited were
11 policies that simply permitted management to make
12 dividend distributions. Is that right?

13 A. (Ms. Chavich) We cite to--and we can see
14 exactly the term of the policy--when they explained
15 that dividends should be paid, that dividends are
16 going to pay once liabilities--and, yes, you can show
17 it, probably, better than me trying to--

18 Q. Yeah. So, this is Exhibit CE-934. This is
19 the dividend distribution policy of SMCV.

20 And specifically, if we can highlight the
21 paragraph, the sentence that says "according to this
22 policy," about halfway through. But, of course, it's

1 just a paragraph. You can read the whole paragraph.

2 A. (Ms. Chavich) Yes. Yes.

3 And then this is the line; right? The
4 Company is going to use their profit as much as if
5 they have any continued growth of opportunities, face
6 any financial obligation, and then dividend
7 distribution will take place.

8 We know that all those before had been
9 covered because dividends were distributed, so we are
10 in the point where we are already distributing
11 dividends in 2018, '19, '21, and '22.

12 Q. And in the periods where the management was
13 making the major capital investments in the
14 Concentrator expansion from 2012 to 2018, we know that
15 there were large financial obligations that were not
16 paid, nevertheless; right? That was when all the Tax
17 Assessments were pending?

18 A. (Ms. Chavich) That there were financial
19 obligations? There was an outstanding debt that was
20 also used to finance the Project, and it was paid as
21 payments come. It was not a default, in a sense. I
22 don't know what--

1 Q. I'm actually referring to the tax
2 obligations—

3 A. (Ms. Chavich) Okay.

4 Q. --which--this policy would suggest
5 that one should first pay your tax
6 obligations and then pay out your dividends.
7 But we don't--that didn't happen, did it?
8 They didn't follow that policy?

9 A. (Ms. Chavich) Well, they followed the policy
10 of paying what they considered were obligation that
11 otherwise you will be in default.

12 Same with "financial obligation." It
13 doesn't mean that you have to cancel all your debt
14 before paying dividends. You have to be on good terms
15 with your debt before paying dividends.

16 Q. Okay. Let's switch gears and talk about the
17 mitigation, which is one of the disagreements that
18 you've identified between the Experts.

19 SMCV did pay some of its taxes when
20 assessed, and that stopped the running of Penalties
21 and Interest. And, when that happened, you took
22 account of that in the Damages calculations; correct?

1 A. (Mr. Spiller) Yes.

2 Q. So, we know that they knew how to do that?

3 A. (Mr. Spiller) Sorry. Can you repeat that?

4 Q. Never mind.

5 Sorry. I'm just trying to accelerate
6 through a few points here. All right. But obviously,
7 because we have large accumulated Penalties and
8 Interest, we know that they did not pay all of their
9 Assessments when assessed. They chose to let some of
10 those obligations hang while they contested them in
11 the administrative and court proceedings, and that's
12 how they accrued Penalties and Interest; right?

13 A. (Mr. Spiller) I believe that they followed
14 the tax proceedings and--yeah, these amounts were not
15 enforceable yet in Perú. My understanding is that
16 once there is a Decision of the Tax Tribunal, I think
17 it becomes enforceable and payable. But, yeah, I
18 think that they took whatever management strategy or
19 decision they took is what they did.

20 Q. Right. And, I mean, that decision to choose
21 between paying your taxes under protest and stopping
22 the Penalties and Interest, or not paying the

1 Assessments, contesting them and waiting to see what
2 happens at the end, that's what causes more than half
3 of the Damages--more than half of the Assessments
4 claimed here; right? You broke this down in your
5 first slide?

6 A. (Mr. Spiller) Well, I think that it is
7 Claimant's Claim that the reason why they're--that
8 amount is because of the inappropriate Tax and Royalty
9 Assessments. I think that's the reason, and whatever
10 they were doing was they were following the
11 administrative process in contesting the tax
12 obligations, with expectations of recovery from SUNAT
13 that--at the reimbursement rate, which is reasonably
14 high, very close to the Cost of Capital of the
15 Company. So...

16 Q. But it's your understanding that they had
17 the option to pay the Assessments, when received--

18 A. And also to--

19 (Overlapping speakers.)

20 Q. --and they would not have accrued the
21 penalty and interest; correct?

22 A. (Mr. Spiller) Yeah. And also to ask SUNAT

1 to reverse its--to review its policy, and pay back
2 with interest at the reimbursement rate. So, it
3 is--yeah.

4 Q. And that's common--

5 A. (Mr. Spiller) That's the options. You know,
6 whether it's one or the other, it seems that both are
7 legal, to me.

8 Q. Right. So--and this is common in taxation
9 in many, if not most countries in the world, that you
10 have the option to pay under protest, avoid the
11 Penalties and Interest, contest the issue, and if it
12 turns out you're right in the end, you get your
13 payment back, with Interest. This is the statutory
14 rate that you're referring to.

15 So, that option is known to the Company,
16 because we know they did it, and they simply chose not
17 to do that here.

18 If we look at your Slide 3 from your
19 presentation; right?

20 A. (Mr. Spiller) Okay.

21 Q. Which is just the instruction Slide.

22 A. (Mr. Spiller) Yeah.

1 Q. Just for reference. If they had done that,
2 on both Claims, the dark green bar would be gone;
3 right?

4 A. (Mr. Spiller) Yes.

5 Q. And that dark green bar is more than half of
6 the amounts in the Main Claim; right?

7 A. (Mr. Spiller) Yes. And what's the question?

8 Q. Yes. I was confirming that it's more than
9 half of the amount—

10 A. (Mr. Spiller) Yeah.

11 Q. --claimed here was the Company's choice to
12 incur?

13 A. (Mr. Spiller) Yeah. Right. But, you know,
14 paying doesn't exempt the Penalties, you know.
15 Normally, you get an assessment and that assessment
16 incorporates a penalty. You don't get a free
17 assessment.

18 Q. But it stops the running of future
19 Penalties; correct?

20 A. (Mr. Spiller) Well, it depends because you
21 pay the Assessment, and then SUNAT comes with a
22 different Assessment and a different Penalty. So,

1 it's not necessarily true. You know, if I pay one
2 Assessment of SUNAT, I don't know what--you save the
3 Statutory Interest on that particular Assessment, but
4 that doesn't save you anything else after tomorrow.
5 They come with a different assessment, for a different
6 reason. As it happened.

7 Q. In this same time period that they chose to
8 accrue \$616 million in Penalties and Interest, that
9 was the same time period in which they were making a
10 \$5.3 billion capital investment; correct?

11 A. (Mr. Spiller) I find they choose to accrue
12 Penalties and Statutory Interest. I don't think
13 that's a proper representation of anything because
14 Penalties are not chosen. You don't choose to pay--to
15 get assessed a Penalty. You receive a Penalty. You
16 may select to delay and absorb the Interest, and then
17 you'll get that money back, but the Penalty and the
18 Penalty too, but the Penalty is what you get assessed.

19 So, it's not clear that paying the
20 Assessment saves you that particular Penalty.

21 At least, that remains to be explained
22 better, you know, because it's not proper,

1 your characterization.

2 Q. We can agree, I assume, that you would avoid
3 paying further Interest; correct?

4 A. (Mr. Spiller) For avoid what?

5 Q. Paying further Interest?

6 A. (Mr. Spiller) You may save on Interest,
7 yeah.

8 Q. Yeah. And if the--if you change your tax
9 behavior, you will also avoid further Assessments,
10 and, therefore, avoid the Penalties in those
11 Assessments;--

12 A. (Mr. Spiller) Well...

13 Q. right?

14 A. (Mr. Spiller) Well, yeah, but why would you
15 change your tax--your tax stories? You know, your tax
16 reporting. You know, that assumes a lot.

17 Q. Okay. One moment, please.

18 Just a quick note about the interest rate
19 that you used--switching back to the dividends, the
20 interest rate that you used to bring forward the
21 dividend distributions, if we want to look at your
22 slides just for reference, let's use Slide 7, please.

1 A. (Mr. Spiller) Yes.

2 Q. So, you took the--you explained that you
3 took the green bar, which is all the Assessments, you
4 adjusted that for tax savings associated with having
5 paid Royalties and the like, and then the--I want to
6 talk about the transition from the orange bar to the
7 light blue bar.

8 As I understand it, for this period of time,
9 you're adjusting for time, and you applied interest at
10 a short-term deposit rate?

11 A. (Mr. Spiller) From the 813 to the 819,
12 yes, that the assumption is that the Company keeps the
13 cash at hand until it has--as you recall, you saw that
14 declining cash balance is in one of the charts of
15 Mrs. Kunsman's, declining cash balance, during that
16 period of time, the Company would not have distributed
17 dividends, and then in 2018, you started distributing
18 dividends. So, until that day, then, they will have
19 kept the cash at hand and collecting some short-term
20 deposit rate.--

21 Q. Right.

22 A. (Mr. Spiller)--And then

1 Q. And I just want to ask you about that rate.

2 It's the rate specifically I'm interested in.

3 A. (Mr. Spiller) Okay.

4 Q. So, that rate, I looked at the Excel
5 spreadsheet to get here, but it seems to range from
6 like .5 percent to about 2 percent over this time
7 period?

8 A. (Mr. Spiller) Yeah. It's a low--it's a
9 low--it comes from the--it's the deposit rate,
10 short-term deposit rate at the time in Perú was
11 between .5 and 2, I think.

12 Q. Yeah, somewhere in that 1 to 2 range.

13 (Overlapping speakers.)

14 A. (Mr. Spiller) With that average, I think it
15 was 1.25 or something.

16 Q. Right. So, when we go, though, when we do
17 the next adjustment for time, for time value, when we
18 take the light blue bar to the dark blue bar, now
19 there's a different rate being applied here, and
20 that's the Cost of Equity.

21 A. (Mr. Spiller) Correct.

22 Q. Which, numerically, I think ranges between

1 about 5 and 8 percent, over the 2018 to 2022 period?

2 A. (Mr. Spiller) I believe you're right. Yes.

3 Q. Okay. So, that's 2018 to 2022. That's a
4 period in which the U.S. Government can only borrow at
5 a 1 to 2 percent rate; right?

6 A. (Mr. Spiller) I think so.

7 Q. Right. And if you take something
8 like--well, Ms. Kunsman suggests--

9 A. (Mr. Spiller) Well, sorry. The short-term
10 rates is the borrow. Long-terms rates was--

11 (Overlapping speakers.)

12 Q. The U.S. T-bill rates?

13 A. (Mr. Spiller) Yeah, that's a very short
14 term.

15 Q. Right.

16 A. 10-years rates were higher than that, but,
17 10-years rates were around 2 percent, 2-3 percent.

18 Q. Right. And if we said, okay, well, this
19 isn't the U.S. Government, certainly, but this is a
20 commercial player. So, if we add a couple of
21 percentage points to that, we get rates between, let's
22 say, 2.4 and 4.4 percent. That's Ms. Kunsman T-bill

1 plus 2.

2 A. (Mr. Spiller) Well, not really because the
3 T-bill was much lower, but the--but this is not--this
4 is not what a shareholder demands from--

5 Q. But it is the rate--

6 A. Hold on. From postponing dividends. If I
7 am a shareholder in a company, and Claimants control
8 the Board, and they will demand an appropriate return,
9 and an appropriate return is at least the Cost of
10 Equity. So, if I--if for some good reason they would
11 like to postpone dividends when the cash is available
12 for distribution, they will demand, at least, to
13 obtain that return.

14 Now, here what we have is an involuntary--
15 involuntary postponement. The dividend will come
16 whenever the Tribunal makes a determination, say, in
17 2024. So, if I have to accept a delay until 2024 of
18 my dividend, then it should be at least the Cost of
19 Equity. And that's a cost for SMCV. If SMCV
20 voluntarily postpones dividends, then it will have to
21 distribute that amount that we provide here, 942.4, as
22 of 2022, and some more until 2024.

1 Q. Dr. Spiller, I will ask that you focus on
2 the question that I asked.

3 The T-bill plus 2 rate is close to the--is
4 something that we might refer to as a prime rate,
5 something that's available in the commercial
6 marketplace; right?

7 A. (Mr. Spiller) No. The T-bill is not.

8 Q. I'm sorry?

9 A. (Mr. Spiller) The T-bill is not.

10 Q. T-bill plus 2?

11 A. (Mr. Spiller) It could be plus 2, plus 3.

12 Q. Okay. All right.

13 And what evidence do you have that anyone in
14 the marketplace would have offered 5.5 to 8.6 percent--

15 A. (Mr. Spiller) Well.

16 Q. --in the 2018 to 2022 period?

17 A. (Mr. Spiller) Well, simply the Cost of
18 Equity in--in mining. For mining--

19 (Overlapping speakers.)

20 Q. I said in the marketplace. If somebody
21 wants to borrow--

22 (Overlapping speakers.)

1 A. (Mr. Spiller) Sorry. This is not borrowing.
2 Nobody is borrowing here. I'm postponing a
3 particular--I'm postponing receiving a particular
4 dividend.

5 Q. But what is your evidence--

6 A. (Mr. Spiller) So, the...

7 Q. that this rate was available as a commercial
8 rate? Do you have any evidence that this, these rates
9 were available as a commercial rate?

10 A. (Mr. Spiller) What is a commercial rate for
11 you?

12 Q. Have you seen the--

13 (Overlapping speakers.)

14 A. Because a commercial rate is--commercial
15 rates are things are being priced based on that rate.
16 So, for example, I can price a loan based on a rate
17 that's associated with that loan. I can price a share
18 based on the Cost of Equity, the Cost of Capital
19 associated with that particular company. So, shares
20 are being transacted every day, and the shares
21 have--when you discount the cash flows of a particular
22 company, that's how you value a share, and that is the

1 Cost of Equity.

2 So, all shares are being transacted at Cost
3 of Equity, different Cost of Equity for different
4 industries, and Cost of Equities, as commercial as any
5 other rate.

6 Q. Did you investigate whether rates of
7 5.5 percent to 8.6 percent were commercially available
8 to third parties in the marketplace, or did you only
9 calculate the Cost of Equity of the specific company?

10 A. (Mr. Spiller) Well, the Cost is a
11 commercially reasonable rate in that sense too.

12 Q. Did you have any proof that there is a
13 commercially available rate of 5.5 to 8.6 percent in
14 the 2018 to 2022 time period?

15 A. (Mr. Spiller) Well, shares were
16 being--shares were being transacted. You're asking
17 me, do you have proof of a loan at that rate.

18 Q. Right.

19 A. (Mr. Spiller) Well, this is equity. This is
20 not debt. This is equity. So, if you are looking at
21 equity, you don't apply the Cost of Debt. It's
22 like--if I--if you--if you buy--if you're going to buy

1 a loan portfolio, you're going to use the Cost of Debt
2 of that particular portfolio, but if you're going to
3 buy a company, rather than give you debt is going to
4 give you equity, you discount at the Cost of Equity.

5 So, each Cost of Capital applies to whatever
6 the asset you are valuing. So if I'm valuing debt, I
7 use the Cost of Debt. If I'm valuing equity, I use
8 the Cost of Equity. So, when we do the cash flows to
9 the firm, we don't use the Cost of Equity. We use the
10 Cost of Capital of SMCV, which is the balance of
11 equity and debt, because the Company, as I show in
12 Slide 3, is a balance of--it has equity and has debt.
13 So, you compute the average cost.

14 But when you only focus on the equity, then
15 you use the cost of capital of equity. So, it is an
16 applicable asset, applicable rate of--it's true--an
17 applicable rate to the appropriate instrument.

18 MR. UKABIALA: I'm really sorry to
19 interrupt. Just pursuant to the Agreement between the
20 Parties, each Party had a hundred and--I'm sorry, hour
21 and 10 minutes, which would be 40 minutes for cross,
22 which I believe we've gone over.

1 So, we just wanted to see if the plan is for
2 Kunsman to have a shorter direct, or we'll have the
3 equal amount of time for cross as well.

4 MS. CARLSON: We can discuss that in just a
5 second. I have one question left. Thank you.

6 BY MS. CARLSON:

7 Q. Dr. Spiller, you are aware that the
8 requirement of the Treaty that is applicable in this
9 case is that--to use a "commercially reasonable rate"?

10 You're aware of that Treaty provision;
11 correct?

12 A. (Mr. Spiller) I think that--

13 Q. This is just a question.

14 A. (Mr. Spiller) There are two issues on this.

15 Q. No, I don't need an explanation.

16 A. (Mr. Spiller) I--no, no--

17 (Overlapping speakers.)

18 Q. Are you aware that that is the applicable
19 Treaty provision?

20 A. (Mr. Spiller) Well, I think this is--

21 Q. That's a yes or no.

22 A. (Mr. Spiller) Hold on. It cannot be. Hold

1 on.

2 Q. Yes, it is.

3 A. (Mr. Spiller) No. If I look at the chapter
4 in which this interest at commercially reasonable rate
5 appears, it's--go up a little bit on this, go up a bit
6 more--it's Article 10.7, which talks about
7 expropriation and compensation. I'm not a lawyer. I
8 don't know if that applies or not. But, to me, it
9 means that for an expropriation claim, the
10 compensation that you're going to apply is that. And
11 even the Article 3 doesn't apply here. We are not
12 looking at the Fair Market Value of a company. We are
13 looking at historical damages, damages that happen in
14 the past.

15 So, this is not--this is the--to me, as an
16 economist, this is not necessarily the article that
17 you want to look.

18 Q. Okay.

19 A. (Mr. Spiller) Maybe you refer me to
20 a different article, but that's up to you.

21 Q. So, you're operating under a legal
22 instruction, that this is not the right--the

1 applicable provision?

2 A. (Mr. Spiller) I'm not under a particular
3 instruction. I understand--normally, we talk about
4 commercial rates in international arbitration, and I
5 think that the Cost of Equity is the applicable rate
6 for this particular methodology. For a different
7 methodology, there is a different rate.

8 Q. Okay. Thank you.

9 MS. CARLSON: That concludes my questions,
10 Madam President.

11 PRESIDENT HANEFELD: Any questions in
12 redirect?

13 MR. UKABIALA: No redirect for Claimant.
14 Thank you, Madam President.

15 PRESIDENT HANEFELD: Thank you.

16 No further questions.

17 MS. HAWORTH McCANDLESS: Can I get a sense
18 of where I am on time?

19 PRESIDENT HANEFELD: Yes.

20 MS. HAWORTH McCANDLESS: Just so, that I can
21 answer Counsel's question.

22 PRESIDENT HANEFELD: Yes. And now, first of

1 all, thank you very much for your testimony. We have
2 no additional questions. So, you are released as
3 Experts in these proceedings.

4 THE WITNESS: (Mr. Spiller) Thank you.

5 (Witnesses step down.)

6 PRESIDENT HANEFELD: And, Marisa, could you
7 please share with us where we stand in terms of time?

8 MS. CARLSON: And I guess I need to know
9 what--just what was on this examination.

10 SECRETARY PLANELLS VALERO: Yeah. This
11 examination you used 48 minutes.

12 MS. CARLSON: Okay.

13 Counsel, I am prepared to proceed on either
14 basis; Ms. Kunsman can shorten her presentation, or
15 you can have an extra eight minutes, whichever you
16 prefer.

17 MR. UKABIALA: Yeah, the extra time for
18 cross-examination would be preferred. Thank you.

19 MS. CARLSON: Thank you.

20 PRESIDENT HANEFELD: That we will proceed on
21 this basis, and use this moment for a 10-minute break.

22 (Brief recess.)

1 PRESIDENT HANEFELD: So, let us continue now
2 with the Respondent's Quantum Expert, Ms. Kunsman.

3 ISABEL SANTOS KUNSMAN, RESPONDENT'S WITNESS, CALLED

4 PRESIDENT HANEFELD: Welcome. And let us go
5 right away into the Declaration.

6 Could you please read it out?

7 THE WITNESS: Great. Yes. I am Isabel
8 Kunsman, and I solemnly declare, upon my honor and
9 conscience, that my statement will be in accordance
10 with my sincere belief.

11 PRESIDENT HANEFELD: Thank you. Do you have
12 your Expert Reports--that's RER-5 and 10--in front of
13 you?

14 THE WITNESS: Yes, I do.

15 PRESIDENT HANEFELD: And I understand you
16 will also give a presentation?

17 THE WITNESS: I will.

18 PRESIDENT HANEFELD: So, we are looking
19 forward to your presentation now.

20 THE WITNESS: Great. Thank you.

21 DIRECT PRESENTATION

22 THE WITNESS: For the benefit of the

1 Tribunal, I provide a summary of my qualifications in
2 this slide which you can reference later.

3 So, as Compass Lexecon mentioned, their
4 Damages calculation contains two scenarios: One, the
5 Main Claim, under which they assume that the Tribunal
6 will find that all Assessments, Penalties, and
7 Interest constitute a breach of the Treaty and/or the
8 Stability Agreement; and an Alternative Claim, whereby
9 the Tribunal will find that not waiving all the
10 Penalties and Interest, incorrectly calculating some
11 of the Assessments, and not fully reimbursing SMCV for
12 the GEM payments constitute a breach of the Treaty
13 and/or the Stability Agreement.

14 Now, both Claims have two components in the
15 calculation: Historical losses, and future losses or
16 offsets. Because the offsets are higher, those become
17 negative.

18 In total, Damages under the Main Claim,
19 which I will show in red throughout the presentation,
20 are USD 942.4 million, and the Alternative Claim,
21 which I will show in blue, USD 719.9 million as of
22 September 13, 2022.

1 Now, there are two items of note on Damages.

2 One, Claimant is calculating--is presenting
3 Damages on behalf of SMCV, and Compass Lexecon, as I
4 have said, have only calculated Damages on behalf of
5 SMCV for both breaches. So, if the Tribunal decides
6 that Damages should only be calculated for Freeport,
7 you would need to reduce Damages by the dividend taxes
8 and also by their shareholding of SMCV.

9 The second item of note that was brought up
10 is that the second-largest Shareholder of SMCV, SMM
11 Cerro Verde, has initiated an arbitration against
12 Perú, and if the Tribunal in both cases award Damages,
13 SMM Cerro Verde would double-recover.

14 I make seven adjustments to Compass
15 Lexecon's Damages calculations. Five of them deal
16 with historical losses and two of them with the future
17 losses offset.

18 All but one relate to both the Main and the
19 Alternative Claims. The sales-based tax correction
20 only deals with the Alternative Claim. Now, before I
21 go into the details of my adjustments, I want to
22 highlight where the areas of disagreement are with

1 respect to each step of Compass Lexecon's Damages
2 calculation.

3 So, in this schematic, I'm just showing the
4 historical losses which Compass Lexecon calculates in
5 three steps: First, the net losses, which represent
6 the amount that SMCV paid for the assessment,
7 Penalties, and Interest, net of the GEM
8 reimbursements, depreciation offsets and Income Tax
9 savings.

10 They then calculate net dividends lost by
11 adding to the net losses interest at a short-term
12 U.S.-denominated deposit rate, which is approximately
13 1 percent annually. And, because they are claiming
14 Damages on behalf of SMCV, they don't deduct the
15 dividend tax. The assessment payment--the interests
16 run from the various assessment payment dates to the
17 various dividend payment dates.

18 Now, in the third step they calculate
19 Claimant's historical Damages by adding pre-Award
20 interest to the net dividends lost at SMCV's Cost of
21 Equity.

22 So, of the areas of disagreement in the

1 historical calculations, three of them deal with the
2 net losses, which is the avoidable Penalties and
3 Interest, the Tax Measures not allowed for Damages
4 under the Treaty, and the sales-based tax correction;
5 then the second one deals with the timing of the
6 but-for cash flows to be paid out as dividends; and
7 the last disagreement is with the pre-award interest
8 rate that Compass Lexecon uses.

9 So, my first adjustment deals with the
10 mitigation of Penalties and Interest. I calculated
11 Damages based on the legal assumption that SMCV could
12 have avoided a significant portion of the Penalties
13 and Interest associated with the Assessments if SMCV
14 had followed SUNAT's methodology and paid the
15 Assessment Interest and Penalties under protest after
16 receiving the first Assessment.

17 This adjustment reduces the Main Claim by
18 62.1 percent and the Alternative Claim by
19 72.4 percent.

20 The calculation of this adjustment hinges on
21 what I call the cutoff dates, and the cutoff dates
22 represent the date SMCV received the first Assessment

1 for Royalties and for each type of tax. So, in total,
2 there are seven cutoff dates.

3 So, for Royalties and taxes that were due
4 before the cutoff date, SMCV could have paid the
5 Assessment, Interest, and Penalties up to the cutoff
6 date under protest to keep additional interest from
7 accruing on those Penalties and Assessments. But, for
8 the ones due after the cutoff date, the entire
9 Penalties and Interest could have been avoided by
10 filing taxes under protest using SUNAT's methodology.

11 So, in this schematic, I provide an example
12 of the methodology I used for the Royalties. On the
13 left side of the table, it shows that, for Royalties,
14 SMCV received seven Assessments. The first one, they
15 received on August 17, 2009 for the Royalty period
16 between December 2006 to December 2007. The gray bar
17 represents that period where they paid the Royalties,
18 and the white bar surrounded by the red dotted line
19 represents the interest and penalties accrued on the
20 Assessments.

21 So, for the first two Assessments they
22 received, because they had already paid those

1 Royalties by the time they received the Assess--the
2 first Assessment, which means the cutoff date is
3 August 17, 2009, they could have only avoided the
4 interest from accruing after the cutoff date.

5 Now, for the third Assessment, because the
6 cutoff date is in between the Royalty Assessment
7 period, they could have only avoided the Penalties and
8 Interest for those payments that would occur after the
9 cutoff date.

10 Then, for the last four Assessments, they
11 could have avoided the Assessments altogether,
12 including the Penalties and the Royalties, if they had
13 paid the Royalties using SUNAT's methodology that they
14 already knew as of August 17, 2009, and doing so under
15 protest.

16 My adjustments are conservative in two
17 respects: First, as the Tax Experts mentioned, I
18 understand that after receiving the first Assessment,
19 SMCV could have understood that it should have applied
20 nonstabilized taxes and Royalties to the Concentrator
21 going forward in order to avoid additional
22 Assessments, Penalties, and interest.

1 And, second, I did not include a mitigation
2 adjustment for the interest associated with the
3 payment plans because I didn't have enough information
4 to do so.

5 Now, my second adjustment deals with the Tax
6 Measures not allowed for Damages under the Treaty.

7 Compass Lexecon's Damages calculation does
8 not distinguish between the two legal Claims, which I
9 referred to under the breach of the Stability
10 Agreement and the breach of Article 10.5 of the
11 Treaty.

12 I calculate Damages under Article 10.5 of
13 the Treaty based on the legal assumption that the
14 Royalty Assessments and not fully reimbursing SMCV for
15 the GEM payments are the only Measures Claimants can
16 claim for Damages. So, they can only claim the
17 Royalty Assessments and the Interest and Penalties
18 associated with the Royalty Assessments, and then the
19 GEM payments, but nothing else.

20 This adjustment reduces the Main Claim by
21 39.6 percent and the Alternative Claim by 36 percent.
22 And these are stand-alone adjustments. The impact is

1 a stand-alone impact.

2 Now, the sales-based tax correction, which
3 is my third adjustment, is a difference of opinion
4 between the Tax Experts. All I did is just completely
5 remove the tax corrections from Compass Lexecon's
6 calculation of the Alternative Claim, and it reduces
7 the Alternative Claim by 3.3 percent.

8 Now, for the fourth adjustment, which deals
9 with the distribution of the but-for cash flows,
10 Compass Lexecon assumes that the but-for cash flows
11 would be distributed based on the dates that SMCV
12 distributed dividends. But there is no evidence to
13 support this assumption that they would have
14 distributed all those but-for cash flows. And without
15 any evidence of the dividend policy or a circled
16 pattern of practice, I assume that the but-for cash
17 flows would be distributed as a one-time settlement
18 payment at the Valuation Date.

19 This reduces Damages by 12.1 percent in the
20 Main Claim and 11.6 percent on the Alternative Claim.

21 So, what do I mean by "no dividend policy or
22 pattern"? All companies have a dividend policy,

1 explicitly or implicitly. Some companies will
2 distribute a percentage of their earnings or their
3 Free Cash Flows to Equity or some other Measure every
4 year. Other companies will distribute a fixed amount,
5 a fixed amount per share. Others will have, before
6 they make the investment, project companies, an
7 expected pattern of distribution of dividends, and
8 other companies may choose to not distribute dividends
9 at all for a period of time.

10 So, there is a policy, and I asked for this
11 policy, and I didn't receive it. So, as an
12 alternative, I looked at, well, what did SMCV do
13 historically? And there isn't any disagreement
14 between the Experts that there weren't any dividend
15 payments between 2012 and 2017, and also no dividend
16 payments in 2020 because of COVID.

17 However, when--the years they did distribute
18 dividends, SMCV didn't distribute all of the available
19 cash that they had. For example, in 2018, as the
20 yellow block shows, they distributed a very round
21 amount of 200 million in dividends, and they could
22 have distributed up to 501 million. And you've heard

1 today from Claimant's side that, well, they decided
2 what was the cash amount they needed, and then what
3 was left over they could distribute as dividends.
4 That assumes that a company will first decide the cash
5 amount they need, and then they will decide what's
6 left over to pay as dividends.

7 That's not right. That's not always the
8 case. Sometimes companies will say: "We will
9 distribute a certain amount as dividends, and whatever
10 is left over, we'll keep it as a cushion," or--there
11 are many reasons. Or we'll keep--"We don't want to
12 distribute it for tax reasons," or because of debt
13 issues, other commitments that they have may have.
14 There are a lot of reasons. Unfortunately, I don't
15 know what were the reasons specific to SMCV, because I
16 didn't have their dividend distribution policy.

17 Now, the fifth adjustment deals with the
18 pre-award interest rate. In their First Report,
19 Compass Lexecon states: "To restore SMCV to the
20 position it would have been in but for Perú's
21 breaches, it is necessary to add interest to the
22 nominal cash flows--lost cash flows. SMCV's Cost of

1 Equity represents such rate, as it is the minimum Rate
2 of Return that SMCV's equity holders require to
3 voluntarily invest or retain cash flows in SMCV.
4 Therefore, it reflects the Cost SMCV bears by delaying
5 its equity distributions due to Perú's breaches."

6 However, Compass Lexecon ignores relevant
7 provisions of the TPA, which provides for an interest
8 at a "commercially reasonable" rate.

9 So, what Claimants and/or SMCV would have
10 done is not relevant, given the TPA's instruction to
11 calculate interest using a commercially reasonable
12 interest rate.

13 Now, even if one were to ignore the TPA's
14 instruction, Compass Lexecon, as I mention here, is
15 comparing the But-For and the Actual
16 Scenario--right?--when it comes to Damages.

17 So, in order to show that, in the But-For
18 Scenario, SMCV would have earned that Cost of Equity,
19 they have to present evidence that Claimant had the
20 opportunity to invest in a project that earned SMCV's
21 Cost of Equity during the relevant period; and, even
22 if such project existed, they would have to

1 demonstrate that the Measures prevented Claimant from
2 raising capital to invest in said project.

3 Now, the issue of the Cost of Equity that
4 was discussed earlier relating to whether it's a
5 commercially available rate or not, the Cost of Equity
6 represents the average return investors expect from
7 investments in the common shares of companies over a
8 multi-decade period. It is a very long-term rate, and
9 it's an expectation.

10 So, using SMCV's Cost of Equity as a
11 pre-award interest rate assumes that very long-term
12 Rates of Return can be earned over very short periods
13 of time. Over a short period of time, companies may
14 or may not earn their Cost of Equity, and in general,
15 companies hope to earn their Cost of Equity, but they
16 may or may not.

17 Finally, there is no evidence that Claimant
18 had reinvested or was reinvesting any capital back
19 into SMCV, and Compass Lexecon's assumption that SMCV
20 would hold the but-for cash flows in short-term
21 deposits before distributing them as dividends
22 implicitly assumes that SMCV would not have reinvested

1 the but-for cash flows into the Project or started
2 additional projects.

3 I also wanted to note that Compass Lexecon's
4 Damages calculation assumes that the amounts that
5 would be paid in dividend taxes would be accruing
6 interest at the Cost of Equity.

7 We didn't make an adjustment for this
8 because all of our other adjustments negate this
9 adjustment, but it is also something that the Tribunal
10 should consider.

11 Based on the "relevant interest rate"
12 language on the Treaty, I consider the one-year U.S.
13 Treasury Bill plus 2 percent compounded annually a
14 commercially reasonable rate to calculate pre-award
15 interest. Using this rate reduces the Main Claim
16 Damages by 7.5 percent and the Alternative Claim
17 Damages by 7.2 percent.

18 Now, Compass Lexecon provides alternative
19 pre-award interest such as the Weighted Average Cost
20 of Capital and Perú's Cost of Debt. I won't repeat
21 the reasons again, but the same reasons apply to those
22 rates as the ones that apply to the Cost of Equity.

1 Now, with SUNAT's reimbursement rates for
2 excess payments, Compass Lexecon is assuming that that
3 rate would apply to all of the Assessments, Interest,
4 and Penalties, but my understanding is that that rate
5 would only apply to payments--would not apply to
6 payments of avoidable Assessments because it assumes
7 that those avoidable assessment Penalties and Interest
8 are not excess payments.

9 Also, for both avoidable and unavoidable
10 Assessments, the reimbursement rate doesn't apply to
11 interest. My understanding is that.

12 Now, for future losses, I provide a similar
13 schematic as I did for historical losses. In total,
14 Compass Lexecon calculates expected net offsets of USD
15 12.23 million--negative million--which are made up of
16 outstanding liabilities and depreciation of offsets.

17 Compass Lexecon assumes that the Outstanding
18 Liabilities will be paid as of the Valuation Date, and
19 that depreciation of offsets will happen between 2023
20 and 2027.

21 Like they did for the historical losses,
22 they bring forward those offsets using a short-term

1 interest rate. And then on the third step, they
2 discount them back to the Valuation Date using SMCV's
3 Cost of Equity. Now, the areas of disagreement here
4 are with the outstanding liabilities and the Discount
5 Rate used.

6 These are small adjustments, with the
7 outstanding liabilities. On their First Report, they
8 assumed--Compass Lexecon assumed that they would have
9 been paid as of the Valuation Date, but what we found
10 is that, when they submitted the Second Report, there
11 were still 33.2 million of outstanding liabilities
12 unpaid.

13 So, in our view, because it is unclear
14 whether those liabilities will be paid or not, they
15 should be excluded since they have not materialized,
16 and excluded in those liabilities reduces the Main
17 Claim by 2.7 percent and the Alternative Claim by
18 .2 percent.

19 The last adjustment just deals with the
20 Discount Rate Compass Lexecon uses for the
21 depreciation offset, and it has less than 1 percent
22 impact.

1 Now, as I have mentioned, the effect on
2 Damages of all of my adjustments are stand-alone, and
3 there are a couple of adjustments that are mutually
4 exclusive. In this slide, I provide the impact of
5 several adjustments in combinations. So, the
6 adjustments combined for the Treaty Claim excluding
7 Adjustments 3 and 5 reduce Damages by 87.4 for the
8 Main Claim and 90.4 for the Alternative Claim.

9 And then for the Stability Agreement Claim
10 in combination, if you exclude Adjustments 2 and 5,
11 the decrease is 69.4 percent and 77.3 percent for the
12 Main Claim and Alternative Claim respectively.

13 Now for the Tribunal's reference, similar to
14 what Compass Lexecon did, I provide a cheat sheet of
15 what are all the adjustments, what are the assumptions
16 under Compass Lexecon's calculation, and then what are
17 the assumptions for my adjustments.

18 And, with that, I conclude my presentation.

19 PRESIDENT HANEFELD: Thank you very much.

20 We have no immediate questions from the
21 Tribunal's side, so we hand over to the Claimant's
22 Counsel for cross.

1 MR. UKABIALA: Thank you, Madam President.

2 CROSS-EXAMINATION

3 BY MR. UKABIALA:

4 Q. Hello, Ms. Kunsman. Nice to see you again.

5 A. Great to see you again, Mr. Ukabiala.

6 Q. Ukabiala, yes.

7 A. Okay.

8 Q. I apologize for cutting personally into your
9 time, and we are very short on time. So, you remember
10 the drill from last time; I'll try to ask my questions
11 as concisely as possible and would be very grateful if
12 you could give as concise answers as you can.

13 And what I think would be really helpful is
14 to help the Tribunal to identify where we actually
15 have differences between the Damages Experts, because
16 I think there are actually a lot of agreements. And
17 so, I think it would be helpful to isolate the
18 economic issues for the Tribunal.

19 So, I would like to just go through Table 3
20 of your Report. And if we can put that up on the
21 screen, that would be great.

22 This is Table 3 of your Second Report.

1 A. Thank you.

2 Q. Okay. So first we have Adjustment A, the
3 mitigation adjustment, and this is by far your biggest
4 adjustment with a 62 percent impact. I understand
5 from the SMM Hearing that this adjustment is based on
6 a legal assumption and is not based on any independent
7 economic assumption by you?

8 A. Correct.

9 Q. Thank you. Next, we have Adjustment B,
10 which you call "Taxes Not Allowed for Damages Under
11 the Treaty," and I understand that this is also an
12 instruction from Counsel?

13 A. Correct.

14 Q. And you are aware that this instruction is
15 based on Respondent's Article 22.3.1 objection to
16 Article 10.5 claims based on Penalties and Interest on
17 Tax Assessments; correct?

18 A. How I understand this instruction is
19 that--and I'm going to refer to the language.

20 Q. And I think you might have mentioned it in
21 your presentation.

22 A. Yes. That under Article 10.5 of the Treaty,

1 Claimant cannot claim for taxes or--Tax Assessments or
2 the Penalties and Interest associated with those Tax
3 Assessments. So, they can claim for Royalties and the
4 Penalties and Interest associated with the Royalties.

5 Q. Exactly. Thank you, Ms. Kunsman.

6 A. Okay.

7 Q. And so you weren't asked to perform any
8 adjustment based on the application of Article 22.3.1
9 to Article 10.5 Claims for Royalties or Penalties and
10 Interest on Royalties?

11 A. No.

12 Q. Okay. Thank you.

13 And I wanted to just make sure--I know you
14 appreciate this, but under the Main Claim as Claimant
15 has articulated it, the breaches of Article 10.5 and
16 the stability are described as "and/or" breaches of
17 Article 10.5 or the Stability Agreement; right?

18 A. Can you repeat that question?

19 Q. Right. So, in the articulation of
20 Claimant's Main Claim, Claimant alleges that the final
21 and enforceable assessments breached the Stability
22 Agreement and/or--

1 A. Yes, "and/or." Yes.

2 Q. --the Article 10.5; right?

3 So, the Tribunal need not necessarily reach
4 the Article 22.3.1 objection if the Tribunal finds a
5 breach of the--breaches of the Stability Agreement?

6 A. Your questions are starting to sound very
7 legal to me. I'm not sure. All I know is what the
8 Damages correspond which--to what and how I present it
9 in my presentation. I'm not sure what the Tribunal
10 needs to conclude from a legal perspective or not.

11 Q. Yeah. No, I'm sorry, Ms. Kunsman.

12 Let's just go to just one more question on
13 this. Let's just go to your Second Report,
14 Paragraph 7. It says: "This exclusion Article 22.3.1
15 does not extend to the breach of the Stability
16 Agreement"; correct?

17 A. Right. And that's what we call--what I
18 called the "Stability Agreement Claim."

19 Q. Right.

20 A. Versus the Article 10.--Article 10.5 Treaty
21 Claim.

22 Q. Right. So you weren't intending to present

1 any adjustments based on 22.3.1 to those claims?

2 A. Correct. No.

3 Q. Thank you, Ms. Kunsman.

4 Next we have the dividend distribution date.

5 This is Adjustment C, and this is, in fact, an
6 economic dispute between the Damages Experts; right?

7 A. Correct. Could you--yes. Thank you.

8 Q. And this is based on your view that, but for
9 Perú's breaches, Cerro Verde would have only paid the
10 lost cash flows to its Shareholders on the Valuation
11 Date?

12 A. It is an assumption I make, not because I am
13 certain that that's what they would have done. But
14 because I don't have enough evidence to decide what
15 they would have done, I picked a middle-of-the-road
16 assumption. I could have assumed that they wouldn't
17 distribute them until the end of the Concession, which
18 some concessions do, or that they would have
19 distributed them over time, as a percentage, but since
20 I didn't have enough information, I assumed the
21 Valuation Date.

22 Q. I understand that. And right now I'm just--I

1 just want to establish what the legal and economic
2 disputes are.

3 A. Yeah.

4 Q. And so then we have the outstanding
5 liabilities. That is also based on an economic
6 dispute between the Parties; right?

7 A. Yes.

8 Q. And the sales-based tax correction is an
9 instruction?

10 A. Yes.

11 Q. And the depreciation mitigation Discount
12 Rate reflects an economic dispute between the Parties?

13 A. Yes.

14 Q. And the pre-award interest rate reflects an
15 economic dispute between the Parties?

16 A. It reflects an economic dispute between the
17 Parties, but also it has the legal implication that
18 the reasonable rate--I mean, the commercially
19 reasonable rate mentioned in the treaties is what
20 applies.

21 Q. Right. I just want to establish that you
22 didn't receive an instruction.

1 Did you receive an instruction for that?

2 A. No. When I--when I calculate Damages, when
3 I represent Claimants, I look at the Treaty first to
4 see if there's a specific rate to use, and in this
5 case there was.

6 Q. Okay. So we have four adjustments based on
7 economic disputes between the Damages Experts, and
8 those are outstanding liabilities, depreciation,
9 mitigation, the dividend payment date and the
10 pre-award interest rate?

11 A. Correct.

12 Q. And, again, the adjustments for the dividend
13 payment date and the pre-award interest rate are in
14 the alternative?

15 A. Yes.

16 Q. So, if the Tribunal agrees with Dr. Spiller
17 and Ms. Chavich on the dividend payment dates, the
18 difference between the Damages Experts on actual
19 economic issues is around 7.5 percent?

20 A. Yeah.

21 Q. Okay. Great.

22 So, now I'd like to continue discussing

1 things that I think we mostly agree about, and I'm
2 sure we'll reach a point where we may not agree, and
3 I'll let you know. But let's talk about the dividend
4 distribution assumptions. I think a lot of
5 this--there's agreement. I think it's undisputed that
6 Cerro Verde paid dividends in each year between 2018
7 and 2022, except 2020; right?

8 A. Right.

9 Q. And in the real world, that reflects a
10 decision by Cerro Verde's Board about how much Cerro
11 Verde needed to retain as cash in the real world?

12 A. No. I asked for the Board minutes to
13 determine what was the decision-making of the Board.
14 I don't know if the Board decided: "This is how much
15 cash we need and we are going to pay these dividends
16 because of that." No. They could have said: "We are
17 only going to pay up to this amount of dividends
18 because we have--it is more advantageous for whatever
19 reason to just do that amount" or "because we have a
20 pre-established dividend distribution policy or plan
21 that, when we first bid for the Concession was what we
22 were going to do."

1 So, I don't know if that's right, no. I
2 don't know what they did in the Actual Scenario.

3 Q. Right. So you referred to whatever reason
4 that would be, and whatever that reason--whatever
5 reason that would be, wouldn't that be--wouldn't that
6 be a decision about how much cash Cerro Verde needed?
7 For whatever reason it would be, it would still be a
8 decision about how much cash Cerro Verde needed?

9 A. No. Like I said, you don't distribute
10 dividends just based on how much cash you need because
11 you can raise cash many other ways. You can hold
12 paint suppliers. You can raise more debt. There are
13 many ways, and dividends--how you--when and how many
14 dividends you distribute are based on specific
15 policies to each company.

16 Q. Right. But--and we'll get to the dividend
17 policies in a moment. But once the Board distributes
18 dividends, it's made a decision about how much cash it
19 wants to retain.

20 Is it your testimony that that does not
21 reflect the decision by the Board about how much cash
22 it wants to retain?

1 A. It reflects a decision by how many dividends
2 the Board wants to distribute. It is a very rounded
3 figure. So, for example, in 2018, they distributed
4 200 million. If they had had an extra, let's say,
5 7 million, I'm not sure they would have distributed
6 207.

7 It's always a very round figure that they
8 distribute. So, I'm not sure if the thought process
9 at the Board level or at the--within the Company was:
10 "Okay. How much cash do we need? Great. Then what's
11 left over? Okay. Let's distribute that as dividend."
12 No, it could have been the other way around.

13 Q. Okay. So I just want to confirm, first,
14 that it is your testimony that a decision by Cerro
15 Verde's Board to distribute dividends does not reflect
16 a decision by Cerro Verde's Board about how much cash
17 it wanted to retain on those dates?

18 A. It may or it may not. I don't know. That's
19 why I asked for those Board minutes.

20 Q. Okay. And just really briefly on the point
21 you raised about the round figures, it would--you're
22 not testifying, are you, that Cerro Verde's Board

1 would decide not to distribute, for example,
2 \$252 million in dividends because the number is not
3 250 million?

4 Wouldn't they just round it down or round
5 up?

6 A. I don't know. Like I said, I asked for the
7 information. I didn't get it.

8 Q. Okay. So Ms. Kunsman, you keep saying that
9 you asked for the information, but you have, in fact,
10 reviewed Cerro Verde's dividend policy; right?

11 That's the document titled "Dividend Policy"
12 that is Claimant's Exhibit CE-934.

13 A. Yes. And while the document is titled
14 "Dividend Policy" it does not contain the actual
15 dividend policy of SMM Cerro Verde. It just contains
16 what Cerro Verde can do, not what they were doing or
17 what their policy was.

18 Q. And just--the document is called "Dividend
19 Policy"; right?

20 A. Yes. Like I said, that's the title. Yeah.

21 Q. And you also reviewed--and I'm sorry, first,
22 that policy doesn't place any limitation on Cerro

1 Verde's ability to distribute dividends that would
2 have been applicable in the but-for, does it?

3 A. I heard that there was some dispute on that,
4 on whether the Tax Assessments constituted obligations
5 or not.

6 Q. So, did you identify any economic reason?

7 A. No. They could have distributed the
8 dividends.

9 Q. And you also--

10 A. Well, let me clarify that. They could have
11 distributed dividends, but, like I said, I have not
12 reviewed the policy. And there is some financial
13 obligations that may preclude them to distribute more
14 dividends than what they distributed.

15 Q. We're just talking about the dividend policy
16 right now, Ms. Kunsman.

17 Did you identify anything in that dividend
18 policy that would have prevented Cerro Verde from
19 distributing the but-for cash flows as dividends in
20 the But-For Scenario?

21 A. I did not, but this document would not be
22 sufficient to make that determination.

1 Q. Okay. And you also reviewed Cerro Verde's
2 bylaws; right?

3 A. Uhm--Yes. Yes, I did. Yeah.

4 Q. Okay. And, for the record, that is Tab 9,
5 Claimant's Exhibit 480.

6 And the bylaws also don't contain any
7 restriction on Cerro Verde's ability to have
8 distributed the but-for cash flows on the dividend
9 distribution dates in the but-for, do they?

10 A. No.

11 Q. Okay.

12 A. But there are--like I said, but there are
13 other documents that could restrict.

14 Q. Right. Yeah. You keep saying that.

15 It seems that you are basing your assumption
16 on some rule, whether formal or informal, that you
17 haven't seen but that you think might exist somewhere
18 that might have required Cerro Verde to retain a
19 certain percentage of the but-for cash flows.

20 A. It is not might. They actually retained
21 some of their cash flows when they could have
22 distributed more in the years in which they

1 distributed dividends.

2 Q. Right. So, just to be clear, my question
3 is, you're basing that assumption on some kind of rule
4 or informal, you know, practice that you haven't
5 actually seen; right?

6 A. I'm basing my assumption on looking at the
7 times that Cerro Verde distributed dividends and
8 finding that they had available cash to distribute
9 more dividends than they actually did. And that tells
10 me, like all companies have, there is a dividend
11 policy, and that dividend policy for some reason is
12 precluding them from distributing more cash than I
13 would expect a project company would distribute.

14 I agree with the testimony from Compass
15 Lexecon. It's unusual for project companies to retain
16 cash unless they have a very specific reason.

17 PRESIDENT HANEFELD: Ms. Kunsman, just to
18 follow, now, is this Tab Number 10 in Paragraph 66 of
19 your Second Expert Report, and the numbers contained
20 therein which you base your conclusion?

21 THE WITNESS: Well, yes, it--Well, let me
22 see. Second Expert Report.

1 PRESIDENT HANEFELD: It's Paragraph 66. And
2 then on the Page 24 of the English version, Table 10.
3 And it's an overview of profit dividends, cash, and
4 retained earnings. I think it is based on the balance
5 sheets and Income Statements?

6 THE WITNESS: Correct.

7 PRESIDENT HANEFELD: This is the financials
8 we looked at; right?

9 THE WITNESS: Yes. And also Table 9 and
10 Table 11. Yeah.

11 BY MR. UKABIALA:

12 Q. Thanks.

13 So I think you've said that all companies
14 have--there is a dividend policy, and that dividend
15 policy for some reason is precluding them from
16 distributing more cash.

17 And you've agreed that you saw the document
18 in the record titled "Dividend Policy," and I believe
19 that you also testified that--didn't you testify at
20 the SMM Hearing that you couldn't find a pattern of a
21 specific percentage of cash that they were
22 distributing or of retained earnings or of net income

1 for that year; right?

2 So, you didn't see any kind of pattern, did
3 you?

4 A. Right. If I had found a pattern or if they
5 had paid nearly all of their available cash as
6 dividends, then I would have modeled that. But I
7 couldn't find a pattern.

8 Q. Yeah. And you think that the secret
9 dividend policy would have had the explanation of
10 that, that would have brought, you know, some kind of
11 understanding to that non-pattern?

12 A. I don't know what you mean by "secret."

13 Q. Well, we have established that you reviewed
14 the document titled "Dividend Policy" in the record,
15 and you are referring to a secret dividend policy that
16 you're saying has been withheld from you; right?

17 A. Again, I don't know what you mean by
18 "secret," but I asked for dividend policy, which means
19 what is the policy that the Company follows to decide
20 whether to distribute dividends or not, and I did not
21 receive it.

22 Q. But you received a document titled "Dividend

1 Policy"; correct?

2 A. I did receive a document that is titled
3 "Dividend Policy," but it did not contain the dividend
4 policy.

5 Q. Did it not contain a policy limiting Cerro
6 Verde's ability to distribute dividends?

7 A. If that was their policy on 2018, 2019, and
8 2021, they would have distributed more dividends than
9 they did, but they did not.

10 Q. Well, doesn't that policy leave the Board
11 with discretion about whether to distribute more
12 dividends or less dividends?

13 A. Absolutely, and that's exactly what I'm
14 trying to find out: What does the Board take into
15 account to make that decision, that it is absolutely
16 at their discretion.

17 Q. But why do we have to guess about what's in
18 a secret dividend policy? Why can't we just look at
19 the dates on which the Board actually had determined
20 that it had as much cash as it wanted to retain?

21 A. Because you are trying to project dividends
22 in a But-For Scenario, not in the Actual Scenario.

1 You do have the data for the Actual Scenario
2 but not for the But-For Scenario. So, that's why I'm
3 asking for it, to figure out what assumptions I need
4 to make to project those dividend distributions of the
5 but-for cash flows in the But-For Scenario. Typically
6 you can rely on the Actual Scenario to find a pattern
7 or to--or in specific documents. In this case, I
8 couldn't.

9 Q. But, Ms. Kunsman, companies don't have
10 but-for dividend policies, do they?

11 A. Companies have dividend policies that they
12 rely on to determine dividends each year.

13 Q. And you have reviewed the dividend policy in
14 the record that is Claimant's Exhibit CE-934?

15 A. I have reviewed a document in the record
16 titled "dividend policy," which does not contain the
17 dividend policy.

18 Q. Because you insist that there's a secret
19 dividend policy?

20 A. No, that is what you say. That wasn't my
21 answer. We can review it again, if you'd like.

22 Q. Okay. I think we can move on, and I'd like

1 to discuss very briefly the outstanding liabilities.

2 So you don't dispute that Cerro Verde has
3 paid over 97 percent of the outstanding
4 liabilities; right?

5 A. Correct.

6 Q. And as of September 13, 2022, the only
7 outstanding liabilities were PTU; right?

8 A. Yes.

9 Q. Now, you--so we went through this last time,
10 and we know that Cerro Verde is a publicly traded
11 company; right?

12 A. Yes.

13 Q. And so, publicly traded companies have to
14 report their liabilities; right?

15 A. Right.

16 Q. And Cerro Verde reported the outstanding PTU
17 liabilities in the 2021 Financial Statements; correct?

18 A. Yes, as current liabilities.

19 Q. Okay. So, this is where we, I think--we
20 agree with everything up to there, and I want to see
21 if we can find--so you say Damages are not incurred
22 until the amounts are paid. And, as you know, we say

1 Damages are incurred once there's an enforceable
2 payment obligation.

3 So, it seems that we, at least, agree that
4 Cerro Verde couldn't have incurred Damages before
5 there was an enforceable payment obligation; right?

6 A. What's--Let's take that step by step.
7 Repeat the first part of your question please.

8 Q. Well, I guess really the question is, do we
9 agree that Cerro Verde couldn't have incurred Damages
10 before there was an enforceable payment obligation?

11 A. You can incur Damages in the future, but you
12 have to show that you are actually going incur those
13 Damages with certain--with certain certainty; right?
14 And if you're going to incur those Damages in the
15 future, you need to discount them.

16 Compass Lexecon didn't do that. They
17 assumed that all of the liabilities would be paid as
18 of the Valuation Date when we know for a fact today
19 already that didn't happen. So, just based on that
20 assumption, you would at least need to model that
21 those liabilities would be paid in the future.

22 Q. But these are the PTU liabilities that Cerro

1 Verde owes to Perú; right?

2 A. No. They owe them to the workers. The
3 "Participación de Trabajadores en Utilidades," so they
4 go to the employees.

5 Q. Could we--could we go to Claimant's
6 Exhibit 1033 Page 41.

7 PRESIDENT HANEFELD: These were not
8 translated; right?

9 MR. UKABIALA: No, I don't think we have the
10 translation, but I can read it into the record.

11 PRESIDENT HANEFELD: Exactly. What you want
12 to bring to my attention, you can read into the
13 record.

14 MR. UKABIALA: Yes, of course Madam
15 President. "Represents the excess of salaries limit in
16 the shared participation of workers to be transferred
17 to the regional government."

18 THE WITNESS: Yeah. You are correct. That
19 it goes to the regional government--Yes, you are
20 correct. It goes to the regional government and it is
21 for what I mentioned, the utility-sharing mechanism
22 for employees.

1 BY MR. UKABIALA:

2 Q. Right. So, you do understand that Cerro
3 Verde pays some amounts directly to employees, and
4 they pay some of the amounts directly to the
5 Government?

6 A. Right.

7 Q. Right. And you do understand that Cerro
8 Verde incurs interest on those amounts that they owe
9 to the Government; right?

10 A. I haven't been shown that. Compass Lexecon
11 does not mention that or provide a document--

12 Q. Okay.

13 A. --of that.

14 Q. Well, assuming that those amounts incur
15 interest and Compass Lexecon would be arguably very
16 reasonable by assuming that they are being paid on the
17 Valuation Date because, if they don't make that
18 assumption, then Cerro Verde is being compensated for
19 interest that will be accruing in the future. They
20 will have to project the interest that will accrue in
21 the future?

22 A. It would depend on the interest rate that is

1 accruing, that I haven't seen and Compass Lexecon has
2 not shown, and the interest rate that they are using
3 for pre-award interest.

4 So, it may or may not.

5 Q. But by assuming that it is paid on the
6 Valuation Date, no interest accrues in the future;
7 right? In Dr. Spiller's and Ms. Chavich's model.

8 A. They will if the Tribunal decides to just
9 apply--to apply interest from their Calculation Date
10 to the date of payment of the Award, if those haven't
11 been paid yet.

12 So, yeah, they would accrue interest.

13 I'm not sure if the Tribunal is going to ask
14 Compass Lexecon to update their Valuation Model to the
15 date of payment of the Award and if at that point
16 those outstanding liabilities will be paid or not.
17 But, for it to not accrue--to not accrue interest,
18 they would need to do that. Otherwise, it will.

19 Q. Yeah. But assuming that the payments are
20 assumed to have been made on the date of the Award, by
21 assuming that those payments are made on the date of
22 the Award, Compass Lexecon does not model future

1 Damages for the interest that Cerro Verde would have
2 to pay?

3 A. They do in that--they do implicitly in that
4 they are asking the Tribunal to use the Cost of Equity
5 as a pre-award interest rate, and that--those
6 pre-award interest will run from the date that Compass
7 Lexicon models Damages to the date that the payment is
8 made.

9 Q. Okay. Well, I think we do, at least, agree
10 that those amounts are owed to Perú, and it seems to
11 be your main concern is that, if Cerro Verde is
12 awarded Damages for these outstanding liabilities,
13 that there is some risk of double recovery.

14 Is that your--is that your concern?

15 A. Yes. Exactly.

16 Q. But if the amounts are owed to Perú, isn't
17 it difficult to imagine a scenario in which Perú would
18 pay those amounts in this proceeding and not enforce
19 those amounts against Cerro Verde in Perú?

20 A. I don't know legally what they would need to
21 do. I don't know.

22 Q. Well, wouldn't you--if it was you and you

1 were asked to pay amounts that you could then be
2 reimbursed for elsewhere, wouldn't you get reimbursed
3 for them?

4 A. I would get the advice of a lawyer. I
5 wouldn't make that decision myself.

6 Q. Okay. Just one more line of questioning.

7 So I'd like to ask you a little bit about
8 the mitigation calculations, and I'm--so, you already
9 explain how you calculate Penalties, the mitigation of
10 Penalties and Interest, in your presentation and your
11 Report. So, I don't think we need to go through that.

12 And we established in the last Hearing that
13 you do understand that your model is assuming that the
14 Respondent will retain the Damages that the Claimant
15 suffered as a result of the Respondent's breaches?

16 A. It is not up to me to determine if those
17 represent Damages are not. That is for the Tribunal
18 to decide.

19 Q. Right. But have you--are you aware of whose
20 burden it is to carry the burden on mitigation?

21 A. My assumption is that it is Claimant's.

22 Q. Would it surprise you to know that it is the

1 Respondent's burden to carry?

2 A. No. Look, this is--it was an instruction.
3 I'm not sure what the legal implications are. So, I
4 don't know if I would be surprised or not because it
5 is not something that I have gone into detail with.
6 It's not my scope.

7 Q. Okay. Well, in your adjustment you assume
8 that Cerro Verde's only entitled to recover Statutory
9 Interest that accrued before your cutoff dates?

10 A. Correct.

11 Q. The dates after which you were instructed
12 that Cerro Verde had a legal obligation to avoid
13 incurring Penalties and Interest?

14 A. Right.

15 Q. And you calculate the Statutory Interest
16 that you think Cerro Verde is entitled to recover, the
17 Statutory Interest that accrued before the cutoff
18 dates, by assuming a daily Statutory Interest rate,
19 which is the average of the Statutory Interest rate
20 during the relevant time periods; right?

21 A. Yeah.

22 Q. So, you don't actually compute the Statutory

1 Interest that you were--that would have applied to
2 Cerro Verde, that Cerro Verde is entitled to recover,
3 using the actual Statutory Interest rates at that
4 time?

5 A. I had to make certain assumptions because of
6 the way the model was. I presented the calculations
7 in my First Report, and Compass Lexecon made some
8 comments, but they didn't alter the calculations. So,
9 yeah.

10 Q. So Compass Lexecon identified the error in
11 your calculations, and you wanted them to correct it?

12 Is that what you're saying?

13 A. They made--they made some comments, and in
14 order for me to implement those comments, I needed
15 more information. Their model needed a lot more
16 detail, which I didn't have. So I didn't implement
17 it.

18 Q. But we're just talking about the Statutory
19 Interest rates that were applicable during the
20 relevant time.

21 Isn't that information publicly available?

22 A. It is public information, but what I don't

1 have is how much--the period in which those interests
2 are accruing, so what part of the interest is accruing
3 to which assessment.

4 Q. But don't you have the dates on which each
5 of the Assessments were, you know, accruing interest,
6 that began accruing interest?

7 A. Not to the detail that I would require, no.

8 Q. Ms. Kunsman, doesn't Compass Lexecon's model
9 have the dates on which every single assessment
10 started accruing interest?

11 A. Yes, but not--the assessment contains an
12 assessment for a broad tax period, so they are for
13 different tax payments that occurred on different
14 days. So, yes, we do have the assessment date, but I
15 didn't have enough detail to calculate, based on
16 royalty payment or each tax payment that they did
17 incorrectly, how the interest were calculated,
18 allocated to those specific payments. So, I have the
19 assessment as a whole, but not the individual
20 calculations, and the interest run from each period in
21 which the taxes should have been paid correctly. And
22 that change--there are many of those for each

1 assessment.

2 Q. Well, Ms. Kunsman, I'm very familiar with
3 Compass Lexecon's model. It is incredibly detailed,
4 and it is built from the ground up. And you didn't
5 make any disputes about when--the dates of Assessments
6 in Compass Lexecon's model, which, at least, you know,
7 would suggest that the dates were sufficient for it to
8 allow you to accurately compute Statutory Interest,
9 don't you think?

10 A. I made a specific comment on my Report that
11 I needed to use an allocation for that reason. So, I
12 did mention it. But it--I mean, go ahead, show me--
13 since, well, nothing.

14 Q. And you called that a simplifying assumption
15 in your Report; right?

16 A. Yes.

17 Q. And at the SMM Cerro Verde Hearing, didn't
18 you describe that as a calculation that is not exact?

19 A. Right. It's a simplifying assumption.

20 Q. And your adjustment also uses exchanges
21 rates from the actual payment dates--right?--rather
22 than earlier dates that you claim that those payments

1 should have been made. Isn't that right?

2 A. Yep.

3 Q. And that would also be a calculation that is
4 not exact; right?

5 A. Correct.

6 Q. And actually at the SMM Hearing, I think you
7 admitted that the calculation for the mitigation
8 assumption you were instructed to make is really not
9 as precise as it could have been; right?

10 A. It could have been more precise had I had
11 better information, and it would have been higher as
12 well if I had more information because I completely
13 dismissed the interest associated with the payment
14 plans.

15 Q. But since the Respondent is--we can't test
16 that because you didn't do the calculation, and since
17 the Respondent has the burden of proving mitigation,
18 don't you think the Respondent should calculate that
19 as precisely as it can?

20 A. If the information is available, yes, but I
21 didn't have the information available, so I couldn't
22 do it.

1 Q. Okay. Ms. Kunsman, so just one last
2 question. You do realize that, if Cerro Verde had
3 prevailed in the administrative process in Perú, it
4 would have been refunded any overpayment including the
5 penalties and interest that Cerro Verde allegedly
6 could have mitigated in this proceeding. And those
7 amounts would have been updated at SUNAT's
8 reimbursement rate, which we saw in Dr. Spiller and
9 Ms. Chavich's calculations would have resulted in
10 higher Damages than what Freeport is asking for in
11 this proceeding?

12 A. No. Because my understanding is that the
13 reimbursement rate of interest would not have applied
14 to the interest payments.

15 Q. What's that understanding based on?

16 A. From the legal--sorry. From the Tax Experts
17 that have testified.

18 Q. Okay. That's just based on an instruction
19 from the Tax Experts. You can't independently verify
20 that; correct?

21 A. No.

22 ARBITRATOR TAWIL: Excuse me. So, what

1 you're saying is that reimbursement of interest are
2 not subjects to interest?

3 THE WITNESS: Correct.

4 ARBITRATOR TAWIL: But that's different from
5 applying interest to interest, which is probably a
6 legal provision. That's a different thing.

7 THE WITNESS: My understanding is that you
8 would be reimbursed the interest, but you wouldn't be
9 reimbursed interest on interest.

10 ARBITRATOR TAWIL: That means--that means
11 that it's related to the provision to apply interest
12 to interest, but that is different of reimbursement.
13 If not, it would not have any reason to pay in
14 advance--

15 THE WITNESS: Right.

16 ARBITRATOR TAWIL: --if you would not be
17 able to update the amounts. Say you pay interest and
18 you recover 10 years afterwards. That's a lot.

19 THE WITNESS: No. So you would--well,
20 again, I'm not the right person to testify on this.

21 ARBITRATOR TAWIL: No. No, but I'm just
22 wondering on your assumption.

1 THE WITNESS: My understanding is that the
2 reimbursement interest would apply to the assessed
3 amount and to the Penalties, but not to the Interest
4 paid on those Penalties and Assessment. But they
5 would get the interest they paid back.

6 ARBITRATOR TAWIL: Yeah, but say you paid
7 interest in the year 2010, and you recover that
8 10 years afterwards--

9 THE WITNESS: Well

10 ARBITRATOR TAWIL: --Let's say you have an
11 inflation rate of--I don't know what the inflation
12 rate is of Perú, but that's a lot.

13 THE WITNESS: But when you're getting
14 reimbursed, you're assuming that you are making excess
15 payments. So, you wouldn't be accruing all those
16 interests on the unpaid amounts because you would have
17 already paid it.

18 ARBITRATOR TAWIL: The problem is from the
19 point of view of the debtor, payment of interest it's
20 capital; it's not interest. It's capital.

21 THE WITNESS: Right. Right. And you would
22 need to run the numbers. I don't know what those

1 numbers are. I didn't run them, but I know I've been
2 involved in other cases in Perú where the issue of
3 prepayment came up and they did prepay some of their
4 Assessments in the Duke Energy-Perú Case. So, there
5 must be some incentive to do that.

6 (Comments off microphone.)

7 MR. UKABIALA: I promised that would be my
8 last question, so nothing further from Claimant.

9 PRESIDENT HANEFELD: Any questions in
10 redirect?

11 MS. CARLSON: Give me just a second to
12 consult my notes.

13 (Pause.)

14 MS. CARLSON: Just one very quick question.

15 REDIRECT EXAMINATION

16 BY MS. CARLSON:

17 Q. When you're back on talking with Counsel
18 about the dividend policy and about the fact that the
19 dividend policy leaves discretion to the Board. And I
20 think at Transcript reference 17:30 you responded and
21 you said: "That's exactly what I'm trying to find
22 out. What does the Board take into account to make

1 that decision?"

2 What sort of information would you wanted to
3 see? What would you have expected to see? What would
4 have been helpful?

5 A. Board minutes and also an actual written
6 policy. Some companies will have written policies. I
7 would have wanted to look at, for example, their
8 original models for project companies. You have
9 models that model out right from the beginning when
10 interest--when dividends will be paid and how much.
11 So, those would have been documents they could have
12 sent to me.

13 Q. What would you--what sort of discussion
14 would you have expected to see in the Board minutes,
15 for example?

16 A. The reason why they chose to pay 200 million
17 instead of all of the cash they had available. It
18 could have been as simple as, this is what our
19 investors are expecting, or because of some tax
20 reasons or reinvestment reasons, this is what we
21 should distribute and no more.

22 Q. Okay.

1 MS. CARLSON: Thank you.

2 PRESIDENT HANEFELD: Thank you very much.

3 No further questions from the Tribunal.

4 You are released as an Expert in this
5 proceedings. So thanks. Thank you very much,
6 Ms. Kunsman.

7 THE WITNESS: Thank you.

8 (Witness steps down.)

9 PRESIDENT HANEFELD: Which leads us to more
10 or less 5:30 sharp, and now to conclude this Hearing
11 day, which is only possible thanks to the great
12 efforts and cooperation on both sides. Thank you very
13 much.

14 Is there anything you wish to address before
15 we conclude for today?

16 MR. PRAGER: Nothing on Claimant's side.
17 Thank you.

18 PRESIDENT HANEFELD: Thank you.

19 MS. CARLSON: Nothing from Respondent.
20 Thank you.

21 PRESIDENT HANEFELD: Then we wish you a
22 productive evening and looking forward to hearing your

1 Closing Statement tomorrow. Tomorrow will be

2 9:00 a.m. start.

3 (Whereupon, at 5:27 p.m., the Hearing was

4 adjourned until 9:00 a.m. the following day.)

CERTIFICATE OF REPORTER

I, Dawn K. Larson, RDR-CRR, Court Reporter, do hereby certify that the foregoing English-speaking proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the English-speaking proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.


Dawn K. Larson