

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

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

Claimant

— v. —

THE REPUBLIC OF PERU

Respondent

ICSID Case No. ARB/20/08

NOTICE OF ADDITIONAL CLAIMS

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Pursuant to Articles 10.16.1(a), (b), 10.16.3, and 10.16.4 of the United States–Peru Trade Promotion Agreement (the “TPA”), Article 46 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the “ICSID Convention”), and Rule 40(1) of the Rules of Procedure for Arbitration Proceedings, Freeport-McMoRan Inc. (“Freeport” or “Claimant”) on its own behalf, and on behalf of Sociedad Minera Cerro Verde S.A.A. (“SMCV”), submits the additional claims herein (the “Additional Claims”), which arise directly out of the same subject-matter as the dispute that is noticed in Freeport’s Notice of Arbitration of 28 February 2020 (the “Notice of Arbitration”).

I. BACKGROUND

1. On 28 February 2020, Freeport submitted its Notice of Arbitration concerning Peru’s breaches of commitments it made in a February 1998 Stability Agreement (the “Stability Agreement”), the TPA, and public international law.

2. The Notice of Arbitration sets forth that in 2009, Peru began assessing royalties and taxes against SMCV based on laws and regulations that came into effect during the stabilization period set forth in the Stability Agreement. Peru did so based on a novel and restrictive interpretation of stability benefits granted under the Stability Agreement and the Mining Law and Regulations. Under Peru’s newly invented interpretation, stability benefits applied not to the mining unit (the “Mining Unit”) identified in the stability agreement but only to the investments set forth in the feasibility study that the investor must submit to obtain the stability agreement. Accordingly, Peru took the position that stability benefits did not apply to the concentrator that SMCV constructed between 2004 and 2006 (the “Concentrator”) because the investment in the Concentrator was not set forth in the feasibility study that SMCV submitted with its application for the Stability Agreement. Based in part on that alleged reason, Peru, among other things,

- a. unlawfully imposed on SMCV royalties and taxes inconsistent with the stabilized regime set forth in the Stability Agreement during the stabilization period;
- b. arbitrarily failed to waive penalties and interest on those royalty and tax assessments;
- c. manipulated proceedings before the Tax Tribunal to ensure that SMCV could not meaningfully challenge Peru’s new interpretation of the scope of stability benefits; and

- d. arbitrarily refused to fully reimburse SMCV for Special Contribution (“GEM”) overpayments.¹

The assessments at issue in the Notice of Arbitration include assessments for royalties and taxes, including assessments for the alleged underpayment of income tax for fiscal years 2006, 2007, 2008, 2009, 2010, 2011, and 2012² and assessments for the alleged nonpayment of additional income tax for fiscal years 2007, 2008, 2009, 2010, 2011, and 2012.³

3. After Freeport submitted its Notice of Arbitration, Peru committed additional breaches of the Stability Agreement and international law, causing additional injury and loss to the Claimant and SMCV. Specifically, on 30 December 2020, Peru notified SMCV of an assessment for alleged underpayment of income tax for fiscal year 2013 (the “2013 Income Tax Assessment”) and penalties and interest for that year’s income tax,⁴ and an assessment for alleged nonpayment of additional income tax for fiscal year 2013 (the “2013 Additional Income Tax Assessment”) and interest for that year’s additional income tax.⁵ A portion of the 2013 Income Tax Assessment and all of the 2013 Additional Income Tax Assessment arose from Peru’s position that SMCV was not entitled to stability for activities related to the Concentrator. The portions of the assessments related to Peru’s refusal to recognize stability for the Concentrator were

¹ Freeport’s Notice of Arbitration, Section III.D., Annexes A and B.

² Freeport’s Notice of Arbitration, Annexes A and B; **CE-191**, 22 Aug. 2018 Tax Tribunal Resolution No. 06367-2-2018 (Income Tax for 2006); **CE-192**, 22 Aug. 2018 Tax Tribunal Resolution No. 06369-2-2018 (Income Tax for 2007); **CE-109**, 30 May 2014 SUNAT Resolution No. 055-014-0001907 (Income Tax for 2008); **CE-131**, 23 Jun. 2015 SUNAT Resolution No. 055-014-0002145 (Income Tax for 2009); **CE-134**, 4 Nov. 2015 SUNAT Resolution No. 055-014-0002255 (Income Tax for 2010); **CE-187**, 10 Aug. 2018 SUNAT Resolution No. 0150140014311 (Income Tax for 2011); **CE-232**, 26 Nov. 2019 SUNAT Assessment No. 0120030108051 (Income Tax for 2012); **CE-235**, 26 Nov. 2019 SUNAT Fine Resolution No. 0120020033157 (Income Tax for 2012); **CE-233**, 26 Nov. 2019 SUNAT Fine Resolution No. 0120020033155 (Income Tax for 2012); **CE-234**, 26 Nov. 2019 SUNAT Fine Resolution No. 0120020033156 (Income Tax for 2012).

³ Freeport’s Notice of Arbitration, Annexes A and B; **CE-202**, 30 Oct. 2018 Tax Tribunal Resolution No. 08470-2-2018 (GST and AIT for 2007); **CE-100**, 24 Oct. 2013 SUNAT Resolution No. 055-014-0001810 (GST and AIT for 2008); **CE-131**, 23 Jun. 2015 SUNAT Resolution No. 055-014-0002145 (Income Tax and AIT for 2009); **CE-134**, 4 Nov. 2015 SUNAT Resolution No. 055-014-0002255 (Income Tax and AIT for 2010); **CE-187**, 10 Aug. 2018 SUNAT Resolution No. 0150140014311 (Income Tax and AIT for 2011); **CE-231**, 26 Nov. 2019 SUNAT Assessment No. 0120030108050 (AIT for 2012).

⁴ **CE-277**, 28 Dec. 2020 SUNAT Resolution No. 0120030113991 (Income Tax for 2013); **CE-278**, 28 Dec. 2020 SUNAT Fine Resolution No. 0120020034409 (Income Tax for 2013); **CE-279**, 28 Dec. 2020 SUNAT Fine Resolution No. 0120020034411 (Income Tax for 2013); **CE-280**, 28 Dec. 2020 SUNAT Fine Resolution No. 0120020034412 (Income Tax for 2013).

⁵ **CE-281**, 28 Dec. 2020 SUNAT Assessment No. 0120030114004 (AIT for 2013).

- a. US\$5,819,715 of the 2013 Income Tax Assessment;
- b. US\$2,933,634 of the penalties related to the 2013 Income Tax Assessment;
- c. US\$22,520,762 of the interest related to the 2013 Income Tax Assessment and related penalties;
- d. all US\$401,908 of the 2013 Additional Income Tax Assessment; and
- e. all US\$400,088 of the interest related to the 2013 Additional Income Tax Assessment.⁶

4. On 20 January 2021, SMCV paid, under protest, both the 2013 Income Tax Assessment and the 2013 Additional Income Tax Assessment and the related penalties and interest.⁷

II. ADDITIONAL CLAIMS

5. As a result of Peru's additional breaches of the Stability Agreement and international law following the submission of the Notice of Arbitration, Freeport presents the following additional claims for adjudication in this arbitration:

- a. Peru breached the Stability Agreement by unlawfully imposing on SMCV (i) the 2013 Income Tax Assessment, including related penalties and interest, to the extent that they arose from Peru's position that SMCV was not entitled

⁶ Freeport estimates the amount of the assessments and fine resolutions by applying the exchange rate of 3.617 soles to 1 U.S. dollar prevailing at the time each of the assessments and fine resolutions was notified.

⁷ **CE-282**, 5 Feb. 2021 SMCV Payments Under Protest (Income Tax and AIT for 2013) (summarizing payments made on 20 January 2021). Taxpayers that pay assessments and related penalties and interest prior to seeking reconsideration by SUNAT are eligible for a 60% discount on the penalties and interest, which SMCV was able to take advantage of. *Id.* at p. 1; **CE-276**, 3 Aug. 2012 SUNAT Superintendency Resolution No. 180-2012/SUNAT, Article 5(c) ("The fine shall be reduce[d] by sixty percent (60%), if by the end of the term granted by SUNAT as per the dispositions established in section 75 of the Tax Code or, if no such term was granted, as from the effective date of the notice of the payment order, or assessment resolution, or fine resolution, the tax debt contained in the payment order or assessment resolution is paid off before expiration of the term established in the first paragraph if the section 117 of the Tax Code regarding the fine resolution."). Article 10.18(2)(b) of the TPA, requires a claimant to waive "any right to initiate or continue before any administrative tribunal or court . . . any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16." **CA-10**, TPA, Article 10.18(2)(b). Claimant maintains that Article 10.18(2)(b) does not require Freeport or SMCV to waive the right to initiate or continue proceedings before SUNAT or the Tax Tribunal. Nevertheless, SMCV has elected not to submit to SUNAT a request to reconsider the portions of the 2013 Income Tax Assessment and the 2013 Additional Income Tax Assessment that relate to Peru's refusal to recognize stability for the Concentrator or request a waiver of penalties and interest on those portions of the assessments.

to stability for activities related to the Concentrator; and (ii) the 2013 Additional Income Tax Assessment and related interest. Under the Stability Agreement, SMCV was entitled to stability for all operations within its Mining Unit, consisting of its Mining Concession and Beneficiation Concession. The Concentrator forms part of SMCV's Mining Unit and therefore is entitled to stability. The assessments in question are inconsistent with the stabilized regime set forth in the Stability Agreement. Imposing these assessments on activities related to the Concentrator therefore breaches Peru's obligations under the Stability Agreement to guarantee fiscal and administrative stability for the entire Mining Unit.⁸ Freeport is entitled to submit these breaches of the Stability Agreement to arbitration pursuant to Article 10.16.1 of the TPA.⁹

- b. Peru breached Article 10.5 (Minimum Standard of Treatment) of the TPA by arbitrarily failing to waive penalties and interest in relation to the 2013 Income Tax Assessment and the 2013 Additional Income Tax Assessment. Peru should have waived the penalties and interest because the correct interpretations of the provisions of Peruvian law upon which Peru based the 2013 Income Tax Assessment and the 2013 Additional Income Tax Assessment were subject to reasonable doubt. For that reason and others, Peru was required to waive penalties and interest on the assessments under both international and Peruvian law and its failure to do so resulted in a breach of Article 10.5 of the TPA."¹⁰

III. JURISDICTION AND ADMISSIBILITY

6. Consistent with the ICSID Convention, the ICSID Arbitration Rules, and the TPA, Freeport's Notice of Arbitration "reserve[d] its rights to amend or supplement th[e] Notice of Arbitration, including the requested relief and the amount claimed, and to seek relief for additional breaches arising from Peru's past, current, or future conduct."¹¹ Article 46 of the ICSID Convention provides that, unless the parties agree otherwise, "the Tribunal shall, if

⁸ CE-12, 1998 Stability Agreement, Clauses 9.5, 10.

⁹ See Freeport's Notice of Arbitration ¶¶ 105–107.

¹⁰ See CA-14, 22 Jun. 2013 Peruvian Tax Code, Supreme Decree No. 133-2013-EF, Art. 170 ("The assessment of interest . . . or . . . penalties is inappropriate if . . . [a]s a result of the misinterpretation of a provision, no amount of the tax debt related to said interpretation would have been paid until it was clarified.").

¹¹ Freeport's Notice of Arbitration, ¶ 153.

requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.”¹² Article 40(1) of the ICSID Arbitration Rules echoes that a party may make such a request,¹³ and Article 40(2) provides, as relevant here, that “[a]n incidental or additional claim shall be presented not later than in the reply” unless the Tribunal authorizes a later submission. Article 10.16.4 of the TPA confirms the right to submit an additional claim by providing that “[a] claim asserted by the claimant for the first time after such notice of arbitration is submitted shall be deemed submitted to arbitration under this Section on the date of its receipt under the applicable arbitral rules.”¹⁴ As the tribunal in *Kappes v. Guatemala* observed, interpreting a substantially identical provision in another treaty, this provision “expressly allows for the possibility that an additional claim may be ‘asserted for the first time after such notice of arbitration’” and “nothing in the Treaty text suggests an intent to displace . . . [ICSID Arbitration Rule 40] with respect to the admissibility of additional claims.”¹⁵

7. These provisions of the Convention, Rules, and TPA entitle Freeport as a matter of right to present, in its reply or earlier, additional claims arising out of the same subject matter as the dispute noticed in the Notice of Arbitration.¹⁶ The Parties have not made any agreement that prevents Freeport from submitting additional claims pursuant to Article 46 of the ICSID Convention and ICSID Arbitration Rule 40(1). Moreover, the Additional Claims arise out of

¹² CA-22, ICSID Convention, Regulation, and Rules, p. 24.

¹³ CA-22, ICSID Convention, Regulation, and Rules, p. 118.

¹⁴ CA-10, TPA, Article 10.16.4.

¹⁵ CA-20, *Kappes v. Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent’s Preliminary Objections, 13 March 2020 ¶¶ 195–197 (interpreting identical provision in Article 10.16 of the DR-CAFTA).

¹⁶ See CA-25, *Gran Colombia Gold Corp. v. Republic of Colombia*, ICSID Case No. ARB/18/23, Decision on the Bifurcated Jurisdictional Issue, 23 November 2020, ¶¶ 153-156 (concluding that under ICSID Rule 40, claimant’s “new claim about [Respondent’s] allegedly unfounded invocation of the denial of benefits provision” was admissible because the claim had “a direct factual connection to the original claims, since the benefit sought to be denied is the ability to pursue redress for the subject matter of the original claims. It would be nonsensical, in these circumstances, to require the new claim to be brought in a separate proceeding”); CA-24, *Belenergia S.A. v. Italian Republic*, ICSID Case No. ARB/15/40, Award, 6 August 2019, ¶ 368 (applying ICSID Rule 40 to allow claimant to file a new FET claim in its Memorial because it was “so close” to the subject-matter already in dispute that it was “incidental or additional” within the meaning of the Rule); CA-23, *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on the Remaining Issues of Jurisdiction and on Liability, 12 September 2014, ¶ 438 (“The Tribunal cannot accept Ecuador’s submission that the claim was submitted out of time. Rule 40 of the ICSID Arbitration Rules provide that ‘an incidental or additional claim . . . arising directly out of the subject-matter of the dispute’ ‘shall be presented not later than in the reply.’ It is uncontested that the claim was raised in the Reply, and the Tribunal accordingly finds that this objection is unfounded and the claim is admitted for its consideration.”) (emphasis omitted).

the same subject-matter as the dispute noticed in the above-captioned arbitration because they concern violations of the commitments that Peru made in the Stability Agreement and Peru's arbitrary failure to waive penalties and interest against SMCV in violation of the TPA and international law.

8. The Additional Claims are within the scope of the consent of the Parties and the jurisdiction of the Centre for the reasons set forth in sections IV, V, and VIII of the Notice of Arbitration, which are incorporated here by reference. In compliance with Article 10.18(2)(b) of the TPA, Freeport and SMCV have each duly signed declarations waiving their "right to initiate or continue before any administrative tribunal or court . . . any proceeding" with respect to the measures described in Section II of the Additional Claims that are alleged to constitute a breach the Stability Agreement or the TPA.¹⁷

IV. DAMAGES

9. Freeport seeks damages presently estimated at approximately US\$27,495,489 for Peru's additional breaches of the Stability Agreement and the TPA identified in this Notice of Additional Claims, plus applicable interest. Freeport has estimated the approximate amount of damages for the Additional Claims by applying the exchange rate prevailing at the time of payment of 3.615 Peruvian soles to 1 U.S. dollar to the combined value of the 2013 Income Tax Assessment, the 2013 Additional Income Tax Assessment, and the associated penalties and interest.

V. REQUESTED RELIEF

10. Freeport incorporates by reference the Request for Relief contained in the Notice of Arbitration.

11. Freeport reserves its rights to further amend or supplement the Notice of Arbitration, including the requested relief and the amount claimed, and to seek relief for additional breaches arising from Peru's past, current, or future conduct.

¹⁷ **Ex. CE-283**, 14 June 2021, Waiver Declaration, Freeport-McMoRan Inc.; **Ex. CE-284**, 14 June 2021, Waiver Declaration, Sociedad Minera Cerro Verde.



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