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

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

Claimant

— *v.* —

REPUBLIC OF PERU

Respondent

ICSID Case No. ARB/20/08

CLAIMANT'S REJOINDER ON JURISDICTION

Dietmar W. Prager
Laura Sinisterra
Nawi Ukabiala
Julianne J. Marley
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, NY 10022
United States of America
+1 (212) 909-6000
dwprager@debevoise.com
lsinisterra@debevoise.com
nukabiala@debevoise.com
jjmarley@debevoise.com

Luis Carlos Rodrigo Prado
Francisco Cardenas Pantoja
RODRIGO, ELIAS & MEDRANO
Av. Pardo y Aliaga 652 piso 8
San Isidro
Lima 15073
Republic of Peru
+511 619-1900
lcrodrigo@estudiorodrigo.com
fcardenas@estudiorodrigo.com

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CONTENTS

ABBREVIATED TERMS

1972 Feasibility Study	Wright Engineers Ltd., Feasibility Study for the Cerro Verde Project for Empresa Minera del Perú (1 February 1972)
1994 Stability Agreement	Agreement of Guarantees and Measures for the Promotion of Investments Between the Peruvian State and SMCV (26 May 1994)
1996 Feasibility Study	Fluor Daniel Wright Ltd., Cerro Verde Expansion Project: Leach Feasibility Study (1996)
1996 Mill Feasibility Study	ICF Kaiser Engineers Inc., Feasibility Study Analysis for the Cerro Verde Project (1 June 1996)
1998 Mill Feasibility Study	Bateman Engineering Inc., Primary Sulfide Ore Mill Expansion: Feasibility Study (16 March 1998)
2004 Feasibility Study	Fluor Canada Ltd., Feasibility Study: Cerro Verde Primary Sulfide Project (May 2004)
AIT	Additional Income Tax
APOYO	Apoyo Consultoría
Centromín	Empresa Minera del Centro del Perú
CEPRI	Special Committee to Promote Private Investment in Production Units
CMPF	Complementary Mining Pension Fund Tax
COPRI	Commission to Promote Private Investment
CPI	Consumer Price Index
Cyprus	Cyprus Amax Minerals Company
DGM	Directorate General of Mining
EAU	Economic-Administrative Unit
EGASA	Empresa de Generación Arequipa S.A.
EIS	Environmental Impact Study
GEM	*Gravamen Especial a la Minería*
GEM Agreement	Agreement for the Assessment of *Gravamen Especial a la Minería* Approved by Law No. 29790 (28 February 2012)
GST	General Sales Tax
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States
L.D. 109	General Mining Law, Legislative Decree No. 109 (12 June 1981)

L.D. 662	Legal Stability Regime for Foreign Investment by Recognizing Certain Guarantees, Legislative Decree No. 662 (29 August 1991)
L.D. 708	Promotion of Investment in the Mining Sector, Legislative Decree No. 708 (6 November 1991)
L.D. 757	Framework Law for Private Investment Growth, Legislative Decree No. 757 (13 November 1991)
LGAP	Law on General Administrative Procedure
MDT	Municipal Development Tax
MEF	Ministry of Economy and Finance
MINCETUR	Ministry of Foreign Trade and Tourism
MINEM	Ministry of Energy and Mines
Minero Perú	Empresa Minero del Perú S.A.
Mining Law	Single Unified Text of the General Mining Law, Supreme Decree No. 014-92-EM (3 June 1992)
Mining Society	National Society of Mining, Petroleum, and Energy
MOF	Manual of the Operation and Functions of the Tax Tribunal
MT/d	Metric Tons per Day
NAFTA	North American Free Trade Agreement
OSINERGMIN	Supervisory Agency for Investment in Energy and Mining
PDAC	Prospectors & Developers Association of Canada
Phelps Dodge	Phelps Dodge Mining Corporation
PMSP	Mining Program of Solidarity with the People
PTU	Profit-Sharing Obligation
RAF Plan	*Régimen de aplazamiento y/o fraccionamiento de las deudas tributarias administradas por la SUNAT*
Regulations	Regulations of Title Nine of the General Mining Law, Supreme Decree No. 024-93-EM
Roundtable Discussion Agreement	Agreements of the Roundtable Discussion Between the Committee of the Struggle for the Defense of the Interests of Arequipa and SMCV (2 August 2006)
Settlement Agreement	Out-of-Court Settlement Between Cyprus Climax Metals Co. and Empresa Minera del Perú S.A. (30 March 2001)
Share Purchase Agreement	Share Purchase Agreement Between Empresa Minera del Perú S.A. and Cyprus Climax Metals Co. (17 March 1994)
SMCV	Sociedad Minera Cerro Verde S.A.A.

SMM Cerro Verde	SMM Cerro Verde Netherlands B.V.
SMT	Special Mining Tax
Stability Agreement	Contract of Guarantees and Investment Promotion Measures Between the Peruvian State and Sociedad Minera Cerro Verde S.A. (26 February 1998)
SUNAT	National Superintendence of Customs and Tax Administration
SX/EW	Solvent Extraction and Electrowinning
TPA	U.S.-Peru Trade Promotion Agreement
TTNA	Temporary Tax on Net Assets
UIT	Taxation Unit
Voluntary Contribution Agreement	Voluntary Contribution Agreement (18 January 2007)

I. INTRODUCTION

1. Peru's Reply on Jurisdiction does nothing to rehabilitate the flawed arguments in Peru's Memorial on Jurisdiction. Peru admits that, if its arguments were accepted, an investor that has received an assessment from the National Superintendence of Customs and Tax Administration ("SUNAT") would forfeit access to investment treaty arbitration by requesting that the Peruvian tax administration reconsider and, where appropriate, correct that assessment. Peru also admits that its position would mean that an investor would have to submit to treaty arbitration claims for breaches that are based on future SUNAT assessments that might never be rendered, for fiscal periods that have not yet commenced, and for amounts that cannot yet be determined. Peru argues that achieving these absurd results is the object and purpose of the U.S.-Peru Trade Promotion Agreement ("TPA"). And because the preparatory work of the TPA and the unrebutted testimony of representatives from both sides of the negotiations clearly show that Peru's arguments are antithetical to the object and purpose the TPA drafters intended to achieve, Peru argues that—contrary to basic rules of treaty interpretation—the Tribunal should simply ignore that evidence.

2. More fundamentally, Peru fails to reconcile its arguments with the plain terms of the TPA. For example, Peru now disavows its argument in the Memorial on Jurisdiction that Freeport had to submit claims for losses SMCV "would incur" in the future. Yet, that would precisely be the result if Peru were correct that the limitation period began once a claimant "first knew" the "legal basis" of a future breach. And it is unsurprising that this argument remains central to Peru's Article 10.18.1 objection because, in its own words, "Respondent does not accept" that Article 10.18.1 "require[s] completed breach and injury." But that is exactly what the plain terms of Article 10.18.1 require—the limitation period does not begin until the claimant acquires knowledge that a breach has occurred and that the claimant "has incurred loss or damage."

3. If anything, Peru's Reply on Jurisdiction only makes Peru's jurisdictional objections *more irreconcilable* with the plain terms of the TPA. Contrary to Article 10.18.4, which only applies if an investor previously submitted claims for the "*same alleged breach*," Peru maintains its argument that any claim for breach of the Stability Agreement that Freeport submitted is barred if it is based on an Assessment that SMCV previously challenged through the administrative process. But now Peru also argues, in the alternative, that Article 10.18.4 bars *all of* Freeport's Stability Agreement claims because SMCV submitted administrative law challenges to the 2006-2007 and 2008 Royalty Assessments to the Contentious Administrative Courts, even though Freeport does not even allege breaches of the Stability Agreement based on the 2006-2007 and 2008 Royalty Assessments in this arbitration. Peru's new argument only demonstrates that the "fundamental basis test" that Peru proposes has no objective limitations, which is why Peru's own authority describes it as a test "simply too vague to ensure legal certainty."

4. Peru's new objection that Freeport's Stability Agreement claims are barred because the definition of "investment agreement" in Article 10.28 allegedly contains a latent temporal limitation is equally detached from the plain terms of the TPA. Peru argues that the definition of investment agreement excludes agreements that an investor or enterprise relied on in establishing an investment before the TPA entered into force. However, Article 10.28 does not say that and the TPA expressly defines "covered investment" to include investments that predate the TPA's entry into force. Moreover, Peru ignores the documents in the negotiation record showing that the TPA drafters expressly considered and rejected a provision limiting the temporal scope of investment agreements to those that "take effect two years after the date of entry into force of this Agreement," which would have rendered Peru's temporal limitation superfluous.

5. Peru's Reply on Jurisdiction also exacerbates the inconsistencies between Peru's jurisdictional arguments and Peru's position on liability and quantum. For example, in support of its retroactivity objection, Peru maintains that the June 2006 MINEM Report is the "*sine qua non* of SUNAT's Assessments" but, elsewhere, argues that "SUNAT's audit and assessments against SMCV were not a response to MINEM's June 2006 Report." In support of its time-bar objection, Peru continues to argue that, when SUNAT notified SMCV of the 2006-2007 Royalty Assessments, Freeport "incurred" damages from assessments that SUNAT could not yet enforce against SMCV and future assessments that SUNAT had not yet rendered. But for damages purposes, Peru argues that "[a] legal obligation can only be considered a 'damage' if that legal obligation will actually result in the victim making the payments; if not, then the victim has not suffered (and will not suffer) any actual damage." In its submissions on Article 10.18.1, Peru admits that, if during the administrative process, "SMCV had won, then it would have been refunded the amount of any overpayment, *with interest*." But for damages purposes, Peru maintains its absurd argument that even if it breached the Stability Agreement and Article 10.5 of the TPA, it should be permitted to retain over 60% of the ill-gotten gains resulting from the penalties and interest because SMCV allegedly failed to sufficiently mitigate those damages.

6. As Freeport has explained, all of Freeport's claims for breaches of the Stability Agreement and Article 10.5 of the TPA have been properly submitted to arbitration and squarely fall within the scope of Peru's consent to arbitrate. *First*, all of Freeport's claims for breaches of the Stability Agreement are timely under Article 10.18.1 because Freeport submitted its claims within three years of when it acquired or should have acquired knowledge of each of Peru's breaches and the resulting loss or damage. Peru breached the Stability Agreement and SMCV incurred loss or damage only once each Assessment became final and enforceable and SMCV had an obligation to pay. Likewise, Freeport submitted each of its claims for breaches of Article 10.5 within three years of the date of each breach, with the exception of Freeport's

claims for breach of due process in the 2006-2007 and 2008 Royalty Cases, which are still timely because Freeport submitted those claims within three years of acquiring knowledge of those breaches.

7. *Second*, Peru's Article 10.18.4 objection falls away because Peru breached the Stability Agreement when each SUNAT assessment became final and enforceable and SMCV, therefore, could not have taken the fork-in-the-road for those breaches before they occurred. In any event, Article 10.18.4 of the TPA does not apply to any of Freeport's claims for breaches of the Stability Agreement because SMCV did not submit the "same alleged breach[es]" to any court or administrative tribunal of Peru or to binding dispute settlement procedures. SMCV submitted administrative law challenges to SUNAT and the Tax Tribunal, not contract claims for breaches of the Stability Agreement. Similarly, SMCV submitted administrative law claims to the Contentious Administrative Courts in the 2006-2007 and 2008 Royalty Cases and, in any event, does not allege breaches of the Stability Agreement based on the 2006-2007 and 2008 Royalty Assessments in this arbitration. Moreover, the proceedings before SUNAT's Claims Division and the Tax Tribunal are not proceedings before "an administrative tribunal" or "binding dispute settlement procedures" under Article 10.18.4 of the TPA.

8. *Third*, Freeport's claims comply with Article 10.1.3 of the TPA, as all of the breaches that Freeport alleges occurred after the TPA entered into force.

9. *Fourth*, Article 22.3.1 does not bar Freeport's Article 10.5 claims for penalties and interest on the Tax Assessments because penalties and interest are not taxes under Peruvian law and, therefore, cannot constitute "taxation measures" under the TPA.

10. *Finally*, Freeport can submit claims for breaches of the Stability Agreement on behalf of SMCV under Article 10.16.1(b)(i)(C) because SMCV relied on the Stability Agreement in making its investment in the Concentrator.

II. THE TRIBUNAL HAS JURISDICTION TO CONSIDER FREEPORT'S CLAIMS

A. ARTICLE 10.18.1 OF THE TPA DOES NOT BAR FREEPORT'S CLAIMS

11. As Freeport explained in its Reply and Counter-Memorial on Jurisdiction ("Counter-Memorial on Jurisdiction) and Memorial, all of Freeport's claims were submitted to arbitration within the three-year limitation period in Article 10.18.1 of the TPA.[1] Each breach of the Stability Agreement and the

[1] Reply and Counter-Memorial on Jurisdiction ¶¶ 211-41; Memorial ¶¶ 355, 429(a).

TPA that Freeport alleges occurred after the 28 February 2017 cut-off date that the Parties agree applies to Freeport's claims.[2] Therefore, Freeport could only have acquired knowledge of those breaches and the respective losses or damages incurred after 28 February 2017.[3]

1. Freeport's Claims for Breach of the Stability Agreement Are Timely

12. Each of Freeport's Stability Agreement claims is timely because: (*i*) Peru breached the Stability Agreement and SMCV incurred loss or damage when each Assessment became final and enforceable;[4] and (*ii*) each final and enforceable Assessment resulted in a separate breach of the Stability Agreement and separate loss to SMCV, and thus gives rise to a separate claim for breach of the Stability Agreement with a separate limitation period.[5] Each of the Assessments became final and enforceable after 28 February 2017.[6] Freeport accordingly could not have acquired knowledge of Peru's breaches or the loss or damage incurred before that date.

13. In the Rejoinder on the Merits and Reply on Jurisdiction ("Reply on Jurisdiction"), Peru repeats its argument that the 36 breaches of the Stability Agreement that Freeport alleges are a single breach with a single limitation period running from 18 August 2009 when SUNAT notified SMCV of the 2006-2007 Royalty Assessments because: that was when SUNAT first "applied the non-stabilized regime to SMCV's Concentrator;"[7] after the 2006-2007 Royalty Assessments SMCV "knew how SUNAT interpreted the 1998 Stabilization Agreement,"[8] and that interpretation is "the essence of Claimant's claims;"[9] and "that knowledge should equally apply to every other assessment or action of Respondent taken on the same legal basis thereafter" because they were "essentially guaranteed (predestined)."[10] Based on the same rationale,

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2 *See* Reply and Counter-Memorial on Jurisdiction ¶ 211 ("The Parties agree that 28 February 2017, three years before the date of the Request for Arbitration, is the cut-off date for the three-year limitation period."); Rejoinder on the Merits and Reply on Jurisdiction ¶ 694 (same).

3 *See* Reply and Counter-Memorial on Jurisdiction ¶ 211.

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

5 Reply and Counter-Memorial on Jurisdiction ¶¶ 214, 220, 224.

6 Reply and Counter-Memorial on Jurisdiction ¶¶ 220, 227.

7 Rejoinder on the Merits and Reply on Jurisdiction ¶¶ 697, 713, 718; *see also id.* ¶ 743.

8 Rejoinder on the Merits and Reply on Jurisdiction ¶ 698.

9 Rejoinder on the Merits and Reply on Jurisdiction ¶ 710.

10 Rejoinder on the Merits and Reply on Jurisdiction ¶¶ 704, 745(d) (arguing that "Claimant's knowledge of the alleged breaches of the 1998 Stabilization Agreement and loss related to SUNAT's Assessments against SMCV should be grounded on the first Assessment in the series of SUNAT's Royalty and Tax Assessments" and that when SUNAT's first Assessment was notified to SMCV, "Claimant (or SMCV) knew at that moment that

Peru also maintains its alternative arguments that the limitation period should run from 15 September 2009, 8 July 2011, or 30 December 2009.[11]

14. Peru's attempt to reframe Freeport's 36 alleged breaches as a single breach of the Stability Agreement is a gross mischaracterization of Freeport's claims[12] and Peru's argument that the limitation period runs from when Freeport "first knew" the "legal basis" upon which Peru *would breach* the Stability Agreement and that SMCV *would incur* loss or damage is wrong as a matter of law.[13] As Freeport explained in the Counter-Memorial on Jurisdiction, Peru's argument that the limitation period began to run for *future* Assessments concerning fiscal periods that *had not yet started* and for amounts yet unknown would encourage a claimant to submit unripe and uncertain investment treaty claims because the future SUNAT

SMCV must pay royalties and taxes for all other fiscal years for which it had failed to pay royalties and taxes (at a non-stabilized rate) and that the same obligations would apply in future years as well."); *see also id.* ¶¶ 697, 704, 710, 734.

[11] Reply and Counter-Memorial on Jurisdiction ¶ 212 ("Alternatively, Peru argues that the limitation period was triggered on: (*i*) 15 September 2009, the date SMCV filed its Request for Reconsideration of the 2006-2007 Royalty Assessment with SUNAT's Claims Division; (*ii*) 8 July 2011, the date SMCV was notified of the 2009 Royalty Assessments, if the Tribunal excludes the 2006-2007 and 2008 Royalty Assessments (which SMCV does not challenge as resulting in a breach of the Stability Agreement in this arbitration) from its determination of when the limitation period began to run; or (*iii*) either 30 December 2009, the date SMCV was notified of the first Tax Assessment, the 2006 GST Assessment, or 28 January 2010, the date SMCV filed its Request for Reconsideration of the 2006 GST Assessment with SUNAT's Claims Division, if the Tribunal finds that knowledge of the breaches of the Stability Agreement resulting from the Tax Assessments cannot be 'imputed' from the earlier Royalty Assessments.") (citing Memorial on Jurisdiction ¶¶ 430, 436, 440, 442); Rejoinder on the Merits and Reply on Jurisdiction ¶¶ 701-704 (same).

[12] *But see* **CA-412**, *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Decision on Jurisdiction (4 December 2017) (Kaufmann-Kohler, Hanotiau, Stern), ¶ 185 ("[I]t is the Claimant's prerogative to formulate its claims as it sees fit."); *see also* **CA-20**, *Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections (13 March 2020) (Kalicki, Townsend, Douglas (dissenting in part on other grounds)), ¶¶ 220-21 (holding that the central inquiry is "what particular breach has been alleged" by the claimant, based on the "operative pleading" and subsequent clarifications by the claimant).

[13] Rejoinder on the Merits and Reply on Jurisdiction ¶¶ 693, 698, 704.

assessments might never be rendered or might never become final and enforceable.[14] Yet, as Freeport explained, the plain terms of the TPA confirm that Article 10.18.1 does not have that untenable effect.[15]

i. Under the Terms of Article 10.18.1, the Limitation Period Can Only Start After a Claimed Breach Has Occurred and the Claimant Has Incurred Damage

15. As Freeport explained in the Counter-Memorial on Jurisdiction, Article 10.18.1 refers, in the past tense, to knowledge that a claimant or an enterprise "*has incurred loss or damage*."[16] The limitation period, therefore, cannot commence until the breach and loss have *actually occurred*.[17] The claimant, thus, must have knowledge or constructive knowledge that: (*i*) the alleged breach has occurred; and (*ii*) the claimant or the enterprise has incurred loss or damage.[18]

16. In its Reply on Jurisdiction, Peru continues to ignore the plain terms of Article 10.18.1. Peru and its experts maintain that SMCV acquired knowledge of each of Peru's breaches of the Stability Agreement once SUNAT notified SMCV of the 2006-2007 Royalty Assessment despite admitting that each of the Assessments only became "binding" and enforceable once the administrative process for that

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14 *See* Reply and Counter-Memorial on Jurisdiction ¶ 213 ("According to Peru, Freeport not only acquired knowledge of each of Peru's breaches of the Stability Agreement before any of the Assessments were final and enforceable, but years before SUNAT even notified SMCV of the other Royalty and Tax Assessments and before most of the relevant fiscal years had even started."); *see also* **RA-1**, *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award (3 June 2021) (Kaufmann-Kohler, Hanotiau, Stern (dissenting in part on other grounds)), ¶ 247 (reasoning that "for the statute of limitations to start running, the claimant must be legally in a position to bring a claim. If a claim cannot be brought for legal reasons (for instance, because the claim is not ripe), it would be fundamentally unfair to find that the statute of limitations has started to run.").

15 Reply and Counter-Memorial on Jurisdiction ¶¶ 216-17 ("There is simply no support in the express terms of Article 10.18.1 for Peru's argument that that the limitation period for each of Freeport's claims could have commenced *before* those breaches and losses even occurred.") (emphasis in original).

16 **CA-10**, TPA, Article 10.18.1 (emphasis added); *see also* Reply and Counter-Memorial on Jurisdiction ¶ 217.

17 Reply and Counter-Memorial on Jurisdiction ¶ 217.

18 Reply and Counter-Memorial on Jurisdiction ¶ 225.

Assessment was complete,[19] "each assessment constitutes an *independent* administrative act,"[20] and "the issuance of each Assessment Resolution may give rise to a *different* tax dispute proceeding."[21] Moreover, despite Peru's attempt to distance itself from its argument in the Counter-Memorial on the Merits and Memorial on Jurisdiction ("Memorial on Jurisdiction") that a claimant's knowledge that it "*would incur*" loss is sufficient to trigger the limitation period,[22] that same reasoning pervades its Reply.[23] Peru even goes so far as to state that "Respondent does not accept" that Article 10.18.1 "require[s] completed breach and injury."[24] But that is exactly what Article 10.18.1 requires—the limitation period does not begin until the claimant acquires knowledge that a breach has occurred and that the claimant "has incurred loss or damage."[25] "The earliest possible date" on which a claimant could acquire knowledge of breach and loss cannot pre-date the occurrence of breach and loss.

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19 *See* Rejoinder on the Merits and Reply on Jurisdiction ¶ 818 ("For example, if SMCV challenged SUNAT's Assessments before SUNAT's Claims Division, and SMCV did not subsequently challenge the Division's decision confirming SUNAT's Assessments, or if SMCV withdrew its appeals to the Tax Tribunal from the Division's decisions, the Division's decisions would be binding on SMCV."); *see also* **RER-7**, Morales II, ¶ 106 (acknowledging that for SUNAT Assessments "the enforceability of their payment is suspended while the remedies filed by the company are resolved"); *id.* ¶ 111 (conceding "the fact that Assessment and Penalty Resolutions cannot be enforced until the administrative process is exhausted"); **RER-8**, Bravo and Picón II, ¶ 249 (recognizing that "[i]n the specific case in which the taxpayer, after being notified of an assessment resolution, complains or appeals within the legal deadline, the debt will not be due (enforceable) in coercive collection").

20 **RER-7**, Morales II, ¶ 97 (emphasis added); *see also id.* ¶ 115 ("[E]ach assessment by the tax authority gives rise to an independent administrative act.").

21 **RER-8**, Bravo and Picón II, ¶ 254 (emphasis added).

22 Counter-Memorial on the Merits and Memorial on Jurisdiction ¶ 424 ("SMCV (and thus Claimant) knew . . . that SMCV . . . *would incur* . . . loss or damages" and "Claimant (and SMCV) knew at that time that SMCV *would have* to pay royalties, and that SMCV *would have* to pay taxes at an unstabilized rate.") (emphases added). *But see* Rejoinder on the Merits and Reply on Jurisdiction ¶ 732 ("Perú did not claim that the limitations period should start to run before the alleged breaches have occurred or before the loss or damage is known, as Claimant alleges.").

23 *See* Rejoinder on the Merits and Reply on Jurisdiction ¶ 734 ("Claimant (or SMCV) knew at that moment that SMCV must pay royalties and taxes for all other fiscal years for which it had failed to pay royalties and taxes (at a non-stabilized rate) and that *the same obligations would apply in future years as well*.") (emphasis added); *id*. ¶ 745(b) ("SMCV knew immediately upon receipt of SUNAT's Assessment that it owed royalties and taxes at the non-stabilized rate and corresponding penalties and interest with respect to its Concentrator Project, *and that it would owe such royalties and taxes*.") (emphasis added); *see also* **RER-7**, Morales II, ¶ 95 ("[A]ny damages suffered by SMCV as a consequence of the hypothetical breach of contract crystalized when the tax authority notified SMCV of the Assessment and Penalty Resolution. From that point in time, SMCV was aware of *the financial loss it would suffer* as the result of the breach of contract, without it being necessary to exhaust all available administrative appeals.") (emphasis added).

24 Rejoinder on the Merits and Reply on Jurisdiction ¶ 708.

25 **CA-10**, TPA, Article 10.18.1.

17. *First*, there is no support in the TPA for Peru's argument that the limitation period begins when a claimant acquires knowledge of the "legal basis" upon which a respondent will commit future breaches, which will cause losses or damages to be incurred.[26]

(a) Article 10.18.1 requires knowledge or constructive knowledge of "the breach alleged" and that the "loss or damage" has been incurred.[27] It does not require knowledge of the "legal basis" for a future breach. A government's "legal basis" for future conduct alone neither breaches the TPA nor causes loss to the investor. To give rise to a claim for breach of an investment agreement or the TPA, a Government must have adopted a *measure* that breaches its obligations and that causes loss or damage.[28] Here the measures that Freeport alleges have breached the Stability Agreement and have caused loss or damage are each of the final and enforceable Assessments, not the "legal basis" for them.[29]

(b) Peru's position that the limitation period starts to run when a claimant has knowledge of the "legal basis" for a future measure and loss, hence, fully contradicts Peru's own statement that it does "not claim that the limitations period would start to run before an alleged breach and loss have occurred."[30] Peru's position is also flatly inconsistent with the decisions in *Eli Lilly*, *Resolute Forest Products*, *Mobil II*, and *Pope & Talbot*,[31] which, as Peru must concede, "recognize that the limitations period starts to run as of the moment

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[26] Rejoinder on the Merits and Reply on Jurisdiction ¶ 741 ("[T]he *legal basis* for SUNAT's Assessments is *identical* for each of the Assessments about which Claimant complains in this arbitration" so "Claimant's claims arising from SUNAT's Assessments cannot give rise to separate breaches with differing limitations periods.") (emphasis added); *see also id.* ¶ 713 (contending that an "alleged breach occurs when (*i*) a government act forming the basis of the alleged breach is performed").

[27] **CA-10**, TPA, Article 10.18.1.

[28] *See* **CA-10**, TPA, Articles 10.1.1 ("This Chapter applies to *measures* adopted or maintained by a Party."); *id.* at Article 10.18.1.

[29] *But see* Rejoinder on the Merits and Reply on Jurisdiction ¶ 698 ("Thus, as of that moment, SMCV (and, thus, Claimant) knew *how SUNAT interpreted* the 1998 Stabilization Agreement.") (emphasis added); *id*. ¶ 704 ("[T]hat knowledge should equally apply to every other assessment or action of Respondent taken on the *same legal basis* thereafter.") (emphasis added); *id*. ¶ 741 ("[T]he *legal basis* for SUNAT's Assessments is *identical* for each of the Assessments about which Claimant complains in this arbitration" so "Claimant's claims arising from SUNAT's Assessments cannot give rise to separate breaches with differing limitations periods.") (emphasis added).

[30] Rejoinder on the Merits and Reply on Jurisdiction ¶ 736.

[31] *But see* Rejoinder on the Merits and Reply on Jurisdiction ¶ 736 ("Because Perú did not claim that the limitations period would start to run before an alleged breach and loss have occurred, Claimant's assertions to that effect in its Reply, including paragraphs 213 through 218, its reference to *Eli Lilly*, *Resolute Forest Products*, *Mobil II*, and *Pope & Talbot*, [is] entirely misplaced and should be disregarded in full); *id*. ¶ 737 (arguing that *Pope & Talbot* is "entirely consistent with Perú's interpretation").

when the alleged breach and loss have occurred and became known to the claimant."[32] None of these cases indicate that the limitation period starts once a claimant learns the "legal basis" upon which a respondent will commit future breaches and cause losses or damages.

(c) Peru's emphasis on the phrase "*first* acquired . . . knowledge" in Article 10.18.1 is misguided.[33] That phrase in no way suggests that a claimant is capable of acquiring knowledge of a breach before that breach occurs because it has acquired knowledge of the legal basis. Article 10.18.1 refers to the moment a claimant first acquires knowledge that a breach has occurred and that loss has been "incurred," in the past tense.[34] It does not refer to the moment a claimant "first acquires knowledge" that a breach and loss might occur, as Peru would have it.[35]

18. *Second*, "the earliest possible date" on which a claimant could acquire knowledge of breach and loss incurred cannot pre-date the occurrence of breach and loss.

(a) The reference by the *Corona Materials* tribunal to "the earliest possible date on which the [c]laimant would have obtained knowledge of the alleged breach . . . and of the incurred loss or damage" does not have the effect that Peru seeks to give it.[36] The tribunal referred to knowledge "of the *incurred* loss or damage," in the past tense.[37]

(b) Similarly, the *Mobil II* tribunal concluded that the claimant "first acquired knowledge . . . , at the earliest when it received" a letter from the respondent because it was "impossible to know that loss or damage *has been* incurred until that loss or damage actually has been

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[32] Rejoinder on the Merits and Reply on Jurisdiction ¶ 736. *But see id.* ¶ 737 (arguing that *Pope & Talbot* is "entirely consistent with Perú's interpretation, because Perú asserts that 'the loss ha[d] occurred and was known to [Claimant]' when SMCV was notified of the first Assessment (in the series of SUNAT's Assessments), because that is when Claimant first knew or should have known that SMCV has incurred a loss as a result of SUNAT's assessment of royalty (or tax), penalties, and interest, against SMCV's Concentrator Project.").

[33] Rejoinder on the Merits and Reply on Jurisdiction ¶ 696 (emphasis in original).

[34] **CA-10**, TPA, Article 10.18.1.

[35] *But see* Rejoinder on the Merits and Reply on Jurisdiction ¶¶ 734, 745(b).

[36] Rejoinder on the Merits and Reply on Jurisdiction ¶ 696 (citing **RA-3**, *Corona Materials, LLC v. Dominican Republic,* ICSID Case No. ARB(AF)/14/3, Award on the Respondent's Expedited Preliminary Objections In Accordance with Article 10.20.5 of the DR-CAFTA (31 May 2016) (Dupuy, Mantilla-Serrano, Thomas) ("*Corona Materials v. Dominican Republic* Award on Preliminary Objections"), ¶ 198).

[37] **RA-3**, *Corona Materials, LLC v. Dominican Republic,* ICSID Case No. ARB(AF)/14/3, Award on the Respondent's Expedited Preliminary Objections In Accordance with Article 10.20.5 of the DR-CAFTA (31 May 2016), ¶ 198 (emphasis added).

incurred" and that "[t]o suspect that something will happen is not at all the same as knowing that it will do so."[38]

19. *Finally*, Article 10.18.1 must be interpreted in good faith in accordance with its ordinary meaning, the context in which it appears, and in the light of the object and purpose of the TPA. In a retreat from the unsupported argument in the Memorial on Jurisdiction that "a treaty's limitations period should be interpreted strictly,"[39] Peru now concedes that tribunals have not "interpreted limitations periods strictly *per se*."[40] Peru now argues that tribunals have "applied the limitations provisions strictly to bar untimely claims."[41] But Article 10.18.1 must equally be applied strictly to *allow timely claims*, which is precisely what Freeport argues for here.

ii. Peru's Breaches of the Stability Agreement Did Not Occur and SMCV Did Not Incur Loss Until Each Assessment Became Final and Enforceable

20. As Freeport explained in the Counter-Memorial on Jurisdiction, Peru's breaches of the Stability Agreement occurred, and SMCV incurred loss, only when the relevant Assessment became final and enforceable.[42] Freeport explained that the Assessments did not become final and enforceable until the conclusion of the administrative process for each assessment.[43] Before that moment, the Assessments were not final administrative decisions because the tax administration could have reversed course before the Assessments were enforceable against SMCV.[44] Moreover, SMCV was under no obligation to pay the Assessments until they became final and enforceable and SUNAT could not initiate coercive collection procedures.[45] As Freeport also explained, Peruvian courts have recognized that royalty and tax assessments do not result in contractual breach under Peruvian law until they become final and enforceable.[46]

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38 **CA-420**, *Mobil Investments Canada Inc. v. Canada (II),* ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, (13 July 2018) (Greenwood, Rowley, Griffith), ("*Mobile v. Canada (II)* Decision on Jurisdiction"), ¶¶ 154-55, 172 (emphasis in original).

39 Counter-Memorial on the Merits and Memorial on Jurisdiction ¶ 417.

40 Rejoinder on the Merits and Reply on Jurisdiction ¶ 747 (citing Counter-Memorial on the Merits and Memorial on Jurisdiction ¶ 417).

41 Rejoinder on the Merits and Reply on Jurisdiction ¶ 747.

42 *See* Reply and Counter-Memorial on Jurisdiction ¶ 220.

43 *See* Reply and Counter-Memorial on Jurisdiction ¶ 220(a).

44 *See* Reply and Counter-Memorial on Jurisdiction ¶ 220(b).

45 *See* Reply and Counter-Memorial on Jurisdiction ¶ 220(c) (citing **CA-14**, Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Article 115(a)).

46 *See* Reply and Counter-Memorial on Jurisdiction ¶ 220(d) (citing **CA-385**, Civil Appellate Court, Case File No. 956-2007, Decision (20 November 2007), pp. 2-3; **CA-384**, Trial Court No. 43, File No. 41531-2006.79, Decision (8 May 2007), pp. 2-3).

21. In the Reply on Jurisdiction, Peru maintains its argument that a breach of the Stability Agreement "occurred when SUNAT (an entity of the Peruvian State) issued and notified [sic] the Assessment and Penalty Resolutions against SMCV."[47] Peru argues that "enforceability is not the measurement set by the TPA."[48] Peru's arguments miss the mark. It is undisputed that the limitation period runs from the time a claimant acquires knowledge or constructive knowledge of breach and loss.[49] As the tribunal in *Mercer v. Canada* explained, the timing of breach is dictated by when a government act becomes enforceable "under its applicable law."[50] In this case, that was when each Assessment gave rise to an enforceable payment obligation under Peruvian law.

22. Peru also reprises its argument that SMCV incurred loss or damage at the moment it was notified of an assessment because "the amounts stated in the Assessments . . . were immediately due and owed to SUNAT upon the issuance and notification . . . as a matter of Peruvian law."[51] But that argument is directly contradicted by the concessions of Peru's experts that SUNAT assessments are not enforceable

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47 Rejoinder on the Merits and Reply on Jurisdiction ¶ 715 (citing **RER-2**, Morales I, ¶ 106); *see also id*. ¶ 713 ("Claimant's assertion that the alleged breaches occurred only when SUNAT's Assessments become 'final and enforceable' lacks a basis in the TPA and is inconsistent with investment treaty arbitration decisions and the views of learned commentators.").

48 Rejoinder on the Merits and Reply on Jurisdiction ¶725; *see also id*. ¶ 699 ("Under Peruvian law, the amounts identified in the Assessment were immediately due and owed to SUNAT and, therefore, immediately became liabilities of SMCV."); *id*. ¶ 702 ("SMCV incurred the loss or damage at the moment that it was required to pay the Assessment, which, under Peruvian law, was immediately as of the date of issuance of the Assessment"); *id*. ¶ 721 ("SMCV was immediately obligated to pay those amounts when SUNAT 'inform[ed] the tax debtor [i.e., SMCV]' of its debt to ensure "compliance with tax obligations."); *id*. ¶ 723 ("[Article 10.18.1] simply does not require a government act to become 'final and enforceable' (words that appear nowhere in Article 10.18.1) to trigger the limitations period."); *id*. ¶ 725 ("As Perú's expert Dr. Morales explains, 'these [Assessments]—from the moment they are issued and notified—have already determined the existence of tax obligation in charge of the taxpayer that is presumed valid.'"); *id*. ¶ 729 ("There is no question that SMCV . . . first knew that it incurred a loss when it was notified of the first Assessment . . . because that is when SMCV became subject to a payment obligation.").

49 **CA-10**, TPA, Article 10.18.1.

50 **RA-45**, *Mercer International, Inc. v. Government of Canada*, ICSID Case No, ARB(AF)/12/3, Award (6 March 2018) (Vicuna, Douglas, Veeder) ("*Mercer v. Canada* Award"), ¶ 3.83.

51 Rejoinder on the Merits and Reply on Jurisdiction ¶¶ 721, 725; *see also id*. ¶ 699 ("Under Peruvian law, the amounts identified in the Assessment were immediately due and owed to SUNAT and, therefore, immediately became liabilities of SMCV."); *id*. ¶ 702 ("SMCV incurred the loss or damage at the moment that it was required to pay the Assessment, which, under Peruvian law, was immediately as of the date of issuance of the Assessment"); *id*. ¶ 721 ("SMCV was immediately obligated to pay those amounts when SUNAT 'inform[ed] the tax debtor [*i.e*., SMCV]' of its debt to ensure 'compliance with tax obligations.'"); *id* ¶ 723 (Article 10.18.1 "simply does not require a government act to become 'final and enforceable' (words that appear nowhere in Article 10.18.1) to trigger the limitations period"); *id*. ¶ 725 ("As Perú's expert Dr. Morales explains, 'these [Assessments]—from the moment they are issued and notified—have already determined the existence of tax obligation in charge of the taxpayer that is presumed valid.'"); *id*. ¶ 729 ("There is no question that SMCV . . . first knew that it incurred a loss when it was notified of the first Assessment . . . because that is when SMCV became subject to a payment obligation.").

until the administrative process is complete.[52] Peru does not explain how SMCV could have incurred loss or damage from assessments that *were not final* and that *could not be enforced*, as a matter of Peruvian law.

23. *First*, as Freeport explained in its Counter-Memorial on Jurisdiction, it is only once a particular Assessment became final and enforceable that it resulted in a breach of the Stability Agreement and that SMCV incurred loss or damage.[53]

(a) Peru's argument that the Assessments resulted in loss or damage before they were final and enforceable is fundamentally contradicted by Peru's position that SMM Cerro Verde is not entitled to recovery for still Outstanding Liabilities. Specifically, Peru argues that "[a] legal obligation can only be considered a 'damage' if that legal obligation will actually result in the victim making the payments; if not, then the victim has not suffered (and will not suffer) any actual damage."[54] Thus, under Peru's own damages theory the Assessments could not "be considered a 'damage'" until they were final and enforceable because, until that time, it was not clear that they would "actually result in the victim making the payments."[55]

(b) Unlike other administrative acts in Peru, SUNAT assessments are not immediately enforceable.[56] Instead, the taxpayer is afforded an opportunity to request that SUNAT, and then the Tax Tribunal, reconsider an assessment before it becomes final and enforceable.[57] The purpose of this is to provide the Tax Administration with an opportunity to correct

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52 *See* **RER-2**, Morales I, ¶ 99 ("Now, the 'enforceability of the administrative act' should not be confused with the moment when the act becomes enforceable (with the enforceability of the act) that is established in the second phase of the administrative act."); **RER-3**, Bravo and Picón I, ¶ 61 ("[T]axpayer challenges [to] these resolutions ha[ve] the effect of suspending [their] enforceability."); **RER-7**, Morales II, ¶ 106 (acknowledging that for SUNAT Assessments "the enforceability of their payment is suspended while the remedies filed by the company are resolved"); *id.* ¶ 111 (conceding "the fact that Assessment and Penalty Resolutions cannot be enforced until the administrative process is exhausted"); **RER-8**, Bravo and Picón II, ¶ 249 (recognizing that "[i]n the specific case in which the taxpayer, after being notified of an assessment resolution, complains or appeals within the legal deadline, the debt will not be due (enforceable) in coercive collection").

53 Reply and Counter-Memorial on Jurisdiction ¶ 220(d).

54 Rejoinder on the Merits and Reply on Jurisdiction ¶ 1066 (quoting **RA-108**, *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia,* ICSID Case No. ARB/05/24, Award (17 December 2015), ¶ 238 ("it is trite to observe that the Claimant can only recover in compensation the loss that it has actually suffered")).

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

56 **CER-13**, Hernández III, ¶ 7; **CER-12**, Bullard III, ¶ 6.

57 **CER-13**, Hernández III, ¶ 8; **CER-12**, Bullard III, ¶¶ 8, 10; **CER-7**, Bullard II, ¶ 82 ("Prof. Morales's argument that the mere notification of the SUNAT Assessments breached the Stability Agreement is inconsistent with the tax administration's prerogative of correction. Under Peruvian law, SUNAT and the Tax Tribunal exercise control over SUNAT's assessments before they become *final* in the administrative stage") (emphasis in original); **CER-8**, Hernández II, ¶ 109 ("[W]hether SMCV owed anything at all, and if it did, how much, was still in question (SUNAT and the Tax Tribunal could correct the Assessments.").

erroneous assessments before they become final and enforceable administrative acts.[58] In order to fulfil this purpose, the Tax Code explicitly provides that SUNAT cannot enforce assessments until the administrative process is complete.[59] As Peru and its experts admit "SMCV was under no legal obligation to pay the Assessments before challenging them," and the Tax Administration "might or might not . . . change or correct the Assessment" in the course of the administrative process.[60] And, as Peru also admits, an assessment does not become "binding" on a taxpayer until the administrative process for that assessment is complete.[61]

(c) Peru complains that Freeport took out of context the admission of its experts that SUNAT cannot enforce an assessment until the administrative process is complete.[62] But Peru and its experts *still do not deny* that an assessment can be enforced only upon completion of the administrative process—and that only then must a taxpayer pay an assessment or face coercive collection procedures.[63] Rather, they argue that the Assessments were "due and owed" upon notification and that SMCV was "immediately obligated to pay" because the Assessments "establish[ed] the existence of the tax . . . debt" and the "payment obligation

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58 **CER-13**, Hernández III, ¶ 8; **CER-12**, Bullard III, ¶ 10; **CER-7**, Bullard II, ¶ 82.

59 **CER-13**, Hernández III, ¶¶ 9, 11 (citing **CA-14**, Tax Code, Supreme Decree No. 133-2013-EF (June 22, 2013), Article 115 (a), (c)); **CER-12**, Bullard III, ¶ 10.

60 Reply on Jurisdiction ¶ 1060 ("Claimant argues that SMCV was under no legal obligation to pay the Assessments before challenging them—but Perú has never argued to the contrary."); *see also id.* ¶ 716 (acknowledging that "the Peruvian government might or might not subsequently change or correct the Assessment" after it is issued and before it becomes final and enforceable); **RER-7**, Morales II, ¶ 101 (conceding that SUNAT assessments may be "revoked by the Tax Tribunal"); **RER-8**, Bravo and Picón II, ¶ 264 ("[T]he debtor is afforded the opportunity to file an administrative proceeding to demonstrate an incorrect allocation of debt, in order for the State— if the grounds for that exist—to invalidate the already established obligation, during which time the tax debt is not enforceable, ensuring the right to due process."); **Ex. CE-1111**, Jorge Bravo, *Debts that Are Not Debts* (29 October 2020); **Ex. CE-1109**, Jorge Bravo, *The Truth About the SUNAT vs. TELEFONICA Dispute* (29 July 2019). .

61 Rejoinder on the Merits and Reply on Jurisdiction ¶ 818 ("For example, if SMCV challenged SUNAT's Assessments before SUNAT's Claims Division, and SMCV did not subsequently challenge the Division's decision confirming SUNAT's Assessments, or if SMCV withdrew its appeals to the Tax Tribunal from the Division's decisions, the Division's decisions would be binding on SMCV.").

62 Rejoinder on the Merits and Reply on Jurisdiction ¶¶ 723-24; *see also* **RER-3**, Bravo and Picón I, ¶ 61 ("[T]axpayer challenges [to] these resolutions ha[ve] the effect of suspending [their] enforceability."); **RER-2**, Morales I, ¶ 102 ("[T]he act (the Assessment and Penalty Resolution) is not enforceable by SUNAT until such time as it is possible for the administrative procedure to be brought to an end.").

63 *See* **RER-8**, Bravo and Picón II, ¶ 249 ("In the specific case in which the taxpayer, after being notified of an assessment resolution, complains or appeals within the legal deadline, the debt will not be due (enforceable)."); **RER-7**, Morales II, ¶ 111 (conceding "the fact that Assessment and Penalty Resolutions cannot be enforced until the administrative process is exhausted").

remains operative" but is "suspend[ed]" during the administrative process.[64] Peru is wrong. Because the assessments were not enforceable upon notification, there was *no payment obligation* that could be suspended at that time as a matter of Peruvian law.[65]

(d) The fact that assessments "explicitly state" "specific amounts"[66] and that "taxpayers can and do pay . . . before any . . . coercive collection occurs" does not mean that those amounts are "due and owed."[67] The fact that SUNAT precisely quantifies the amounts that it believes a taxpayer owes in an assessment does not change the fact that those amounts are not yet due and owed because SUNAT is not entitled to collect those amounts until the assessment is final and enforceable and the assessment may still be corrected at the administrative level. Moreover, taxpayers do not pay assessments before they become final and enforceable because they are due and owed.[68] As Peru concedes, they may do so to "reduce the amount due in penalties and accrued interest" "*in the event" the amounts become due and owed* and, if the amounts do not become due and owed, the taxpayer will be "refunded the amount of any overpayment, with interest."[69]

(e) As Freeport has explained, assessments only give rise to contractual breach when they become final and enforceable.[70] Citing Mr. Morales's first report, Peru reprises its argument that "Dr. Bullard erroneously 'attempt[s] to mix the sphere of administrative procedure with the contractual sphere of the State's actions in this case.'"[71] But Prof.

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64 Rejoinder on the Merits and Reply on Jurisdiction ¶¶ 721-23.

65 **CER-13**, Hernández III, ¶¶ 8-9, 11; **CER-12**, Bullard III, ¶¶ 6, 8; **CER-8**, Hernández II, ¶ 109 ("[W]hether SMCV owed anything at all, and if it did, how much, was still in question (SUNAT and the Tax Tribunal could correct the Assessments).").

66 Rejoinder on the Merits and Reply on Jurisdiction ¶ 699; *see also id.* ¶ 702 ("The Assessment identified the specific amount of royalties, penalties, and interest that SMCV owed.").

67 Rejoinder on the Merits and Reply on Jurisdiction ¶¶ 721, 725 (citing **RER-7**, Morales II, ¶¶ 105-07).

68 **CER-13**, Hernández III, ¶ 11; **CER-12**, Bullard III, ¶ 8.

69 Rejoinder on the Merits and Reply on Jurisdiction ¶¶ 725, 1052; **RER-2**, Morales I, ¶ 61 ("Consequently, had Cerro Verde paid the amounts stated in the assessment resolutions, it (i) would have ceased to incur the interest and penalties of which it is now complaining, and (ii) would have protected its rights."); **RER-7**, Morales II ¶ 105 ("[I]f the taxpayer wanted to avoid incurring more interest, it could have paid the tax obligation under protest even if the administrative complaint process had not been concluded"); **RER-8**, Bravo and Picón II, ¶ 251 ("[T]he tax debtor may pay the debt with a view to reducing the total penalties and/or preventing the delinquent interest from continuing to accrue, in the event that its claims are not ultimately defensible.").

70 *See* Reply and Counter-Memorial on Jurisdiction ¶ 220; Memorial ¶ 352; **CER-2**, Bullard I, ¶ 86; **CER-7**, Bullard II, ¶ 75; **CER-12**, Bullard III, ¶ 4.

71 Rejoinder on the Merits and Reply on Jurisdiction ¶ 718 (citing **RER-2**, Morales I ¶ 95); *see also* **RER-7**, Morales II, ¶ 106.

Bullard has already explained that he does no such thing. He explained that "a claim for breach of a contract is regulated by civil—and not administrative—law" but that it is only when an assessment becomes final and enforceable as a matter of Peruvian administrative law that breach occurs because, at that time, "the administrative act [became] unchangeable" at the administrative level.[72]

(f) As a matter of Peruvian contract law, the amounts set forth in SUNAT assessments do not constitute damages until the assessment becomes final and enforceable.[73] As Prof. Bullard explains, in Peruvian law, exposure to enforcement is inherent in the concept of loss or damage.[74] A claimant does not suffer pecuniary loss or damage, which is a prerequisite to submit a contractual cause of action in the judicial courts, until pecuniary loss is *capable of materializing*.[75] Because SUNAT has *no power to enforce* an assessment until the administrative process is complete, loss or damage from an assessment is incapable of materializing until that time.[76]

(g) As Freeport explained, in the case of royalty and tax assessments, Peruvian courts have recognized that contractual breach occurs when the assessments become final and enforceable.[77] Peru fails in its attempt to distinguish the *Poderosa* case on the grounds that "the judicial instances were not [presented with] the legal question, nor did they analyze it, on whether or not it was necessary to exhaust the administrative remedies to configure the contractual breach of the tax stabilization agreement."[78] But it is irrelevant that the Peruvian courts did not decide whether the exhaustion of administrative remedies was required for a breach of contract claim. The import of the *Poderosa* case is that the Peruvian courts decided that the alleged breaches of Poderosa's mining stability agreement occurred, and the Peruvian limitation period for breach-of-contract claims started to run,

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72 **CER-7**, Bullard II, ¶ 77; *see also* **CER-12**, Bullard III, ¶ 4.

73 *See* **CER-12**, Bullard III, ¶¶ 11-13.

74 **CER-12**, Bullard III, ¶¶ 12-13.

75 *See* **CER-12**, Bullard III, ¶ 13.

76 *See* **CER-12**, Bullard III, ¶¶ 12-13.

77 **CER-7**, Bullard II, ¶ 81 (citing **CA-384**, Trial Court No. 43, Decision, File No. 41531-2006-79-1801-JR-CI-43, Decision (8 May 2007), pp. 2-3); **CA-385**, Civil Appellate Court, Case File No. 956-2007, Decision (20 November 2007), pp. 2-3); *see also* Reply and Counter-Memorial on Jurisdiction ¶ 220(d).

78 Rejoinder on the Merits and Reply on Jurisdiction ¶ 719 (citing **RER-7**, Morales II, ¶ 108).

when the Tax Tribunal issued its resolutions.[79] Peru also fails in its attempt to avoid the fatal implications of the Poderosa case by arguing "it is the provision of the TPA, not Peruvian law, that dictates the start date of the TPA's limitations period."[80] That is undisputed but, as Peru repeatedly recognizes,[81] the limitation period runs from the moment a cause of action arose and the question of when a cause of action arose for breach of a Peruvian law contract can only be answered by resort to Peruvian law.[82]

(h) Moreover, in the *Gold Fields La Cima S.A. v. Private Investment Promotion Agency and Ministry of Energy and Mines* arbitration, Peru itself argued that there could not have been a breach of the claimant's stability agreement because "there [was] no assessment [for the Complementary Mining Pension Fund contribution], the applicable legal [challenge] procedure ha[d] not been followed, and a *final decision* rejecting the company's interpretation d[id] not exist," and therefore there was no "argument that the LSA [legal stability agreement] has been breached."[83] Peru had it right in the Gold Fields arbitration; a breach of the Stability Agreement occurs only when the Tax Administration renders a final decision.

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79 *See* **CER-12**, Bullard III, ¶ 9; **CER-7**, Bullard II, ¶ 81 (citing **CA-384**, Trial Court No. 43, Decision, File No. 41531-2006-79-1801-JR-CI-43, Decision (8 May 2007), pp. 2-3); **CA-385**, Civil Appellate Court, Case File No. 956-2007, Decision (20 November 2007), pp. 2-3); Reply and Counter-Memorial on Jurisdiction ¶ 220(d).

80 Rejoinder on the Merits and Reply on Jurisdiction ¶ 720 (emphasis omitted).

81 *See* Rejoinder on the Merits and Reply on Jurisdiction ¶¶ 713-14 ("Perú explained in its Counter-Memorial that, for purposes of a limitations period, tribunals have held that an alleged breach occurs when (i) a government act forming the basis of the alleged breach is performed, and (ii) that act gives rise to an independent cause of action."); Counter-Memorial on the Merits and Memorial on Jurisdiction ¶ 420 ("According to the *Spence v. Costa Rica* tribunal, if the government action constituting the alleged breach gives rise to a 'self-standing cause of action,' the limitations period starts to run on the date the alleged government action occurred.").

82 *See* Rejoinder on the Merits and Reply on Jurisdiction ¶ 26 (conceding that the Stability Agreement is "governed by Peruvian law"); *id.* ¶ 833 (arguing that Freeport's stability agreement claims "are governed by the same law (Peruvian law, specifically the Mining Law and Regulations)"); Counter-Memorial on the Merits and Memorial on Jurisdiction ¶¶ 427-28 (arguing that "*[a]s a matter of Peruvian law*, the amounts stated in the Assessment were immediately due and owing to SUNAT, and therefore were liabilities of SMCV" and relying on an "expert in Peruvian contract law" to define when SMCV's cause of action allegedly arose) (emphasis added); **RER-7**, Morales II, ¶ 9 (conceding that stability agreements are governed by Peruvian civil law).

83 **Ex. CE-443**, *Gold Fields La Cima S.A. v. Private Investment Promotion Agency (PROINVERSIÓN) and Ministry of Energy and Mines (MEM)*, Legal Arbitral Award (2 October 2015), ¶¶ 54-55. *See also id.* ¶ 134 (finding that where a taxpayer challenges the "interpretation of tax matters," "it is the Tax Tribunal that has the definitive position about a specific challenge").

24. *Second*, Peru's reprisal of its argument that Freeport cannot use the administrative review process to "toll the limitations period" mischaracterizes Freeport's claims and the principle of tolling.[84]

(a) As explained in the Counter-Memorial, Freeport does not argue that the administrative review process before SUNAT's Claims Division and the Tax Tribunal "tolled" the limitation period.[85] Nor does Freeport argue that the administrative process "delayed the limitations period," as Peru claims in its Reply on Jurisdiction.[86] Tolling is a doctrine in which the limitation period for filing a cause of action is suspended *after* the breach of an obligation gives rise to the cause of action and the limitation period has started to run.[87] Freeport's argument is that the completion of the administrative process for each Assessment *constituted* the breaches of the Stability Agreement and *caused* the resulting losses and, therefore, triggered the limitation periods in the first place.[88] Freeport and SMCV could not have had knowledge of the breaches and losses before they occurred.

(b) Peru concedes that the investment treaty decisions establish that a "claimant cannot use a *court decision* or subsequent *court proceedings* to toll the limitations period" and that "SUNAT's Claims Division and the Tax Tribunal are administrative adjudicatory bodies rather than courts."[89] Yet, Peru argues that the rule against tolling "logically would apply regardless of whether that appeal is presented to administrative review or a 'court

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84 Rejoinder on the Merits and Reply on Jurisdiction ¶¶ 726-27; *id*. ¶ 746(e) (citing **RA-7**, *Apotex Inc. v. The Government on the United States of America*, Award on Jurisdiction and Admissibility (14 June 2013) (Smith, Davidson, Landau) ("*Apotex v. USA* Award on Jurisdiction and Admissibility"), ¶ 325).

85 Claimant's Reply and Counter-Memorial on Jurisdiction ¶ 221(a).

86 Rejoinder on the Merits and Reply on Jurisdiction ¶ 727.

87 *See* **CA-444**, International Institute for the Unification of Private Law (UNIDROIT), UNIDROIT Principles on International Commercial Contracts 2016 (integral version), p. 361 ("[T]he running of the limitation period is suspended . . . when the obligee performs any act, by commencing judicial proceedings or in judicial proceedings already instituted, that is recognized by the law of the court as asserting the obligee's right against the obligor.").

88 *See* Claimant's Reply and Counter-Memorial on Jurisdiction ¶ 221(a); Memorial ¶¶ 352-53.

89 Rejoinder on the Merits and Reply on Jurisdiction ¶¶ 726-27 (emphasis added); *see also* **RER-3**, Bravo and Picón I, ¶ 147 (recognizing that "the Tax Tribunal's decisions only exhaust the administrative instance, and therefore they may be appealed in judicial instances"); **RWS-5**, Olano Silva, ¶ 6 ("The Tax Tribunal is not part of the Judiciary."); **RA-7**, *Apotex v. USA* Award on Jurisdiction and Admissibility, ¶ 331 ("The position, therefore, is that any challenge to the FDA decision itself had to be brought within three years, and could not be delayed by resort to *court action*.") (emphasis added); **RA-6**, *Mondev International Ltd. v. United States of America,* Award (11 October 2002) (Stephen, Crawford, Schwebel) ("*Mondev v. USA* Award"), ¶ 87 ("[T]he Tribunal would not have accepted Mondev's argument that it could not have had "knowledge of . . . loss or damage" arising from the actions of the City and BRA prior to the United States *court decisions*.") (emphasis added).

action.'" [90] Peru is wrong. The distinction between administrative and judicial proceedings is not one "without a difference" as Peru argues.[91] Judicial proceedings involve the review of final and enforceable administrative decisions that give rise to breach and loss and, once commenced, might toll the applicable limitation period.[92] Here, there were no limitation periods capable of being tolled until each Assessment became final and enforceable resulting in breaches of the Stability Agreement and losses to SMCV.

25. *Finally*, Peru's argument that SMCV became "liable or subject to" loss or damage when SUNAT notified SMCV of an assessment even if there was no "immediate outlay of funds" is totally circular.[93] Peru's argument rests entirely on its incorrect assertion that "SMCV became subject to a payment obligation" when SUNAT notified SMCV of an assessment.[94] But SMCV *could not be subjected to* a payment obligation and *could not become liable to pay* at the moment SUNAT notified SMCV of an assessment because, at that time, SUNAT could not enforce the assessment against SMCV. Moreover, Freeport's position is not that an "immediate outlay of funds" is required for loss or damage to be incurred.[95] Rather, it is that loss or damage cannot be incurred before a Government act is *capable of compelling an outlay of funds*. Thus, the ream of sources that Peru cites to support the undisputed point that "incurred" means to become "liable or subject to" and that an immediate outlay of funds is not required are of no moment.[96] *Grand River* exemplifies the irrelevance of Peru's argument. In that case, the tribunal rejected the claimants' argument that they did not incur loss or damage until "a competent authority initiated judicial enforcement proceedings against them to oblige them to place funds in escrow."[97] In *Grand River*, it was undisputed that the obligation to pay the funds into escrow was capable of being enforced in judicial proceedings and the tribunal correctly determined that loss was incurred at the moment the obligation to

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90 Rejoinder on the Merits and Reply on Jurisdiction ¶ 727.

91 Rejoinder on the Merits and Reply on Jurisdiction ¶ 727.

92 *See* **RA-6**, *Mondev v. USA* Award, ¶ 87 ("Courts award compensation because loss or damage has been suffered.").

93 Rejoinder on the Merits and Reply on Jurisdiction ¶ 728 (citing **RA-98**, *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru*, ICSID Case No. UNCT/18/2, Submission of the United States of America (21 June 2019), ¶ 8).

94 Rejoinder on the Merits and Reply on Jurisdiction ¶ 729.

95 Rejoinder on the Merits and Reply on Jurisdiction ¶ 728.

96 Rejoinder on the Merits and Reply on Jurisdiction ¶ 728, n. 1497 (citing sources).

97 **RA-4**, *Grand River Entreprises Six Nations, Ltd., et. al. v. United States of America*, Decision on Objections to Jurisdiction (20 July 2006) (Nariman, Anaya, Crook) ("*Grand River v. USA* Decision on Jurisdiction"), ¶ 74.

pay the funds into escrow became capable of being enforced.[98] Here, it is undisputed that the Assessments were incapable of being enforced until they became final and enforceable.

iii. Each Final and Enforceable Royalty or Tax Assessment Gave Rise to a Separate Breach of the Stability Agreement

26. As Freeport explained in its Counter-Memorial on Jurisdiction, each of the Assessments gave rise to an independent cause of action for breach of the Stability Agreement on the dates they became final and enforceable against SMCV.[99] Freeport could not have acquired knowledge of the loss or damage resulting from any of Peru's breaches of the Stability Agreement until those dates. Freeport explained that Peru's argument that Freeport should have brought a claim in 2009 for future royalty and tax assessments that had not yet been rendered, for royalty and tax debts that had not yet been incurred, would have the perverse effect of encouraging investors to bring claims before they are ripe for adjudication. This would be contrary to the express terms of Article 10.18.1 of the TPA, which requires the actual or constructive knowledge of breach and "loss or damage" that has been "incurred."[100]

27. In the Reply on Jurisdiction, Peru continues its attempt to recharacterize the 36 breaches of the Stability Agreement that Freeport alleges as a single breach.[101] Peru argues that "SUNAT's Assessments against SMCV are similar and related government acts, and that . . . knowledge of the alleged

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98 **RA-4**, *Grand River v. USA* Decision on Jurisdiction, ¶ 82 ("The Tribunal believes that becoming subject to a clear and precisely quantified statutory obligation to place funds in an unreachable escrow for 25 years, at the risk of serious additional civil penalties and bans on future sales in case of non-compliance, is to incur loss or damage as those terms are ordinarily understood. A party that becomes subject to such an obligation, even if actual payment into escrow is not required until the following spring, has incurred 'loss or damage.'").

99 *See* Claimant's Reply and Counter-Memorial on Jurisdiction ¶¶ 224, 226-27; **CER-7**, Bullard II, ¶ 88; **CER-8,** Hernández II, ¶ 124.

100 Claimant's Reply and Counter-Memorial on Jurisdiction ¶ 225 (citing **CA-10**, TPA, Article 10.18.1; **CER-11**, Sampliner I, ¶ 25 (citing **CA-405**, *Mesa Power Group LLC v. Canada*, PCA Case No. 2012-17, Submission of the United States of America (25 July 2014), ¶ 4 ("NAFTA Article 1116(1) further provides that an investor may submit a claim to arbitration that a Party 'has breached' certain obligations, and that the investor 'has incurred loss or damage by reason of, or arising out of, that breach.' Thus, there can be no claim under Article 1116(1) until an investor has suffered harm from an alleged breach. Consistent with Articles 1116(1) and 1120(1), therefore, a disputing investor may submit a claim to arbitration under Chapter Eleven only for a breach that already has occurred and for which damage or loss has already been incurred, provided that six months has elapsed from the events giving rise to the claim. No claim based solely on speculation as to future breaches or future loss may be submitted.")).

101 *See e.g.*, Rejoinder on the Merits and Reply on Jurisdiction ¶ 704 ("Claimant's knowledge of the alleged breaches of the 1998 Stabilization Agreement and loss related to SUNAT's Assessments against SMCV should be grounded on the first Assessment in the series of SUNAT's Royalty and Tax Assessments."); *id*. ¶ 734 (arguing that when SUNAT notified SMCV of the 2006-2007 Royalty Assessments, "Claimant (or SMCV) knew at that moment that SMCV must pay royalties and taxes for all other fiscal years for which it had failed to pay royalties and taxes (at a non-stabilized rate) and that the same obligations would apply in future years as well"); *see also id*. ¶¶ 697, 710, 735-38, 745(d) (same).

breach based on a series of government acts must attach to the first act in that series—here, to the first Assessment in the series of Assessments."[102] Peru's argument has no merit. Peru still concedes that the limitation period in Article 10.18.1 commences when each government act gives rise to an "independent," "self-standing cause of action."[103] And Peru still fails to identify anything in the TPA or any investment treaty authority that supports applying a single limitation period to independent causes of action.

28. *First*, Peru's argument remains completely detached from the text of the TPA. As Freeport already explained, Article 10.18.1 refers to the limitation period for a "claim," not for "a series of similar or related" claims. Article 10.18.1 also requires knowledge of breach and loss or damage that has been "*incurred*," not breach and loss or damages that might occur in the future.[104] In its Reply on Jurisdiction, Peru does nothing to conform its argument to the text of Article 10.18.1. Instead, Peru continues to characterize Freeport's 36 claims for breaches of the Stability Agreement as a single claim for one breach of the Stability Agreement that occurred once SUNAT notified the 2006-2007 Royalty Assessments.[105] And Peru continues to argue that Freeport acquired knowledge of *future Government acts before they occurred* and *future losses for fiscal periods that had not started*. Nothing in the plain text of Article 10.18.1 supports imputing to a claimant knowledge of future government acts that may not occur or future losses that may never be incurred.

29. *Second*, as Freeport explained in the Counter-Memorial on Jurisdiction, under Peruvian law each final and enforceable Assessment is a separate administrative act that creates a separate cause of

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102 Rejoinder on the Merits and Reply on Jurisdiction ¶ 733.

103 Rejoinder on the Merits and Reply on Jurisdiction ¶ 714 ("[A] claim . . . must rest on a breach that gives rise to a self-standing cause of action.") (citing **RA-2**, *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (25 October 2016) (Bethlehem, Kantor, Vinuesa) ("*Spence v. Costa Rica* Interim Award"), ¶ 210); Counter-Memorial on the Merits and Memorial on Jurisdiction ¶ 420 (citations omitted).

104 Reply and Counter-Memorial on Jurisdiction ¶ 225. *See also* **CA-10**, TPA, Article 10.18.1 ("No claim may be submitted to arbitration . . . if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that . . . the enterprise . . . *has incurred* loss or damage.") (emphasis added); *id.* at Article 10.16.1 ("[T]he claimant . . . may submit . . . a claim . . . that the respondent has breached . . . an investment agreement . . . and . . . that the enterprise *has incurred* loss or damage.") (emphasis added); *id.* at Article 10.16.2(b) (specifying that in the notice the Claimant shall specify "for each claim, the provision of this Agreement, investment authorization or investment agreement alleged to have been breached and any other relevant provisions").

105 *See* Rejoinder on the Merits and Reply on Jurisdiction ¶ 738 ("Respondent is not alleging that Claimant is asserting 'a series of similar or related' claims.' Rather, Respondent is asserting that Claimant is alleging a claim for a series of similar or related acts.").

action for breach of the Stability Agreement.[106] Peru and its experts do not contest this point, which is fatal to Peru's objection.[107]

(a) Peru and its experts accept that each final and enforceable Assessment is an independent Government act,[108] but Peru argues "that is a distinction without a difference" because "[a]ll of the Assessments . . . are in most ways identical and indistinguishable."[109] However, the distinction is of material import because, as Prof. Bullard has explained, "SMCV could have brought separate contract claims for breach of the Stability Agreement for each SUNAT Assessment irrespective of whether they are factually or legally related."[110] SMCV did not do so and, instead, Freeport has submitted the contract claims that SMCV could have submitted to Peruvian courts to arbitration on behalf of SMCV. Pursuant to Article 10.16.1(b)(i)(C) of the TPA, this proceeding provides a forum for Freeport to assert on behalf of SMCV claims for breach of an investment agreement that

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106 *See* Reply and Counter-Memorial on Jurisdiction ¶ 226 (citing **CER-7**, Bullard II, ¶ 88 ("SUNAT assessments are unique, as they refer to specific charges and fiscal periods. Moreover, they comprise distinct collection and challenge procedures. Thus, SMCV could have brought separate contract claims for breach of contract for each SUNAT Assessment irrespective of whether they are factually or legally related."); **CER-8**, Hernández II, ¶ 124 ("SMCV's self-assessments were based on specific facts, which varied from one fiscal period to another. For example, if in fiscal period 1, SMCV reported higher profits than in fiscal period 2, then it paid higher taxes; if in fiscal period 3, the company reported lower profit than in fiscal period 4, it paid lower taxes. The facts based on which SMCV self-assessed and paid taxes from 2006 to 2013 were, therefore, unique for each fiscal period and determined the taxes SMCV paid."); *id.* ¶ 125 ("SUNAT also issued the Royalty and Tax Assessments based on specific facts, which varied from one fiscal period to another.") (citing **CA-14**, Tax Code, Articles 75-77)); *id.* ¶ 126 ("Each Royalty and Tax Assessment is an *independent* administrative act because the legal effects of one did not extend to the other.").

107 *See* Rejoinder on the Merits and Reply on Jurisdiction ¶ 743 ("And, even if each act standing alone were to give rise to its own cause of action, as Claimant asserts, tribunals have held that where those acts are part of a series of similar and related acts, the start date of the limitations period must attach to the first act in that series."); **RER-7**, Morales II, ¶ 97 (conceding that "each assessment *constitutes an independent administrative act* under Perú's Administrative Law") (emphasis added); *id.* ¶ 115 (acknowledging that "under Peruvian administrative law, each assessment by the tax authority gives rise to an independent administrative act"); **RER-8**, Bravo and Picón II, ¶ 254 (conceding that "the issuance of each Assessment Resolution may give rise to a different tax dispute proceeding").

108 Rejoinder on the Merits and Reply on Jurisdiction ¶ 743 ("Even if the Assessments may be separate acts, they all rest on the same alleged breach of the 1998 Stabilization Agreement."); *see also* **RER-7**, Morales II, ¶¶ 97, 115; **RER-8**, Bravo and Picón II, ¶ 254.

109 Rejoinder on the Merits and Reply on Jurisdiction ¶ 700; *see also id.* ¶ 743 ("[T]he government act constituting Claimant's alleged breaches is the same from the first through the last Assessment: SUNAT applied the non-stabilized regime to SMCV's Concentrator Project."); *id.* ¶ 742 ("Claimant's assertion in its Reply that SUNAT issued each Assessment based on a differing set of facts is misleading. Claimant argues that the Assessments are separate breaches based on superficial differences . . . . Equally misleading is Claimant's expert Dr. Hernandez's assertion that SUNAT issued Assessments 'based on specific facts, which varied from one fiscal period to another.'").

110 **CER-7**, Bullard II, ¶ 88.

SMCV would be entitled to submit in Peruvian courts.[111] Peru identifies nothing in the TPA or elsewhere that supports treating separate breaches that SMCV would be entitled to commence separate proceedings for in Peruvian civil courts as a single breach in this proceeding.

(b) Peru provides absolutely no support for its argument that, after SUNAT notified SMCV of the 2006-2007 Royalty Assessments, every single Assessment was "essentially guaranteed (predestined)" to come out the same way.[112] Peru does not dispute the fact that none of SUNAT's or the Tax Tribunal's resolutions had any precedential effect and admits that even the Supreme Court's decision in the 2008 Royalty Case was limited to "th[at] specific dispute" and had no "*erga omnes* precedential effect."[113] And Peru even concedes that the "Peruvian government might [have] subsequently change[d] or correct[ed] the" 2006-2007 Royalty Assessments after SUNAT notified SMCV of them.[114]

(c) Moreover, Peru's argument is premised on a *post-hoc* review of the final and enforceable Assessments that is incompatible with Article 10.18.1, which requires the claimant's knowledge of a breach and loss that have occurred.[115] Freeport and SMCV could not know in 2009 the final and enforceable decisions that SUNAT and the Tax Tribunal would render in the time period from 2010 through 2020.

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111 **CA-10**, TPA, Article 10.16.1(b)(i)(C).

112 Rejoinder on the Merits and Reply on Jurisdiction ¶ 745(d).

113 Rejoinder on the Merits and Reply on Jurisdiction ¶ 79; *see also* Reply and Counter-Memorial on Jurisdiction ¶ 226(c) ("[T]he Tax Tribunal did not issue any precedents of mandatory compliance in any of SMCV's administrative challenges or confirm any of the Assessments based on a precedent of mandatory compliance. Nor did SUNAT or the Tax Tribunal ever indicate that they were bound by the 2006-2007 or 2009 Royalty Assessments in deciding SMCV's challenges to any of the subsequent assessments.") (citing **CER-8**, Hernández II, ¶ 127 ("SUNAT could have arrived at a different legal conclusion in each assessment, for example, as a result of a change in position or by order of the Tax Tribunal. Thus, SMCV could not have anticipated the content of any particular royalty or tax assessment based on SUNAT's interpretation of the mining provisions in its first-issued assessment.")); *id.* ¶ 126 ("Each Royalty and Tax Assessment is an independent administrative act because the legal effects of one did not extend to the other."). *See also* Reply and Counter-Memorial on Jurisdiction ¶ 226(c).

114 Rejoinder on the Merits and Reply on Jurisdiction ¶ 716.

115 **CA-10**, TPA, Article 10.18.1.

30. *Third*, Peru fundamentally misunderstands the authorities discussing a "series of similar and related actions by a respondent state," none of which support consolidating independent causes of action into a single cause of action with a single limitation period.[116]

(a) As Peru and each of Peru's authorities recognize, separate limitation periods apply to "legally distinct injur[ies.]"[117] Yet, Peru confuses the concept of "a legally distinct injury" with the concept of an injury based on distinct legal reasoning or legal bases.[118] "Legally distinct injuries" means distinct causes of action, irrespective of whether they are based on similar and related Government acts.[119] Mr. Sampliner assisted in preparing the U.S. non-disputing party submission in *Spence*, which Peru cites.[120] He explains that the U.S. position, reflected in the U.S. submission in *Spence* and elsewhere, is that a claimant cannot evade the limitation period by arguing that similar and related actions concerning a single cause of action each produce a separate cause of action.[121]

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116 Rejoinder on the Merits and Reply on Jurisdiction ¶ 741 (citing **RA-3**, *Corona Materials v. Dominican Republic* Award on Preliminary Objections, ¶ 215; **RA-4**, *Grand River v. USA* Decision on Jurisdiction, ¶ 81).

117 Rejoinder on the Merits and Reply on Jurisdiction ¶ 741 ("The U.S. submission also opines that 'a legally distinct injury' gives rise to a separate limitations period. Conversely, a claimant's injury that is not legally distinct cannot give rise to separate limitations periods."); **RA-2**, *Spence v. Costa Rica* Interim Award, ¶ 163 ("[E]ach claimant must show, in respect of each property claim, that they have a cause of action, a distinct and legally significant event that is capable of founding a claim in its own right, of which they first became aware in the period after 10 June 2010."); **RA-3**, *Corona Materials v. Dominican Republic* Award on Preliminary Objections, ¶ 202 ("[T]he Tribunal only needs to decide whether the failure to respond to the Claimant's Motion for Reconsideration would, if found to amount to a denial of justice, constitute a breach of the Treaty that is separate from the non-issuance of the license."); **RA-4**, *Grand River v. USA* Decision on Jurisdiction, ¶86 ("[T]he Tribunal has difficulty seeing how NAFTA Articles 1116(2) and 1117(2) can be interpreted to bar consideration of the merits of properly presented claims challenging important statutory provisions that were enacted within three years of the filing of the claim and that allegedly caused significant injury, even if those provisions are related to earlier events."); **RA-5,** *Resolute Forest v. Canada* Decision on Jurisdiction, ¶ 154 ("There may thus be a difference between the date of different breaches arising from a given course of governmental conduct."); **RA-7**, *Apotex v. USA* Award on Jurisdiction and Admissibility, ¶ 334 (assessing whether claimant's "two types of claims are analytically distinct").

118 Rejoinder on the Merits and Reply on Jurisdiction ¶ 741 ("Here, Claimant's injury arising from SUNAT's application of the non-stabilized regime in each of the Assessments is not 'legally distinct,' because. . . the legal basis for SUNAT's Assessments is identical for each of the Assessments about which Claimant complains in this arbitration.").

119 *See* **CER-14**, Sampliner II, ¶ 6 ("By referring to 'legally distinct injur[ies]' we meant distinct causes of action that gave rise to distinct loss or damage, irrespective of whether the government conduct giving rise to each cause of action is similar and related or based on the same 'legal basis.'").

120 **CER-14**, Sampliner II, ¶ 6 ("I assisted in preparing the submissions in the *Spence*, *Corona*, *Jin Hae Seo*, and *Grammercy* arbitrations, which are also consistent with the conclusions in my First Report and the consistent position I recall the U.S. taking during my tenure at Treasury.").

121 *See* **CER-14**, Sampliner II, ¶ 6 ("The position reflected in the U.S. submissions is not that a single limitations period applies for claims challenging any government measures that are similar or related or that have the same legal basis. As I explained in my First Report, the U.S. position was that the limitations period for a single

(b) None of the sources Peru cites suggest that a single limitation period applies to separate causes of action because they concern similar and related Government acts. Peru mischaracterizes these decisions, which each merely confirm that similar and related Government acts supporting a *single* cause of action only give rise to a single limitation period. The tribunal in *Grand River* held that a Master Settlement Agreement ("MSA") and various subsequent escrow statutes adopted by U.S. state governments that signed the MSA did not give rise to separate causes of action because the MSA legally required the state governments to "adopt escrow legislation precisely replicating a draft law annexed to the MSA."[122] The tribunal in *Corona Materials* held that a "final" decision denying an environmental permit and the failure to reconsider that same decision did not give rise to separate causes of action.[123] The tribunal in *Spence* held that the continued refusal to pay compensation for expropriations that occurred before the cut-off date did not constitute new breaches.[124] None of these cases are applicable here because Freeport challenges separate measures, each of which gave rise to a separate cause of action for breach of the Stability Agreement.

31. *Fourth*, Freeport could not have acquired knowledge of the loss or damage resulting from any of Peru's breaches of the Stability Agreement until each of the Assessments became final and enforceable. As Freeport explained in the Counter-Memorial on Jurisdiction, Peru's argument that all of the Assessments became "immediately due and owing," once SUNAT notified SMCV of the 2006-2007 Royalty Assessments on 18 August 2009, is absolutely wrong as a matter of Peruvian law.[125] Peru reprises this argument in the Reply on Jurisdiction but still provides no explanation of how Freeport could have acquired knowledge of future tax assessments for subsequent fiscal periods from the 2006-2007 Royalty Assessments. *See* Sections II.A.1.ii and II.A.1.iii above.

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breach and the resulting loss *does not renew* as a result of each action by the host government related to the same breach and resulting loss.") (emphasis in original).

122 **RA-4,** *Grand River v. USA* Decision on Jurisdiction, ¶¶ 12, 80, 82.

123 **RA-3**, *Corona Materials v. Dominican Republic* Award on Preliminary Objections, ¶¶ 222-23, 27; *see also id.* ¶ 78.

124 **RA-2**, *Spence v. Costa Rica* Interim Award, ¶¶ 146, 162-65, 251-52.

125 Reply and Counter-Memorial on Jurisdiction ¶ 227 (citing Counter-Memorial on the Merits and Memorial on Jurisdiction ¶ 427); *see also* Rejoinder on the Merits and Reply on Jurisdiction ¶ 734 ("Claimant (or SMCV) knew at that moment that SMCV must pay royalties and taxes for all other fiscal years for which it had failed to pay royalties and taxes (at a non-stabilized rate) and that *the same obligations would apply in future years as well*.") (emphasis added).

32. *Fifth*, Peru fails in its attempt to mischaracterize the investment treaty decisions clearly demonstrating that separate limitation periods apply to separate causes of action.[126]

(a) Peru argues that *Eli Lilly* is distinguishable on the grounds that the tribunal held the claimant could not have acquired knowledge of breach and loss resulting from a court decision by virtue of an earlier court decision applying the same "promise utility" legal doctrine, because the earlier court decision concerned a "*different investment*."[127] Peru is wrong. The tribunal in *Eli Lilly* expressly based its decision on the fact that the claimant alleged that specific court decisions rendered after the cut-off date constituted breaches, not "that the promise utility doctrine itself in the abstract is a violation of NAFTA Chapter Eleven."[128] The tribunal only mentioned that the earlier decision applying the promise utility doctrine concerned a different investment as "[f]urther" support for its conclusion.[129] The fact that the final and enforceable Assessments concerned the same investment is not relevant because, like the alleged breaches in *Eli Lilly*, they each support a separate cause of action.

(b) Peru quotes out of context the *Nissan* tribunal's statement that "additional conduct related to the *same underlying harm* 'cannot without more renew the limitation period.'"[130] Peru omits the first part in the quoted sentence, which makes clear that the tribunal is referring to harm resulting from "a particular State act," in the singular.[131] Nor does Peru engage with *Nissan*'s core holding that alleged breaches based on a series of defaults on payment obligations under a contract that occurred after the cut-off date were timely even though they were virtually identical to defaults that occurred under the same contract before the

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126 *See* Rejoinder on the Merits and Reply on Jurisdiction ¶ 745.

127 Rejoinder on the Merits and Reply on Jurisdiction ¶ 745(a) (emphasis added).

128 **CA-411**, *Eli Lilly and Company v. Canada*, ICSID Case No. UNCT/14/2, Final Award (16 March 2017) (van den Berg, Bethlehem, Born) ('*Eli Lilly v. Canada* Final Award"), ¶ 164; *id*. ¶ 167 ("Given the Tribunal's finding on the identity of the alleged breach, the Tribunal sees no way in which Claimant could have acquired the requisite knowledge before the court invalidated the Zyprexa and Strattera Patents. An investor cannot be obliged or deemed to know of a breach before it occurs.").

129 **CA-411**, *Eli Lilly v. Canada* Final Award, ¶ 167.

130 Rejoinder on the Merits and Reply on Jurisdiction ¶ 745(b) (citing **CA-243**, *Nissan Motor Co., Ltd. v. Republic of India*, PCA Case No. 2017-37, Decision on Jurisdiction (29 April 2019) (Kalicki, Hobér, Khehar) (*Nissan v. India* Decision on Jurisdiction), ¶ 325).

131 **CA-243,** *Nissan v. India* Decision on Jurisdiction, ¶ 325 ("[O]nce an investor has knowledge that it has been harmed by *a particular State act* alleged to breach a CEPA obligation, additional conduct relating to the same underlying harm 'cannot without more renew the limitation period' for the filing a claim seeking redress.") (emphasis added) (citations omitted).

cut-off date.[132] Like the alleged breaches based on defaults that occurred after the cut-off date in *Nissan*, Freeport's alleged breaches based on Assessments that became final and enforceable after the cut-off date are timely.

(c) Peru's focus on the different types of measures at issue in *Bilcon* does not detract from that tribunal's clear statement that it is "possible and appropriate . . . to separate a series of events into distinct components, some time-barred, some still eligible for consideration on the merits."[133] Peru is incorrect that this statement was *dicta* because it was precisely what the tribunal did, as is evident from the *dispositif* in the decision.[134]

(d) Peru does not address Freeport's argument that the *Grand River* tribunal distinguished between: (*i*) time-barred claims based on the MSA and the escrow statutes; and (*ii*) timely claims based on similar and related legislation that U.S. state governments adopted after the cut-off date.[135] Nor does Peru address the fact that the tribunal ruled that claims based on the escrow statutes were time-barred *because* the state governments adopted the escrow statutes before the cut-off date.[136] Moreover, Peru's argument that SUNAT's notification of the 2006-2007 Royalty Assessment "predestined" the subsequent Assessments like the MSA "predestined" the escrow statutes is wrong in fact and law.[137] The escrow statutes were "required" under the Master Settlement Agreement, to which the state governments were party.[138] Nothing in Peruvian law "required" SUNAT and the Tax Tribunal to render

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132 *See* **CA-243**, *Nissan v. India* Decision on Jurisdiction, ¶¶ 299, 313, 326-28; *id.* ¶ 329 ("The limitations period still serves an important purpose, by limiting any claims – and therefore any damages exposure to the respondent State – to only such instances where the investor can demonstrate it incurred a qualitatively new instance of 'loss or damage' after the critical date, because of a new State act that it alleges constituted a treaty breach.").

133 Rejoinder on the Merits and Reply on Jurisdiction ¶ 745(c) (citing **CA-278**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada,* PCA Case No. 2009-04, Award on Jurisdiction and Liability (17March 2015) ("*Clayton v. Canada* Award"), ¶ 266.

134 **CA-278**, *Clayton v. Canada* Award, ¶ 742(a)(i) ("Unanimously decides that the Tribunal has jurisdiction insofar as these Investors base their claims on events occurring on or after 17 June 2005; the Respondent's jurisdictional objection is upheld insofar as the Investors base their claims on events occurring prior to that date.").

135 Reply and Counter-Memorial on Jurisdiction ¶ 228(d) (citing **RA-4**, *Grand River v. USA* Decision on Jurisdiction, ¶¶ 22-24, 84-94).

136 Reply and Counter-Memorial on Jurisdiction ¶ 228(d) (citing **RA-4**, *Grand River v. USA* Decision on Jurisdiction, ¶ 81) ("All of the 46 concerned states adopted such legislation by 2000, so that in all of them there was an existing duty to escrow with respect to any past sales in that State as of January 1, 2001.")).

137 Rejoinder on the Merits and Reply on Jurisdiction ¶ 745(d).

138 *See* **RA-4**, *Grand River v. USA* Decision on Jurisdiction, ¶¶ 12, 80, 82.

the subsequent final and enforceable Assessments because of the 2006-2007 Royalty Assessments. *See* Paragraph 29(b) above.

33. *Finally*, Peru largely accepts that the cases concerning allegations of "continuing" or "composite act" breaches that Peru cited in its Memorial on Jurisdiction are irrelevant because Freeport alleges 36 independent breaches of the Stability Agreement based on independent causes of action arising from each final and enforceable Assessment *after* the cut-off date.[139] To the extent that Peru does argue otherwise, those arguments fail. Peru mainly focuses on *distinguishing passages in the authorities it cited* in the Memorial on Jurisdiction, which, as Freeport explained, show that separate limitation periods apply to each alleged breach of the Stability Agreement. Peru fails here too.

(a) Peru argues that *Corona Materials* is analogous to this case because: (*i*) "[l]ike in the *Corona Materials* case, all of SUNAT's Assessments in this case are based on the 'same theory of liability' as the first Assessment—that is, that the 1998 Stabilization Agreement does not apply to the Concentrator Project;" and (*ii*) like the letter in *Corona Materials* denying the environmental permit "SUNAT's Assessments reflect its 'final' administrative interpretation of the 1998 Stabilization Agreement, and that Claimant first knew of the alleged breach and loss when SMCV was notified of SUNAT's first Assessment."[140] Peru is wrong on both counts. *First*, the facts on which the *Corona Materials* tribunal concluded that the two claims "relate[d] to the same theory of liability" were completely distinguishable from the facts here.[141] As the tribunal explained, "the absence of a response to the Motion for Reconsideration cannot be considered as a standalone 'measure.'"[142] Here, as Freeport explained, each of the final and enforceable assessments

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139 Rejoinder on the Merits and Reply on Jurisdiction ¶ 746; *see also* Reply and Counter-Memorial on Jurisdiction ¶ 229 ("Contrary to the claimants in these cases, Freeport has not alleged a continuing or composite act breach in an attempt to hold Peru liable for Government actions that occurred before the cut-off date . . . . As reflected in the investment treaty decisions, including *Infinito Gold v. Costa Rica*, the Tribunal thus must assess the timeliness of Freeport's claims by reference to the actual "breach[es] alleged" in Freeport's pleadings.") (citing **CA-412**, *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Decision on Jurisdiction (4 December 2017) (Kaufmann-Kohler, Hanotiau, Stern), ¶ 185 ("[I]t is the Claimant's prerogative to formulate its claims as it sees fit."); **CA-20**, *Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections (13 March 2020) (Kalicki, Townsend, Douglas (dissenting in part on other grounds)), ¶¶ 220-21 (holding that the central inquiry is "what particular breach has been alleged" by the claimant, based on the "operative pleading" and subsequent clarifications by the claimant)).

140 Rejoinder on the Merits and Reply on Jurisdiction ¶ 746(d) (citing **RA-3**, *Corona Materials v. Dominican Republic* Award on Preliminary Objections, ¶ 215).

141 **RA-3**, *Corona Materials v. Dominican Republic* Award on Preliminary Objections, ¶ 210.

142 **RA-3**, *Corona Materials v. Dominican Republic* Award on Preliminary Objections, ¶ 210.

is a unique, separate, and standalone measure, based on specific facts and related to a specific past fiscal period, which does not have legal effects on, or determine the outcome of, subsequent assessments.[143] *Second*, unlike the permit denial in *Corona Materials*, the 2006-2007 Royalty Assessments did not have a "final character" when SUNAT notified SMCV of them. Each assessment became final and enforceable only when the administrative process for the relevant assessment was complete.[144] Peru offers no response to Freeport's argument that, unlike the permit denial in *Corona Materials*, which was a final administrative decision resulting in the "closure of" the claimant's administrative file, SUNAT's notification of each Assessment was not a final administrative decision but was merely a step in the administrative process by which each Assessment became final and enforceable.[145]

(b) Peru argues that "Claimant's reliance on *Infinito Gold* is misplaced" because "[i]n that case, the five alleged measures at issue were distinct government acts that addressed dissimilar issues."[146] However, Peru does not engage with the tribunal's fundamental holding, assessing each of "the measures as simple breaches" and explaining "that a simple act 'occurs' when it has been 'performed' or 'completed'" and that "the concept of 'completion' relates to the point in time at which the act is capable of constituting a breach, which depends on the content of the primary obligation."[147] Thus, the tribunal's decision was based on when each government act breached the relevant primary obligation and not whether each act was similar to acts pre-dating the cut-off date. In this case, the point in time at which each Assessment was capable of constituting a breach of Peru's obligations under the Stability Agreement was when the relevant assessment became final and enforceable under Peruvian law.

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143 *See* Reply and Counter-Memorial on Jurisdiction ¶ 226.

144 *See* Reply and Counter-Memorial on Jurisdiction ¶ 220(a).

145 Reply and Counter-Memorial on Jurisdiction ¶ 229(d) (citing **RA-3**, *Corona Materials v. Dominican Republic* Award on Preliminary Objections, ¶ 222).

146 Rejoinder on the Merits and Reply on Jurisdiction ¶ 746(a).

147 **RA-1**, *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award (3 June 2021) (Kaufmann-Kohler, Hanotiau, Stern) ("*Infinito v. Costa Rica* Award"), ¶¶ 230, 235-36 ("[T]he first step in the analysis is to identify when a given act or omission was performed or *completed.* The second step is to assess when the Claimant first knew of the completion of the action or omission and of the loss caused thereby.") (emphasis added).

(c) Peru argues that its authority *Resolute Forest Products* is distinguishable because the "claimant did not have knowledge of the alleged loss . . . until a date after the cut-off date."[148] Peru's argument is entirely unresponsive to Freeport's argument in the Counter-Memorial on Jurisdiction.[149] Freeport explained that the tribunal treated the claimant's FET and expropriation claims as independent causes of action with separate limitation periods, even though they were based on the *same measures*.[150] Thus, contrary to Peru's argument, the decision shows that separate limitations periods apply to separate causes of action, even if the causes of action are based on similar and related government acts.[151]

(d) In the Counter-Memorial on Jurisdiction, Freeport explained that *Spence* is distinguishable because unlike here, the respondent issued a "binding legal interpretation" of a law before the cut-off date that indicated that the law would result in the expropriation of claimants' residential properties.[152] Peru argues that *Spence* is analogous because: (*i*) the Mining Law and Regulations predestined SUNAT's Assessments; (*ii*) the June 2006 MINEM Report definitively interpreted the 1998 Stabilization Agreement and brought about the SUNAT Assessments; and (*iii*) "in the first Assessment (2006-2007 Royalty Assessment)—on the very first page—SUNAT set out its interpretation of the scope of the 1998 Stabilization Agreement and concluded that the Agreement does not apply to SMCV's Concentrator Project."[153] Peru is wrong on all counts. *First*, as Freeport explained in the Memorial and the Counter-Memorial on Jurisdiction, the Mining Law and Regulations clearly extended stability guarantees to concessions or mining units and that is how Peru consistently applied the Mining Law and Regulations before its *volte face*.[154] *Second*, the June 2006 Report

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148 Rejoinder on the Merits and Reply on Jurisdiction ¶ 746(b); **RA-5**, *Resolute Forest v. Canada* Decision on Jurisdiction, ¶ 178 ("In the Tribunal's view, the Claimant did not know, and could not reasonably have known, by December 2012, that it had already incurred loss or damage by reason of the alleged breach.").

149 *Compare* Reply and Counter-Memorial on Jurisdiction ¶ 229(b) ("Moreover, consistent with Freeport's position that a series of similar or related actions can give rise to independent causes of action with independent limitation periods, the *Resolute Forest Products* tribunal rejected the respondent's time-bar objection to the expropriation claim even though it was based on the very same measures."), *with* Rejoinder on the Merits and Reply on Jurisdiction ¶ 746(b) ("Unlike the claimant in *Resolute Forest Products*, SMCV knew immediately upon receipt of SUNAT's Assessment that it owed royalties and taxes at the non-stabilized rate.").

150 *See* **RA-5**, *Resolute Forest v. Canada* Decision on Jurisdiction, ¶¶ 156-58, 163.

151 *See* **RA-5**, *Resolute Forest v. Canada* Decision on Jurisdiction, ¶ 154 ("There may thus be a difference between the date of different breaches arising from a given course of governmental conduct.").

152 Reply and Counter-Memorial on Jurisdiction ¶ 229(c).

153 Rejoinder on the Merits and Reply on Jurisdiction ¶ 746(c).

154 *See, e.g.*, Reply and Counter-Memorial on Jurisdiction ¶ 62 ("[T]he 'evidence' on which Peru relies actually confirms that, prior to the Government's *volte-face* in response to political pressure, Peru consistently applied

was *expressly non-binding* as indicated on the first page of the document.[155] *Finally*, the 2006-2007 Royalty Assessments were not binding when SUNAT notified SMCV of them and they had no precedential effect. *See* Paragraph 29(b) above.

(e) There is no merit to Peru's argument that, unlike the claims in *Apotex* challenging judicial decisions, Freeport's claims challenging each Assessment are not "analytically distinct."[156] In *Apotex*, the tribunal upheld a time-bar objection to claims based on an administrative decision and exercised jurisdiction over different court decisions concerning the claimant's challenges to that *same* administrative decision because they gave rise to "analytically distinct" causes of action for breach of the NAFTA.[157] The *Apotex* decision, thus, contradicts Peru's claim that a single limitation period applies for all claims based on similar and related Government acts. Here each of the final and enforceable Assessments gave rise to a separate cause of action for breach of the Stability Agreement under Peruvian law, with separate limitations periods under Article 10.18.1.[158]

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stability guarantees to entire concessions or mining units"); Memorial ¶ 313 ("Until its *volte-face* when it began adopting Mr. Isasi's novel and restrictive interpretation of the scope of stability guarantees, the Government had also consistently interpreted the Mining Law and Regulations as applying stability on the basis of an entire mining unit or concession, both in theory and in practice."); **CA-440**, Tax Tribunal, Resolution No. 03248-5-2010 (26 March 2010); **CA-446**, Tax Tribunal, Resolution No. 05125-9-2018 (6 July 2018); **Ex. CE-1118**, INGEMMET Satellite MAP - Chaupiloma Dos (two pits) (16 November 2022); **Ex. CE-1107**, SENACE Maps in Yanacocha's MEIA - Chaupiloma Dos (two pits) (January 2019); **Ex. CE-1119**, Search for Chaupiloma Sur EAU (Art. 44 EAU) (1994 MSA); **Ex. CE-1120**, Search for Carachugo Sur EAU (no results) (1998 MSA); **Ex. CE-1121**, Search for La Quinua EAU (no results) (2003 MSA); **Ex. CE-1096**, Directoral Resolution No. 158-78-EM-DGM (UEA Cuajone) (Annex A) (6 June 1978); **Ex. CE-1097**, Directoral Resolution No. 011-93-EM-DGM (UEA Toquepala) (Annex B) (13 January 1993); **CA-432**, Supreme Decree No. 024-93-EM (7 June 1993).

155 *See* **CE-534**, MINEM, Report No. 156- 2006-MEM/OGJ (16 June 2006), p. 1 ("[N]ot[ing] that, in view of the nature of the query, this report has *only* the status of a *referential opinion* and lacks binding force for the bodies of competent jurisdiction [*solo el carácter referencial de una opinion y carece de fuerza vinculante para los órganos competentes*] that, such as SUNAT, enjoy the legal prerogative of collecting mining taxes and royalties.") (emphasis added).

156 Rejoinder on the Merits and Reply on Jurisdiction ¶ 746(e) (citing **RA-7**, *Apotex v. USA* Award on Jurisdiction and Admissibility, ¶ 325).

157 **RA-7**, *Apotex v. USA* Award on Jurisdiction and Admissibility, ¶ 334.

158 Reply and Counter-Memorial on Jurisdiction ¶ 226; *see also* **CER-7**, Bullard II, ¶ 88 ("In the case of the Stability Agreement, any breach arising from a final, definitive, and enforceable SUNAT Assessment would have similarly given rise to a separate cause of action. SUNAT assessments are unique, as they refer to specific charges and fiscal periods.").

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

34. As Freeport explained in the Counter-Memorial on Jurisdiction and the Memorial, Freeport acquired knowledge of each of Peru's breaches of Article 10.5 of the TPA after 28 February 2017.[159] In the Reply on Jurisdiction, Peru continues to argue that "most" of Freeport's Article 10.5 claims are time-barred. Yet, nothing in the Reply on Jurisdiction serves to rehabilitate Peru's Article 10.18.1 objections to Freeport's Article 10.5 claims. Freeport could not have acquired knowledge of each breach of Article 10.5 and the resulting loss before each breach occurred and SMCV incurred losses. Moreover, Freeport and SMCV could not have acquired knowledge of the due process violations in the 2006-2007 and 2008 Royalty Cases at the time they occurred because Peru concealed that information.

i. Freeport's Article 10.5 Claims Challenging Royalty Assessments Based on Breach of Legitimate Expectations, Arbitrary Actions, Inconsistent and Non-Transparent Action, and Lack of Due Process Are Timely

35. As explained in the Memorial and the Counter-Memorial on Jurisdiction, each of the 2009, 2010-2011, Q4 2011, 2012, and 2013 Royalty Assessments breached Peru's obligations under Article 10.5 on the dates upon which each assessment became final and enforceable for the same reasons set forth above in Section II.A.1 and Section III.A.1 of the Counter-Memorial on Jurisdiction.[160] As reflected in Table A of the Memorial, each of those Assessments became final and enforceable after 28 February 2017.

36. In the Reply on Jurisdiction, Peru maintains its argument that Freeport's Article 10.5 claims are time-barred because, like Freeport's Stability Agreement claims, they are based on a "'series of similar or related actions by a respondent state'" that Freeport should have acquired knowledge of "on August 18, 2009 (when SMCV was notified of the first Royalty Assessment against it for the years 2006-2007) or, at the latest, by September 15, 2009 (when SMCV challenged SUNAT's decision regarding the 2006-2007 Royalty Assessment through an administrative proceeding)."[161] Peru does not contest that "the standard for determining when causes of action for breach of the TPA arose is the same as that for determining when a cause of action for breach of the Stability Agreement arose."[162] This concession is fatal to Peru's objection, because, as explained above in Section II.A.1.iii each Assessment created a separate cause of action when

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159 Reply and Counter-Memorial on Jurisdiction ¶¶ 230-41; Memorial ¶¶ 426-29.

160 Memorial ¶ 426, Table A.

161 Rejoinder on the Merits and Reply on Jurisdiction ¶ 765 (citing Counter-Memorial on the Merits and Memorial on Jurisdiction ¶¶ 460-61); Counter-Memorial on the Merits and Memorial on Jurisdiction ¶ 447; *see also* Rejoinder on the Merits and Reply on Jurisdiction ¶ 754 ("[T]he record is clear that SMCV (and thus Claimant) had the necessary knowledge on August 18, 2009 when SMCV was notified about the first Assessment, for all the reasons just discussed at length.").

162 Reply and Counter-Memorial on Jurisdiction ¶ 234.

it became final and enforceable.[163] Moreover, Peru's attempts to mischaracterize Freeport's argument and the *Mobil II* decision are unavailing.[164]

37. *First*, Freeport's argument is not that Freeport "first knew of the alleged breaches and losses based on SUNAT's Assessments only . . . at the end of all court appeals or SMCV's withdrawal of the court cases," as Peru claims.[165] Freeport's argument is that it acquired knowledge that each Assessment breached the Stability Agreement and that SMCV incurred loss *when the administrative process* for the relevant Assessment was complete or after SMCV withdrew its administrative challenge.[166] SMCV's administrative challenges were not court appeals because, as Peru acknowledges, "SUNAT's Claims Division and the Tax Tribunal are administrative adjudicatory bodies rather than courts."[167]

38. *Second*, Peru's reliance on *Mobil II* is misplaced.

(a) Peru's argument finds no support in the *Mobil II* tribunal's holding that the alleged breach and loss occurred when the respondent informed Mobil that it would continue enforcing performance requirements against Mobil, in contravention of the *Mobil I* award.[168] In *Mobil II*, it was undisputed that the respondent was capable of enforcing the performance requirements against Mobil when it notified Mobil that it would do so.[169] In this case, it is undisputed that the Government was incapable of enforcing the 2006-2007 Royalty Assessments against SMCV at the time of notification, much less enforcing subsequent assessments that had not been issued for fiscal periods that had not yet started.[170]

(b) Peru's argument also finds no support in the *Mobil II* tribunal's statement that, while "it is not necessary that the quantum of loss or damage be known, it is clear that there must be at least a reasonable degree of certainty on the part of the investor that some loss or damage will be sustained."[171] Peru completely mischaracterizes the passage, in which the tribunal

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163 *See also* Reply and Counter-Memorial on Jurisdiction ¶ 220.

164 *But see* Rejoinder on the Merits and Reply on Jurisdiction ¶¶ 753-56.

165 Rejoinder on the Merits and Reply on Jurisdiction ¶ 753.

166 Reply and Counter-Memorial on Jurisdiction ¶ 231.

167 Rejoinder on the Merits and Reply on Jurisdiction ¶ 727; *see also* **RWS-5**, Olano Silva, ¶ 6 ("The Tax Tribunal is not part of the Judiciary.").

168 *See* **CA-420**, *Mobil v. Canada II* Decision on Jurisdiction, ¶¶ 162, 172, 173.

169 *See* **CA-420**, *Mobil v. Canada II* Decision on Jurisdiction, ¶¶ 162, 172, 173.

170 *But see* Rejoinder on the Merits and Reply on Jurisdiction ¶ 756 (citing **CA-420**, *Mobil v. Canada I*, Decision on Jurisdiction, ¶ 155).

171 *But see* Rejoinder on the Merits and Reply on Jurisdiction ¶ 756 (citing **CA-420**, *Mobil v. Canada II* Decision on Jurisdiction, ¶ 155).

rejected the very argument that Peru makes here. In response to the respondent's argument that the limitation period began to run before the respondent notified the claimant that the claimant was subject to the enforcement of the guidelines in contravention of the *Mobil I* award, the tribunal explained that "it is impossible to know that loss or damage has been incurred until that loss or damage actually has been incurred."[172] The tribunal further stated "[e]ven if it is possible to read the [NAFTA limitation provision] as embracing a case in which the investor knows that loss or damage *will be* incurred, the time limit . . . could not start to run until the investor had *knowledge* that it would suffer such loss or damage" which "requires a degree of certainty."[173] Thus, the tribunal affirmed that the standard is knowledge of loss that *has been* incurred.[174] In any event, even under Peru's own standard, which the *Mobil II* tribunal expressly rejected, there was not "reasonable certainty" that SMCV would incur loss or damage from future Assessments when SUNAT notified SMCV of the 2006-2007 Royalty Assessments. *See* Section II.A.1.ii and II.A.1.iii above.

ii. Freeport's Article 10.5 Claims Based on Due Process Violations are Timely Because Freeport and SMCV Exercised Reasonable Diligence

39. As Freeport explained in its Counter-Memorial on Jurisdiction, all of Freeport's Article 10.5 claims based on due process violations in the Tax Tribunal proceedings are timely.[175] Freeport also explained that it acquired knowledge of the due process breaches in the 2006-2007 and 2008 Royalty Cases in 2021, only when it received President Olano Silva's email correspondence in response to a request for access to public information.[176] Further, Freeport argued that Peru should not be allowed to avoid the due process claims because it effectively managed to conceal its due process violations.[177]

40. In the Reply on Jurisdiction, Peru still concedes that Freeport's Article 10.5 claims based on due process violations in the Tax Tribunal proceedings in the 2009 and 2010-2011 Royalty Cases are timely.[178] Peru also still maintains its position in the Memorial on Jurisdiction that Freeport's due process

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172 **CA-420**, *Mobil v. Canada II* Decision on Jurisdiction, ¶ 154 (emphasis omitted).

173 **CA-420**, *Mobil v. Canada II* Decision on Jurisdiction, ¶¶ 154-55.

174 **CA-420**, *Mobil v. Canada II* Decision on Jurisdiction, ¶¶ 154-55.

175 *See* Reply and Counter-Memorial on Jurisdiction ¶ 235.

176 *See* Reply and Counter-Memorial on Jurisdiction ¶ 236.

177 *See* Reply and Counter-Memorial on Jurisdiction ¶ 237.

178 Rejoinder on the Merits and Reply on Jurisdiction ¶ 761 ("Claimant's only due process claims that could be heard by this Tribunal given the limitations period are limited to its complaints that the Tax Tribunal (i) failed to recuse a 'conflicted decision-maker,' (ii) copy-pasted portions of the 2008 Royalty Case decision into the 2009 Royalty Case decision, and (iii) improperly assigned the 2010-2011 Royalty Case to Ms. Villanueva, because

claims based on the Tax Tribunal proceedings in the 2006-2007 and 2008 Royalty Cases are time-barred because the "irregularities" in those cases "appeared on the face of the . . . decisions."[179] As an initial matter, Peru is incorrect when it states that Freeport "does not expressly state which dates should be used to start the limitations period with respect to its due process violation claims."[180] Freeport expressly stated that it acquired knowledge of the due process violations in the 2006-2007 and 2008 Royalty Cases in 2021 when SMCV received President Olano Silva's email correspondence in those cases.[181] In the alternative, Freeport argued that it acquired knowledge in 2019, when SMCV began investigating the decisions in the 2006-2007 and 2008 Royalty Cases in preparation for filing this arbitration.[182]

41. Peru does not rebut Freeport's argument that Ms. Villanueva's initials on the work route of the resolution in the 2008 Royalty Case and the copy-pasting of that resolution in the 2006-2007 Royalty Case were insufficient to constitute constructive knowledge of due process violations.[183] Instead, Peru argues that Freeport and SMCV were not "sufficiently diligent in looking into the perceived procedural irregularities in a timely fashion" because the resolutions "should have prompted SMCV (or Claimant) to start inquiring into or investigating the supposed irregularities."[184] This argument also lacks merit. Peru's argument is just as absurd as its argument that the resolutions put SMCV on notice of the due process violations.[185] Peru cannot play hide and seek. It cannot, on the one hand, hide the due process violations from SMCV and, on the other hand, argue that SMCV should have sought out the due process violations sooner. Peru and Ms. Olano Silva went to great lengths to conceal that wrongful conduct from Freeport and SMCV. The Tax Tribunal did not disclose the egregious departures from the Tax Tribunal rules of procedure during the administrative process, nor when it notified SMCV of the resolutions in the 2006-2007 and 2008 Royalty Cases.[186] In this proceeding, Peru strenuously resisted disclosure of documents

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those events transpired after the cut-off date of February 28, 2017."); Counter-Memorial on the Merits and Memorial on Jurisdiction ¶ 454 (same).

179 Rejoinder on the Merits and Reply on Jurisdiction ¶ 757.

180 Rejoinder on the Merits and Reply on Jurisdiction ¶ 759.

181 *See* Reply and Counter-Memorial on Jurisdiction ¶ 236.

182 *See* Reply and Counter-Memorial on Jurisdiction ¶ 236.

183 *See* Reply and Counter-Memorial on Jurisdiction ¶ 237.

184 Rejoinder on the Merits and Reply on Jurisdiction ¶ 758.

185 *See* Rejoinder on the Merits and Reply on Jurisdiction ¶ 758.

186 *See, e.g.*, **Ex. CE-648**, Email from Úrsula Villanueva Arias to Zoraida Alicia Olano Silva (22 March 2013, 4:02 PM PET (confirming that President Olano Silva and Ms. Villanueva discussed preliminary conclusions on the 2008 Royalty Case before hearing); **Ex. CE-651**, Email from Zoraida Alicia Olano Silva to Carlos Hugo Moreano Valdivia (May 21, 2013, 10:47 AM PET) (Chamber No. 10's presiding vocal, Mr. Moreano Valdivia, sent an email to President Olano Silva saying that his chamber was "informed that Ursula Villanueva made a draft that was returned to Chamber 1"); **Ex. CE-652**, Email from Carlos Hugo Moreano Valdivia to Zoraida

concerning the procedural irregularities in the 2006-2007 and 2008 Royalty Cases, baselessly arguing that relevant documents that Peru designated as "secret" under Peruvian law were not subject to disclosure.[187] And then Peru produced *no documents* in response to the two requests for documents prepared, sent, or received by President Olano Silva and Ms. Villanueva concerning the 2006-2007 and 2008 Royalty Cases.[188] Thus, Peru's argument defies both the constructive knowledge standard and basic principles of fairness.

42. The applicable standard for constructive knowledge under Article 10.18.1 is one of *reasonable* prudence and diligence.[189] The resolutions alone do not reveal the flagrant violations at the core of Freeport's due process claims—that President Olano Silva intervened on the merits of the 2008 Royalty Case and that she was the reason Chamber No. 1 adopted a copy-paste version of the resolution in that case in the 2006-2007 Royalty Case. The irregularities on the face of the resolutions merely *confirm* those grave

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Alicia Olano Silva (22 May 2013 8:58 AM PET) (objecting to President Olano Silva's usurpation of Chamber No. 10's role and complaining about the lack of transparency surrounding the adoption of Chamber No. 1's resolution); **Ex. CE-650**, Email from Carlos Hugo Moreano Valdivia to Zoraida Alicia Olano Silva (21 May 2013, 10:05 AM PET) (noting that Chamber No. 1 and Chamber No. 10 "will coordinate"); **Ex. CE-653**, Email from Licette Isabel Zúñiga Dulanto to Zoraida Alicia Olano Silva (22 May 2013, 9:55 AM PET) ("As I spoke with Luis Cayo before the first session, they were in agreement to confirm and it seemed to us that the terms of the resolution were quite clear . . . so we agreed that after the session I would send them a copy of the draft to coordinate [the 2008 and 2006-2007 resolutions]."); **Ex. CE-654**, Email from Luis Gabriel Cayo Quispe to Zoraida Alicia Olano Silva and Licette Isabel Zuñiga Dulanto (24 May 2013, 8:31 AM PET) (President Olano Silva and Ms, Zuñiga called Mr. Cayo, vocal ponente of Chamber No. 10, to meet to discuss SMCV's case); **Ex. CE-655**, Email from Zoraida Alicia Olano Silva to Luis Gabriel Cayo Quispe and Licette Isabel Zuñiga Dulanto (24 May 2013, 10:23 AM PET) ("Do you have a file number 1889-2012 [the 2009 Royalty Case], which is also on the same subject?"); *see also* **CA-442**, Ministerial Resolution No. 626-2012-EF-43 (5 October 2012).

187 Procedural Order No. 2 (4 July 2022), Appendix 1, pp. 65, 71, 74, 82.

188 **Ex. CE-1116**, Claimant's Letter to Respondent dated 12 August 2022, p. 3 (noting that "[i]n its mandatory production of 25 July 2022, Respondent produced zero documents responsive to Document Requests No. 15 and 16"); **EX. CE-1117**, Respondent's Letter to Claimant dated 19 August 2022, p. 4 (claiming that "the documents it has produced [by 25 July 2022] are the entire set of responsive documents not already produced in the transparency proceedings that Respondent was able to locate").

189 *See* **RA-4**, *Grand River v. USA* Decision on Jurisdiction, ¶ 59 ("Constructive knowledge' of a fact is imputed to person if by *exercise of reasonable care or diligence*, the person would have known of that fact.") (emphasis added); *id*. ¶ 72 ("[A] *reasonable and prudent investor* in the position of the Claimants would not expect the state escrow laws or related actions to apply in connection with such on-reservation sales.") (emphasis added); **RA-2**, *Spence v. Costa Rica* Interim Award¶ 192 ("As regards the first category of properties, and indeed the second and third categories as well, the publication of both the MINAE Unglaube resolution and the Procuraduría Opinion, *evidently discoverable by a reasonable due diligence enquiry*, would, in the Tribunal's estimation, have alerted a prudent potential purchaser to the fact that the properties in question fell within the Park.") (emphasis added); **RA-8**, *Vanessa Ventures Ltd. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Decision on Jurisdiction (22 August 2008) (Stern, Brower, Lowe), ¶ 99 ("The Arbitral Tribunal considers that the purpose of such a statute of limitation provision is to require diligent prosecution of *known claims* and insuring that claims will be resolved when evidence is *reasonably available* and fresh, therefore to protect the potential debtor from late actions.") (emphasis added).

irregularities.[190] Therefore, SMCV cannot be expected to have investigated the due process violations when it received the resolutions in the 2006-2007 and 2008 Royalty Cases. Peru also argues that if the limitation periods run from "2019 or 2021, then Article 10.18.1 of the TPA would be rendered meaningless, since a claimant could easily overcome a limitations period by delaying the date of its investigation to a date that is clearly within the limitations period."[191] But this argument is circular. Freeport and SMCV did *not delay* any investigation because reasonable prudence and diligence did not compel an investigation.

iii. Freeport's Article 10.5 Claims Based on Peru's Failure to Waive Penalties and Interest Are Timely

43. ***Failure to Waive Penalties and Interest on the 2006-2007 and 2008 Royalty Assessments.*** In its Counter-Memorial on Jurisdiction, Freeport explained that Peru breached Article 10.5: (*i*) on 21 July 2017 when the Appellate Court notified SMCV of its decision arbitrarily and unreasonably refusing to consider *de novo* SMCV's entitlement to a waiver of penalties and interest on the 2006-2007 Royalty Assessments; and (*ii*) on 10 October 2017 when the Supreme Court notified SMCV of its decision arbitrarily and unreasonably refusing to consider *de novo* SMCV's entitlement to a waiver of penalties and interest on the 2008 Royalty Assessments.[192]

44. In the Reply on Jurisdiction,[193] Peru reprises its argument that Freeport's "true complaint" is SUNAT's "imposition" of penalties and interest when it notified SMCV of the 2006-2007 and 2008 Royalty Assessments on 18 August 2009 and 17 June 2010, respectively.[194] However, Freeport's claims challenge judicial acts, which support separate causes of action for breach of Article 10.5

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190 *See* **RA-45**, *Mercer v. Canada* Award, ¶ 6.21 ("As to constructive knowledge of such discriminatory treatment, the Tribunal does not consider that Celgar could have acquired sufficient knowledge before 30 April 2009 with the exercise of reasonable care and diligence. The Tribunal notes that relevant information regarding other pulp mills was not then publicly available.").

191 Rejoinder on the Merits and Reply on Jurisdiction ¶¶ 758-59 ("[U]nder Claimant's theory, the limitations period may not even be triggered if Claimant has not yet started to investigate the facts of which they were aware.").

192 Reply and Counter-Memorial on Jurisdiction ¶ 239 (citing Memorial ¶¶ 230, 233, 427, Table B); *see also* **Ex. CE-153**, Supreme Court, Decision No. 5212-2016, 2008 Royalty Assessment (18 August 2017), ¶ 46; *see also id*. ¶¶ 45-50; **Ex. CE-739**, Supreme Court, Decision, No. 18174-2017, 2006/07 Royalty Assessments (20 November 2018), p. 34, ¶ 29.

193 Peru still does not challenge the timeliness of Freeport's claims for Peru's failure to waive penalties and interest on the Tax Assessments, instead relying on its argument that those claims are barred by the tax exclusion in Article 22.3.1 of the TPA. Rejoinder on the Merits and Reply on Jurisdiction ¶ 763; Counter-Memorial on the Merits and Memorial on Jurisdiction ¶¶ 455-58, 463. Freeport addresses Peru's objections based on Article 22.3.1 separately in Section 2.D.

194 Rejoinder on the Merits and Reply on Jurisdiction ¶ 768 (emphasis omitted); *see also* Memorial, Annex A (listing notification dates).

independent from Peru's failures to waive the penalties and interest at the administrative level.[195] Even Peru now concedes the timeliness of Freeport's Article 10.5 claim based on the Appellate Court's 21 July 2017 notification of its decision refusing to waive the penalties and interest on the 2006-2007 Royalty Assessments.[196] That concession makes Peru's time-bar objection to Freeport's Article 10.5 claim based on the Supreme Court's 10 October 2017 notification of its decision refusing to waive the penalties and interest on the 2008 Royalty Assessments totally inexplicable. That Supreme Court decision post-dates the Appellate Court's decision in the 2006-2007 Royalty Case and was likewise rendered after the 28 February 2017 cut-off date.

45. ***Failure to Waive Penalties and Interest on the 2009, 2010-2011, 2011/Q4, 2012, 2013 Royalty Assessments and the Tax Assessments.*** As Freeport explained in the Counter-Memorial on Jurisdiction and the Memorial, Peru's breaches for failure to waive penalties and interest on the remaining assessments occurred when each assessment of penalties and interest became final and enforceable.[197] In the Memorial on Jurisdiction, Peru argued that Freeport knew or should have known of all of the Government's breaches for failure to waive penalties and interest on the Royalty Assessments on 22 April 2010, when SUNAT's Claims Division notified SMCV of its resolution rejecting SMCV's Request for Reconsideration of the 2006-2007 Royalty Assessment.[198] In the Reply on Jurisdiction, Peru still argues that Freeport should have known about the subsequent decisions not to waive penalties and interest and the loss incurred long before those decisions were made because "SUNAT's decisions in rejecting SMCV's . . . request[s] to waive penalties and interest are undoubtedly a series of similar and related government acts."[199] However, Peru now appears to argue that the limitation period commenced either on 25 April 2016 when the first-instance Contentious Administrative Court notified SMCV of its decision in the 2006-2007 Royalty Case or on 9 February 2016, when the first-instance Contentious Administrative Court notified SMCV of its decision in the 2008 Royalty Case.[200] Peru's argument makes no sense. It is inexplicably inconsistent with Peru's concession that Freeport's Article 10.5 claim based on the failure to waive penalties and interest on the 2006-2007 Royalty Assessments is timely because the limitation period runs from the

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195 Reply and Counter-Memorial on Jurisdiction ¶ 239 (citing **RA-7**, *Apotex v. USA* Award on Jurisdiction and Admissibility, ¶¶ 333-34 (finding that claims based on "judicial decisions" and "prior administrative and judicial decisions" present separate breaches and losses because they are "two types of claim [that] are clearly analytically distinct")).

196 Rejoinder on the Merits and Reply on Jurisdiction ¶ 694 n. 1395.

197 Reply and Counter-Memorial on Jurisdiction ¶ 240; Memorial ¶ 427, Table B.

198 Counter-Memorial on the Merits and Memorial on Jurisdiction ¶ 459.

199 Rejoinder on the Merits and Reply on Jurisdiction ¶¶ 765, 768.

200 Rejoinder on the Merits and Reply on Jurisdiction ¶ 768.

date of the Appellate Court's decision.[201] In any event, for the reasons set forth above and Sections III.A.1.iii and III.A.2.iii of the Counter-Memorial on Jurisdiction, there is no merit to Peru's argument that all of the breaches of Article 10.5 that Freeport alleges for failure to waive penalties and interest on the Royalty Assessments are a single breach, with a single limitation period.

iv. Freeport's Article 10.5 Claims Based on Peru's Failure to Reimburse GEM Payments Are Timely

46. The Parties still agree that Freeport's claims for breach of Article 10.5 of TPA based on Peru's failure to reimburse SMCV for Q4 2012 to Q4 2013 GEM payments are timely because Peru's denial of SMCV GEM reimbursement request occurred on 22 March 2019.[202]

B. ARTICLE 10.18.4 DOES NOT APPLY BECAUSE SMCV DID NOT SUBMIT CLAIMS FOR BREACHES OF THE STABILITY AGREEMENT TO A PERUVIAN ADMINISTRATIVE TRIBUNAL OR TO ANY OTHER BINDING DISPUTE SETTLEMENT PROCEDURE

47. To start with, Peru's Article 10.18.4 objections from the Memorial on Jurisdiction to Freeport's claims for breaches of the Stability Agreement based on Assessments that SMCV challenged in the administrative process fail because SMCV could not have taken the fork-in-the-road for breaches of the Stability Agreement that had not yet occurred. As set forth above in Section II.A.1, each of the breaches of the Stability Agreement that Freeport alleges in this arbitration occurred when the Assessments became final and enforceable at the conclusion of the administrative process. When SMCV challenged SUNAT's assessments before the SUNAT Claims Division and the Tax Tribunal, the assessments had not yet become final and enforceable, and no breach had yet occurred. As a result, SMCV could not have taken the fork-in-the-road for breaches of the Stability Agreement that had not yet occurred. In any event, Peru's objections also because SMCV did not submit breaches of the Stability Agreement to SUNAT's Claims Division and the Tax Tribunal and those bodies do not provide an alternative to arbitration under Article 10.18.4. That leaves before the Tribunal only Peru's new argument from the Reply on Jurisdiction that Article 10.18.4 allegedly bars *all* of Freeport's Stability Agreement claims because they share a "fundamental basis" with SMCV's administrative law claims before the Contentious Administrative Courts in the 2006-2007 and 2008 Royalty Cases. That argument also fails for the reasons set forth below.

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201 Rejoinder on the Merits and Reply on Jurisdiction ¶ 768.

202 *See* Rejoinder on the Merits and Reply on Jurisdiction ¶ 769; Counter-Memorial on the Merits and Memorial on Jurisdiction ¶ 464.

48. As Freeport explained in the Counter-Memorial on Jurisdiction, Article 10.18.4 does not bar Freeport's claims for breaches of the Stability Agreement because SMCV did not submit "the same alleged breach[es]," of the Stability Agreement to an "administrative tribunal or court of the respondent, or to any other dispute settlement procedure."[203] Rather, SMCV submitted Peruvian administrative law challenges to two agencies of the MEF—SUNAT's Claims Division and the Tax Tribunal.[204]

49. In its Reply on Jurisdiction, Peru maintains its argument that Article 10.18.4 bars Freeport's claims for breaches of the Stability Agreement that are based on assessments that SMCV challenged before SUNAT's Claims Division or the Tax Tribunal—*i.e.*, all of Freeport's claims for breaches of the Stability Agreement, except those "based on the 2013 Income Tax and Additional Income Tax Assessments, and the 2012 Temporary Tax on Net Assets Assessments."[205] Peru argues that those claims are barred because they "rest on the same fundamental basis" as the administrative law challenges before SUNAT's Claims Division and the Tax Tribunal, which Peru argues are "administrative tribunal[s]" and "binding dispute settlement procedure[s]" under the TPA.[206] In its Reply on Jurisdiction, Peru further expands its objection by arguing that even if SUNAT's Claims Division and the Tax Tribunal are not "administrative tribunal[s]" or "binding dispute settlement procedure[s]" under the TPA, *all* of Freeport's Stability Agreement claims are barred because they share the same "fundamental basis" as SMCV's claims before the contentious administrative courts in the 2006-2007 and 2008 Royalty Cases—even though Freeport does not submit claims for breach of the Stability Agreement based on the 2006-2007 and 2008 Royalty Assessments.[207]

50. Remarkably, Peru does not deny that its interpretation of Article 10.18.4 would require an investor to file for arbitration before the Government has the opportunity to reconsider and, if appropriate, correct a SUNAT assessment at the administrative level.[208] Instead, Peru argues that achieving this absurd result is the object and purpose of Article 10.18.4.[209] Nor does Peru deny that its interpretation would leave

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203 *See* Reply and Counter-Memorial on Jurisdiction § III.B; Memorial ¶ 357 (citing **CA-10**, TPA, Article 10.18.4).

204 *See* Reply and Counter-Memorial on Jurisdiction ¶¶ 248, 261; Claimant's Memorial ¶ 357.

205 *See* Rejoinder on the Merits and Reply on Jurisdiction ¶ 804, n.1755; Counter-Memorial on the Merits and Memorial on Jurisdiction ¶¶ 496-97 (same).

206 Rejoinder on the Merits and Reply on Jurisdiction ¶ 802; *see also id.* ¶¶ 825-31; Counter-Memorial on the Merits and Memorial on Jurisdiction ¶¶ 501-03, 516, 518.

207 *See* Rejoinder on the Merits and Reply on Jurisdiction ¶¶ 803-04, n.1755; *id.* ¶¶ 849-51.

208 *See* Reply and Counter-Memorial on Jurisdiction ¶ 245.

209 Rejoinder on the Merits and Reply on Jurisdiction ¶ 837 ("Claimant argues that Perú's interpretation of Article 10.18.4 would lead to an 'absurd result' where the investor would forgo the opportunity to request reconsideration of an administrative act in local proceedings, and the government would be deprived of the opportunity to correct that act. Claimant gravely misunderstands the objective of a fork-in-the-road provision like Article 10.18.4 and the way it is intended to operate . . . . [T]he purpose of fork-in-the-road provisions,

an investor with only 20 days after receiving a SUNAT assessment to decide whether to ask SUNAT to reconsider the assessment or commence investment treaty arbitration.[210] Instead, Peru claims that it is "frivolous at best" to argue that this is an unreasonable result.[211] Yet, that result would render completely artificial the "choice" between alternative fora that Peru recognizes is at the core of Article 10.18.4.[212]

51. Nothing in the Reply on Jurisdiction justifies Peru's untenable reading of Article 10.18.4. *First*, by its plain terms, Article 10.18.4 does not apply because SMCV did not previously submit a "claim" for any of the "the same alleged breach[es]" of the Stability Agreement that Freeport submits here.[213] Moreover, Peru still admits that "SMCV's claims before SUNAT's Claims Division and the Tax Tribunal were administrative challenges to the validity of SUNAT's assessments" and not breach of contract claims.[214] This alone is fatal to Peru's objection. There is no support for abandoning the express terms of Article 10.18.4 in favor of Peru's vague "fundamental basis" test.

52. *Second*, Peru's argument fails on the independent ground that neither proceedings before SUNAT's Claims Division nor the Tax Tribunal qualify as proceedings before "an administrative tribunal" or "binding dispute settlement procedures" under Article 10.18.4 of the TPA. Peru again does not deny that neither of these agencies of the MEF are competent to resolve claims for breach of an investment agreement,

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particularly those that contain the irrevocable-choice rule like Article 10.18.4, is to require a claimant to choose only one forum to resolve its dispute to the exclusion of all others.") (emphasis omitted).

210 *See* Reply and Counter-Memorial on Jurisdiction ¶ 245 (citing **CA-14**, Tax Code, Article 137); **CER-8**, Hernández II ¶ 113.

211 Rejoinder on the Merits and Reply on Jurisdiction ¶ 838.

212 *See, e.g.*, Rejoinder on the Merits and Reply on Jurisdiction ¶ 837 ("[T]he purpose of fork-in-the-road provisions, particularly those that contain the irrevocable-choice rule like Article 10.18.4, is to require a claimant to *choose* only *one* forum to resolve its dispute to the *exclusion of all others*.") (emphasis in original). *See also* **CA-108**, *Occidental Exploration & Production Co. v. Ecuador*, LCIA Case No. UN3467, Award (1 July 2004) (Orrego Vicuña, Brower, Sweeney), ¶¶ 60-61 ("The 'fork in the road' mechanism by its very definition assumes that the investor has made a choice between alternative avenues. . . the Ecuadorian Tax Law requires the taxpayer to apply to the courts within the brief period of twenty days . . . [before] the resolution becomes final and binding. The Tribunal is of the view that in this case the investor did not have a real choice. Even if it took the matter instantly to arbitration, . . . the protection of its right to object to the adverse decision . . . would have been considered forfeited if the application before the local courts were not made within the period mandated by the Tax Code."); **CA-400**, Hanno Wehland, The Coordination of Multiple Proceedings in Investment Treaty Arbitration, p. 93-94 § 3.141 (OUP 2013) (recognizing investment treaty authorities hold that fork-in-the-road provisions are not intended to put investors "in a position where they would have to exercise their choice in favour of one or the other option in the face of rigid deadlines and looming immediate disadvantages").

213 **Ex. CA-10**, TPA, Article 10.18.4. *See also* Reply and Counter-Memorial on Jurisdiction ¶ 246.

214 Rejoinder on the Merits and Reply on Jurisdiction ¶ 825. *See also* Counter-Memorial on the Merits and Memorial on Jurisdiction ¶ 505 ("SMCV's claims before SUNAT's Claims Division and the Tax Tribunal were *indeed administrative challenges* to the validity of SUNAT's assessments under the Mining Law and Regulations . . . .") (emphasis added).

rendering them incapable of providing an alternative to arbitration or court proceedings.[215] Moreover, the TPA expressly contemplates that an "administrative tribunal" is a body that is independent from the administrative-level decision maker and reviews final administrative acts—qualities that neither SUNAT's Claims Division nor the Tax Tribunal possess.[216]

1. Article 10.18.4 Does Not Apply Because SMCV Did Not Previously Submit Claims for Breaches of the Stability Agreement for Adjudication

53. As Freeport has explained, by its plain terms, Article 10.18.4 only applies to Freeport's claims for breach of the Stability Agreement if "the claimant or the enterprise . . . has previously *submitted* the *same alleged breach[es]*" for adjudication.[217] In the Reply on Jurisdiction, Peru fails to escape the fatal implications of its concession that SMCV never submitted claims for breaches of the Stability Agreement in any forum by arguing that "the record is clear that SMCV alleged that SUNAT's Assessments violated the Stabilization Agreement before the Tax Tribunal and SUNAT's Claims Division."[218] The fact remains that, by its plain terms, Article 10.18.4 does not apply because SMCV "submitted" claims based on Peruvian administrative law not claims for breaches of the Stability Agreement.[219] Peru's objection fails for this reason alone.

54. Yet, Peru still insists that Article 10.18.4 must be interpreted according to a vague "fundamental basis" test, which Peru essentially argues is an inquiry into whether there are sufficient similarities between the "alleged breach[es]" in the arbitration and the "alleged breach[es]" that the claimant or its enterprise previously submitted.[220] Peru also maintains its alternative argument that if the Tribunal rejects the "fundamental basis" test, it should apply the triple-identity test, which Peru maintains is met here.[221] Peru's interpretation of Article 10.18.4 finds no support in the text, object, or purpose of Article 10.18.4 and is inconsistent with investment treaty jurisprudence and the intent of the TPA parties.

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215 *See* Rejoinder on the Merits and Reply on Jurisdiction ¶ 825 (describing "SMCV's claims before SUNAT's Claims Division and the Tax Tribunal" as "administrative challenges to the validity of SUNAT's assessments").

216 *See* Reply and Counter-Memorial on Jurisdiction ¶¶ 258-61 (citing **Ex. CA-10**, TPA, Article 19.5.1).

217 **Ex. CA-10**, TPA, Article 10.18.4 (emphasis added). *See* Reply and Counter-Memorial on Jurisdiction ¶¶ 246, 248, 251.

218 Respondent's Rejoinder on the Merits and Reply on Jurisdiction ¶ 836.

219 *See* **Ex. CA-10**, TPA, Article 10.18.4.

220 *See* Rejoinder on the Merits and Reply on Jurisdiction ¶¶ 826-30; Counter-Memorial on the Merits and Memorial on Jurisdiction ¶¶ 505, 514-16.

221 Rejoinder on the Merits and Reply on Jurisdiction ¶ 840; Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction ¶ 507.

55. *First*, Peru's argument remains totally detached from the plain terms of Article 10.18.4. Despite claiming that its interpretation is "wholly consistent with the text of Article 10.18.4,"[222] Peru makes no textual arguments in support of that interpretation. Instead, Peru offers various formulations of the "fundamental basis" test, none of which find textual support in Article 10.18.4.[223] Nor does the triple-identity test, which is not met here for the reasons set forth in Section II.B.1 of the Memorial on Jurisdiction.

56. Moreover, Peru affirmatively rejects any kind of textual interpretation of Article 10.18.4. As Freeport explained in the Counter-Memorial on Jurisdiction, contrasting Article 10.18.4 with the waiver provision under Article 10.18.2—which refers to "any proceeding with respect to any measure alleged to constitute a breach,"—shows that Article 10.18.4 is narrowly limited to previous claims for the "same alleged breach."[224] Reading the broader terms of Article 10.18.2 into Article 10.18.4, as Peru effectively does, renders the waiver requirement in Article 10.18.2 meaningless.[225] Unable to rebut this argument, Peru claims that "[b]ecause the purposes and the coverage of Articles 10.18.4 and 10.18.2 are different, Article 10.18.2 cannot be used to inform the coverage of Article 10.18.4."[226] But under basic rules of treaty interpretation, other TPA provisions with different purposes and coverage provide important context for interpreting Article 10.18.4.[227] Peru's interpretation cannot be right, not only because it fails to distinguish between the types of "coverage" expressly provided by Article 10.18.4 and Article 10.18.2, but also because it would render meaningless the Article 10.18.2 requirement to waive the right to continue proceedings "with respect to any measure alleged to constitute a breach."[228] If, as Peru argues, an investor was precluded from submitting a claim for breach of an investment agreement for international arbitration because it had

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222 Rejoinder on the Merits and Reply on Jurisdiction ¶ 834.

223 *See* Rejoinder on the Merits and Reply on Jurisdiction ¶ 825 ("SMCV's claims . . . rested . . . on the exact same legal argument and the exact same claimed legal right."); *id.* ¶ 826 ("Two claims have the same fundamental basis if resolving the arbitration claim requires the arbitral tribunal to reach and resolve the same underlying dispute at issue."); *id.* ¶ 828 (arguing that Article 10.18.4 applies if the "complaints and the underlying legal question are the same" and the "parallels between the claims . . . are undeniable"); *id.* ¶ 829 (arguing that Article 10.18.4 applies if the Tribunal "would have to engage in the same legal exercise already completed (repeatedly) by SUNAT's Claims Division and the Tax Tribunal"); *id.* ¶ 830 (arguing that Article 10.18.4 applies if the two claims do "not have 'an autonomous existence'"); *id.* ¶ 849 (arguing that Article 10.18.4 applies if the previous claims are "regarding the same alleged breaches" in the arbitration); *id.* ¶ 851 (arguing that Article 10.18.4 applies if the "essence" of the claims is "the same").

224 Reply and Counter-Memorial on Jurisdiction ¶ 251.

225 *See* Reply and Counter-Memorial on Jurisdiction ¶ 251.

226 Rejoinder on the Merits and Reply on Jurisdiction ¶ 839.

227 *See* **CA-49**, Vienna Convention on the Law of Treaties (23 May 1969), Article 31(1)-(2) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to *the terms of the treaty in their context* . . . . The context for the purpose of the interpretation of a treaty shall comprise . . . the text," *inter alia*) (emphasis added).

228 **CA-10**, TPA, Articles 10.18.2, 10.18.4.

previously submitted a claim with respect to the measure alleged to constitute the breach, it would be unnecessary to require the investor to waive its right to continue proceedings with respect to that measure because the existence of any such proceedings would preclude the investor from submitting the claim for breach of the investment agreement for international arbitration in the first place. It is plainly Peru's argument, not Freeport's argument, that contravenes the *effet utile* principle that Peru invokes.[229]

57. *Second*, Peru's argument is inconsistent with the object and purpose of the TPA. Peru fundamentally misunderstands recourse to "object and purpose" in treaty interpretation. Article 10.18.4 must be read in a manner that is consistent with the object and purpose of the TPA, not the object and purpose of fork-in-the-road provisions in *different treaties* or in academic writings as Peru argues.[230] Citing *Pantechniki v. Albania*, *H&H Enterprises v. Egypt, Supervisión y Control v. Costa Rica*, and *Hassan Awdi v. Romania*, Peru argues that "[t]he intended purpose and effect of a fork-in-the-road provision . . . is to prevent the *same dispute* or controversy from being litigated more than once."[231] Perhaps that is the object and purpose of the provisions in the treaties the tribunals interpreted in those cases, which expressly applied to the same "dispute."[232] But it is not the object and purpose of Article 10.18.4 of the TPA, which applies to the "same alleged breach." Moreover, even if academic writings were instructive in determining the object

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229 *Contra* Rejoinder on the Merits and Reply on Jurisdiction ¶ 834.

230 *See* **CA-49**, Vienna Convention on the Law of Treaties (23 May 1969), Article 31(1) ("*A treaty shall be interpreted* in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and *in the light of its object and purpose*.") (emphasis added).

231 Rejoinder on the Merits and Reply on Jurisdiction ¶ 834 (emphasis added) (citing **RA-12**, *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award (30 July 2009) (Paulsson), ¶ 61; **RA-13**, *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, ICSID Case No.ARB/09/15, Award (6 May 2014) (Gharavi, Heiskanen, Cremades), ¶ 367; **RA-17**, *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award (2 March 2015) (Gharavi, Dolzer, Bernardini), ¶ 203; **CA-228**, *Supervision y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award (18 January 2017) (Romero, Klock, Wobeser), ¶ 310).

232 *See* **RA-12**, *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, Award, ¶ 53 (interpreting Article 10(2) of the Albania-Greece BIT which provides that an investor "may submit *the dispute* either to the competent court of the Contracting Party, or to an international arbitration tribunal") (emphasis added); **RA-13**, *H&H Enterprises v. Egypt*, Award, ¶ 362 (interpreting Article VII(3)(a) of the US-Egypt BIT which states that an investor may submit a dispute for international arbitration if it "has not brought *the dispute* before the courts of justice or administrative tribunals or agencies of competent jurisdiction of the Party that is a Party to the dispute") (emphasis added); **RA-17**, *Hassan Awdi v. Romania*, ICSID Case No. ARB/10/13, Award, ¶ 203 (quoting Article VI(2)(a) of the Romania U.S. BIT which requires "that the investor has not 'submitted the *dispute* for resolution' before the court of the State that is a party to the dispute.") (emphasis added); **CA-228**, *Supervision y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award, ¶ 135 (interpreting Article XI.3 of the Spain-Costa Rica BIT which states, "[i]f the investor has submitted *the dispute* to a competent court of the Party in whose territory the investment was made, it may, in addition, resort to the arbitral tribunals referred to in this article, if such national court has not issued a judgment. In the latter case, the investor shall adopt any measures that are required for the purpose of permanently desisting from the court case then underway") (emphasis added). *See also* Reply and Counter-Memorial on Jurisdiction ¶ 254.

and purpose of Article 10.18.4, the article on which Peru relies *does not* support the application of the fundamental test, noting that it "is simply too vague to ensure legal certainty."[233]

58. *Third*, Peru's interpretation is inconsistent with the intent of the TPA parties as evidenced by the negotiating history and the testimony of representatives of both the Peruvian and U.S. delegations. Peru argues that resort to the TPA's preparatory work is "impermissible" because it is clear that the ordinary meaning of the "same alleged breach" is the "same fundamental basis."[234] But the ordinary meaning of the "same alleged breach" is clearly the "same alleged breach."[235] Moreover, the VCLT plainly authorizes the Tribunal to make "[r]ecourse . . . to . . . the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning" of Article 10.18.4, irrespective of whether Article 10.18.4 is unclear.[236] So, contrary to Peru's argument, the Tribunal should carefully consider the testimony of "Mr. Sampliner, and Mr. Herrera that, in negotiating the TPA, the United States sought broad access to dispute settlement for alleged breaches of an investment agreement, and that the understanding of the TPA parties was that Article 10.18.4 would apply only to the previous submission of the 'same alleged breach.'"[237] Unlike the inapposite authorities Peru cites, the *unrebutted* testimony of Mr. Sampliner and Mr. Herrera is actually evidence of the purpose the TPA parties intended Article 10.18.4 to serve.

59. Despite grossly misrepresenting the documents in the negotiation record, Peru does nothing to undermine Mr. Sampliner's and Mr. Herrera's testimony, or the documentary record, showing that Article

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233 **RA-16**, Markus A. Petsche, *The Fork in the Road Revisited: An Attempt to Overcome the Clash Between Formalistic and Pragmatic Approaches*, 18 WASH. U. GLOBAL STUD. L. REV. 391, 427 (2019). *See also id*. at p. 394 (noting that commentators "have also (and rightly so) pointed out that the fundamental-basis test is vague and that it does not therefore ensure a high degree of legal certainty and predictability"); *id*. at p. 402 ("As has already been mentioned, *arbitral practice has shown a strong preference for a formalistic approach requiring strict identity* of some or all relevant features.") (emphasis added); *id*. at p. 426 (noting that where, as is the case here, "the nature of the relief requested is dissimilar (for example, an annulment of a particular measure by the competent administrative court versus a request for compensation for the loss suffered as a result of the application of the said measure), no risk of overcompensation exists"); *id*. at p. 427 (noting that the fundamental basis test "fails to acknowledge the relevance of the relief requested in the proceedings concerned.").

234 Rejoinder on the Merits and Reply on Jurisdiction ¶ 841.

235 **CA-10**, TPA, Article 10.18.4.

236 **CA-49**, Vienna Convention on the Law of Treaties (23 May 1969), Article 32 ("Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, *or* to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.") (emphasis added). *See also* **CA-251,** *ESPF Beteiligungs GmbH et al. v. Italy*, ICSID Case No. ARB/16/5, Award, (14 September 2020) (Pryles, Boisson de Chazournes, Alvarez), ¶ 750 ("Article 32 of the VCLT permits recourse to supplementary means of interpretation in order to confirm the meaning derived by application of Article 31 *or* to resolve an ambiguity") (emphasis added).

237 Rejoinder on the Merits and Reply on Jurisdiction ¶ 841.

10.18.4 is the product of a compromise between the U.S. and Peruvian delegation based on the clear understanding that Article 10.18.4 would apply only if an investor had previously submitted "the same alleged breach" for adjudication.[238] Nothing in the negotiation record shows that the TPA parties intended Article 10.18.4 to apply beyond its express terms, much less to any claims sharing the "same fundamental basis."[239]

(a) Peru misrepresents Mr. Herrera's and Mr. Sampliner's testimony and the documentary record of the TPA negotiations when it argues that the documents do not show the TPA parties' shared intent regarding Article 10.18.4.[240] As both Mr. Sampliner and Mr. Herrera explained, the U.S. sought broad access to ISDS for investment agreement claims throughout the negotiations.[241] Mr. Herrera cited numerous TPA drafts supporting his testimony that the Andean States, including Peru, initially opposed allowing claims for breach of an investment agreement and maintained a proposal for an exclusive forum selection clause applying to a previous "claim of a breach of the disciplines contained under Section A."[242] As both Mr. Sampliner and Mr. Herrera explained, the U.S. rejected the

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238 *See* **CER-11**, Sampliner, ¶ 35 ("By 'same alleged breach,' we meant exactly that—an identical claim for breach of an investment agreement . . . . I do not recall the Peruvian delegation expressing a contrary interpretation of the U.S. proposal."). *See also* **CWS-12**, Herrera ¶ 28 (explaining the compromise reached by reference to the negotiation record).

239 Reply and Counter-Memorial on Jurisdiction ¶¶ 250-52. *But see* Rejoinder on the Merits and Reply on Jurisdiction ¶¶ 826, 847.

240 Rejoinder on the Merits and Reply on Jurisdiction ¶ 843(a) (arguing that the "drafts that Mr. Herrera cites do not indicate Perú's intent or understanding of Article 10.18.4"); *id*. (arguing that the November 2004 draft of the TPA is "substantially different" from the final text of Article 10.18.4) (citing **Ex. CE-1064**, U.S.-Andean FTA Draft (23 November 2004), pp. 18-19; **Ex. CE-1083**, U.S.-Andean FTA Draft (12 December 2005), pp. 16-17); *id*. ¶ 843(b)) (arguing that negotiation summary does "not indicate that Perú intended Article 10.18.4 to bar claims only if they alleged the exact same breach") (citing **Ex. CE-1077**, Round X Summary (Guayaquil, 6-10 June 2005), p. 22); *id*. ¶ 843(c) (arguing that the negotiation record does not "indicate that the Peruvian delegation understood that Article 10.18.4 bars only claims of 'identical' breaches of an investment agreement") (citing **Ex. CE-1067**, Email from D. Weiner to C. Herrera, (14 January 2005); **Ex. CE-1075**, Email from David Weiner to Carlos Herrera et. al, (12 May 2005); **Ex. CE-1080**, Email from David Weiner to Carlos Herrera et. al., (9 November 2005)).

241 *See* **CER-11**, Sampliner I, ¶¶ 26, 28-29, 32, 45; **CWS-12**, Herrera I, ¶ 26 ("Throughout the negotiations, the U.S. team sought broad access to the Investment Chapter's dispute settlement mechanism including for breach of investment agreement claims.") (citing **Ex. CE-1080**, Email from David Weiner to Carlos Herrera *et. al*. (9November 2005); **CWS-22**, Herrera II, ¶ 10 ("The U.S. supported broad access to dispute settlement, including for breach of investment agreement claims."); **CER-14**, Sampliner II, ¶¶ 15-16 (explaining the "intention of the interagency group and the U.S. team negotiating the TPA to provide broad access to dispute settlement under the TPA for investment agreement claims that an investor or an enterprise owned or controlled by an investor would otherwise have to submit in domestic courts.").

242 *See* **CWS-12**, Herrera I, ¶¶ 27-28 (citing **Ex. CE-1064**, U.S.-Andean FTA Draft (23 November 2004), pp. 18-19 ("When an investor opts for a dispute settlement mechanism to submit a claim of a breach of the disciplines contained under Section A, such option shall be understood as excluding and definitive.")); **Ex. CE-1066**, U.S.-

Andean proposal for exclusive forum selection because it was too broad, and ultimately proposed what became Article 10.18.4. and Annex 10-G of the TPA, provided that those provisions would only apply to the "same alleged breach."[243] Peru ultimately accepted that proposal.[244]

(b) Peru's reliance on the MEF's "Opinion on the Free Trade Agreement with the United States of America," is particularly misplaced.[245] The "no U-turn" reference in the passage that Peru cites makes it clear that the passage refers to Article 10.18.2, not 10.18.4.[246]

(c) The United States submission in *Latam Hydro v. Peru* does not support Peru's interpretation.[247] There is no dispute that Article 10.18.4 "underscore[s] the Parties' intent

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Andean FTA Draft (14 January 2005), pp. 18-19 (same); **Ex. CE-1068**, U.S.-Andean FTA Draft (21 January 2005), p. 17; **Ex. CE-1070**, U.S.-Andean FTA Draft (31 January 2005), pp. 17-18 (same); **Ex. CE-1072**, U.S.-Andean FTA Draft (16 February 2005), p. 17 (same). *See also* **CER-11**, Sampliner I, ¶¶ 32-34 (citing **Ex. CE-1073**, MINCETUR, Round VIII Summary (Washington, 14-18 March 2005), p. 14 ("[A]ll three Andean countries confirmed their position to the effect that the election of forum made by the investor to submit the controversy should be exclusive both in cases of direct violation of the disciplines contained in Section A. . . . The Andean countries agreed that only cases of non-compliance with investment agreements that constituted violations of the disciplines contained in Section A should be the subject of lawsuits under the Investor - State mechanism contemplated by the chapter.").

243 *See* **CER-11**, Sampliner I, ¶ 34; **CWS-12**, Herrera I, ¶ 28 (citing **Ex. CE-1083**, U.S.-Andean FTA Draft (12 December 2005), pp. 16-17, 40). *See also* **CER-14**, Sampliner II, ¶¶ 7-9 ("When the U.S. proposed Article 10.18.4 and Annex 10-G to the Peruvian team . . . we explained that Article 10.18.4 only applied to the "*same alleged breach*;" identical causes of action for identical breaches of identical obligations. ") (emphasis in original); **CWS-22**, Herrera II, ¶ 11(a)("The U.S. eventually shared the proposed text for the provisions that would become Article 10.18.4 and Annex 10-G of the TPA.").

244 *See* **CER-14**, Sampliner II, ¶ 9 ("When the U.S. proposed Article 10.18.4 and Annex 10-G to the Peruvian team . . . we explained that Article 10.18.4 only applied to the "*same alleged breach*;" identical causes of action for identical breaches of identical obligations. The TPA parties adopted Article 10.18.4 based on this clear understanding.") (emphasis in original); **CWS-22**, Herrera II, ¶ 11.

245 Rejoinder on the Merits and Reply on Jurisdiction ¶ 845 (citing **Ex. RE-336**, MEF, Report No. 2006-EF/67, "Opinion on the Free Trade Agreement with the United States of America," (16 June 2006), p. 16 ("[I]t should be noted that the [investment] chapter includes the requirement for the investor to opt, from the outset and in an exclusionary and definitive manner, for a forum for the resolution of the particular dispute (no "U-turn" from one forum to another).").

246 **Ex. RE-336**, MEF, Report No. 2006-EF/67, "Opinion on the Free Trade Agreement with the United States of America," (16 June 2006), p. 16. *See also* **CWS-22**, Herrera II, ¶ 10(a) ("[F]rom the outset, the U.S. negotiating team introduced a waiver provision, or as the U.S. coined the term, a 'no U-turn' provision"); **CER-11**, Sampliner I, ¶ 36 ("The intended scope of Article 10.18.4 is reflected when it is contrasted to the 'no U-turn' waiver language in Article 10.18.2.").

247 Rejoinder on the Merits and Reply on Jurisdiction ¶ 844 (citing **RA-174**, *Latam Hydro LLC, CH Mamacocha S.R.L. v. Republic of Peru*, ICSID Case No. ARB/19/28, Submission of the United States of America (19 November 2021), n.10).

to avoid issues of potentially inconsistent decisions and double recovery."[248] Article 10.18.4 promotes the parties' intent by precluding claims for the "same alleged breach," not claims with the "same fundamental basis."[249]

60. *Fourth*, Peru fails to distinguish the decisions of the tribunals in *Corona Materials*, *Nissan*, and *Kappes*, each of which declined to expand fork-in-the-road provisions beyond their express terms to embrace a "fundamental basis," "triple identity," or "same dispute" standard.[250] Peru argues that these decisions are distinguishable because they concerned the "difference between an alleged breach of the applicable investment treaty . . . and an alleged breach of domestic law, which is entirely different than the issue relevant in this case, where both claims of breach arise under the same contract."[251] Yet, Peru provides no explanation for why treaty provisions narrowly drawn to only preclude the successive submission of the same alleged treaty breaches should be respected but provisions narrowly drawn to only preclude the successive submission of the same alleged breaches of an investment agreement should not. Peru ignores the distinction between different causes of action in Article 10.18.4, which Peruvian law embraces.[252] Peru's arguments are wrong in fact and law.

(a) SMCV's challenges before SUNAT's Claims Division and the Tax Tribunal did not "arise under" the Stability Agreement, they arose under Peruvian administrative law.[253]

(b) As Freeport has explained, precisely because of the Peruvian law distinction between contract and administrative law causes of action, SUNAT's Claims Division or the Tax

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248 **RA-174**, *Latam Hydro LLC, CH Mamacocha S.R.L. v. Republic of Peru*, ICSID Case No. ARB/19/28, Submission of the United States of America (19 November 2021), n.10.

249 *See* **CER-14**, Sampliner II, ¶ 10 ("I see nothing in the U.S. submission that supports Peru's argument that the TPA parties intended Article 10.18.4 to apply more broadly to 'the same dispute.').

250 Rejoinder on the Merits and Reply on Jurisdiction ¶ 833. *See* Reply and Counter-Memorial on Jurisdiction ¶ 253.

251 Rejoinder on the Merits and Reply on Jurisdiction ¶ 833.

252 *See* **RER-6**, Eguiguren II, ¶ 105 ("It is evident that a contentious administrative proceeding and a civil proceeding are different" and the relevant "competent jurisdictional body hears proceedings of different types and causes of action"); *id.* ¶ 123 ("SMCV could also have appealed simultaneous with or subsequent to the contentious administrative proceeding with a civil proceeding in order to question matters linked to the interpretation of the contractual provisions, its compliance or its performance."); **RER-8**, Bravo and Picón II, ¶ 263 ("[T]he sphere of contractual disputes is one thing, and the one deriving from breaches of legal obligations, as in the case of mining taxes and royalties, is quite another.").

253 *See* Counter-Memorial on the Merits and Memorial on Jurisdiction ¶ 505 ("SMCV's claims before SUNAT's Claims Division and the Tax Tribunal were indeed administrative challenges to the validity of SUNAT's assessments under the Mining Law and Regulations."); **RER-8**, Bravo and Picón II, ¶ 263 (recognizing that SUNAT and the Tax Tribunal "decide those disputes in the context of an administrative procedure"); Reply and Counter-Memorial on Jurisdiction ¶¶ 248, 256; Memorial ¶ 357.

Tribunal are not competent to entertain contract law causes of action, which is why SMCV could not have submitted a claim for an alleged breach of the Stability Agreement to SUNAT's Claims Division or the Tax Tribunal.[254]

(c) Peru misrepresents the decision in *Kappes*.[255] The tribunal's conclusion that the fork-in-the-road in Annex 10-E of the CAFTA-DR only applied to "the *same alleged Treaty breach* as the U.S. investor seeks to assert under the DR-CAFTA," supports Freeport's argument that Article 10.18.4 only applies to the previous submission of the same cause of action.[256]

(d) Peru ignores the decision in *RDC v. Guatemala*,[257] explaining that in the substantively identical Article 10.18 of the CAFTA-DR, "the term 'claim' is used consistently to refer to a specific cause of action" and "Article 10.18(4) . . . excludes claims for certain breaches if such claims have been previously submitted."[258]

(e) Peru wrongly claims that the tribunal in *Khan Resources* did not reject the "fundamental basis" test, which it expressly did.[259]

61. *Finally*, there is no merit to Peru's new argument that Article 10.18.4 bars *all* of Freeport's claims because SMCV submitted appeals to the Supreme Court in the 2008 Royalty Case and to the Superior Court of Lima in the 2006-2007 Royalty Case.[260] Here too, as it must, Peru concedes that SMCV did not submit to the contentious administrative courts the "same alleged breaches" of the Stability Agreement that Freeport submits for arbitration, arguing instead that SMCV "submitted claims *regarding*

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254 *See* Reply and Counter-Memorial on Jurisdiction ¶¶ 256-57 (explaining that SUNAT's Claims Division and the Tax Tribunal are not competent to resolve contract claims under Peruvian law).

255 Rejoinder on the Merits and Reply on Jurisdiction ¶ 833(c) (citing **CA-20**, *Kappes* Decision on Respondent's Preliminary Objections, ¶¶ 135, 140, 142).

256 **CA-20**, *Kappes* Decision on Respondent's Preliminary Objections, ¶ 142 (emphasis added).

257 Reply and Counter-Memorial on Jurisdiction ¶ 246 n. 1189 (citing **CA-389**, *Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction CAFTA Article 10.20.5 (17 November 2008) (Crawford, Eizenstat, Sureda), ¶ 70.

258 **CA-389**, *Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction CAFTA Article 10.20.5, ¶¶ 69-70.

259 **CA-397**, *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v. The Government of Mongolia*, PCA Case No. 2011-09, Decision on Jurisdiction (25 July 2012) (Hanotiau, Fortier, Williams) , ¶¶ 389-90 ("The Respondents therefore argued for the application of what they identified as the 'fundamental basis' test. However, in the present case, the Tribunal sees no reason to go beyond the triple identity test."). *But see* Rejoinder on the Merits and Reply on Jurisdiction ¶ 833(d).

260 *See* Rejoinder on the Merits and Reply on Jurisdiction ¶¶ 804, n.1755, 850-51.

the same alleged breaches."[261] That is not the standard in Article 10.18.4. For this reason, and all those outlined above, Peru's objection must fail.

2. SMCV Did Not Previously Submit Claims to an Administrative Tribunal or to Binding Dispute Settlement Procedures

62. Peru's objection fails on the independent grounds that Peru is unable to establish that proceedings before SUNAT's Claims Division or the Tax Tribunal qualify as proceedings before "an administrative tribunal" or "binding dispute settlement procedures" under Article 10.18.4 of the TPA. Peru fails in its attempt to show that the features of SUNAT's Claims Division and the Tax Tribunal are consistent with those of an "administrative tribunal" that Article 19.5.1 of the TPA contemplates.[262] Moreover, Peru's argument that SUNAT's Claims Division and the Tax Tribunal offer binding dispute settlement procedures because they make binding administrative decisions is unavailing.[263] If proceedings before the administrative-level decision-maker constituted "binding dispute settlement procedures" under Article 10.18.4, the choice between adjudicative fora would be rendered meaningless because the Peruvian Tax Administration would be judge in its own cause.[264]

i. SUNAT's Claims Division and the Tax Tribunal Are Not Administrative Tribunals

63. In the Counter-Memorial on Jurisdiction, Freeport explained that SUNAT's Claims Division and the Tax Tribunal fail to meet the basic criteria for an "administrative tribunal" that the TPA expressly contemplates.[265] In the Reply on Jurisdiction, Peru argues that SUNAT's Claims Division and

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261 Respondent's Rejoinder on the Merits and Reply on Jurisdiction ¶ 849 (emphasis added). *See also id.* ¶ 851 (conceding that Claimant has "avoided presenting in these proceedings claims for any assessments that were submitted to the Peruvian courts."). *See also* **RER-6**, Second Eguiguren Report, ¶ 105 ("It is evident that a contentious administrative proceeding and a civil proceeding are different. . . [c]ertainly, in each one of these the competent jurisdictional body hears proceedings of different types and causes of action that are assessed and assigned via procedural law"); *id.* ¶ 107 ("SMCV could also have appealed simultaneous with or subsequent to the contentious administrative proceeding with a civil proceeding in order to question matters linked to the interpretation of the contractual provisions, its compliance or its performance. But SMCV did not do so."); *id.* ¶ 121 (noting that in judicial proceedings, "SMCV requested that the administrative decisions of SUNAT and of the Tax Tribunal that imposed to pay royalties for the Primary Sulfides Plant be declared as void."); **RER-7**, Morales II, ¶ 91 (acknowledging that "what was sought through the [2008 Royalty] case was annulment of the Tax Tribunal and SUNAT resolutions concerning the collection of the 2008 Royalties").

262 Rejoinder on the Merits and Reply on Jurisdiction ¶¶ 812-17. *But see* Reply and Counter-Memorial on Jurisdiction ¶¶ 258-61 (citing **CA-10**, TPA, Article 19.5.1).

263 Rejoinder on the Merits and Reply on Jurisdiction ¶¶ 809, 818-20.

264 *See* Reply and Counter-Memorial on Jurisdiction ¶¶ 256-57, 261.

265 *See* Reply and Counter-Memorial on Jurisdiction ¶¶ 258-61.

the Tax Tribunal are administrative tribunals because they are "administrative bodies" that make binding decisions.[266] Peru is wrong.

64. *First*, there is no merit to Peru's argument that Freeport has admitted that SUNAT's Claims Division and the Tax Tribunal are administrative tribunals.[267] Characterizing SUNAT's Claims Division and the Tax Tribunal "as administrative bodies that resolve taxpayers' administrative challenges against SUNAT's assessments" is not an admission that they qualify as "administrative tribunals" under Article 10.18.4.[268] Moreover, the ability to resolve "taxpayers' administrative challenges against SUNAT's assessments" cannot possibly be sufficient to qualify agencies of the MEF as a meaningful alternative to international arbitration, which is what Article 10.18.4 of the TPA contemplates.[269] Further Freeport has not admitted that SUNAT's Claims Division and the Tax Tribunal are administrative tribunals by alleging that the Tax Tribunal violated SMCV's due process rights.[270] As Freeport already explained in the Reply, investment treaty authorities have roundly rejected the argument that due process guarantees are limited to the judicial context.[271]

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266 Rejoinder on the Merits and Reply on Jurisdiction ¶ 809 ("Claimant should be held to have conceded that both SUNAT's Claims Division and the Tax Tribunal are administrative tribunals, because Claimant itself characterizes them as administrative bodies that resolve taxpayers' administrative challenges against SUNAT's assessments.").

267 *Contra* Respondent's Rejoinder on the Merits and Reply on Jurisdiction ¶ 809.

268 *Contra* Respondent's Rejoinder on the Merits and Reply on Jurisdiction ¶ 809.

269 Rejoinder on the Merits and Reply on Jurisdiction ¶ 809. *See* **CWS-11**, Sampliner I, ¶ 35 ("Accordingly, the U.S. delegation intended the references to 'administrative tribunal[s],' 'court[s] of the respondent,' and 'other binding dispute settlement procedure[s]' to refer only to adjudicative bodies competent to resolve contractual claims for breach of an investment agreement or authorization, as the case may be. Nor did we intend those terms to encompass administrative bodies that are part of the administrative decision-making and review process."); **CWS-12**, Herrera I, ¶¶ 29-30 ("[T]he Peruvian delegation understood that the terms 'administrative tribunal' and 'binding dispute settlement procedure' referred to adjudicative bodies competent to resolve claims for breach of an investment agreement or investment authorization . . . . I believed that the contentious administrative courts, the part of the judiciary that reviews final administrative decisions in Peru also fit the description of 'administrative tribunals' in Article 19.5.1 of the TPA.").

270 Rejoinder on the Merits and Reply on Jurisdiction ¶ 810.

271 *See, e.g.*, Reply and Counter-Memorial on Jurisdiction ¶ 143 (collecting cases); **CA-202**, *TECO* Award, ¶¶ 96, 458, 473, 682-83, 711 (finding that the Comisión Nacional de Energía Eléctrica, a "technical organ" for tariff review, breached "elementary standards of due process in administrative matters"); **CA-237**, *Rumeli* Award, ¶¶ 147, 617-18 (finding that an "inter-departmental Working Group tasked with conducting an audit of Claimant's investment failed to satisfy its obligations of "transparency and due process"); **CA-163**, *Lemire* Decision on Jurisdiction and Liability, ¶¶ 143, 299, 309, 316 (finding that Ukrainian regulatory agency, "facilitate[d] arbitrary decision making" by issuing decision "behind closed doors" and without providing sufficient reasoning in its ultimate decision on claimant's license application, violating its due process obligations). *See also* **RA-130** *Bank Melli Iran and Bank Saderat Iran v. The Kingdom of Bahrain*, PCA Case No. 2017-25, Final Award, (9 November 2021) (Hanotiau, Lord Collins, Kaufmann-Kohler), ¶ 522 ("Invoking due process violations in the administrative decision-making, in order to establish a breach of BIT standards does not rest upon the predicate of a 'systemic failure of the State's justice system' or on the failure of the national system

65. *Second*, SUNAT's Claims Division and the Tax Tribunal do not possess the characteristics of an administrative tribunal that the TPA expressly contemplates. Remarkably, Peru claims that it was "inappropriate" and "misleading" for Freeport to point out that the features of SUNAT's Claims Division and the Tax Tribunal are inconsistent with the description of an administrative tribunal in the TPA.[272] It is neither "inappropriate" nor "misleading" but, instead, mandatory to interpret the terms of a treaty not in isolation but in the context of other relevant provisions of that same treaty.[273] Peru provides no explanation why the TPA parties would have intended "administrative tribunal" to mean one thing in the context of ensuring transparency in the review of final administrative acts and something entirely different in identifying an alternative forum for claims concerning the very same acts.[274] Moreover, to the extent there is any inconsistency between the use of the phrase "administrative tribunals" in Chapter 10 and Chapter 19 of the TPA (there is none), Chapter 19 prevails by the express terms of the TPA.[275]

66. Peru does not succeed in establishing that the features of SUNAT's Claims Division and the Tax Tribunal are remotely consistent with Article 19.5.1.

(a) SUNAT's Claims Division and the Tax Tribunal are incapable of reviewing final administrative acts. Peru's argument that SUNAT's Claims Division and the Tax Tribunal review final administrative acts makes no sense.[276] There can only be one *final* administrative act. If a taxpayer submits an administrative challenge to the Tax Tribunal, the Tax Tribunal's decision is the final administrative act.[277] If a taxpayer submits an

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'as a whole'. It rather seeks to rely on the breach of a specific international obligation undertaken by the State, be [it] the protection against expropriation or fair and equitable treatment.").

272 Rejoinder on the Merits and Reply on Jurisdiction ¶ 811.

273 *See* **CA-49**, Vienna Convention on the Law of Treaties (23 May 1969), Article 31(1); *see also, e.g.*, **CA-243**, *Nissan v. India*, Decision on Jurisdiction, ¶ 209 ("The relevant 'context' for construing any given passage in a treaty includes the words and sentences found in close proximity to that passage, including definitional terms, as well as other provisions of the same treaty which help illuminate its object and purpose.").

274 **CA-10**, TPA, Articles 10.18.4, 19.5.1.

275 **CA-10**, TPA, Article 10.2.1 ("In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.").

276 Rejoinder on the Merits and Reply on Jurisdiction ¶ 812.

277 *See* **CA-14**, Tax Code, Article 137 ("In the case of claims against Assessment Resolutions, Penalty Resolutions . . . and any acts directly related to the assessment of the tax debt, they will be submitted by the unextendable deadline of twenty (20) business days reckoned from the business day following the one on which notice of the appealed act or resolution was served."). *See also* **CER-8**, Hernández II ¶¶ 113, 116 ("After SUNAT notifies a taxpayer of an assessment, the taxpayer has 20 business days to challenge it before SUNAT itself through a request for reconsideration" and "[i]f SUNAT denies the taxpayer's request for reconsideration, the taxpayer has 15 business days to challenge SUNAT's denial of its request for reconsideration before the Tax Tribunal—the last administrative instance on tax and royalty disputes.").

administrative challenge only to SUNAT's Claims Division, the decision of SUNAT's Claims Division is the final administrative act.[278]

(b) SUNAT's Claims Division and the Tax Tribunal are not "independent of the office or authority entrusted with administrative enforcement"—they are part of it.[279] Because Peru admits that SUNAT is part of the MEF and that SUNAT enforces royalty and tax decisions, [280] it makes no sense for Peru to argue that the MEF is not the "office or authority entrusted with administrative enforcement" of royalty and tax decisions.[281] Moreover, because SUNAT's Claims Division and the Tax Tribunal are part of the MEF, they are, by definition, not "independent" from the MEF.[282] That alone is decisive and even if it were not, Peru still fails to rebut Freeport's showing that SUNAT's Claims Division and the Tax Tribunal are not independent from the MEF.[283] In particular, Peru does not deny that:[284] (*i*) SUNAT's Claims Division and the Tax Tribunal are "subject to the technical guidelines of the MEF;"[285] (*ii*) SUNAT's Claims Division and the Tax Tribunal "cooperate closely with the other organs of the MEF on a range of matters related to royalty and tax enforcement, including legislative proposals and information sharing;"[286] (*iii*) the majority of the *vocales* are former employees of SUNAT;[287] (*iv*) the MEF enjoys considerable discretion with respect to the appointment and retention of Tax Tribunal *vocales*;[288] or

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278 **CA-14**, Tax Code, Article 146 ("The appeal of the resolution before the Tax Tribunal must be made within fifteen (15) business days following the one on which notice thereof was served by means of a substantiated brief.").

279 **CA-10**, TPA, Article 19.5.1.

280 Rejoinder on the Merits and Reply on Jurisdiction ¶ 813 ("SUNAT's Claims Division and the Tax Tribunal are structurally part of the MEF."); *id.* ¶ 815 ("SUNAT is the 'office or authority entrusted with administrative enforcement' 'of royalty and tax decisions'"); *id.* ¶ 816 ("[SUNAT's Claims] Division is charged with the power to review and decide the taxpayers' challenges against SUNAT's assessments.").

281 Rejoinder on the Merits and Reply on Jurisdiction ¶ 815.

282 **CA-10**, TPA, Article 19.5.1.

283 *See* Rejoinder on the Merits and Reply on Jurisdiction ¶¶ 813-14, 816.

284 Rejoinder on the Merits and Reply on Jurisdiction ¶¶ 813-14.

285 *Compare* Reply and Counter-Memorial on Jurisdiction ¶ 261 (citing **CA-145**, Organic Law of the Executive Branch, Law No. 29158 (18 December 2007), Article 33).

286 Reply and Counter-Memorial on Jurisdiction ¶ 261(a) (citing sources).

287 Reply and Counter-Memorial on Jurisdiction ¶ 261(b) (citing **CWS-6**, Estrada I, ¶ 18 ("Currently, as shown in Appendix B, 22 of the 33 *vocales*—that is, over 65%—previously worked at SUNAT."); *id.* Appendix B.).

288 Reply and Counter-Memorial on Jurisdiction ¶ 261(b) (citing sources); *see also* **Ex. CE-1100**, Supreme Resolution No. 036-2010-EF (10 March 2010); **Ex. CE-1101**, Supreme Resolution No. 081-2010-EF (23 June 2010); **Ex. CE-1102**, Supreme Resolution No. 060-2012-EF (19 September 2012); **Ex. CE-1103**,

(*v*) the maximum budget available for the Tax Tribunal is a direct function of SUNAT's collections.[289] Moreover, Peru ignores that SUNAT and the Tax Tribunal appear *together* as co-parties in appeals to the contentious administrative courts as they did in the 2006-2007 and 2008 Royalty Cases.[290] These features show that SUNAT's Claims Division and the Tax Tribunal are co-dependent and dependent on the MEF. Ultimately, Peru's argument fails because it is based on the fundamentally flawed premise that SMCV could have received independent review of an administrative action from the very Government ministry that took that administrative action.

ii. SUNAT's Claims Division and the Tax Tribunal Do Not Provide the Binding Dispute Settlement Procedures Article 10.18.4 Contemplates

67. As Freeport explained in the Memorial on Jurisdiction, SUNAT's Claims Division and the Tax Tribunal cannot be the "binding dispute settlement procedure[s]" that Article 10.18.4 contemplates because those bodies are not competent to resolve contract claims for "alleged breach[es]" of an investment agreement.[291] In the Reply on Jurisdiction, Peru argues that SUNAT's Claims Division and the Tax Tribunal qualify as "binding dispute settlement procedure[s]" because they issue "final and binding decisions."[292] Peru is wrong.

68. SUNAT's Claims Division and the Tax Tribunal do not provide an alternative to the other dispute settlement proceedings that Article 10.18.4 contemplates. Article 10.18.4 is intended to give a claimant a choice between alternative fora for resolving contract claims for breaches of an investment

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Supreme Resolution No. 061-2012-EF (19 September 2012); **Ex. CE-1106**, Supreme Resolution No. 033-2018-EF (30 December 2018).

289 Reply and Counter-Memorial on Jurisdiction ¶ 261(c) (citing sources).

290 *See* **CER-8**, Hernández II, ¶ 146 (citing **CA-239**, Single Unified Text of the Law of the Contentious-Administrative Process, approved by Law No. 27584, Supreme Decree No. 011-2019-JUS (May 4, 2019), Article 16.1 ("The representation and defense of administrative entities will be the responsibility of the Office of the Public Prosecutor of competent jurisdiction or, when so indicated by the respective provision of law, by the entity's duly authorized judicial representative."); **Ex. CE-122**, Administrative Court Decision, No. 07650-2013-CA, 2008 Royalty Assessment, p. 12 ("[T]he respondent parties in this case are the National Superintendence of Tax Administration and the Tax Tribunal."); **Ex. CE-698**, Contentious Administrative Court, Decision, No. 07649-2013 (2006/07 Royalty Assessments), pp. 5-6 (showing that the Tax Tribunal and SUNAT both appeared in the proceeding to respond to SMCV's claims)). *But see* Rejoinder on the Merits and Reply on Jurisdiction ¶ 816 ("The Tax Tribunal is also independent and separate from SUNAT; rather, SUNAT is a party that may appear (as it did repeatedly in this case) before the Tax Tribunal, which decides appeals submitted to it by taxpayers like SMCV.").

291 Reply and Counter-Memorial on Jurisdiction ¶¶ 256-57; **CA-10**, TPA, Article 10.18.4.

292 Rejoinder on the Merits and Reply on Jurisdiction ¶ 820; **CA-10**, TPA, Article 10.18.4.

agreement.[293] Peru does not dispute that SUNAT's Claims Division and the Tax Tribunal are not competent to resolve contract claims for breaches of an investment agreement.[294] Administrative proceedings before SUNAT's Claims Division and the Tax Tribunal cannot qualify as "binding dispute settlement procedure[s]" under Article 10.18.4 for this reason alone. Additionally, the decisions of SUNAT's Claims Division and the Tax Tribunal resulted in the very breaches of the Stability Agreement that Freeport submits for arbitration in this proceeding. Therefore, the administrative proceedings that led to those decisions are not an alternative to arbitration or judicial proceedings under Article 10.18.4.

69. Moreover, the negotiation history of the TPA confirms that Article 10.18.4 cannot apply to proceedings before SUNAT's Claims Division and the Tax Tribunal.[295] Peru provides *no evidence* to rebut Mr. Sampliner and Mr. Herrera's testimony that both of the TPA parties understood that "binding dispute settlement procedure" referred to proceedings before adjudicative bodies competent to resolve claims for breach of an investment agreement.[296] Peru is incorrect when it argues that the MINCETUR summary of the eighth negotiation round in Washington, D.C., does not support Mr. Herrera's testimony.[297] It shows that Peru initially opposed dispute settlement for investment agreement claims on the grounds that provisions for contract-based arbitration in those agreements, not proceedings before the administrative-

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293 *See* **CA-424**, *Jin Hae Seo v. Republic of Korea*, HKIAC Case No. HKIAC/18117, Concurring Opinion of Benny Lo (24 September 2019), ¶ 14 (interpreting fork-in-the-road provision for treaty claims in US-Korea FTA identical to Annex 10-G of the TPA and concluding that "in order for Annex 11-E to be triggered, the allegation of breach must be made in a court or administrative tribunal of Korea that is competent to adjudicate upon that allegation and grant relief for it").

294 *See* Reply and Counter-Memorial on Jurisdiction ¶¶ 256-57 (citing **CA-53**, Political Constitution of Peru (1993), Article 62)); Counter-Memorial on the Merits and Memorial on Jurisdiction ¶ 505 ("SMCV's claims before SUNAT's Claims Division and the Tax Tribunal were indeed administrative challenges to the validity of SUNAT's assessments under the Mining Law and Regulations."); **RER-8**, Bravo and Picón II, ¶ 263 (recognizing that SUNAT and the Tax Tribunal "decide those disputes in the context of an administrative procedure").

295 *Compare* **CA-49**, Vienna Convention on the Law of Treaties (23 May 1969), Article 31(2), *with* Rejoinder on the Merits and Reply on Jurisdiction ¶ 823 ("[E]ven if it were appropriate under a Vienna Convention analysis to turn to the TPA's *travaux preparatoires* (which it is not . . .) it would not be appropriate to rely on Mr. Herrera's claims regarding the Peruvian delegation's alleged understanding of 'binding dispute resolution procedure'").

296 **CER-11**, Sampliner I, ¶ 35 ("Accordingly, the U.S. delegation intended the references to 'administrative tribunal[s],' 'court[s] of the respondent,' and 'other binding dispute settlement procedure[s],' to refer only to adjudicative bodies competent to resolve contractual claims for breach of an investment agreement."); **CWS-12**, Herrera I, ¶ 29 ("Consistent with our understanding that Article 10.18.4 applied only to claims alleging the exact same breach of an investment agreement or investment authorization that an investor submitted for arbitration, the Peruvian delegation understood that the terms 'administrative tribunal' and 'binding dispute settlement procedure' referred to adjudicative bodies competent to resolve claims for breach of an investment agreement or investment authorization.").

297 Rejoinder on the Merits and Reply on Jurisdiction ¶ 823.

level decision-maker, provided an adequate alternative.[298] For this reason, and all those set forth above, Peru's Article 10.18.4 objections must fail.

C. FREEPORT'S CLAIMS DO NOT REQUIRE RETROACTIVE APPLICATION OF THE TPA

70. As Freeport explained in its Counter-Memorial on Jurisdiction, the Tribunal has jurisdiction *ratione temporis* because all the acts and facts that Freeport alleges constituted breaches of the Stability Agreement and the TPA occurred after the TPA entered into force.[299] Freeport, therefore, does not seek to "bind" Peru "in relation to any act or fact that took place or any situation that ceased to exist" before the TPA entered into force.[300] In the Reply on Jurisdiction, Peru repeats its argument that the non-retroactivity rule bars most of the breaches that Freeport alleges because Peru's interpretation of the Stability Agreement, Mining Law, and Regulations, as reflected in the June 2006 MINEM Report, pre-dates the TPA's entry into force on 1 February 2009 and is the "*sine qua non*" of the breaches Freeport alleges.[301] Alternatively, Peru argues that SUNAT's June 2006 Report, which was not disclosed to SMCV until Peru exhibited it in the Reply on Jurisdiction, is the "*sine qua non*" of the Assessments.[302] Peru's argument is deeply misguided.

71. *First*, Peru still misunderstands the applicable legal standard. The relevant inquiry is not whether "acts or facts" pre-dating the TPA's entry into force are "the birth of [Claimant's] dispute," or are "causally connected to" or the "*sine qua non*" of the measures that Freeport challenges as breaches of the Stability Agreement and the TPA.[303] Nor is it whether a "dispute" or the legal reasoning underlying a breach

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298 **Ex. CE-1073**, MINCETUR, Round VIII Summary (Washington, 14-18 March 2005), p. 14 (noting the Andean states' agreement that "the dispute resolution mechanism set forth in each specific investment agreement should prevail; this position is based on the negotiation framework of each agreement (concluded under the protection of internal regulations of each State), the equilibrium of which cannot be altered by the entry into force of the FTA.").

299 Reply and Counter-Memorial on Jurisdiction ¶¶ 263-70.

300 **CA-49**, Vienna Convention on the Law of Treaties (23 May 1969), Article 28 ("Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."); **CA-10**, TPA, Article 10.1.3 ("For greater certainty, this Chapter does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.").

301 Rejoinder on the Merits and Reply on Jurisdiction ¶ 783. Peru does not revisit its concession that the non-retroactivity rule does not bar Freeport's Article 10.5 claims concerning due process violations in the 2006-2007, 2008, 2009, and 2010-2011 Royalty Cases. *See* Counter-Memorial on the Merits and Memorial on Jurisdiction ¶ 484.

302 Rejoinder on the Merits and Reply on Jurisdiction ¶ 793.

303 *Compare* Rejoinder on the Merits and Reply on Jurisdiction ¶ 780 ("Notably, Claimant has asserted (repeatedly) that the basis of all of SUNAT's Assessments . . . and, thus, the '*birth of [Claimant's] dispute*,' . . .

arose before the TPA entered into force.[304] Chapter 10 of the TPA contains "bind[ing]" provisions regulating government "measures."[305] Therefore, it is government measures that are the relevant acts, facts, or situations for determining whether a claim seeks to "bind" a TPA party in contravention of the non-retroactivity rule.[306]

72. *Second*, the non-retroactivity rule does not apply because the measures Freeport challenges as breaches of the Stability Agreement and the TPA indisputably post-date the TPA's entry into force and, accordingly, cannot result in Peru being bound retroactively. Peru's arguments to the contrary rest on egregious mischaracterizations of Freeport's claims and supporting arguments, as well as the evidentiary record.

(a) As Peru admits, the non-retroactivity rule is inapplicable so long as Freeport does "not include in its claims . . . acts or omissions of the Respondent prior to [the Treaty's entry into force] which, considered in *isolation*, could be deemed to be in violation of the Agreement prior to such date."[307] Hence, the non-retroactivity rule does not apply because each of the government acts or omissions upon which Freeport bases its claims constitute

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is MINEM's interpretation of the scope of the Agreement and the Mining Law and Regulations contained in its June 2006 Report.") (emphasis added); *id*. ¶ 783 ("Clearly, Claimant's own words make the case that MINEM's interpretation is the *sine qua non* of SUNAT's Assessments which in turn are measures challenged in Claimant's claims of alleged breaches."); *id*. ¶ 788 ("Perú argues that the alleged breaches based on SUNAT's Assessments . . . are *causally connected to* MINEM's pre-TPA interpretation of the scope of the 1998 Stabilization Agreement and Mining Law and Regulations.") (emphasis added), *with* **CA-10**, TPA, Article 10.1.3 ("For greater certainty, this Chapter does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.").

304 *See* Rejoinder on the Merits and Reply on Jurisdiction ¶ 786 ("Because 'the Government's restrictive interpretation' materialized long before February 1, 2009, including but not only in the June 2006 Report on which Claimant repeatedly focuses, the Tribunal does not have jurisdiction to hear claims related to each of the Assessments that were founded on that interpretation under Article 10.1.3."); *id.* ¶ 789(a) (contending that the "government's pre-TPA interpretation . . . formed the essential legal basis of SUNAT's Assessments"); *id.* ¶ 789(b) (arguing that "before the TPA entered into force on February 1, 2009, the dispute . . . already existed as of June 4, 2008"); *see also* Counter-Memorial on the Merits and Memorial on Jurisdiction ¶¶ 472, 474.

305 **CA-10**, TPA, Article 10.1.1 ("This Chapter *applies to measures* adopted or maintained by a Party.") (emphasis added); *id*. at Article 10.1.3 ("For greater certainty, this Chapter does not *bind* any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.") (emphasis added).

306 **CA-10**, TPA, Article 10.1.3.

307 Rejoinder on the Merits and Reply on Jurisdiction ¶ 789(c) (citing **CA-99**, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003) (Verea, Fernández Rozas, Grigera Naón) ("*Tecmed v. Mexico* Award"), ¶ 60) (emphasis in the original).

breaches of the Stability Agreement and the TPA, in isolation, and indisputably occurred long after 1 February 2009.[308]

(b) Despite accepting that "consideration of whether the Agreement is to be applied retroactively must first be determined *in light of the claims of the Parties*,"[309] Peru grossly mischaracterizes Freeport's claims and supporting arguments.[310] Contrary to Peru's argument,[311] Freeport does not claim that the June 2006 Report or any of the other Government reports and memoranda that Peru cites breached the Stability Agreement or the TPA. As Freeport explained, the June 2006 MINEM Report, in isolation, could not support a claim for breach of the Stability Agreement or the TPA because it was *expressly non-binding* and Freeport and SMCV did not "*incur"* loss or damage from it.[312]

(c) Recognizing that a mere showing that the June 2006 MINEM Report is relevant to Freeport's claims is insufficient to sustain its objection, Peru now argues that "Claimant asserts that it was MINEM's interpretation reflected in its June 2006 Report that *directly caused* SUNAT to issue the Royalty and Tax Assessments against SMCV starting in August 2009."[313] Yet, that assertion is found nowhere in Freeport's pleadings. As reflected in the

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308 *See* Reply and Counter-Memorial on Jurisdiction ¶ 266.

309 Rejoinder on the Merits and Reply on Jurisdiction ¶ 789(c) (emphasis in the original) (citing **CA-99**, *Tecmed v. Mexico* Award ¶ 56).

310 *See, e.g.*, Rejoinder on the Merits and Reply on Jurisdiction ¶ 780 ("Claimant has asserted (repeatedly) that the basis of all of SUNAT's Assessments—every single royalty, tax, penalty, and interest assessments at issue in this case—(and, thus, the 'birth of [Claimant's] dispute,' . . . is MINEM's interpretation of the scope of the Agreement and the Mining Law and Regulations contained in its June 2006 Report."); *id.* ¶ 783 ("Claimant admits that the genesis of this entire dispute is MINEM's interpretation reflected in the June 2006 Report."); *id.* ¶ 789(c) ("Claimant. . . affirmatively argues that MINEM's (pre-TPA) interpretation . . . caused SUNAT to issue Assessments against SMCV (post-TPA), and formed the basis of those same Assessments.").

311 Rejoinder on the Merits and Reply on Jurisdiction ¶¶ 783, 793 (referring to **CE-534**, MINEM, Report No. 156-2006-MEM/OGJ (16 June 2006); **RE-179**, SUNAT June 2006 Internal Report; **RE-26**, SUNAT, Report No. 263-2002-SUNAT/K00000 (23 September 2002); **RE-27**, SUNAT, Report No. 166-2007-SUNAT/2B0000 (20 September 2007)); *see also* Counter-Memorial on the Merits and Memorial on Jurisdiction ¶ 481, Table 3 (table of the alleged "multiple occasions" before TPA's entry into force "on which Perú's agencies and representatives stated the position . . . which is the foundation and legal basis of all of SUNAT's Royalty and Tax Assessments.").

312 *See* Reply and Counter-Memorial on Jurisdiction ¶ 266 (citing **CA-10**, TPA, Article 10.16.1(a)(ii) (permitting claims only if "the claimant *has incurred* loss or damage") (emphasis added); **CE-534**, MINEM, Report No. 156- 2006-MEM/OGJ (16 June 2006) ("[N]ot[ing] that, in view of the nature of the query, this report has *only* the status of a *referential opinion* and lacks binding force for the bodies of competent jurisdiction [*solo el carácter referencial de una opinion y carece de fuerza vinculante para los órganos competentes*] that, such as SUNAT, enjoy the legal prerogative of collecting mining taxes and royalties") (emphasis added)).

313 Rejoinder on the Merits and Reply on Jurisdiction ¶ 781 (emphasis in original); *see also id*. ¶¶ 787(a), 789(c), (d) (same).

passages of Freeport's pleadings that Peru cites,[314] Freeport argues that SUNAT and the Tax Tribunal adopted the legal "basis" for excluding the Concentrator from the coverage of the Stability Agreement contained in the June 2006 MINEM Report,[315] not that the June 2006 MINEM Report was the legal "basis" for, much less the "cause" of SUNAT's and the Tax Tribunal's decisions. Peru's conflation of State conduct and the legal rationale for that conduct is fatal to its objection. And, in any event, Peru's argument cannot survive its admission that "SUNAT's audit and assessments against SMCV were not a response to MINEM's June 2006 Report."[316]

(d) Peru's argument that Freeport's claims seek to bind Peru "in relation to" the 2006 SUNAT Report is even more absurd.[317] Peru did not disclose that Report to Freeport and SMCV until it exhibited it in its Rejoinder and Reply on Jurisdiction in November 2022.[318] Accordingly, the claims Freeport submitted in its February 2020 Notice of Arbitration—more than two years earlier—cannot possibly seek to "bind" Peru with "respect to" the 2006 SUNAT Report.[319] In any event, as is the case with the June 2006 MINEM Report, Freeport does not allege that the interpretation in the 2006 SUNAT Report breached the Stability Agreement and the TPA and the 2006 SUNAT Report, "in *isolation*,"[320] could not support a claim for breach of the Stability Agreement or the TPA because Freeport and SMCV did not "*incur*[]" loss or damage from it.[321]

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314 Rejoinder on the Merits and Reply on Jurisdiction ¶ 782 (citing Memorial ¶ 233 ("*Echoing the novel interpretation* first concocted by Mr. Isasi, and then *adopted* by SUNAT and the Tax Tribunal, the Appellate Court concluded that: . . .'a future investment, . . . will not be covered by the benefits of the Stability Agreement.'"); *see also id.* Memorial ¶¶ 212-213, 223, 226, 391(c), 399 (same).

315 *See e.g.*, Memorial ¶ 201 ("The [Tax Tribunal] resolution drafted by Ms. Villanueva upheld the 2008 Royalty Assessments adopting the same interpretation of the Mining Law and Regulations first set out by Mr. Isasi in his June 2006 Report."); *id*. ¶ 261 (same).

316 Rejoinder on the Merits and Reply on Jurisdiction ¶ 529.

317 Rejoinder on the Merits and Reply on Jurisdiction ¶ 793 ("[E]ven if the Tribunal were to accept that MINEM's interpretation in the June 2006 Report is not the *sine qua non* of SUNAT's Assessments, surely SUNAT's own interpretation of the scope of the 1998 Stabilization Agreement and the Mining Law and Regulations is a *sine qua non* of its Assessments against SMCV.").

318 *See* **Ex. RE-179**, SUNAT June 2006 Internal Report.

319 *See* **CA-49**, Vienna Convention on the Law of Treaties (23 May 1969), Article 28; **CA-10**, TPA, Article 10.1.3; Notice of Arbitration.

320 *See* **CA-99**, *Tecmed v. Mexico* Award ¶ 60 (emphasis in original).

321 **CA-10**, TPA, Article 10.16.1(a)(ii) ("[T]he claimant, on its own behalf, may submit to arbitration under this Section a claim . . . that the claimant has incurred loss or damage."); *id.* at Article 10.16.1(b)(ii) ("[T]he claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or

73. *Third*, Peru fails to rebut the documents in the TPA negotiation record and the testimony of Mr. Herrera and Mr. Sampliner showing that the TPA parties did not intend "to bar claims simply because the challenged measures related to acts or facts that gave rise to a dispute before the TPA entered into force so long as the challenged measures themselves occurred after the entry into force."[322] Although that conclusion is plain from the terms of the TPA, contrary to Peru's argument,[323] it is permissible for the Tribunal to look to the negotiation record to confirm it.[324]

(a) The summaries of the first and second round of negotiations, in May and June 2004, respectively, do not show that "the TPA Parties contemplated disputes arising before the TPA entered into force being excluded from the TPA," as Peru argues.[325] Consistent with Mr. Herrera's and Mr. Sampliner's testimony, those summaries show that the TPA parties initially disagreed about the breadth of non-retroactivity.[326] The first round summary shows that it was initially an Andean priority to limit the application of Chapter 10 to "disputes arising from events after the FTA" and a U.S. priority to obtain "[b]road temporal application of the dispute resolution mechanism."[327] The second round summary similarly shows that the TPA parties were still "debat[ing]" the breadth of non-retroactivity in June 2004.[328] Thus, Peru's is wrong when it argues that the second round summary "confirms

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controls directly or indirectly, may submit to arbitration under this Section a claim . . . that the claimant has incurred loss or damage.").

322 **CWS-12**, Herrera I, ¶ 35. *See also* **CER-11**, Sampliner I, ¶ 39 ("We did not intend Article 2.3 to preclude claims challenging government measures adopted after entry into force of an IIA simply because those measures related to acts or facts that occurred prior to entry into force."); **CWS-22**, Herrera II, ¶¶ 13-14; **CER-14**, Sampliner II, ¶¶ 11-13.

323 Rejoinder on the Merits and Reply on Jurisdiction ¶ 791 ("As a preliminary matter, interpreting a treaty provision by relying on such materials is impermissible under Article 32 of the Vienna Convention on the Law of Treaties (VCLT), unless the ordinary meaning is unclear . . . . The Tribunal should, therefore, disregard Claimant's assertion in reliance on the TPA's preparatory work cited by Mr. Herrera and Mr. Sampliner.").

324 **CA-49**, Vienna Convention on the Law of Treaties (23 May 1969), Article 32 ("Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, *or* to determine the meaning when the interpretation according to article 31: a. Leaves the meaning ambiguous or obscure; or b. Leads to a result which is manifestly absurd or unreasonable.") (emphasis added); *see also* **CA-251**, *ESPF* Award ¶ 750 ("Article 32 of the VCLT permits recourse to supplementary means of interpretation in order to confirm the meaning derived by application of Article 31 *or* to resolve an ambiguity.") (emphasis added).

325 Rejoinder on the Merits and Reply on Jurisdiction ¶ 791(b) (citing **Ex. CE-1060**, MINCETUR, Round I Summary (Cartagena, 18-19 May 2004), p. 25); *id.* ¶ 791(c) (citing **Ex. CE-1061**, MINCETUR, Round II Summary (Atlanta, 14 to 18 June 2004), pp. 23-25).

326 **CWS-12**, Herrera I, ¶ 34; **CER-11**, Sampliner I, ¶ 40.

327 **Ex. CE-1060**, MINCETUR, Round I Summary (Cartagena, 18-19 May 2004), pp. 25-26.

328 **Ex. CE-1061**, MINCETUR, Round II Summary (Atlanta, 14 to 18 June 2004), pp. 23-25.

the TPA Parties' intent was to limit the scope of the TPA to disputes that arose after the TPA entered into force."[329]

(b) If the TPA parties intended Article 10.1.3 to apply broadly to bar pre-existing "disputes," as Peru argues,[330] they would have adopted the non-retroactivity provision that the Andean States proposed in the July 2004 TPA draft, which stated that the "this chapter shall only be applied to the *disputes* over facts and acts that may arise after the entry into force of the Agreement."[331] But they did not; instead they negotiated and agreed on the text of Article 10.1.3 in February 2005.[332] Article 10.1.3 is plainly not as "broadly-worded" as the Andean proposal, as Peru argues.[333] Not only does it permit claims concerning situations that did not cease to exist after entry into force,[334] as explained above and in the Counter-Memorial on Jurisdiction, it applies narrowly to bar claims alleging that measures pre-dating the TPA's entry into force breached an investment agreement or the TPA.[335] Accordingly, the

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329 Rejoinder on the Merits and Reply on Jurisdiction ¶ 791(c) (citing **Ex. CE-1061**, MINCETUR, Round II Summary (Atlanta, 14 to 18 June 2004), pp. 23-25).

330 *See* Rejoinder on the Merits and Reply on Jurisdiction ¶ 789(b) ("Thus, as of June 4, 2008, not only were there pre-TPA events inextricably intertwined with Claimant's claims, there was already a pre-TPA dispute (*i.e.,* 'a disagreement on a point of law or fact') regarding the payment of royalties related to the Concentrator Project."); *id.* ¶ 791(b) (arguing that the TPA negotiation record "supports Perú's interpretation of Article 10.3.1, because the statement shows that the TPA Parties contemplated disputes arising before the TPA entered into force being excluded from the TPA.").

331 **CWS-12**, Herrera I, ¶ 33 (citing **Ex. CE-1062**, US-Andean FTA Draft (Andean Proposal) (19 July 2004), p. 2)) (emphases added); **CWS-22**, Herrera II, ¶ 14.

332 **CWS-12**, Herrera I, ¶ 34 (citing **Ex. CE-1071**, MINCETUR, Round VII Summary (Cartagena, 7-11 February 2005), p. 32 ("On the morning of Sunday the 6th, after a broad discussion, the Andean countries and the US reached an agreement regarding the temporary scope of application of the chapter."); **CER-11**, Sampliner I, ¶ 41 (citing **Ex. CE-1072**, U.S.-Andean FTA Draft (16 February 2005), p. 2.); **CWS-22**, Herrera II, ¶ 14; **CER-14**, Sampliner II, 13.

333 Rejoinder on the Merits and Reply on Jurisdiction ¶ 791(a) ("[R]eplacing the earlier draft with the current text—which is also broadly-worded—does not demonstrate that the Parties intended to limit or narrow the scope of Article 10.1.3.").

334 *Compare* **CA-10**, TPA, Article 10.1.3 ("For greater certainty, this Chapter does not bind any Party in relation to any act or fact that took place or *any situation that ceased to exist before the date of entry into force* of this Agreement") (emphasis added), *with* **Ex. CE-1062**, US-Andean FTA Draft (Andean Proposal) (19 July 2004), p. 2 ("This chapter shall not be applicable to *disputes* over facts and acts occurred or over any situation that ceased to exist prior to its entry into force, *even if its effects persist after the date of entry into force*.") (emphasis added).

335 Reply and Counter-Memorial on Jurisdiction ¶ 265 ("Hence, the relevant analysis is whether any of the 'measures,' as defined in the TPA, that Freeport alleges breached the Stability Agreement or Article 10.5 are an 'act or fact that took place or [a] situation that ceased to exist before the date of entry into force.'").

elimination of the broader term "disputes" from the July 2004 TPA draft does not show a "preference to apply Article 10.1.3 broadly," as Peru argues.[336]

74. *Fourth*, even if Peru's incorrect legal standard could be credited (it cannot be), Peru's objection still fails on its own terms.

(a) The June 2006 MINEM Report was *expressly non-binding* and Peru's witness Ms. Bedoya still testifies that it was not the *sine qua non* of the Assessments.[337] She states that after "internally analyz[ing] the Cerro Verde case,"[338] "SUNAT initiated the audit of Cerro Verde for royalty payments independently,"[339] "in the exercise of its oversight" and "auditing powers,"[340] "without being instructed to do so by MINEM;"[341] that SUNAT reached its conclusions "[n]otwithstanding . . . consultation[s]" with MINEM;[342] and that "the 2006 MINEM Report prepared by Mr. Felipe Isasi, and received by SUNAT on January 29, 2008, was not decisive in the decision to audit Cerro Verde or SUNAT's interpretation of the scope of the stability guarantees."[343] Therefore, Peru's argument that the June 2006 MINEM Report was the *sine qua non* of the Assessments contradicts the testimony of its own witness.[344]

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336 Rejoinder on the Merits and Reply on Jurisdiction ¶ 791(a).

337 *See* **CE-534**, MINEM, Report No. 156- 2006-MEM/OGJ (16 June 2006) ("[N]ot[ing] that, in view of the nature of the query, this report has *only* the status of a *referential opinion* and lacks binding force for the bodies of competent jurisdiction [*solo el carácter referencial de una opinion y carece de fuerza vinculante para los órganos competentes*] that, such as SUNAT, enjoy the legal prerogative of collecting mining taxes and royalties") (emphasis added); Counter-Memorial on the Merits and Memorial on Jurisdiction ¶ 481, Table 3; **RWS-4**, Bedoya I, ¶¶ 2, 16, 44-45; **RWS-11**, Bedoya II, ¶ 7 ("SUNAT's oversight of Cerro Verde's operations was in no way due to political pressure, or orders from MINEM, or complaints from third parties as Claimant contends. SUNAT—independently—conducted its work of verifying compliance with tax obligations in the exercise of the auditing powers contained in Articles 62 and 85 of the Tax Code. Proof of this is that before receiving the 2006 MINEM Report (on January 29, 2008) and Mr. Martinez's complaints (in July 2006 and November 2007), the Tax Administration had already taken several actions to audit Cerro Verde, as I explain below."); *id.* ¶ 14 (testifying that "it was already clear to the Tax Administration based on its own analysis and due diligence that Cerro Verde was not exempt from paying royalties for the Primary Sulfides Project").

338 **RWS-11**, Bedoya II, ¶ 10.

339 **RWS-11**, Bedoya II, ¶ 5.

340 **RWS-11**, Bedoya II, ¶ 7, § II.

341 **RWS-11**, Bedoya II, ¶ 5.

342 **RWS-11**, Bedoya II, ¶ 12.

343 **RWS-11**, Bedoya II, ¶ 14.

344 *But see* Rejoinder on the Merits and Reply on Jurisdiction ¶ 783 ("Clearly, Claimant's own words make the case that MINEM's interpretation is the *sine qua non* of SUNAT's Assessments which in turn are measures challenged in Claimant's claims of alleged breaches. Because the alleged conduct (*i.e.,* SUNAT's Assessments) is deeply rooted in acts or facts that occurred before the TPA entered into force (*i.e.,* MINEM's interpretation

(b) It is equally clear that the June 2006 SUNAT Report was not the *sine qua non* of the Assessments. The June 2006 SUNAT Report is similarly a non-binding document—Ms. Bedoya testifies that she helped to prepare it to "*preliminarily* determine whether or not the Concentrator Plant was a project covered by the Stability Agreement"[345] and that it was followed by "consultations" with MINEM "to find out the scopes of the matters regulated in" the Stability Agreement.[346] Moreover, Peru admits that even after SUNAT notified SMCV of each of the Assessments, the Government "might" have "correct[ed]" them before they ever became "binding" or enforceable against SMCV. [347] The tribunal in *RDC v. Guatemala* rejected arguments similar to those Peru bases on the June 2006 MINEM and SUNAT Reports because "[i]t seems incongruent with the formal requirements of the Guatemalan legal system that the controlling date of a measure of the Government would be uncertain and unknown to members of the Government *or those affected by it*."[348]

(c) Moreover, the non-retroactivity rule would not apply under Peru's incorrect standard even if the interpretation in the June 2006 MINEM and SUNAT Reports were the "*sine qua non*" of the Assessments because, as the later-issued Assessments demonstrate, that interpretation is not an "act," "fact," or "situation that ceased to exist" before 2009.[349]

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of the 1998 Stabilization Agreement and the Mining Law and Regulations contained in its June 2006 Report), Article 10.1.3 dictates that Claimant's claims based on SUNAT's Assessments fall outside of the scope of the TPA.").

345 **RWS-11**, Bedoya II, ¶ 10 (emphasis added).

346 **Ex. RE-179**, SUNAT June 2006 Internal Report ("Thus, with the Administration not being the most suitable body for the development of an exegetic interpretation of the mining law, we recommend a detailed consultation be made with the Energy and Mining sector."); *see also* **RWS-11**, Bedoya II, ¶ 12 ("I suggested that MINEM be consulted about the scope of the administrative stability guarantees.").

347 Rejoinder on the Merits and Reply on Jurisdiction ¶ 716 ("[T]he Peruvian government might or might not subsequently change or correct the Assessment."); *id.* ¶ 818 ("For example, if SMCV challenged SUNAT's Assessments before SUNAT's Claims Division, and SMCV did not subsequently challenge the Division's decision confirming SUNAT's Assessments, or if SMCV withdrew its appeals to the Tax Tribunal from the Division's decisions, the Division's decisions would be binding on SMCV."); *see also* **RER-2**, Morales I, ¶ 102 (recognizing "the fact that the act (the Assessment and Penalty Resolution) is not enforceable by SUNAT until such time as it is possible for the administrative procedure to be brought to an end"); **RER-3**, Bravo and Picón I, ¶ 61 (acknowledging that "taxpayer challenges [to] these resolutions ha[ve] the effect of suspending [their] enforceability"); **RER-7**, Morales II, ¶ 102 ("The administrative appeal of the Assessment and Penalty Resolution only suspends its 'enforceability' ('*ejecutoriedad')*."); **RER-8**, Bravo and Picón II, ¶ 248 (recognizing that "[i]n the specific case in which the taxpayer, after being notified of an assessment resolution, complains or appeals within the legal deadline, the debt will not be due (enforceable) in coercive collection").

348 **CA-441**, *Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction (18 May 2010) (Crawford, Eizenstat, Sureda), ¶ 120.

349 *See* **CA-49**, Vienna Convention on the Law of Treaties, Article 28; **CA-10**, TPA, Article 10.1.3.

Peru contends that it "does not need to rely on the alternative 'ceased to exist' scenario of Article 10.1.3" because the Government's pre-entry into force interpretation of the Mining Law, Regulations, and Stability Agreement is an "act or fact which took place" prior to the TPA's entry into force.[350] Peru's argument reveals a basic misunderstanding of the rule against the non-retroactive application of treaties. Peru does not dispute that Article 10.1.3 merely reiterates "for greater certainty" the general rule against the retroactive application of treaties set forth in Article 28 the VCLT.[351] As the commentaries to the ILC Draft Articles on the Law of Treaties explain, if "an act or fact or situation which took place or arose prior to the entry into force of a treaty continues to occur or exist after the treaty has come into force, it will be caught by the provisions of the treaty."[352] Peru demonstrated that it understood this rule when, in the *EC-Sardines* case, Peru argued (and the WTO Dispute Panel agreed), that a preexisting "technical regulation" was a "situation that has not ceased to exist but continues to exist" such that Peru's challenge did not run afoul of the retroactivity principle.[353]

75. *Finally*, Peru misreads the authorities applying the rule against the non-retroactivity of treaties, all of which are consistent with Freeport's argument here.

(a) The *Eco Oro v. Colombia* award, in which the tribunal interpreted language identical to Article 10.1.3,[354] is not distinguishable, as Peru argues.[355] Like the claimant in that case,

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350 Rejoinder on the Merits and Reply on Jurisdiction ¶ 794.

351 Reply and Counter-Memorial on Jurisdiction ¶ 263 (arguing that "Article 10.1.3 of the TPA reiterates the non-retroactivity rule" found in Article 28 of the VCLT).

352 *See* **CA-431**, ILC Draft Articles on the Law of Treaties with commentaries (1966), p. 212 ("If, however, an act or fact or situation which took place or arose prior to the entry into force of a treaty continues to occur or exist after the treaty has come into force, it will be caught by the provisions of the treaty. The non-retroactivity principle cannot be infringed by applying a treaty to matters that occur or exist when the treaty is in force, even if they first began at an earlier date. . . [i]n other words, the treaty will not apply to acts or facts which are completed or to situations which have ceased to exist before the treaty comes into force.").

353 **CA-433**, *European Communities — Trade Description of Sardines*, WT/DS231, Report of the Panel, 29 May 2002, ¶¶ 4.23, 7.74, 7.85 ("Peru contends that the European Communities' argument cannot be reconciled with the principle of non-retroactivity of treaties enshrined in Article 28 of the Vienna Convention. Peru points out that, in the instant case, both the international standard and the EC Regulation continued to exist after the entry into force of the TBT Agreement"); *see also id.* ¶¶ 7.74, 7.85.

354 **CA-285**, *Eco Oro Minerals Corp. v. Republic of Colombia,* ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum (9 September 2021) ("*Eco Oro v. Colombia* Decision on Jurisdiction") (Grigera Naón, Sands, Blanch), ¶ 342 (quoting Article 801(2) of the Canada-Colombia BIT which provides that "[f]or greater certainty, the provisions of this Chapter do not bind a Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement").

355 *See* Rejoinder on the Merits and Reply on Jurisdiction ¶ 789(d).

Freeport relies "only on [post-entry into force] *measures*" and that is "sufficient to found jurisdiction over those *measures*."[356] The tribunal held it was "entitled to have regard to" pre-entry into force acts "in establishing the facts as they occurred after" entry into force.[357]

(b) Peru maintains its misplaced reliance on *Spence v. Costa Rica*,[358] but does not engage with Freeport's arguments in the Counter-Memorial on Jurisdiction.[359] The non-retroactivity holding in *Spence* is completely inapposite because that case involved an expropriation that was completed before the treaty entered into force and the only post-entry into force acts were the continued refusal to pay compensation for that expropriation.[360] As Freeport explained, the *Spence* tribunal still concluded that the non-retroactivity rule does not apply in situations such as this case, in which pre-entry into force acts or facts are not "relied upon to establish the breach in circumstances in which the post-entry into force conduct would not otherwise constitute an actionable breach in its own right."[361] Here, each of the post-entry into force measures that Freeport challenges as breaches of the Stability Agreement and the TPA would be "independently actionable" irrespective of whether Peru earlier expressed its novel position on the scope of stability guarantees in the non-binding 2006 MINEM Report or any of the other reports and memoranda that Peru cites.[362]

(c) The *dicta* in the *M.C.I. Power v. Ecuador* award that Peru cites does not undermine Freeport's argument.[363] The tribunal in that case concluded that it had jurisdiction "over events subsequent to the entry into force of the BIT when those acts are alleged to be

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356 **CA-285**, *Eco Oro v. Colombia* Decision on Jurisdiction, ¶ 360 (emphasis added).

357 **CA-285**, *Eco Oro v. Colombia* Decision on Jurisdiction, ¶ 360.

358 Rejoinder on the Merits and Reply on Jurisdiction ¶ 787(a).

359 *See* Reply and Counter-Memorial on Jurisdiction ¶ 269.

360 Reply and Counter-Memorial on Jurisdiction ¶ 269 ("The [*Spenc*e] tribunal found that it lacked temporal jurisdiction because the post-entry into force actions were not 'orders or other regulatory measures imposing legal consequences on the Claimants.'") (citing **RA-2**, *Spence v. Costa Rica* Interim Award, ¶ 24).

361 **RA-2**, *Spence v. Costa Rica* Interim Award, ¶ 217.

362 *See* Rejoinder on the Merits and Reply on Jurisdiction ¶ 783 (referring to **CE-534**, MINEM, Report No. 156-2006-MEM/OGJ (16 June 2006)); *id.* ¶ 793 (referring to **RE-179**, SUNAT June 2006 Internal Report; **RE-26**, SUNAT, Report No. 263-2002-SUNAT/K00000, September 23, 2002; and **RE-27**, SUNAT, Report No. 166-2007-SUNAT/2B0000, September 20, 2007 Memorial on Jurisdiction); *see also* Counter-Memorial on the Merits and Memorial on Jurisdiction ¶ 481, Table 3 (table of the alleged "multiple occasions" between September 2002 and the TPA's entry into force "on which Peru's agencies and representatives stated the position . . . which is the foundation and legal basis of all of SUNAT's Royalty and Tax Assessment").

363 Rejoinder on the Merits and Reply on Jurisdiction ¶¶ 789(a)-(b) (citing **RA-11**, *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award (31 July 2007) ("*M.C.I. v. Ecuador* Award"), ¶¶ 63, 66, 84).

violations of the BIT" and that "[p]rior events may only be considered by the Tribunal for purposes of understanding the background, the causes, or scope of violations of the BIT that occurred after its entry into force."[364] Here too, the Tribunal has jurisdiction over post-entry into force acts that Freeport alleges to be breaches of the Stability Agreement and the TPA and should consider "[p]rior events" such as the June 2006 MINEM and SUNAT Reports "for purposes of understanding the background, the causes, or scope of" the breaches that Freeport alleges.[365]

(d) Freeport's argument is also entirely consistent with the *Tecmed v. Mexico* tribunal's conclusion that it only lacked jurisdiction over "acts or omissions of the Respondent prior to [the Treaty's entry into force] which, considered in *isolation*, could be deemed to be in violation of the Agreement prior to such date."[366] As Freeport has explained,[367] neither the June 2006 MINEM Report nor any of the other reports or memoranda that Peru cites,[368] "considered in *isolation*," breached the Stability Agreement or the TPA because they were not binding and did not cause Freeport or SMCV to incur loss.[369] Moreover, like in *Tecmed*, pre-entry into force acts, facts, and situations are "relevant for the purpose of determining whether the Respondent violated the Agreement through conduct which took place or reached its consummation point *after* its entry into force."[370]

(e) *Mondev v. USA* supports Freeport's argument that the non-retroactivity rule does not preclude jurisdiction simply because pre-entry into force facts, such as the June 2006 MINEM Report, are "relevant" to determining whether post-entry into force measures

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364 **RA-11**, *M.C.I. v. Ecuador* Award, ¶ 93.

365 **RA-11**, *M.C.I. v. Ecuador* Award, ¶ 93.

366 **CA-99**, *Tecmed v. Mexico* Award, ¶ 60. *But see* Rejoinder on the Merits and Reply on Jurisdiction ¶ 789(c).

367 *See supra* ¶¶ 72(b)-(d); 74(a)-(b); Reply and Counter-Memorial on Jurisdiction ¶ 266 ("Freeport does not allege that the *expressly non-binding* June 2006 Report or any of the other government reports and memoranda Peru identifies in Table 3 breached the Stability Agreement or Article 10.5 of the TPA.") (emphasis in original).

368 *See* Rejoinder on the Merits and Reply on Jurisdiction ¶¶ 783, 793 (referring to various MINEM and SUNAT reports); Counter-Memorial on the Merits and Memorial on Jurisdiction ¶ 481, Table 3 (table of the alleged "multiple occasions" between September 2002 and the TPA's entry into force "on which Peru's agencies and representatives stated the position . . . which is the foundation and legal basis of all of SUNAT's Royalty and Tax Assessment.").

369 *See supra* ¶¶ 72(b)-(d); 74(a)-(b); Reply and Counter-Memorial on Jurisdiction ¶ 266 ("Freeport does not allege that the *expressly non-binding* June 2006 Report or any of the other government reports and memoranda Peru identifies in Table 3 breached the Stability Agreement or Article 10.5 of the TPA.") (emphasis in original).

370 **CA-99**, *Tecmed* Award, ¶ 66 (emphasis in original).

constitute breaches.[371] Moreover, the submissions of the U.S. in *Mondev* confirm the U.S.'s view that claims alleging that government "*measures*" post-dating the TPA's entry into force constitute breaches are not barred by the non-retroactivity rule.[372]

(f) The PCIJ and ICJ authorities that Peru relies on are completely irrelevant because those cases involved non-retroactivity provisions that applied to preexisting "disputes."[373]

76. For the above reasons, each of Freeport's Stability Agreement and Article 10.5 claims are within the Tribunal's temporal jurisdiction and Peru's objections must be dismissed.

D. ARTICLE 22.3.1 DOES NOT APPLY TO PENALTIES AND INTEREST ON THE TAX ASSESSMENTS

77. As Freeport explained in its Counter-Memorial on Jurisdiction, the TPA's tax exclusion under Article 22.3.1 does not bar Freeport's Article 10.5 claims for Peru's failure to waive penalties and interest on the Tax Assessments because penalties and interest are not taxes in Peruvian law.[374] In the Reply

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371 *See* Reply and Counter-Memorial on Jurisdiction ¶ 265 (citing **RA-6**, *Mondev* Award, ¶ 70 ("[E]vents or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after that date which is itself a breach."). *But see* Rejoinder on the Merits and Reply on Jurisdiction ¶ 787(b).

372 **CER-14**, Sampliner II, ¶ 12 (citing **CA-434**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, U.S. Rejoinder on Competence and Liability (1 October 2002), pp. 5-6 ("It follows, therefore, that the *only measures even arguably capable of giving rise to liability* under Chapter Eleven in this case are the acts or omissions of the various courts that heard LPA's case.")) (emphasis added).

373 *See* Rejoinder on the Merits and Reply on Jurisdiction ¶ 779; **RA-171**, *Phosphates in Morocco*, 1938 P.C.I.J. (Ser. A/B) No. 74, Decision on Preliminary Objections (June 14) ("Phosphates in Morocco, Decision on Preliminary Objections"), at p. 22 (quoting French Article 36(2) declaration limiting jurisdiction to "*any disputes* which may *arise after* the ratification of the present declaration with regard to *situations or facts subsequent* to this ratification") (emphasis added); **RA-172**, *The Electricity Company of Sofia and Bulgaria*, 1939 P.C.I.J. (Ser. A/B) No. 77, Decision on Preliminary Objections (April 4), at pp. 81 (quoting Belgian Article 36(2) declaration limiting jurisdiction to "any disputes arising after the ratification of the present declaration with regard to situations or facts subsequent to this ratification"); **RA-173**, *Case Concerning Right of Passage Over Indian Territory (Portugal v. India)*, Judgment, 1960 I.C.J. 6 (April 12), at pp. 33-34 ("By the terms of that Declaration India accepted the jurisdiction of the Court 'over all *disputes* arising after February 5th, 1930, with regard to situations or facts subsequent to the same date.'") (emphasis added).

374 Reply and Counter-Memorial on Jurisdiction ¶¶ 271-75; **CA-10**, TPA, Article 22.3.1 ("Except as set out in this Article, nothing in this Agreement shall apply to taxation measures."). Peru does not revisit its concession that Article 22.3.1 does not bar Freeport's Stability Agreement claims, including those based on the Tax Assessments and the penalties and interest, or Freeport's Article 10.5 claims based on the Royalty Assessments and the penalties and interest. *See* Counter-Memorial on the Merits and Memorial on Jurisdiction ¶¶ 456-58; *id*. n.938 ("Respondent notes that Article 22.3.6 of the TPA provides that 'taxation measure[s] alleged to be . . . a breach of an investment agreement or investment authorization' brought under Article 10.16 of the TPA are not excluded from the scope of the TPA. Thus, to the extent Claimant's claims of breach of the Stabilization Agreement are not otherwise excluded from the Tribunal's jurisdiction, Claimant would be able to raise breaches of the Stabilization Agreement on the basis of tax measures."); **RER-3**, Bravo and Picón I, ¶ 52 ("[I]t is clear that a royalty does not qualify as a tax or contribution, but rather as compensation."); **RWS-7**, Cruz I, ¶ 8 (noting that

on Jurisdiction, Peru and its experts "are in full agreement" that "neither delinquent interest nor penalties are taxes."[375] That concession is decisive. Yet, Peru argues that Article 22.3.1 nevertheless applies because the penalties and interest on the Tax Assessments are "part of the Executive Branch's powers and duties in administering taxes,"[376] the "means by which a government enforces a tax obligation,"[377] and part of the "tax debt" as defined under Article 28 of the Tax Code.[378] Peru is wrong.

78. *First*, as Freeport explained in the Counter-Memorial on Jurisdiction, Article 22.3.1 applies only to measures that constitute "taxation;"[379] *i.e.*, measures that impose tax obligations. Peru's argument is based on the fundamentally flawed premise that "'taxation measures' encompasses more than just 'taxes.'"[380] The term "measure" as defined in Article 1.3 does not expand the scope of Article 22.3.1 to encompass "more than just taxes."[381] Instead, it clarifies that Article 22.3.1 applies irrespective of the type of measure the Government uses to impose a tax—be it a "law, regulation, procedure, requirement, or practice."[382] That conclusion is consistent with the "purpose" of the tax exclusion, which "specifically is to preserve the States' sovereignty in relation to their power to impose taxes in their territory."[383]

79. *Second*, Peru's concession that penalties and interest are not taxes leaves no further room to argue that Government decisions failing to waive penalties and interest are taxation measures.[384] Those

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the royalty is "'[an] economic consideration'") (citing **CA-6**, Law No. 28258, Mining Royalty Law, (24 June 2004), Article 2).

375 **RER-8**, Bravo and Picón II, ¶ 256; *see also* Reply on Jurisdiction ¶ 772 ("'[T]axation measures' should be interpreted under the TPA as including more than just 'taxes' themselves."); *id.* ¶ 775 ("If the TPA Parties intended 'taxation measures' to be limited solely to 'taxes,' as Claimant suggests, Article 22.3.1 would only have carved-out only 'taxes' from the investment chapter rather than 'taxation measures.'").

376 Rejoinder on the Merits and Reply on Jurisdiction ¶ 773.

377 Rejoinder on the Merits and Reply on Jurisdiction ¶ 774.

378 Rejoinder on the Merits and Reply on Jurisdiction ¶ 774 (citing **RER-8**, Bravo and Picón II, ¶ 260).

379 Reply and Counter-Memorial on Jurisdiction ¶ 272 ("The critical question is what constitutes 'taxation.'").

380 Rejoinder on the Merits and Reply on Jurisdiction ¶ 773.

381 *But see* Rejoinder on the Merits and Reply on Jurisdiction ¶ 773.

382 **CA-10**, TPA, Article 1.3.

383 **CA-279**, *Murphy Exploration & Production Company – International v. The Republic of Ecuador (II)*, PCA Case No. 2012-16, Partial Final Award (6 May 2016) (Hobér, Hanotiau, Derains) ("*Murphy v. Ecuador* Partial Final Award"), ¶ 165; *see also* **RA-153,** *Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum (13 September 2021), ¶ 377 ("This is understandable, since no State executing the ECT was willing to relinquish *their right to tax*, and equally to submit any disputes arising thereunder to the dispute resolution procedures under Article 26.") (emphasis added).

384 *See* **RER-8**, Bravo and Picón II, ¶ 256 ("In fact, neither delinquent interest nor penalties are taxes *per se*. In that, we are in full agreement with Claimant's tax law expert."); *see also* Rejoinder on the Merits and Reply on Jurisdiction ¶ 772 ("'[T]axation measures' should be interpreted under the TPA as including more than just 'taxes' themselves."); *id.* ¶ 775 ("If the TPA Parties intended 'taxation measures' to be limited solely to 'taxes,'

decisions are not taxation measures because they do not "impose taxes."[385] Rather they fail to waive penalties and interest and, thus, are penalties and interest measures, which are not covered by Article 22.3.1. Peru is wrong when it argues that the decisions failing to waive penalties and interest are "taxation measures" because "the disputed penalties and interest were imposed on SMCV as a direct result of its failure to comply with its underlying tax obligations."[386] Article 22.3.1 simply does not apply to every Government act that may be the but-for consequence of a taxation measure. For example, SMCV made GEM payments as a consequence of the Government's misrepresentation that, if SMCV paid GEM, SMCV would be exempt from SMT, which is a taxation measure.[387] Yet, Peru does not contest that Article 22.3.1 does not apply to Freeport's claims for unreimbursed GEM payments.

80. Moreover, penalties and interest plainly are not "the specific means by which a government enforces a tax obligation" as Peru argues.[388] The means by which the Government enforces a tax obligation is the coercive collection "procedure" for that tax obligation.[389] The fact that penalties and interest measures may fall within the category of measures that incentivize compliance with taxation measures is irrelevant. Article 22.3.1 does not apply to that broad and amorphous category of measures; it applies only to the taxation measures themselves. As Freeport explained,[390] if the TPA parties intended Article 22.3.1 to apply more broadly, they would have used language to that effect, such as the term "fiscal measures."[391]

81. *Third*, Peruvian law does not support Peru's argument that the decisions failing to waive penalties and interest are taxation measures under the TPA. Peru concedes that the decisions of the Tax

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as Claimant suggests, Article 22.3.1 would only have carved-out only 'taxes' from the investment chapter rather than 'taxation measures.'").

385 **CA-279**, *Murphy v. Ecuador* Partial Final Award ¶ 165.

386 Rejoinder on the Merits and Reply on Jurisdiction ¶ 774.

387 *See* Memorial ¶ 26 ("When SMCV entered into the GEM Agreement, Peruvian officials repeatedly confirmed that the Government could not collect GEM at the same time it collected royalties and Special Mining Tax ('SMT') payments."); Reply and Counter-Memorial on Jurisdiction ¶ 161 ("Peru also does not contest that SMCV made millions of dollars in GEM payments following the Government's explicit confirmation that SMCV needed to make either GEM payments or royalty and SMT payments, but not both."); *see also* **CER-13**, Hernández III, ¶ 18.

388 Rejoinder on the Merits and Reply on Jurisdiction ¶ 774.

389 **CA-14**, Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Article 115(a)) ("An enforceable debt will give rise to coercive actions for its collection.").

390 Reply and Counter-Memorial on Jurisdiction ¶ 274.

391 *See* **RA-162**, *SunReserve Luxco Holdings S.À.R.L, SunReserve Luxco Holdings II S.À.R.L and SunReserve Luxco Holdings III S.À.R.L v. Italian Republic,* SCC Case No. V2016/32, Final Award (25 March 2020) (van den berg, Giardina, Sachs), ¶ 518 ("Apart from the fact that the term 'fiscal measures' does not appear in Article 21(7)(a) ECT, even conceptually, fiscal measures could include a number of measures, including but not limited to measures relating to taxes . . . [a]ccordingly, the Tribunal considers the term 'fiscal measures' to be broader than, but inclusive of, taxation measures.").

Tribunal and the Constitutional Court that Freeport cited in the Reply on Jurisdiction "appear to define the term 'tax'" and that Rule II of the "the Tax Code . . . appears to identify the types of 'taxes.'"[392] Peru does not deny that those authorities clearly show that Peruvian law does not characterize penalties and interest as taxes and expressly *excludes* penalties from the definition of taxes.[393] Decisions failing to waive penalties and interest, thus, cannot be taxation measures.[394] Peru turns to Peruvian law to establish the irrelevant point that penalties and interest can be related to taxes but does not contradict the basic proposition, with which Peru agrees, that penalties and interest are not taxes in Peruvian law.

(a) The argument by Peru and its experts that penalties and interest are taxation measures because they are identified as "components of tax debt," under Article 28 of the Tax Code is irrelevant and deeply misleading.[395] As Dr. Hernandez explains, the term "tax debt" encompasses a "broad range" of concepts that the Tax Code bundles together purely for purposes of procedural and administrative convenience because they are each administered by the Tax Administration and are subject to "similar procedures for their administration, payment, collection, and challenge," even though they are not taxes.[396] Similarly, Peruvian law classifies royalties and GEM as components of the "tax debt" by authorizing SUNAT

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392 Rejoinder on the Merits and Reply on Jurisdiction ¶ 773 (citing Reply and Counter-Memorial on Jurisdiction ¶ 272; **CA-378**, Constitutional Court Decision, Case No. 3303-2003-AA/TC (28 June 2004), p. 3 (defining tax as a "monetary obligation, set out in law, *which does not constitute a penalty for an unlawful action* . . . that must be paid by the person that is in the situation determined by the law") (emphasis added); **CA-365**, Tax Tribunal Resolution No. 889-5-2000 (October 27, 2000), p. 4 ("The collection is not a penalty for an unlawful action, which implies that the mandatory relationship mentioned above arises as a result of the law's will, such obligation does not result from the application of a penalty for a wrongful conduct.")); **CER-8**, Hernández II, ¶ 133 (explaining that the Tax Code recognizes three categories of tax obligations, *impuestos*, contributions, and fees, which do not include penalties and interest) (citing **CA-14**, Tax Code, Rule II).

393 *See* Reply and Counter-Memorial on Jurisdiction ¶¶ 273-74 (citing sources).

394 *See* **RA-155**, *Cavalum SGPS, S.A. v. Kingdom of Spain*, ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum (31 August 2020) (Collins, Bethelehem, Haigh), ¶ 383 (concluding that "[i]n order for [the ECT's tax exclusion for "taxation measures"] to apply, the domestic law of the host State must characterise the measure as a tax in nature and substance").

395 *See* Rejoinder on the Merits and Reply on Jurisdiction ¶ 774; **RER-8**, Bravo and Picón II, ¶¶ 260-61.

396 **CER-13**, Hernández III, ¶ 17.

to administer the Royalty and GEM Laws.[397] Yet, Peru does not contest that royalty and GEM measures are not taxation measures under the TPA.[398]

(b) It is equally irrelevant that Peruvian law authorizes the same divisions of the MEF, SUNAT and the Tax Tribunal, to administer penalties and interest on tax assessments.[399] Peruvian law also authorizes SUNAT and the Tax Tribunal to administer royalties and GEM which, [400] again, Peru concedes are not taxation measures under the TPA.

(c) Peru's resort to Peruvian law for the definition of "taxation measures" is misguided.[401] Peruvian law is dispositive in defining what constitutes a tax but is irrelevant in defining

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397 **CER-13**, Hernández III, ¶ 17 (citing **CA-8**, Law No. 28969, Law that Authorizes SUNAT to Implement Provisions that Facilitate the Administration of Royalties (January 25, 2007), Final Supplementary Provisions, Second(g) (including royalties as a component of the "tax debt"); **CA-182**, Regulations for the Law Establishing GEM Legal Framework, Supreme Decree No. 173-2011-EF (29 September 2011), Clause 6.2 ("SUNAT, for the performance of the functions associated with the payment of the Gravamen, shall apply the provisions of Law No. 28969, Law that authorizes SUNAT to apply rules that facilitate the administration of mining royalties, including the provisions of Article 33 of the Single Unified Text of the Tax Code.")); *see also* **CE-46**, SUNAT Resolution No. 055-014-0001394/SUNAT, 2008 Royalty Assessments, p. 43 (referring to royalties as part of the "tax debt"); **CE-686**, SUNAT, Resolution No. 0510190000089 (2006-2008 Royalty Assessments, Approval and Deferral of Installment Plan), p. 2 (same); **CE-729**, SUNAT, Coercive Enforcement Resolution, No. 011-006-0056535 (2009 Royalty Assessments) (same).

398 *See, e.g.*, Counter-Memorial on the Merits and Memorial on Jurisdiction ¶ 456; Reply and Counter-Memorial on Jurisdiction ¶ 271 ("The Parties are agreed that Article 22.3.1. . . does not bar. . . Freeport's Article 10.5 claims based on the Royalty Assessments and the penalties and interest."); **RER-3**, Bravo and Picón I, ¶ 52 ("[I]t is clear that a royalty does not qualify as a tax or contribution, but rather as compensation.").

399 Rejoinder on the Merits and Reply on Jurisdiction ¶ 773 (citing **Ex. RE-327**, Law Delegating to the Executive Branch the Power to Legislate on Matters of Economic Reactivation and Formalization, Citizen Security, Fight Against Corruption, Water and Sanitation and Reorganization of Petroperú S.A., Law No. 30506, October 6, 2016 (published on October 9, 2016), Article 2(1)(a)(5); **CA-209**, Law Establishing Tax Measures, Simplification of Procedures, and Permits for Promoting and Revitalizing Investment in the Country, Law No. 30230, July 12, 2014, at Arts. 4.1-4.3).

400 **CER-13**, Hernández III, ¶¶ 17-18 (citing **CA-8**, Law No. 28969, Law that Authorizes SUNAT to Implement Provisions that Facilitate the Administration of Royalties (January 25, 2007), Final Supplementary Provisions, Second(g) ("'Tax debt': the amounts that mining concession titleholders are obliged to pay and that are comprised of mining royalties, penalties and interest applicable under the laws that regulate mining royalties."); **CA-182**, Regulations for the Law Establishing GEM Legal Framework, Supreme Decree No. 173-2011-EF (29 September 2011), Clause 6.2 ("SUNAT, for the performance of the functions associated with the payment of the Gravamen, shall apply the provisions of Law No. 28969, Law that authorizes SUNAT to apply rules that facilitate the administration of mining royalties, including the provisions of Article 33 of the Single Unified Text of the Tax Code.")).

401 Rejoinder on the Merits and Reply on Jurisdiction ¶ 773 (citing **Ex. RE-327**, Law Delegating to the Executive Branch the Power to Legislate on Matters of Economic Reactivation and Formalization, Citizen Security, Fight Against Corruption, Water and Sanitation and Reorganization of Petroperú S.A., Law No. 30506, October 6, 2016 (published on October 9, 2016), Article 2(1)(a)(5); **CA-209**, Law Establishing Tax Measures, Simplification of Procedures, and Permits for Promoting and Revitalizing Investment in the Country, Law No. 30230, July 12, 2014, Articles 4.1-4.3).

"taxation measure" as that term is used in the TPA.[402] Under the TPA a taxation measure is a measure that imposes tax obligations. In any event, there is no definition of "taxation measures" in Peruvian law and the provisions of Peruvian law in which Peru and its experts identify isolated references to that term do not purport to provide one.[403] They merely reflect that SUNAT administers penalties and interest measures using procedures that are applicable to taxation measures.[404] SUNAT also administers royalty and GEM measures using procedures that are applicable to taxation measures, but royalty and GEM measures are not "taxation measures."[405]

82. *Third*, the investment treaty authorities that Peru cites do not support Peru's attempt to expand Article 22.3.1 to cover penalties and interest measures.

(a) Peru mischaracterizes *Canfor v. U.S.A.* and Peru's reliance on that decision is misplaced.[406] The tribunal in *Canfor* did not interpret "'taxation measures' in NAFTA's Article 2103.1" as Peru claims.[407] In rejecting the claimant's argument that the NAFTA exclusion for "antidumping" and "countervailing duty law[s]" was narrower than the NAFTA exclusion for "taxation measures," the *Canfor* tribunal observed that "'measure' is . . . broader than 'law.'"[408] But Freeport does not argue that Article 22.3.1 applies only to taxation laws but, instead, that it applies only to taxation measures.

(b) Peru's reliance on the *Link Trading v. Moldova* tribunal's conclusion that the tax exclusion in the U.S.-Moldova BIT was "broad enough to cover customs duties" is similarly

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402 **CA-10**, TPA, Article 22.3.1.

403 **CER-13**, Hernández III, ¶ 16 (citing **RER-8**, Second Bravo and Picón Report, ¶ 258; **CA-209**, Law Establishing Tax Measures, Simplification of Procedures and Permits for the Promotion and Dynamization of Investment in the Country, Law No. 30230 (July 12, 2014), Article 4; **RE-327**, Law Delegating to the Executive Branch the Power to Legislate on Matters of Economic Reactivation and Formalization, Citizen Security, Fight Against Corruption, Water and Sanitation and Reorganization of Petroperú S.A., Law No. 30506, October 6, 2016 (published on October 9, 2016), Art. 2(1)(a) a.5; **RE-332**, SUNAT Resolution No. 362-2014/SUNAT (28 November 2014), "Whereas" section)).

404 **CER-13**, Hernández III, ¶ 17.

405 **CER-13**, Hernández III, ¶ 18.

406 Rejoinder on the Merits and Reply on Jurisdiction ¶ 772 (citing **RA-9**, *Canfor Corporation et al. v. United States of America*, UNCITRAL, Decision on Preliminary Question (6 June 2006), ¶ 258).

407 Rejoinder on the Merits and Reply on Jurisdiction ¶ 772.

408 **RA-9**, *Canfor Corporation et al. v. United States of America*, UNCITRAL, Decision on Preliminary Question, June 6, 2006 ¶¶ 248-49, 258, 273.

misplaced because, as reflected by their express carve-out from the TPA's tax exclusion, customs duties are taxes.[409] Here, Peru admits that penalties and interest are not taxes.

83. *Finally*, Peru's argument cannot survive the investment treaty decisions confirming that government measures, and *expressly penalties*, do not qualify as "taxation measures" merely because they are related to taxation measures.

(a) Peru utterly fails to distinguish the decision in *Nissan*. Peru ignores entirely the tribunal's conclusion that "not . . . every instance of governmental authority imposing monetary obligations . . . is . . . a 'tax'" and "the fact that a government ministry or department may impose *fines or penalties* as punishment for proscribed conduct . . . does not make these actions necessarily 'taxation measures.'"[410] Peru observes that the *Nissan* tribunal defined "taxation measures" as "measures regulating the *obligation to pay taxes*."[411] Because penalties and interest are not taxes, measures failing to waive penalties and interest cannot be measures regulating the obligation to pay taxes. Peru's argument finds no support in the tribunal's conclusion that "if the harm to the investor was caused by a 'taxation measure,' then that measure cannot be challenged through CEPA-based arbitration."[412] SMCV's payment of penalties and interest is not harm that was caused by a taxation measure—it is harm that was caused by Peru's completely unreasonable and arbitrary decisions failing to waive the extraordinarily punitive penalties and interest. Those decisions are penalties and interest measures not taxation measures. Moreover, because Peru does not contest that penalties and interest serve a distinct "purpose" from taxes in Peruvian law,[413] Peru cannot credibly argue that the conclusion that penalties and interest

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409 Reply on Jurisdiction ¶ 772 (citing **RA-101**, *Link Trading v. Department for Customs Control of Republic of Moldova*, Award on Jurisdiction, February 16, 2001, at p. 9); **CA-10**, TPA, Article 22.5 (specifying that "taxation measures do not include (a) a customs duty.").

410 Reply and Counter-Memorial on Jurisdiction ¶ 274(a) (citing **CA-243**, *Nissan v. India* Decision on Jurisdiction, ¶ 385 (emphasis added)).

411 Rejoinder on the Merits and Reply on Jurisdiction ¶ 776(a) (citing **CA-243**, *Nissan v. India*, Decision on Jurisdiction, ¶ 384 (emphasis added)).

412 Rejoinder on the Merits and Reply on Jurisdiction ¶ 776(a) (citing **CA-243**, *Nissan v. India* Decision on Jurisdiction, ¶ 380).

413 Reply and Counter-Memorial on Jurisdiction ¶ 273 ("The 'purpose of taxes is to fund the provision of public goods and services and help redistribute wealth to fight social inequality.' . . . The purpose of penalties is not to 'fund the provision of public goods and services and help redistribute wealth' but 'to punish taxpayers that break tax regulations and deter future violations.' . . . [I]nterest serves a distinct function from taxes—the purpose of interest is to 'compensate the Government for the loss of the use of money as a result of the taxpayer's default.'") (citing sources); **CER-8**, Hernández II, ¶¶ 130, 135, 139 (citing sources); *see also* **Ex. CE-1115**, Jorge Bravo, *Is the Administration of Tax Justice Efficient in Peru?* (4 April 2022); **Ex. CE-**

measures qualify as taxation measures is consistent with the *Nissan* tribunal's "nuanced inquiry."[414]

(b) Peru fails to recognize the import of the decision in *Murphy II*.[415] Peru does not contest that, just as in *Murphy II*, the Government's stated purpose of penalties and interest is distinct from the purpose of taxes and, thus, the decisions failing to waive penalties and interest cannot be taxation measures.[416] Moreover, Peru ignores that the *Murphy II* tribunal, interpreting broader treaty language that referred to "matters of taxation," concluded that "certain types of *fines*, fees, or special contributions may be required payments to the government but do not constitute a tax" or a "matter of taxation."[417]

(c) The decision in *Antaris v. Czech Republic* further supports Freeport's argument.[418] That case concerned the Czech Republic's imposition of a "Solar Levy" in the photovoltaic industry. Relying on domestic authorities and "characterizations – issued by the Czech Government itself,"[419] the tribunal concluded that the levy was not a "taxation measure"

1114, Jorge Bravo, *Taxes: Misinformation and Mistaken Targets* (24 August 2021); **Ex. CE-1113**, Jorge Picón, *The Information about Buenaventura Is Not According to the Truth* (13 August 2021); **Ex. CE-1112**, Jorge Picón, *Decision of the Constitutional Tribunal Gives Legal Certainty in Tax Matters* (18 January 2021); **Ex. CE-1110**, Jorge Picón, *Tax Mega Disputes in Peru* (13 December 2019); **Ex. CE-1108**, Jorge Bravo, *Mega Disputes, the State, the Companies, and Interests* (8 March 2019); **Ex. CE-1104**, Jorge Picón, *The Truth about Mega Tax Disputes vs. Mega Companies. The Constitutional Tribunal Has Resolved* (15 November 2018); **Ex. CE-1105**, Jorge Bravo, *Gnosis Tributaria 3* (7 December 2018).

414 Rejoinder on the Merits and Reply on Jurisdiction ¶ 776(a) (citing **CA-243**, *Nissan v. India* Decision on Jurisdiction, ¶ 386 (including an assessment of the "purpose of the relevant acts, including whether they were motivated principally by tax objectives")).

415 Rejoinder on the Merits and Reply on Jurisdiction ¶ 776(b) (citing **CA-279**, *Murphy v. Ecuador*, Partial Final Award, ¶ 190).

416 *Compare* **CA-279**, *Murphy* Partial Final Award, ¶ 190 (observing statements by government officials that the levy was not a tax), *with* Reply and Counter-Memorial on Jurisdiction ¶ 274(b) (citing **CER-8**, Hernández II, ¶¶ 132, 136, 138, 140, 143) (citing **CA-378**, Constitutional Court Decision, Case No. 3303-2003-AA/TC (June 28, 2004), p. 3 (distinguishing between taxes and their "coercive nature" and "penalt[ies] for an unlawful action"); **CA-365**, Tax Tribunal Resolution No. 889-5-2000 (October 27, 2000), p. 4; **CA-394**, Tax Tribunal Resolution No. 04170-1-2011 (16 March 2011), p. 4; **CA-429**, Constitutional Court Decision, Case No. 02169-2016-PA/TC (19 April 2022), p. 11 (holding that "[t]he purpose of charging moratory interest on tax debts is aimed at encouraging its payment on time, as well as compensating the tax creditor for the delay on the collection of the debt"); **CA-428**, Constitutional Court Decision, Case No. 2036-2021-PA/TC (7 December 2021), p. 26 (same); **CA-427**, Constitutional Court Decision, Case No. 05289-2016-PA/TC (11 November 2021), p. 19 (same); **CE-189**, Constitutional Court Decision, Case No. 04532-2013-PA/TC (16 August 2018), p. 7 (same)).

417 **CA-279**, *Murphy v. Ecuador* Partial Final Award ¶ 191 (citing V. Thuronyi, COMPARATIVE TAX LAW, pp. 45-54 (2003) (emphasis added)).

418 *See* **Ex. CA-445**, *Antaris Solar GmbH and Dr. Michael Göde v. The Czech Republic*, PCA Case No. 2014-01, Award (2 May 2018) (Tomka, Born, Collins) ("*Antaris v. Czech Republic* Award").

419 **Ex. CA-445**, *Antaris v. Czech Republic* Award, ¶¶ 241-43.

because it did not qualify as a tax in Czech law,[420] despite the ECT's broader language defining "taxation measures" as "any provision relating to taxes."[421] Moreover, the tribunal in *Antaris* expressly recognized that the fact the "Solar Levy [wa]s administered by the Tax Administration Law [wa]s not dispositive" because "[t]he 'definition' of tax contained in the Tax Administration Law extends to many payments which by their nature are not taxes."[422] Here Rule II of the Peruvian Tax Code *does not* include penalties and interest as one of the types of taxes in Peruvian law.

84. For the above reasons, Article 22.3.1 does not bar Freeport's claims that Peru's failure to waive penalties and interest on the Tax Assessments breached Article 10.5 of the TPA.

E. THE STABILITY AGREEMENT IS AN INVESTMENT AGREEMENT ON WHICH SMCV RELIED IN ESTABLISHING ITS INVESTMENT IN THE CONCENTRATOR

85. As Freeport explained in the Counter-Memorial on Jurisdiction, the Stability Agreement is an investment agreement under Article 10.28 of the TPA, upon which SMCV "reli[ed]" when "establish[ing] or acquir[ing]" the covered investment in the Concentrator.[423] Thus, Freeport is entitled to submit breaches of the Stability Agreement on behalf of SMCV under Article 10.16.1(b)(i)(C) of the TPA.[424] In its Memorial on Jurisdiction, Peru argued that Article 10.16.1(b)(i)(C) requires that Freeport show "that it relied on th[e Stability] Agreement when it acquired," "SMCV," the "'Cerro Verde production unit,' and the 'Mining and Beneficiation Concessions.'"[425] Peru contended that Freeport had not demonstrated its own reliance and could not invoke the reliance of Phelps Dodge, Freeport's predecessor-in-interest.[426] In its Reply on Jurisdiction, Peru reiterates those arguments and, in addition, argues that, even if the Tribunal

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420 **Ex. CA-445**, *Antaris v. Czech Republic* Award, ¶ 242.

421 *See* **Ex. CA-445**, *Antaris v. Czech Republic* Award, ¶ 176 ("For the purposes of this Article: (a) The term "Taxation Measures" includes: (i) *any provision relating to taxes* of the domestic law of the Contracting Party or of a political subdivision thereof or a local authority therein.") (emphasis added).

422 **Ex. CA-445**, *Antaris v. Czech Republic* Award, ¶ 230 ("Preliminarily, the Tribunal takes the view that reliance on the fact that the Solar Levy is administered by the Tax Administration Law is not dispositive of the question whether the Solar Levy constitutes a tax in substance. The 'definition' of tax contained in the Tax Administration Law extends to many payments which by their nature are not taxes; reliance on the Tax Administration Law is therefore unsuitable to give a conclusive answer as to whether or not a payment it governs is in nature a tax.").

423 *See* Reply and Counter-Memorial on Jurisdiction ¶¶ 276, 278-80.

424 *See* Reply and Counter-Memorial on Jurisdiction ¶¶ 276, 282-83 (citing **CA-10**, TPA, Article 10.16.1).

425 Counter-Memorial on the Merits and Memorial on Jurisdiction ¶ 525; *see also* Rejoinder on the Merits and Reply on Jurisdiction ¶ 854.

426 Counter-Memorial on the Merits and Memorial on Jurisdiction ¶¶ 526, 529.

accepted Freeport's reading of Article 10.16.1(b)(i)(C), Freeport's claims would still be barred because SMCV's and Phelps Dodge's reliance pre-dated the entry into force of the TPA.[427]

86. Peru is wrong. Article 10.28 defines an investment agreement as an agreement on which *either* a claimant *or* an enterprise relied in establishing or acquiring a covered investment.[428] And Article 10.16.1 does *not* say that a claimant must demonstrate that it relied on an investment agreement to submit an Article 10.16.1(b)(i)(C) claim for breach of that agreement on behalf of an enterprise that the claimant owns or controls.[429] Moreover, Peru's argument that a claimant or an enterprise must rely on an investment agreement in establishing or acquiring a covered investment *after* the TPA's entry into force fails because the TPA expressly defines "covered investment" to include investments established or acquired *before* the TPA's entry into force.[430] Finally, Peru's argument that an investor cannot invoke the reliance of its predecessor is wrong as a matter of law.

1. Article 10.16.1(b)(i)(C) Only Requires That SMCV Relied on the Stability Agreement

87. Peru's argument that a claimant must show that it relied on an investment agreement to submit Article 10.16.1(b)(i)(C) claims is inconsistent with the plain terms of the TPA and its negotiation history. The only sensible reading of Article 10.16.1 is that claimant must show either: (*i*) that the claimant relied on an investment agreement to bring claims for breach of that investment agreement on its own behalf under Article 10.16.1(a)(i)(C); or (*ii*) that the enterprise that the claimant owns or controls relied on an investment agreement to bring claims for breach of that investment agreement on behalf of that enterprise under Article 10.16.1(b)(i)(C).

88. *First,* the plain terms of the TPA are clear—a claimant is not required to establish that it relied on an investment agreement to submit claims for breaches of that agreement on behalf of an enterprise under Article 10.16.1(b)(i)(C). Article 10.28 of the TPA states that "investment agreement means a written agreement between a national authority of a Party and a covered investment <u>*or*</u> an investor of another Party, on which the covered investment <u>*or*</u> the investor relies in establishing or acquiring a covered investment."[431]

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427 *See* Rejoinder on the Merits and Reply on Jurisdiction ¶¶ 854, 857-58, 868, 876, 879.

428 **CA-10**, TPA, Article 10.28.

429 **CA-10**, TPA, Article 10.16.1.

430 **CA-10**, TPA, Article 1.3 ("[C]overed investment means, with respect to a Party, an investment, as defined in Article 10.28 (Definitions), in its territory of an investor of another Party in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter.").

431 **CA-10**, TPA, Article 10.28 (emphasis added).

As Freeport explained in the Counter-Memorial on Jurisdiction,[432] the Stability Agreement is an investment agreement because: (*i*) MINEM is a "national authority of a Party;" (*ii*) Freeport's "covered investment" is SMCV, an "enterprise" that Freeport owns or controls;[433] and (*iii*) the "covered investment" that SMCV established or acquired in reliance on the Stability Agreement is the Concentrator. Peru cannot escape the plain terms of Article 10.28 by arguing that it "in no way dictates how the reliance should be read in a separate provision (Article 10.16.1)."[434] That is precisely what Article 10.28 does. Article 10.28 *defines* "investment agreement" "[f]or purposes of [] Chapter" Ten of the TPA, which includes Article 10.16.1.[435]

89. As Freeport explained in the Counter-Memorial on Jurisdiction, the reference to reliance in the Article 10.28 definition of "investment agreement" is clearly disjunctive—if the investor is the party to the agreement then the investor must have relied on the agreement *or* if an enterprise is the party to the agreement then the enterprise must have relied on the agreement.[436] Yet, Peru argues that "under Article 10.28, ... to be considered an 'investment agreement' under the TPA in the first place, Claimant must demonstrate that it relied on that Agreement in establishing or acquiring its covered investments."[437] The only support that Peru offers for discarding the plain terms of Article 10.28 is an abbreviated recitation of the identical 2004 U.S. Model BIT definition of investment agreement in the Vandevelde treatise on U.S. international investment agreements.[438] Even if a passage in a treatise could override the plain terms of Article 10.28, which it cannot, the Vandevelde treatise would not help Peru's case. In the Chapter "Defining Investment Agreements," Vandevelde explains that the reliance requirement in the 1994 U.S. Model BIT was disjunctive and the 2004 U.S. Model BIT only introduced "a number of stylistic changes" and "modifie[d] the categories of rights that may be granted under an investment agreement."[439]

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[432] Reply and Counter-Memorial on Jurisdiction ¶¶ 279-80 ("[T]he definition of an investment agreement can also be read as: 'a written agreement between a national authority of a Party and a [enterprise] or a [claimant], on which the [enterprise] *or* the [claimant] relies in establishing or acquiring a covered investment other than the written agreement itself.'") (emphasis in original) (citing **CA-10**, TPA, Article 10.28).

[433] *See* **CA-10**, TPA, Articles 1.3, 10.28 (defining a "covered investment" to include, *inter alia*, an "enterprise").

[434] Rejoinder on the Merits and Reply on Jurisdiction ¶ 867.

[435] **CA-10**, TPA, Article 10.28.

[436] Reply and Counter-Memorial on Jurisdiction ¶¶ 278-79 (citing **CA-10**, TPA, Article 10.28).

[437] Rejoinder on the Merits and Reply on Jurisdiction ¶ 856.

[438] *See* Rejoinder on the Merits and Reply on Jurisdiction ¶ 862; **RA-102**, Kenneth J. Vandevelde, U.S. International Investment Agreements (2009) (excerpts), at p. 599 ("The definition limits the scope of the term to written agreements between an investor or a covered investment and a national authority of the host state upon which the investor relies in establishing an investment and that grants rights to the investor or covered investment of one of three types.").

[439] **CA-390**, Kenneth J. Vandevelde, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009), pp. 173-74.

90. Peru's argument does not find any textual support in Article 10.16.1 either. According to Peru, "Article 10.16.1 must be read to require a claimant's reliance on an investment agreement . . . if the claimant wishes to bring a claim of breach of the agreement."[440] But that is not what Article 10.16.1 says. The final paragraph of Article 10.16.1 states that:

> a claimant may submit . . . a claim for breach of an investment agreement only if the subject matter of the claim and the claimed damages directly relate to the covered investment *that was established or acquired, or sought to be established or acquired, in reliance* on the relevant investment agreement.[441]

Article 10.16.1 *does not* refer to a "covered investment" that the claimant "established or acquired, in reliance" on an investment agreement. It just refers, in the passive voice, to a "covered investment" that "was established or acquired, in reliance" on an investment agreement.[442]

91. As Freeport explained in the Counter-Memorial on Jurisdiction, there is a simple reason why the final paragraph of Article 10.16.1 refers to reliance in the passive voice, without identifying whose reliance is required—the purpose of the final paragraph is not to modify the definition of investment agreement in Article 10.28.[443] Rather, the purpose of the final paragraph is to ensure that the "subject matter" of a claim for breach of an investment agreement and the claimed damages "directly relate" to the investment that the claimant or enterprise established or acquired in reliance on that investment agreement.[444] This is confirmed by the Vandevelde passage that Peru cites, explaining that this is the "additional condition" that the 2004 U.S. Model BIT added to the provision for investment agreement claims in the 1994 U.S. Model BIT.[445] Article 10.16.1 thus does not modify the reliance requirement that Article 10.28 imposes and it does not impose any additional reliance requirement.

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440 Rejoinder on the Merits and Reply on Jurisdiction ¶ 860.

441 **CA-10**, TPA, Article 10.16.1.

442 **CA-10**, TPA, Article 10.16.1. *See also* **RA-102**, Kenneth J. Vandevelde, U.S. International Investment Agreements (2009) (excerpts), at p. 599 (quoting remarks of U.S. Assistant Secretary of State at Senate hearing in accord).

443 Reply and Counter-Memorial on Jurisdiction ¶ 283.

444 Reply and Counter-Memorial on Jurisdiction ¶ 283. *See also* **CER-11**, Sampliner I, ¶ 44 ("I was closely involved in the process of updating the investment agreement provisions in the 1994 Model BIT for the 2004 Model BIT . . . . In the 2004 Model BIT, the interagency group added a direct nexus requirement between the subject matter of the claim and the claimed damages and the covered investment that was established or acquired or sought to be established or acquired in reliance on the relevant investment agreement. However, we did not modify the reliance requirement in the 1994 Model BIT.").

445 **RA-102**, Kenneth J. Vandevelde, U.S. International Investment Agreements (2009) (excerpts), at p. 599 ("Article 24(1) imposes the additional condition that the subject matter of the claim and the claimed damages 'directly relate to the covered investment that was established or acquired, or sought to be established or

92. There is no merit to Peru's argument that Freeport somehow admitted that Article 10.16.1 says what it does not say by asserting Freeport's reliance on the Stability Agreement in the Notice of Arbitration and the Memorial.[446] Freeport noticed all claims on behalf of SMCV and, alternatively, on Freeport's own behalf.[447] Moreover, Peru's argument that Freeport has "changed the description of its covered investment" "to make its new argument work" is meritless.[448] There is no new argument and Freeport has referred to the Concentrator as a covered investment for the purposes of its investment agreement claims consistently since the Notice of Arbitration.[449]

93. *Second*, Peru's arguments remain inconsistent with the clearly established intent of the TPA parties.[450] In the Reply on Jurisdiction, Peru claims to reveal "the TPA Parties' deliberate intent in requiring a claimant's reliance on the investment agreement for which it is submitting a claim, regardless of whether it is bringing a claim on its own behalf or on behalf of an enterprise."[451] But Peru submits *no* witness or expert testimony, *no* negotiation records, and not a single shred of evidence contradicting the testimony of Mr. Sampliner and Mr. Herrera and the documents in the negotiation record showing that the TPA parties did not intend that.

(a) Peru does not contest Freeport's argument that the 1994 U.S. Model BIT required only the reliance of the party to the investment agreement for a claimant to submit investment agreement claims.[452] It also does not contest that the U.S. did not intend to introduce an

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acquired, in reliance on the relevant investment agreement.' *The term 'investment agreement' is a defined term* in the 2004 model. . . . During Senate hearings . . . Assistant Secretary of State Daniel Williams explained this clause . . . as follows: In other words, a claim for breach of an investment agreement can be made if the subject matter and damages relate to a covered investment . . . , but not if they relate to aspects of the investment agreement that do not have a significant connection to the covered investment.") (emphasis added).

446 Rejoinder on the Merits and Reply on Jurisdiction ¶ 863 (citing Notice of Arbitration, ¶¶ 4, 106; Memorial, ¶ 297).

447 Notice of Arbitration ¶ 18 ("Freeport accordingly claims, *on its own behalf and that of SMCV*, that: a) Peru has violated the Stability Agreement by confirming SUNAT's unlawful Assessment of Royalties and Taxes; and b) Peru has violated Articles 10.4 and 10.5 of the TPA by (i) arbitrarily refusing to waive SUNAT's extraordinarily punitive penalties and interest, as required by law; (ii) denying SMCV a fair hearing before the Tax Tribunal; and (iii) arbitrarily refusing to fully repay SMCV the GEM overpayments.") (emphasis added).

448 Rejoinder on the Merits and Reply on Jurisdiction ¶ 865.

449 *See* Notice of Arbitration ¶ 106 ("SMCV relied on the Stability Agreement in making their investments in the Cerro Verde mine including, among other investments, the Leaching and the *Flotation Plant*.") (emphasis added); Memorial ¶ 297 ("SMCV similarly 'relied' on the Stability Agreement when 'establishing or acquiring' covered investments in the Cerro Verde Mining Unit, *including the investment to construct the Concentrator*.") (emphasis added).

450 Reply and Counter-Memorial on Jurisdiction ¶ 284; **CER-11**, Sampliner I, ¶¶ 42, 44-48 (citing sources); **CWS-12**, Herrera I, ¶¶ 36-38 (citing sources).

451 Rejoinder on the Merits and Reply on Jurisdiction ¶ 856 (citing Counter-Memorial ¶ 521).

452 Reply and Counter-Memorial on Jurisdiction ¶ 284.

additional requirement when it updated the provision for investment agreement claims in Article 24.1(b)(i)(C) of the 2004 U.S. Model BIT, which is identical to Article 10.16.1(b)(i)(C).[453] Instead, Peru admits that what the "comparisons show is the similarity in the construction of the relevant model provisions and the TPA provisions."[454]

(b) Peru's selective discussion of the negotiation record does not undermine Mr. Herrera's testimony.[455] As Mr. Herrera explained, he wrote an email to the U.S. delegation to obtain "clarity" about the reference to "reliance" in what became Article 10.16.1 in January 2005.[456] The U.S. team explained that it "was to be interpreted by reference to the definition of investment agreement in Article 10.28 of the TPA."[457] Both TPA parties thus understood "that for a given contract to qualify as an "investment agreement" under the TPA, an investor *or* a 'covered investment' had to rely on such contract in establishing or acquiring an investment."[458]

2. There Is No Temporal Limitation Unique to Article 10.16.1(b)(i)(C) Claims

94. In the Notice of Arbitration, the Memorial, and the Counter-Memorial on Jurisdiction Freeport asserted that SMCV and the Concentrator are "covered investments" of Freeport under the TPA.[459] For the first time in the Reply on Jurisdiction, Peru argues in the alternative that SMCV and the Concentrator

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453 *See* Reply and Counter-Memorial on Jurisdiction ¶ 284 (citing **CA-375**, 2004 U.S. Model BIT, Article 24.1); **CA-390**, Kenneth J. Vandevelde, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009), pp. 818-21, Appendix G, 1994 U.S. Model BIT, Articles 1(h), 9 (allowing investment agreement claims where the "investment, national, or company relie[d] upon" the investment agreement "in establishing or acquiring a covered investment"); **CER-11**, Sampliner I, ¶¶ 44-45 ("I was closely involved in the process of updating the investment agreement provisions in the 1994 Model BIT for the 2004 Model BIT and incorporating them into the standard FTA. . . . The interagency group did not intend to modify the reliance requirement in the 1994 Model BIT for investment agreement claims that an investor brought on behalf of an enterprise that it owned or controlled.").

454 Rejoinder on the Merits and Reply on Jurisdiction ¶ 872.

455 *Contra* Rejoinder on the Merits and Reply on Jurisdiction ¶ 874.

456 **CWS-12**, Herrera I, ¶ 37 (citing **Ex. CE-1069**, Email from D. Weiner to C. Herrera re: Consultas (31 January 2005)).

457 **CWS-12**, Herrera I ¶ 37(b).

458 **CWS-12**, Herrera I ¶ 37(b).

459 Notice of Arbitration ¶ 106 ("Freeport and SMCV relied on the Stability Agreement 'in establishing or acquiring a covered investment.' Freeport relied on the Stability Agreement in acquiring SMCV's shares and Freeport and SMCV relied on the Stability Agreement in making their investments in the Cerro Verde mine including, . . . the Flotation Plant."); Memorial ¶ 297 (stating that Freeport and SMCV relied on the Stability Agreement when establishing or acquiring "covered investments in the Cerro Verde Mining Unit, including the investment to construct the Concentrator"); Reply and Counter-Memorial on Jurisdiction ¶ 280 ("The covered investment that SMCV established or acquired in reliance on the Stability Agreement is the Concentrator.").

are not "covered investments" under the TPA because they were not Freeport's investments at the time the TPA entered into force.[460] According to Peru, it follows that SMCV's and Phelps Dodge's "reliance on the [Stability] Agreement when [they] invested in the Concentrator cannot satisfy the reliance requirement under Article 10.16.1(b)(i)(C)."[461] Peru's argument appears to be that the TPA only permits investment agreement claims if the claimant or enterprise made the relevant investment in reliance on the investment agreement after the TPA's entry into force. This convoluted *ratione temporis* and *ratione materiae* hybrid argument is an entirely new objection. ICSID Rule 41 states that jurisdictional objections should be made "as early as possible" and "no later than the time limit fixed for the filing of the counter-memorial."[462] The Tribunal should dismiss Peru's objection as untimely for this reason alone. In any event, Peru's objection is meritless.

95. *First*, Peru's argument finds no support in the text of the TPA. No provision of the TPA temporally limits investment agreement claims to those concerning an investment that the claimant or enterprise made in reliance on an investment agreement *after* the TPA entered into force. On the contrary, Article 1.3 provides that "covered investment means, with respect to a Party, an investment, as defined in Article 10.28 (Definitions), in its territory of an investor of another Party *in existence as of the date of entry into force of this Agreement* or established, acquired, or expanded thereafter."[463] Thus, by definition, "covered investment" includes investments made prior to the TPA's entry into force.[464]

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460 Rejoinder on the Merits and Reply on Jurisdiction ¶¶ 868-69.

461 Rejoinder on the Merits and Reply on Jurisdiction ¶¶ 868-69; *id* ¶ 879 ("[E]ven if Claimant could step in the shoes of Phelps Dodge's alleged reliance (it cannot), Claimant would still not meet the reliance requirements under Article 10.16.1 because when Phelps Dodge invested in the Concentrator from 2004 to 2006, the Concentrator was not (and could not be) a covered investment under the TPA as the TPA did not enter into force until at least three years later in February 2009.").

462 **CA-22**, ICSID Convention, Regulation, and Rules, Rule 41 ("A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the countermemorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder—unless the facts on which the objection is based are unknown to the party at that time.").

463 **CA-10**, TPA, Article 1.3 ("Definitions of General Application") (emphasis added). *Compare id*. *with* Rejoinder on the Merits and Reply on Jurisdiction ¶ 869 ("The TPA defines a 'covered investment' as 'an investment . . . in its territory of an investor of another Party.'").

464 **CA-10**, TPA, Article 1.3 ("Definitions of General Application"). *Compare* **CA-390**, Kenneth J. Vandevelde, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009), pp. 124-25 ("[I]n the 2004 model, the definition of 'covered investment' is the location at which the treaty specifies that *it applies to existing as well as future investment*, a matter that had been addressed in the final provision in earlier models.") (emphasis added), *with* Rejoinder on the Merits and Reply on Jurisdiction ¶ 871 ("Again, therefore, Claimant's assertion is contradicted by the same authority on which it relies in its Reply.") (citing **CA-390**, Kenneth J. Vandevelde, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009) (excerpts), Appendix G, at p. 591).

96. The definition of "covered investment" under Article 1.3 applies generally throughout the TPA and, hence, is necessarily incorporated into the definition of investment agreement in Article 10.28 and Article 10.16.1. Article 10.16.1 accordingly permits claims for breach of an investment agreement, provided that either the claimant or the enterprise relied on the investment agreement in establishing or acquiring an investment, even if that investment was already "in existence as of the date of entry into force" of the TPA. Moreover, the reasoning underlying Peru's argument is inconsistent with Peru's recognition that Freeport is entitled to bring Article 10.5 claims on behalf of SMCV even though those claims equally relate to the Concentrator investment that SMCV made before Freeport acquired SMCV.

97. *Second*, Peru's new objection is inconsistent with the intent of the TPA parties, which was to allow claims based on an investment agreements concluded before the TPA entered into force.[465] During the TPA negotiations, the U.S. sought to ensure that the investment agreement provisions of the TPA would apply to preexisting agreements that investors had established investments in reliance on due to "special concerns" related to "recent litigation and cases derived from the actions of SUNAT."[466] Accordingly, the U.S. rejected an Andean proposal to limit the definition of investment agreements to agreements concluded two years after the Treaty entered into force.[467] If the TPA parties intended to impose a temporal limitation on the investments that could be the subject of investment agreement claims, they would have done so expressly by adopting the Andean proposal or the language in other U.S. FTA's, including Article 15.1.14 of the U.S.-Singapore FTA, which expressly defines "investment agreement[s]" as those that "take effect on or after the date of entry into force of this Agreement."[468] They did not do so and, as Mr. Sampliner and

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465 *But see* Rejoinder on the Merits and Reply on Jurisdiction ¶ 876 ("Moreover, Claimant's assertion that the reliance requirement under TPA Article 10.16.1(b)(i)(C) can be satisfied by the enterprise on whose behalf the claimant is submitting a claim suggests that there are no boundaries or time limits on when the enterprise could have relied on a contract when making its investment, and that contracts that were not "investment agreements" can become investment agreements just because a U.S. entity acquires shares or ownership in the enterprise.").

466 *See* **CER-14**, Sampliner II, ¶ 20 (citing **Ex. CE-1079**, MINCETUR, Round XI Summary (Miami, 18-22 July 2005), p. 22; **Ex. CE-1099**, U.S. State Department, Lima Post Cable, *Peru: 2006 Report on Investment Disputes and Expropriation Claims* (1 June 2006)). *See also* **CWS**-22, Herrera II, ¶¶ 11(b), 18; **CWS-12**, Herrera I, ¶ 26 ("Throughout the negotiations, the U.S. team sought broad access to the Investment Chapter's dispute settlement mechanism including for breach of investment agreement claims."); **CER-11**, Sampliner I, ¶¶ 26, 28, 32, 45.

467 **Ex. CE-1071**, MINCETUR, Round VII Summary (Cartagena, 7-11 February 2005), pp. 36-37 ("To Obtain: Art. 27 Definition of Investment Agreement. Proposal for the definition to be applicable as of a period of two years reckoned from the effective date of the Treaty."). *See also* **CWS**- 22, Herrera II, ¶¶ 18-19; **CER-14**, Sampliner II, ¶¶ 19-20 ("I recall that the Andean States, like nearly all of our other IIA counterparties, sought a similar temporal limitation in the definition of investment agreements. I also recall that the U.S. rejected the Andean States' proposals for a temporal limitation.").

468 *See* **CER-14**, Sampliner II, ¶ 18 (citing **CA-371**, U.S.-Singapore FTA (2003), Article 15.1(14); **CA-430**, U.S.-Morocco FTA (2004), Article 10.27; **CA-437**, U.S.-Panama FTA (2007), Article 10.29; **CA-376**, CAFTA-DR

Mr. Herrera explain, that decision was intentional.[469] By instead adopting Article 10.28 the TPA parties intended to allow preexisting contracts to become investment agreements after the TPA entered into force in the same way they intended to allow preexisting investments to become covered investments. That intent is reflected in the MEF's opinion on the TPA stating that Chapter 10 applies to "existing investments as of the date of the entry into force."[470]

3. Phelps Dodge and SMCV Relied on the Stability Agreement in Making the Covered Investment

98. As explained above and in the Counter-Memorial on Jurisdiction, the TPA does not require Freeport to show that Phelps Dodge relied on the Stability Agreement.[471] In any event, the reliance requirement for investment agreement claims is satisfied on the alternative grounds that Phelps Dodge, Freeport's predecessor-in-interest, relied on the Stability Agreement in making the Concentrator investment.[472] In the Reply on Jurisdiction, Peru argues that Phelps Dodge's reliance is not "an acceptable substitute" for Freeport's reliance because that would be incompatible with the TPA's scope and because Phelps Dodge's reliance is a historical fact or behavior, not a legal right that it could transfer to Freeport.[473] Peru also disputes for the first time that Phelps Dodge and SMCV relied on the Stability Agreement in making the Concentrator investment.[474] Peru's arguments are meritless.

99. *First*, Freeport's argument is compatible with the scope of the TPA. Peru claims that Freeport's argument defies the scope of the TPA because it implies that a contract between a party to the TPA and a national of a non-party to the TPA can become an investment agreement if a national of a party to the TPA acquires the national of the non-party.[475] But as Peru admits, that is not what happened in this

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(2004), Article 10.28). *See also id*. (citing **CA-372**, U.S.-Chile FTA (2003), Article 10.27 (defining "investment agreement" as those that "take effect at least two years after the date of entry into force").

469 *See* **CER-14**, Sampliner II, ¶¶ 19-20; **CWS**- 22, Herrera II, ¶ 18.

470 *See* **RE-336**, MEF, Report No. 2006-EF/67, "Opinion on the Free Trade Agreement with the United States of America," (1 June 2006), p. 13 (MEF's opinion interpreting the FTA, acknowledging that Chapter 10 "covers existing investments as of the date of the entry into force, as well as those established later").

471 *See supra* ¶¶ 87-91; Reply and Counter-Memorial on Jurisdiction ¶¶ 276, 285.

472 Reply and Counter-Memorial on Jurisdiction ¶ 285.

473 Rejoinder on the Merits and Reply on Jurisdiction ¶¶ 878-79.

474 Rejoinder on the Merits and Reply on Jurisdiction ¶ 880.

475 Rejoinder on the Merits and Reply on Jurisdiction ¶ 878 ("One need only imagine a fact pattern in which the (U.S.) claimant's predecessor were a non-U.S. national (*e.g.*, a Chinese company): that Chinese company would not have any protection under the U.S.-Perú TPA that it could sell or pass to the U.S. company in the corporate acquisition process. In that scenario, whether or not the Chinese predecessor relied on the contract with the Peruvian government when it established or acquired its investment would be irrelevant, because that reliance would not have given the Chinese company any rights under the US-Perú TPA.").

case because, like Freeport, Phelps Dodge was a U.S. investor.[476] Therefore, it is unnecessary to entertain Peru's convoluted argument. In any event, nothing in the TPA or its negotiation history supports the limitation that Peru suggests. The parties could have easily limited the definition of "investment agreement" to require that the TPA's nationality requirements were satisfied at the time an investor or an enterprise relied on the investment agreement. Yet, they did not do so. They referred only to agreements existing "*between*" an investor or covered investment (*i.e.*, an enterprise) and a national authority of a TPA party.[477]

100. *Second*, there is no merit to Peru's argument that Phelps Dodge could not transfer its reliance on the Stability Agreement to Freeport because that reliance is a "historical fact or a behavior," not a "legal right."[478] Yet, as Peru's objection demonstrates, Phelps Dodge's reliance was a fact or behavior relevant to a legal right—the right to submit investment agreement claims under the TPA. Peru admits that Phelps Dodge would have been able to submit the same investment agreement claims Freeport submits here absent the acquisition.[479] Peru cannot seriously argue that if Phelps Dodge performed obligations under a contract, also a historical fact or behavior, it would be incapable of transferring to Freeport a contingent right to claim payment based on that performance in the context of an acquisition. For this reason, Peru's attempt to distinguish *Renée Rose Levy de Levi v. Republic of Perú* fails.[480]

101. *Finally*, Phelps Dodge and SMCV relied on the Stability Agreement in making the Concentrator investment. In the Notice of Arbitration, Memorial, and the Reply, Freeport showed that Phelps Dodge and SMCV relied on the Stability Agreement and provided abundant supporting evidence.[481]

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476 Rejoinder on the Merits and Reply on Jurisdiction ¶ 878 ("Here, purely by happenstance, the predecessor could have had relied on an investment agreement and claimed coverage under the US-Perú TPA (because Phelps Dodge was a U.S. company).").

477 **CA-10**, TPA, Article 10.28.

478 Rejoinder on the Merits and Reply on Jurisdiction ¶ 879.

479 Rejoinder on the Merits and Reply on Jurisdiction ¶ 878 ("Here, purely by happenstance, the predecessor could have had relied on an investment agreement and claimed coverage under the US-Perú TPA (because Phelps Dodge was a U.S. company).").

480 Rejoinder on the Merits and Reply on Jurisdiction ¶ 879.

481 Notice of Arbitration ¶ 4 (stating that "SMCV relied on the Stability Agreement and invested hundreds of millions of dollars to develop the Cerro Verde mine"); *id.* ¶106 ("SMCV relied on the Stability Agreement in making their investments in the Cerro Verde mine including, among other investments, the Leaching and the Flotation Plant."); Claimant's Memorial ¶ 297 (similar) (citing **Ex. CE-4**, Share Purchase Agreement Between Cyprus Climax Metals Company and Empresa Minera del Peru S.A. (17 March 1994), Article 3.1(g) (containing Peru's commitment to grant a mining stability agreement pursuant to Articles 78 and 79 of the Mining Law); **Ex. CE-341**, Guarantee of the Republic of Peru in Favor of Cyprus Climax Metals (17 March 1994), Art.1.6 (guaranteeing the execution of "any" mining stability agreement related to SMCV's "business and operations" that SMCV qualified for); **Ex. CE-20**, Fluor Canada Ltd., Feasibility Study: Cerro Verde Primary Sulfide Project (May 2004), Vol. IV, pp. 14-16 (assuming that SMCV would be entitled to rely on the stabilized regime); **Ex. CE-459**, Fluor, SMCV Primary Sulfide Project Feasibility Study Project Update

As Freeport explained in the Counter-Memorial on Jurisdiction,[482] Peru failed to contest this point at all in the Memorial on Jurisdiction.[483] In the Reply on Jurisdiction, Peru claims to have "specifically disputed that claim" and cross-references to a section of the "factual background" in the Counter-Memorial alleging that SMCV failed to conduct adequate due diligence on the scope of the Stability Agreement.[484] But not only did Peru fail to incorporate that section into its jurisdictional objection in the Memorial on Jurisdiction, the questions of reliance and adequate due diligence are distinct. In the Reply on Jurisdiction, Peru *still fails* to provide any arguments to support its claim that SMCV did not rely on the Stability Agreement and, instead, cross-references to the "factual background" section of that brief alleging that SMCV did not conduct adequate due diligence.[485] Thus, Peru's failure to provide *any argument* to support that point is decisive. In any event, Freeport has clearly established that Phelps Dodge and SMCV relied on the Stability Agreement in making the Concentrator investment.

(a) Mr. Morán testifies that when Phelps Dodge acquired Cyprus, it "believed that SMCV's stability regime was critically important," and "assigned great importance to th[e] [Stability] Agreement in determining the company's future plans," including a future primary sulfide expansion.[486]

(b) The 2004 Feasibility Study and the September 2004 update demonstrate that SMCV relied on the Stability Agreement in making the Concentrator investment, as the Study and update both explicitly assumed that the Stability Agreement would apply to the Concentrator.[487]

(September 2004), p. 48 (same)); Reply and Counter-Memorial on Jurisdiction ¶ 283; **CWS-5**, Davenport I, ¶ 40; **CWS-11**, Torreblanca I, ¶ 27.

482 Reply and Counter-Memorial on Jurisdiction ¶¶ 283, 285.

483 Counter-Memorial on the Merits and Memorial on Jurisdiction ¶¶ 519-35.

484 Rejoinder on the Merits and Reply on Jurisdiction ¶ 877 (citing Counter-Memorial on the Merits and Memorial on Jurisdiction § II.C); Rejoinder on the Merits and Reply on Jurisdiction ¶ 880 (citing Respondent's Counter-Memorial § II.C); Counter-Memorial on the Merits and Memorial on Jurisdiction at § II.C.3 (arguing that Phelps Dodge did not conduct adequate due diligence but not that Phelps Dodge did not rely on the Stability Agreement); Rejoinder on the Merits and Reply on Jurisdiction § II.E (same).

485 Rejoinder on the Merits and Reply on Jurisdiction ¶ 877 (citing Rejoinder on the Merits and Reply on Jurisdiction § II.D).

486 **CWS-8**, Morán I, ¶ 14. *Id*. ¶ 17 ("Once Phelps Dodge acquired Cyprus, we had to determine how to prioritize our new investments among the company's mining units. Cerro Verde was near the top of our list, given our strong interest in building the Concentrator to process primary sulfides and prolong the mine's useful life, which at the time was expected to last only until between approximately 2014 and 2018 unless we built the Concentrator.").

487 **Ex. CE-20**, Fluor Canada Ltd., Feasibility Study: Cerro Verde Primary Sulfide Project (May 2004), Vol. IV, pp. 14-16 (assuming that SMCV would be entitled to rely on the stabilized regime); **Ex. CE-459**, Fluor, SMCV Primary Sulfide Project Feasibility Study Project Update (September 2004), p. 48 (same); **CWS-5**, Davenport I, ¶ 40 ("In September 2004, Fluor issued an update to the 2004 Feasibility Study to reflect changes in ore

(c) Mr. Davenport testifies that SMCV's Board of Directors "relied on financial projections that assumed the Stability Agreement's guarantees would apply" when it approved the Concentrator investment.[488]

(d) SMCV's Board of Directors conditionally approved the Concentrator investment, "depend[ing] on obtaining the required permits . . . necessary for the project," including "the approval of SMCV's request to expand the Beneficiation Concession," which the Board understood would result in the Stability Agreement covering the Concentrator by operation of law.[489]

(e) Phelps Dodge's Board of Directors approved the Concentrator investment on the recommendation of the Finance Committee, "based on the financial information contained in the 2004 Feasibility Study and its update" and its analysis of the "risks and benefits associated with the investment," including the "stability guarantees contemplated in the Stability Agreement."[490]

(f) Phelps Dodge's Board of Directors conditionally approved the Concentrator investment, contingent on the expansion of the Beneficiation Concession, which would "ensure that [the Concentrator] would be covered by the Stability Agreement."[491]

102. For the above reasons, Freeport's Stability Agreement claims brought on behalf of SMCV under Article 10.16.1(b) of the TPA have been properly submitted to arbitration.

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processing and production rate options, as well as infrastructure and development assumptions. Consistent with Ms. Chappuis' assurance, we agreed with Fluor to retain the assumption that the Stability Agreement would apply to the concentrator, including with respect to the Mining Royalty Law that the Peruvian Congress had passed in June.").

488 **CWS-5**, Davenport I, ¶ 40.

489 **CWS-11**, Torreblanca I, ¶ 27 (citing **Ex. CE-470**, SMCV, Board of Directors Meeting Minutes (11 October 2004), p. 1, ¶ 1); **CWS-21**, Torreblanca II, ¶ (same); **CWS-16**, Davenport II, ¶ 17 (same); **CWS-5**, Davenport I, ¶ 40 (same).

490 **CWS-8**, Morán I, ¶¶ 26-27 (citing **Ex. CE-901**, Phelps Dodge 2004 10-K report, p. 5 ("In October 11, 2004, the Phelps Dodge board of directors announced conditional approval for an $850 million expansion of the Cerro Verde mine. Final approval was contingent upon receiving all required permits from the Peruvian government and placing necessary financing. The required permits and approvals were obtained in the 2004 fourth quarter. In early February 2005, the board approved moving forward on financing and project development. We expect to finalize financing during 2005.")); **CWS-5**, Davenport I, ¶ 40 ("In approving the investment, Phelps Dodge's and SMCV's Boards of Directors relied on financial projections that assumed the Stability Agreement's guarantees would apply to the concentrator, consistent with Ms. Chappuis's advice to SMCV.").

491 **CWS-8**, Morán I, ¶¶ 28-29. *See also* **CWS-5**, Davenport I, ¶ 40 ("[T]he [Phelps Dodge] Board approved an investment of US$850 million to construct the concentrator, conditional 'on obtaining the required permits and the financing necessary for the project.'"); **CWS-16**, Davenport II, ¶ 17 (same).

III. REQUESTED RELIEF

103. Freeport respectfully requests the Tribunal dismiss Peru's objections to jurisdiction and declare that it has jurisdiction over Freeport's claims.

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Dietmar W. Prager
Laura Sinisterra
Nawi Ukabiala
Julianne J. Marley
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, NY 10022
United States of America
+1 (212) 909-6000
dwprager@debevoise.com
lsinisterra@debevoise.com
nukabiala@debevoise.com
jjmarley@debevoise.com

Luis Carlos Rodrigo Prado
Francisco Cardenas Pantoja
RODRIGO, ELIAS & MEDRANO
Av. Pardo y Aliaga 652 piso 8
San Isidro
Lima 15073
Republic of Peru
+511 619-1900
lcrodrigo@estudiorodrigo.com
fcardenas@estudiorodrigo.com

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