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 COMMENTS ON THE NON-DISPUTING PARTY SUBMISSION OF THE UNITED STATES OF AMERICA

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I. INTRODUCTION

1. The 24 February 2023 non-disputing party submission of the United States of America ("the U.S. Submission") confirms that Peru's jurisdictional objections are not only irreconcilable with the terms of the United States-Peru Trade Promotion Agreement ("TPA") and the intent of the TPA parties, but also with the views of the U.S. Government. For example, the U.S. repeatedly confirms that the Article 10.18.1 limitation period can only start to run once the claimant has acquired knowledge that breach has occurred and the claimant has "incurred loss or damage" in the past tense. Accordingly, Peru's refusal to accept that Article 10.18.1 of the TPA "require[s] completed breach and injury" is incompatible with the U.S. Submission. Peru's argument that the limitation period begins once a claimant "first knew" the "legal basis" of a future breach is equally incompatible with the U.S. Submission. That would expose the TPA parties to unripe claims for breaches based on future State conduct that may never occur and for damages that may never be incurred. Unsurprisingly, the U.S. Government does not endorse that absurd result. Nor does it endorse any of Peru's remaining attempts to contort the jurisdictional provisions of the TPA.

2. The U.S. also expresses its views on the content of the customary international law minimum standard of treatment and the means of establishing the content of the minimum standard. In this respect, the U.S. Submission has no bearing on the merits of Freeport's claims and is thus ultimately of limited assistance to the Tribunal. For example, the U.S. opines that a claimant carries the burden of proving a rule of customary international law and may only make limited recourse to prior decisions in doing so. Yet, the U.S. supports its views almost exclusively by reference to prior decisions and the U.S. Submission cannot be interpreted as seeking to impose a greater standard on Freeport than the U.S. imposes on itself in asserting its own views on the content of customary international law. Thus, under the approach taken by the U.S. in its submission, Freeport has established the rules of customary international law relevant to the claims Freeport makes. The U.S. Submission on the content of the minimum standard has limited relevance to Freeport's claims and thus provides little, if anything, for the Tribunal to consider. For example, the U.S.'s opinion that the minimum standard of treatment does not contain independent "legitimate expectations" or "transparency" obligations is ultimately irrelevant to resolving Freeport's argument that those concepts are relevant to assessing an alleged breach of the minimum standard.

II. THE UNITED STATES' VIEWS ON THE JURISDICTIONAL PROVISIONS OF THE TPA SUPPORT FREEPORT'S ARGUMENTS

3. The U.S. Submission supports Freeport's arguments on the jurisdictional provisions of the TPA and confirms that the Tribunal has jurisdiction over Freeport's claims. *First*, the U.S. agrees with Freeport that the three-year limitation period set forth in Article 10.18.1 only begins to run once a breach has occurred and loss or damage has been incurred, and that a separate limitation period applies to each independently actionable breach. *Second*, the U.S. Submission confirms that the rule against the retroactive application of treaties does not bar claims challenging post-entry-into-force measures that independently support a cause of action, such as Freeport's claims challenging final and enforceable SUNAT Assessments that indisputably post-date the TPA's entry-into-force. *Third*, the U.S.'s view that the term "taxation measures" in Article 22.3.1 contemplates measures that apply or enforce, or fail to apply or enforce taxes, supports Freeport's argument that non-tax measures such as penalties and interest are not "taxation measures" under the TPA. *Finally*, the U.S.'s recognition of the distinction between investment agreement claims submitted on behalf of an investor and on behalf of an enterprise under Article 10.16.1 supports Freeport's view that it is SMCV's reliance on the Stability Agreement, not Freeport's, that is relevant for the investment agreement claims Freeport submitted on behalf of SMCV.

A. THE UNITED STATES' VIEWS ON ARTICLE 10.18.1 SUPPORT FREEPORT'S ARGUMENTS

4. The U.S. Submission supports Freeport's argument that Article 10.18.1 of the TPA does not bar Freeport's claims for breaches of the Stability Agreement and Article 10.5 of the TPA. Article 10.18.1 of the TPA provides that:

> No claim may be submitted to arbitration under this Section 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 claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) *has incurred loss or damage*.[1]

5. As Freeport explained in its previous submissions, Freeport acquired knowledge of Peru's breaches of the Stability Agreement and Article 10.5 of the TPA after the 28 February 2017 cut-off

[1] **CA-10**, United States-Peru Trade Promotion Agreement ("TPA"), Article 10.18.1 (emphasis added).

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]

6. The U.S. Submission contradicts Peru's tortured interpretation of Article 10.18.1. The U.S. correctly observes that the limitation period cannot begin before breach and loss have occurred, thus contradicting Peru's argument that the limitation period begins to run once a claimant acquires knowledge of the "legal basis" upon which it "would incur" loss or damage in the future.[4] Peru's erroneous argument would mean that the limitation period would have started not only before any of the Assessments were final and enforceable, but years before SUNAT even notified SMCV of most of the Assessments and before most of the relevant fiscal years had even started.[5] That would encourage claimants to submit unripe and uncertain investment treaty claims based on future SUNAT assessments that might never be rendered or might never become final and enforceable and damages that may never be incurred.[6] Unsurprisingly, the U.S. Submission does not support that untenable result, which would be contrary to

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2 *See* Claimant's Rejoinder on Jurisdiction (16 December 2022) ("Rejoinder on Jurisdiction"), ¶ 11; Claimant's Reply and Counter-Memorial on Jurisdiction (13 September 2022) ("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."); Respondent's Rejoinder on the Merits and Reply on Jurisdiction (8 November 2022) ("Rejoinder on the Merits and Reply on Jurisdiction"), ¶ 694 (same).

3 *See* Rejoinder on Jurisdiction ¶ 11; Reply and Counter-Memorial on Jurisdiction ¶ 211.

4 *Compare* Non-Disputing Party Submission of the United States of America (24 February 2023) ("U.S. Submission"), ¶¶ 8-10; *id.* ¶ 9 (referring to the "alleged breach and loss or damage *incurred* thereby") (emphasis added), *with* 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—i.e., the 2006-2007 Royalty Assessment—and that knowledge should equally apply to every other assessment or action of Respondent *taken on the same legal basis thereafter*") (emphasis added), *and* Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction (4 May 2022) ("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.") (emphasis added).

5 *See* Rejoinder on Jurisdiction ¶ 28 ("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") (emphasis in original); Reply and Counter-Memorial on Jurisdiction ¶ 213.

6 *See* Rejoinder on Jurisdiction ¶ 14; 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."); **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 ("[F]or 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.").

the goal of promoting "legal stability and predictability for potential respondents and third parties" because the respondent State would be exposed to claims for future assessments and damages not yet incurred.[7]

1. The United States' Submission Supports the Timeliness of Freeport's Claims Alleging Breaches of the Stability Agreement

7. The U.S. Submission supports the timeliness of each of Freeport's claims for breach of the Stability Agreement and shows why Peru's arguments are untenable.

8. *First*, the U.S. Submission confirms that Freeport could not have acquired knowledge of the breach and loss resulting from each Assessment until the relevant assessment became final and enforceable. Conversely, the U.S. Submission directly contradicts Peru's argument that the limitation periods for Freeport's claims started before SMCV incurred loss or damage.

(a) The U.S. Submission is consistent with Freeport's argument that a claimant cannot "incur" loss or damage from a SUNAT assessment until it becomes final and enforceable.[8] The U.S. recognizes that the limitation period cannot begin before a claimant has incurred loss and damage. As Freeport explained,[9] under Peruvian law, SUNAT assessments are not immediately enforceable against a taxpayer upon notification.[10] 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.[11] As Freeport explained and as Peru admits, SUNAT cannot enforce assessments until that administrative process is complete.[12] The Tax Code explicitly

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7 U.S. Submission ¶ 10 (stating that the purpose of limitations periods is to provide "legal stability and predictability for potential respondents and third parties").

8 *See* Rejoinder on Jurisdiction ¶ 25.

9 Rejoinder on Jurisdiction ¶ 23(b).

10 **CER-13**, Rejoinder Expert Report by Luis Hernández Berenguel (16 December 2022) ("Hernández III"), ¶ 7; **CER-12**, Rejoinder Expert Report of Alfredo Bullard (16 December 2022) ("Bullard III"), ¶ 6.

11 **CER-13**, Hernández III, ¶ 8; **CER-12**, Bullard III, ¶¶ 8, 10; **CER-7**, Reply Expert Report of Alfredo Bullard (13 September 2022) ("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**, Reply Expert Report by Luis Hernández Berenguel (13 September 2022) ("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).").

12 *See* Rejoinder on Jurisdiction ¶ 23(c); Rejoinder on the Merits and Reply on Jurisdiction ¶¶ 723-24; *see also* **RER-3**, Report from Experts in Peruvian Tax Law Jorge Bravo and Jorge Picón (4 May 2022) ("Bravo and Picón I"), ¶ 61 ("[T]axpayer challenges [to] these resolutions ha[ve] the effect of suspending [their]

precludes SUNAT from doing so.[13] And as Peru and its experts admit, "SMCV was under no legal obligation to pay the Assessments" until the administrative process was complete and an assessment does not become "binding" on a taxpayer until the administrative process for that assessment is complete.[14] Peru even admits that a claimant cannot incur loss or damage from a legal obligation until "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."[15] The conclusion by the U.S. that "the term 'incurred' broadly means 'to become liable or subject to'" is fully consistent with Freeport's arguments.[16] There was no payment obligation that SUNAT could enforce until each assessment became final and enforceable.[17] Thus, SMCV *could not be subjected to* a payment obligation and *could not become liable to pay* an assessment until it became final and enforceable.[18]

(b) The U.S. recognizes that Article 10.18.1 requires knowledge that breach has occurred and that the claimant "*has incurred loss or damage*," in the past tense.[19] It thus cannot be reconciled with Peru's refusal to accept that Article 10.18.1 "require[s] completed breach

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enforceability…."); **RER-2**, Report of Expert in Peruvian Civil Law Rómulo Morales Hervias (4 May 2022) ("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.").

13 Rejoinder on Jurisdiction ¶ 20; Reply and Counter-Memorial on Jurisdiction ¶ 220(c); **CER-13**, Hernández III, ¶¶ 9, 11 (citing **CA-14**, Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Article 115 (a), (c)); **CER-12**, Bullard III, ¶ 10.

14 Rejoinder on the Merits and 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."); *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."); **RER-8**, Second Report by Peruvian Tax Law Experts Jorge Bravo and Jorge Picón (3 November 2022) ("Bravo and Picón II"), ¶ 262 ("[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.").

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

16 U.S. Submission ¶ 11.

17 Rejoinder on Jurisdiction ¶ 23(f) ("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.") (emphasis in original) (citing **CER-12,** Bullard III, ¶¶ 12-13).

18 Rejoinder on Jurisdiction ¶ 25.

19 *See* U.S. Submission ¶ 10 (referring to "knowledge . . . that the claimant *has incurred* loss or damage) (emphasis added); *id*. ¶¶ 11-12 (same); Rejoinder on Jurisdiction ¶ 15; Reply and Counter-Memorial on Jurisdiction ¶ 217.

and injury."[20] Nothing in the U.S. Submission supports Peru's argument that the limitation period runs from the date a claimant acquires knowledge of the "legal basis" upon which it "would incur" loss or damage in the future.[21] As Freeport explained, a government's "legal basis" for future conduct alone neither breaches the TPA nor causes loss to the investor.[22] To give rise to a claim for breach of an investment agreement or the TPA, the Government must adopt a *measure* that breaches its obligations and that causes loss or damage.[23] 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.[24]

(c) Freeport does not disagree with the U.S. Submission that "a claimant may have knowledge of loss or damage even if the amount or extent of that loss or damage cannot be precisely quantified until some future date."[25] That submission is consistent with Freeport's argument that the relevant point in time is not the moment when the amount of loss or damage can be "precisely quantified" but, rather, the moment when an assessment is final and enforceable against a taxpayer.[26] The limitation period cannot commence before an assessment is final and enforceable not because loss or damage cannot yet be "precisely quantified" but because loss or damage cannot occur until that time.

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

21 *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*. ¶ 746(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); **RER-7**, Second Report of Expert in Peruvian Civil Law Rómulo Morales Hervias (3 November 2022) ("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); 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).

22 Rejoinder on Jurisdiction ¶ 17(a).

23 *See* Rejoinder on Jurisdiction ¶ 17(a) (citing **CA-10**, TPA, Articles 10.1.1 ("This Chapter applies to *measures* adopted or maintained by a Party."); *id.* at Article 10.18.1).

24 Rejoinder on Jurisdiction ¶ 17.

25 U.S. Submission ¶ 11.

26 Rejoinder on Jurisdiction ¶ 23(f).

(d) Nothing in the U.S. Submission contradicts Freeport's argument that Peruvian law governs the question of when a SUNAT assessment results in breach of a Peruvian law stability agreement. As Freeport explained, in the case of royalty and tax assessments, Peruvian courts have recognized that a contractual breach occurs when the assessment becomes final and enforceable.[27] For example, in the *Poderosa* case, the Peruvian courts held that the alleged breaches of Poderosa's stability agreement occurred, and the Peruvian limitation period for breach-of-contract claims started to run, when the Tax Tribunal issued its resolutions.[28]

(e) The U.S. position that the limitations period is a "clear and rigid" requirement not subject to "suspension," "prolongation" or "other qualification" is fully consistent with Freeport's position.[29] As Freeport has explained, a SUNAT assessment does not result in breach and loss capable of triggering the limitation period until the administrative process for that assessment is complete.[30] Thus, Freeport does not argue that the administrative process suspends or tolls the limitation period as Peru claims.[31] Instead, Freeport's position is that breach and loss do not occur and hence the limitation period does not start until the administrative process for a SUNAT assessment is complete.[32] Moreover, Peru is wrong when it argues that the administrative process suspends the enforceability of an assessment.[33] An assessment does not *become* final and enforceable until the

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27 *See* Rejoinder on Jurisdiction ¶ 23(g); **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).

28 **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* Rejoinder on Jurisdiction ¶ 23(g); **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).

29 U.S. Submission ¶ 9.

30 Rejoinder on Jurisdiction ¶ 24(a) ("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.") (emphasis in original); Reply and Counter-Memorial on Jurisdiction ¶ 221(a); Claimant's Memorial (19 October 2021) ("Memorial"), ¶¶ 352-53.

31 Rejoinder on the Merits and Reply on Jurisdiction ¶¶ 726-27.

32 *See* Rejoinder on Jurisdiction ¶ 23(f) ("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.")

33 Rejoinder on Jurisdiction ¶ 23(c); Rejoinder on the Merits and Reply on Jurisdiction ¶ 718 (stating that SUNAT Assessments "do generate effects from their notification despite the fact that the enforceability of their

administrative process is complete. Thus, prior to that moment, there is nothing to suspend.[34]

9. *Second*, the U.S. Submission is consistent with Freeport's argument that 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.[35] Nothing in the U.S. Submission supports Peru's argument that a single limitation period applies for separate claims if they result from a "series of similar and related actions by a respondent state."[36]

(a) The U.S. Submission is consistent with the plain terms of Article 10.18.1, according to which a single limitation period applies for a "claim," not for "a series of similar or related" claims.[37] As Freeport has explained, each of the Assessments gave rise to an independent cause of action for breach of the Stability Agreement and caused separate loss or damage to SMCV on the dates they became final and enforceable.[38] Thus, Freeport could not have acquired knowledge of Peru's breaches of the Stability Agreement or the loss or damage resulting from any of Peru's breaches until those dates. 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 encourage investors to bring claims before they are ripe for adjudication.[39] Nothing in the U.S. Submission supports giving Article 10.18.1 that perverse effect. As Freeport explained, tribunals have repeatedly recognized that separate

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payment is suspended while the remedies filed by the company are resolved") (quoting **RER-7**, Morales II, ¶ 106); *id.* ¶ 723 ("SMCV's payment obligation *remains operative* notwithstanding the fact that the assessments have been challenged.") (emphasis in original).

34 **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).").

35 Rejoinder on Jurisdiction ¶ 12; Reply and Counter-Memorial on Jurisdiction ¶¶ 214, 220, 224.

36 Rejoinder on the Merits and Reply on Jurisdiction ¶ 730 ("SUNAT's Assessments are a 'series of similar and related actions by a respondent state.'") (citing Counter-Memorial ¶¶ 421-39); Counter-Memorial ¶¶ 421-39.

37 U.S. Submission ¶ 8 ("[T]he claimant must…establish that *each* of its claims falls within the three-year limitations period.") (emphasis added); *see also* Rejoinder on Jurisdiction ¶ 28.

38 *See* Rejoinder on Jurisdiction ¶ 26; Claimant's Reply and Counter-Memorial on Jurisdiction ¶¶ 224, 226-27; **CER-7**, Bullard II, ¶ 88; **CER-8,** Hernández II, ¶ 124-25.

39 Rejoinder on Jurisdiction ¶ 26.

limitation periods apply to separate causes of action even if they are based on a series of similar or related actions.[40]

(b) The U.S. correctly recognizes that "a legally distinct injury can give rise to a separate limitations period."[41] As Freeport explained, each final and enforceable Assessment caused a legally distinct injury because it gave rise to separate causes of action for breach of the Stability Agreement.[42] Peru and its experts do not dispute that 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.[43]

(c) Nothing in the U.S. Submission supports Peru's argument that independent causes of action can be consolidated into a single cause of action with a single limitation period if they are "similar" or "related."[44] The U.S. Submission observes that "where a 'series of similar and related actions by a respondent state' is at issue, a claimant cannot evade the limitations period by basing its claim on 'the most recent transgression' in that series."[45] That reflects the long-standing U.S. position that Freeport mentioned in the Rejoinder on

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40 Rejoinder on Jurisdiction ¶ 32; Reply and Counter-Memorial on Jurisdiction ¶ 228; **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") ¶ 167 (concluding that court decisions rendered after the cut-off date constituted independent breaches from court decisions rendered before the cut-off date based on the same legal reasoning); **CA-243,** *Nissan Motor Co., Ltd. v. Republic of India,* PCA Case No. 2017-37, Decision on Jurisdiction (29 April 2019) (Hobér, Khehar, Kalicki) ("*Nissan v. India* Decision on Jurisdiction"), ¶¶ 327-28 (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 cut-off date); **CA-278**, *Clayton et al. v. Canada,* PCA Case No. 2009-04, Award on Jurisdiction and Liability (17 March 2015) (McRae (dissenting), Schwartz, Simma) ("*Bilcon/Clayton v. Canada* Award"), ¶ 266 (concluding 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").

41 U.S. Submission ¶ 10 n. 14.

42 Rejoinder on Jurisdiction ¶ 29; Reply and Counter-Memorial on Jurisdiction ¶ 226.

43 **CER-7**, Bullard II, ¶ 88; Rejoinder on Jurisdiction ¶ 29(a); 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.") (emphasis in original); *see* **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, ¶ 253 (conceding that "the issuance of each Assessment Resolution may give rise to a different tax dispute proceeding").

44 Rejoinder on the Merits and Reply on Jurisdiction ¶ 733 ("SUNAT's Assessments against SMCV are similar and related government acts, and [] both the language in Article 10.18.1 and investor-state jurisprudence make clear that knowledge of the alleged 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.") (emphasis in original).

45 U.S. Submission ¶ 10.

Jurisdiction—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.[46] But that does not mean that the distinct causes of action Freeport alleges give rise to a single limitation period if they are based on similar legal reasoning as Peru argues.[47] This is clear from the U.S.'s reliance on *Grand River v. U.S.A.* which, as Freeport explained, supports applying separate limitation periods to distinct causes of action even if they are based on similar or related Government conduct. As Freeport explained, in *Grand River*, the tribunal concluded that claims challenging various escrow statutes implementing a Master Settlement Agreement between U.S. tobacco producers and 46 U.S. state governments requiring the states to enact escrow statutes were time barred.[48] However, the tribunal concluded that claims challenging related, complementary legislation that the state governments adopted after the cut-off date were not time-barred.[49]

(d) The U.S. Submission does not support Peru's 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.[50] The U.S. Submission nowhere suggests that Peru's breaches could have been "predestined" when Peru itself admits 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."[51]

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46 Rejoinder on Jurisdiction ¶ 30(a); **CER-14**, Rejoinder Export Report of Gary Sampliner (16 December 2022) ("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 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).

47 Rejoinder on Jurisdiction ¶ 30(b); 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 <u>not</u> 'legally distinct,' because. . . the legal basis for SUNAT's Assessments is <u>identical</u> for each of the Assessments about which Claimant complains in this arbitration.") (emphasis in original).

48 **RA-4**, *Grand River Enterprises 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"), ¶¶ 22-24, 79, 81-83.

49 **RA-4**, *Grand River v. USA* Decision on Jurisdiction, ¶¶ 84−94.

50 Rejoinder on Jurisdiction ¶ 29(b); Rejoinder on the Merits and Reply on Jurisdiction ¶ 745(d).

51 Rejoinder on the Merits and Reply on Jurisdiction ¶ 79; *see also* Rejoinder on Jurisdiction ¶ 29(b); Reply and Counter-Memorial on Jurisdiction ¶ 226(c) ("[T]he Tax Tribunal did not issue any precedents of mandatory

2. The United States' Submission Supports the Timeliness of Freeport's Claims Alleging Breaches of Article 10.5 of the TPA

10. The U.S. Submission similarly supports the timeliness of each of Freeport's claims for breach of Article 10.5 of the TPA. As Freeport explained, Freeport acquired knowledge of each of Peru's Article 10.5 breaches after 28 February 2017.[52] Nothing in the U.S. Submission suggests that Freeport should be deemed to have acquired knowledge of those breaches before those dates.

i. The United States' Submission Supports the Timeliness of Freeport's Article 10.5 Claims Challenging Royalty Assessments

11. For the same reasons set forth above in Section II.A.I, the U.S. Submission is consistent with Freeport's argument that the 2009, 2010-2011, Q4 2011, 2012, and 2013 Royalty Assessments each breached Peru's obligations under Article 10.5 on the dates upon which each assessment became final and enforceable.[53] The U.S. does not contradict Freeport's argument that the standard for determining when a cause of action for breach of the TPA arose is the same as the standard for determining when a cause of action for breach of the Stability Agreement arose, which Peru does not dispute.[54] As explained above, the U.S. Submission is consistent with Freeport's argument that each Assessment created a separate cause of action when it became final and enforceable.

ii. The United States' Submission Supports the Timeliness of Freeport's Article 10.5 Claims Based on Due Process Violations

12. The U.S. Submission is consistent with Freeport's argument that its Article 10.5 claims based on due process violations in the Tax Tribunal proceedings are timely.[55] As Freeport explained, it only acquired knowledge of the due process breaches in the 2006-2007 and 2008 Royalty Cases in 2021 when it received President Olano Silva's email correspondence in response to a request for access to public information or, in the alternative, in 2019, when SMCV began investigating the decisions in the

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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.")).

52 Rejoinder on Jurisdiction ¶ 34; Reply and Counter-Memorial on Jurisdiction ¶¶ 230-41; Memorial ¶¶ 426-29.

53 Rejoinder on Jurisdiction ¶ 35; Memorial ¶ 426, Table A.

54 Rejoinder on Jurisdiction ¶ 36; Reply and Counter-Memorial on Jurisdiction ¶ 234.

55 Rejoinder on Jurisdiction ¶ 39; Reply and Counter-Memorial on Jurisdiction ¶ 235.

2006-2007 and 2008 Royalty Cases in preparation for filing this arbitration.[56] Nothing in the U.S. Submission supports Peru's argument that a respondent State can avoid liability by successfully hiding the evidence of its Treaty breaches.[57]

13. The U.S. Submission endorses Freeport's argument that the applicable standard for constructive knowledge under Article 10.18.1 is one of *reasonable* prudence and diligence.[58] As Freeport explained, 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 result in constructive knowledge of due process violations.[59] The resolutions alone did 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. 10 adopted a copy-paste version of the resolution in that case in the 2006-2007 Royalty Case. Instead, the irregularities on the face of the resolutions merely *confirm* those grave irregularities.[60] Thus, reasonable prudence and diligence did not call for Freeport to investigate Peru's due process violations at the time SMCV received the Tax Tribunal resolutions in the 2006-2007 and 2008 Royalty Cases.

14. The U.S.'s recognition that the standard of reasonable prudence and diligence applies contradicts Peru's argument that a respondent State can avoid liability by playing hide and seek with the evidence until the limitation period expires. As Freeport explained, it would be utterly unreasonable to expect Freeport to have learned of Peru's due process violations earlier given the great lengths to which Peru and Ms. Olano Silva went to conceal that wrongful conduct from Freeport and SMCV.[61] As Freeport explained, 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.[62] Moreover, Peru strenuously resisted disclosure of documents 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.[63] And then Peru produced *no documents* in response to the two requests for documents prepared, sent, or received by

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56 Rejoinder on Jurisdiction ¶ 39; Reply and Counter-Memorial on Jurisdiction ¶ 236.

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

58 Rejoinder on Jurisdiction ¶ 42; U.S. Submission ¶ 12.

59 Rejoinder on Jurisdiction ¶ 41; Reply and Counter-Memorial on Jurisdiction ¶ 237.

60 Rejoinder on Jurisdiction ¶ 42.

61 Rejoinder on Jurisdiction ¶¶ 41-42.

62 *See* Rejoinder on Jurisdiction ¶ 41.

63 Rejoinder on Jurisdiction ¶ 41 (citing Procedural Order No. 2 (4 July 2022), Appendix 1, pp. 65, 71, 74, 82).

President Olano Silva and Ms. Villanueva concerning the 2006-2007 and 2008 Royalty Cases.[64] Nothing in the U.S. Submission supports Peru's attempt to defy both the constructive knowledge standard and basic principles of fairness.

iii. The United States' Submission Supports the Timeliness of Freeport's Article 10.5 Claims Based on Peru's Failure to Waive Penalties and Interest

15. ***Failure to Waive Penalties and Interest on the 2006-2007 and 2008 Royalty Assessments.*** The U.S. Submission is consistent with Freeport's argument that its Article 10.5 claims based on Peru's failure to waive penalties and interest on the 2006-2007 and 2008 Royalty Assessments are timely. As Freeport explained, 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.[65] Nothing in the U.S. Submission contradicts Freeport's argument that, because the decisions of the contentious administrative courts are judicial acts, they support causes of action for breach of Article 10.5 independent from Peru's failures to waive the penalties and interest at the administrative level.[66]

16. ***Failure to Waive Penalties and Interest on the 2009, 2010-2011, 2011/Q4, 2012, 2013 Royalty Assessments and the Tax Assessments.*** For the same reasons set forth above in Section II.A.1, the U.S. Submission is consistent with Freeport's argument that its Article 10.5 claims based on Peru's failure to waive penalties and interest on the remaining assessments are timely. As Freeport explained,

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64 Rejoinder on Jurisdiction ¶ 41 (citing **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").

65 Rejoinder on Jurisdiction ¶ 43; 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), ¶ 29.

66 Rejoinder on Jurisdiction ¶ 44; Reply and Counter-Memorial on Jurisdiction ¶ 239 (citing **RA-7**, *Apotex v. USA*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility (14 June 2013) (Davidson, Smith, Landau) ("*Apotex v. USA* Award on Jurisdiction*"),* ¶¶ 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")).

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.[67]

iv. The United States' Submission Supports the Timeliness of Freeport's Article 10.5 Claims Based on Peru's Failure to Reimburse GEM Payments

17. The U.S. Submission is consistent with the timeliness of Freeport's claims for breach of Article 10.5 of TPA based on Peru's failure to reimburse SMCV for Q4 2011 to Q3 2012 GEM, which Peru does not dispute.[68]

B. THE UNITED STATES' SUBMISSION CONFIRMS THAT FREEPORT'S CLAIMS DO NOT REQUIRE RETROACTIVE APPLICATION OF THE TPA

18. The U.S. Submission supports Freeport's arguments that the non-retroactivity rule does not bar any of Freeport's claims. Article 10.1.3 of the TPA reiterates the general rule against the retroactive application of treaties reflected in Article 28 of the Vienna Convention on the Law of Treaties (the "VCLT").[69] Article 28 of the VCLT provides that:

> 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.[70]

19. The U.S. Submission supports Freeport's argument that the non-retroactivity rule is inapplicable because each of the Government acts or omissions upon which Freeport bases its claims are sufficient to support causes of action for breaches of the Stability Agreement and the TPA and indisputably occurred long after 1 February 2009, when the TPA entered into force.[71] The recognition by the U.S. that Article 10.1.3 of the TPA does not modify the general rule against the retroactive application

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67 Rejoinder on Jurisdiction ¶ 45; Reply and Counter-Memorial on Jurisdiction ¶ 240; Memorial ¶ 427, Table B.

68 *See* Rejoinder on Jurisdiction ¶ 46; Rejoinder on the Merits and Reply on Jurisdiction ¶ 769; Counter-Memorial on the Merits and Memorial on Jurisdiction ¶ 464.

69 *See* **CA-10**, TPA, Article 10.1.3; Counter-Memorial on the Merits and Memorial on Jurisdiction ¶ 469. *See also id*. ¶¶ 470, 472 ("The TPA itself confirms the applicability of this rule.").

70 **CA-49**, VCLT, 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.").

71 *See* Rejoinder on Jurisdiction ¶ 72(a); Reply and Counter-Memorial on Jurisdiction ¶ 266.

of treaties reflected in Article 28 of the VCLT contradicts Peru's arguments that the Tribunal lacks jurisdiction over "disputes" that began prior to the TPA's entry-into-force.[72]

20. *First*, the U.S. agrees with Freeport that the non-retroactivity rule does not apply to post-entry-into-force acts or facts that are sufficient to constitute a breach and are thus "actionable in [their] own right."[73] As Freeport explained, because Chapter 10 of the TPA contains "bind[ing]" provisions regulating government "measures," it is government measures that can support a cause of action for breach of an investment agreement or the TPA and thus government measures are the acts or facts relevant for determining whether the non-retroactivity rule applies.[74] Here, the non-retroactivity rule does not apply because each of the measures upon which Freeport bases its claims occurred long after 1 February 2009 and is sufficient to support a cause of action for breach of the Stability Agreement or the TPA.[75]

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[72] *Compare* U.S. Submission ¶ 2 n. 2 (observing that "[t]he phrase 'for greater certainty' [in Article 10.1.3] signals that the sentence it introduces reflects what the agreement would mean even if that sentence were absent" and citing Article 28 of the VCLT), *with* Rejoinder on the Merits and Reply on Jurisdiction ¶ 779 (relying on international law authorities interpreting non-retroactivity provisions that applied to preexisting "disputes"); *id.* ¶ 783 (contending that "Claimant admits that the genesis of this entire dispute is MINEM's interpretation reflected in the June 2006 Report").

[73] *See* U.S. Submission ¶ 2 (quoting **RA-6**, *Mondev Int'l Ltd. v. United States,* NAFTA/ICSID Case No. ARB(AF)/99/2, Award, (11 October 2002) ("*Mondev* Award"), ¶ 70); Reply and Counter-Memorial on Jurisdiction ¶ 269 (arguing that the non-retroactivity rule does not apply because "the Assessments, arbitrary decisions refusing to waive penalties and interest, and arbitrary decision denying SMCV's GEM reimbursement request are 'orders or other regulatory measures imposing legal consequences on' Freeport and SMCV giving rise to 'actionable breach[es] in [their] own right.'"); Rejoinder on Jurisdiction ¶ 75(b) ("[E]ach 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.").

[74] Rejoinder on Jurisdiction ¶ 71 (citing **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)).

[75] *See* Rejoinder on Jurisdiction ¶ 72(a); Reply and Counter-Memorial on Jurisdiction ¶ 266 ("Freeport alleges that: (*i*) each final and enforceable Assessment breached the Stability Agreement on the dates identified in Table A of the Memorial; (*ii*) each final and enforceable Royalty Assessment breached Article 10.5 of the TPA on the dates identified in Table A of the Memorial; (*iii*) the arbitrary failure of the Supreme Court to consider *de novo* SMCV's entitlement to a waiver of penalties and interest on the 2008 Royalty Assessments and the arbitrary failure of the Appellate Court to consider *de novo* SMCV's entitlement to a waiver of penalties and interest on the 2006-2007 Royalty Assessments breached Article 10.5 of the TPA on 21 July 2017 and 10 October 2017, respectively, when the courts notified SMCV of their decisions; (*iv*) each of the remaining arbitrary failures to waive penalties and interest breached Article 10.5 of the TPA on the dates identified in Table B of the Memorial; and (*v*) Peru's arbitrary refusal to reimburse Q4 2011 to Q3 2012 GEM payments for activities related to the Concentrator breached Article 10.5 of the TPA on 22 March 2019 when SUNAT notified SMCV of its decision rejecting SMCV's reimbursement request. Each of these measures occurred long after 1 February 2009.").

21. *Second*, the U.S. recognizes that the non-retroactivity rule does not apply simply because pre-entry-into-force conduct is relevant to the challenged measures. Instead the U.S. opines that "a host State's conduct prior to the entry into force of an obligation may be relevant to determining whether the State subsequently breached that obligation."[76] The U.S. Submission thus supports Freeport's argument that the non-retroactivity rule does not apply merely because Mr. Isasi's non-binding June 2006 Report, the recently-surfaced June 2006 SUNAT Report, and the various pre-entry-into-force Government reports and memoranda that Peru cites are relevant to Freeport's claims.[77] None of those reports and memoranda were capable of supporting a cause of action for breach of the Stability Agreement or the TPA because SMCV did not incur loss or damage from them.[78] As Freeport explained, the Tribunal can and should take into account the factual background against which the complained-of measures took place in assessing the merits of claims that those measures breached the Stability Agreement and the TPA—but that does not place those measures beyond the Tribunal's temporal jurisdiction.[79]

22. *Third*, the U.S. Submission confirms that Article 10.1.3 merely "reflects" the general rule against the non-retroactivity of treaties set forth in Article 28 of the VCLT and thus contradicts Peru's attempt to distort that standard.

(a) The non-retroactivity rule only applies to claims that would bind Peru with respect to "any act or fact which took place or any situation which ceased to exist" before the TPA

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76 U.S. Submission ¶ 2.

77 Rejoinder on Jurisdiction ¶ 72(c)-(d).

78 Rejoinder on Jurisdiction ¶ 72(c)-(d).

79 Reply and Counter-Memorial on Jurisdiction ¶ 269 (citing **CA-285**, *Eco Oro Minerals Corp., v. Colombia*, ICSID Case No. ARB/16/341, Decision on Jurisdiction, Liability and Directions on Quantum (9 September 2021) (Blanch, Naón (dissenting in part on other grounds), Sands (dissenting in part on other grounds)) ("*Eco Oro* Decision on Jurisdiction, Liability, and Directions on Quantum"), ¶ 360 ("[A]s Eco Oro relies only on post-15 August 2011 measures, that is sufficient to f[i]nd jurisdiction over those measures: the Tribunal does not have jurisdiction to determine whether prior acts are compatible with the FTA, although it is entitled to have regard to those acts in establishing the facts as they occurred after 15 August 2011, including the state of mind of the Parties, and the expectations they may have had at that time."); **CA-99**, *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003) (Grigera Naon, Fernandez Rozas, Bernal Verea), ¶ 66 ("[I]t should not necessarily follow from this that events or conduct prior to the entry into force of the Agreement are not 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.") (emphasis in original); **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) (Irarrázabal, Greenberg, Vinuesa), ¶ 84 ("[E]vents or situations prior to the entry into force of the treaty may be relevant as antecedents to disputes arising after that date."); **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.")).

entered into force.[80] Thus, the U.S. Submission confirms that Peru is deeply misguided in its focus on "the birth of [Claimant's] dispute," or "acts or facts" that are "causally connected to," or the "*sine qua non*" of the measures that Freeport challenges as breaches of the Stability Agreement and the TPA.[81] That is not the standard set forth in Article 28 of the VCLT. Freeport's claims do not seek to bind Peru retroactively because they do not challenge measures that the Government adopted before the TPA entered into force.

(b) The U.S.'s recognition that Article 10.1.3 does not modify Article 28 of the VCLT is also consistent with the TPA negotiation record and the testimony of Mr. Herrera and Mr. Sampliner 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."[82] As Freeport explained, if the TPA parties intended Article 10.1.3 to apply broadly to bar pre-existing "disputes," as Peru argues,[83] they would have adopted the non-retroactivity provision that the Andean States proposed in the July 2004 TPA draft, which stated that "this chapter shall only be applied to the *disputes* over facts and acts

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80 **CA-49**, VCLT, 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.").

81 Rejoinder on Jurisdiction ¶ 71; 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*,' . . . 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).

82 **CWS-12**, Witness Statement of Carlos Alberto Herrera Perret (13 September 2022) ("Herrera I"), ¶ 35; **CWS-22**, Rejoinder Witness Statement of Carlos Alberto Herrera Perret (16 December 2022) ("Herrera II"), ¶¶ 13-14; **CER-11**, Export Report of Gary Sampliner (13 September 2022) ("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."); **CER-14**, Sampliner II, ¶¶ 11-13. *See also* Rejoinder on Jurisdiction ¶ 73(a); Reply and Counter-Memorial on Jurisdiction ¶ 267.

83 *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.").

that may arise after the entry into force of the Agreement."[84] But they did not; instead they negotiated and agreed on the text of Article 10.1.3 in February 2005.[85]

23. *Finally*, the authorities that the U.S. cites support Freeport's argument that the non-retroactivity rule does not bar claims challenging post-entry-into-force measures that are sufficient to constitute a cause of action.

(a) Like Freeport,[86] the U.S. concludes that the decision in *Spence v. Costa Rica* stands only for the limited proposition that claims must challenge post-entry-into-force conduct that is capable of constituting "an actionable breach in its own right."[87] The U.S. Submission therefore does not support Peru's reliance on *Spence* for the argument that the non-retroactivity rule bars all claims "based on" or "causally connected" to pre-entry-into-force acts or facts. As Freeport explained, each of the post-entry-into-force measures it challenges is capable of constituting an "actionable breach" of the Stability Agreement and the TPA "in its own right," irrespective of whether MINEM earlier expressed its novel position on the scope of stability guarantees in the non-binding June 2006 Report or any of the other reports and memoranda that Peru cites.[88] Moreover, the U.S.'s discussion of *Spence* is consistent with Freeport's argument, recently confirmed by the *Renco II v. Peru* tribunal, that the reference to "deeply and inseparably rooted" conduct in the *Spence* decision does not "modify or supplement the applicable test," according to which the "allegedly wrongful conduct postdating the entry into force of the Treaty must 'constitute an actionable breach in its own right.'"[89]

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

85 **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.

86 Reply and Counter-Memorial on Jurisdiction ¶ 269; Rejoinder on Jurisdiction ¶ 75(b).

87 U.S. Submission ¶ 2 ("Pre-entry into force acts and facts cannot . . . constitute a cause of action") (quoting **CA-455**, *Spence International Investments, LLC, Berkowitz, et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected) (30 May 2017) (Bethlehem, Kantor, Vinuesa), ¶ 217).

88 Rejoinder on Jurisdiction ¶ 75(b).

89 **CA-458**, *The Renco Group, Inc. v. The Republic of Peru (II)*, PCA Case No. 2019-46, Decision on Expedited Preliminary Objections (30 June 2020) (Simma, Grigera Naón, Thomas QC (dissenting on other grounds)), ¶¶ 145-46 (holding that the tribunal "does not understand [*Spence*] to purport to modify or supplement the applicable test for non-retroactivity of treaties, notwithstanding its frequent use of the apposite but imprecise phrase 'deeply rooted'. . . the principle is that . . . the allegedly wrongful conduct postdating the entry into

(b) The U.S submission also cites the decision in *Carrizosa v. Colombia*,[90] which confirms that "if post-treaty conduct can constitute an independent cause of action under the treaty, it will come under the treaty tribunal's jurisdiction, irrespective of whether such conduct may pertain to a broader pre-treaty dispute."[91] The tribunal, interpreting Article 10.1.3 of the U.S.-Colombia TPA, which also reiterates Article 28 of the VCLT, expressly rejected the argument that "the temporal scope of its jurisdiction is limited to *disputes* that have arisen after the entry into force of the TPA" that Peru makes here.[92] Instead, the tribunal focused its analysis on whether "the *measures* giving rise to the claims in this arbitration predate the entry into force of the TPA and are therefore . . . capable of constituting breaches of the TPA."[93] The tribunal concluded that it lacked temporal jurisdiction because the Colombian Constitutional Court's failure to "annul or otherwise redress the outcome of the pre-treaty" judicial decisions did not constitute an independent cause of action under the treaty.[94] As the tribunal explained, the only "legal effect" of the decision "was to leave unaltered the outcome of" the previous decisions and "[t]he Tribunal would not be able to [assess] damages without reviewing the lawfulness of the pre-TPA measures that are indisputably beyond the temporal scope of the TPA."[95] The tribunal's conclusion is consistent with Freeport's arguments. Here, Freeport does not submit any claims challenging the failure to annul or redress the outcome of pre-entry-into-force measures. Instead, Freeport challenges measures that indisputably occurred after the TPA entered into force which independently gave rise to damages, not the failure to remedy those measures.

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force of the Treaty must 'constitute an actionable breach in its own right' when evaluated in the light of all circumstances, including acts or facts that predate the entry into force of the Treaty").

90 U.S. Submission ¶ 2 (citing **CA-459**, *Astrida Benita Carrizosa v. Colombia,* ICSID Case No. ARB/18/5, Award (19 April 2021) (Kaufmann-Kohler, Fernández Arroyo, Söderlund) ("*Carrizosa* Award"), ¶ 153).

91 **CA-459**, *Carrizosa* Award, ¶ 143. *See also id*. ¶ 164 ("Rather, it is the fact that the only measure that postdates the TPA's entry into force is not separately impeachable, or in the words of the Spence tribunal, does not "constitute an actionable breach in its own right.").

92 **CA-459**, *Carrizosa* Award, ¶ 135 (emphasis added).

93 **CA-459**, *Carrizosa* Award, ¶ 167.

94 **CA-459**, *Carrizosa* Award, ¶ 157.

95 **CA-459**, *Carrizosa* Award, ¶¶ 156, 163.

C. THE UNITED STATES' SUBMISSION SUPPORTS FREEPORT'S ARGUMENT THAT ARTICLE 22.3.1 DOES NOT APPLY TO PENALTIES AND INTEREST ON THE TAX ASSESSMENTS

24. Article 22.3.1, the TPA's tax exclusion, provides that "[e]xcept as set out in this Article, nothing in this Agreement shall apply to taxation measures."[96] As the U.S. Submission correctly observes, Article 1.3 of the TPA defines "measure" as "any law, regulation, procedure, requirement or practice."[97] Thus, the U.S. Submission concludes that "[a]ny 'practice' related to 'taxation' is therefore addressed by Article 22.3.1.[98] Critically, the U.S. Submission clearly explains what it means for a "practice" to be *related* to taxation, stating that it "includes not only the application of, or failure to apply a tax, but also the enforcement or failure to enforce a tax."[99] It follows that any measure must apply or enforce a tax or fail to apply or enforce a tax to qualify as a taxation measure. Thus, the U.S. Submission supports Freeport's argument that Article 22.3.1 does not bar Freeport's Article 10.5 claims based on Peru's failure to waive penalties and interest on the Tax Assessments because the Parties agree that penalties and interest are not taxes in Peruvian law.[100] It does not support Peru's attempt to expand Article 22.3.1 to cover "more than just 'taxes.'"[101]

25. *First*, the U.S. Submission confirms Freeport's conclusion that Article 22.3.1 is limited to measures that apply or enforce a tax, but supplements it by including measures that fail to apply or enforce a tax. That supplementary observation is of no relevance here because Freeport does not challenge any measures *failing* to apply or enforce payment obligations. The U.S. Submission thus confirms that 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,'" as Peru argues.[102] Rather, Article 1.3 merely 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."[103] That conclusion is consistent with the "purpose" of

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

97 U.S. Submission ¶ 32.

98 U.S. Submission ¶ 32.

99 U.S. Submission ¶ 32.

100 Rejoinder on Jurisdiction ¶ 77; Reply and Counter-Memorial on Jurisdiction ¶ 271.

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

102 *See* Rejoinder on Jurisdiction ¶ 78; **CA-10**, TPA, Article 1.3. *But see* Rejoinder on the Merits and Reply on Jurisdiction ¶ 773.

103 Rejoinder on Jurisdiction ¶ 78; **CA-10**, TPA, Article 1.3.

the tax exclusion, which "specifically is to preserve the States' sovereignty in relation to their power to impose taxes in their territory."[104]

26. *Second*, the U.S. Submission is consistent with Freeport's argument that Peru's decisions failing to waive penalties and interest do not constitute taxation measures because they do not apply or enforce a tax. Peru and its experts "are in full agreement" with Freeport that "neither delinquent interest nor penalties are taxes."[105] Moreover, Peru concedes that decisions of the Tax Tribunal and the Constitutional Court "define the term 'tax'" and that Rule II of the "the Tax Code . . . appears to identify the types of 'taxes.'"[106] Peru does not deny that those authorities clearly show that Peruvian law does not recognize penalties and interest as taxes and expressly *excludes* penalties from the definition of taxes.[107]

27. *Third*, the U.S.'s recognition that taxation measures must apply or enforce or fail to apply or enforce a tax contradicts each of Peru's attempts to expand Article 22.3.1.

(a) The U.S. Submission contradicts Peru's argument 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."[108] The U.S. Submission confirms that Article 22.3.1 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

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104 **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* 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) (Siqueiros, Cameron, González García), ¶ 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); Rejoinder on Jurisdiction ¶ 78.

105 **RER-8**, Bravo and Picón II, ¶ 255-56; *see also* Rejoinder on the Merits and Reply on Jurisdiction ¶ 772; *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.'").

106 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).

107 *See* Reply and Counter-Memorial on Jurisdiction ¶¶ 272-74 (citing sources).

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

misrepresentation that, if SMCV paid GEM, SMCV would be exempt from SMT, which is a taxation measure.[109] Yet, like the failure to reimburse GEM payments, which Peru does not contend is a taxation measure,[110] penalties and interest measures do not qualify as taxation measures under the U.S.'s interpretation of Article 22.3.1.

(b) The U.S. Submission does not support Peru's argument that penalties and interest are taxation measures merely because they may incentivize payment of taxes.[111] The U.S. Submission does not support the application of Article 22.3.1 to the broad and amorphous category of measures that may incentivize compliance with taxation measures; it only supports the application of Article 22.3.1 to measures that apply or enforce or fail to apply or enforce a tax. As Freeport explained, the means by which the Government enforces a tax is the coercive collection "procedure" for that tax.[112] If the TPA parties intended Article 22.3.1 to apply more broadly to measures that apply or enforce non-taxes, such as penalties and interest, they would have used language to that effect, such as the term "fiscal measures."[113]

(c) The U.S. Submission does not support Peru's argument that any measure governed by the Tax Code or administered by the tax authorities constitutes a taxation measure.[114] As Freeport explained, the fact that penalties and interest are identified as "components of tax debt," under Article 28 of the Tax Code is irrelevant.[115] The term "tax debt"

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109 *See* Rejoinder on Jurisdiction ¶ 79; 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.

110 Rejoinder on Jurisdiction ¶ 79.

111 Rejoinder on the Merits and Reply on Jurisdiction ¶ 774 (arguing that penalties and interest are "the specific means by which a government enforces a tax obligation").

112 Rejoinder on Jurisdiction ¶ 80; **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.").

113 *See* Rejoinder on Jurisdiction ¶ 80 (citing **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, Sachs, Giardina), ¶ 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."); Reply and Counter-Memorial on Jurisdiction ¶ 274.

114 *See* Rejoinder on the Merits and Reply on Jurisdiction ¶ 774; **RER-8**, Bravo and Picón II, ¶¶ 259-61.

115 Rejoinder on Jurisdiction ¶ 81(a).

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," although they are not taxes.[116] For example, Peruvian law classifies royalties and GEM as components of the "tax debt" and authorizes the same divisions of the MEF, SUNAT and the Tax Tribunal, to administer penalties and interest on tax assessments.[117] Yet, Peru does not contend that royalty and GEM measures are taxation measures under the TPA.[118] A measure that applies or enforces non-taxes cannot qualify as a taxation measure under the U.S.'s interpretation of Article 22.3.1 merely because it is governed by the tax code or administered by the tax authorities. Instead, the measure must itself apply or enforce or fail to apply or enforce a tax.

28. *Finally*, the U.S.'s interpretation of Article 22.3.1 is consistent with the cases interpreting tax exclusions in other treaties that Freeport cited.

(a) The tribunal in *Nissan v. India* concluded that "taxation measures" are "measures regulating the *obligation to pay taxes*."[119] As the tribunal explained "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

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116 **CER-13**, Hernández III, ¶ 17.

117 Rejoinder on Jurisdiction ¶ 81(a)-(b); **CER-13**, Hernández III, ¶ 17-18 (citing **CA-14**, Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Article 28; **CA-8**, Law No. 28969, Law that Authorizes SUNAT to Implement Provisions that Facilitate the Administration of Royalties (25 January 2007), Final Supplementary Provisions, Second(g); **CA-182**, Regulations for the Law Establishing GEM Legal Framework, Supreme Decree No. 173-2011-EF (29 September 2011), Model Agreement, Clause 6.2); **Ex. CE-46**, SUNAT Resolution No. 055-014-0001394/SUNAT, 2008 Royalty Assessments (31 January 2011), p. 43 (referring to royalties as part of the "tax debt"); **Ex. CE-686**, SUNAT, Resolution No. 0510190000089 (2006-2008 Royalty Assessments, Approval and Deferral of Installment Plan) (29 October 2015), p. 2 (same); **Ex. CE-729**, SUNAT, Coercive Enforcement Resolution, No. 011-006-0056535 (2009 Royalty Assessments) (18 October 2018) (same).

118 *See, e.g.*, Counter-Memorial on the Merits and Memorial on Jurisdiction ¶¶ 456-60; 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.").

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

measures.'"[120] Because penalties and interest are not taxes in Peruvian law, measures failing to waive penalties and interest cannot be measures "regulating the obligation to pay taxes."[121]

(b) The tribunal in *Murphy v. Ecuador II* concluded that payments to the Government must "*constitute a tax*" to be barred by the broader tax exclusion in the U.S.-Ecuador BIT, which applied to "matters of taxation."[122] In concluding that Ecuador's windfall levy on oil profits did not constitute a tax,[123] the tribunal observed statements by government officials that the levy was not a tax,[124] the "stated purpose of the law was to amend certain oil contracts held by certain oil companies,"[125] and "[t]he revenue earned by the State under Law 42 was classified as non-tax revenue."[126] Similarly, in this case, the Tax Tribunal and the Constitutional Court have stated that penalties are not taxes and serve a distinct purpose from taxes,[127] the Constitutional Court has stated that interest on tax assessments serve a distinct purpose from taxes,[128] and penalties and interest are not recognized as taxes under the Peruvian Tax Code.[129]

(c) The tribunal in *Antaris v. Czech Republic* concluded that the Czech Republic's imposition of a "Solar Levy" was not a "taxation measure" because it did not "*constitute*" a tax in

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

121 **CA-243**, *Nissan v. India* Decision on Jurisdiction, ¶ 384. *See also* Rejoinder on the Merits and Reply on Jurisdiction ¶ 776(a).

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

123 **CA-279**, *Murphy* Partial Final Award, ¶ 192.

124 **CA-279**, *Murphy* Partial Final Award, ¶¶ 168-169.

125 **CA-279**, *Murphy* Partial Final Award, ¶ 190.

126 **CA-279**, *Murphy* Partial Final Award, ¶ 190.

127 **CER-8**, Hernández II, ¶¶ 132, 136 (citing **CA-378**, Constitutional Court Decision, Case No. 3303-2003-AA/TC (28 June 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 (27 October 2000), p. 4; **CA-394**, Tax Tribunal Resolution No. 04170-1-2011 (16 March 2011), p. 4).

128 **CER-8**, Hernández II, ¶ 140 (citing **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); **Ex. CE-189**, Constitutional Court Decision, Case No. 04532-2013-PA/TC (16 August 2018), p. 7 (same)).

129 **CER-8**, Hernández II, ¶¶ 138, 143.

Czech law,[130] despite the ECT's broader language defining "taxation measures" as "any provision relating to taxes."[131] 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."[132] Here, Rule II of the Peruvian Tax Code *does not* include penalties and interest as one of the types of taxes in Peruvian law.

D. THE UNITED STATES' SUBMISSION IS CONSISTENT WITH FREEPORT'S ARGUMENT THAT THE STABILITY AGREEMENT IS AN INVESTMENT AGREEMENT

29. As Freeport has explained, 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.[133] Thus, Freeport is entitled to submit breaches of the Stability Agreement under Article 10.16.1(b)(i)(C) of the TPA on behalf of SMCV.[134]

30. Article 10.16.1(b) of the TPA permits a claimant to bring claims for breach of an investment agreement on behalf of an enterprise the claimant owns or controls.[135] Article 10.28 defines "investment agreement" as:

> a written agreement between a national authority of a Party and a covered investment or an investor of another Party, on which the covered investment <u>or</u> the investor relies in establishing or acquiring a covered investment other than the written agreement itself.[136]

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130 **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* Award"), ¶ 242.

131 *See* **CA-445**, *Antaris* 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).

132 **CA-445**, *Antaris* 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.").

133 *See* Reply and Counter-Memorial on Jurisdiction ¶¶ 276, 278-80; **CA-10**, TPA, Article 10.28.

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

135 **CA-10**, TPA, Article 10.16.1(b).

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

31. Article 10.16.1, which incorporates the term "investment agreement" from Article 10.28, provides:

> 1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:
>
> (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim
>
> (i) that the respondent has breached
> . . .
> (C) an investment agreement;
>
> (b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim
>
> (i) that the respondent has breached
> . . .
> (C) an investment agreement;
>
> provided that a claimant may submit pursuant to subparagraph (a)(i)(C) or (b)(1)(C) 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.[137]

32. The U.S. Submission, which focuses on the text of Article 10.16.1, is consistent with Freeport's argument that it is the text of Article 10.16.1 that controls.[138] The U.S. Submission thus contradicts Peru's attempt to read into Article 10.16.1(b)(i)(C) an additional reliance requirement and a temporal limitation that are found nowhere in its text.

33. *First*, the U.S. Submission confirms that a claimant is only required to show: (*i*) that it relied on an investment agreement for claims under Article 10.16.1(a)(i)(C); or (*ii*) that the enterprise relied on an investment agreement for claims under Article 10.16.1(b)(i)(C).

(a) The U.S. Submission nowhere indicates that the reference to "investment agreement" in Article 10.16.1 deviates from the definition of "investment agreement" set forth in Article 10.28 of the TPA. It is thus inconsistent with Peru's argument that Article 10.28 "in no

[137] **CA-10**, TPA, Article 10.16.1.

[138] *See* U.S. Submission ¶¶ 3-6; Reply and Counter-Memorial on Jurisdiction ¶¶ 282-86.

way dictates how the reliance should be read in a separate provision (Article 10.16.1)."[139] Because Article 10.28 *defines* "investment agreement" "[f]or purposes of [] Chapter" Ten of the TPA, it necessarily dictates how the term "investment agreement" in Article 10.16.1 is understood.[140]

(b) 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 *or* an investor of another Party, on which the covered investment *or* the investor relies in establishing or acquiring a covered investment."[141] As Freeport explained, 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.[142] Thus, Freeport is entitled to bring Article 10.16.1(b)(i)(C) claims for breaches of the Stability Agreement on behalf of SMCV because SMCV relied on the Stability Agreement in establishing the "covered investment" in the Concentrator.

(c) The U.S.'s submission that [a]n investor may bring *separate claims* under both Articles 10.16.1(a) and 10.16.1(b)" but that the "*relief available* for each claim *is limited to the article under which that particular claim falls*" confirms that investment agreement claims brought by an investor and investment agreement claims brought on behalf of an enterprise are distinct.[143] The U.S. Submission thus supports Freeport's argument that the only sensible reading of Article 10.16.1 is that a claimant must show either: (*i*) that the claimant relied on an investment agreement to bring claims for breach of that investment agreement under Article 10.16.1(a)(i)(C); or (*ii*) that the enterprise that it owns or controls relied on an investment agreement to bring claims for breach of that investment agreement on behalf of the enterprise under Article 10.16.1(b)(i)(C).[144]

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139 Rejoinder on the Merits and Reply on Jurisdiction ¶ 867.

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

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

142 Rejoinder on Jurisdiction ¶ 89; Reply and Counter-Memorial on Jurisdiction ¶¶ 278-79 (citing **CA-10**, TPA, Article 10.28).

143 U.S. Submission ¶ 3, n. 6 (emphasis added).

144 *See* Rejoinder on Jurisdiction ¶ 87; Reply and Counter-Memorial on Jurisdiction ¶ 278.

(d) The U.S. agrees with Freeport that the "additional condition" that the final paragraph of Article 10.16.1 imposes is that "the subject matter of the claim and the claimed damages [must] 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."[145] The U.S. Submission refers to "additional condition" in the singular and thus does not support a further condition that the claimant rely on an investment agreement for Article 10.16.1(b)(i)(C) claims, which is found nowhere in Article 10.28.[146]

(e) The U.S. Submission is consistent with the negotiating history of the TPA. As Freeport explained, 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 and the U.S. did not intend to introduce an 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).[147] And as Mr. Herrera explained, he specifically sought "clarity" from the U.S. negotiating team about the reference to "reliance" in Article 10.16.1, leading to a clear understanding by both TPA parties "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."[148]

34. *Second*, the U.S. Submission does not support the objection, that Peru raised for the first time in its Rejoinder and Reply on Jurisdiction, that there is a latent temporal limitation unique to

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145 U.S. Submission ¶ 6. *See also* Rejoinder on Jurisdiction ¶ 91 ("[T]he purpose of the final paragraph is not to modify the definition of investment agreement in Article 10.28. 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.); Reply and Counter-Memorial on Jurisdiction ¶ 283.

146 U.S. Submission ¶ 6.

147 Rejoinder on Jurisdiction ¶ 93(a); 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."); **CER-14**, Sampliner II, ¶ 15).

148 **CWS-12**, Herrera I, ¶ 37(b); (emphasis in original); *see also* **CWS-22**, Herrera II, ¶ 16; Rejoinder on Jurisdiction ¶ 93(a); Reply and Counter-Memorial on Jurisdiction ¶ 283.

Article 10.16.1(b)(i)(C), which 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.[149]

(a) The U.S. Submission nowhere refers to a temporal limitation in Article 10.16.1(b)(i)(C), confirming that the definition of "covered investment" in Article 1.3, which includes investments established before the TPA entered into force, applies to Article 10.16.1(b)(i)(C).[150]

(b) Accordingly, the U.S. Submission is consistent with the negotiation history of the TPA. As Freeport explained,[151] 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."[152] 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.[153] 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. FTAs, 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."[154] They did not do so

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

150 **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.") (emphasis added). *See also* Rejoinder on Jurisdiction ¶¶ 95-96.

151 Rejoinder on Jurisdiction ¶ 97.

152 **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, ¶¶ 28, 32, 45.

153 **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 from the date of the entry into force 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."). *See also* Rejoinder on Jurisdiction ¶ 97.

154 *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

and, as Mr. Sampliner and Mr. Herrera explain, that decision was intentional.[155] 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.

III. THE UNITED STATES' VIEWS ON THE MINIMUM STANDARD OF TREATMENT HAVE LIMITED RELEVANCE TO FREEPORT'S CLAIMS

35. The U.S.'s submissions on the means of establishing the content of the minimum standard of treatment and the obligations that the minimum standard comprises are of limited relevance to Freeport' claims. Freeport has established the obligations under the customary international law minimum standard of treatment relevant to the claims Freeport makes to the satisfaction of any burden of proof the U.S. Submission can reasonably be interpreted as supporting. Moreover, the U.S.'s submissions on "[c]laims for judicial measures" are irrelevant to Freeport's claims and the U.S. does not dispute the relevance of "legitimate expectations" and "transparency" in assessing breaches of the minimum standard.

A. FREEPORT HAS CARRIED ANY BURDEN OF PROOF FOR ESTABLISHING CUSTOM THAT THE U.S. SUBMISSION CAN REASONABLY BE INTERPRETED AS SUPPORTING

36. The U.S. opines that the claimant bears the burden of establishing the existence of an obligation under the customary international law minimum standard of treatment and advocates a narrow role for arbitration awards in ascertaining the content of the minimum standard.[156] Yet, the authorities contradict both of these positions and the U.S. itself relies heavily on arbitration awards in asserting its views on the content of the minimum standard. Thus, the U.S.'s view on the means of establishing the content of the minimum standard ultimately has no bearing on Freeport's claims because Freeport has carried the burden of establishing the rules of customary international law relevant to the claims Freeport makes under the approach the U.S. takes in its own submission.

37. *First*, the conclusion by the U.S. that the concept of "burden of proof" applies to questions of law finds no support in the text of the TPA and is contradicted by authorities.[157] International

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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").

155 *See* **CER-14**, Sampliner II, ¶¶ 19-20; **CWS-22**, Herrera II, ¶ 18. *See also* Rejoinder on Jurisdiction ¶ 97.

156 *See* U.S. Submission ¶¶ 18-19.

157 U.S. Submission ¶ 19.

courts and tribunals have consistently recognized that the doctrine of *jura novit curia* applies to questions of law before an arbitral tribunal and thus the Tribunal is free to determine questions of customary international law based on the sources available to it.

(a) For example, in concluding that the concept of burden of proof does not apply to questions of customary international law, the International Court of Justice (the "ICJ") explained in the *Fisheries Jurisdiction* case that "*the burden of establishing or proving rules of international law cannot be imposed upon any of the parties*, for the law lies within the judicial knowledge of the Court."[158]

(b) Investment treaty tribunals have consistently recognized the same principle.[159] For example, the tribunal in *Deutsche Telekom v. India* explained, "[w]hen applying the governing law, be it international or national, the Tribunal is not bound by the arguments and sources invoked by the Parties. Under the maxim *jura novit curia* — or, better, *jura novit arbiter* — the Tribunal is required to apply the law of its own motion, provided it seeks the Parties' views."[160]

38. The U.S. does not engage with any of these authorities, and the authorities that it cites do not demonstrate that the claimant bears the burden of proof for establishing a rule of customary international law.

(a) The tribunal in *Glamis Gold v. U.S.A.* gives little reasoning for its conclusion that a claimant carries the burden for establishing rules of customary international law, cites no

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158 **CA-450**, *Fisheries Jurisdiction Case (Germany v. Iceland)*, Merits Judgment (25 July 1974) ("*Fisheries Jurisdiction Case* Merits Judgment"), 1974 I.C.J. Reports 175, ¶ 18 (emphasis added); *see also* **RA-41**, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits Judgment (27 June 1986), 1986 I.C.J. Reports 14, ¶ 29 ("For the purpose of deciding whether the claim is well founded in law, the principle *jura novit curia* signifies that the Court is not solely dependent on the argument of the parties before it with respect to the applicable law").

159 *See* **RA-73**, *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Award (5 November 2021) (van Houtte, Schill, Bernárdez), ¶ 309 ("[T]he Tribunal notes that, in its analysis of the governing law, it is not limited to the arguments or sources invoked by the Parties, but is required, under the maxim *iura novit curia* or, better, *iura novit arbiter,* to apply the law on its own motion."); **RA-75**, *Muszynianka Spółka z Ograniczoną Odpowiedzialnością v. Slovak Republic*, PCA Case No. 2017-08, Award (7 October 2020) (Kaufmann-Kohler, Volterra, Thomas QC), ¶ 164 ("When applying the governing law, be it in the context of jurisdiction, admissibility, or merits, the Tribunal is not bound by the arguments and sources invoked by the Parties. Under the maxim *iura novit curia*–or more accurately *iura novit arbiter*–the Tribunal is required to apply the law of its own motion, provided it seeks the Parties' views if it intends to base its decision on a legal theory that was not addressed by the Parties and that the Parties could not reasonably anticipate.").

160 **CA-234**, *Deutsche Telekom AG v. The Republic of India*, PCA Case No. 2014-10, Interim Award (13 December 2017) (Kaufmann-Kohler, Price, Stern), ¶ 112.

authority for that proposition, is contrary to the weight of authority (*see* paragraph 37 above), and ignores the fundamental distinction between questions of law and fact.[161]

(b) The tribunal in *Cargill v. Mexico* acknowledged that its view that the claimant bore the burden of proving a change in customary international law was a departure from the view taken by various prior tribunals.[162] The *Cargill* tribunal then looked to various arbitral decisions and other evidence to conclude that the minimum standard of treatment under customary international law had in fact substantially evolved beyond the antiquated standard followed in *Glamis Gold*.[163]

(c) The U.S. Submission also cites *ADF Group v. U.S.A.*, *Methanex v. U.S.A.*, and *North Sea Continental Shelf*—none of which decided the question of the burden of proof.[164]

(d) The U.S. cites the *Lotus* case, which concluded, without explanation, that France had not "conclusively proved" the rule of customary international law that France had "endeavoured to prove."[165] However, the decision pre-dates the ICJ's holding in the *Fisheries Jurisdiction Case* clearly establishing that the concept of the burden of proof does not apply to questions of customary international law by nearly half a century.[166] Moreover, the PCIJ did not hold that conclusive proof by a party asserting a rule of

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161 *See* **RA-30**, *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Award (8 June 2009) (Young, Caron, Hubbard) ("*Glamis Gold* Award"), ¶ 601.

162 *See* **RA-29**, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009) (Pryles, Caron, McRae) ("*Cargill v. Mexico* Award"), ¶¶ 270–71.

163 *See* **RA-29**, *Cargill v. Mexico* Award, ¶¶ 281–82.

164 *See* **RA-53**, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award (9 January 2003) (Feliciano, de Mestral, Lamm) ("*ADF Group* Award"), ¶ 185 (holding that the *respondent* did not have the burden of proof of establishing the content of the customary international law minimum standard of treatment because the claimant had failed to make a *prima facie* case on the facts); **RA-43**, *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, (3 August 2005) (Veeder, Reisman, Rowley) (*Methanex v. U.SA.* Final Award"), Part IV, Chapter C Article 1105 NAFTA, ¶ 26 (holding that the Tribunal "need not comment on the accuracy" of the claimant's proposed national treatment standard under customary international law because the claimant had failed to prove its factual case even under the standard it argued applied); **RA-42**, *North Sea Continental Shelf* Judgment (20 February 1969) 1969 I.C.J., ¶¶ 70-81 (finding on the merits that no uniform state practice had emerged without discussing the burden of proof, where a party claimed that a new rule of customary international law had arisen in the three years between 1964 and 1967 as a result of uniform state practice).

165 **RA-54**, *The Case of the S.S. "Lotus" (France v. Turkey)*, 1927 P.C.I.J. (ser. A) No. 10, Judgment (7 September 1927) (Huber, Oda, Anzilotti, et. al.), pp. 25–26.

166 *See* **CA-450**, *Fisheries Jurisdiction Case* Merits Judgment, ¶ 18 ("*[T]he burden of establishing or proving rules of international law cannot be imposed upon any of the parties*, for the law lies within the judicial knowledge of the Court.") (emphasis added).

custom is necessary in all cases or explain why conclusive proof was necessary in that case.

(e) The U.S. also cites the *Asylum Case* and the *Rights of Nationals* case, which similarly predate the *Fisheries Jurisdiction Case* and, in any event, do not support the view that the claimant generally carries the burden of proof for questions of customary international law.[167] The tribunal in *Garcia Armas v. Venezuela*, which recently affirmed the *jura novit curia* principle, explained that the *Asylum Case* and the *Rights of Nationals* only support the limited proposition that the claimant carries the burden for establishing *local or regional* custom.[168]

39. *Second*, the conclusion by the U.S. that only arbitral awards containing an examination of State practice and *opinio juris* are relevant to establishing a rule of customary international law is inconsistent with the authorities and the U.S.'s own reliance on arbitral awards in its submission.[169]

(a) As Freeport explained,[170] "tribunals interpreting the minimum standard of treatment under NAFTA, CAFTA, and other treaties routinely rely on prior arbitral decisions, which do not contain surveys of State practice and *opinion juris*, as authoritative distillations of the customary international law standard."[171] Moreover, the tribunals

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167 U.S. Submission ¶ 19 nn. 32, 33 (citing **RA-50**, *Colombia-Peruvian Asylum Case*, Judgment (20 November 1950) 1950 I.C.J. Reports 266, p. 276; **RA-52**, *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, Judgment (27 August 1952) 1952 I.C.J. Reports 176, p. 200 ("The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party.").

168 *See* **CA-457**, *Domingo García Armas, Manuel García Armas, Pedro García Armas and others v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Award on Jurisdiction, (13 December 2019) (Pinto, Gómez-Pinzón, Bernárdez), ¶ 638 ("Al respecto, el Tribunal considera, de conformidad con la jurisprudencia de la CIJ, que la regla *onus probandi actori incumbit* no es aplicable en cuanto al derecho internacional alegado o relevante en el presente caso por no estar involucradas en las presentes circunstancias normas consuetudinarias de carácter local o regional. El contenido del derecho internacional relevante a la hora de interpretar el Tratado es conocido conforme el principio *iura novit curia*, y debe ser determinado por el Tribunal –y por lo tanto la carga de probar su contenido no es susceptible de ser impuesto a ninguna de las Partes.").

169 U.S. Submission ¶ 18.

170 Counter-Memorial on the Merits and Memorial on Jurisdiction ¶ 633 (arguing that "[a]rbitral awards . . . do not constitute State practice and thus cannot create or prove customary international law").

171 *See* Reply and Counter-Memorial on Jurisdiction ¶ 135(a) (citing **CA-278**, *Clayton et al. v. Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability (17 March 2015) (Simma, Schwartz, McRae (dissenting)) ("*Bilcon/Clayton v. Canada* Award"), ¶ 441 ("In interpreting the international minimum standard, the Tribunal also drew guidance from earlier NAFTA Chapter Eleven decisions."); **RA-53**, *ADF Group* Award, ¶ 184 ("[A]ny general requirement to accord 'fair and equitable treatment' and 'full protection and security' must be disciplined by being based upon State practice *and judicial or arbitral caselaw* or other sources of customary or general international law.") (emphasis added); **CA-269**, *Waste Management, Inc. v. Mexico (II)*, ICSID Case

consistently recognizing that a party may demonstrate the content of the minimum standard by relying on prior arbitral decisions nowhere suggest that those prior decisions must contain a survey of State practice and *opinio juris* to be instructive.[172]

(b) The U.S. Submission itself does not support the conclusion that arbitral decisions must examine State practice and *opinio juris* to be instructive on the content of customary international law. The U.S. relies almost exclusively on arbitral decisions that do not examine State practice or *opinio juris* to support its own views about the content of the minimum standard. For example, the U.S. defines denial of justice under the minimum standard of treatment by reference to prior arbitral decisions and relies on arbitral decisions to argue that legitimate expectations and transparency have not crystallized into "independent host State obligations" under the minimum standard.[173]

(c) The decisions that the U.S. relies on do not support the conclusion that arbitral decisions must examine State practice and *opinio juris* to be instructive on the content of customary international law. The *Glamis* decision nowhere draws that conclusion. Instead, the tribunal expressly recognized that arbitral decisions can "serve as illustrations of customary international law" and only concluded that arbitral decisions interpreting fair and equitable treatment treaty provisions are not instructive in establishing the content of

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No. ARB(AF)/00/3, Award (30 April 2004) (Crawford, Civiletti, Gómez) ("*Waste Management II* Award"), ¶ 98 (surveying prior arbitral awards and articulating minimum standard of treatment based on "the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases"); **CA-202**, *TECO Guatemala Holdings, LLC v. The Republic of Guatemala,* ICSID Case No. ARB/10/17, Award (19 December 2013) (Mourre, Park, von Wobeser) ("*TECO* Award"), ¶ 455 (agreeing "with the many arbitral tribunals and authorities that have confirmed [] the content of the minimum standard of treatment in customary international law"); **CA-276**, *Railroad Development Corp. v. Guatemala*, ICSID Case No. ARB/07/23, Award (29 June 2012) (Sureda, Crawford, Eizenstat) ("*RDC* Award"), ¶ 219 (adopting same approach))..

172 *See* Reply and Counter-Memorial on Jurisdiction ¶ 135(a) (citing **CA-276**, *RDC* Award, ¶ 217 ("[A]s such, arbitral awards do not constitute State practice, but it is also true that parties in international proceedings use them in their pleadings in support of their arguments of what the law is on a specific issue. There is ample evidence of such practice in these proceedings. It is an efficient manner for a party in a judicial process to show what it believes to be the law."). *See also, e.g.*, **RA-30**, *Glamis Gold* Award, ¶ 605 ("Arbitral awards, Respondent rightly notes, do not constitute State practice and thus cannot create or prove customary international law. They can, however, serve as illustrations of customary international law if they involve an examination of customary international law, as opposed to a treaty-based, or autonomous, interpretation."); **RA-29**, *Cargill v. Mexico* Award, ¶¶ 277-78 ("[T]he writings of scholars and the decisions of tribunals may serve as evidence of custom."). *See also* **CA-280**, *Windstream Energy LLC v. The Government of Canada (I)*, PCA Case No. 2013-22, Award (27 September 2016) (Heiskanen, Bishop, Cremades Sanz-Pastor) ("*Windstream (I)* Award"), ¶¶ 351-52 (relying on "decisions taken by other NAFTA tribunals that specifically address the issue of interpretation and application of Article 1105(1) of NAFTA, as well as relevant legal scholarship" to "ascertain the content of the customary international law minimum standard of treatment").

173 *See* U.S. Submission ¶ 24 nn.43, 47; ¶¶ 25-26, 29-30.

the minimum standard.[174] The U.S. also cites *Obligation to Negotiate Access to the Pacific Ocean* but in that case the ICJ merely concluded that investment treaty decisions on an investor's legitimate expectations were of no relevance to establishing a customary international law obligation arising from a *State's* legitimate expectations.[175] The ICJ nowhere suggested that decisions addressing the question of whether there is a customary international law rule protecting an investor's legitimate expectations are irrelevant to tribunals in resolving that question.

40. *Third*, the conclusion by the U.S. that decisions by tribunals interpreting treaty-based fair and equitable treatment provisions are irrelevant to establishing the content of the minimum standard ignores the extensive assimilation of the two standards resulting from the minimum standard's evolution beyond its historical origins. As Freeport has explained, there is no longer any material difference between treaty-based and customary international law standards of "fair and equitable treatment."[176] Moreover, tribunals interpreting treaty-based fair and equitable treatment standards often expressly determine the content of the minimum standard of treatment and whether State conduct breached that standard, making them relevant even under the U.S.'s restrictive view.[177]

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174 *See* **RA-30**, *Glamis Gold* Award, ¶ 605 ("Arbitral awards . . . can, however, serve as illustrations of customary international law if they involve an examination of customary international law, as opposed to a treaty-based, or autonomous, interpretation.").

175 *See* **CA-456**, *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, 2018 I.C.J. Reports 507 Merits Judgment (1 October 2018), p. 559, ¶ 162 ("The Court notes that references to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment. It does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation. Bolivia's argument based on legitimate expectations thus cannot be sustained.").

176 *See* Reply and Counter-Memorial on Jurisdiction ¶ 134(e); Memorial ¶¶ 361-62; **CA-237**, *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award (29 July 2008) (Hanotiau, Lalonde, Boyd) ("*Rumeli* Award"), ¶ 611 (adopting "the view of several ICSID tribunals that the treaty standard of fair and equitable treatment is not materially different from the minimum standard of treatment in customary international law"); **RA-57**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, (24 July 2008) (Hanotiau, Born, Landau), ¶ 592 (same); **RA-70**, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (18 August 2008) (van den Berg, Gómez-Pinzón, Kaufmann-Kohler), ¶¶ 336-37 ("The Tribunal concurs . . . with the conclusion that the standards [under an autonomous FET provision and under customary international law] are essentially the same."); **CA-279**, *Murphy* Partial Final Award, ¶ 208 (noting that "[t]he international minimum standard and the treaty standard continue to influence each other" and that "these standards are increasingly aligned").

177 *See* Reply and Counter-Memorial on Jurisdiction ¶ 134(e) (citing **CA-279**, *Murphy* Partial Final Award, ¶ 208 (analyzing claims for breach of fair and equitable treatment on the express condition that "[t]he Tribunal does not find it necessary to determine for the purposes of the present case whether the FET standard reflects an autonomous standard above the customary international law standard"); **CA-108**, *Occidental Exploration & Production Co. v. Ecuador (I)*, LCIA Case No. UN3467, Award (1 July 2004) (Vicuña, Sweeney, Brower),

41. *Finally*, as reflected in Freeport's submissions and below, Freeport has established the obligations it asserts under the customary international law minimum standard of treatment by reference to more extensive authorities than the U.S. cites in its own submission.[178] Thus, Freeport has carried any burden of proof that the U.S. Submission can reasonably be interpreted as supporting.

B. THE UNITED STATES' VIEWS ON THE CONTENT OF THE MINIMUM STANDARD OF TREATMENT ARE OF LIMITED RELEVANCE TO FREEPORT'S CLAIMS

42. The U.S.'s views on the content of the minimum standard of treatment are of limited relevance to Freeport's claims. The U.S. does not assess the evolution of "[c]laims for judicial measures" under the minimum standard of treatment and is therefore of limited assistance to the Tribunal in assessing Freeport's claims that Peru breached Article 10.5 when the contentious administrative courts arbitrarily and unreasonably refused to consider *de novo* SMCV's entitlement to a waiver of penalties and interest on the 2006-2007 and 2008 Royalty Assessments.[179] Moreover, the U.S.'s opinion that the minimum standard of treatment does not contain independent "legitimate expectations" or "transparency" obligations does not contradict Freeport's argument that those concepts are relevant to assessing an alleged breach of the minimum standard.[180]

1. Challenges to Judicial Measures Under the Minimum Standard of Treatment Are Not Limited to Denial of Justice

43. The U.S. Submission concludes that "an investor's claim challenging judicial measures under Article 10.5.1 is limited to a claim for denial of justice under the customary international law minimum standard of treatment."[181] Yet, the U.S. Submission does not address the evolution in the minimum standard for judicial measures, which, like the content of the minimum standard as a whole, has

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¶ 190 ("The Tribunal is of the opinion that in the instant case the Treaty standard is not different from that required under international law . . . . [t]o this extent the Treaty standard can be equated with that under international law as evidenced by the opinions of the various tribunals cited above. It is also quite evident that the Respondent's treatment of the investment falls below such standards.")).

178 *See* Reply and Counter-Memorial on Jurisdiction ¶¶ 134-143 (compiling authorities); Memorial ¶¶ 361-66 (same).

179 *See* U.S. Submission, ¶¶ 23-27; Reply and Counter-Memorial on Jurisdiction ¶ 189 ("[T]he Contentious Administrative Courts' arbitrary refusal to consider the waiver issue *de novo*, as they were required to do . . . constituted self-standing breaches of Article 10.5."); Memorial ¶¶ 411-12 (detailing the Courts' arbitrary refusals to consider the waiver issue).

180 *See* U.S. Submission, ¶¶ 28-30; Reply and Counter-Memorial on Jurisdiction ¶ 134(a)-(d).

181 U.S. Submission ¶ 26.

evolved from its "historical" origins.[182] Accordingly, the U.S. Submission is ultimately of no assistance to the Tribunal on this point. In any event, nothing in the U.S. Submission suggests that due process challenges to administrative measures are limited to denial of justice. Thus, the U.S. Submission does not affect the merit of Freeport's claims that Peru breached Article 10.5: (*i*) 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; (*ii*) 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; and (*iii*) when the Tax Tribunal violated SMCV's due process rights in the 2009, 2010-2011, Q4 2011, 2012, and 2013 Royalty Cases.[183]

44. *First*, Article 10.5 of the TPA does not suggest that challenges to judicial measures under the minimum standard are limited to denial of justice claims. Instead, as the U.S. correctly observes, Article 10.5.2 of the TPA sets forth a *non-exhaustive* list of obligations encompassed within the minimum standard of treatment, which is an "umbrella concept."[184] Annex 10-A adds that the TPA parties intended to incorporate "*all*" relevant customary international law principles that "protect the economic rights and interests of aliens" in the protections afforded by Article 10.5.[185] Thus, Article 10.5.2 merely clarifies that the minimum standard of treatment "*includes* the obligation not to deny justice in . . . adjudicatory proceedings"—not that challenges to judicial measures under the minimum standard are limited to denial of justice.[186]

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182 U.S. Submission ¶ 23 ("Denial of justice in its historical and 'customary sense' denotes 'misconduct or inaction of the judicial branch of the government' and involves 'some violation of rights in the administration of justice, or a wrong perpetrated by the abuse of judicial process.'"). *But see* **RA-53**, *ADF Group* Award, ¶ 179 ("[C]ustomary international law . . . is not 'frozen in time' and [] the minimum standard of treatment does evolve . . . both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development.").

183 *See* Memorial ¶¶ 230, 233, 427, Table B; **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; *see also* Reply and Counter-Memorial on Jurisdiction, ¶¶ 163, 165, 169 (summarizing due process violations by Tax serious violations "including interference by the Tax Tribunal President to dictate the results of the first-decided 2008 Royalty Case, improperly copy-pasting the flawed resolution in that case to decide other cases, and allowing a blatantly conflicted decision-maker to preside over the 2010-2011 Royalty Case"); Memorial ¶ 426 (describing Freeport's due process claims).

184 *See* U.S. Submission ¶ 13 (citing **CA-10**, TPA, Article 10.5.2(a) ("fair and equitable treatment *includes* the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world") (emphasis added).

185 *See* Memorial ¶ 360 (citing **CA-10**, TPA, Annex 10-A).

186 **CA-10**, TPA, Article 10.5.2(a) (emphasis added).

45. *Second*, as Freeport explained, the minimum standard for judicial measures has evolved from the standard applicable in claims of diplomatic protection of aliens in the early 20th century.[187] Tribunals have recognized that challenges to judicial measures under the minimum standard are no longer limited to denial of justice. For example, the *Eli Lilly* tribunal observed that "the conduct of the judiciary will in principle be attributable to the State" like the conduct of any other state organ, and held that "a claimed breach of the customary international law minimum standard of treatment requirement of NAFTA Article 1105(1) may be properly a basis for a claim under NAFTA Article 1105 notwithstanding that it is not cast in denial of justice terms."[188] The U.S. Submission does not purport to examine this evolution and is thus of no assistance to the Tribunal on this point.

46. Given the evolution of the minimum standard of treatment, treaty-based and customary international law standards of "fair and equitable treatment" are now largely coextensive.[189] Thus, investment treaty decisions concluding that treaty-based challenges to judicial measures are not limited to denial of justice claims confirm that the same is true of the minimum standard of treatment.[190]

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187 *See* Reply and Counter-Memorial on Jurisdiction ¶ 134 ("Peru's argument that the 'full scope' of the minimum standard of treatment that states must provide to investors and their investments under customary international law remains the 1926 *Neer* tribunal's standard . . . has been repeatedly rejected by tribunals and authorities interpreting the minimum standard of treatment."); **CA-451**, E. J. de Aréchaga, *International Law in the Past Third of a Century*, 159-1 Recueil des cours (General Course in Public International Law, The Hague, 1978) (31 December 1978) (former President of the ICJ recognizing that "in the present century State responsibility for acts of judicial organs came to be recognized. Although independent of the Government, the judiciary is not independent of the State: the judgment given by a judicial authority emanates from an organ of the State in just the same way as a law promulgated by the legislature or a decision taken by the executive" and that even in 1978, "denial of justice" was just one of the ways that "acts of judicial authorities" may result in "responsibility of the State").

188 **CA-411**, *Eli Lilly v. Canada* Final Award, ¶ 223 ("As a matter of principle, therefore, having regard to the content of the customary international law minimum standard of treatment, the Tribunal is unwilling to shut the door to the possibility that judicial conduct characterized other than as a denial of justice may engage a respondent's obligations under NAFTA Article 1105, within the standard articulated in the award in *Glamis*").

189 *See, e.g.*, Reply and Counter-Memorial on Jurisdiction ¶ 134 ("[T]ribunals have consistently articulated the minimum standard of treatment under customary international law as protecting against state conduct that is arbitrary, non-transparent, involves a lack of due process, and/or is inconsistent with representations made by the state which were reasonably relied upon—in other words, that it is not materially different from the treaty-based fair and equitable treatment obligation."); Memorial ¶¶ 361-65 ("[T]he minimum standard of treatment's fair and equitable treatment obligation encompasses several interrelated obligations, including obligations (*i*) to honor the investor's legitimate expectations, (*ii*) of nonarbitrariness and reasonableness, (*iii*) to act with reasonable consistency and transparency, and (*iv*) to act with procedural propriety and due process."); *id*. ¶¶ 133, 137; Memorial ¶ 361 (citing **CA-279**, *Murphy* Partial Final Award, ¶ 208 (noting that "[t]he international minimum standard and the treaty standard continue to influence each other" and that "these standards are increasingly aligned"); **CA-276**, *RDC* Award, ¶ 218 (interpreting DR-CAFTA and adopting "the conclusion that the minimum standard of treatment is 'constantly in a process of development'") (quoting **RA-53**, *ADF Group* Award, ¶ 179).

190 *See* Reply and Counter-Memorial on Jurisdiction ¶ 143(d); *see also* **CA-195**, *Deutsche Bank AG v. Sri Lanka*, ICSID Case No. ARB/09/2, Award (31 October 2012) (Hanotiau, Williams, Ali Khan (dissenting)), ¶ 478

47. *Finally*, the U.S. Submission provides no support for Peru's argument that a claimant is limited to challenging due process violations before administrative agencies like the Tax Tribunal as a denial of justice.[191]

(a) As Freeport explained, the denial of justice framework does not apply to the Tax Tribunal because, as Peru admits,[192] the Tax Tribunal is not part of the judiciary, but rather is part of the executive branch, and acts as the final administrative decision-maker.[193]

(b) Investment treaty decisions confirm that the minimum standard of treatment does not require a claimant to frame due process challenges to administrative measures as a denial of justice. For example, the tribunal in *TECO v. Guatemala* applying the minimum standard of treatment provision in the DR-CAFTA concluded that "[t]he fact that the Claimant did not make the argument that there was a denial of justice in Guatemalan judicial proceedings cannot deprive the Arbitral Tribunal of its jurisdiction" because "the Claimant's case was in fact not based on denial of justice before the Guatemalan courts, but primarily on the arbitrary conduct of the [Guatemalan energy agency] in establishing the tariff, as well as on an alleged lack of due process in the tariff review process."[194]

(concluding that the Sri Lankan Supreme Court, by issuing an interim order "without a proper examination and without giving the banks involved an opportunity to respond," breached the fair and equitable treatment standard "in a form of a due process violation"); **CA-211**, *OAO Tatneft v. Ukraine*, PCA Case No. 2008-08, Award on the Merits (29 July 2014) (Vicuña, Brower, Lalonde), ¶ 405 ("The discussion about whether these various [judicial] decisions amounted to a denial of justice is immaterial because what this Tribunal has to determine in the end is whether they were manifestly unfair and unreasonable."); **CA-217**, *Dan Cake S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability, (24 August 2015) (Mayer, Landau, Paulsson), ¶¶ 142-46 (concluding that a bankruptcy court decision marred by unjustified procedural obstacles breached *both* the "due process" and the "denial of justice" components of the fair and equitable treatment standard); **RA-58**, *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award (8 April 2013) (Cremades Sanz-Pastor, Hanotiau, Knieper), ¶ 555(g) ("[S]hould subsequent judicial proceedings arising from the Dufremol litigation lead to court orders for closure of these stores, Respondent would be required to take action to remedy the consequences of a breach of Respondent's legitimate expectations."); **RA-69**, *Frontier Petroleum Services Ltd. v. Czech Republic*, UNCITRAL, Final Award(12 November 2010) (Williams, Álvarez, Schreuer), ¶ 525 ("[T]he Tribunal must ask whether the Czech courts' refusal amounts to an abuse of rights contrary to the international principle of good faith, *i.e.* was the interpretation given by the Czech courts to the public policy exception in Article V(2)(b) of the New York Convention made in an arbitrary or discriminatory manner or did it otherwise amount to a breach of the fair and equitable treatment standard.").

191 Rejoinder on the Merits and Reply on Jurisdiction ¶ 960 ("Claimant's 'absence of fair procedure' or 'serious procedural shortcoming in administrative . . . proceedings' claims were essentially claims for denial of justice.") (citing Counter-Memorial on the Merits and Memorial on Jurisdiction ¶ 661).

192 Counter-Memorial on the Merits and Memorial on Jurisdiction ¶¶ 282, 666.

193 Reply and Counter-Memorial on Jurisdiction ¶ 143(a).

194 **CA-202**, *TECO* Award, ¶¶ 472-73.

(c) In any event, the due process violations by the Tax Tribunal—including the interference by the Tax Tribunal President to dictate the results in the 2008 Royalty Case, the improper copy-pasting of the flawed resolution in that case to decide other cases, and the presence of a blatantly conflicted decision-maker presiding over the 2010-2011 Royalty Case—are exactly the type of conduct that prior tribunals have concluded constitute a denial of justice under the minimum standard of treatment.[195]

2. The United States' Submission Confirms That Deference to Domestic Court Decisions is Limited to the Denial of Justice Context

48. In its submission, the U.S. also opines that an international tribunal assessing "[c]laims for judicial measures" "will defer to domestic courts interpreting matters of domestic law unless there is a denial of justice."[196] For the reasons discussed in the preceding section, the U.S.'s opinion has no bearing on Freeport's claims that Peru breached Article 10.5 when the contentious administrative courts arbitrarily and unreasonably refused to consider *de novo* SMCV's entitlement to a waiver of penalties and interest on the 2006-2007 and 2008 Royalty Assessments.[197] Moreover, the U.S. expresses its view in a section titled "[c]laims for judicial measures," in a paragraph explaining that the allegedly "high threshold required for judicial measures to rise to the level of a denial of justice in customary international law gives due regard to the principle of judicial independence, the particular nature of judicial action, and the unique status of the judiciary in both international and municipal legal systems."[198] Thus, the U.S. opinion is clearly limited to the context of "[c]laims for judicial measures" and therefore has no relevance

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195 *See* Reply and Counter-Memorial on Jurisdiction ¶ 163; **CA-202**, *TECO* Award, ¶¶ 458, 473, 682, 711 (finding administrative agency's "willful disregard" of its own procedures and of "elementary standards of due process in administrative matters," breached the fair and equitable treatment obligation, even though claimant did not allege a denial of justice claim); **CA-237**, *Rumeli* Award, ¶¶ 617-19 (finding breach of fair and equitable treatment obligation where administrative Working Group failed to provide "transparency and due process" "in contradiction with the requirements of the fair and equitable treatment principle," by issuing a "summarily reasoned" decision, where the investor had no "real possibility" to present their claims, despite also concluding that there was no evidence of procedural or substantive error by courts).

196 U.S. Submission ¶ 25.

197 *See* Memorial ¶¶ 230, 233, 427, Table B); **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; Reply and Counter-Memorial on Jurisdiction, ¶¶ 163, 165, 169 (summarizing due process violations by Tax serious violations "including interference by the Tax Tribunal President to dictate the results of the first-decided 2008 Royalty Case, improperly copy-pasting the flawed resolution in that case to decide other cases, and allowing a blatantly conflicted decision-maker to preside over the 2010-2011 Royalty Case"); Memorial ¶ 426 (describing Freeport's due process claims).

198 U.S. Submission ¶ 25.

to Freeport's remaining claims, none of which challenge judicial measures.[199] Accordingly, the U.S. Submission is consistent with the investment treaty authorities Freeport cited showing that the decision of the Third Transitory Chamber of Constitutional and Social Law of the Supreme Court in the 2008 Royalty Case is entitled to no deference in resolving Freeport's claims challenging non-judicial measures.[200] Moreover, as Freeport explained, it would be particularly inappropriate for the Tribunal to defer to the Peruvian Supreme Court decision in resolving Freeport's claims in the circumstances present here.[201]

49. *First*, domestic court decisions are entitled to no deference outside the denial of justice context. As Freeport explained, it is well-established that domestic court decisions have no binding effect in international investment treaty proceedings.[202] A contrary result would undermine the contracting states' agreement to submit disputes to an international forum independent of State courts.[203]

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199 Freeport's other Article 10.5 claims challenge (*i*) final and enforceable royalty assessments; (*ii*) final and enforceable penalty and interest assessments; and (*iii*) SUNAT's decision denying SMCV's request for reconsideration of its GEM reimbursement request, none of which are judicial measures. *See* Memorial ¶ 426 ("Peru violated Article 10.5 when the 2009, 2010-2011, Q4 2011, 2012, and 2013 Royalty Assessments became final and enforceable. . . Peru also violated Article 10.5 due to President Zoraida and Ms. Villanueva's unlawful interference in the challenges to the 2006-2007 and 2008 Royalty Assessments" before the Tax Tribunal); ¶ 427 ("For all claims, except the 2006-07 and 2008 Royalty Assessments, Freeport has submitted claims based on the breaches that occurred when the Assessments of penalties and interest became final and enforceable and the administrative process concluded."); ¶ 428 ("Peru breached Article 10.5 when it arbitrarily and unreasonably refused to reimburse SMCV's GEM overpayments for Q4 2011 through Q3 2012. This breach occurred on 23 August 2019, the date that SUNAT's decision denying SMCV's request for reconsideration regarding the reimbursement request became a final administrative act.").

200 *See* Reply and Counter-Memorial on Jurisdiction ¶¶ 106-11.

201 *See* Reply and Counter-Memorial on Jurisdiction ¶ 105.

202 *See e.g.*, **CA-314**, *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision on Jurisdiction (1 February 2006) (Fortier, Nikken (partially dissenting on other grounds), Tawil (partially dissenting)) ("*Duke Energy* Decision on Jurisdiction"), ¶¶ 152, 160 (dismissing Peru's argument that claims for breach of a Peruvian stability agreement were inadmissible because "the key issues in dispute have already been fully resolved within the Peruvian tax system by operation of the Peruvian Tax Court" and explaining that "by agreeing to international arbitration in the DEI Bermuda LSA, Respondent affirmed Claimant's right to a review by an ICSID tribunal of the matters considered by the *Peruvian administration and court system*, to the extent those matters fall within the guarantees contained in the DEI Bermuda LSA.") (emphasis added); **CA-189**, *EDF International S.A. et al. v. Argentina*, ICSID Case No. ARB/03/23, Award (11 June 2012) (Park, Kaufmann-Kohler, Peñalver) , ¶ 1125 (concluding that claims based on governmental measures affecting a contractual concession "are not foreign to this Tribunal and that any decisions made on these issues by Argentine courts do not render these claims *res judicata*."); **CA-349**, *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. The Italian Republic*, SCC Case No. V 2015/095, Award (23 December 2018) (Park, Sacerdoti (dissenting), Haigh), ¶¶ 432, 464-466 (concluding that Italy's modification of energy tariff scheme breached the ECT's umbrella clause despite Italy's reliance on an Italian Constitutional Court decision confirming that the tariff reduction did not breach underlying Italian law obligations).

203 *See, e.g.,* **CA-314**, *Duke Energy* Decision on Jurisdiction, ¶ 160.

50. *Second*, deferring to the Peruvian courts would be inconsistent with the dispute resolution scheme the TPA parties established in Chapter 10 of the TPA. Article 10.18.4 and Annex 10-G of the TPA,[204] which are *lex specialis* in this case, define the *only* set of circumstances under which the existence of a prior domestic court proceeding may affect the Tribunal's independent duty to hear and decide claims.[205] Thus, the TPA parties explicitly intended for claims to be heard by an *international* tribunal if the claimant so elected, *unless* barred by Article 10.18.4 or Annex 10-G. As Freeport has explained, Article 10.18.4 does not apply here and it is undisputed that Annex 10-G is inapplicable.[206] Thus, there is absolutely no basis for the Tribunal to abdicate its duty to independently assess Freeport's claims by deferring to the Supreme Court decision in the 2008 Royalty Case.

51. *Third*, the authorities the U.S. cites do not indicate that an investment treaty tribunal resolving claims challenging non-judicial measures should defer to domestic court decisions on domestic law issues absent a denial of justice and, unlike Peru, the U.S. does not suggest otherwise.[207] Those authorities *only* discuss the subject of deference in the context of adopting the antiquated view that a State will not be held internationally liable *for judicial measures* absent a denial of justice, which, as explained above in Section III.B.1 no longer prevails at customary international law. They do not support the view that an international tribunal should defer to domestic courts in resolving challenges to non-judicial measures and are therefore irrelevant to Freeport's claims for breaches of the Stability Agreement and Article 10.5 of the TPA that do not challenge judicial measures.

(a) In *Azinian v. Mexico*, the tribunal rejected the argument that a local court decision annulling a concession contract constituted an expropriation, concluding that denial of justice provides the only "possibility of holding a State internationally liable for judicial decisions" and the claimants "d[id] not allege a denial of justice."[208]

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204 **CA-10**, TPA, Article 10.18.4, Annex 10-G.

205 *See* Reply and Counter-Memorial on Jurisdiction ¶ 110.

206 *See* Rejoinder on Jurisdiction ¶¶ 47-52; Reply and Counter-Memorial on Jurisdiction, ¶¶ 242, 246-47.

207 *See* Rejoinder on the Merits and Reply on Jurisdiction, ¶ 95 ("Absent any such due process claims against the judicial proceedings that generated the Judgments, there is simply no basis to look behind or second-guess those final rulings on Peruvian law that Perú's judiciary has generated."); *id.* ¶ 913 ("If the Tribunal accepted Claimant's request, the Tribunal would not be applying Peruvian law; it would instead be substituting its own view of what it believes Peruvian law should be. That would be wholly inappropriate."); Counter-Memorial on the Merits and Memorial on Jurisdiction, ¶ 541 ("Absent a denial of justice or due process violation . . . SMCV, and therefore also Claimant proceeding here on its behalf, is collaterally estopped from arguing that the 1998 Stabilization Agreement covers the Concentrator Project").

208 **RA-170**, *Robert Azinian et al. v. United Mexican States,* ICSID Case No. ARB(AF)/97/2, Award (1 November 2009) (Paulsson, Civiletti, Wobeser) ("*Azinian v. Mexico* Award"), ¶¶ 99-100.

(b) The tribunal in *Al Bahloul v. Tajikistan* merely concluded that the claimant failed to prove the denial of justice challenge to a judicial decision that the claimant had expressly asserted.[209]

(c) In *Apotex v. U.S.A.*, the tribunal resolved claims that various U.S. federal court decisions breached the NAFTA.[210]

(d) The *Waste Management II* tribunal resolved claims that court decisions constituted "a denial of justice"[211]

(e) Judge Tanaka's separate opinion in *Barcelona Traction* addressed allegations that a "judgment of a municipal court" constituted a "denial of justice."[212]

(f) The section of Jan Paulsson's book "Denial of Justice in International Law" that the U.S. cites is limited to a discussion of the evolution of claims challenging judicial measures as a "substantive denial of justice" under international law.[213]

52. *Fourth*, as Freeport explained, the authorities that Peru cites similarly concern challenges to judicial measures.[214] They do not suggest that international tribunals should defer to domestic courts outside of that context. Thus, they are likewise irrelevant to Freeport's claims for breaches of the Stability Agreement and Article 10.5 of the TPA that do not challenge judicial measures.

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209 **CA-453**, *Mohammad Ammar Al Bahloul v. Tajikistan,* SCC Case No. V(064/2008), Partial Award on Jurisdiction and Liability (2 September 2009) (Hertzfeld, Happ, Zykin), ¶ 219 (Claimant "complains that the courts . . . breached applicable procedural and substantive laws"); *id*. ¶ 158 ("In the present case, the acts or omissions allegedly in breach of the Treaty are those of the . . . Tajik economic courts (in respect of alleged denial of justice and lack of due process in proceedings which allegedly affected and/or expropriated Claimant's investment in the two joint venture companies).").

210 **RA-7**, *Apotex* Award on Jurisdiction, ¶¶ 277-78 ("Apotex asserts that the U.S. District Court for the District of Columbia, and the U.S. Court of Appeals for the D.C. Circuit, administered justice so deficiently as to violate Apotex's rights under the U.S. Constitution, and to put the United States in breach of its international law obligations under the NAFTA").

211 **CA-269**, *Waste Management (II)* Award, ¶¶ 128-30.

212 **CA-449**, *Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain)*, Separate Opinion of Judge Tanaka (5 February 1970), 1970 I.C.J. 3, p. 115.

213 U.S. Submission, ¶ 25 n. 51 (citing **RA-25**, Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW 44 (2005), pp. 81-84 (discussing developments regarding doctrine of substantive denial of justice)).

214 *See* Reply and Counter-Memorial on Jurisdiction ¶ 111 (citing **RA-6**, *Mondev* Award, ¶ 127; **RA-23**, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award (22 June 2010) (Böckstiegel, Hobér, Crawford), ¶ 274; **RA-24**, *Alps Finance and Trade AG v. Slovak Republic*, UNCITRAL, Award (Redacted Version) (5 March 2011) (Crivellaro, Stuber, Klein), ¶¶ 249-50)).

(a) The tribunal in *América Móvil v. Colombia* resolved claims challenging a Colombian court decision.[215]

(b) The tribunal in *Levy v. Peru* addressed the claimant's allegation of a "denial of justice" that "originated in the lack of a fair judicial system."[216]

(c) The tribunal in *Valores v. Bolivia* resolved the claimant's allegation that failure to consider evidence in a local court proceeding constituted a "denial of procedural justice."[217]

53. *Fifth*, as Freeport explained,[218] the Supreme Court's decision in the 2008 Royalty Case is not even entitled to deference in Peruvian courts.[219] For instance, in the subsequent 2006/07 Royalty Case, which involved the same parties and the same cause of action, the Supreme Court was unable to reach the four-vote majority required to issue a decision.[220] Two of the five Supreme Court justices voted to annul and remand the decision for further analysis, a step that would have been unnecessary if the 2008 Royalty Case was entitled to deference.[221]

54. *Finally*, SMCV did not have the opportunity to present a fraction of the evidence before this Tribunal in the contentious administrative court proceedings culminating in the Supreme Court's decision in the 2008 Royalty Case.[222]

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215 **RA-136**, *América Móvil S.A.B. de C.V. v. Republic of Colombia*, ICSID Case No. ARB(AF)/16/5, Award (7 May 2021) (di Brozolo, de Hoz, Jr., Oreamuno), ¶¶ 336-37, 360.

216 **CA-404,** *Renée Rose Levy v. Republic of Peru*, ICSID Case No. ARB/10/17, Award (26 February 2014) (Oreamuno, Godoy, Hanotiau), ¶¶ 408, 433.

217 **RA-116,** *Valores Mundiales, S.L. and Consorcio Andino S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/13/11, Award (25 July 2017) (Jaramillo, Naón, Derains), ¶¶ 551-53.

218 *See* Reply and Counter-Memorial on Jurisdiction ¶ 118 ("[T]he record conclusively demonstrates that neither the Supreme Court, nor the Tax Tribunal, nor SUNAT accorded any binding effect to the Supreme Court decision in the 2008 Royalty Case.").

219 *See* Reply and Counter-Memorial on Jurisdiction ¶ 116 (citing Counter-Memorial on the Merits and Memorial on Jurisdiction ¶ 551 ("Claimant argues that the Supreme Court's decision in the 2008 Royalty Assessment case is not precedential. Under the Peruvian legal system, that is true."); **RER-1**, Eguiguren, ¶ 101 ("[T]he Supreme Court cassation judgment is not strictly precedential for all judges in Peru."); **RER-2**, Morales, ¶ 86 ("[T]he Supreme Court's judgement does not create a precedent.")).

220 *See* **Ex. CE-739**, Supreme Court, Decision, No. 18174-2017 (2006/07 Royalty Assessments) (20 November 2018).

221 **Ex. CE-739**, Supreme Court, Decision, No. 18174-2017 (2006/07 Royalty Assessments) (20 November 2018), p. 47 ¶ 2.17; p. 48. *See also* Reply and Counter-Memorial on Jurisdiction ¶ 118 (detailing the record evidence demonstrating that "neither the Supreme Court, nor the Tax Tribunal, nor SUNAT accorded any binding effect to the Supreme Court decision in the 2008 Royalty Case, including in interpreting the scope of the Stability Agreement in subsequent proceedings.").

222 Reply and Counter-Memorial on Jurisdiction ¶ 119.

(a) The Supreme Court did not have before it the ample evidence in this arbitration establishing Peru's breaches of the Stability Agreement and the TPA.[223] For example, the Supreme Court did not consider: (*i*) the evidence showing that the Tax Tribunal proceedings were marred by due process violations;[224] (*ii*) the fact and expert witness testimony concerning Title Nine of the Mining Law and the Regulations; [225] (*iii*) the full extent of the evidence concerning the Government's consistent application of stability agreements to concessions and mining units, such as the 105 SUNAT documents that the Tribunal ordered Peru to submit into the record; [226] (*iv*) Mr. Isasi's April 2005 Report contradicting the conclusion in his June 2006 Report that stability guarantees were limited to investment projects; [227] (*v*) the evidence of the political pressure on Minister Sánchez Mejía resulting in MINEM's *volte-face*; [228] or (*vi*) expert witness testimony concerning the purpose of stability guarantees and their presumptive scope in international practice. [229]

(b) As Freeport explained, the contentious administrative courts are structurally inadequate for assessing the evidence now before this Tribunal.[230] The contentious administrative courts have "very short procedural deadlines" and "limited evidentiary methods."[231] For

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223 Reply and Counter-Memorial on Jurisdiction ¶ 119 (listing "among others: (*i*) the evidence of due process violations tainting the Tax Tribunal resolution under review; (*ii*) the fact and expert witness testimony concerning Title Nine of the Mining Law and the Regulations; (*iii*) the full extent of the evidence concerning the Government's consistent application of stability agreements to concessions and mining units; (*iv*) Mr. Isasi's April and September 2005 Reports; (*v*) the evidence of the political pressure on Minister Sánchez Mejía resulting in MINEM's *volte-face*; or (*vi*) expert witness testimony concerning the purpose of stability guarantees and their presumptive scope in international practice, among other matters.").

224 *See* Reply and Counter-Memorial on Jurisdiction ¶¶ 165-168 (detailing due process violations in Tax Tribunal proceedings, including President Zoraida Olano Silva's interference "to resolve the 2008 Royalty Case in the Government's favor by instructing her administrative assistant, Ursula Villanueva, to draft the operative resolution").

225 *See e.g.*, **CWS-14**, Reply Witness Statement of María Chappuis Cardich (witness statement by the director of MINEM's Directorate-General of Mining, who participated in the drafting of the Mining Law); **CER-10**, Reply Expert Report of María del Carmen Vega (report by Peruvian law expert).

226 *See* Reply and Counter-Memorial on Jurisdiction ¶¶ 63-69; Procedural Order No. 3 dated 14 March 2023, ¶¶ 80, 94(a) (ordering Peru to submit 105 SUNAT documents into the record); *see also* **Ex. CE-377**, MINEM, Resolution No. 380-2001-EM-CM, November 16, 2001, p. 1 (resolution showing Government's application of stability guarantees to Parcoy's entire mining unit).

227 *See* **Ex. CE-494**, MINEM, Report No. 33-2005-MEM/OGAJ (14 April 2005), ¶ 17; **Ex. CE-534**, MINEM, Report No. 156-2006-MEM/OGJ (16 June 2006), ¶ 4.1.

228 *See* Reply and Counter-Memorial on Jurisdiction ¶¶ 148-50.

229 *See* **CER-9**, Reply Expert Report of James M. Otto.

230 Reply and Counter-Memorial on Jurisdiction ¶ 115 (citing **CER-7**, Bullard II, ¶ 67).

231 **CER-7**, Bullard II, ¶ 67.

these reasons, "SMCV never had an evidentiary forum in the contentious-administrative proceeding to present its full case related to the contractual claims for breach of the Stability Agreement."[232]

3. The United States' Submission is Consistent with Freeport's Argument That Legitimate Expectations and Transparency Are Relevant Under the Minimum Standard of Treatment

55. In its submission, the U.S. opines that an investor's expectations about the "legal regime governing its investment . . . impose no obligations on the State under the minimum standard of treatment," that the "concept[] of "legitimate expectations" does not give rise to an independent host State obligation, and that "something more" than frustration of an investor's expectations is required to breach the minimum standard of treatment.[233] The U.S. also opines that "transparency is not an independent source of obligation within the minimum standard of treatment."[234] Neither these opinions in the U.S. Submission,[235] nor the decisions that the U.S. cites contradict Freeport's argument that the frustration of the legitimate expectations of an investor and non-transparent conduct are relevant to the overall assessment of whether a State has breached the minimum standard of treatment,[236] which is consistent with the weight of authority.[237]

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232 **CER-7**, Bullard II, ¶ 67.

233 U.S. Submission ¶¶ 28-29.

234 U.S. Submission ¶ 30 ("The concept of 'transparency' also has not crystallized as a component of 'fair and equitable treatment' under customary international law giving rise to *an independent* host-State obligation") (emphasis added).

235 *See* U.S. Submission ¶¶ 28-30 (citing **RA-170**, *Azinian v. Mexico* Award, ¶ 87 (concluding that the claimants' expropriation claims were effectively breach of contract claims and the NAFTA did not permit claims for "mere contractual breaches" of a concession contract); **CA-269,** *Waste Management (II)* Award, ¶¶ 98, 116-17 (concluding on the facts that Mexico's non-payment of debts to a creditor under an ordinary commercial contract did not amount to a breach of the NAFTA but recognizing that in applying the MST "it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant"). *See also* **CA-452**, *United Mexican States v. Metalclad Corp.*, Decision of the Supreme Court of British Columbia on the Challenge by the Petitioner, 2001 BCSC 664 (2 May 2001), ¶¶ 68, 72, 76 (Can. B.C. S.C.) (deciding that *Metalclad* tribunal's use of NAFTA's transparency provisions to interpret and apply the MST was in excess of the tribunal's jurisdiction, without opining on whether transparency may be a relevant factor to establishing a breach of the MST); **RA-10**, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, (16 December 2002) (Kerameus, Gantz, Bravo (dissenting in part), ¶ 133 (addressing an expropriation claim and merely expressing doubts that "lack of transparency alone" rose to a violation of NAFTA and international law as of 2002); **CA-454**, *Merrill & Ring Forestry L.P. v. Canada,* NAFTA/ICSID Case No. UNCT/07/1, Award, (31 March 2010) (Vicuña, Dam, Rowley), ¶¶ 208, 231 (recognizing that under the MST "it would be difficult today to justify the appropriateness of a secretive regulatory system" and observing that transparency was "approaching" the "stage" of being incorporated as an independent obligation under the MST).

236 *See* Reply and Counter-Memorial on Jurisdiction ¶ 138 ("[A] State's repudiation of the general legal framework or specific representations on which the investor reasonably relied in making its investment is

IV. CONCLUSION

56. For the reasons discussed above, the U.S. Submission supports Freeport's jurisdictional arguments and are of limited relevance to the merits of Freeport's claims.

57. Freeport respectfully requests that the Tribunal dismiss Peru's objections to jurisdiction, declare that it has jurisdiction over Freeport's claims, and enter an award requiring Peru to pay compensation to Freeport as set forth in paragraph 319 of Freeport's Reply and Counter-Memorial on Jurisdiction.

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relevant to assessing whether the State has breached the fair and equitable treatment obligation."). *See also id.* ¶ 140(b) ("Peru's complete lack of transparency, in circumstances where the lack of transparency was misleading, is an important component of Peru's unfair and inequitable conduct resulting in its breaches of Article 10.5"); *id.* ¶ 141 (A "*volte-face* followed by inconsistent and nontransparent conduct is exactly what prior tribunals have concluded gives rise to breaches of the fair and equitable treatment obligation"); Memorial ¶ 366 ("[W]hile each of these concepts presents a different dimension of the obligation of fair and equitable treatment that forms part of the minimum standard of treatment, it is not defined by a single definitive test: rather, the Tribunal's task is to assess whether viewed comprehensively, the Government's conduct violated the Treaty standard for each claimed breach.").

237 *See, e.g.*, **CA-285**, *Eco Oro* Decision on Jurisdiction, Liability and Directions on Quantum, ¶ 754 (interpreting fair and equitable treatment under the MST and concluding that, "[r]eviewing past decisions, concepts such as *transparency*, stability and the *protection of the investor's legitimate expectations* play a central role in defining the FET standard.") (emphasis added); **CA-280**, *Windstream (I)* Award, ¶¶ 379-80 (concluding that Canada's failure to "bring clarity" and "address the legal and contractual limbo" imposed on the investor when the government adopted a moratorium on offshore wind development contributed to a breach of the minimum standard of treatment); **CA-278**, *Bilcon/Clayton v. Canada* Award, ¶ 455 ("The reasonable expectations of the investor are a factor to be taken into account in assessing whether the host state breached the international minimum standard of fair treatment under Article 1105 of NAFTA."); **RA-107**, *Cargill v. Mexico* Award, ¶ 285 (concluding that a violation of the minimum standard of treatment "may arise in many forms" and "may relate to a lack of due process, discrimination, a lack of transparency, a denial of justice, or an unfair outcome"); **RA-55**, *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada,* ICSID Case No. ARB(AF)/07/4, Decision on Liability and Principles of Quantum (22 May 2012) (van Houtte, Sands (partially dissenting), Janow), ¶ 152 ("[I]n determining whether [the MST] has been violated it will be a relevant factor if the treatment is made against the background of (i) clear and explicit representations made by or attributable to the NAFTA host State in order to induce the investment, and (ii) were, by reference to an objective standard, reasonably relied on by the investor, and (iii) were subsequently repudiated by the NAFTA host State."); **CA-269**, *Waste Management II* Award, ¶ 98 ("In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.").

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