

IN ACCORDANCE WITH THE TRADE PROMOTION AGREEMENT BETWEEN
THE REPUBLIC OF PERU AND THE UNITED STATES OF AMERICA
- AND -
UNDER THE UNCITRAL ARBITRATION RULES (2013)

The Renco Group, Inc.,
Claimant,

v.

The Republic of Peru,
Respondent.

PCA Case No. 2019-46

Respondent's Counter-Memorial

1 April 2022

ALLEN & OVERY

CONTENTS

I.	INTRODUCTION	9
A.	Overview of the Renco Case.....	11
B.	The Tribunal has no jurisdiction over all but one of Claimant’s claims.....	17
C.	All of Renco’s claims should be dismissed for lack of merit	18
D.	The Treaty was never intended to protect investors that destroy the environment and endanger public health	19
E.	Renco’s pleading is filled with material omissions of fact	20
F.	Renco’s claim should have never been brought	22
II.	FACTUAL BACKGROUND.....	25
A.	Renco and DRRC knowingly invested in a country that had moved towards environmental protection and a Facility in need of environmental reform.....	25
1.	The environmental protection framework under which Renco decided to invest in the La Oroya Facility	28
2.	There was an environmental remediation plan in place for the La Oroya Facility when Renco and DRRC decided to invest.....	31
3.	Renco and DRRC represented that they were capable of and committed to implementing the environmental remediation plan for the Facility	42
4.	DRP undertook investment and environmental obligations that it never fulfilled and now Renco tries to re-write the STA to justify DRP’s non-compliance	46
5.	Renco and DRRC confirmed their understanding of DRP’s environmental obligations in DRRC’s 1998 SEC Report.....	47
B.	DRP purchased the Facility with an obligation to turn around its environmental performance	50
1.	The Basic Terms of the STA	50
2.	The STA set out the STA Parties’ environmental obligations and responsibilities	52
a.	The STA Parties’ environmental remediation obligations.....	52

b.	The scope of DRP’s assumption of responsibility for third-party claims	53
c.	The scope of Centromín’s assumption of responsibility for third-party claims	55
3.	DRP warranted that it had conducted due diligence.....	55
4.	Subsequent amendments to the STA and Guaranty.....	56
5.	By reversing its capital contribution the day it executed the STA, DRP compromises its ability to meet its PAMA obligations	57
C.	The Renco knew what needed to be done to meet its environmental obligations.....	59
1.	Renco compromised DRP’s ability to meet its obligations	60
a.	At the outset, Renco compromised DRP’s ability to meet its environmental and investment obligations	60
b.	Renco further compromised DRP through a series of intercompany deals that benefitted Renco	62
c.	DRP executives, auditors, and banks repeatedly raised concerns about DRP’s viability.....	69
2.	DRP adopted standards and practices that were less protective of the environment and human health than Centromín.....	73
3.	DRP failed to complete the Sulfuric Acid Plant Project by the established deadlines, despite receiving several extensions from Peru	80
a.	DRP neglected its most important environmental obligations from the moment it acquired the Facility.....	80
b.	When DRP failed to meet the deadline under the maximum regulatory limit, the MEM extended DRP a lifeline and granted the company an extension beyond the PAMA Period to complete the Sulfuric Acid Plant Project.....	89
c.	DRP failed to meet its deadline under the “final and non-extendable” 2006 Extension	108
d.	Peru granted DRP a second lifeline to complete the Sulfuric Acid Plant Project	117
D.	Renco harmed human health in La Oroya, leading to criticism of the company and legal actions against both Claimant and the Peruvian State	123

1.	DRP’s standards and practices adversely affected the health of the residents of La Oroya.....	125
2.	DRP sought to shift the responsibility for the harm it was causing onto the community	128
3.	Renco and DRP were criticized before domestic and international bodies and regulators	131
4.	Renco and DRRC sought to hold Peru and Activos Mineros responsible for lawsuits based on their own corporate decisions	132
	a. Renco’s corporate decisions led to lawsuits by La Oroya residents in the United States.....	132
	b. Renco and DRRC’s efforts to draw Peru and Activos Mineros into the Missouri Litigations.....	137
E.	Renco’s actions drove DRP into bankruptcy	140
	1. Renco, not the financial crisis or Peru, drove DRP into bankruptcy	140
	2. DRP’s creditors, not Peru, initiated bankruptcy proceedings against DRP.....	143
	3. In September 2010, the MEM filed a valid credit claim against DRP, which was properly approved by INDECOPI	146
	4. DRP dragged the MEM through exhaustive and meritless challenges of the MEM’s credit claim, all of which failed.....	146
	a. DRP filed a baseless constitutional amparo recourse in an attempt to overturn INDECOPI Chamber No. 1’s decision to recognize the MEM’s credit against DRP, which failed.....	147
	b. DRP filed a baseless administrative contentious action in an attempt to overturn INDECOPI Chamber No. 1’s decision to recognize the MEM’s credit against DRP, which failed.....	149
	5. DRP’s creditors, not Peru, challenged DRCL’s credit as unlawful.....	150
	6. Cormín, not Peru, filed a criminal complaint against officers of Renco and DRRC, which were dismissed by the Peruvian judiciary	152
F.	DRP’s Board of Creditors guides the bankruptcy.....	153
	1. DRP’s Board of Creditors, not Peru, guides the bankruptcy	153

2.	DRP’s Board of Creditors rejected DRP’s inadequate restructuring proposals, and agreed to liquidate DRP pursuant to the <i>Ley General del Sistema Concursal</i> of Peru	154
3.	The Facility was reopened in compliance with environmental law	162
4.	Current status of DRP’s bankruptcy	164
G.	Renco’s Second Attempt to use a Treaty Claim to Pressure Peru	164
H.	Renco and DRRC are polluters that have received similar treatment in the United States for failing to meet their environmental obligations	165
1.	Renco and DRRC violated their environmental obligations in Missouri, USA, and faced significant environmental penalties and fines, and public outcry	165
2.	Renco violated its environmental obligations in Utah, USA, and faced significant environmental penalties and fines, and public outcry	168
3.	DRRC’s “environmental achievements and community work” occurred as part of multiple settlements with governmental authorities	174
4.	Renco and DRRC’s history of purchasing failing companies with significant environmental and public health liabilities, stripping them of their assets, and walking away	175
III.	THE TRIBUNAL LACKS JURISDICTION OVER ALL BUT ONE OF RENCO’S CLAIMS	178
A.	The Tribunal lacks jurisdiction over Renco’s expropriation claims for failure to establish a <i>prima facie</i> case	178
1.	Claimant has failed to articulate a cognizable direct expropriation claim	179
2.	Claimant has failed to articulate a cognizable indirect or creeping expropriation claim	181
B.	The Tribunal lacks jurisdiction <i>ratione temporis</i> over all fair and equitable treatment claims, save Renco’s meritless denial of justice claim	184
1.	The Treaty does not apply retroactively to claims of breach based on State acts or omissions that pre-date its entry into force	188
2.	When faced with situations in which the alleged State conduct straddles the entry into force of the treaty, State acts that are rooted	

in pre-treaty conduct fall outside of the tribunal’s jurisdiction <i>ratione temporis</i>	191
a. When faced with situations in which the alleged State conduct straddles the entry into force of the treaty, State acts that did not alter the “status quo” of Renco’s alleged investment fall outside of the Tribunal’s jurisdiction <i>ratione temporis</i>	192
b. When faced with situations in which the State conduct straddles the entry into force of the treaty, State acts that are not independently actionable fall outside of the Tribunal’s jurisdiction <i>ratione temporis</i>	196
3. Renco’s claims based on the Pre-Treaty Acts are outside of the <i>ratione temporis</i> scope of the Treaty because they did not alter the status quo of Claimant’s investment and are not independently actionable	199
a. The Pre-Treaty Acts did not alter the status quo of Claimant’s investment	199
b. The Pre-Treaty Acts are not independently actionable	207
IV. PERU HAS COMPLIED WITH ITS OBLIGATIONS UNDER THE TREATY	210
A. Peru has complied with its obligation under Article 10.5 to treat protected investments in accordance with international law	214
1. The content of the fair and equitable treatment standard under customary international law	216
a. The relevant standard is the minimum standard of treatment under customary international law, which provides a narrow protection to investors	218
b. The minimum standard of treatment has not converged with the autonomous FET standard	221
2. The MEM’s treatment of DRP in connection with the 2009 extension request and restructuring requests was fair and in no way arbitrary	224
a. The minimum standard of treatment establishes a high threshold for finding a violation of the prohibition on arbitrary treatment	225
b. Peru’s treatment of DRP was fair, equitable, and reasonable after DRP repeatedly reneged on its environmental investment obligations; Peru’s treatment of DRP did not breach the prohibition of arbitrary conduct under customary international law	227

3.	DRP had no legitimate expectation of receiving extensions without conditions.....	275
	a. The minimum standard of treatment does not protect an investor’s legitimate expectations.....	275
	b. The MEM’s treatment of DRP in connection with the extension and restructuring requests did not violate Renco’s legitimate expectations.....	279
4.	The MEM treated DRP transparently and fairly and warned DRP in 2006 that it would receive no further extensions.....	281
	a. The minimum standard of treatment does not include an obligation to treat investors transparently.....	281
	b. The MEM treated DRP transparently and with candor	285
5.	The trust account requirement and other conditions were a proportionate response to DRP’s repeated failures to fulfill its environmental obligations.....	286
	a. The minimum standard of treatment does not include an obligation to treat investors proportionately.....	286
	b. The imposition of the trust account requirement and other conditions was a proportionate response	287
6.	The 2009 Extension Regulation was consistent with the actions of Congress and the Technical Commission.....	291
	a. The minimum standard of treatment does not include an obligation to treat investors consistently.....	291
	b. The MEM and the Peruvian Congress acted consistently in connection with the 2009 Extension Law and Regulation.....	292
7.	Peru did not coerce or harass Renco or DRP	293
	a. Renco has not established that the minimum standard of treatment protects against coercion or harassment	293
	b. Neither President Garcia nor the Lima District Attorney harassed Renco or DRP	295
8.	DRP never had a right to receive multiple, condition-free extensions under customary international law.....	297
B.	Peru did not expropriate Renco’s investment in breach of Article 10.7 of the Treaty	300

1.	Renco has failed to identify the correct legal standard for expropriation, and instead relies on a superficial and incorrect summary of the applicable standard	301
a.	Claimant must prove that the value of its investment was radically affected or effectively destroyed.....	302
b.	Claimant must prove that the State caused the alleged damage.	304
c.	Claimant must prove that government action interfered with reasonable and objective investment-backed expectations.....	306
d.	Claimant must prove its claim of indirect expropriation is the “rare circumstance” that would constitute indirect expropriation, discrimination, and Peru’s actions were not applied to protect legitimate public welfare objectives	307
2.	Peru did not expropriate Renco’s investment	307
a.	Peru did not expropriate Renco’s investment when the MEM allegedly denied DRP’s request for an extension of time to complete the Sulfuric Acid Plant Project.....	307
b.	Peru did not expropriate Renco’s investment through the MEM’s legitimate claim for credit against the bankrupt DRP ...	312
c.	Peru did not expropriate Renco’s investment through the bankruptcy proceedings of DRP	315
C.	Peru’s refusal to invalidate the MEM’s legitimate credit against DRP does not constitute a denial of justice.....	319
1.	Customary international law imposes a high standard for claims of denial of justice	320
2.	The MEM’s credit and the local proceedings do not place Peru in breach of the customary international law standard of denial of justice	324
a.	INDECOPI Chamber No. 1’s approval of the MEM’s credit against DRP	325
b.	The proceeding before the 4th Transitory Administrative Contentious Court	332
c.	The proceeding before the 8th Chamber.....	338
d.	The Supreme Court’s decision to reject DRP’s extraordinary cassation recourse	342

V. PRAYER FOR RELIEF 345

Glossary

<u>Term</u>	<u>English</u>	<u>Spanish</u>
2004 Extension Regulation	Supreme Decree No. 046-2004-MEM, regulation that allowed the MEM to grant an extension to one or more PAMA projects beyond the ten-year deadline	Decreto Supremo N° 046-2004-MEM, reglamento que permitía al MEM otorgar una prórroga a uno o más proyectos PAMA más allá del plazo de diez años
2006 Extension	Ministerial Resolution No. 257-2006-MEM/DM, which extended DRP's deadline to complete, <i>inter alia</i> , the Sulfuric Acid Plant Project until 31 October 2009	Resolución Ministerial N° 257-2006-MEM/DM, que amplió el plazo para culminar, entre otros, el Proyecto de Planta de Ácido Sulfúrico hasta el 31 de octubre de 2009
2009 Extension Law	Law No. 29140, which extended DRP's deadline to complete the Sulfuric Acid Plant Project until 30 April 2012	Ley N° 29140, que amplió el plazo para culminar el Proyecto Planta de Ácido Sulfúrico hasta el 30 de abril de 2012
2009 Extension Regulation	Supreme Decree No. 075-2009-EM, which implemented the 2009 Extension Law	Decreto Supremo N° 075-2009-EM
2006 Guaranty Letter	Requirement that Doe Run Peru or a parent company to issue a letter of guarantee to the MEM covering 20% of the cost of its obligations under the 2006 Extension.	Requisito de que Doe Run Perú o una casa matriz emita una carta de garantía al MEM que cubra el 100% del costo de sus obligaciones bajo la Prórroga de 2006.
2009 Guaranty Letter	Requirement that Doe Run Peru or a parent company to issue a letter of guarantee to the MEM covering 100% of the remaining cost of its obligations under the 2006 Extension.	Requisito de que Doe Run Perú o una casa matriz emita una carta de garantía al MEM que cubra el 100% del costo restante de sus obligaciones bajo la Prórroga de 2006.
2006 Trust Account	Requirement that DRP establish a trust account that would cover 100% of its obligations under the 2006 Extension	Requisito de DRP de establecer una cuenta de fideicomiso que cubriría el 100% de sus obligaciones bajo la Prórroga de 2006
2009 Trust Account	Requirement that DRP channel 100% of its revenues into a trust account to finance the Sulfuric Acid Plant Project	Requisito de DRP de canalizar el 100% de sus ingresos a una cuenta de fideicomiso para financiar el Proyecto de Planta de Ácido Sulfúrico
Apoyo	Apoyo Consultoría S.A.	Apoyo Consultoría S.A.

<u>Term</u>	<u>English</u>	<u>Spanish</u>
Bankruptcy Law	Law No. 27809, the General Law of the Bankruptcy System of Peru	La Ley N° 27809, Ley General del Sistema Concursal
Board of Creditors (Junta)	Board of recognized creditors of Doe Run Peru S.R.LTDA.	Junta de acreedores reconocidos de Doe Run Peru S.R.L.
BLL	Blood lead level	Nivel de plomo en la sangre
Bidding Terms	Public International Bidding PRI-16-97 for the privatization of Metaloroya	Bases del Concurso Público Internacional PRI-016-97
Metaloroya Business Plan	Business Plan for Metaloroya for 1997-2011, June 1996	1997-2011 Business Plan para Metaloroya, junio 1996
Claimant (Demandante) or Renco	Renco Group, Inc.	Renco Group, Inc.
Respondent (Demandada) or Peru (Perú)	Republic of Peru	República del Perú
Treaty	Trade Promotion Agreement between the Republic of Peru and the United States of America, dated 12 April 2006, entered into force on 1 February 2009	Acuerdo de Promoción Comercial entre la República del Perú y los Estados Unidos de América, de fecha 12 de abril de 2006, vigente a partir del 1 de febrero de 2009
UNCITRAL Rules (Reglamento CNUDMI)	Arbitration Rules of the United Nations Commission on International Trade Law (as revised in 2010, with new article 1, paragraph 4, as adopted in 2013)	Reglamento de Arbitraje de la Comisión de las Naciones Unidas para el Derecho Mercantil Internacional (revisado en 2010, con el nuevo artículo 1, párrafo 4, aprobado en 2013)
PCA (CPA)	Permanent Court of Arbitration	Corte Permanente de Arbitraje
Centromín	Empresa Minera Del Centro Del Peru S.A.	Empresa Minera Del Centro Del Peru S.A.
Environmental Code	Environment and Natural Resources Code	Código del Medio Ambiente y los Recursos Naturales
Consultation Agreement	Consultation Agreement, dated 10 November 2016	Acuerdo de Consulta, de fecha 10 de noviembre de 2016
Cormin	Consortio Minero S.A.	Consortio Minero S.A.

<u>Term</u>	<u>English</u>	<u>Spanish</u>
Counter-Memorial on Preliminary Objections	Claimants' Counter-Memorial on Preliminary Objections, dated 21 February 2020	Memorial de Contestación de la Demandante sobre las Objeciones Preliminares, de fecha 21 de febrero de 2020
CEPRI	Special Committee for the Promotion of Private Investment for Centromin	Comité Especial de Promoción de la Inversión Privada
COPRI	Commission for the Promotion of Private Investment	Comisión de Promoción de la Inversión Privada
DR-CAFTA	Dominican Republic-Central America-United States Free Trade Agreement, dated 5 August 2004	Acuerdo de Libre Comercio entre Estados Unidos, Centroamérica y República Dominicana, de fecha 5 de agosto de 2004
Environmental Health Directorate (DIGESA)	General Directorate of Environmental Health of the Ministry of Health	Dirección General de Salud Ambiental del Ministerio de Salud del Perú
Draft MOU	Draft Memorandum of Understanding presented by Doe Run Peru to various Peruvian agencies	Proyecto de Memorándum de Entendimiento presentado por Doe Run Perú a diversas agencias peruanas
DRCL	Doe Run Cayman LTD	Doe Run Cayman LTD
DRP	Doe Run Peru S.R. LTDA	Doe Run Perú S.R.L.
DRRC	Doe Run Resources Corporation	Doe Run Resources Corporation
ECAs	Ambient Air Quality Standards	Estándares de Calidad Ambiental
EVAP	Environmental Assessment	Evaluación Preliminar
SNC Report	Prefeasibility study of the environmental aspects of cooper, zinc and lead smelter of La Oroya prepared by Kilborn SNC-Lavalin Europe	Estudio de pre factibilidad de los aspectos ambientales de la fundición de cobre, zinc y plomo de La Oroya elaborado por Kilborn SNC-Lavalin Europe
Facility	Smelting and refining complex in La Oroya, Peru	Complejo de fundición y refinamiento en La Oroya, Perú
FET (TJE)	Fair and equitable treatment	Tratamiento justo y equitativo

<u>Term</u>	<u>English</u>	<u>Spanish</u>
Framework Agreement	Framework Agreement, dated 14 March 2017	Acuerdo Marco, de fecha 14 de marzo de 2017
Peru Guaranty	Guaranty Agreement between Peru and DRP, executed on 21 November 1997	Acuerdo de Garantía entre Peru y DRP, firmado el 21 de diciembre de 1997
Renco Guaranty	Guaranty Agreement between Renco, DRRC, and Centromin, executed on 23 October 1997	Acuerdo de Garantía entre Renco, DRRC, y Centromin, firmado el 23 de octubre de 1997
IACHR	Inter-American Commission of Human Rights	Comisión Interamericana de los Derechos Humanos
ICSID	International Centre for Settlement of Investment Disputes	Centro Internacional de Arreglo de Diferencias Relativas a Inversiones
ILC Articles on State Responsibility	International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts	Artículos de la Comisión de Derecho Internacional sobre la Responsabilidad del Estado por Hechos Internacionalmente Ilícitos
INDECOPI	National Institute for the Defense of Free Competition and the Protection of Intellectual Property	Instituto Nacional de Defensa de la Competencia y la Protección de la Propiedad Intelectual
INDECOPI Chamber No. 1	INDECOPI Chamber No. 1 for the Defense of Competition	Sala de Defensa de la Competencia No. 1
1996 Offering Memorandum	Offering Memorandum for the La Oroya Metallurgical Complex, prepared by CS First Boston, October 1996	Memorándum de Información para el Complejo Metalúrgico La Oroya, preparado por CS First Boston, octubre de 1996
Knight Piesold Report	Environmental Evaluation of La Oroya Metallurgical Complex, prepared by Knight Piésold LLC	Evaluación Medioambiental del Complejo Metalúrgico Metaloroya, preparado por Knight Piésold LLC
LPMs	Maximum Permitted Levels of Pollution	Límites Máximos Permisibles de Contaminación
Memorial on Preliminary Objections	Respondent's Memorial on Preliminary Objections, dated 20 December 2019	Memorial de la Demandada sobre Objeciones Preliminares, de fecha 20 de diciembre de 2019

<u>Term</u>	<u>English</u>	<u>Spanish</u>
MEM	Ministry of Energy and Mines	Ministerio de Energía y Minas
Metaloroya	Empresa Minera Metaloroya La Oroya S.A.	Empresa Minera Metaloroya La Oroya S.A.
Missouri Litigations	Lawsuits beginning in 2007 in the U.S. state of Missouri by a group of minors from La Oroya against Renco and DRRC, and entities and individuals affiliated with them	Litigios iniciados en el 2007 en el estado de Missouri de EEUU por un grupo de menores de edad de La Oroya en contra de Renco y DRRC, y entidades e individuos afiliados a ellas
Missouri Plaintiffs	The group of minors from La Oroya who filed suit in Missouri	El grupo de menores de edad de La Oroya que inició el litigio en Missouri
2020 NDP Submission	Non-Disputing State Party Submission of the United States of America, dated 7 March 2020	Escrito de Parte No Contendiente presentado por Estados Unidos de América, de fecha 7 de marzo de 2020
NAFTA (TLCAN)	North American Free Trade Agreement, entered into force on 1 January 1994	Tratado de Libre Comercio de América del Norte, vigente a partir de 1 de enero de 1994
Notice of Arbitration and Statement of Claim	Notice of Arbitration and Statement of Claim, dated 23 October 2018	Notificación de Arbitraje y Escrito de Demanda, de fecha 23 de octubre de 2018
OSINERG	Supervisory Organ of Energy Investment of Peru	Organismo Supervisor de la Inversión en Energía del Perú
OSINERGMIN	Supervisory Organ of Energy and Mines of Peru	Organismo Supervisor de la Inversión en Energía y Minería del Perú
PAMA	Environmental Adjustment and Management Program	Programa de Adecuación y Manejo Ambiental
PAMA Period	The period of time between 23 October 1997 and 13 January 2007	El periodo de tiempo de 23 de octubre de 1997 a 13 de enero de 2007
Post-PAMA Period	The period of time after 13 January 2007	El periodo de tiempo posterior al 13 de enero de 2007
Peru (Perú)	The Republic of Peru	La República del Perú

<u>Term</u>	<u>English</u>	<u>Spanish</u>
Procedural Agreement	Procedural Agreement between The Renco Group, Inc. and the Republic of Peru, dated 10 June 2019	Acuerdo Procedimental entre The Renco Group, Inc. y la República del Perú de fecha 10 de junio de 2019
Profit Consultoría	Profit Consultoría e Inversiones S.A.C.	Profit Consultoría e Inversiones S.A.C.
Environmental Mining Law	Regulation for Environmental Protection in the Mining-Metallurgical Activity	Reglamento para la Protección Ambiental en la Actividad Minero Metalúrgica
Renco I	<i>The Renco Group v. Republic of Peru</i> , ICSID Case No. UNCT/13/1	The Renco Group c. la República del Perú, Caso CIADI N° UNCT/13/1
Renco II (or Treaty Case)	<i>The Renco Group, Inc. v. Republic of Peru</i> , PCA Case No. 2019-46 (the instant proceedings)	<i>The Renco Group, Inc. c. la Republica del Perú</i> , Caso CPA N° 2019-46 (el proceso instantáneo)
Renco III (or Contract Case)	<i>The Renco Group, Inc. and Doe Run Resources Corp. v. Republic of Peru and Activos Mineros S.A.C.</i> , PCA Case No. 2019-47	<i>The Renco Group, Inc. y Doe Run Resources Corp. c. la Republica del Perú y Activos Mineros S.A.C.</i> , Caso CPA N° 2019-47
Renco Defendants	The defendants in the Missouri Litigations, which include Renco, DRRC, DR Acquisition Corp., Doe Run Cayman Holdings LLC, Marvin K. Kaiser, Albert Bruce Neil, Jeffrey L. Zelms,x Theodore P. Fox III, and Ira L. Rennert.	Los demandados en los litigios
Right Business	Right Business S.A	Right Business S.A
Sulfuric Acid Plant Project	Project No. 1, Sulfuric Acid Plants	Proyecto No. 1, Planta de Ácido Sulfúrico
Special Commission (Comisión Especial)	Special Commission that represents the State in International Disputes, part of the Ministry of Economy and Finance of the Republic of Peru	Comisión Especial que representa al Estado en Controversias Internacionales de Inversión adscrita al Ministerio de Economía y Finanzas de la República del Perú
STA	Stock Transfer Agreement between “Centromin,” “the Investor,” and “the Company,” executed on 23 October 1997	Contrato de Transferencia de Acciones “Centromin,” “el Inversionista,” y “la Empresa,” firmado el 23 de octubre de 1997

<u>Term</u>	<u>English</u>	<u>Spanish</u>
STA Parties	<p>The contracting parties of the Stock Transfer Agreement, identified therein as “Centromin,” “the Investor,” and “the Company”</p> <p>The legal persons that constitute the contracting parties have changed through a corporate absorption and contractual assignments</p>	<p>Las partes contratantes del Contrato de Transferencia de Acciones, identificadas como “Centromin,” “el Inversionista,” y “la Empresa”</p> <p>Las personas jurídicas que constituyen las partes contratantes han cambiado mediante una absorción corporativa y cesiones de posiciones contractuales</p>
STA Arbitral Clause	Clause 12 of the Stock Transfer Agreement	La cláusula 12 del Contrato de Transferencia de Acciones
Industrias Peñoles	Servicios Industriales Peñoles S.A. de C.V.	Servicios Industriales Peñoles S.A. de C.V.
Supreme Court	Supreme Court of Justice of Peru	Corte Suprema de Justicia de la República del Perú
Technical Commission	Technical commission appointed by the Peruvian Government to evaluate the possibility of granting an extension to Doe Run Peru in 2009	Comisión técnica nombrada por el Gobierno peruano para evaluar la posibilidad de otorgar una prórroga a Doe Run Perú en 2009
The Rio Declaration	The Rio Declaration on Environment and Development	Declaración de Río sobre el Medio Ambiente y el Desarrollo
US (EE.UU.)	United States of America	Estados Unidos de América
VCLT (CVDT)	Vienna Convention on the Law of Treaties	Convención de Viena sobre el Derecho de los Tratados
Volcan	Volcan Compañía Minera	Volcan Compañía Minera
4th Chamber for Administrative Contentious Actions	4th Chamber for Administrative Contentious Actions of the Superior Court	4ta Sala Contencioso Administrativo de la Corte Superior
8th Chamber Chamber for Administrative Contentious Actions	8th Chamber for Administrative Contentious Actions with a Sub-Specialty in INDECOPI matters	8va Sala Especializada en lo Contencioso Administrativo con Subespecialidad en tema de INDECOPI de la Corte Superior

I. INTRODUCTION

1. The Republic of Peru (“**Peru**”) is a sovereign State committed to promoting investment and development, without compromising its commitments to environmental protection. This should come as no surprise to The Renco Group, which brings the present dispute under an international agreement that itself expressly provides that a State’s commitment to protecting the environment must not be sacrificed in the name of investment:

“The Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in their respective environmental laws. Accordingly, a Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws in a manner affecting trade or investment between the Parties.”¹

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.”²

2. This text, and the similar texts included in many international investment agreements, articulates a clear policy: States should not have to choose between promoting investment and protecting the environment. The international investment legal regime does not provide cover to the once ubiquitous practice of extracting economic spoils while laying waste to the environment and disregarding the health of local communities.
3. Renco’s arbitration against Peru asks this Tribunal to provide a recidivist polluter an opportunity under international law to dictate, to modify, and to weaken – as it sees fit – the environmental laws that protect the people of La Oroya, Peru.
4. The smelting and refining complex in La Oroya, Peru (the “**Facility**”) is just one of many of Renco’s profit and pollution projects. Renco, under the control of Ira Rennert, has a well-established history of purchasing failing companies with aging equipment and

¹ [RLA-001](#), United States-Peru Trade Promotion Agreement, signed on 12 April 2006, entered into force on 1 February 2009 (“**Treaty**”), Art. 18.3.2.

² [RLA-001](#), Treaty, Art. 10.11.

significant environmental and public health liabilities, stripping them of their assets, extracting what it can, and walking away.³ Described as a “New York financier who’s collected distressed companies at fire-sale prices since the mid-1970s,”⁴ Ira Rennert centers his dealings on the transfer of assets from newly acquired companies to his holding company, Renco, and consistent payout of dividends to its shareholders. What Rennert and Renco did to distressed companies, Rennert and Renco did to La Oroya – an unfortunate move from companies to communities – but a pattern of acquisition, stripping, enrichment of Renco entities, and ultimately bankruptcy protection.

5. After the acquisition, a financial structure is put in place to strip the acquisition of value and destine the new company to failure. This usually includes one or more of the following strategies: (1) burdening the subsidiary with the debt of its own purchase price; (2) jeopardizing future financing of the subsidiary by making it guarantor for Renco’s debt or another subsidiary’s debt; (3) limiting the subsidiary’s access to cash flows; (4) actively withdrawing funds from the subsidiary through intercompany “agreements”; and (5) when the company is unable to make payments on its debts, Rennert strips the company of any remaining assets and shifts the blame for the failure elsewhere, including falling commodities prices.
6. In the specific context of Renco’s operation of the La Oroya Facility, the strategy of maximizing production while minimizing capital expenditures had catastrophic consequences for the community of people living near and working at the Facility. Profits from ramped up production were funneled to Renco affiliated entities; and, thus, the Facility was left with little to no capital to spend on environmental projects necessary to address the toxic emissions emptying out of aging equipment run at capacity and flowing into the surrounding community. As described herein, Renco’s meritless claims against Peru are nothing more than an attempt to shift blame, pressure Peru, and use international investment law as a weapon against the people of La Oroya.

³ See, e.g., [Exhibit R-030](#), Herky Jerk: Doe Run’s Owner Has Done This Before – And That Has Regulators Braced for Trouble, RIVERFRONT TIMES, 20 February 2002.

⁴ See, e.g., [Exhibit R-030](#), Herky Jerk: Doe Run’s Owner Has Done This Before – And That Has Regulators Braced for Trouble, RIVERFRONT TIMES, 20 February 2002.

7. Renco subsidiary Doe Run Peru S.R.L (“**DRP**”) entered into an agreement to acquire the La Oroya Facility and to bring the Facility into compliance with applicable environmental standards within a strict ten-year timeframe. DRP then proceeded to ramp up production, funnel profits to Renco affiliated entities, and delay any meaningful capital expenditure works to bring the Facility into environmental compliance by the deadline. DRP repeatedly put off the most significant environmental protection works, until DRP announced that it would not be able to meet the looming deadline.
8. What followed DRP’s neglect was Peru’s good faith attempt to accommodate DRP’s request for more time. Nevertheless, DRP was intent on continuing its disregard for sufficiently capitalizing and timely completing its environmental obligations. The totality of Renco’s claims spring from Renco’s claim that DRP was entitled to (i) dictate the terms of the extraordinary accommodation that Peru granted DRP, and (ii) evade the consequences of its own calculated financial downfall. Renco now seeks to blame Peru for DRP’s failures, but Renco’s claims of unfair and inequitable treatment, denial of justice and expropriation are baseless, both on the facts and the law, and they should be rejected outright. Indeed, the instant arbitration is one in a series of proceedings by which Renco has tried to shift to Peru responsibility for Renco’s own failures and its own extractive and exploitative practices.

A. Overview of the Renco Case

9. Renco seeks an award of unspecified damages for the alleged mistreatment of, and interference with, its subsidiary DRP, a Peruvian mining and mineral processing company. On 23 October 1997, DRP acquired the Facility from State-owned *Empresa Minera del Centro del Perú* (“**Centromín**”) when it executed the Contract of Stock Transfer (the “**STA**”).⁵ DRP made specific promises and undertakings to comply with various environmental and investment obligations. The STA also held DRP responsible for harm to third parties if it failed to undertake the environmental remediation projects assigned to it or if its operations were less protective of the environment and public health than those of Centromín.

⁵ **Exhibit R-001**, Public Deed containing Contract of Stock Transfer, Capital Stock Increase and Stock Subscription of Empresa Metalurgica La Oroya S.A. and Renco Guaranty, 23 October 1997 (“**STA & Renco Guaranty**”).

10. Many of the environmental and investment obligations were outlined in an Environmental Remediation and Management Program (or “**PAMA**” for its Spanish initials “*Programa de Adecuación y Manejo Ambiental*”). The PAMA provided for 16 projects in total to be divided between Centromín and DRP. Projects that would remediate SO₂ emissions – a critical source of contamination – were particularly important. To achieve the remediation of SO₂ emissions, the PAMA outlined the construction of sulfuric acid plants: the most important and costly PAMA project for DRP (the “**Sulfuric Acid Plant Project**”). The Regulation for Environmental Protection in the Mining-Metallurgical Activity (the “**Environmental Mining Law**”)⁶ set a strict, *ten-year deadline* to complete the PAMA and bring the Facility into compliance with applicable environmental standards. DRP thus committed to turn around the Facility’s environmental performance within an ambitious timeline.
11. Despite making specific promises and undertakings to comply with environmental obligations under the PAMA and the STA within a legally mandated and immovable ten-year timeframe, starting in 1998, DRP made a series of requests to Peru’s Ministry of Energy and Mines (the “**MEM**”) to modify the project and capital expenditure schedule, consistently delaying work on the most critical PAMA projects: first in December 1998, second in May 2000, third in December 2001, and fourth in January 2002. The MEM granted every single modification request.
12. Notably, in February 2004, DRP asked the MEM to extend the PAMA deadline, from 13 January 2007 to 31 December 2011, a full five years beyond the legally mandated ten-year deadline.⁷ The MEM, however, could not grant DRP’s request because there was no legal framework for granting an extension under the 1993 Environmental Mining Law.⁸ When DRP submitted its 2004 extension request, the relevant regulations in place provided that the MEM could not extend any PAMA deadlines beyond the original ten-year term.⁹

⁶ See [Exhibit R-025](#), Supreme Decree No. 016-93-EM concerning Regulations for Environmental Protection in Mining and Metallurgy, 28 April 1993 (“**Supreme Decree No. 016-93**”).

⁷ [Exhibit C-045](#), Letter from DRP (B. Neil) to MEM (M. Chappuis) *attaching* PAMA for the Metallurgical Complex of La Oroya 2004-2011 Period, 17 February 2004.

⁸ [Exhibit R-025](#), Supreme Decree No. 016-93-EM, 28 April 1993.

⁹ Alegre Expert Report, ¶ 39.

DRP's proposal to delay completion of the Sulfuric Acid Plant Project until 31 December 2011 was legally impossible.¹⁰ Still, despite DRP's reckless postponement of its PAMA obligations, the MEM worked with DRP to devise a solution.

13. In late 2004, the MEM published a draft of the regulation meant to allow DRP extra time to complete its most critical environmental obligation.¹¹ The draft triggered a public backlash based on (i) DRP's poor environmental performance; and (ii) the fact that the MEM sought to issue a regulation that was *de facto* intended to benefit a single company.¹² The draft also drew criticism from DRP, which objected to a condition that would require the company to establish a trust account to guarantee financing for the remaining projects.¹³
14. DRP had put the MEM in a difficult situation. Denying DRP's extension request would have resulted in devastating economic consequences for the people of La Oroya.¹⁴ At the same time, however, the MEM needed to ensure that mining and metallurgy companies respected national environmental standards.¹⁵
15. Ultimately, in December 2004, the Peruvian government enacted Supreme Decree No. 046-2004-MEM (the "**2004 Extension Regulation**"), which allowed companies, including DRP, to apply for a one-time, limited extension.¹⁶ The regulation allowed the Peruvian authorities to condition approval of the extension on the adoption of additional environmental mitigation measures¹⁷ "intended to reduce the risks to the environment, health or the safety of the population, and to ensure adequate performance of the PAMA."¹⁸ To reduce financing risks associated with fluctuations in metal prices, the regulation required any company receiving an extension to establish (i) a trust account with funds

¹⁰ Alegre Expert Report, ¶ 39.

¹¹ Witness Statement of Juan Felipe Isasi Cayo ("**Isasi Witness Statement**"), ¶ 27.

¹² Isasi Witness Statement, ¶ 27.

¹³ Isasi Witness Statement, ¶ 29.

¹⁴ Isasi Witness Statement, ¶ 25.

¹⁵ Isasi Witness Statement, § IV.

¹⁶ **Exhibit R-029**, Supreme Decree No. 046-2004-EM, 29 December 2004, Art. 1.1–1.2 ("**2004 Extension Regulation**").

¹⁷ **Exhibit R-029**, 2004 Extension Regulation, Art. 4.

¹⁸ **Exhibit C-059**, Report No. 118-2006-MEM-AAM/AA/RC/FV/AL/HS/PR/AV/FO/CC, 25 May 2006, p. 7.

dedicated to completing any outstanding PAMA projects; and (ii) a guarantee letter in the amount of 20% of the value of the outstanding PAMA projects, meant to cover future penalties for missing the extended deadline.¹⁹

16. Under the new regulation, in December 2005 DRP submitted a revised extension request to the MEM. While DRP's February 2004 extension request sought a five-year extension, its December 2005 request sought four additional years to complete the Sulfuric Acid Plant Project. As it turned out, although almost eight out of the ten years to complete the PAMA had elapsed, DRP had neglected to perform the most important environmental project, the Sulfuric Acid Plant Project. Pyro-metallurgical expert Dr. Wim Dobbelaere explains that DRP's proposal to further delay the Sulfuric Acid Plant Project was unjustified and supported with faulty data.
17. On May 29, 2006, the MEM issued Ministerial Resolution No. 257-2006-MEM/DM (the "**2006 Extension**"), which granted DRP an extension of two years and ten months (until October 2009) to complete the Sulfuric Acid Plant Project.²⁰ Consistent with the text of the 2004 Extension Regulation, the 2006 Extension explicitly provided that it did "not imply an amendment to any of the obligations or the terms stipulated in the agreements that Doe Run Peru S.R.L. and its shareholders have entered into with Centromín and with the Peruvian state..."²¹ Additionally, the 2006 Extension specified that the term of the extension was "**final and non-renewable.**"²²
18. Consistent with the intent of the 2004 Extension Regulation "to reduce the risks to the environment, health or the safety of the population, and to ensure adequate performance of the PAMA," and given concerns over DRP's willingness to meet the new deadline, the 2006 Extension created new financial and environmental obligations for DRP.

¹⁹ **Exhibit R-029**, 2004 Extension Regulation, Art. 8.

²⁰ **Exhibit R-287**, Ministerial Resolution No. 257-2006-MEM/DM, 29 May 2006, pp. 5–7 ("**2006 Extension**").

²¹ **Exhibit R-287**, 2006 Extension, Art. 10.

²² **Exhibit R-287**, 2006 Extension, Art. 1.

19. Following the 2006 Extension, DRP made some progress on the Sulfuric Acid Plant Project but incurred a series of sanctions for violations of emissions standards and other environmental obligations.
20. DRP's mismanagement of operations at the Facility, overproduction and use of dirtier concentrates, and failure to complete the most important environmental project, led to personal injury lawsuits against DRP's parent companies and affiliates in Missouri in 2007 (the "**Missouri Litigations**"). This investment arbitration is brought in the context of the Missouri Litigations. As made evident from the Contract Case²³ initiated parallel to this arbitration, Renco wishes to use these international arbitration proceedings to escape the process it faces in the Missouri Litigations, which has been ongoing for fifteen years. Neither Peru, nor Activos Mineros, nor DRP is a party to the Missouri Litigations.
21. Back in La Oroya, DRP had managed its finances poorly and had wasted time, singly focused on increasing production and channeling profit to Renco affiliates, rather than its legally mandated environmental remediation projects; as a result, DRP was destined to fail to meet its deadline under the "final and non-extendable" extension it received in 2006. In March 2009—seven months before its new October 2009 deadline—DRP sought another time extension to complete the very same project for which the MEM had granted an extraordinary and final extension in 2006. For the MEM, this was unacceptable and legally impossible. As independent expert in Peruvian Environmental Law Ada Alegre explains, the MEM could not have approved DRP's extension request unless the regulatory framework expressly empowered it to do so,²⁴ and there was "no regulatory framework to answer to an extension application or a project extension"²⁵
22. Although the MEM could not grant a new extension, the Peruvian Government worked yet again to try to find a way of granting DRP extra time to complete the Sulfuric Acid Plant Project. In this regard, Peru's Congress debated passing a new law to grant DRP more time. The debate record demonstrates that the Congress was deeply critical of DRP and expected the MEM to impose strict regulations on the company to ensure the completion

²³ The case caption for the "**Contract Case**" is *The Renco Group, Inc. & Doe Run Resources, Corp. v. The Republic of Peru & Activos Mineros S.A.C.*, PCA Case No. 2016-47.

²⁴ Alegre Expert Report, ¶ 93.

²⁵ **Exhibit C-076**, Letter from MEM (F.A. Ramirez del Pino) to DRP (J. Mogrovejo), 15 July 2009.

of its environmental obligations. The record directly contradicts Renco's false narrative, according to which the Congress recognized that DRP deserved another extension but was sabotaged by the MEM's misbehavior.

23. In September 2009, the Peruvian Congress passed Law No. 29140, which (i) declared the decontamination of the environment in La Oroya to be a high-priority matter of public interest, (ii) granted DRP a 30-month extension of its deadline to complete the Sulfuric Acid Plant Project, and (iii) required the company to restart operations within ten months (the "**2009 Extension Law**").²⁶ The 2009 Extension Law required DRP to submit financial guarantees sufficient to ensure compliance with its obligations "subject to such terms and conditions as may be established by the Ministry of Energy and Mines."²⁷
24. Under the 2009 Extension Law, the Peruvian Congress instructed the MEM to issue supplementary regulations to implement the law's provisions.²⁸ Accordingly, the MEM issued Supreme Decree No. 075-2009-EM (the "**2009 Extension Regulation**"), which required DRP to comply with several strict conditions that were similar to those imposed by the 2006 Extension. These conditions were aimed at ensuring the completion of the Sulfuric Acid Plant Project, particularly in light of DRP's repeated failure to comply with and finance its PAMA obligations, as well as its failure to honor its commitments under the 2006 Extension.
25. Notwithstanding Peru's extraordinary support, DRP failed to meet the conditions under the 2009 Extension Law and Regulation. It remained in a state of total paralysis, both with respect to its operations and its progress on the Sulfuric Acid Plant Project.
26. Despite receiving multiple extensions and committing to make the investment necessary to complete the promised environmental improvements, DRP closed the Facility in 2009. DRP ceased making payments to its suppliers prompting one of those suppliers to institute bankruptcy proceedings against DRP. As a result of DRP's inter-company agreements, a Renco affiliate, Doe Run Cayman Ltd. ("**DRCL**"), applied for and ultimately was recognized as one of DRP's largest creditors in the bankruptcy proceeding. The MEM was DRP's other largest creditor in the bankruptcy proceeding. Notwithstanding DRP and

²⁶ [Exhibit C-077](#), Law No. 29410, 26 September 2009 ("**2009 Extension Law**")

²⁷ [Exhibit C-077](#), 2009 Extension Law, Art. 3.

²⁸ [Exhibit C-077](#), 2009 Extension Law, Art. 5.

DRCL's multiple challenges in local proceedings, the MEM's right to participate as a creditor in DRP's bankruptcy proceeding has been upheld in accordance with Peruvian law.

27. Not content with the harm it had caused and what it had already extracted from La Oroya, Renco seeks to extract even more through arbitration, making baseless claims that Peru's enforcement of DRP's environmental and creditor obligations were treaty violations. Renco's claims suffer from grave jurisdictional deficiencies and Renco is unable to show that Peru has violated any obligation whatsoever under the Treaty. Renco's claims are based on a compilation of omissions and misrepresentations, calculated to conceal the true story of DRP's malefactions, leading to its own demise. Indeed, from the moment DRP acquired the Facility, it followed Renco's pollute and leave playbook. Renco's claims should be dismissed in their entirety.

B. The Tribunal has no jurisdiction over all but one of Claimant's claims

28. As discussed during the expedited preliminary objections phase of this arbitration, this Tribunal lacks jurisdiction over claims of Treaty breaches based on alleged State acts or omissions that pre-dated the Treaty's entry into force on 1 February 2009.²⁹ In that regard, the Tribunal left the question of its jurisdiction *ratione temporis* over Claimant's FET claims open for the present phase of the proceedings,³⁰ noting that Peru "may yet convince the Tribunal that MEM did nothing but uphold its prior decisions and hold DRP to its existing contractual and environmental obligations."³¹
29. A review of the acts or facts constituting the alleged violations of the Treaty demonstrates that the bulk of Claimant's claims (all of its FET claims) relating to these acts or facts fall outside of the jurisdiction *ratione temporis* of the Treaty. Indeed, the basis for Claimant's claims is not — as Claimant alleges — MEM's rejection of DRP's extension request in 2009, or the rejection of DRP's restructuring plans in the bankruptcy proceedings, but rather the MEM's 2006 extension and the terms of the PAMA and the STA, which were all in effect well before the Treaty entered into force. The events that occurred post-Treaty

²⁹ See generally Peru's Memorial on Preliminary Objections, §§ III.A, III.B.

³⁰ See Decision on Expedited Preliminary Objections, ¶ 151.

³¹ Decision on Expedited Preliminary Objections, ¶ 151.

simply reaffirmed what the MEM had expressed to DRP for many years before the Treaty entered into force.

30. Furthermore, to the extent that Renco is attempting to advance claims of indirect expropriation, it has failed to state a *prima facie* case under Annex 10-B.3.b of the Treaty, which provides:

“Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.”

31. Renco has failed to (i) articulate why its claim of indirect expropriation is the “rare circumstance” that would constitute indirect expropriation, (ii) put forth a *prima facie* case of discrimination in accordance with customary international law, or (iii) articulate or allege how Peru’s regulatory actions were not designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment. In short, Renco has failed to articulate a claim of indirect expropriation over which this Tribunal has jurisdiction. Renco has likewise failed to state a *prima facie* case for direct expropriation.

C. All of Renco’s claims should be dismissed for lack of merit

32. Even assuming that the Tribunal has jurisdiction over Claimant’s claims, *quod non*, all of its claims should be dismissed for lack of merit. Claimant has not demonstrated — because it cannot — that Peru has violated its obligations under the Treaty. All three of Claimant’s claims under the Treaty must fail.
33. Claimant alleges that Peru violated Article 10.5 of the Treaty, which expressly establishes that the fair and equitable treatment standard that applies to the present case is the minimum standard of treatment under customary international law. Peru demonstrates in this Counter-Memorial that the Claimant seeks to apply an autonomous treaty standard of fair and equitable treatment that does not correspond to the minimum level of treatment under customary international law. Even under the standard proposed by Claimant, however, Peru has not violated its obligations under Article 10.5 of the Treaty. This wasteful claim should be dismissed.
34. Claimant also alleges that a series of measures adopted by Peru resulted in the indirect and direct expropriation of its investment. As noted above, Renco has failed to state a *prima*

facie case of indirect expropriation under Annex 10-B.3.b of the Treaty and direct expropriation under Article 10.7 of the Treaty, and therefore this Tribunal has no jurisdiction over this claim. Should the Tribunal nevertheless determine that it has jurisdiction over Renco's indirect expropriation claims, as well as its direct expropriation claims, Renco's expropriation claims otherwise fail because Claimant has failed to articulate cognizable expropriation claims, has failed to identify the correct legal standard for expropriation, and the measures identified by Claimant do not meet the legal standard applicable to indirect expropriation claims under Article 10.7 of the Treaty. These claims of expropriation are not serious and should be dismissed.

35. Finally, Claimant alleges that a series of measures adopted by Peru constitute a denial of justice under Article 10.5 of the Treaty. Claimant's denial of justice claim fails because, among other reasons, a denial of justice claim entails a high legal standard that requires more than the misapplication of domestic law, speculative observations of undue influence, or disagreement with the structure and operation of a judicial system. Yet again, Renco presents a frivolous claim that should be dismissed.

D. The Treaty was never intended to protect investors that destroy the environment and endanger public health

36. Peru has a right to protect the health of its population, its environment, and enforce its environmental law — it is that simple. Pursuant to Article 10.11 of the Treaty, nothing in Chapter 10 of the Treaty shall be construed to prevent Peru from “adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.”³²
37. This case involves a foreign investor that committed specifically to modernize a metallurgical facility to comply with applicable laws, regulations and standards in order to protect the environment and public health. Through its signing of the STA, DRP *specifically committed* to complete the PAMA within a legally mandated, strict ten-year timeframe. This commitment included the obligation to complete sulfuric acid plants for the Facility. Without completion of the sulfuric acid plants, it would be impossible for the

³² [RLA-001](#), Treaty, Art. 10.11.

Facility to operate without posing severe negative impacts on the environment and health of the population of La Oroya.

38. It is uncontested that DRP failed to complete the PAMA by the ten-year deadline of 13 January 2007. Despite DRP's failure to fulfill that commitment, Peru twice granted DRP—through extraordinary legislative action — extra time to complete the Sulfuric Acid Plant Project. It is uncontested that DRP failed to ever complete the project.
39. In addition to presenting claims that manifestly lack merit, Renco's claims in the present arbitration encourage the Tribunal to find Peru in violation of the Treaty for adopting, maintaining, and enforcing measures “that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.”³³ Such a result is prohibited under the Treaty, and Renco's claims — which amount to no more than objections to Peru adopting, maintaining and enforcing its environmental laws and regulations — must be dismissed.

E. Renco's pleading is filled with material omissions of fact

40. Renco's omissions of key facts are too numerous to list in this introduction, but two sets of factual omissions are particularly relevant and detrimental to Claimant's claims: (i) DRP and its parent companies (including Renco) caused DRP's financial ruin and inability to complete its environmental commitments under the STA and the PAMA; and (ii) while repeatedly delaying performance of the most critical environmental projects at the Facility, Renco focused on ramping up production in order to extract as much profit as possible from DRP.
41. **DRP and its parent companies (including Renco) are responsible for DRP's financial ruin.** On the very day that the purchase of the Facility was concluded, DRP took nearly the entire USD 126.5 million capital contribution it was obligated to pay into Metaloroya under the STA and gave it to Doe Run Mining (DRP's parent and Renco's subsidiary) in the form of an interest-free USD 125 million loan.³⁴ With this financial sleight of hand,

³³ RLA-001, Treaty, Art. 10.11.

³⁴ See Exhibit R-095, Credit Agreement between Doe Run Mining S.R. Ltda. and Bankers Trust Company, 23 October 1997 (“Acquisition Loan”), p. 45, Clause 2.5(f); Exhibit R-094, Securities and Exchange Commission Form S-4, DRRC, (“DRRC SEC Form S-4”), p. 31.

Doe Run Mining diverted the funds that were contractually intended to fund DRP's environmental and investment obligations; instead, Doe Run Mining used those funds to repay more than half of the Acquisition Loan used to finance the purchase.³⁵ These transactions were made at the direction of Renco.³⁶ Depleting the working capital at the outset compromised DRP's ability to meet environmental and investment obligations in the years to come.

42. Renco's undercapitalization of DRP at the outset, by effectively reversing the capital contribution, was just the beginning. In the months and years that followed, Renco further compromised DRP through a series of intercompany deals that benefitted Renco, including by burdening DRP with its own acquisition debt and other commitments and sending significant cash payments upstream from DRP to Renco and its U.S. subsidiaries.³⁷
43. The negative ramifications DRP suffered from those intercompany deals benefitting the U.S. Renco entities were evident for years. DRP's own documents are replete with warnings by DRP executives, auditors, financial experts, and banks alerting stakeholders that the business model was fundamentally flawed and threatened DRP's ability to meet its obligations or even to remain a going concern. As noted by financial and accounting expert, Isabel Kunsman, "the circular transactions [. . .] immediately undercapitalized DRP, made the newly combined entity a higher default risk to creditors by reducing collateral assets, stressed DRP's liquidity, and limited DRP's ability to fund its PAMA Commitments."³⁸
44. **DRP and its parent companies did not focus on performing DRP's environmental obligations.** DRP adopted policies that exacerbated the environmental crisis in La Oroya, even though the State had privatized the Facility to improve the smelter's environmental performance. As explained by pyrometallurgy expert, Wim Dobbelaere, immediately upon

³⁵ See [Exhibit R-095](#), Acquisition Loan, p. 45, Clause 2.5(f); [Exhibit R-094](#), DRRC SEC Form S-4, p. 31.

³⁶ [Exhibit R-091](#), Jeffrey Zelms Deposition (excerpts), Document No. 764-1, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 14 June 2017, pp. 161:1–14, 163:5–9.

³⁷ See, e.g., [Exhibit R-068](#), DRP Intercompany Note: Summary of Facts, undated, pp. 3–4, 6 (summary of facts); [Exhibit R-069](#), Indenture between DRRC and State Street Bank and Trust Company, 12 March 1998, p. 1, 15–16, 55–56; [Exhibit R-070](#), Special Term Deposit Contract, 12 March 1998; [Exhibit R-071](#), Contract for a Loan in Foreign Currency, 12 March 1998.

³⁸ Expert Report of Isabel Kunsman ("Kunsman Expert Report"), ¶ 136.

acquiring the Facility, DRP ramped up production and introduced dirtier crude metal concentrates into the smelter.³⁹ These actions increased emissions of harmful pollutants, which damaged the environment and human health in and around La Oroya.

45. DRP purchased the Facility with a timeline already in place to address the Facility's environmental footprint and bring it into compliance with Peru's emissions standards. Rather than comply with that timeline, DRP delayed. It postponed internal deadlines for the Sulfuric Acid Plant Project, which comprised the largest, most costly, and time-consuming project aimed at bringing the Facility to compliance with environmental law. After years of making no meaningful progress on that project, DRP concocted excuses for its delays and twice demanded that the MEM extend the project's legal deadline, lest the company be forced to close the Facility. Eventually, DRP ran out of time. Already years past the expiry of the PAMA Period, DRP refused to comply with the terms of the final extension and left its operations paralyzed until its suppliers forced it into bankruptcy.

F. Renco's claim should have never been brought

46. Renco's case is not what investment treaties were intended to protect. Renco knowingly invested in a country that, along with the nearly 180 countries who signed the Rio Declaration on Environment and Development, had moved towards environmental protection.
47. By the time Renco set sight on the Facility, Peru had embarked on its own environmental reforms. The emergence of Peru's regulatory regime for the protection of the environment and human health had major implications for any investor in the Facility. The environmental and health impacts of the facility were well-known, and necessarily made bringing the Facility into environmental compliance a *significant challenge*.
48. The facility had undergone gradual improvements under the stewardship of its previous owner, Centromín, but Peru had decided to search for an experienced, well-capitalized and committed private investor to modernize the aging facility and turn around the environmental record of the La Oroya Facility. The environmental objectives that were in place were a *sine qua non* of the sale of the Facility. In acquiring the La Oroya facility, Renco knowingly and affirmatively agreed to carry out the necessary actions to protect the

³⁹ See Expert Report of Wim Dobbelaere ("Dobbelaere Expert Report"), § IX.

environment and the population of La Oroya from the harm it knew the facility was prone to causing.

49. Not only did DRP abandon the environmental commitment it assumed under the STA and PAMA, but, as discussed above and further addressed in this Counter-Memorial, it focused on extracting as much profit as possible and funneling it to Renco affiliates. This strategy of DRP and its parent companies (including Renco) was the cause of DRP's financial ruin and grave damage to the community of La Oroya.
50. Peru has a right to protect the health of its population, its environment, and enforce its environmental laws, and Renco now looks to sue Peru for the consequences of its own failures.

* * *

51. In summary, Renco's claims suffer from numerous defects, including on jurisdiction and the merits, which justify the dismissal of all of its claims. Given the abusive nature of these claims, in addition to the dismissal of all claims, a full award of costs and legal fees against Claimant is justified.
52. The present Counter-Memorial is supported by seven expert reports, two witness statements, exhibits R-036 to R-298 and legal authorities RL-083 to RL-218.
53. The seven reports are from the following experts:
 - Ada Carmen Alegre Chang, a Peruvian lawyer, who provides an expert report explaining the regulatory framework governing environmental obligations in Peru and opines on the events that succeeded DRP's purchase of the Facility from an environmental law perspective ("**Alegre Expert Report**").
 - Oswaldo Hundskopf, a Peruvian bankruptcy law expert, who provides an expert report explaining that the MEM's credit claim against DRP was valid under Peruvian law and that all legal proceedings regarding the MEM's credit were in accordance with Peruvian law ("**Hundskopf Expert Report**").
 - Enrique Varsi, a Peruvian civil and contract law expert, who provides an expert report explaining that the force majeure clause of the STA does not apply to DRP's obligation to complete the PAMA and that the 2008 financial crisis did not amount to force majeure under the applicable law ("**Varsi Expert Report-Treaty**").
 - Wim Dobbelaere, a pyrometallurgy expert, who provides an expert report that addresses DRP's failure to implement the modernization and PAMA projects

necessary to meet its environmental obligations, as well as the company's standards and practices when operating the Facility (“**Dobbelaere Expert Report**”).

- Deborah Proctor, a toxicology expert, who provides an expert report that addresses the effects of DRP's operations on public health (“**Proctor Expert Report**”).
- Isabel Kunsman, a financing and accounting expert from AlixPartners, who provides an expert report that explains how DRP was undercapitalized to complete its obligations under the PAMA and how DRP's own financial decisions resulted in its failure to complete the PAMA and its obligations under the STA (“**Kunsman Expert Report**”).

54. The two witness statements are the following:

- Witness Statement of **Juan Felipe Isasi Cayo**, former Vice Minister of the MEM, who provides his account of DRP's request to modify the scope of its PAMA obligations, DRPS' violation of its PAMA obligations, and DRP's requests to extend deadlines for its PAMA obligations.
- Witness Statement of **Guillermo Shinno Huamaní**, former Vice Minister of the MEM, who provides his account of the meetings and decisions of DRP's Board of Creditors.

55. Additionally, Peru includes a Glossary at the beginning of this Counter-Memorial to assist the Tribunal.

II. FACTUAL BACKGROUND

56. While the issues are different, for the Tribunal to properly assess the legal issues in each case it is helpful to benefit from the full story. Therefore, Peru provides a comprehensive summary of the facts relevant for both *The Renco Group, Inc. v. The Republic of Peru*, PCA Case No. 2019-46 (“**Renco II**” or the “**Treaty Case**”) and *The Renco Group, Inc. and Doe Run Resources, Corp. v. The Republic of Peru and Activos Mineros S.A.C.*, PCA Case No. 2019-47 (“**Renco III**” or the “**Contract Case**”).

A. Renco and DRRC knowingly invested in a country that had moved towards environmental protection and a Facility in need of environmental reform

57. “Not since the arrival of the Spaniards have outsiders shown so much interest in Andean rocks,” proclaimed the *Economist* in 1995, in its article “South American Mining: The New El Dorado,” in reference to the boom in mineral prospecting in the Andes of Peru, Chile, Bolivia and Argentina during the 1990s.⁴⁰ More than half of these explorations were for copper and a quarter for gold, the prices for which were rising on the international market.⁴¹ Like its neighbors, Peru followed the example of its neighbors and adopted legislation to privatize State-owned mining and metallurgical facilities, providing for a stable legal framework, generous tax treatment and the repatriation of profits.⁴² According to the president of DRRC, Jeffrey Zelms: “[F]ree-trade policies ... ma[de] Peru a promising place to do business.”⁴³

58. Peru’s openness to foreign investment coincided with a period of environmental pressures and reduced resources for mining. These pressures combined to make the industry expensive in countries other than Peru, including the U.S., where regulations under the National Environmental Policy Act required assessments of air quality on particulates, sulfur dioxide, nitrogen dioxide, carbon monoxide, and ozone.⁴⁴

⁴⁰ [Exhibit R-137](#), South American Mining: The New El Dorado, THE ECONOMIST, 2 September 1995, p. 1.

⁴¹ [Exhibit R-137](#), South American Mining: The New El Dorado, THE ECONOMIST, 2 September 1995, p. 1.

⁴² [Exhibit C-087](#), Supreme Decree No. 014-92-EM, Consolidated Text of the General Mining Law, 3 June 1992.

⁴³ [Exhibit R-139](#), Doe Run’s Globalization Lesson, AMERICAN METAL MARKET, 19 January 1998.

⁴⁴ [Exhibit R-140](#), Saving Mining is a Good Business, ENGINEERING AND MINING JOURNAL, October 1994 (“There are areas in the USA where mining is nearly extinct because of public criticism and increasing regulation, forcing mining companies to pursue new frontiers in Latin America and elsewhere.”).

59. In early 1998, the American Metal Market reported that Renco’s acquisition of mining and metallurgical assets in Peru was linked, not only to the Peruvian Government’s trade policies, but also—as confirmed by Mr. Zelms—to the negative business climate in the U.S. toward natural resource companies. This included an increasing “environmental awareness in [] society,” and “government standards towards the industry [] getting tighter.”⁴⁵
60. In the U.S., Renco was accumulating environmental liabilities and the Environmental Protection Agency was moving in.⁴⁶ The Magnesium Corporation of America, acquired by the Renco Group in 1989, had been labeled as the U.S.’s number one emitter of toxic pollution, and the DRRC, which Renco acquired in 1994, had been compelled by federal authorities to undertake a number of environmental remediation projects.⁴⁷ By 1993, DRRC had already entered into a series of consent decrees requiring it to complete emissions control projects at its Herculaneum smelter in Missouri.⁴⁸ These and other Renco Group companies sat on the cusp of two decades of civil and criminal lawsuits, regulatory actions and bankruptcies—legal battles that came to characterize the Renco Group and its owner Ira Rennert in the United States.⁴⁹
61. Renco and DRRC turned their sights on a new home: Peru. In 1997, DRP, Renco and DRRC’s Peruvian subsidiary, acquired the La Oroya Facility, and heralded its commitment to cleaning up the site. A year after the acquisition, DRRC acknowledged that “one of the challenges that faced any new owner was the task of cleaning up the site, which after years of operation had become thoroughly polluted.”⁵⁰ Mr. Zelms, of DRRC, also explained

⁴⁵ [Exhibit R-091](#), Jeffrey Zelms Deposition (excerpts), Document No. 764-1, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 14 June 2017 (“**Zelms Deposition**”), p. 52–53. *See also* [Exhibit R-139](#), Doe Run’s Globalization Lesson, AMERICAN METAL MARKET, 19 January 1998.

⁴⁶ [Exhibit R-030](#), Herky Jerk: Doe Run’s owner has done this before—and that has regulators braced for trouble, RIVERFRONT TIMES, 20 February 2002, p. 3.

⁴⁷ [Exhibit R-030](#), Herky Jerk: Doe Run’s owner has done this before—and that has regulators braced for trouble, RIVERFRONT TIMES, 20 February 2002, p. 3.

⁴⁸ [Exhibit R-178](#), Herculaneum Orders and Stipulations 5–9, *Air Conservation Commission (State of Missouri), Missouri Department of Natural Resources and The Doe Run Company*, July 1990–1994.

⁴⁹ *See* [Section II.H](#) below.

⁵⁰ [Exhibit R-139](#), Doe Run’s Globalization Lesson, AMERICAN METAL MARKET, 19 January 1998.

that, while improving the site’s conditions would take time and money:⁵¹ “I expect to see a day when you can look at the horizon at La Oroya and not see any emissions.”⁵²

62. Peru was simultaneously embarking on its own environmental reforms. Peru passed its first Environment and Natural Resources Code (the “**Environment Code**”) in 1990,⁵³ and adopted a Political Constitution in 1993, which affirmed Peru’s sovereign right and responsibility to safeguard the health of its population by developing a comprehensive national environmental policy.⁵⁴ That same year, Peru adopted a landmark regulation for mining-metallurgical activities: the Regulation for Environmental Protection in the Mining-Metallurgical Activity (the “**Environmental Mining Law**”).⁵⁵ Renco and DRRC were well apprised of this backdrop.⁵⁶
63. The emergence of Peru’s regulatory regime for the protection of the environment and human health had major implications for any investor in the La Oroya Facility. The environmental and health impacts of the facility were well known, as was the fact that it would be a significant challenge to bring it into compliance with applicable regulations. The Facility had undergone gradual improvements under the stewardship of its previous owner, Centromín, but Peru had decided to search for an experienced, well-capitalized, and committed private investor to modernize the aging facility and turn around its environmental record. The environmental objectives and modernization plans that were in place were a *sine qua non* of the sale of the Facility.

⁵¹ **Exhibit R-139**, Doe Run’s Globalization Lesson, AMERICAN METAL MARKET, 19 January 1998.

⁵² **Exhibit R-139**, Doe Run’s Globalization Lesson, AMERICAN METAL MARKET, 19 January 1998.

⁵³ In Spanish “*Código del Medio Ambiente y los Recursos Naturales*” approved by Legislative Decree No. 613 on 8 September 1990. See **Exhibit C-085**, Legislative Decree No. 613, 9 September 1990.

⁵⁴ **RLA-036**, Peruvian Constitution, 29 December 1993, Art. 62. See Alegre Expert Report, ¶ 96.

⁵⁵ In Spanish the “*Reglamento para la Protección Ambiental en la Actividad Minero Metalúrgica*”. See **Exhibit R-025**, Supreme Decree No. 016-93-EM concerning Regulations for Environmental Protection in Mining and Metallurgy, 28 April 1993 (“**Supreme Decree No. 016-93**”). This legislation remains fully valid, subject to a number of specific amendments, such as those deriving from Supreme Decree No. 059-93-EM approved on 10 December of that same year, among others. See also, Alegre Expert Report, Section IV(B).

⁵⁶ See **Exhibit R-179**, Securities and Exchange Commission Form 10-K, The Doe Run Resources Corporation, 31 October 2003, p. 9.

64. In acquiring the Facility, DRP thus knowingly and affirmatively agreed to carry out the necessary actions to protect the environment and the population of La Oroya from the harm it knew the facility was prone to causing.

1. The environmental protection framework under which Renco decided to invest in the La Oroya Facility

65. In 1992, nearly 180 States, including Peru and the U.S., adopted The Rio Declaration on Environment and Development (“**The Rio Declaration**”) at the Earth Summit.⁵⁷ The Rio Declaration is credited with affirming the concept of sustainable development as a principle of international law, and it enshrined two critical economic principles: the polluter pays (Principle 16)⁵⁸ and the precautionary approach (Principle 15).⁵⁹ It also endorsed environmental impact assessments, as national instruments of environmental protection (Principle 17) and advised member states to put in place legislative instruments to address environmental issues (Principle 11).

66. Peru heeded these calls and incorporated The Rio Declaration’s principles into its national legislation. The Natural Resources Code, enacted one year before The Rio Declaration, had already recognized the obligation to carry out environmental impact assessments before initiating industrial activities, and the “Polluter Pays Principle”.⁶⁰

67. The current Peruvian Constitution, adopted a year after The Rio Declaration, recognizes that all Peruvians have: (a) the right to enjoy a balanced and adequate life environment (Article 2, paragraph 22); and (b) the right to the protection of their health (Article 7).⁶¹ The Constitution also affirms the Government’s sovereign right to determine the country’s

⁵⁷ See [Exhibit R-180](#), The Rio Declaration on Environment and Development, The Earth Summit, 3–4 June 1992.

⁵⁸ See [Exhibit R-180](#), The Rio Declaration on Environment and Development, The Earth Summit, 3–4 June 1992 (Principle 16: “National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.”).

⁵⁹ See [Exhibit R-180](#), The Rio Declaration on Environment and Development, The Earth Summit, 3–4 June 1992 (Principle 15: “In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”).

⁶⁰ In Spanish “*Código del Medio Ambiente y los Recursos Naturales*” approved by Legislative Decree No. 613 on 8 September 1990. See [Exhibit C-085](#), Legislative Decree No. 613 concerning the Environmental and Natural Resources Code, 9 September 1990, Art. 8.

⁶¹ [RL-036](#), Peruvian Constitution, 29 December 1993, Arts. 2 and 7.

environmental policy and promote the sustainable use of its natural resources (Article 67).⁶²

68. To that end, the government passed in April 1993, the Environmental Mining Law, which required existing mining or metallurgical facilities to undertake environmental assessments (“EVAP”) to identify environmental impacts and possible remedial steps.⁶³ Facilities would then have to undertake a PAMA for the operational phase,⁶⁴ and a closure plan for the post-operational phase.⁶⁵ The objective of the PAMA was to bring a given facility into compliance with Peru’s maximum permitted levels of pollution (or “LMPs” for its Spanish initials, “*Límites Máximos Permisibles*”),⁶⁶ and ambient air quality standards (or “ECAs” for its Spanish initials “*Estándares de Calidad Ambiental*”).⁶⁷
69. Existing mining operations were given five (5) years to complete PAMAs and meet LMPs and ECAs,⁶⁸ while metallurgical facilities were given ten (10) years.⁶⁹ A company’s non-compliance with its PAMA, including its failure to complete it by the end of the stipulated period, would result in sanctions.⁷⁰ Both mining and metallurgical facilities were required to spend at least 1% of their annual revenues on environmental remediation and control

⁶² [RL-036](#), Peruvian Constitution, 29 December 1993, Art. 67.

⁶³ [Exhibit R-025](#), Supreme Decree No. 016-93, Arts. 2, 8 and Transitory Provision 2 (a).

⁶⁴ [Exhibit R-025](#), Supreme Decree No. 016-93, Arts. 2 and 9. Subsequently, Peru implemented Supreme Decree No. 059-93-EM that further specified the methodology and guidelines that should be used to prepare the PAMA; [Exhibit R-025](#), Supreme Decree No. 016-93.

⁶⁵ [Exhibit R-025](#), Supreme Decree No. 016-93, Art. 16.

⁶⁶ [Exhibit R-025](#), Supreme Decree No. 016-93, Art. 5.

⁶⁷ [Exhibit C-087](#), Supreme Decree No. 014-92-EM, Consolidated Text of the General Mining Law, 4 June 1992; [Exhibit R-025](#), Supreme Decree No. 016-93. Peruvian law distinguishes “limits” from “standards”. While LMPs refer to the source of the “emission” (*i.e.* gas) or “effluent” (*i.e.* liquid), ECAs refer to the level of a contaminant present in a receiving “receiving body” (for example, a river or the ambient air). Thus, for air quality, an LMP might measure emissions at a chimney; while for water quality an LMP might measure effluents at the overflow of a tailings dam.

⁶⁸ [Exhibit R-025](#), Supreme Decree No. 016-93, Art. 9.

⁶⁹ [Exhibit R-025](#), Supreme Decree. No. 016-93, Art. 9.

⁷⁰ [Exhibit R-025](#), Supreme Decree. No. 016-93, Art. 48.

programs and to submit an annual report to the MEM regarding their operations' emissions.⁷¹

70. During the initial years, the MEM was the government agency entrusted with the enforcement of the Environmental Mining Law (responsibility passed to the Council of Ministers in 1998⁷² and then to the Ministry of Environment in 2008).⁷³ The MEM was responsible for setting LMPs, ECAs and reviewing and approving environmental impact assessments and PAMAs, supervising closures of mines and metallurgical facilities, and sanctioning non-compliance with environmental regulations.⁷⁴ On July 16, 1996, The MEM set LMPs⁷⁵ and ECAs⁷⁶ for lead and SO₂, among other pollutants.
71. The Environmental Mining Law also permitted mining and metallurgical operators to enter into administrative stability agreements with the MEM.⁷⁷ A stability agreement would “freeze” the LMPs and ECAs in force at the time of entering into the agreement and would not be modified during the duration of the PAMA execution period.

⁷¹ **Exhibit R-025**, Supreme Decree No. 016-93, Art. 9, Transitory Provision 2(b), p. 15. Subsequently, Peru implemented Supreme Decree No. 059-93-EM that further specified the methodology and guidelines that should be used to prepare the PAMA. **Exhibit R-025**, Supreme Decree No. 016-93, Preliminary Title, Arts. 3 and 9.

⁷² **Exhibit R-181**, Supreme Decree No. 044-98-PCM, 6 November 1998, Art. 12.

⁷³ **Exhibit R-182**, Legislative Decree No. 1013, 13 May 2008, Art. 7.

⁷⁴ **Exhibit C-086**, Legislative Decree No. 757, 13 November 1991.

⁷⁵ **Exhibit C-128**, Ministerial Resolution No. 315-96, Art. 1, 2, and Annex I; **Exhibit C-127**, Ministerial Resolution No. 011-96-EM/VMM approving permissible exposure for liquid effluents for mining-metallurgy activities, 13 January 1996 (“**Resolution No. 011-96**”). *See also* Alegre Expert Report, ¶¶ 5–7.

⁷⁶ **Exhibit C-128**, Ministerial Resolution No. 315-96, Annex 3. New ECAs were approved in 2001; *see* **Exhibit C-093**, Supreme Decree. No. 074-2001-PCM, 22 June 2001 (“**Supreme Decree No. 074-2001**”). *See also* Alegre Expert Report, ¶¶ 5–7.

⁷⁷ In Spanish “*Contratos de Estabilidad Administrativa*”. **Exhibit R-025**, Supreme Decree No. 016-93, Art. 4.3; **Exhibit R-131**, Ministerial Resolution No. 292-97-EM/VMM, 7 July 1997, Art. 18.

2. There was an environmental remediation plan in place for the La Oroya Facility when Renco and DRRC decided to invest

Figure 1



72. La Oroya is located in the Andes Mountains of Peru, at approximately 175 km from Lima, and is the capital of the Yauli Province, a mineral-rich area like many others in Peru. The Facility is a refinery complex and copper smelter founded in La Oroya in 1922 by the U.S. Cerro de Pasco Corporation, which also built a lead smelter in 1928, and a zinc refinery in 1952.⁷⁸
73. The city of La Oroya emerged around the Facility without planning and today has approximately 30,000 inhabitants. It is a long, thin city that lies along the central highway and the Mantaro River.⁷⁹ Climactic temperature inversions cause environmental

⁷⁸ [Exhibit C-090](#), Environmental Impact Program, La Oroya Metallurgical Complex, Centromín, 12 December 1996 (“PAMA 1996 Report”), PDF p. 25; *See also* [Exhibit C-104](#), White Paper - Fractional Privatization of Centromín, 1999 (“1999 White Paper”).

⁷⁹ [Exhibit R-132](#), La Oroya Cannot Wait, Interamerican Association for Environmental Defense (AIDA) and Peruvian Society for Environmental Law (SPDA), Anna K. Cederstav and Alberto Barandiarán, September 2002, PDF p. 8.

contamination to linger over the city. There is little in the way of flora or fauna because of the altitude and topography, as well as acid rain and gaseous emissions from the smelter.⁸⁰

74. The Facility is the foundation of the city. It provides employment and has historically provided medical facilities, education, housing and hotels for its employees, and basic infrastructure services, such as electricity and water supply for the entire city. Although some services and infrastructure were transferred to the Municipality of La Oroya, responsibility for a number of social services remains with the Facility, including education, housing and medical services for workers and their families.⁸¹
75. In 1974, Peru nationalized the installations of Cerro de Pasco and founded Centromín as the State entity in charge of operating the Facility,⁸² and by 1997, the Facility had become one of the largest and most complex metal refining complexes in the western world.⁸³ It is able to recover 11 metals (including copper, zinc, silver and lead), and various by-products (including sulfuric acid and arsenic trioxide).⁸⁴ It comprises four integrated circuit systems: (a) the copper smelter and refinery; (b) the lead smelter and refinery; (c) the zinc roasting plant, leaching and purification plant and refinery; and (d) an anode residue plant and silver refinery.⁸⁵
76. The copper circuit and the lead circuit systems undertake three main processes to create metals: roasting, smelting, and refining.⁸⁶ The zinc circuit undertakes three similar

⁸⁰ [Exhibit C-090](#), PAMA 1996 Report, PDF p. 17.

⁸¹ [Exhibit C-117](#), Offering Memorandum, La Oroya Metallurgical Complex, October 1996, PDF p. 7.

⁸² [Exhibit C-090](#), PAMA 1996 Report, PDF p. 26.

⁸³ [Exhibit C-090](#), PAMA 1996 Report, PDF p. 63. By 1997 the complex contained seven mining units, eight concentrators with an installed capacity of 8.5 million tons of ore, the metallurgical complex, a hydroelectric system with an installed power of 183.4 Mw, a railway system with a total of 279 km of lines, 24 mining prospects and deposits with port facilities. *See* [Exhibit C-104](#), 1999 White Paper, p. 1.

⁸⁴ [Exhibit C-090](#), PAMA 1996 Report, PDF p. 63. The other metals are: cadmium, indium, bismuth, gold, selenium, tellurium and antimony; and numerous by-products, such as zinc sulphate, copper sulphate, arsenic trioxide, zinc dust, zinc-silver concentrates.

⁸⁵ [Exhibit C-090](#), PAMA 1996 Report, PDF p. 18 “In 1995, 255 1 09 t of copper concentrates, 191 575 t of lead concentrate, and 154 710 t of zinc concentrate were processed. Concentrate processing in 1996 should reach similar amounts.”

⁸⁶ [Exhibit R-133](#), Operations and Procedures in La Oroya Metallurgical Complex, Doe Run Peru, 1999, PDF p. 2 *et seq.*

processes: roasting, leaching, and refining.⁸⁷ These processes generate pollution via emissions of gas and particles, liquid effluents, and solid waste that contaminate the air, soil, and water.⁸⁸

77. Over the course of its time in control of the Facility, Centromín implemented a series of environmental improvements such as the reduction of production lines, the construction of a new oxygen plant and the reduction of consumption of heavy oil.⁸⁹ Centromín also conducted a series of projects and works aimed at controlling pollution and improving housekeeping within the Facility in order to facilitate its privatization.⁹⁰
78. In 1992, Peru created CEPRI,⁹¹ and later decided to privatize the operational units of Centromín separately. To that end, it created Metaloroya to serve as an investment vehicle to own and operate the Facility.⁹²
79. CEPRI sought to ensure that investors in Metaloroya would understand that they were expected to invest in the modernization of the Facility and to address the environmental issues. Thus, in June 1996, CEPRI and another public entity, the Commission for the Promotion of Private Investment (“COPRI”), developed a business plan for Metaloroya for 1997-2011 (the “**Metaloroya Business Plan**”).⁹³ The Metaloroya Business Plan stated that the buyer would be expected to “maximize the profitability of the complex” by investing *at least* USD 69.4 million and to “solve existing and future environmental problems” by investing *at least* another USD 137.5 million capital.⁹⁴ In light of the extensive modernization and environmental obligations involved, the Metaloroya Business Plan clarified that the business plan should be used as a “starting point and basis for negotiation of the investment commitment needed to achieve the financial results predicted

⁸⁷ [Exhibit C-108](#), Environmental Evaluation of La Oroya Metallurgical Complex, Knight Piésold LLC, Final Report, 18 September 1999 (“**Knight Piésold Report**”), p. 16.

⁸⁸ [Exhibit C-090](#), PAMA 1996 Report, PDF p. 83.

⁸⁹ *See, e.g.*, [Exhibit C-090](#), PAMA 1996 Report, PDF p. 19.

⁹⁰ [Exhibit C-117](#), Offering Memorandum, La Oroya Metallurgical Complex, October 1996, PDF p. 93.

⁹¹ [Exhibit C-122](#), Supreme Resolution No. 102-92 PCM, 21 February 1992, Art. 1.

⁹² [Exhibit R-183](#), Supreme Resolution No. 016-96-PCM; *See also* [Exhibit C-104](#), 1999 White Paper, p. 38.

⁹³ [Exhibit R-184](#), Metaloroya Business Plan (1997–2011), La Oroya Metallurgical Complex, June 1996.

⁹⁴ [Exhibit R-184](#), Metaloroya Business Plan (1997–2011), La Oroya Metallurgical Complex, June 1996, p. 3.

... Potential buyers [would] need to undertake a due diligence of the [Facility] and proposed business plan to establish the value of La Oroya.”⁹⁵

80. The Peruvian Government’s official white paper looking back on Metaloroya’s privatization process also highlighted the Government’s sustainable development objectives. Peru made it clear, from the beginning, that while it had sought to create favorable conditions to attract buyers to Metaloroya, it had also designed a privatization process aimed at ensuring that environmental protection objectives were met.⁹⁶ All potential investors, including the Renco, were well aware of this. Further to the Environmental Mining Law, Centromín undertook an environmental assessment, or EVAP, for Metaloroya from March 1994 to February 1995, identifying pressing environmental issues.⁹⁷ The EVAP would serve as a basis for the environmental action plan that Centromín immediately started to implement.⁹⁸

81. The EVAP noted that Centromín’s policy regarding mitigating contamination was clear:

“The environmental policy of [CENTROMÍN] is clearly defined and put into action on having characterized environmental problems, and then proceeding to implement the required means of mitigation. It should be noted that CENTROMÍN has undertaken various measures to control environmental pollution, with hours of work and significant economic investments, even before the design of environmental monitoring programs and production of the EVAP.”⁹⁹

⁹⁵ [Exhibit R-184](#), Metaloroya Business Plan (1997–2011), La Oroya Metallurgical Complex, June 1996, p. 18.

⁹⁶ [Exhibit C-104](#), 1999 White Paper, PDF p. 9 and 12; [Exhibit C-117](#), Offering Memorandum, La Oroya Metallurgical Complex, October 1996, PDF p. 91–94.

⁹⁷ [Exhibit C-125](#), Preliminary Environmental Evaluation (“EVAP”) Monitoring Report on Water and Air Quality and Emissions (March 1994 to February 1995), Centromín, March 1995 (“**1995 Centromín Report EVAP**”); [Exhibit C-126](#), Preliminary Environmental Evaluation (“EVAP”) Monitoring Report of Gaseous Emissions and Environmental Air Quality, Centromín, March 1995 (“**1995 Centromín Gaseous Emissions and Environmental Air Quality Report EVAP**”); *See also* [Exhibit C-117](#), Offering Memorandum, La Oroya Metallurgical Complex, October 1996, PDF p. 90–91. (“During the EVAP, the Facility used seven control stations to monitor water quality and five additional stations to test air quality for particulate matter, SO₂, lead and arsenic contents.”).

⁹⁸ [Exhibit C-117](#), Offering Memorandum, La Oroya Metallurgical Complex, October 1996, PDF p. 90–91.

⁹⁹ [Exhibit C-125](#), 1995 Centromín Report EVAP, PDF p. 6. *See also* [Exhibit C-126](#), 1995 Centromín Gaseous Emissions and Environmental Air Quality Report EVAP, PDF p. 2 (“For some years and at present, the Company has been taking direct action in this area; first, the environmental problem and then continuing with the implementation of mitigation measures. It should be noted [] that CENTROMÍN undertook several mitigation measures with significant investments long before culmination in the Environmental Monitoring Program and developing the EVAP.”).

82. The EVAP also noted severe air contamination from three main sources: the main chimney or stack, secondary chimneys or stacks, and fugitive emissions.¹⁰⁰
83. Subsequently, on 30 August 1996, Centromín submitted a PAMA to the MEM, describing the actions and investments needed to modernize the Facility and bring it into compliance with LMPs and ECAs. The PAMA also included a closure plan, indicating actions to rehabilitate, reforest and prevent adverse effects of existing solid, liquid, and gaseous residues, upon cessation of operations.¹⁰¹
84. The MEM reviewed the first PAMA proposal and requested that Centromín amend it to address certain technical observations.¹⁰² To prepare its amended PAMA, Centromín hired various external advisors,¹⁰³ including Kilborn SNC-Lavalin Europe, a leading multinational engineering firm, which assisted Centromín in designing technical solutions to address environmental concerns (the “**SNC Report**”).¹⁰⁴ The SNC Report provided various options to remediate SO₂ emissions—a main source of contamination—including the construction of two sulfuric acid plants: the most important and costly PAMA project (the “**Sulfuric Acid Plant Project**”, labelled Project No. 1).
85. The PAMA provided for 16 projects in total to be divided between Centromín and the new operator of the Facility following privatization. If the new operator wished to modify the PAMA, it would have twelve (12) months to request modifications on technical grounds (by 13 January 1998).¹⁰⁵ In addition to the sixteen (16) PAMA projects, the PAMA also required that the new operator carry out a modernization process of the facility for which it also detailed a series of technological improvements. The sixteen (16) PAMA projects

These actions have been taken because of the severe and obvious nature of some of the sources of pollution, and because mitigation measures were immediately applicable that did not require prolonged studies.”).

¹⁰⁰ See Contract Memorial, ¶ 33 (citing [Exhibit C-031\(Contract\)](#), 1995 Centromín Gaseous Emissions and Environmental Air Quality Report, p. 2).

¹⁰¹ [Exhibit C-117](#), Offering Memorandum, La Oroya Metallurgical Complex, October 1996, PDF p. 90–91.

¹⁰² [Exhibit C-107](#), Environmental Impact Program, La Oroya Metallurgical Complex, Centromín, 29 August 1996 (“**Centromín Preliminary PAMA**”), PDF p. 12.

¹⁰³ [Exhibit C-123](#), 1997 White Paper, pp. 8–9.

¹⁰⁴ [Exhibit R-267](#), Kilborn SNC Lavalin Study Report, October 1996.

¹⁰⁵ [Exhibit C-090](#), PAMA 1996 Report, PDF p. 185, table 5.1.2. See also PDF p. 186.

were complementary to the modernization process, and both were prepared with external expert advice, and carefully designed to comply with the statutory ten-year deadline.

86. The implementation of the PAMA required a twofold investment. While the sixteen (16) PAMA projects required an estimated investment of USD 129 million,¹⁰⁶ the technological modernization of the Facility required an estimated investment of over USD 141 million.¹⁰⁷ These investment estimates were endorsed by the SNC Report.¹⁰⁸
87. On top of this approximately USD 270 million for modernization and the implementation of PAMA projects, the new operator would also have to invest in securing the continuation of operations, and improving the various processes that the Facility undertook, requiring approximately an additional USD 14 million.¹⁰⁹
88. The PAMA included an estimated investment schedule to implement this reform, with the actions that needed to be taken, year by year, until 13 January 2007, the date by which works had to be completed.¹¹⁰ The table below, included in the PAMA, reflects the investment schedule estimated by Centromín.

¹⁰⁶ [Exhibit C-090](#), PAMA 1996 Report, PDF p. 20. Table below, PDF p. 156.

¹⁰⁷ [Exhibit C-090](#), PAMA 1996 Report, PDF p. 20; [Exhibit C-054](#), Letter from DRP (K. Buckley) to MEM (Director General of Mining), 15 December 1998, Table 2, p. 5.

¹⁰⁸ [Exhibit R-025](#), Supreme Decree No. 016-93, Art. 3.

¹⁰⁹ [Exhibit C-090](#), PAMA 1996 Report, PDF p. 155, table 5.2/1.

¹¹⁰ [Exhibit R-026](#), Directorial Resolution No. 017-97-EM/DGM, 13 January 1997. Treaty Memorial, ¶ 38 *citing* [Exhibit C-090](#), PAMA 1996 Report and [Exhibit C-123](#), 1997 White Paper, p. 38–39.

1997 – 2006 Estimated Investment Schedule for Technological Improvement and PAMA Projects

1997-2006 INVESTMENT SCHEDULE FOR TECHNOLOGICAL IMPROVEMENT (in USD)											
Technological improvement	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	TOTAL
Copper circuit		776.000	37.700.000	6.000.000							44.476.000
Lead circuit		1.464.000					40.000.000	15.000.000			56.464.000
Zinc circuit		20.000.000	20.000.000								40.000.000
Environmental control equipment	10.000	50.000	40.000								100.000
Total	10.000	22.290	57.740	6.000.000	0	0	40.000.000	15.000.000	0	0	140.040.000
1997-2006 INVESTMENT SCHEDULE FOR PAMA PROJECTS (in USD)											
Divided by relevant environmental issue to be solved ¹¹¹	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	TOTAL
Process gases											
Acid plant for the copper smelter (Project No. 1)							41.200.000				41.200.000
Acid plant for the lead and zinc smelter (Project No. 1)									48.800.000		48.800.000
Process liquids											
Treating industrial liquid effluents (Project No 5, No. 8, No. 9, No. 10 and No. 11)	575.000	1.000.000	1.500.000								3.075.000
Process solids											
New copper and lead slag management system (Project No. 12)	850.000	3.362.000	2.288.000								6.500.000
New copper and lead slag deposit (Project No. 13)						2.500.000					2.500.000
Closure of the previous slag deposit Project (Project No. 13)	750.000	1.000.000	1.250.000	1.250.000	1.000.000						5.250.000
New arsenic trioxide deposit (Project No. 14)			1.000.000	1.000.000							2.000.000

¹¹¹ The planned investment for Projects Nos. 2; 3; 6 and 7 is not reflected in this table because it was considered to be covered by the investment needed to secure the continuation of operations of the Facility, and improving its various processes (amounting to approximately USD 14 million) as mentioned above.

Closure of the previous arsenic trioxide deposit (Project No. 14)	1.625.000	2.000.000	2.000.000	1.600.000	1.475.000						8.700.000
Closure of the ferrite deposit (Project No. 15)	500.000	500.000	1.200.000	1.200.000	1.200.000	1.000.000					5.600.000
Air quality emissions											
Revegetation of the areas affected by the smoke (Project No. 4)	200.000							554.000	755.000	491.000	2.000.000
Public health											
Waste treatment and trash disposal of staff housing (Project No. 16)			200.000	1.100.000	1.100.000	1.100.000					3.500.000
Total	4.500.000	7.862.000	9.438.000	6.150.000	4.775.000	4.600.000	41.200.000	554.000	49.555.000	491.000	129.125.000
TOTAL investment for technological improvement and PAMA projects	4.510.000	30.152.000	67.178.000	12.150.000	4.775.000	4.600.000	81.200.000	15.554.000	49.555.000	491.000	270.165.000

89. Project No. 1, the Sulfuric Acid Plant Project, was a costly project—an estimated USD 230 million between modernization of the circuits and implementation of the project— and entailed the construction of two new sulfuric acid plants for the lead and copper circuits, together with the modernization of the zinc circuit to repower its existing acid plant. Despite DRP requesting various changes to this project, including the date of completion and the design and number of acid plants to be constructed,¹¹² it never completed the Sulfuric Acid Plant Project.
90. A major problem at La Oroya was the emission of SO₂ at the Facility’s main chimney. The maximum permitted level of SO₂ emissions pursuant to the 1996 parameters set by the MEM, was 195 tonnes per day,¹¹³ meaning that emissions would have to be reduced by 83%.¹¹⁴ The technical solution proposed by the SNC Report—and incorporated into the PAMA—was the construction of two sulfuric acid plants that would capture SO₂ emissions, convert them into sulfur trioxide (“SO₃”), and recover it as sulfuric acid (“SO₄”), a by-product that would then be sold or stored.¹¹⁵ The technology to construct the plants was well known, available, and tested, and would have significant positive effects on the environment and health of the La Oroya population.¹¹⁶
91. The SNC Report’s proposals for La Oroya—including the construction of the sulfuric acid plants—were “based broadly on environmental compliance to satisfy [United States Environmental Protection Agency (EPA)] levels of emissions” to “estimate the total cost

¹¹² See Section II.C.

¹¹³ Exhibit C-128, Ministerial Resolution No. 315-96, Annex I.

¹¹⁴ Exhibit C-090, PAMA 1996 Report, PDF p. 165. See also Exhibit C-090, PAMA 1996 Report, PDF p. 19 and 21 (“Para mitigar los impactos originados por la descarga de SO₂ y materiales particulados a la atmosfera, se ha proyectado la construcción de 2 módulos, para fijar de acuerdo con la norma ambiental el 83% del total de SO₂ generado, produciendo un volumen de 505 000 t/año de ácido sulfúrico” and “Las emisiones gaseosas, constituyen el principal agente contaminante del emplazamiento, razón por la cual, el 70% de la inversión del programa está orientado a la fijación del S02 en forma de ácido sulfúrico, cuya demanda de mercado está garantizada, por su aplicación a nivel mundial en megaproyectos de yacimientos de Cobre, orientados a la lixiviación.” “[To] mitigate the effects of SO₂ and particles emissions into the atmosphere, two modules are planned to fix 83% of the total SO₂ generated, thus producing sulfuric acid in the amount of 505,000 t/year” and “[g]as emissions are the main contaminant agent of the site, thus 70% of program investment is oriented to fix SO 2 in the form of sulfuric acid, which is in great demand due to its worldwide application in megaprojects of Copper deposit, oriented to lixiviation.”).

¹¹⁵ Exhibit R-154, Request for the Exceptional Extension of Compliance for the Sulfuric Acid Plant Project, DRP, December 2005, PDF pp. 53–54.

¹¹⁶ Exhibit C-090, PAMA 1996 Report, PDF p. 166–167.

effect and also to satisfy potential investors whose own standards may also be superior to the Peruvian legislation.”¹¹⁷ The report concludes that the sulfuric acid plants would, “ensur[e] the maximum fixation of [SO₂], dust and particulates in the various process gas streams.”¹¹⁸

92. The SCN Report provided potential buyers with thorough technical guidelines on the available solutions for remediation of SO₂ emissions and related dust issues through the main stack. Furthermore, any remediation program at La Oroya, the report notes, “would need to be completed within ten years.”¹¹⁹
93. If production levels at the Facility were to be raised, the SNC Report proposed the construction of a third sulfuric acid plant for the zinc circuit.¹²⁰ Despite Claimant’s claim that it only discovered in 2005 that a third plant might be needed,¹²¹ this requirement was reflected not only in the SNC Report, but also in the PAMA.¹²² Both the SNC Report and the PAMA were at the Claimant’s disposal when it acquired the Facility.
94. Peru also hired a multinational environmental consultant, Knight Piésold LLC, to perform an independent environmental review of the facility (the “**Knight Piésold Report**”). The Knight Piésold Report—issued in September 1996—made a number of findings and recommendations about pollution at La Oroya. It recommended controlling emissions from the larger low altitude sources in order to achieve “the greatest incremental improvement” to air quality in the community and pointed to significant quantities of SO₂ and other pollutants that were being emitted from secondary stacks.¹²³ The report also recommended that priority be given to conducting a comprehensive emissions inventory to “efficiently determine the more cost-effective actions to reduce air quality impacts” and that this inventory “should estimate pollutant emissions from all operations, including

¹¹⁷ [Exhibit R-267](#), Kilborn SNC Lavalin Study Report, October 1996, PDF p. 10.

¹¹⁸ [Exhibit R-267](#), Kilborn SNC Lavalin Study Report, October 1996, PDF p. 10.

¹¹⁹ [Exhibit R-267](#), Kilborn SNC Lavalin Study Report, October 1996, PDF p. 10.

¹²⁰ [Exhibit R-267](#), Kilborn SNC Lavalin Study Report, October 1996, PDF p. 71

¹²¹ Treaty Memorial, ¶ 70.

¹²² [Exhibit C-090](#), PAMA 1996 Report, PDF p. 169.

¹²³ [Exhibit C-108](#), Knight Piésold Report, PDF pp. 39–40.

fugitive sources, and should then detail potential methods and costs for controlling each of these emissions.”¹²⁴

95. After listing the “the key environmental considerations” for La Oroya, the Knight Piésold Report determined that:

“It is our opinion that most existing environmental impacts at the La Oroya complex can be adequately controlled if readily available and commonly used operating, reclamation and remediation, and closure techniques are employed. . . . **The responsibility for continued regulatory compliance and for the implementation of any necessary environmental controls and remediation technologies lies with the owner and/or operator of the metallurgical unit.**”¹²⁵

96. While the Knight Piésold Report concluded that controlling environmental impacts at la Oroya was achievable, it also warned that the required 75-to-80% reduction in SO₂ emissions could only be achieved by conducting “multiple process changes and/or major modifications to much of the smelter” and that “[s]uch changes or modifications will be required over a ten-year period.”¹²⁶ The specific usage of “over” in this passage indicates that the modifications necessary to comply with SO₂ emissions standards will take place over a period of time.
97. Also, the Knight Piésold Report did not advise on the engineering designs of the PAMA or propose technical solutions to address environmental issues. Nor could it have. It was not a technical report, and thus, such issues were “beyond the scope of [its evaluation].”¹²⁷
98. The ten-year deadline was set forth in the Environmental Mining Law. As stated above, the Environmental Mining Law, passed years before the PAMA for Metaloroya was approved, required that metallurgical facilities design PAMAs to be completed in ten (10) years. The deadline was therefore mandated by law, not by the MEM. Indeed, other facilities were capable of meeting the ten-year deadline. For instance, the metallurgical facility Ilo (located in the Andes Mountains of Peru) also was, in accordance with the

¹²⁴ Exhibit C-108, Knight Piésold Report, PDF p. 34.

¹²⁵ Exhibit C-108, Knight Piésold Report, PDF p. 4 (emphasis added).

¹²⁶ Exhibit C-108, Knight Piésold Report, PDF p. 33.

¹²⁷ Exhibit C-108, Knight Piésold Report, PDF p. 41.

Environmental Mining Law, given a ten-year deadline, was able to complete its PAMA within the prescribed period.¹²⁸

99. Claimant had access to and an opportunity to review — *before it made its investment decisions* — the Knight Piésold Report, but also the SNC Report, the PAMA, and the Environmental Mining Law, all of which highlighted the ten-year, statutorily set deadline to complete the PAMA. The Knight Piésold Report further noted that complying with the PAMA would be difficult and costly. Claimant did not question the feasibility of completing the PAMA in a ten-year period until 2004, when DRP asked for an extension to remedy years of inaction on critical PAMA tasks.
100. By Renco’s own design, DRP was unable to make progress in meeting its PAMA obligations in ten (10) years and Renco’s financial gerrymandering of DRP ensured that DRP never had sufficient funds to do so.¹²⁹ Renco’s greatest priority was instead the maximization of production and financial gain by increasing lead production and reducing costs.¹³⁰
101. The Knight Piésold Report was a stark warning that Metaloroya’s buyer would need to take action immediately to meet environmental obligations. Following DRP’s acquisition, environmental conditions at La Oroya drastically deteriorated.¹³¹

3. Renco and DRRC represented that they were capable of and committed to implementing the environmental remediation plan for the Facility

102. The PAMA was approved by the MEM on 13 January 1997, giving the Facility until 13 January 2007 to complete the works. Following the PAMA’s approval, in March 1997, CEPRI announced an international tender, inviting private investors to bid for Metaloroya.¹³² The tender process was conducted by COPRI, CEPRI and investment bank, CS First Boston/Macroinvest, which prepared the Information Offering Memorandum (the

¹²⁸ Alegre Expert Report, ¶ 91.

¹²⁹ Kunsman Expert Report, § VI.

¹³⁰ **Exhibit R-094**, DRRC SEC Form S-4, PDF p. 125; Kunsman Expert Report, § VI.

¹³¹ Proctor Expert Report, Figures 13, 17.

¹³² **Exhibit R-187**, Bases and Model Contracts (Second Round), Centromín, 26 March 1997 (“**Bidding Terms (Second Round)**”); *See also* **Exhibit C-104**, 1999 White Paper, p. 72.

- “1996 Offering Memorandum”).¹³³ The approved PAMA—together with its supporting documentation—was shared with potential buyers of Metaloroya during the bidding process.
103. Bidders were required to demonstrate: (a) technical capacity, *i.e.* the bidder had to have “operate[d] or [] implemented metallurgical processes in a production capacity of at least 50,000 annual tons”; and (b) financial capacity, *i.e.* the bidder had “to have net assets no lower than USD 50,000,000.”¹³⁴
104. CEPRI provided the bidding terms and model contracts for the transfer of shares of Metaloroya to 30 bidders—including Renco and DRRC.¹³⁵ Renco represented that its subsidiary, DRRC: (a) had twenty (20) years of experience in ore extractions including lead, zinc and copper; (b) owned and operated six (6) mines and four (4) plants; and (c) operated higher annual capacities than the 50,000 annual tons required for prequalification at its Missouri facilities in Herculaneum and Boss.¹³⁶ It also represented that it owned and operated fourteen (14) companies with annual profits amounting to USD 2 billion and maintained assets of USD 1.3 billion, while employing over 7,000 people.¹³⁷ Further, Renco represented that it possessed a net worth of over USD 50 million and owned 100% of DRRC.¹³⁸
105. Renco was experienced in operating smelters and contending with their environmental and public health consequences. Its corporate managers and executives, highly qualified in both the smelting industry and related environmental matters, understood the importance of controlling emissions to protect the environment and human health, in no small part due to their experience with the DRRC smelter in Herculaneum, Missouri.¹³⁹ For instance, Mr.

¹³³ [Exhibit C-117](#), Offering Memorandum, La Oroya Metallurgical Complex, October 1996.

¹³⁴ [Exhibit R-187](#), Bidding Terms (Second Round), p. 18; [Exhibit R-188](#), Renco Prequalification, Centromín, 6 March 1997, p. 46.

¹³⁵ [Exhibit R-187](#), Bidding Terms (Second Round); [Exhibit R-188](#), Renco Prequalification, Centromín, 6 March 1997, p. 11; See also [Exhibit C-123](#), 1997 White Paper, p. 50.

¹³⁶ [Exhibit R-188](#), Renco Prequalification, Centromín, 6 March 1997, p. 35.

¹³⁷ [Exhibit R-188](#), Renco Prequalification, Centromín, 6 March 1997, p. 34.

¹³⁸ [Exhibit R-188](#), Renco Prequalification, Centromín, 6 March 1997, p. 35.

¹³⁹ See [Exhibit R-165](#), Jack V. Matson Expert Report, Document No. 1242-38, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 1 December 2020, p. 5.

Vornberg, Director of Environmental Affairs for DRRC, and later in charge of environmental matters at the Facility, conducted a study in 1984 showing that emissions from the Herculaneum smelter resulted in high blood lead levels in children living within close proximity of the smelter.¹⁴⁰

106. During the visit to DRRC’s Herculaneum facilities, DRRC represented that it: (a) used technology that balanced profitability for the business and management of factors that affect the environment with relatively low investments; and (b) complied with environmental and human health regulations.¹⁴¹ A report prepared by Centromín after visiting Herculaneum notes that Claimant’s main interest in acquiring La Oroya was the production of lead and the possibility of diversifying its business.¹⁴² The notes also record that, during the visit, Claimant emphasized its technical and “political” capabilities to manage environmental related issues.¹⁴³
107. The Renco / DRRC consortium was pre-qualified, with five (5) other companies, to move forward with the bidding.¹⁴⁴ According to the 1996 Offering Memorandum, bidders had to make their own assessment—directly or through third parties—of the Facility and its assets, financial conditions, and the “environmental impacts of [its] operations and of its environmental compliance prospects.”¹⁴⁵ Bidders were provided with the 1996 Offering Memorandum, the EVAP, the PAMA, the SNC Report, the Knight Piésold Report, together with their accompanying documents, and further information on the legal and technical aspects of the Facility. Bidders were given access to a data room with all pertinent documentation. To complete their examination, bidders were also permitted to visit the Facility.¹⁴⁶

¹⁴⁰ **Exhibit R-165**, Jack V. Matson Expert Report, Document No. 1242-38, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 1 December 2020, p. 8.

¹⁴¹ **Exhibit R-189**, Report on Visit to the Herculaneum Site (19–22 October 1996), 25 October 1996, pp. 12–13.

¹⁴² **Exhibit R-189**, Report on Visit to the Herculaneum Site (19–22 October 1996), 25 October 1996, p. 8.

¹⁴³ **Exhibit R-189**, Report on Visit to the Herculaneum Site (19–22 October 1996), 25 October 1996, p. 8.

¹⁴⁴ **Exhibit R-187**, Bidding Terms (Second Round); **Exhibit R-188**, Renco Prequalification, Centromín, 6 March 1997, pp. 46–47; **Exhibit C-123**, 1997 White Paper, p. 50.

¹⁴⁵ **Exhibit C-117**, Offering Memorandum, La Oroya Metallurgical Complex, October 1996, PDF p. 91.

¹⁴⁶ **Exhibit R-187**, Bidding Terms (Second Round), PDF p. 9 (“In addition to the “Information Memorandum”, participants have access to the technical, legal and other information about THE COMPANY, which exists in the

108. In addition, CEPRI offered two rounds of written questions and answers on the contract models. These rounds of questions were intended as an opportunity for bidders to request clarifications with respect to the transaction and obligations under the contract, including those relative to the PAMA.¹⁴⁷ CEPRI provided the first round of responses to bidder questions on 27 February 1997, along with: (a) an example demonstrating how the capitalization mechanism worked; (b) modification of the schedule for the privatization process; and (c) modifications to certain clauses of the model contracts.¹⁴⁸ COPRI provided a second round of written answers to questions on 26 March 1997, with revised model contracts.¹⁴⁹ No questions were raised with the respect to the ten-year period to complete the PAMA.
109. The Public Auction was held on 14 April 1997. Three of the six pre-qualified companies submitted bids: (a) Servicios Industriales Peñoles S.A. de C.V. (“**Industrias Peñoles**”), from Mexico, offered USD 185 million; (b) Renco / DRRC consortium offered USD 121,521,329; and (c) Glencore International Ag. offered USD 85 million.¹⁵⁰
110. Industrias Peñoles won the auction but subsequently withdrew on 9 July 1997 because it could not agree on certain items with CEPRI.¹⁵¹ CEPRI revoked the award granted to

“Data room” of the CENTROMÍN headquarters and which will be available until the date indicated in 2.1.3 g. Participants may obtain photocopies of such information. Upon written request, participants may visit the metallurgical complex of La Oroya until the date indicated above... In the understanding that the participants have full access to the information available in order to carry out their own evaluation of THE COMPANY, CENTROMÍN, the CEPRI, the Commission for the Promotion of Private Investment - COPRI, including its members and advisers, or any other State entity, they are not responsible for the use that is given to said information nor for the decisions that each interested party makes based on it.”); *see also* [Exhibit C-117](#), Offering Memorandum, La Oroya Metallurgical Complex, October 1996, PDF p. 2.

¹⁴⁷ [Exhibit R-200](#), Question and Answers Round 1, 27 February 1997; [Exhibit R-201](#), Question and Answers Round 2, 26 March 1997; [Exhibit R-187](#), Bidding Terms (Second Round).

¹⁴⁸ [Exhibit R-200](#), Question and Answers Round 1, 27 February 1997, PDF p. 47 *et seq*: clauses 3.2, 4.6, 5.1, 8.3, and 14.

¹⁴⁹ [Exhibit R-200](#), Question and Answers Round 1, 27 February 1997; [Exhibit R-201](#), Question and Answers Round 2, 26 March 1997; [Exhibit R-187](#), Bidding Terms (Second Round).

¹⁵⁰ [Exhibit C-123](#), 1997 White Paper, p. 51. *See also* [Exhibit C-104](#), 1999 White Paper, p. 75.

¹⁵¹ [Exhibit R-197](#), *Por qué se revocó la Buena pro concedida a Penoles S.A. para adquirir Metaloroya S.A.*, CENTROMÍN PERU, 16 July 1997, p. 1 noting “[...] the payment of royalties from net sales, for assistance technology and management, technology upgrade; payment for the purchase of a package technology developed in Mexico, as well as the distribution of the premium balance of issuance resulting from the additional contribution of capital to which they had committed. Centromín noted that “Such conditions exceeded what was specified in the bases and even what was agreed in the stage of consultations prior to the Auction and that, with respect to transparency of the process,

Industrias Peñoles and declared Renco / DRRC consortium the winner of the action on 10 July 1997.¹⁵² Subsequently, and as required by the bidding conditions, Renco / DRRC consortium established DRP, its Peruvian subsidiary, to own and operate Metaloroya.¹⁵³

4. DRP undertook investment and environmental obligations that it never fulfilled and now Renco tries to re-write the STA to justify DRP’s non-compliance

111. The STA for the purchase of Metaloroya was executed by DRP, Metaloroya, and Centromín on 23 October 1997. The STA provided that the USD 247 million acquisition price for La Oroya consisted of: (a) a USD 121,440,608 payment for Centromín’s shares in Metaloroya; and (b) a USD 126.5 million capital contribution to Metaloroya. Beyond the acquisition price, the contract also established an obligation for DRP to invest an additional USD 120 million over the next five (5) years.¹⁵⁴ The STA specified that this investment “*must be made necessarily with [capital] contribution.*”¹⁵⁵
112. On 16 October 1997, a few days before the contract was executed, the MEM issued Directorial Resolution No. 334-97-EM/DGM, which modified the PAMA to separate the obligations that DRP and Centromín would fulfill.¹⁵⁶
113. DRP assumed responsibility for completing nine (9) PAMA projects aimed at reforming the Facility, all of which would need to be completed no later than January 2007.¹⁵⁷ DRP also committed to carry out a supplementary control program of air emissions and install

were known to all bidders.”; *See also Exhibit R-224*, Letter COP-081-97/26.09-01 from Centromín (J.C. Barcellos Milla) to DRRC (Raúl Ferrero Costa), 10 July 1997.

¹⁵² *Exhibit R-224*, Letter COP-081-97/26.09-01 from Centromín (J.C. Barcellos Milla) to DRRC (Raúl Ferrero Costa), 10 July 1997.

¹⁵³ *Exhibit R-001*, STA & Renco Guaranty.

¹⁵⁴ *Exhibit R-001*, STA & Renco Guaranty, clause 4.1.

¹⁵⁵ *Exhibit R-001*, STA & Renco Guaranty, clause 4.5(f) (emphasis added).

¹⁵⁶ *Exhibit R-028*, Directorial Resolution No. 334-97/EM/DGM, 16 October 1997. This document notes (p. 1) the “period of environmental adaptation of ten (10) years (1997-2006) of the Program of Adaptation and Environmental Management of La Oroya Metallurgical Complex of Centromín”; *Exhibit R-163*, Letter from AIDA, *et al.* to U.S. Department of State (H. Clinton) and U.S. Department of the Treasury (T. Geithner), 31 March 2011, PDF pp. 2–3.

¹⁵⁷ *Exhibit R-026*, Directorial Resolution No. 017-97-EM/DGM, 13 January 1997, Art. 2; *Exhibit R-028*, Directorial Resolution No. 334-97-EM/DGM, 16 October 1997, p. 1, Section 2.

bag-houses (*i.e.* air filters) and scrubbers.¹⁵⁸ Further, DRP would benefit from the stability agreement entered into between Metaloroya and the MEM on 17 October 1997, which would “freeze” the LMPs and ECAs in force at the time of the STA during the PAMA period, *i.e.*, until 13 January 2007(the “**Stability Agreement**”).¹⁵⁹ Centromín, in turn, would assume responsibility for a series of smaller projects as well as other technical obligations, including abandonment of the slag deposits and remediation of areas affected by certain emissions.¹⁶⁰

114. DRP benefitted from a tax stability agreement as well. In exchange for committing, inter alia, to capitalize Metaloroya, DRP received preferential tax treatment.¹⁶¹
115. The STA also included tailored assumption of responsibility clauses with respect to specific third-party claims and independent indemnity and defense obligations that run to DRP.

5. Renco and DRRC confirmed their understanding of DRP’s environmental obligations in DRRC’s 1998 SEC Report

116. All bidders, including Renco and DRRC, were provided with thorough documentation related to the Facility, prepared not only by governmental authorities but also by external advisors specifically retained to assess on the PAMA, the Facility and its prospects.¹⁶² Bidders were permitted to visit the Facility—as Claimant did—ask questions on relevant documentation and carry out a due diligence by themselves or by third parties. At Clause

¹⁵⁸ **Exhibit R-198**, *Estudio de Evaluación Integral de Impacto Ambiental del Area Afectada Por Los Humos en la Fundición de La Oroya*, Servicios Ecológicos S.A., 1 November 1996, p. 51. See also, **Exhibit R-149**, Report No. 056-2006-MEM-DGM-FMI/MA, 19 January 2006, p. 3 noting: “It is important to indicate that according to the conclusions and recommendations of the Comprehensive Study of Environmental Impact due to atmospheric emissions, indicated in the PAMA (1997), which was developed with the purpose of developing a dispersion model of the gases emitted by the chimneys in the casting; recommended, among other aspects, the implementation of a supplementary control system using meteorological information in line and models to predict local atmospheric conditions and potential sources of contamination. He also recommended adopting the use of adequate control technology such as air filters (bag-house) and scrubber”.

¹⁵⁹ **Exhibit R-199**, Environmental Administrative Stability Contract, 4 May 1998 (“**Stability Agreement**”). See also, Alegre Expert Report, Section IV(B).

¹⁶⁰ **Exhibit R-001**, STA & Renco Guaranty, clause 6.1.

¹⁶¹ **Exhibit R-094**, DRRC SEC Form S-4, PDF pp. 1578–1588 (Legal Stability Agreement between the Ministry of Energy and Mines and Doe Run Peru S.R. Ltda, 21 October 1997).

¹⁶² See Section II.A.2.

- 7 of the STA, DRP confirmed that it had conducted sufficient due diligence to understand the extension of its environmental responsibilities under the PAMA and potential risks.¹⁶³
117. DRP’s representatives involved in the acquisition and operation of the Facility acknowledged that immediate action at La Oroya was needed and that DRP was responsible for minimizing pollution even if it went beyond its PAMA obligations. Mr. Bruce Neil, former President and Manager of DRP, stated that he recognized at the time that DRP had a responsibility “to minimize their impacts on the surrounding communities”, and was “obliged” to find a solution and minimize emissions if they saw an emission source that had not been properly evaluated, even if it went beyond the government standards.¹⁶⁴ Similarly, Mr. Buckley, former President and General Manager of DRP, who was primarily responsible for the due diligence and visited La Oroya before its acquisition,¹⁶⁵ noted that it was “obvious” to him and to “anyone with experience in smelting operations that the town was highly contaminated” and that “there was a serious need for modern management and control, which Doe Run could bring to the Facility.”¹⁶⁶
118. In May 1998, DRRC submitted a Securities and Exchange Commission Form S-4 and expressed therein its understanding of the obligations that DRP had just assumed under the STA and the PAMA, including:

¹⁶³ **Exhibit R-001**, STA & Renco Guaranty, clause 7 (“The investor represents that it has carried out its own investigation, examination, information and evaluation during the ‘due diligence’ process, directly or through third parties, on the basis of information accessible, available and provided by Centromín [...] To the investor’s knowledge, the information concerning the company has been entirely available to the investor through the ‘due diligence’ process. Within this context, the investor assumes the responsibility of the due diligence on the basis of information accessible and provided by Centromín. consequently, the investor cannot claim any responsibility from Copri, its members, from Cepri-Centromín, its members or advisers, from Centromín, or the Peruvian State for the information that the investor has failed to review concerning the company or the la Oroya Metallurgical Complex, which has been provided to the investor through the due diligence process...”).

¹⁶⁴ **Exhibit R-165**, Jack V. Matson Expert Report, Document No. 1242-38, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 1 December 2020, p. 7.

¹⁶⁵ **Exhibit R-197**, *Por qué se revocó la Buena pro concedida a Penoles S.A. para adquirir Metaloroya S.A., CENTROMÍN PERU*, 16 July 1997, Anexo 12–15, PDF p. 40. See also **Exhibit C-104**, 1999 White Paper, Annex 12–15, PDF p. 15; **Exhibit R-207**, Letter from Centromín (J.C. Barcellos M.) to DRRC (J. Zelms), 31 July 1997 (“We are referring to your letter dated 30 of the current, in which you inform us of the visit of six professionals from your esteemed company to carry out the final due diligence in order to conclude and materialize the transfer of Metaloroya S.A.”).

¹⁶⁶ **Exhibit R-165**, Jack V. Matson Expert Report, Document No. 1242-38, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 1 December 2020, p. 9.

- implementing the PAMA projects “*over the next nine years*”, *i.e.*, no later than January 2007, and that it would cost USD 195 million;¹⁶⁷
- the main PAMA projects “related to environmental matters” and included “building sulfuric acid plants for the metal circuits” to increase “the capture of sulfur dioxide from approximately 11% to a minimum of 83%, which [was] the MEM standard.”¹⁶⁸ According to DRRC, the plants had to be constructed no later than 2006;¹⁶⁹
- the facility operations exceeded “some of the applicable MEM maximum permissible limits pertaining to air emissions, ambient air quality and waste water effluent quality” and that “[t]he PAMA projects [had] been designed to achieve compliance with such requirements”;¹⁷⁰
- it was required “to meet ambient air quality standards and the applicable emissions rate by January 2007.” At the time, SO₂ emissions amounted to approximately 990 tons per day and the MEM had “established a maximum [SO₂] rate for [DRP] of 17% of incoming sulfur based on [] production levels”; and
- “[a]lthough the main stack [was] the largest source of gaseous emissions, significant quantities of the same effluents [were] issued from the numerous smaller stacks, as well as from many non-stack sources.”¹⁷¹

119. DRRC also acknowledged its understanding of the strictures of the environmental programs that they DRP agreed to implement. In its SEC filing, DRRC stated that DRP had “advised the MEM that it intend[ed] to seek changes in certain PAMA projects that it believes will more effectively achieve compliance” but that “there [could] be no assurance

¹⁶⁷ Exhibit R-094, DRRC SEC Form S-4, PDF p. 134 (“Doe Run Peru has committed under its PAMA to implement the following projects over the next nine years, estimated in the PAMA to cost approximately \$107.5 million: (i) new sulfuric acid plants; (ii) elimination of fugitive gases from the coke plant; (iii) use of oxygenated gases in the anodic residue plant; (iv) water treatment plant for the copper refinery; (v) a recirculation system for cooling waters at the smelter; (vi) management and disposal of acidic solutions at the silver refinery; (vii) industrial waste water treatment plant for the smelter and refinery; (viii) containment dam for the lead muds near the zileret plant; (ix) granulation process water at the lead smelter; (x) anode washing system at the zinc refinery; (xi) management and disposal of lead and copper slag wastes; and (xii) domestic waste water treatment and domestic waste disposal. The actual current estimate for the environmental projects and related process changes for Doe Run Peru is \$195.0 million.”).

¹⁶⁸ Exhibit R-094, DRRC SEC Form S-4, PDF p. 137.

¹⁶⁹ Exhibit R-094, DRRC SEC Form S-4, PDF p. 137.

¹⁷⁰ Exhibit R-094, DRRC SEC Form S-4, PDF p. 134.

¹⁷¹ Exhibit R-094, DRRC SEC Form S-4, PDF p. 135.

that the MEM [was going to] approve proposed changes to the PAMA or that implementation of the changes will not increase the cost of compliance.”¹⁷²

B. DRP purchased the Facility with an obligation to turn around its environmental performance

120. CEPRI was clear during the bid process that it sought an experienced buyer who could modernize the Facility within ten (10) years.¹⁷³ By turning to foreign investment, Peru hoped to attract a company able to keep the Facility operating without compromising the government’s environmental and public health obligations.
121. Achieving this goal was no easy task. The Facility would require a hefty investment to come into compliance with modern environmental standards, and carried a substantial risk of environmental liability. Despite these challenges, DRP purchased the Facility from Centromín and committed to implementing the costly improvement projects by 13 January 2007. It did so after undertaking its own due diligence and representing that it was qualified both in terms of its financial capital and technological capability.
122. The terms of the STA reflected the balance that CEPRI had sought to strike between commercial and environmental objectives. They committed DRP to turning around the Facility’s environmental performance within the legally mandated timeline of ten years. They also held DRP responsible for harms to third parties if it performed more poorly than Centromín or failed to undertake the environmental remediation projects assigned to it.
123. In this section, Peru will set forth the basic terms of the STA (**Section II.B.1**), as well as its key provisions and related guaranty agreements (**Sections II.B.2-II.B.4**). Peru will then demonstrate that DRP compromised its ability to meet its PAMA obligations the day it executed the STA by immediately reversing its capital contribution (**Section II.B.5**).

1. The Basic Terms of the STA

124. CEPRI required the purchaser of the Facility to (i) establish a local subsidiary to own and operate the Facility, (ii) capitalize the local subsidiary, and (iii) guarantee the performance

¹⁷² Exhibit R-094, DRRC SEC Form S-4, PDF p. 134.

¹⁷³ See Section II.A, above.

of its environmental and other contractual obligations.¹⁷⁴ Accordingly, in September 1997, Renco and DRRC established a Peruvian subsidiary, DRP, to own and operate the Facility.¹⁷⁵

125. The following month, on 23 October 1997, Centromín, Metaloroya, and DRP executed the STA for 99.93% shares of Metaloroya.¹⁷⁶ The STA identified its contracting parties as the following: Centromín, defined as “Centromín;” Metaloroya, defined as “the Company;” and DRP, defined as the “Investor” (jointly, “**STA Parties,**” individually, “**STA Party**”).¹⁷⁷ On 30 December 1997, Metaloroya merged with DRP, and DRP thus assumed all of Metaloroya’s rights and obligations as the Company under the STA.¹⁷⁸ Accordingly, in this facts section, Peru will refer to the Company as DRP, notwithstanding that the Investor and the Company have independent obligations and rights under the STA.
126. Renco and DRRC intervened in the public deed that contains the STA as guarantors for the Investor. Specifically, under an “Additional Clause” at the end of the public deed, Renco and DRRC agreed to “guarantee the compliance with the obligations contracted by the Investor, Doe Run Peru” (the “**Renco Guaranty**”).¹⁷⁹ The Renco Guaranty is a distinct, autonomous contract in which Claimants guaranty the Investor’s compliance with its contractual obligations.
127. DRP paid Centromín USD 121,440,608 for Metaloroya’s shares¹⁸⁰ and was required to make a separate capital contribution of USD 126,481,383.24 to Metaloroya on the day of the purchase.¹⁸¹ DRP also committed to invest USD 120 million in the Facility within the

¹⁷⁴ **Exhibit R-201**, Question and Answers Round 2, 26 March 1997, No. 7, PDF p. 5 (“If the bidder that is Awarded the Bid or the subsidiary to which it transfers said award, is not Peruvian, and there is an intent to acquire shares that CENTROMIN possesses in the COMPANY, one or the other must establish a Peruvian subsidiary in order to execute the contract...”).

¹⁷⁵ **Exhibit C-132**, Deed of Incorporation for DRP, S.A., 8 September 1997 (“**DRP Incorporation**”).

¹⁷⁶ **Exhibit R-001**, STA & Renco Guaranty.

¹⁷⁷ **Exhibit R-001**, STA & Renco Guaranty.

¹⁷⁸ See **Exhibit R-003**, Modification of the Contract to Transfer Shares, Increase Company Capital and Subscription of Shares of Metaloroya S.A., 17 December 1999, clause 7, p. 21.

¹⁷⁹ **Exhibit R-001**, STA & Renco Guaranty, Additional Clause.

¹⁸⁰ **Exhibit R-001**, STA & Renco Guaranty, clause 2.

¹⁸¹ **Exhibit R-001**, STA & Renco Guaranty, clauses 3.2–3.4.

first five (5) years in furtherance of its environmental and modernization obligations.¹⁸² DRP agreed to submit an annual report to Centromín regarding its progress on this investment commitment.¹⁸³

128. Peru did not sign the STA. Rather, Clause 10 of the STA acknowledged that Peru would guarantee Centromín’s obligations.¹⁸⁴ On 21 November 1997, Peru and DRP entered into a separate guaranty agreement pursuant to which Peru guaranteed the representations, securities, guaranties, and obligations undertaken by Centromín in the STA (the “**Peru Guaranty**”).¹⁸⁵

2. The STA set out the STA Parties’ environmental obligations and responsibilities

a. The STA Parties’ environmental remediation obligations

129. The STA divided responsibility for the Facility’s PAMA between Metaloroya and Centromín, establishing a PAMA for Metaloroya (or the Company, which would later be merged into DRP) and a PAMA for Centromín (which would later become Activos Mineros).¹⁸⁶ Metaloroya (ultimately, DRP) assumed responsibility for any amendments that might be made to its PAMA with respect to the smelting and refining facilities, the service facilities and housing of the company, and the zinc ferrite deposits.¹⁸⁷ Likewise, Centromín assumed responsibility for any amendments to its PAMA, as well as several other technical obligations.¹⁸⁸

¹⁸² **Exhibit R-001**, STA & Renco Guaranty, clauses 4.1 and 4.5.

¹⁸³ **Exhibit R-001**, STA & Renco Guaranty, clause 4.2

¹⁸⁴ **Exhibit R-001**, STA & Renco Guaranty, clause 10 (under a Supreme Decree No. 042-97-PCM, 19 September 1997, the Peruvian Government would guarantee “[A]ll of the obligations of Centromín” under the STA, and the guaranty “shall survive the transfer of any of the rights and obligations of Centromín and any liquidation of Centromín”).

¹⁸⁵ [**Exhibit R-002**, Guaranty Agreement, 21 November 1997 (“**Peru Guaranty**”), clause 2.1 (“[T]he **State** guarantees the **Investor** [(DRP)] the declarations, securities, guarantees and obligations assumed by the Transferor [(Centromín)] in the [STA].”)]

¹⁸⁶ **Exhibit R-001**, STA & Renco Guaranty, clause 5.

¹⁸⁷ **Exhibit R-001**, STA & Renco Guaranty, clause 5.1.

¹⁸⁸ **Exhibit R-001**, STA & Renco Guaranty, clause 6.1.

b. The scope of DRP's assumption of responsibility for third-party claims

130. The STA provided that under certain circumstances, Centromín would assume responsibility for environmental claims presented by third parties. Clause 5.3 of the STA established the scope of DRP's (the Company's) assumption of responsibility for third-party claims for the "period approved for the execution of Metaloroya's PAMA," *i.e.*, from 23 October 1997 to 13 January 2007 (the "**PAMA Period**"). During that period, DRP would assume responsibility:

"for damages and claims by third parties attributable to it from the date of the signing of this Contract, only in the following cases:

a) those that arise directly due to acts that are not related to Metaloroya's PAMA which are exclusively attributable to the Company but only insofar as said acts were the result of *the Company's use of standards and practices that were less protective of the environment or of public health than those that were pursued by Centromín* until the date of execution of this Contract.

b) those that result directly from a *default on the Metaloroya's PAMA [sic] obligations* on the part of the Company"

131. Clause 5.3(a) provided that, in the first instance, an independent expert should decide any dispute over whether DRP's operations were "less protective of the environment or of public health than those that were pursued by Centromín":

"Should there be any controversy on the determination of whether the standards or practices used by the Company were or were not less protective of the environment or of the public health than those that were applied by Centromín and should no agreement be reached with regard to this within thirty (30) calendar days from the date on which the claim was made, the Centromín [sic] and the Company shall submit this determination to the opinion of an expert and shall apply for this purpose the procedure that is described in numeral 5.4(c)."

132. Clause 5.4(c) establishes the following procedure for submitting disputes to an independent expert:

"If the amount of the claim were for less than US\$50,000.00, Centromín and the Company will be bound by the decision of the expert. If the amount of the claim were higher than US\$50,000.00, Centromín and the Company may submit the matter to arbitration, in accordance with clause 12 of this Contract, should one or both parties not be in agreement with the decision of the expert."

133. Clause 5.4 of the STA established the scope of DRP’s (the Company’s) assumption of responsibility for the period “[a]fter the expiration of the legal term of Metlaoroya’s [sic] PAMA.” For that period, DRP assumed:

“responsibility for damages and third party claims in the following manner:

- a) those that result directly from acts that are solely attributable to its operations after that period.
- b) those that result directly from a default on the Metaloroya’s [sic] PAMA obligations on the part of the Company
- c) should the damages be attributable to Centromín and to the Company, the Company will assume responsibility proportionately to its contribution to the damage.”

134. Further, Clause 5.4(c) provided that an independent expert should decide disputes over the allocation of responsibility between DRP and Centromín:

“In those cases in which no consensus was reached between Centromín and the Company with regard to the causes of the presumed damage that is the subject of the claim or with regard to the manner in which the responsibility will be shared amongst them, should no agreement be reached within the term of thirty (30) days counted from the reception of the claim, the matter will be submitted to the decision of an expert on this matter that will be designated by mutual agreement. This expert must render a decision as soon as possible. If the amount of the claim were for less than US\$50,000.00, Centromín and the Company will be bound by the decision of the expert. If the amount of the claim were higher than US\$50,000.00, Centromín and the Company may submit the matter to arbitration, in accordance with clause 12 of this Contract, should one or both parties not be in agreement with the decision of the expert.”

135. Clause 5.8 established the consequence of DRP’s assumption of responsibility, requiring DRP (the Company) to indemnify Centromín for “any damages, liability, or obligation” for claims for which it has assumed responsibility.¹⁸⁹

¹⁸⁹ Exhibit R-001, STA & Renco Guaranty, clauses 5.8.

c. The scope of Centromín’s assumption of responsibility for third-party claims

136. Clauses 6.2 and 6.3 of the STA provided that Centromín will “assume responsibility for any damages and claims by third parties” relating to environmental contamination stemming from the acts for which DRP has not assumed responsibility (consistent with that described above).¹⁹⁰ Clause 6.5 established the first consequence of Centromín’s assumption of responsibility, requiring Centromín to “indemnify the Company for any damages, liabilities or obligations” arising from such claims.¹⁹¹

137. Clause 8.14 established the second consequence of Centromín’s assumption of responsibility. It granted Centromín the obligation to assume defense of the Company, among other things, against any third-party claims for which it has assumed responsibility:

“Should the Company or the Investor receive any demand or judicial, administrative notice or notice of any kind, related to any act or fact included within the responsibilities, declaration and guarantees offered by Centromín, they pledge to report it to Centromín within a reasonable term which will allow Centromín to exercise its right to a defense, releasing Company or the Investor from any obligation with regard to the same and Centromín shall be obliged to immediately assume those obligations as soon as it is notified, the Company shall also be entitled to be represented in those procedures by lawyers it has chosen and whose fees shall be solely assumed by it. [Centromín] shall keep the Company fully informed on all the aspects and activities related to that defense, including the supplying of copies of all the legal papers, pleading and other matters.”¹⁹²

138. A failure by the Company (originally the Metaloroya, subsequently DRP) to notify Centromín (or Activos Mineros) of third-party claims would relieve Centromín (or Activos Mineros) of its defense obligations.

3. DRP warranted that it had conducted due diligence

139. DRP warranted that it had conducted due diligence and, by way of the Renco Guaranty, Renco and DRRC backed this statement. Clause 7.1 provides that DRP “has carried out

¹⁹⁰ Exhibit R-001, STA & Renco Guaranty, clauses 6.2–6.3.

¹⁹¹ Exhibit R-001, STA & Renco Guaranty, clause 6.5.

¹⁹² Exhibit R-001, STA & Renco Guaranty, clause 8.14.

its own investigation, examination, information and evaluation during the ‘due diligence’ process, directly or through third parties, on the basis of information accessible, available and provided by CENTROMÍN.”¹⁹³ It further provides:

“Within this context, **the Investor [(DRP)] assumes the responsibility of the due diligence** on the basis of information accessible and provided by Centromín. Consequently, the Investor [(DRP)] **cannot claim any responsibility from COPRI, its members, from CEPRI-Centromín, its members or advisers, from Centromín, or the Peruvian state for the information that the investor has failed to review** concerning the company or the La Oroya Metallurgical Complex, which has been provided to the investor through the due diligence process.” (Emphasis added)

140. The STA also contains a *force majeure* clause, which provides:

“Neither of the contracting parties may demand from the other the fulfillment of the obligations assumed in this contract, when the fulfillment is delayed, hindered or obstructed by causes that arise that are not imputable to the obliged party and this obligation has not been foreseen at the time of the signing of this contract. All those causes are constituted, but not in a restrictive manner, by force majeure or act of God such as earthquakes, floods, fires, strikes whether declared legal or illegal, civil disturbances, extraordinary economic alterations, factors that affect transport generally, governmental prohibitions and catastrophes. . . .”¹⁹⁴

4. Subsequent amendments to the STA and Guaranty

141. On 27 October 1997, Centromín released Renco from its obligations under the Renco Guaranty, per Renco’s request.¹⁹⁵

142. On 1 June 2001, DRP assigned its contractual position as the “Investor” DRCL, a British Virgin Islands company;¹⁹⁶ DRCL thus assumed all of DRP’s rights and obligations as the “Investor” under the STA.¹⁹⁷

¹⁹³ Exhibit R-001, STA & Renco Guaranty, clause 7.1.

¹⁹⁴ Exhibit R-001, STA & Renco Guaranty, clause 15.

¹⁹⁵ See Exhibit R-003, Modification of the Contract to Transfer Shares, Increase Company Capital and Subscription of Shares of Metaloroya S.A., 17 December 1999.

¹⁹⁶ Exhibit R-004, Assignment of Contractual Position between DRP and DRCL, 1 June 2001 (“Contract Assignment”), clause 2.

¹⁹⁷ Exhibit R-004, Contract Assignment, clause 2.

143. Finally, on 19 March 2007, Centromín assigned its contractual position to Activos Mineros, a State-owned company established on 12 July 2006 by Peru’s Private Investment Promotion Agency.¹⁹⁸ Activos Mineros assumed all of Centromín’s rights and obligations under the STA.

5. By reversing its capital contribution the day it executed the STA, DRP compromises its ability to meet its PAMA obligations

144. The STA provided that the USD 247 million acquisition price for La Oroya consisted of (i) a USD 121,440,608 for Centromín’s shares in Metaloroya; and (ii) a USD 126.5 million capital contribution to Metaloroya.¹⁹⁹ Renco financed the vast majority of the acquisition through a USD 225 million loan (“**Acquisition Loan**”) from Bankers Trust Company and other lenders to Doe Run Mining, DRP’s direct parent company.²⁰⁰

145. As described above, the STA also established an obligation for DRP to invest an additional USD 120 million over the next five (5) years.²⁰¹ The STA specified that this investment “must be made necessarily with the [capital] contribution.”²⁰²

146. Nonetheless, on the closing date for the STA, DRP caused Metaloroya to give nearly the entire USD 126.5 million capital contribution to Doe Run Mining as an interest-free USD 125 million loan. Doe Run Mining used that USD 125 million to repay more than half of the Acquisition Loan. In fact, the Acquisition Loan itself expressly provided for the same-

¹⁹⁸ **Exhibit R-284**, Assignment of Centromín’s Contractual Position to Activos Mineros, 19 March 2007

¹⁹⁹ See **Exhibit R-001**, STA & Renco Guaranty, clauses 2 and 3.3.

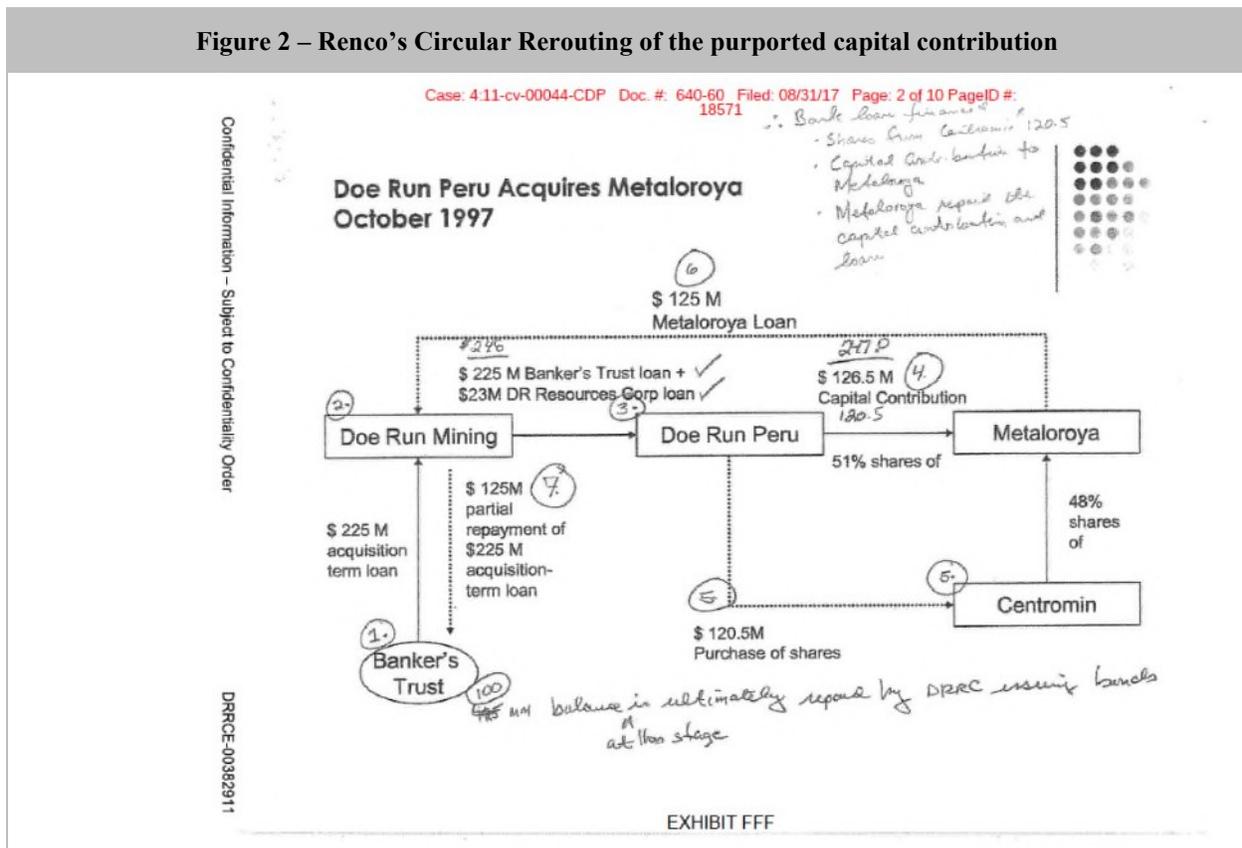
²⁰⁰ See **Exhibit R-095**, Credit Agreement between Doe Run Mining and Bankers Trust Company, 23 October 1997 (“**Acquisition Loan**”).

²⁰¹ **Exhibit R-001**, STA & Renco Guaranty, clause 4.1.

²⁰² **Exhibit R-001**, STA & Renco Guaranty, clause 4.5 (emphasis added).

day transaction.²⁰³ Renco directed these financing arrangements, as confirmed in sworn deposition testimony by DRRC executive Jeffrey Zelms.²⁰⁴

147. The following diagram from an internal DRP summary²⁰⁵ highlights Renco’s rerouting of the purported capital contribution—from the lenders to Doe Run Mining to DRP to Metaloroya, then from Metaloroya back to Doe Run Mining and to the lenders:



²⁰³ See [Exhibit R-095](#), Acquisition Loan, p. 45, clause 2.5(f) (“On the Closing Date, Metaloroya shall loan \$125,000,000 to the Borrower, which shall be represented by a Promissory Note and the Borrower shall apply 100% of the proceeds of such loans from Metaloroya to repay the Term Loans ...”). Doe Run Resources, Doe Run Mining’s immediate parent company, disclosed this financing arrangement in filings with the U.S. Securities and Exchange Commission. See, e.g., [Exhibit R-094](#), DRRC SEC Form S-4, PDF p. 31 (“Doe Run Mining has an intercompany payable due to DRP reflecting an interest free loan of \$125.0 million made by Metaloroya to Doe Run Mining on the closing date of the Acquisition. The proceeds of the intercompany payable were used to reduce the outstanding term loans obtained by Doe Run Mining ... to consummate the Acquisition.”).

²⁰⁴ [Exhibit R-091](#), Jeffrey Zelms Deposition (excerpts), Document No. 764-1, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 14 June 2017, pp. 161:1–14, 163:5–9.

²⁰⁵ [Exhibit R-068](#), DRP Intercompany Note: Summary of Facts, p. 2.

148. As a result of this transaction, Renco effectively reversed the capital contribution and erased more than half of its acquisition debt on the very day that DRP acquired the Facility. Ms. Kunsman summarizes in her report that these circular transactions

“immediately undercapitalized DRP [. . .], stressed DRP’s liquidity, and limited DRP’s ability to fund its Commitments. Had DRM not withdrawn the US\$125 million in “capital stock” from Metaloroya, DRP could have used the capital to begin fulfilling the PAMA Commitments.

[. . .]

the US\$ 126 million outflow – on Day 1 of operations – handicapped DRP’s ability to timely meet its PAMA Commitments. In short, DRM initiated a liquidity crisis from which DRP never recovered.”²⁰⁶

149. Indeed, this undercapitalization contributed to DRP’s repeated inability to meet PAMA obligations and to its ultimate bankruptcy, as detailed further below.

C. The Renco knew what needed to be done to meet its environmental obligations

150. When DRP acquired the Facility in 1997, a solid plan was in place for the new owner to modernize and reform the complex towards compliance with Peru’s environmental standards. Centromín had conducted evaluations of the environmental and public health situation,²⁰⁷ as well as technical engineering studies of ways to address the situation.²⁰⁸ Centromín prescribed a set of corrective projects for the Facility in the form of the PAMA.²⁰⁹ To the extent that the PAMA was insufficient to meet environmental standards, DRP was obligated to propose appropriate design modifications to ensure compliance. In addition to funding the design and implementation of all necessary projects timely complete the PAMA, DRP was obligated under the STA to spend a minimum of USD 125 million over five (5) years to modernize the Facility and implement the PAMA.²¹⁰

²⁰⁶ See Kunsman Expert Report, ¶¶ 136-137.

²⁰⁷ Exhibit C-108, Knight Piésold Report.

²⁰⁸ Exhibit R-267, SNC 1996 Report.

²⁰⁹ Exhibit C-090, Environmental Impact Program, La Oroya Metallurgical Complex, Centromín, 12 December 1996 (“PAMA 1996 Report”).

²¹⁰ Exhibit R-001, STA, clause 4.1.

151. Yet, rather than follow and improve on the path established by Centromín, Renco and DRP moved in the opposite direction. Renco extracted from DRP the capital that was meant for modernization and PAMA projects, and refused to replenish it. At the same time, DRP ramped up production and utilized inputs that were more polluting at the Facility, thereby *exacerbating* the environmental problems it had pledged to resolve. DRP then postponed internal deadlines for any costly projects that were aimed at achieving environmental, rather than commercial, objectives. When it failed to meet those delayed deadlines, DRP concocted excuses for its dilatory performance and twice received generous extensions from the government. Even still, DRP failed to uphold its environmental commitments and eventually went bankrupt.
152. In this section, Peru will explain how (i) Renco compromised DRP’s ability to meet its obligations (**Section II.C.1**); (ii) DRP adopted standards and practices that were less protective of the environment and human health than Centromín (**Section II.C.2**); and (iii) DRP failed to meet its environmental obligations under the PAMA by the established deadlines, despite receiving several extensions from Peru (**Section II.C.3**).

1. Renco compromised DRP’s ability to meet its obligations

- a. At the outset, Renco compromised DRP’s ability to meet its environmental and investment obligations

153. On the very day that the purchase of the Facility was concluded, DRP took nearly the entire USD 126.5 million capital contribution it was obligated to pay under the STA and gave it to Doe Run Mining in the form of an interest-free USD 125 million loan.²¹¹ With this financial sleight of hand, Doe Run Mining diverted funds that were contractually intended to fund DRP’s environmental and investment obligations; instead, Doe Run Mining used those funds to repay more than half of the Acquisition Loan used to finance the purchase.²¹²

²¹¹ See [Exhibit R-095](#), Acquisition Loan, p. 45, clause 2.5(f) (“On the Closing Date, Metaloroya shall loan \$125,000,000 to the Borrower, which shall be represented by a Promissory Note and the Borrower shall apply 100% of the proceeds of such loans from Metaloroya to repay the Term Loans ...”). Doe Run Resources, Doe Run Mining’s immediate parent company, disclosed this financing arrangement in filings with the U.S. Securities and Exchange Commission. See, e.g., [Exhibit R-094](#), DRRC SEC Form S-4, PDF p. 31 (“Doe Run Mining has an intercompany payable due to DRP reflecting an interest free loan of \$125.0 million made by Metaloroya to Doe Run Mining on the closing date of the Acquisition. The proceeds of the intercompany payable were used to reduce the outstanding term loans obtained by Doe Run Mining ... to consummate the Acquisition.”).

²¹² See [Exhibit R-095](#), Acquisition Loan, p. 45, clause 2.5(f); [Exhibit R-094](#), DRRC SEC Form S-4, PDF p. 31.

These transactions were made at the direction of Renco,²¹³ and while Renco enjoyed immediate benefits therefrom, DRP suffered the consequences. The depletion of DRP's capital at the outset compromised its ability to meet environmental and investment obligations in the years to come.

154. DRP was well aware of these adverse effects. For example, DRP's Treasurer, Eric Peitz, confirmed in sworn deposition testimony that the undercapitalization of DRP "from the outset" contributed to its ultimate bankruptcy:

"Q. So the undercapitalization from the outset of Doe Run Peru, in your experience in the finance department of this company[,] resulted in the ultimate bankruptcy of Doe Run Peru, correct?

[. . .]

A. [T]he lack of capitalization is one factor. However, it's *reasonably foreseeable* that the *disposition of Doe Run Peru today is a result* of some role that that lack of capitalization played.... So *if you start out undercapitalized, it's—it's pie in the sky to expect* that certain business conditions will change at a certain level *and that your results will be so good that you can make up a capital deficit.*"²¹⁴ (Emphasis added)

155. Mr. Peitz confirmed that DRP recognized its precarious condition, with adverse impacts on its ability to meet PAMA and other obligations—and even to remain viable as a going concern—*within its first year of acquiring the Facility*:

"Q. [A]s a result of this undercapitalization, was there difficulty with Doe Run Peru having sufficient funds to pay for environment—environmental improvements including modernizing the facility?

A. Yes.... [A]round August of 1998, I told Tony Worcester, who was managing the PAMA, Ken Hecker, and Ken Buckley that *we could not satisfy the obligations* that were imposed upon Doe Run Peru.... And we are going to have to decide which of these [various obligations, including PAMA] we can't do or aren't going to do in order to be—*in order to be viable as a going concern*....

²¹³ [Exhibit R-091](#), Jeffrey Zelms Deposition (excerpts), Document No. 764-1, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 14 June 2017, pp. 161:1–14, 163:5–9.

²¹⁴ [Exhibit R-067](#), Eric Peitz Deposition (excerpts), Document No. 764-6, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 27 July 2017, pp. 73:20–75:2; *see also id.*, p. 75:17–19 (confirming "decisions that were made that resulted in the capitalization only being \$2 million").

Q. And so you recognized these burdens on Doe Run Peru within just a few months after you started your role as treasurer, correct?

A. Yes.”²¹⁵ (Emphasis added)

156. Mr. Peitz’s observations in August 1998 were not well received. Kenneth Buckley, then DRP’s President and General Manager, was “upset” that Mr. Peitz had “exposed the situation,” and “wanted to know if I had provided this information to anyone else. He was upset that Carlota, his secretary, may have seen it. And, you know, obviously if she saw it, then the Peruvians would be concerned about the going concern issues.”²¹⁶ Indeed, Mr. Peitz, the DRP Treasurer, concluded that he “didn’t miss” the key financial burdens facing DRP, which—even in 1998—were as “*plain as an elephant in the room*” (emphasis added).²¹⁷

b. Renco further compromised DRP through a series of intercompany deals that benefitted Renco

157. Renco’s undercapitalization of DRP at the outset, by effectively reversing the capital contribution, was just the beginning. In the months and years that followed, Renco further compromised DRP through a series of intercompany deals that benefitted Renco, including burdening DRP with its own acquisition debt and other commitments, and sending significant cash payments upstream from DRP to Renco and its U.S. subsidiaries.

(i) Intercompany loan transactions

158. Renco burdened DRP with its own acquisition debt, among other damaging financial commitments and restrictions, through the following series of transactions:

a. **DRP gave nearly the entire USD 126.5 million capital contribution to Doe Run Mining as an interest-free USD 125 million loan.** A few weeks after the Facility acquisition, DRP was merged into Metaloroya. As a result, DRP became the

²¹⁵ Exhibit R-067, Eric Peitz Deposition (excerpts), Document No. 764-6, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 27 July 2017, pp. 78:6–78:17, 79:17–79:20, 80:19–22.

²¹⁶ Exhibit R-067, Eric Peitz Deposition (excerpts), Document No. 764-6, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 27 July 2017, pp. 79:21–80:5.

²¹⁷ Exhibit R-067, Eric Peitz Deposition (excerpts), Document No. 764-6, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 27 July 2017, p. 80:13–15.

creditor on the USD 125 million loan to Doe Run Mining (made using the purported capital contribution to Metaloroya).²¹⁸

- b. **DRP guaranteed Renco subsidiary’s junk bonds.** In March 1998, Renco subsidiary DRRC issued approximately USD 255 million in high-yield (*i.e.*, junk) bonds. Under the indenture governing the issuance, DRP was made to pledge all of its assets as a guarantor of the bond debt. As guarantor, DRP was subject to various additional covenants and restrictions, including that DRP was prohibited from incurring any other indebtedness unless subordinated to the guarantee, and could not enter into any revolving credit facility greater than USD 60 million.²¹⁹
- c. **Bond proceeds used to pay off Acquisition Loan and Doe Run Mining becomes indebted to DRRC.** Using proceeds from the junk bond issuance, DRRC loaned USD 125 million to Doe Run Mining, using an overseas bank —“Back-to-Back Loan”— as an intermediary.²²⁰ Doe Run Mining used those funds to repay the USD 100 million balance on the Acquisition Loan, plus other debt associated with the Facility acquisition. In effect, Doe Run Mining paid off the original third-party financing, but became indebted to DRRC for USD 125 million, plus over USD 14 million a year in interest.
- d. **DRP merged into Doe Run Mining.** DRP and Doe Run Mining were merged in 2001, with significant implications. First, the USD 125 million loan from DRP to Doe Run Mining was, in the words of an internal DRP document, simply “eliminated.”²²¹ This was the same USD 125 million that Peru had required in the

²¹⁸ See, e.g., [Exhibit R-068](#), DRP Intercompany Note: Summary of Facts, undated, pp. 3–4.

²¹⁹ See [Exhibit R-069](#), Indenture between DRRC and State Street Bank and Trust Company, 12 March 1998, p. 1, 15–16, 55–56; see also [Exhibit R-068](#), DRP Intercompany Note: Summary of Facts, undated, p. 6.

²²⁰ More specifically, DRRC opened a USD 125 million special term deposit at Banco de Credito Overseas Ltd., a bank incorporated in the Bahamas; [Exhibit R-070](#), Special Term Deposit Contract, 12 March 1998. Those funds were used to secure the USD 125 million Back-to-Back Loan from Banco de Credito Overseas Limited to Doe Run Mining; [Exhibit R-071](#), Contract for a Loan in Foreign Currency, 12 March 1998. The payment terms under the special term deposit and the Back-to-Back Loan were nearly identical.

²²¹ [Exhibit R-068](#), DRP Intercompany Note: Summary of Facts, undated, p. 7 (“The \$125 M Metaloroya loan to Doe Run Mining was eliminated in consolidation as a consequence of the merger between Doe Run Mining and Doe Run Peru.”).

form of a capital contribution.²²² With the elimination of the loan, that working capital would never be recovered. Second, DRP became the debtor on the Back-to-Back Loan, effectively saddling DRP with the outstanding debt from its own acquisition (*i.e.*, the acquisition of Metaloroya, since merged with DRP into one entity).²²³

- e. **DRP became directly indebted to DRRC.** In 2002, DRRC paid off the Back-to-Back loan, and DRP issued a subordinated promissory note to DRRC for the USD 125 million, now USD 139.1 million with accumulated interest.²²⁴ DRRC thus formally became DRP's creditor.
- f. **DRP's debt assigned to other Renco subsidiaries.** DRRC later assigned the USD 139.1 million promissory note to other Renco subsidiaries: to Doe Run Acquisition Corp. in February 2007, to Doe Run Cayman Holdings LLC in March 2007, and then to DRCL in [April 2009].²²⁵

159. The long-term consequences of these intercompany transactions and restructurings within the Renco corporate structure were significant, and included:
- a. DRP never recovered the USD 125 million that Peru had required as a contribution to the working capital of the Facility in order to meet business, regulatory, and investment needs.
 - b. DRP was substantially burdened, and faced onerous financial restrictions, as a guarantor on hundreds of millions of dollars of junk bonds issued by DRRC.

²²² **Exhibit R-001**, STA & Renco Guaranty, clause 4.5f (The STA specified that this investment “must be made necessarily with the [capital] contribution.”).

²²³ **Exhibit R-068**, DRP Intercompany Note: Summary of Facts, undated, p. 7.

²²⁴ See **Exhibit R-073**, Letter from Doe Run Company (J. Zelms) to Banco de Credito Overseas Ltd., 12 September 2002; **Exhibit R-072**, Subordinated Promissory Note, 12 September 2002; see also **Exhibit R-068**, DRP Intercompany Note: Summary of Facts, undated, p. 9.

²²⁵ See, e.g., **Exhibit R-068**, DRP Intercompany Note: Summary of Facts, undated, p. 10.

- c. DRP had sizeable obligations to various upstream entities, ultimately paying tens of millions of dollars in interest alone, on debt originating from its own acquisition.²²⁶
160. Early on, these and other adverse effects caused serious concerns among DRP executives and third-party lenders that DRP would be unable to meet its environmental and investment obligations, or even to remain viable as a going concern, as detailed below.
161. As summarized by Ms. Kunsman,
- “the circular transactions described above immediately undercapitalized DRP, made the newly combined entity a higher default risk to creditors by reducing collateral assets, stressed DRP’s liquidity, and limited DRP’s ability to fund its PAMA Commitments. Had DRM not withdrawn the US\$ 125 million in “capital stock” from Metaloroya, DRP could have used the capital to begin fulfilling the PAMA Commitments.”²²⁷
162. Years later, when DRP did fail as predicted, this same intercompany debt would serve as the basis for DRCL’s claim as a creditor in the DRP bankruptcy. That claim was challenged by another creditor, Consorcio Minero S.A. (“**Cormín**”), on the grounds that it arose from insider dealings in violation of Peruvian law, including the misuse of the capital contribution and the saddling of DRP with its own acquisition debt. It also led that creditor to request a criminal investigation into Renco’s insider dealings. Those bankruptcy and criminal proceedings are explained further below.
- (ii) Intercompany fee arrangements
163. Renco also bled DRP of cash through one-sided intercompany fee arrangements that benefitted Renco and its U.S. affiliates. These began on the same day of the Facility acquisition, and were formulated as agency, managerial, hedging, technical, and other agreements. For example, during the same October 1997 to March 1998 period in which DRP was made to shoulder the debt burdens described above, DRP entered into five such

²²⁶ See, e.g., [Exhibit R-088](#), Email from DRRC (G. Mard) to DRRC (D. Sadlowski and B. Neil) re Peru Payments, 22 December 2008 (“Attached is the activity in the long-term note account, which indicates receipt of interest of \$49,218,850. The combined total of cash received from Peru is \$125,390,157.”).

²²⁷ Kunsman Expert Report, ¶ 136.

intercompany fee agreements under which it paid over USD 70 million to upstream Renco entities in just the next three years:

Figure 3 – Examples of Intercompany Agreements

<i>Date</i>	<i>Parties</i>	<i>Title</i>	<i>Fees (Period)</i> ²²⁸
10/23/1997	DRP DRRC	Technical, Managerial and Professional Agreement	USD 3.8 million (10/1997-03/1998)
01/01/1998	DRP DRRC	Foreign Sales Agency & Hedging Services Agreement	USD 1.6 million (01/1998-03/1998)
03/09/1998	DRP Doe Run Mining	Technical, Managerial and Professional Agreement	USD 5.8 million (03/1998-10/1998) USD 10.15 million (10/1998-10/1999) USD 11.78 million (10/1999-10/2000)
03/09/1998	DRP DRRC	Foreign Sales Agency & Hedging Services Agreement	USD 6.8 million (03/1998-10/1998) USD 11.82 million (10/1998-10/1999) USD 13.07 million (10/1999-10/2000)
03/09/1998	DRP Doe Run Mining	Domestic Sales Agency Agreement	USD 2.3 million (03/1998-10/1998) USD 2.02 million (10/1998-10/1999) USD 1.59 million (10/1999-10/2000)

164. These were hardly arms-length transactions. The Technical, Managerial and Professional Agreement dated 9 March 1998, for example, was signed by Kenneth Buckley on behalf of both DRP and Doe Run Mining.²²⁹ Various other agreements likewise were signed by one executive on behalf of both counterparties. Mr. Buckley, who executed a number of these agreements on behalf of DRP and other parties, stated in sworn deposition testimony

²²⁸ See, e.g., [Exhibit R-074](#), DRP Financial Statements, as of 31 October 2000 and 1999, pp. 16–18 (addressing “Related party transactions”).

²²⁹ [Exhibit R-075](#), Technical, Managerial and Professional Services Agreement between Doe Run Mining S.R. Ltda. and DRP, 9 March 1998, p. 6.

that he “ha[d] no idea” whether any due diligence was conducted to determine the fees involved; nor could he identify who drafted the agreements, whether they were negotiated between the parties, how the terms were agreed upon, or who made the decision to enter into them.²³⁰

165. All the more striking is that DRP paid tens of millions of dollars to Doe Run Mining under these service agreements—even though *Doe Run Mining was an intermediary shell company that had no office or employees, and offered no services*. Mr. Buckley, who could not even identify why Doe Run Mining was established or anything he might have done as its General Manager, confirmed in deposition testimony:

“Q. Doe Run Mining didn’t really have any operations that were separate and apart from –

A. Absolutely not. They had no operation.

Q. All right. And you didn’t have a staff that reported to you when you were general manager of Doe Run Mining?

A. No.

Q. And I presume you didn’t have a separate office that was your office for purposes of serving as general manager of Doe Run Mining?

A. No.”²³¹

166. Because Doe Run Mining had no actual services to offer under the service agreements, it appears to have entered into duplicative agreements with DRRC to provide them. For example, when Mr. Buckley signed the 9 March 1998 Technical, Managerial and Professional Agreement on behalf of both DRP and Doe Run Mining, he also signed at

²³⁰ See, e.g., **Exhibit R-076**, Kenneth Richard Buckley Deposition (excerpts), Document No. 764-5, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 9 June 2017, pp. 128, 131–136.

²³¹ **Exhibit R-076**, Kenneth Richard Buckley Deposition (excerpts), Document No. 764-5, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 9 June 2017, p. 34:6–16 (emphasis added); see also *id.*, pp. 33:16–34:5 (“[T]here was a company called Doe Run Mining, and I was general manager of that, which, frankly, I don’t recall being involved in anything other than being general manager, and it was a company that was set up—Frankly, I don’t recall what it was set up for I didn’t do anything for Doe Run Mining. I was just general manager of that company.”); **Exhibit R-077**, Marvin Kaiser Deposition (excerpts), Document No. 764-3, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 28 June 2017, p. 60:1–3 (“Q. Did Doe Run Mining actually have any employees or offices? A. I don’t believe so.”).

least four other agreements with DRRC on the same day—providing for millions of additional dollars in fees from DRP to Doe Run Mining, and from Doe Run Mining to DRRC—to provide the same services.²³² These overlapping agreements expressly provided that they were meant to give Doe Run Mining “access to professional, technical and managerial services not otherwise present in” Doe Run Mining, “in order for [Doe Run Mining] to better perform its obligations” under the agreement with DRP.²³³

167. Indeed, in the decade following the Facility acquisition, DRP sent over USD 125 million upstream from Peru to U.S. Renco affiliates in loan interest, fees for purported services, and other payments. An internal DRRC email confirms that, for that period, “[t]he combined total of cash received from Peru is USD 125,390,157.”²³⁴ In this way, Renco stripped out another USD 125 million from DRP—*on top of the* USD 125 million, required as a capital contribution in the privatization, which Renco clawed back to repay half of the Acquisition Loan and which “disappeared.” Ms. Kunsman opines in her report that if Doe Run Mining had not taken DRP’s original capital contribution, and if DRP had not been forced to make intercompany payments, “these two outflows groups alone could have satisfied approximately 68.8% of DRP’s PAMA Commitments.”²³⁵
168. Together, these corporate machinations driven by Renco set up DRP to fail—well before any alleged measure by Peru or the 2008–2009 financial crisis.

²³² See, e.g., [Exhibit R-075](#), Technical, Managerial and Professional Services Agreement between Doe Run Mining S.R. Ltda. and DRP, 9 March 1998, p. 1; [Exhibit R-078](#), United States Services Agreement between DRRC and Doe Run Mining S.R. Ltda., 9 March 1998; [Exhibit R-079](#), Professional Services Agreement for Services Partially Within and Partially Outside of Peru between DRRC and Doe Run Mining S.R. Ltda., 9 March 1998; [Exhibit R-080](#), Technology Assistance Agreement between DRRC and Doe Run Mining S.R. Ltda., 9 March 1998.

²³³ See, e.g., [Exhibit R-075](#), Technical, Managerial and Professional Services Agreement between Doe Run Mining S.R. Ltda. and DRP, 9 March 1998, p. 1; see also [Exhibit R-079](#), Professional Services Agreement for Services Partially Within and Partially Outside of Peru between DRRC and Doe Run Mining S.R. Ltda., 9 March 1998, p. 7 (Addendum Exhibit A) (“The Services to be provided by Doe Run include assisting [Doe Run Mining] as needed to perform, in Peru, all of the following services provided by [Doe Run Mining] under the Peru Agreement, as needed from time to time and to the extent that [Doe Run Mining] requires additional services and cannot perform the same with its own personnel.”).

²³⁴ [Exhibit R-088](#), Email from DRRC (G. Mard) to DRRC (D. Sadlowski and B. Neil) re Peru Payments, 22 December 2008; see also [Exhibit R-082](#), Spreadsheet, Peru Intercompany, 1998–2007.

²³⁵ Kunsman Expert Report, ¶ 81.

- c. DRP executives, auditors, and banks repeatedly raised concerns about DRP’s viability

169. The negative ramifications DRP suffered from the intercompany deals benefitting the U.S. Renco entities were evident for years. DRP’s own documents are replete with warnings by DRP executives, auditors, financial experts, and banks alerting stakeholders that the business model was fundamentally flawed and threatened DRP’s ability to meet its obligations or even to remain a going concern. Many such instances have since been revealed in the Missouri Litigations, even in the limited part of the record available to the public. A few select examples are addressed below.
170. As noted, in August 1998, DRP Treasurer Eric Peitz warned that DRP “could not satisfy the obligations that were imposed upon” it, and would need to decide which obligations “we can’t do or aren’t going to do in order to be—in order to be viable as a going concern.”²³⁶
171. At that time (in 1998), Kenneth Buckley, the president and general manager of DRP,²³⁷ was “upset” that Mr. Peitz had “exposed the situation.”²³⁸ But by September 2000, Mr. Buckley too was sounding the alarm. In a memo to Jeffrey Zelms, President/CEO of DRRC, Mr. Buckley conveyed that DRP faced serious problems, including threats related to the reversal of the capital contribution and large upstream payments:

“The time for ‘business as usual’ is over. Doe Run’s situation is deteriorating, Renco is not coming to the rescue, and we must act immediately to preserve our options.

Doe Run’s business model—100% debt financing—is flawed DRP, for example, has financed all of its purchase price, embarked on a major capital investment program, and sent large intercompany payments north. That is simply not a reasonable expectation, and we are unaware of any company, in any industry, that has managed a similar feat.... The system isn’t working....

²³⁶ Exhibit R-067, Eric Peitz Deposition (excerpts), Document No. 764-6, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 27 July 2017, pp. 78:5–79:20.

²³⁷ See Witness Statement of Kenneth Buckley, ¶ 3.

²³⁸ Exhibit R-067, Eric Peitz Deposition (excerpts), Document No. 764-6, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 27 July 2017, pp. 79:21–80:5.

The handling of the \$125 million capital contribution when La Oroya was purchased in 1997 has created a potentially difficult situation in light of DRP's current liquidity problems....

Present a less optimistic perspective to the bondholders and to Ira [Rennert]. We should tell them that ***business is not good, and that Doe Run's future is very much in doubt.***²³⁹ (Emphasis added)

172. That assessment was echoed by a number of banks. In June 2000, for example, Credit Lyonnais wrote to Marvin Kaiser, Vice President of Finance for DRRC:

“[N]eed to see something change in the company's cash flow, otherwise, we will have a tough time in getting the deal through. DRP pays nearly US\$40mln each year directly and indirectly to DRR, directly to DRM and Bco. Credito. ***These payments are channeled through several agency, technical and managerial fees; plus constant intercompany lending to DRM;*** although the ultimate objective is to pay for the original cost of funding the Metal Oroya purchase. ***DRP cash flow generation can not sustain the continuation of this money transfer***²⁴⁰ (Emphasis added)

173. By no later than 2001, DRP's auditors had concluded that the company “faces liquidity issues that raise substantial doubt about its ability to continue as going concern.”²⁴¹ Assessing DRP's financials as of 2003, DRP's auditors again highlighted:

“[T]he Company has jointly and severally, fully, unconditionally guaranteed notes issued by Doe Run Resources. Also, the Company has suffered recurring losses and has a net capital deficiency. These conditions, along with other matters [including investment commitments, PAMA commitments, and the guarantee on Doe Run Resources' debt] indicate ***the existence of material uncertainties that raise substantial doubt about its ability to continue as going concern.***²⁴² (Emphasis added)

²³⁹ [Exhibit R-085](#), Memorandum from DRP (J. Zelms), 4 September 2000, p. 4.

²⁴⁰ [Exhibit R-083](#), Email from Credit Lyonnais (A. Corvalan) to M. Kaiser, 30 June 2000; *see also* [Exhibit R-084](#), Email from Credit Lyonnais (A. Corvalan) to DRP (Eric Peitz), 4 July 2000 (“The most critical aspect of the projections is that the level of operating and interest expenses DRP is financing for the other two companies (DRR and DRM) is so high, that—unless something major changes soon—DRP by the end of this year may have consumed all the cash it can generate both internally and externally (via borrowings). As you can imagine, it would be rather difficult to present a credit proposal with that forecast in our hands.”).

²⁴¹ [Exhibit R-086](#), DRP Combined Financial Statements, as of 31 October 2001 and 2000, p. 2 (KPMG Independent Auditor's Report, 5 December 2001).

²⁴² [Exhibit R-087](#), DRP Financial Statements, as of 31 October 2003 and 2002, p. 2 (KPMG Independent Auditor's Report, 4 February 2004).

174. Years later, nothing had changed. In August 2005, DRP Treasurer Mr. Peitz again “sounded the alarm” —seven years after his first attempt—including with respect to the guarantee and the upstream payments to U.S. entities:

“If ‘everyone’ (Rothschild, BCP, BBVA, Auditors, etc.) are saying one thing and we hold to another position, maybe it’s the ‘everyone’ that has it right. On a related point, we are having trouble putting together a workable 2006 budget.... *I sounded the alarm in writing in August 1998 and it did nothing but discredit me with management....* Aside from the fact that the Company’s capital was drained, its current [sic] earning power is not strong enough to cover its costs. *I say again, drastic measures need to be taken.*²⁴³ (Emphasis added)

With both companies [DRP and Doe Run Resources] in volatile waters, DRR, a non-swimmer, has been clinging to DRP. The two may need to swim separately.... The sponsors have only invested \$2 million in DRP and DRP has sent some \$125 million to the US over a period of six years. *Expectations need to be managed.*²⁴⁴ (Emphasis added)

175. In the fall of 2005, DRP again reached out to banks in an effort to raise financing. Pierre Larroque, apparently an outside financial strategist, was hired to assist. Banks did not want to finance the PAMA projects alone, but did express interest in a larger modernization program for the Facility that would lead to long-term value creation. In an October 2005 report transmitted to Ira Rennert, Mr. Larroque concluded, inter alia (all emphases are original to the report):

“DRP needs to raise debt to fund the remaining \$102 million PAMA investment.... The Banks will not fund the PAMA alone, no debt service capacity. The Banks however appear ready to fund the \$310 million PAMA and Modernization Program because of demonstrably high value creation....

The consequences of not taking advantage of this window of opportunity are clearly severe, for all....

Existing Liens and Negative Pledges on Doe Run Peru’s assets. *This now needs to be resolved as a priority.* No Bank will proceed with arranging financing for Doe Run Peru until it is assured that adequate collateral will be available to back up the new Facility. *If they want Doe Run Peru to have access to the Financing, Renco and*

²⁴³ Exhibit R-089, Email chain between DRRC to DRP, 30 August and 28 December 2005, pp. 4–5.

²⁴⁴ Exhibit R-089, Email chain between DRRC to DRP, 30 August and 28 December 2005, p. 4.

the Note Holders will have to agree that the new lenders have first and unencumbered access to Doe Run Peru's cash and assets....

The PAMA and Modernization Program clearly shows attractive enough returns for all parties to benefit from its implementation.

*Conversely, not letting DRP proceed with this Program involves the taking of likely significant risks with the future of the company....*²⁴⁵ (Emphasis in original)

176. Despite the stark assessments provided by various DRP executives, auditors, financial experts and institutions, and others, Renco did not approve the modernization program. Even when Mr. Larroque communicated a commitment from at least one bank, Mr. Zelms was unable to convince Renco—more specifically, Ira Rennert personally—to proceed.²⁴⁶
177. Indeed, rather than address the concerns that had been raised with respect to the intercompany loans, fees, and guarantees, Renco continued with business as usual, siphoning ever more funds out of DRP. This is highlighted, to provide just one example, by an episode in December 2005, when DRRC demanded that DRP wire it an additional USD 1 million, plus USD 333,000 every month following. Once again, DRP raised concerns about the impact of such upstream payments on its own finances and PAMA obligations:

“The budget was not planned in that way, as you know, we are trying to build enough cash to comply with the MEM requirement = \$20MM guarantee for the PAMA.... *[T]he priority was to comply with the PAMA and allow DRP to continue working. Increasing*

²⁴⁵ **Exhibit R-090**, Email from DRRC (J. Zelms) to Renco Group (I. Rennert), attaching the Pierre Larroque Report on Peru Financing Status, 19 October 2005, pp. 2, 4.

²⁴⁶ **Exhibit R-091**, Jeffrey Zelms Deposition (excerpts), Document No. 764-1, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 14 June 2017, pp. 305:11–308:25 (“Q. Well, you go on to write [in response], Now we need ammunition to—to convince Renco; is that right? A. Sure. Sure. Q. All right. And you’re talking about Mr. Rennert there? A. Well, it’s Renco. I must be. Q. Okay. Renco and Rennert are pretty much the same thing; is that right? A. That’s why it’s called Renco. Q. All right. Because he owns the company? A. Because it—Rennert Company. Q. And so the point here is that you are stating that now we need the ammo to convince Renco to go—to approve this financing agreement that BNP has proposed for modernizing the La Oroya complex and the PAMA extension? A. That’s what it says. Q. All right. And in fact, that financing was never obtained to do the modernization program that was being discussed in late 2005; correct? A. It wasn’t? I don’t know. Q. Okay. I’ll represent to you it wasn’t.”).

*your liquidity is obviously reducing our liquidity, and is putting in danger the objective to extend the PAMA.”*²⁴⁷ (Emphasis added)

178. That same day, and without addressing the concerns raised, DRRC sent a one-line response: “[P]lease have the [USD] 333[,000] sent the first working day of Jan.”²⁴⁸
179. Over the years, DRP continued to raise significant concerns about its dire financial condition—including, among other examples, further warnings by DRP’s Treasurer Mr. Peitz. For example, in a March 2006 email to Bruce Neil attaching DRP’s cash flow projections from 2006 to 2010, Mr. Peitz sounded the following alarm: “Please note that the cash flow is not sufficient to support PAMA, sustaining CAPEX, and the reactor. *We run out of money in 2007*”²⁴⁹ (emphasis added). On 30 March 2006 Mr. Peitz also warned that “[t]he company has to stop spending money like it grows on trees.”²⁵⁰
180. The warnings went unheeded. Renco continued to drain cash out of DRP and push it directly along the path to bankruptcy. Renco exacted the financial bloodletting of DRP years before the global financial crisis or the 2009 Peruvian measure.

2. DRP adopted standards and practices that were less protective of the environment and human health than Centromín

181. DRP adopted policies that exacerbated the environmental crisis in La Oroya, even though the State had privatized the Facility for the purpose of improving the smelter’s environmental performance. Immediately upon acquiring the Facility, DRP ramped up production while introducing cheaper and dirtier crude metal concentrates into the smelter. These actions increased emissions of harmful pollutants, which damaged the environment and human health in and around La Oroya.
182. In 1997, production of refined lead hit an all-time high, reflecting DRP’s choice to increase production from day one.²⁵¹ DRP would go on to break its own record every year from

²⁴⁷ **Exhibit R-089**, Email chain between DRRC to DRP, 30 August and 28 December 2005, p. 1.

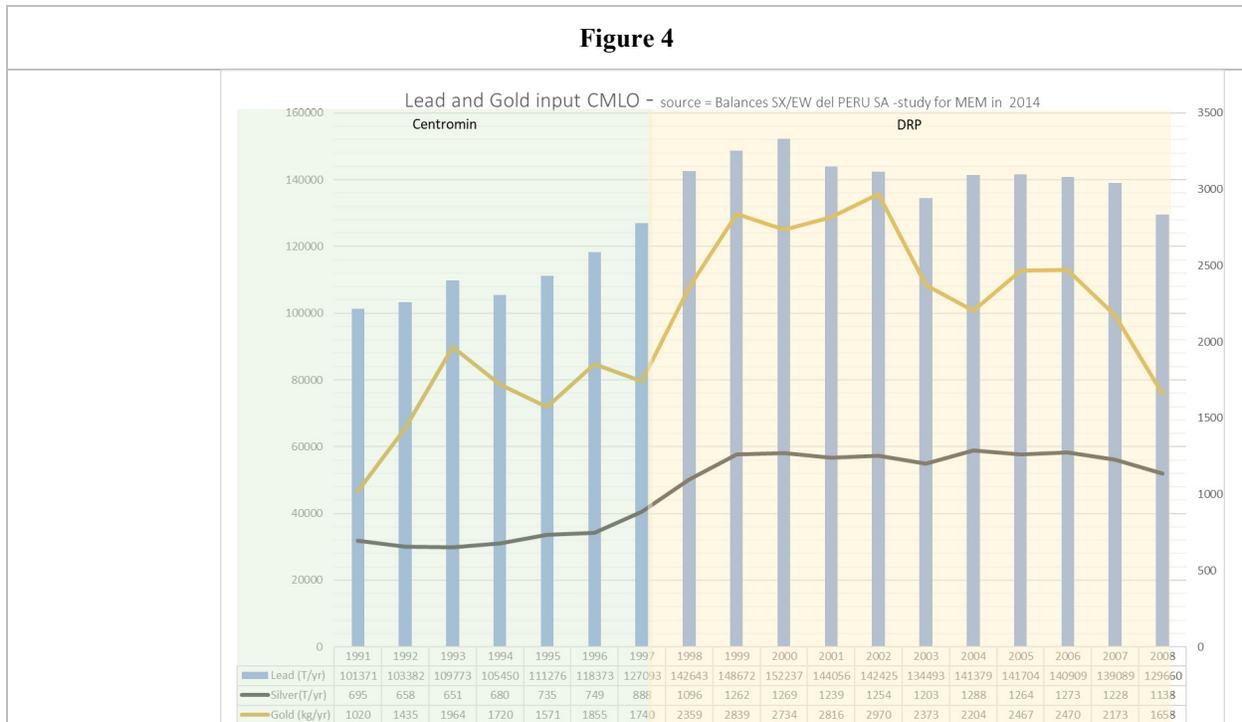
²⁴⁸ **Exhibit R-089**, Email chain between DRRC to DRP, 30 August and 28 December 2005, p. 1.

²⁴⁹ **Exhibit R-092**, Email from DRP (E. Peitz) to DRRC (B. Neil), 13 March 2006, p. 1.

²⁵⁰ **Exhibit R-093**, Email from DRP (E. Peitz) to DRRC (B. Neil), 30 March 2006, p. 1; *see also id.* (“How financial decisions are made without my involvement is strange to me but this is the subject of another topic that has concerned me for some time and cuts to whether the management team in Peru is a management team in form or substance.”).

²⁵¹ Dobbelaere Expert Report, § IX.

1998 to 2000.²⁵² Over the full period of DRP’s operations, the amount of lead introduced into the Facility annually increased by 28.5%, while the sulfur content increased by 2.8% and the arsenic content increased by 10.5%.²⁵³ As pyro-metallurgy expert Wim Dobbelaere explains, given that DRP did not implement any meaningful emissions controls for eight years, any increases in production would have caused a commensurate increase in emissions.²⁵⁴



183. Smelters like the La Oroya Facility process metallic concentrates. Upon taking over operations at la Oroya, DRP sold off the Facility’s stockpile of concentrate and, in addition to increasing production, began to import dirtier concentrates (*i.e.*, concentrates with elevated levels of impurities) from both domestic and international sources that no other smelter would process.²⁵⁵ DRP’s use of these dirty concentrates increased the

²⁵² Dobbelaere Expert Report, § IX.

²⁵³ Dobbelaere Expert Report, § IX.

²⁵⁴ Dobbelaere Expert Report, § IX.

²⁵⁵ **Exhibit R-236**, *Prespectivas de reestructuración del Complejo Metalúrgico de La Oroya mediante un análisis ambiental y económico*, Alfredo Mediola *et al.*, Esan Ediciones, 2017 (“**2017 ESAN Report**”), p. 138.

concentration of harmful substances in the Facility’s emissions. Mr. Dobbelaere explains that the new copper concentrates contained more impurities than did Centromín’s concentrates.²⁵⁶ DRP’s use of these concentrates thus increased the Facility’s emissions of various contaminants.²⁵⁷

184. DRP’s increase in production and use of dirtier concentrates were direct consequences of Claimant’s strategy for DRP, which DRRC set out in its 1999 Securities and Exchange Commission (“SEC”) filing in the United States.²⁵⁸ In its filing, DRRC announced that it would seek to maximize profits in the initial years of owning the Facility by increasing lead production and looking for more “interesting complex concentrates.”²⁵⁹ In keeping with this strategy, DRP immediately modified the PAMA such that it could meet its “environmental requirements with the minimum capital expenditure,” limiting environmental spending to “the minimum amount permitted to fulfill” DRP’s legal obligations.²⁶⁰
185. DRP abandoned Centromín’s modernization plan immediately upon acquiring the Facility.²⁶¹ DRP attempted to implement the PAMA without upgrading the copper and lead smelting technology, a grievous decision that the company later reversed in 2005.²⁶² This not only caused DRP to delay its implementation of the PAMA, but it also meant that the copper and lead circuits would continue to operate using outdated smelters that polluted at much higher rates than the new technology.²⁶³ As a result, those circuit’s emissions, which were already extreme, continued unabated for years.²⁶⁴
186. Meanwhile, DRP implemented minimum emissions controls that were not sufficient to offset the effects of increased production. In Section XI of his report, Mr. Dobbelaere

²⁵⁶ Dobbelaere Expert Report, § IX.A.

²⁵⁷ Dobbelaere Expert Report, §§ IX.A-C.

²⁵⁸ [Exhibit R-094](#), DRRC SEC Form S-4, PDF pp. 20, 126.

²⁵⁹ [Exhibit R-094](#), DRRC SEC Form S-4, PDF pp. 20, 126.

²⁶⁰ [Exhibit WD-015](#), 10 Year Master Plan Report, Fluor Daniel, September 1998, pp. 8, 16.

²⁶¹ Dobbelaere Expert Report, ¶¶ 76–79. *See also*, Dobbelaere Expert Report, §§ VI, X.

²⁶² Dobbelaere Expert Report, ¶¶ 76–79. *See also*, Dobbelaere Expert Report, §§ VI, X.

²⁶³ Dobbelaere Expert Report, ¶¶ 76–79.

²⁶⁴ Dobbelaere Expert Report, ¶¶ 76-79. *See also*, Dobbelaere Expert Report, §§ VI, X.

evaluates in detail each of the projects DRP undertook to control emissions. Mr. Dobbelaere concludes that DRP took *no* meaningful actions to abate emissions until 2006.²⁶⁵

187. Multiple studies later revealed that DRP's operations exacerbated the air quality crisis in La Oroya. These studies showed that levels of contamination had increased well beyond levels in 1996, when the Facility's PAMA was adopted, and that those increases were attributable to DRP's operating practices. For example:

- In November 2001, the State organized a technical commission to study air quality in La Oroya. The commission investigated the sources of contamination in the city and concluded in 2004 that 99% of the air contamination was caused by the Facility. Among the main toxic emissions were sulfur dioxide, lead, arsenic, and cadmium.²⁶⁶ The commission analyzed air monitoring reports and found that sulfur dioxide concentrations frequently exceeded the maximum level allowed by Peruvian environmental standards.²⁶⁷
- In 2002, a consultant retained by the MEM conducted an audit of the Facility to monitor DRP's compliance with its environmental obligations. The consultant reported that the smelter was not meeting its PAMA commitments because the ambient air concentrations at most of the monitoring stations grossly exceeded the LMPs for lead and sulfur dioxide.²⁶⁸
- The following year, another inspection established the link between DRP's increased production and increased emissions. It found that the amount of raw material fed into the lead circuit had risen by 11% under DRP; which translated into increases in the amount of lead, arsenic, and sulfur fed into the circuit of 27%, 59%, and 7%, respectively.²⁶⁹ The MEM documented that, as of 2004, sulfur dioxide emissions had increased 8-9% relative to emissions in 1995.²⁷⁰

²⁶⁵ Dobbelaere Expert Report, § XI.

²⁶⁶ **Exhibit R-210**, *Diagnostico de linea de base de calidad del aire de La Oroya*, CONAM (EDICIÓN GRÁFICA INDUSTRIAL IERL), December 2004, p. 55. See also **Exhibit C-096**, Action Plan to Improve the Air Quality and Health of La Oroya, Gesta Zonal del Aire de La Oroya, 1 March 2006; **Exhibit R-142**, Action Plan to Improve the Air Quality of the Atmospheric Basin of La Oroya, CONAM, 2006.

²⁶⁷ **Exhibit R-148**, Sulfur dioxide levels in La Oroya: Historical analysis and perspectives, REVISTA DEL INSTITUTO DE INVESTIGACIONES FIGMMG, 29 December 2009, PDF p. 1.

²⁶⁸ **Exhibit R-165**, Jack V. Matson Expert Report, Document No. 1242-38, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 1 December 2020, p. 12.

²⁶⁹ See **Exhibit R-149**, Report No. 056-2006-MEM-DGM-FMI/MA, 19 January 2006, p. 10.

²⁷⁰ See **Exhibit R-149**, Report No. 056-2006-MEM-DGM-FMI/MA, 19 January 2006, p. 10.

- In 2005, an environmental audit found that the dissolved arsenic and zinc in some metallurgical effluents exceeded the LMPs, and the total concentrations of lead, zinc and arsenic exceeded permissible levels.²⁷¹
 - In 2006, the MEM’s external auditor detected that DRP had failed to comply with the parameters established for LMPs and ECAs and ordered DRP to adopt immediate mitigation measures.²⁷² According to the auditor’s report, DRP discharged effluents into the Mantaro River with lead, zinc and arsenic concentrations that exceeded the established LMPs.²⁷³ Additionally, the levels of lead and SO₂ that DRP emitted into the atmosphere did not comply with either the LMPs or the ECAs.²⁷⁴
188. Notwithstanding the above, DRP claimed that emissions had decreased during its operation of the Facility.²⁷⁵ This claim did not comport with data that showed that DRP had dramatically increased lead production in the Facility.²⁷⁶ This discrepancy raised concerns about the accuracy of DRP’s reporting. DRP’s reporting of lead emissions in particular was later challenged by independent consultants engaged by Right Business (DRP’s bankruptcy administrator), who reviewed all available reporting and production data and found that total lead emissions had increased dramatically after DRP acquired the Facility, and the fugitive emissions—which are the most environmentally harmful source of emissions—increased by an astonishing 73% during the PAMA Period.²⁷⁷ The same consultants found that concentrations of lead in ambient air worsened between 1997 and 2007 (after DRP had implemented emissions controls).²⁷⁸

²⁷¹ See [Exhibit R-149](#), Report No. 056-2006-MEM-DGM-FMI/MA, 19 January 2006, p. 11.

²⁷² [Exhibit R-194](#), Report No. 089-2006-MEM-DGM-FMI/MA, 1 February 2006, ¶¶ 3.2–3.4; [Exhibit R-149](#), Report No. 056-2006-MEM-DGM-FMI/MA, 19 January 2006, p. 7. See also, Isasi Witness Statement, ¶ 21.

²⁷³ [Exhibit R-194](#), Report No. 089-2006-MEM-DGM-FMI/MA, 1 February 2006, ¶¶ 3.2–3.4.

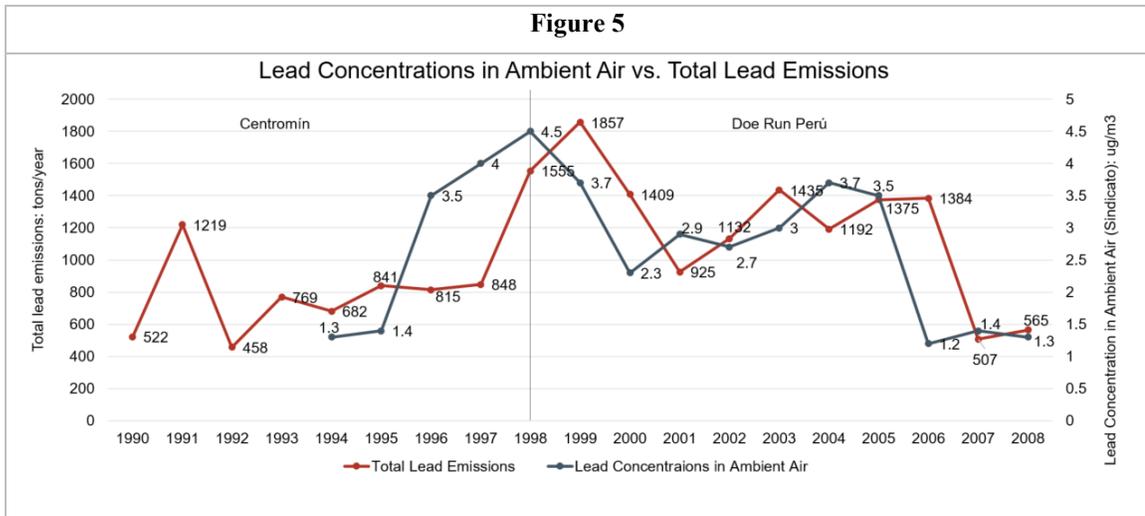
²⁷⁴ [Exhibit R-194](#), Report No. 089-2006-MEM-DGM-FMI/MA, 1 February 2006, ¶¶ 3.2–3.4.

²⁷⁵ [Exhibit R-150](#), Assessment of Lead Loss from the La Oroya Metallurgical Complex and Environmental Contamination (Volume I), January 2013, pp. 17–18.

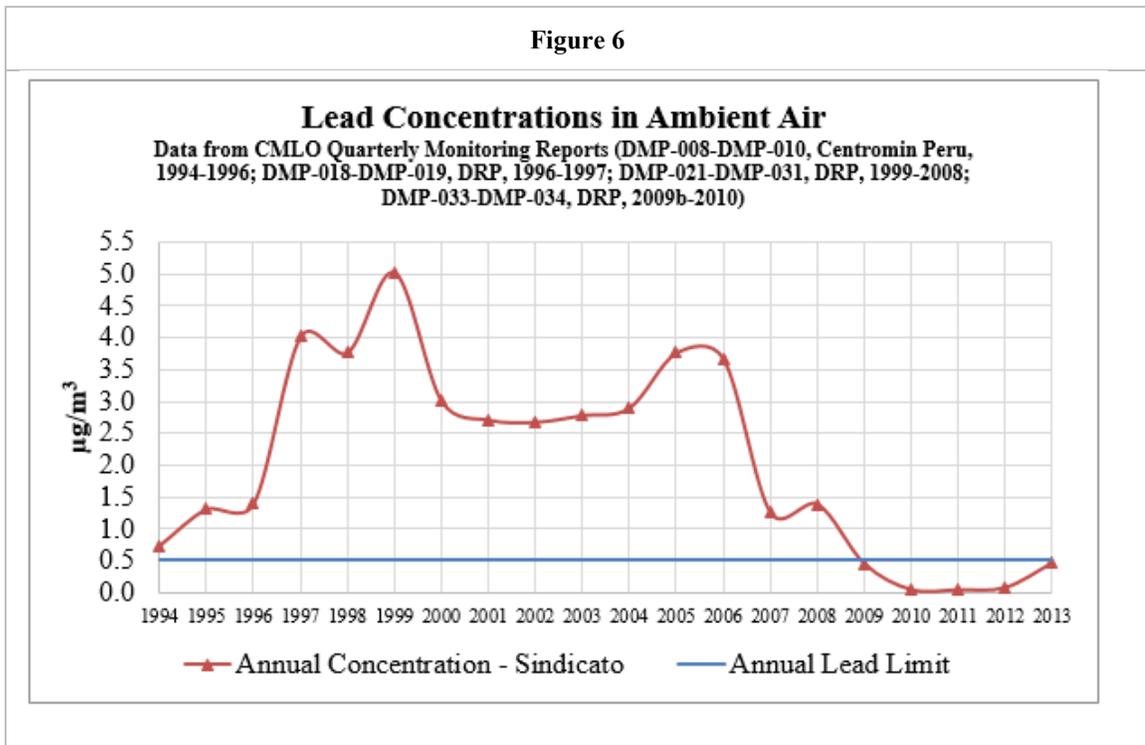
²⁷⁶ [Exhibit R-150](#), Assessment of Lead Loss from the La Oroya Metallurgical Complex and Environmental Contamination (Volume I), January 2013, pp. 17–18.

²⁷⁷ [Exhibit R-150](#), Assessment of Lead Loss from the La Oroya Metallurgical Complex and Environmental Contamination (Volume I), January 2013, pp. 30-31.

²⁷⁸ [Exhibit R-150](#), Assessment of Lead Loss from the La Oroya Metallurgical Complex and Environmental Contamination (Volume I), January 2013, p. 28.



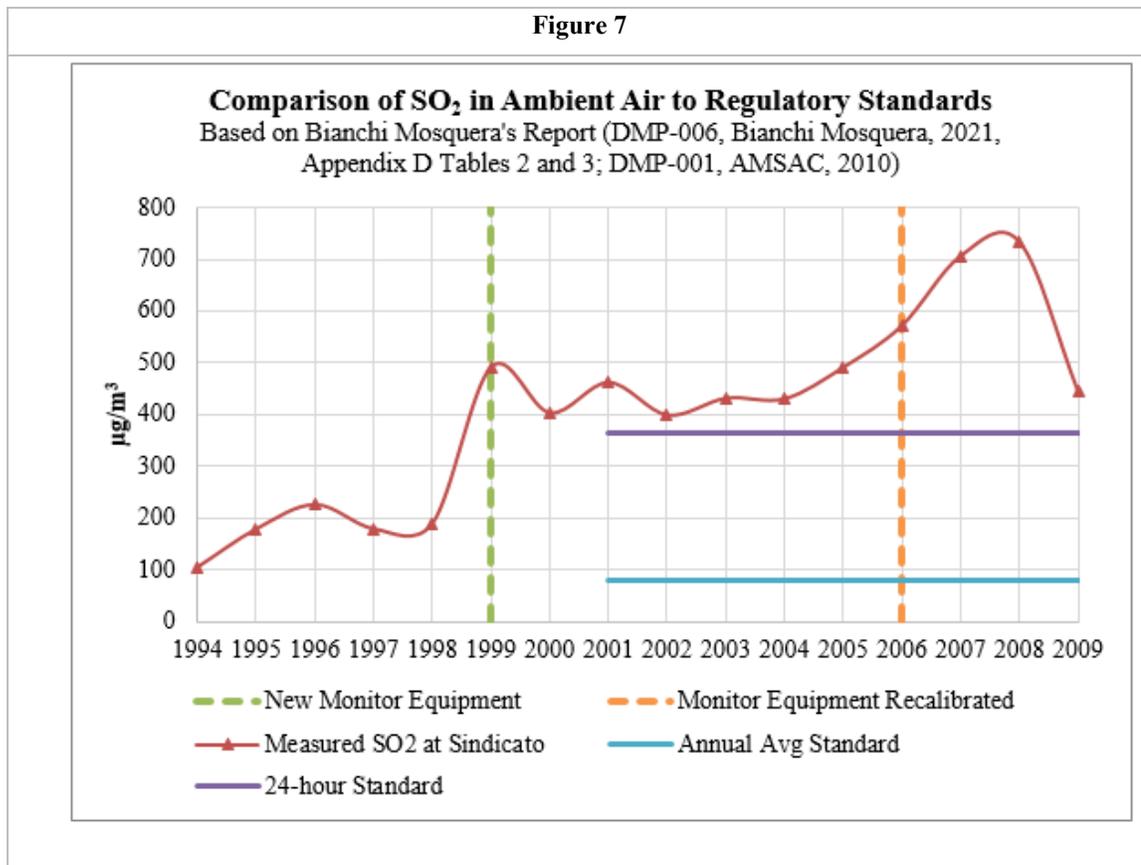
189. Pyrometallurgy expert Wim Dobbelaere’s own analysis of the Facility’s production data shows that lead emissions dramatically increased after DRP acquired the Facility.²⁷⁹ Likewise, toxicologist Deborah Proctor’s analysis of air quality monitoring data confirms that DRP worsened the health crisis in La Oroya by pumping more lead and SO₂ into the environment.²⁸⁰



²⁷⁹ Dobbelaere Expert Report, §§ IX.B-IX.C.

²⁸⁰ Proctor Expert Report, pp. 31, 36.

Figure 7



190. In late 2005, the MEM criticized DRP's method of monitoring particulate matter emissions, noting that it did not comport with best practices, as established by the United States Environmental Protection Agency's ("EPA") so-called "Method 5".²⁸¹ As a result, DRP's monitoring equipment failed to capture SO₂ emissions that measured above 6,002 ug/m³.²⁸² DRP also failed to monitor particulate matter in chimneys using the Method 5 isokinetic sampling.²⁸³ DRP's poor monitoring practices mean that the Facility's emissions may have been higher than reflected in the monitoring reports.
191. The above findings show that DRP's operations breached the applicable Peruvian environmental standards. As explained in **Section II.A**, in accordance with the 1997 Stability Agreement, DRP was allowed to operate the Facility according to 1996 LMPs

²⁸¹ See [Exhibit R-149](#), Report No. 056-2006-MEM-DGM-FMI/MA, 19 January 2006, p. 11, ¶ 6.10.

²⁸² See [Exhibit R-149](#), Report No. 056-2006-MEM-DGM-FMI/MA, 19 January 2006, p. 11, ¶ 6.10.

²⁸³ See [Exhibit R-149](#), Report No. 056-2006-MEM-DGM-FMI/MA, 19 January 2006, p. 11, ¶ 6.10.

and ECAs until the end of the ten-year PAMA Period,²⁸⁴ after which it would be required to comply with the more current standards set in 2001 (and later, in 2008). Even still, DRP failed to comply with the applicable standards.²⁸⁵ Naturally, air quality markedly improved once the Facility shut down.²⁸⁶ The incidence of adverse health impacts from the Facility's operations also decreased, as discussed in **Section II.D**, below.²⁸⁷ These improvements illustrated that the health impacts caused by the Facility's emissions stemmed from DRP's contemporaneous emissions, not Centromín's historical emissions.²⁸⁸

3. DRP failed to complete the Sulfuric Acid Plant Project by the established deadlines, despite receiving several extensions from Peru

192. DRP acquired the Facility with a timeline already in place to swiftly address the Facility's environmental footprint and bring it into compliance with Peru's emissions standards. Rather than comply with that timeline, DRP delayed. It postponed internal deadlines for the Sulfuric Acid Plant Project, which comprised the majority of the expected total investment. After years of making no meaningful progress on that project, DRP concocted excuses for its delays and demanded that the MEM extend the project's legal deadline, lest the company be forced to close the Facility. Eventually, DRP ran out of time—already years past the expiry of the PAMA Period, it ceased operations and requested another unwarranted extension in 2009, which Peru granted in a final effort to help DRP and its workers. DRP, however, refused to comply with the terms of the final extension and left its operations paralyzed until its suppliers forced it into bankruptcy.

a. DRP neglected its most important environmental obligations from the moment it acquired the Facility

193. The Sulfuric Acid Plant Project was the most obvious and effective way to reduce the Facility's emissions of SO₂ and other contaminants. The smelter's main emission was SO₂,

²⁸⁴ DRP was permitted to operate in compliance with the 1996 standards for SO₂ through 2012, in accordance with the 2006 Extension and the 2009 Extension Laws, discussed below.

²⁸⁵ Proctor Expert Report, §§ 3.3-3.4.

²⁸⁶ Proctor Expert Report, Figure 14.

²⁸⁷ Proctor Expert Report, Figure 16.

²⁸⁸ Proctor Expert Report, pp. 30-34.

which represented 97.83% of the emissions from the Facility.²⁸⁹ The original PAMA envisaged the construction of two sulfuric acid plants—one for the copper circuit, and another for the zinc and lead circuits.²⁹⁰ The technology to construct the sulfuric acid plants was well-known, available, and tested.²⁹¹ The plants were designed to capture SO₂, convert it into sulfur trioxide, and recover it as sulfuric acid, a by-product that DRP would then sell.²⁹² The sulfuric acid plants would also reduce metal emissions into the ambient air surrounding the Facility.²⁹³

194. Centromín designed the original PAMA, including the plan for the Sulfuric Acid Plant Project. Centromín developed the PAMA on the basis of the environmental assessment conducted by Knight Piésold the engineering studies conducted by SNC-Lavalin. Pyrometallurgy expert, Mr. Wim Dobbelaere, explains that the original PAMA constituted a suitable initial design that DRP could have improved upon and refined.²⁹⁴
195. Centromín also designed the Facility’s modernization plan, based on the 1996 SNC-Lavalin Study. Mr. Dobbelaere likewise explains that Centromín’s modernization plan was a viable option and was necessary for the success of the Sulfuric Acid Plant Project.²⁹⁵
196. DRP was not required to adopt Centromín’s plans for implementing the Sulfuric Acid Plant Project or modernizing the Facility. Rather, DRP was required to install one or more sulfuric acid plants, capture at least 84% of SO₂ from the Facility, and reduce emissions

²⁸⁹ **Exhibit C-096**, Action Plan to Improve the Air Quality and Health of La Oroya, 1 March 2006, p. 9.

²⁹⁰ **Exhibit C-090**, PAMA Report, PDF pp. 169–170.

²⁹¹ **Exhibit C-090**, PAMA Report, PDF p. 167.

²⁹² **Exhibit R-154**, Request for the Special Extension of the Compliance Deadline for the Sulfuric Acid Plant Project, DRP, December 2005, p. 58. The increase of SO₂ content was important because the process of the sulfuric acid plant was composed of the following three phases. First, cleaning of the gases with greater SO₂ concentrations. Second, transformation of sulfur dioxide (SO₂) into sulfur trioxide (SO₃) and then to sulfur acid (H₂SO₂). Third, storage of the sulphuric acid (H₂SO₂) produced and transportation of it to consumption points.

²⁹³ Dobbelaere Expert Report, ¶¶ 51–54.

²⁹⁴ Dobbelaere Expert Report, § VII.

²⁹⁵ Dobbelaere Expert Report, § VI.

down to legal limits.²⁹⁶ The way in which DRP met those requirements was left to its experienced judgment.²⁹⁷

197. Yet, DRP's priorities were far from complying with its PAMA obligations. DRP repeatedly modified the PAMA and modernization plan so as to delay its investment obligations and maximize short-term profits. For example, on 21 December 1998, DRP proposed to modify most of its PAMA projects and virtually abandon the modernization plans for the copper and lead circuits. The request was aimed at increasing production and pushing the costlier PAMA projects to a later date.²⁹⁸
198. As part of its 1998 request, DRP proposed to modify the design of the Sulfuric Acid Plant Project.²⁹⁹ DRP would discard Centromín's plans to install two sulfuric acid plants and proposed to redesign the project into a single plant that would operate with the smelter's three circuits.³⁰⁰ In addition, DRP sought to modify several other PAMA projects.³⁰¹
199. DRP also asked the MEM to extend the existing deadlines for designing and constructing the sulfuric acid plant.³⁰² Under the original PAMA, DRP agreed to complete the pre-feasibility studies by 2001, finalize design by 2002, complete the sulfuric acid plant for the copper circuit by 2003, and complete the sulfuric acid plant for the lead and zinc circuits by 2005.³⁰³ Under the modified schedule, however, DRP proposed to complete the pre-

²⁹⁶ Dobbelaere Expert Report, ¶ 67.

²⁹⁷ Dobbelaere Expert Report, ¶ 67.

²⁹⁸ **Exhibit WD-015**, 10 Year Master Plan Report, Fluor Daniel, September 1998, p. 5 (Ex. "The Lead circuit remains the least efficient in the area of sulfur fixation at about 78 % , since the low cost solution to meeting production requirements of the 10 year Master Plan retains the traditional sinter plant - blast furnace process.").

²⁹⁹ **Exhibit R-155**, Report to the Ministry of Energy and Mines on the PAMA and Request for Approval of Modifications in the Program, DRP, December 1998.

³⁰⁰ **Exhibit R-155**, Report to the Ministry of Energy and Mines on the PAMA and Request for Approval of Modifications in the Program, DRP, December 1998, p. 2.

³⁰¹ **Exhibit R-155**, Report to the Ministry of Energy and Mines on the PAMA and Request for Approval of Modifications in the Program, DRP, December 1998, p. 1.

³⁰² **Exhibit R-155**, Report to the Ministry of Energy and Mines on the PAMA and Request for Approval of Modifications in the Program, DRP, December 1998, p. 4.

³⁰³ **Exhibit C-090**, PAMA Report, pp. 19 and 157.

feasibility studies by 2001, finalize design by 2002 and complete the single sulfuric acid plant by 2006.³⁰⁴

200. DRP also proposed to abandon the Facility’s modernization plan developed by Centromín and SNC-Lavalin.³⁰⁵ Under DRP’s plan, there would be no changes in the Facility’s copper and lead smelting technology “unless market conditions or concentrates supplies dictat[ed] differently.”³⁰⁶ This decision would prove to be a critical misstep that delayed DRP at least six years in fulfilling its obligation to complete the Sulfuric Acid Plant Project. As Mr. Dobbelaere explains,

“by deciding not to modernize, DRP ignored the warnings given by environmental consultants Knight Piesold, SNC and others about the need for multiple process changes in order to keep the goal of reducing emissions to legal limits by the end of the PAMA period within reach.³⁰⁷ DRP would be taking worse than a status quo approach, rather than a breakthrough or even a continuous improvement approach to its operations of the CMLO. Instead of starting to modernize, it decided to increase production in the old facility.”³⁰⁸

201. The MEM, trusting in DRP’s expertise, approved the company’s first request to modify the PAMA and extend its deadlines.³⁰⁹ The modification updated the total investment

³⁰⁴ **Exhibit R-155**, Report to the Ministry of Energy and Mines on the PAMA and Request for Approval of Modifications in the Program, DRP, December 1998, p. 4.

³⁰⁵ Dobbelaere Expert Report, ¶¶ 76–79; **Exhibit WD-015**, 10 Year Master Plan Report, Fluor Daniel, September 1998, p. 11, Section 3.2.1, Copper Process Changes, p.11, Section 3.3, Lead Plant.

³⁰⁶ Dobbelaere Expert Report, ¶¶ 76–79; **Exhibit WD-015**, 10 Year Master Plan Report, Fluor Daniel, September 1998, p. 2; **Exhibit R-155**, Report to the Ministry of Energy and Mines on the PAMA and Request for Approval of Modifications in the Program, DRP, December 1998, p. 2.

³⁰⁷ **Exhibit WD-001**, Environmental Evaluation of La Oroya Metallurgical Complex, Final Report, Knight Piesold LLC, 18 September 1996, p.58 (“[I]t is Knight Piesold’s opinion that the La Oroya site has a number of significant environmental concerns that could affect continued operation of the metallurgical complex if current airborne emissions and impacts are not brought into compliance with proposed Peruvian and international standards. Considerable flexibility in the implementation and application of new standards will be necessary for La Oroya to continue as an economically viable operation. Continued long-term operations of the smelter and progress on privatization can be achieved only if La Oroya is subject to realistic requirements to gradually reduce air and effluent emissions.”).

³⁰⁸ Dobbelaere Expert Report, ¶ 78.

³⁰⁹ **Exhibit C-091**, Directorial Resolution No. 178-99-EM/DG, 19 October 1999 attaching Report No. 1237-99-EM-DGM-DFM-DFT, 18 October 1999, ¶¶ 1–2.

- requirement to USD 168 million. The increase corresponded to DRP's voluntary adoption of Project #13 from Centromín's PAMA and to DRP's redesign of several projects.³¹⁰
202. News of DRP's PAMA modification and extension spurred opposition from civil society. For example, the Inter-American Association for Environmental Defense—a major environmental group then led by a future Minister of the Environment—argued that the modifications allowed DRP to increase production at the cost of increased emissions, all while delaying the PAMA's most important project (the sulfuric acid plants) until the end of the PAMA Period.³¹¹
203. On 30 May 2000, DRP requested an additional PAMA modification.³¹² On 10 April 2001, the MEM approved DRP's request and updated DRP's required investment to USD 169.7 million. The approval reconfirmed that DRP was required to conclude all of the PAMA projects by the end of the PAMA Period (*i.e.*, 13 January 2007).³¹³
204. On 3 December 2001 and 7 January 2002, DRP again requested to modify its PAMA obligations, seeking to redesign significant aspects of the Sulfuric Acid Plant Project and extend the deadlines for completing three of its other PAMA projects.³¹⁴ DRP proposed to delay the start of construction of the sulfuric acid plant until 2004, a change from its December 1998 proposal to start construction in 2002.³¹⁵
205. Once again demonstrating flexibility and trust in DRP's expertise, the MEM granted DRP's request and updated the total required investment amount to USD 173,953,000.³¹⁶ The

³¹⁰ **Exhibit C-091**, Directorial Resolution No. 178-99-EM/DG, 19 October 1999 *attaching* Report No. 1237-99-EM-DGM-DFM-DFT, 18 October 1999, ¶ 2.

³¹¹ **Exhibit R-236**, 2017 ESAN Report, PDF p. 127.

³¹² See **Exhibit R-158**, Directorial Resolution No. 133-2001-EM-DGAA, 10 April 2001 *attaching* Report No. 046-2001-EM-DGAA/LS, 5 March 2001, p. 5.

³¹³ **Exhibit R-158**, Directorial Resolution No. 133-2001-EM-DGAA, 10 April 2001 *attaching* Report No. 046-2001-EM-DGAA/LS, 5 March 2001, PDF p. 2, Art 2; *id.*, PDF p. 12.

³¹⁴ **Exhibit R-157**, Directorial Resolution No. 28-2002-EM/DGAA, 25 January 2002 *attaching* Report No. 009-2002-EM-DGAA/LS, 25 January 2002, Annex 1, pp. 1–2.

³¹⁵ **Exhibit R-157**, Directorial Resolution No. 28-2002-EM/DGAA, 25 January 2002 *attaching* Report No. 009-2002-EM-DGAA/LS, 25 January 2002, Annex 1, pp. 2–3.

³¹⁶ **Exhibit R-157**, Directorial Resolution No. 28-2002-EM/DGAA, 25 January 2002 *attaching* Report No. 009-2002-EM-DGAA/LS, 25 January 2002, Annex 1, pp. 1–3 and PDF p. 13, Table No. 3.

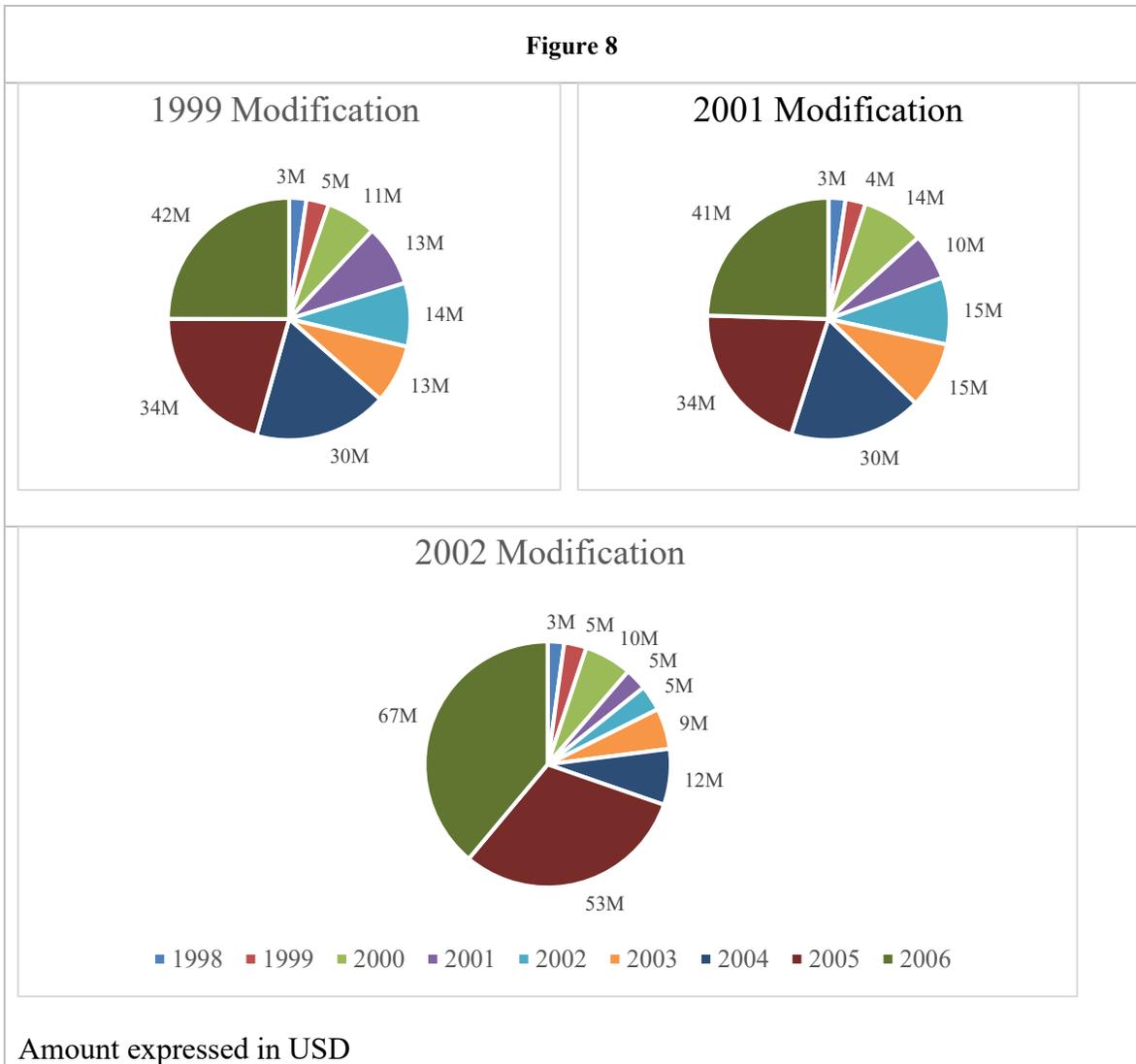
MEM based its decision in part on the belief that even in the event of a fall in metals prices, DRP would still be able to finance and build the plant before the PAMA Period expired.³¹⁷

206. Through its 2002 extension, DRP yet again increased production while pushing its capital expenditure of the costliest PAMA projects as far off as possible. DRP's first two PAMA modifications each allocated approximately 55% of total expenditures to the first seven years (1998-2004) and 45% of total expenditures to the final two years (2005-2006).³¹⁸ In contrast, the 2002 extension allocated approximately 30% of total expenditures to the first seven years (1998-2004) and 70% of total expenditures to the final two years (2005-2006).³¹⁹ The below graphic illustrates DRP's decision to delay capital expenditures until the last possible moment.

³¹⁷ [Exhibit R-157](#), Directorial Resolution No. 28-2002-EM/DGAA, 25 January 2002 *attaching* Report No. 009-2002-EM-DGAA/LS, 25 January 2002, Annex 1, p. 3.

³¹⁸ [Exhibit C-091](#), Directorial Resolution No. 178-99-EM/DG, 19 October 1999 *attaching* Report No. 1237-99-EM-DGM-DFM-DFT, 18 October 1999, PDF p. 5; [Exhibit R-158](#), Directorial Resolution No. 133-2001-EM-DGAA, 10 April 2001 *attaching* Report No. 046-2001-EM-DGAA/LS, 5 March 2001, PDF p. 5, Table No. 3.

³¹⁹ [Exhibit R-157](#), Directorial Resolution No. 28-2002-EM/DGAA, 25 January 2002 *attaching* Report No. 009-2002-EM-DGAA/LS, 25 January 2002, Annex 1, pp. 1-2, and PDF p. 13, Table No. 3.



207. This graphic shows that DRP decided in 2002 to shift its capital expenditure schedule towards 2005 and 2006.³²⁰

208. DRP’s decision to delay construction of the Sulfuric Acid Plant Project also affected Centromín’s ability to implement one of its own PAMA projects, namely the revegetation of La Oroya and the surrounding region (Project No. 4).³²¹ For years, the Facility’s SO₂ emissions had caused acid rain in the region, which left it virtually devoid of plant life.

³²⁰ [Exhibit R-157](#), Directorial Resolution No. 28-2002-EM/DGAA, 25 January 2002 *attaching* Report No. 009-2002-EM-DGAA/LS, 25 January 2002, Annex 1, pp. 1–2 and PDF p. 13, Table No. 3.

³²¹ See [Exhibit C-090](#), PAMA, Project No. 4, PDF pp. 205–214.

Because DRP's delayed Sulfuric Acid Plant Project would not control SO₂ emissions until the end of the PAMA Period, the MEM was compelled to remove Project No. 4 from Centromín's PAMA and transfer it to the Facility's "Closing Plan," which was governed by a separate regulatory framework.³²²

209. Despite the MEM's cooperation in granting the extensions and modifications, it soon became clear that DRP would not meet the maximum legal deadline to complete its PAMA. As of the start of 2004, DRP had invested a mere \$40.3 million of the \$174 million it had pledged to spend on environmental cleanup, and it had completed just 23% of its PAMA obligations.³²³ DRP was exceedingly behind schedule with respect to its obligations to design and construct the sulfuric acid plant, which was the central and most costly component of the PAMA. Nevertheless, DRP repeatedly assured the MEM that it could complete the PAMA within the PAMA Period.³²⁴ The company gave no indication otherwise until 2004,³²⁵ by which time DRP had met just five percent of its investment obligations with respect to the Sulfuric Acid Plant Project.³²⁶ In 2005, the MEM fined DRP for having met only 49.2% of its investment obligations for three PAMA projects in the years 2001, 2002 and 2003.³²⁷
210. DRP's delays continued its pattern of taking on increasing risks associated with postponing the most significant and costly aspects of its environmental obligations. DRP twice proposed to redesign the sulfuric acid plants with the express guarantee that it would still

³²² **Exhibit R-277**, Directorial Resolution No. 082-2000-EM-DGAA, 17 April 2000 attaching Report No. 21-2000-DGAA/LS, 24 March 2000, pp. 4–5; Alegre Expert Report, ¶ 110.

³²³ **Exhibit C-045**, Letter from DRP (B. Neil) to MEM (M. Chappuis) attaching PAMA for the Metallurgical Complex of La Oroya 2004-2011 Period, 17 February 2004 ("**2004 DRP Extension Request**"), p. 19.

³²⁴ **Exhibit R-155**, Report to the Ministry of Energy and Mines on the PAMA and Request for Approval of Modifications in the Program, DRP, December 1998, p. 2; **Exhibit R-157**, Directorial Resolution No. 28-2002-EM/DGAA, 25 January 2002 attaching Report No. 009-2002-EM-DGAA/LS, 25 January 2002, Annex.

³²⁵ **Exhibit C-045**, 2004 DRP Extension Request.

³²⁶ **Exhibit R-160**, Report No. 194-2004-MEM-DGM-FMI/MA, 12 April 2004, p. 1.

³²⁷ **Exhibit R-195**, Directorial Resolution No. 129-2005-MEM/DGM, 22 April 2005. These projects were: (a) Copper Refinery Mother Water Treatment Plant (Project No. 5); (b) Industrial Liquid Effluent Treatment Plant (Project No. 8); and (c) Wastewater/Garbage Disposal (Project No. 16). *See also*, Isasi Witness Statement, ¶ 20.

finish the project by the end of the PAMA Period.³²⁸ Nevertheless, even under DRP's own modified timelines, it neglected several deadlines for planning and designing the sulfuric acid plants. By 2004, DRP was critically falling behind the new timelines it itself had requested and established in the modified PAMA. DRP had barely begun developing pre-feasibility engineering reports, even though—under DRP's own customized timeline—it should have finished all engineering and design tasks by 2002.³²⁹

211. Furthermore, the financial drain exacted on DRP by Renco's inter-company financial transactions was reaching a critical point. DRP found itself with insufficient funds to complete its environmental obligations. Having waited seven years to address the sulfuric acid plant project, DRP started exploring options to see if the company could somehow still do the sulfuric acid plants quickly and on the cheap. DRP commissioned SNC-Lavalin, the consultants who had helped Centromín shape the PAMA, to undertake another pre-feasibility study.³³⁰ DRP instructed SNC to look at the most economical options to enable sulfur capture, rather than the most environmentally friendly options.³³¹ Not surprisingly, this instruction resulted in a plan for modernizing the Facility and implementing the Sulfuric Acid Plant Project that would have increased toxic emissions and taken CMLO even further from meeting Peru's emissions and air quality standards.³³² While it is not entirely clear whether DRP took specific action based on the 2004 SNC-Lavalin study, DRP did seek to delay its environmental obligations even further.

³²⁸ [Exhibit R-155](#), Report to the Ministry of Energy and Mines on the PAMA and Request for Approval of Modifications in the Program, DRP, December 1998, p. 5; [Exhibit R-157](#), Directorial Resolution No. 28-2002-EM/DGAA, 25 January 2002 *attaching* Report No. 009-2002-EM-DGAA/LS, 25 January 2002, Annex 1, pp. 1–2.

³²⁹ Alegre Expert Report, ¶¶ 49-50; [Exhibit C-045](#), 2004 DRP Extension Request, p. 21.

³³⁰ [Exhibit R-186](#), Prefeasibility Study, SNC-Lavalin Chile S.A. (SNCL), Final Report Document No. 919-0000-30IT-001, October 2004.

³³¹ Dobbelaere Expert Report, ¶¶ 82–86.

³³² Dobbelaere Expert Report, ¶¶ 82–86.

- b. When DRP failed to meet the deadline under the maximum regulatory limit, the MEM extended DRP a lifeline and granted the company an extension beyond the PAMA Period to complete the Sulfuric Acid Plant Project

212. *DRP's 2004 Extension Request.* Having abandoned Centromín's modernization plan in 1998, DRP took no action to modernize the copper and lead circuits during the first five years of its operation.³³³ And in the early 2000s, this risky pattern of delaying critical PAMA projects caught up to DRP. In September 2003, Mr. Bruce Neil took over as General Manager of DRP, and, in December 2003, he became the company's President.³³⁴ Under new management, DRP was facing the inconvenient truth that it would not meet the ten-year PAMA deadline to complete the Sulfuric Acid Plant Project, and—contrary to its 1998 decision—it would need to modernize the copper and lead circuits using new smelting technology.³³⁵
213. At this point, DRP had no viable plan to modernize the Facility and implement the Sulfuric Acid Plant Project,³³⁶ and it badly needed an extension of its deadline to do so. Unless DRP got an extension, it would be, in effect, without an environmental permit and an operating license as of 13 January 2007.³³⁷ Given the legally mandated deadline of 13 January 2007, and the years that DRP had sought delays while doing nothing to advance the Sulfuric Acid Plant Project, DRP was not only in desperate need of an extension, it also was in desperate need of a justification for such an extraordinary and incongruous request.
214. In February 2004, DRP asked the MEM to extend its deadline to finish the Sulfuric Acid Plant Project from 13 January 2007 to 31 December 2011, a full five years beyond the legally mandated ten-year deadline.³³⁸ DRP justified the request to extend the PAMA deadline by claiming that, due to alleged deficiencies in the PAMA, the company would need to implement additional projects in order to meet emissions limits for lead: “The

³³³ Dobbelaere Expert Report, § XI.

³³⁴ A. Bruce Neil First Witness Statement, 17 December 2020, ¶ 6.

³³⁵ [Exhibit R-186](#), Prefeasibility Study, SNC-Lavalin Chile S.A. (SNCL), Final Report Document No. 919-0000-30IT-001, October 2004, p. 5.

³³⁶ Expert Report of Dr. Eric Partelpoeg, p. 41.

³³⁷ [Exhibit C-045](#), 2004 DRP Extension Request, p. 16.

³³⁸ [Exhibit C-045](#), 2004 DRP Extension Request.

PAMA did not consider mitigation aspects, fugitive emissions, health and hygiene risks, and air quality in the environmental management of lead, aspects that were defined as priorities by the conducted technical studies.”³³⁹ DRP also threatened to close the Facility if the MEM refused its extension request.³⁴⁰

215. DRP based its request principally on the claim that the PAMA did not adequately address fugitive emissions. When the Facility processes metal concentrates, any impurities are either captured by filters or emitted into the air. While some emissions exit the Facility through its main stack, some of the Facility’s emissions leak into ambient air through other outlets. Such emissions are referred to as fugitive emissions. The Facility’s emissions monitors—which are located in the main stack—do not measure fugitive emissions. Therefore, one can ascertain the quantity and content of the Facility’s fugitive emissions only indirectly by analyzing data related to ambient air quality and production volume.
216. DRP supported its assertion that the PAMA was inadequate with a study it commissioned from the consulting firm McVehil-Monnett. The study attempted to turn focus away from the need to construct sulfuric acid plants, and found that the PAMA would not suffice to reduce emissions to acceptable standards because it did not address the primary sources of fugitive emissions (which included lead emissions).³⁴¹ According to the consultants, fugitive emissions affected air quality eight times more than emissions from the main stack.³⁴² Based on the consultants’ study, DRP proposed several additional projects to reduce fugitive emissions.³⁴³
217. DRP also proposed reordering the environmental projects to prioritize reducing fugitive emissions over sulfur dioxide emissions.³⁴⁴ Accordingly, DRP’s plan would set a December 2006 deadline for controlling fugitive emissions, while yet again delaying

³³⁹ [Exhibit C-045](#), 2004 DRP Extension Request, p. 16.

³⁴⁰ [Exhibit C-050](#), Letter from DRP (J. C. Mogrovejo) to Ministry of Energy & Mines (J. Bonelli) *attaching* Request for an Exceptional Extension of Deadline to Complete the Sulfuric Acid Plants Projects, 15 December 2005, p. 7.

³⁴¹ [Exhibit C-045](#), 2004 DRP Extension Request, pp. 5–6. *See also*, [Exhibit C-045](#), 2004 DRP Extension Request, Annex IV, Relative Contributions of La Oroya Main Stack and Process/Fugitive Emissions to Ground-Level Concentrations.

³⁴² [Exhibit C-045](#), 2004 DRP Extension Request, pp. 5–6.

³⁴³ [Exhibit C-045](#), 2004 DRP Extension Request, pp. 5–6.

³⁴⁴ [Exhibit C-045](#), 2004 DRP Extension Request, pp. 6–7.

construction of the sulfuric acid plant—this time until 31 December 2011.³⁴⁵ DRP supported this proposal with a study conducted by a risk analysis expert who claimed that the effects of lead were “the most immediate concern” for the residents of La Oroya.³⁴⁶

218. DRP “underscored the fact that the alternatives considered in the Plan [to address fugitive emissions] are similar to those applied by Doe Run Company in its U.S. refineries, where the experience has been highly satisfactory.”³⁴⁷ This assertion surprised the MEM because, notwithstanding DRRC’s expertise and its experience with fugitive emissions in Missouri, the company had submitted a detailed redesign of the PAMA in 1998 that did nothing to address the suddenly all-important fugitive emissions (following DRP’s seven years of silence on fugitive emissions).³⁴⁸ Moreover, as Peru explained in **Section II.A**, Renco had conducted extensive due diligence before acquiring the Facility and entering into legally binding obligations regarding the PAMA, during which time it reviewed at least three independent reports warning that fugitive emissions were a critical source of contamination.³⁴⁹ Furthermore, Renco and DRP were fully aware that DRP was obligated to design and implement all necessary programs (whether they be related to fugitive emissions or some other contamination source) to meet all applicable air quality standards by the PAMA deadline.
219. Experts Wim Dobbelaere and Deborah Proctor explain that DRP’s proposal to delay the Sulfuric Acid Plant Project was not justified. Mr. Dobbelaere explains that there was no

³⁴⁵ **Exhibit C-045**, 2004 DRP Extension Request, p. 94.

³⁴⁶ **Exhibit C-045**, 2004 DRP Extension Request, pp. 6–7. *See also*, **Exhibit C-045**, 2004 DRP Extension Request, Annex VI, Comparison of Human Health Risks Associated with Lead, Arsenic, Cadmium, and SO₂ in La Oroya Antigua, Peru.

³⁴⁷ **Exhibit C-045**, 2004 DRP Extension Request, p. 2.

³⁴⁸ *See also*, Dobbelaere Expert Report, ¶ 24 (“As DRRC owned and operated a lead smelter in Missouri, United States, it would have recognised that the levels of lead emissions at CMLO were very high and needed to be brought under control urgently.”).

³⁴⁹ **Exhibit R-166**, Jack V. Matson Supplemental Expert Report, Document No. 1225-5, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), May 2021, p. 7 (warning that “fugitive emissions may continue to contribute significantly to the non-compliance status” for lead, and noting that “fugitive emissions from the lead furnaces and the dross treatment plant would be expected. . . . Capturing fugitive emissions from the sinter plant/blast furnace and better controls in the lead circuit should ensure future, consistent compliance with the lead standard.”); **Exhibit C-108**, Knight Piésold Report, p. 34; **Exhibit R-198**, *Estudio de Evaluación Integral de Impacto Ambiental del Area Afectada Por Los Humos en la Fundición de La Oroya*, Servicios Ecológicos S.A., 1 November 1996, pp. 33–34.

technical reason that DRP could not implement its fugitive emissions projects while working on the Sulfuric Acid Plant Project.³⁵⁰ Mr. Dobbelaere explains that DRP's proposed fugitive emissions projects would have reduced fugitive lead emissions by only 50%, while the modernization plan and the Sulfuric Acid Plant Project would have reduced nearly all fugitive lead emissions.³⁵¹ Moreover, Ms. Proctor, for her part, opines that main stack emissions remained extraordinarily high for both lead and SO₂, such that DRP should have committed to controlling fugitive emissions at the same time as it addressed emissions from the main stack³⁵² In other words, from both a technical and environmental perspective, DRP should not have postponed its existing obligations to make room for addressing fugitive emissions.³⁵³

220. The other arguments in DRP's 2004 Extension Request similarly did not justify the company's delays in completing the Sulfuric Acid Plant Project. Contrary to Claimant's assertion that the original PAMA design was flawed,³⁵⁴ DRP's 2004 Extension Request criticized *DRP's own* 1998 redesign of the PAMA: "the PAMA, *as currently designed*, will not resolve the more serious environmental problems the Metallurgical Complex of La Oroya, and its areas of influence, are experiencing" (emphasis added).³⁵⁵ As Mr. Dobbelaere explains, Centromín's original PAMA and modernization plans would have required DRP to control fugitive emissions.³⁵⁶ In its campaign for an extension, DRP neglected to explain that the company itself had abandoned Centromín's viable PAMA and

³⁵⁰ Dobbelaere Expert Report, § VIII.

³⁵¹ Dobbelaere Expert Report, ¶¶ 51, 52, 98.

³⁵² Proctor Expert Report, Sections 3.4 & 3.5.

³⁵³ Dobbelaere Expert Report § VIII; Proctor Expert Report, §§ 3.4 and 3.5.

³⁵⁴ Treaty Memorial, ¶¶ 66, 203.

³⁵⁵ [Exhibit C-045](#), 2004 DRP Extension Request, p. 1

³⁵⁶ Dobbelaere Expert Report, ¶¶ 92 ("Although the PAMA did not expressly mention fugitive emissions, the recommended modernization upgrades, particularly for the lead and copper circuit, and the SO₂ abatement project in particular would have addressed all types of emissions, including fugitive and short-stack emissions. The sulfuric acid plants project would have been one of the best ways to address lead-related issues, because, as discussed in further detail below, it would have required cleaning the gasses from the complex of lead and arsenic before capturing SO₂."), 46-54 ("In my opinion, in 1996 an experienced member of the industry would have been aware that both heavy metals (lead, arsenic) and SO₂ could be reduced dramatically through the installation of one or more sulfuric acid plants.").

modernization designs and failed to propose a suitable alternative until nearly the end of the PAMA Period.³⁵⁷ Renco appears to have made the same omission in this proceeding.

221. Whatever the reason for DRP’s sudden interest in fugitive emissions, its proposed reordering of priorities would allow DRP yet another opportunity to delay its environmental investment obligations. For the work DRP proposed during years 2005 through 2010, fugitive emissions projects were approximately twelve times cheaper than the proposed sulfuric acid plants (with the projects costing USD 8.8 million and USD 105.4 million, respectively).³⁵⁸ By delaying its environmental expenditures, DRP would buy itself time to address a setback that it had concealed from the MEM: it had insufficient funds to complete the Sulfuric Acid Plant Project in time. According to a DRRC 2004 SEC filing, DRP had determined that it would “not be able to comply with the spending requirements of La Oroya’s PAMA investment schedule in 2005 and 2006 with respect to the construction of the sulfuric acid plant required by the PAMA and, as a result, could be subject to penalties.”³⁵⁹
222. *The 2004 Extension Regulation.* The MEM was unable to grant DRP’s PAMA deadline request because there was no legal framework for granting an extension under the 1993 mining regulation.³⁶⁰ That regulations provided that the MEM could not extend any PAMA projects beyond the original ten-year term (in the case of DRP’s PAMA, 13 January 2007).³⁶¹ DRP’s proposal to delay construction of the sulfuric acid plants until 31 December 2011—nearly five years after the original deadline—was legally impossible.³⁶²

³⁵⁷ Dobbelaere Expert Report, ¶¶ 90-93 (“In my opinion, fugitive emissions were an implausible excuse for delaying the PAMA. DRP had always known about fugitive emissions – they were raised as a cause for concern in the Knight Piesold report provided to bidders – and DRP had made them worse by failing to modernize while increasing production”).

³⁵⁸ [Exhibit C-050](#), Letter from DRP (J. C. Mogrovejo) to Ministry of Energy & Mines (J. Bonelli) *attaching* Request for an Exceptional Extension of Deadline to Complete the Sulfuric Acid Plants Projects, 15 December 2005, PDF pp. 15, 67, 59.

³⁵⁹ [Exhibit R-273](#), Securities and Exchange Commission Form 10-K, DRRC, 31 October 2004, p. 10.

³⁶⁰ [Exhibit R-025](#), Supreme Decree No. 016-93-EM, 28 April 1993.

³⁶¹ Alegre Expert Report, ¶ 17.

³⁶² Alegre Expert Report, ¶¶ 17, 18.

223. It is worth noting here, that Renco, through the testimony of DRP’s former Vice President of Environmental Affairs, Jose Mogrovejo, now claims that DRP expected the MEM to provide as much time as it requested to fulfill its environmental obligations.³⁶³ Curiously, DRP failed to present this alleged expectation at the time of its 2004 Extension Request, and neither Renco nor its witness cites a single law, regulation, communication, or other piece of evidence to support this supposed expectation. Moreover, the applicable legal framework, the PAMA, and the STA all stated unequivocally that DRP must complete its PAMA by 13 January 2007.
224. Still, the MEM worked with DRP to devise a solution. The MEM convened a meeting with DRP and Centromín to discuss the issues that DRP had raised in its extension request.³⁶⁴ The MEM also established a technical committee charged with evaluating certain public health risks caused by the smelter’s operations.³⁶⁵ The committee was comprised of members appointed by the MEM, DRP, and Centromín.³⁶⁶
225. In October 2004, the MEM published a draft of the regulation meant to allow DRP to request an extension beyond the PAMA Period.³⁶⁷ The draft spurred opposition from civil society and the media based on (i) the fact that the MEM sought to issue a regulation that was *de facto* intended to benefit a single company; and (ii) perceptions of DRP’s poor environmental performance.³⁶⁸ The draft also drew criticism from DRP, which balked at a condition that would require the company to establish a trust account to guarantee financing for the remaining projects.³⁶⁹
226. DRP had put the MEM in a difficult situation. DRP had threatened to close the Facility if its extension were denied. Given the economic devastation that would result for the people

³⁶³ Treaty Memorial, ¶ 87; A. José Mogrovejo Castillo First Witness Statement, ¶ 36 (“I did not expect MEM to react negatively to our extension request. . . . The granting of extensions based on new information was consistent with my experience at MEM as General Director of Environmental Affairs and the statements we had made to investors during the privatization process.”).

³⁶⁴ **Exhibit R-161**, MEM, DRP, and Centromín Meeting Minutes, 20 April 2004.

³⁶⁵ **Exhibit R-161**, MEM, DRP, and Centromín Meeting Minutes, 20 April 2004, Second and Third.

³⁶⁶ **Exhibit R-161**, MEM, DRP, and Centromín Meeting Minutes, 20 April 2004, Second.

³⁶⁷ Isasi Witness Statement, ¶ 27.

³⁶⁸ Isasi Witness Statement, ¶¶ 24, 27.

³⁶⁹ Isasi Witness Statement, ¶ 29.

of La Oroya from closing the Facility, the MEM could not easily deny DRP’s extension request.³⁷⁰ At the same time, however, the MEM needed to ensure that mining and metallurgy companies respected national environmental standards.³⁷¹ The MEM did not want to signal to DRP that it could leverage its influence over La Oroya to obtain infinite, unwarranted extensions.³⁷²

227. In December 2004, the Peruvian government enacted Supreme Decree No. 046-2004-MEM (the “**2004 Extension Regulation**”), which allowed companies until 31 December 2005 to apply for a one-time, limited extension.³⁷³ Critically, the regulation clarified that the extension “shall not be greater than three years unless that the [MEM] grants an additional year based on the Health Risks Analysis Study...”³⁷⁴ The regulation also provided that “the extension of the term shall only apply to the project or projects for which the application was made, and shall not affect the terms or schedules of execution of other projects indicated in the PAMA.”³⁷⁵ The 2004 Extension Regulation additionally allowed the Peruvian authorities to condition approval of the extension on the adoption of additional environmental mitigation measures³⁷⁶ “intended to reduce the risks to the environment, health or the safety of the population, and to ensure adequate performance of

³⁷⁰ Isasi Witness Statement, ¶¶ 24–27.

³⁷¹ Isasi Witness Statement, ¶¶ 24–27.

³⁷² Isasi Witness Statement, ¶ 30.

³⁷³ **Exhibit R-029**, Supreme Decree No. 046-2004-EM, 29 December 2004, Arts. 1.1–1.2 (“1.1 Up until December 31, 2005, entities entitled to engage in mining activity may apply to the General Directorate of Environmental Mining Affairs (Dirección General c/c Asuntos Ambientales Mineros—DGAAM) of the Ministry of Energy and Mines, for an extension of the term of execution of one or more specific projects contemplated in the approved Environmental Remediation and Management Program—PAMA, based on exceptional reasons duly demonstrated in accordance with the procedures established in this Supreme Decree. 1.2 The extension of the term shall not be greater than three years unless the DGAAM grants an additional year based on the Health Risks Analysis Study indicated in Article 2.2(h) of this Supreme Decree.”)

³⁷⁴ **Exhibit R-029**, Supreme Decree No. 046-2004-EM, 29 December 2004, Arts. 1.1–1.2.

³⁷⁵ **Exhibit R-029**, Supreme Decree No. 046-2004-EM, 29 December 2004, Art. 1.3 (“The extension of the term shall only apply to the project or projects for which the application was made and shall not affect the terms or schedules of execution of other projects indicated in the PAMA.”)

³⁷⁶ **Exhibit R-029**, Supreme Decree No. 046-2004-EM, 29 December 2004, Art. 4 (“The Ministry of Energy and Mines, based on information obtained from the Health Risk Analysis Studies, as well as from prior oversight processes and the opinions of the DGM and DIGESA may condition approval of the extension applied for by the mining enterprise to the adoption of special measures such as reprioritizing the PAMAs’ environmental objectives, rescheduling, suspension or substitution of projects, and/or any other supplementary or compensatory measures aimed at removing risks to the environment, health or the safety of the population and to see to it that the PAMA is properly executed.”).

the PAMA.”³⁷⁷ To reduce financing risks associated with fluctuations in metal prices, the regulation required any company receiving an extension to establish (i) a trust account with funds dedicated to completing any outstanding PAMA projects; and (ii) a guarantee letter in the amount of 20% of the value of the outstanding PAMA projects, meant to cover future penalties for missing the extended deadline.³⁷⁸

228. The 2004 Extension Regulation also provided for extensive community engagement and input in connection with the process of evaluating a company’s extension request, including at least five mandatory public information sessions and hearings.³⁷⁹ In this way, the regulation attempted to balance the two competing goals of the PAMA regime: ensuring the continuity of economic activity while curbing environmental contamination.³⁸⁰ Still, the regulation drew strong opposition from several actors in civil society and government. For instance, Maria Chappuis, Peru’s mining regulator, complained that the 2004 Extension Regulation was too lax and resigned her position in protest.³⁸¹
229. *DRP’s 2005 Extension Request.* DRP requested an extension in accordance with the 2004 Extension Regulation in December 2005 (the “**2005 Extension Request**”).³⁸² While DRP’s February 2004 extension request sought a five-year extension, its December 2005 request sought four additional years to complete the Sulfuric Acid Plant Project.
230. DRP’s 2005 Extension Request proposed drastic changes to the design of the project. Most critically, DRP reversed its 1998 decision to construct a single sulfuric acid plant and instead sought to operate separate plants for each of the smelter’s circuits (*viz.*, lead, zinc, and copper)—eight years in, DRP essentially proposed going back to the original PAMA

³⁷⁷ [Exhibit R-289](#), Report No. 118-2006-MEM-AAM/AA/RC/FV/AL/HS/PR/AV/FO/CC, 25 May 2006, p. 7.

³⁷⁸ [Exhibit R-029](#), Supreme Decree No. 046-2004-EM, 29 December 2004, Arts. 7–8.

³⁷⁹ [Exhibit R-029](#), Supreme Decree No. 046-2004-EM, 29 December 2004, Arts. 2.2(f), 2.2(g), and 3.

³⁸⁰ Isasi Witness Statement, ¶¶ 24–27.

³⁸¹ “But it is Doe Run who has not complied with the PAMA and has continued to contaminate La Oroya. With this statement, it is as if it was telling the government: I pollute and you pay,” María Chappuis, former director general of Mining, told IPS. Chappuis resigned from his position in December 2004 due to the approval of a rule that allowed Doe Run to extend the term of the PAMA.” See [Exhibit R-162](#), Peru: The New Play of Doe Run, BILATERALS.ORG, 14 January 2011.

³⁸² [Exhibit C-050](#), Letter from DRP (J. C. Mogrovejo) to Ministry of Energy & Mines (J. Bonelli) *attaching* Request for an Exceptional Extension of Deadline to Complete the Sulfuric Acid Plants Projects, 15 December 2005.

design for the sulfuric acid plant project—the plan that DRP scrapped in 1998.³⁸³ According to Mr. Neil, DRP had only just realized that a single sulfuric acid plant would not suffice for the Facility.³⁸⁴ DRP’s about-face gave both the MEM and environmental stakeholders pause about DRP’s progress on its PAMA obligations, let alone its ability to fulfil them in a timely manner.

231. Mr. Neil admits that by the end of 2005, DRP had only a basic outline of its new design for the Sulfuric Acid Plant Project. He notes that by that time, DRP still “had to create the plan, get a proven design, and incorporate a critical path timeline for things like long term shipping . . . [and] also had to have financing in place for each step.”³⁸⁵ Moreover, as Mr. Dobbelaere explains, DRP’s preliminary design proposal was similar to Centromín’s original design of the Sulfuric Acid Plant Project and modernization plan.³⁸⁶ In other words, DRP had wasted almost eight years on the project and found itself in the same place that it started.
232. Nevertheless, the MEM adopted an exceptionally participative and transparent procedure to evaluate the DRP’s extension request.³⁸⁷ On several occasions, the MEM notified DRP that its extension request was incomplete or otherwise lacking, and it afforded the company several opportunities to correct any deficiencies and strengthen its request.³⁸⁸ Moreover, the MEM conducted working tables with various State agencies and civil society groups, and it published all documents related to the evaluation in real time.³⁸⁹
233. The MEM also enlisted the input of three internationally recognized experts appointed by the World Bank, recognizing the complexity and uniqueness of the Facility, as well as the

³⁸³ [Exhibit C-050](#), Letter from DRP (J. C. Mogrovejo) to Ministry of Energy & Mines (J. Bonelli) *attaching* Request for an Exceptional Extension of Deadline to Complete the Sulfuric Acid Plants Projects, 15 December 2005; Dobbelaere Expert Report, ¶¶ 162-163.

³⁸⁴ A. Bruce Neil First Witness Statement, 17 December 2020, ¶ 16.

³⁸⁵ A. Bruce Neil First Witness Statement, 17 December 2020, ¶ 25.

³⁸⁶ Dobbelaere Expert Report, ¶¶ 162-163.

³⁸⁷ Alegre Expert Report, ¶ 61.

³⁸⁸ [Exhibit R-287](#), Ministerial Resolution No. 257-2006-MEM/DM, 29 May 2006, pp. 2–3.

³⁸⁹ Alegre Expert Report, ¶ 61.

dire environmental and public health consequences of its operations.³⁹⁰ The experts evaluated several issues, including the state of air quality in La Oroya and DRP's plans to reduce the Facility's environmental impact.³⁹¹

234. The experts criticized several aspects of DRP's operations. For example, they found that "[m]any streets and sidewalks appeared to be either missed by the mechanical or manual wet cleaning methods or were not cleaned often enough by them,"³⁹² and that "[t]here appear[ed] to be opportunities to reduce the impact of fugitive emissions beyond the current level of effort."³⁹³ The experts also found that most of the funds related to DRP's joint initiative with the Ministry of Public Health "were devoted to the support of staff involved in the program and little [were devoted] to other resources needed for actual mitigation of hazards, particularly in the environments of children with dangerously elevated blood lead in the highest categories."³⁹⁴
235. With respect to DRP's extension request, the experts were asked to opine only on the need to grant an extension and the reasonableness of DRP's request; they were not asked to evaluate whether DRP could have completed the Sulfuric Acid Plant Project within the PAMA Period.³⁹⁵ The experts recommended that the MEM grant DRP's extension request,

³⁹⁰ Alegre Expert Report, ¶ 61; [Exhibit R-289](#), Report No. 118-2006-MEM-AAM/AA/RC/FV/AL/HS/PR/AV/FO/CC, 25 May 2006, pp. 14–15; The panel included Dr. Eric Partelpoeg, who has issued an expert witness report in connection with the Treaty Memorial.

³⁹¹ [Exhibit C-062](#), Expert Comments on Exceptional Fulfillment Extension Request for the Sulfuric Acid Plant Project of La Oroya Metallurgical Complex PAMA, S. Clark, E. Partelpoeg, and James W.S. Young, 10 May 2006, pp. 5–8.

³⁹² [Exhibit C-062](#), Expert Comments on Exceptional Fulfillment Extension Request for the Sulfuric Acid Plant Project of La Oroya Metallurgical Complex PAMA, S. Clark, E. Partelpoeg, and James W.S. Young, 10 May 2006, pp. 13–14.

³⁹³ [Exhibit C-062](#), Expert Comments on Exceptional Fulfillment Extension Request for the Sulfuric Acid Plant Project of La Oroya Metallurgical Complex PAMA, S. Clark, E. Partelpoeg, and James W.S. Young, 10 May 2006, p. 34.

³⁹⁴ [Exhibit C-062](#), Expert Comments on Exceptional Fulfillment Extension Request for the Sulfuric Acid Plant Project of La Oroya Metallurgical Complex PAMA, S. Clark, E. Partelpoeg, and James W.S. Young, 10 May 2006, pp. 13–14.

³⁹⁵ [Exhibit C-062](#), Expert Comments on Exceptional Fulfillment Extension Request for the Sulfuric Acid Plant Project of La Oroya Metallurgical Complex PAMA, S. Clark, E. Partelpoeg, and James W.S. Young, 10 May 2006, PDF p. 3 and pp. 5–8. *See also*, Dobbelaere Expert Report, ¶ 100 ("I do not read the reports as providing any process engineering-related excuses for DRP not having begun the sulfuric acid plant project or the modernization by 2006. The consultants were asked to assess the pros and cons of giving DRP an extension—not whether DRP should have been in the position of asking for one based on technical grounds.").

but they conditioned their recommendation on the company’s implementation of several process and environmental improvement projects.³⁹⁶ These projects would address the experts’ concerns about (i) the extent to which the Facility’s operations had damaged public health, and (ii) the potential for an extension to prolong the impact of the Facility’s harmful emissions.³⁹⁷ The experts—among them Renco’s expert, Mr. Partelpoeg—concluded that two years and ten months would be an aggressive—but achievable—schedule for DRP to implement its remaining obligations.³⁹⁸

236. DRP’s ability to fund the project was also a key factor in the MEM’s evaluation of whether to grant an extension.³⁹⁹ The MEM was particularly concerned with the financial viability of DRP’s proposal, given that the company had repeatedly failed to meet its investment obligations.⁴⁰⁰ At the time of DRP’s 2005 Extension Request, approximately one year before the PAMA deadline, DRP had invested just 42% of the amount that the PAMA required under DRP’s prior modifications.⁴⁰¹ Of the approximately USD 120 million still outstanding, USD 97.3 million corresponded to Sulfuric Acid Plant Project.
237. According to DRP’s 2005 Extension Request, DRP had failed to fund the Sulfuric Acid Plant Project due to “unfavorable conditions of the metals market from 1999 to 2003 that prevented the company from possessing the financial resources necessary to complete this project by 2006,” which “severely affect[ed] the company’s liquidity and its ability to meet

³⁹⁶ [Exhibit C-062](#), Expert Comments on Exceptional Fulfillment Extension Request for the Sulfuric Acid Plant Project of La Oroya Metallurgical Complex PAMA, S. Clark, E. Partelpoeg, and James W.S. Young, 10 May 2006, p. 19.

³⁹⁷ [Exhibit C-062](#), Expert Comments on Exceptional Fulfillment Extension Request for the Sulfuric Acid Plant Project of La Oroya Metallurgical Complex PAMA, S. Clark, E. Partelpoeg, and James W.S. Young, 10 May 2006, p. 6.

³⁹⁸ [Exhibit C-062](#), Expert Comments on Exceptional Fulfillment Extension Request for the Sulfuric Acid Plant Project of La Oroya Metallurgical Complex PAMA, S. Clark, E. Partelpoeg, and James W.S. Young, 10 May 2006, pp. 15–16.

³⁹⁹ Isasi Witness Statement, ¶¶ 35–38.

⁴⁰⁰ Isasi Witness Statement, ¶¶ 35–38.

⁴⁰¹ [Exhibit C-050](#), Letter from DRP (J. C. Mogrovejo) to Ministry of Energy & Mines (J. Bonelli) *attaching* Request for an Exceptional Extension of Deadline to Complete the Sulfuric Acid Plants Projects, 15 December 2005, pp. 16 and 24; [Exhibit R-154](#), Request for Exceptional Extension of the Compliance for the Sulfuric Acid Plants Project, Doe Run Peru, December 2005, p. 16 and table 2.2/1.

the required investment demanded by the PAMA and other project.⁴⁰² The MEM’s experts, however, came to a different conclusion.

238. As part of the interdisciplinary team assembled to assess DRP’s 2005 application, the MEM engaged ESAN University to analyze the application’s economic viability. ESAN’s report attributed DRP’s liquidity problems to the company’s payments to its foreign affiliates through intercompany loans and services contracts, among other practices.⁴⁰³
239. The ESAN report identified a number of risks “whose sources [were] not only domestic or local, but also international and corporate (mainly from the parent company).”⁴⁰⁴ The report found that the actions taken by Renco, DRRC, and DRCL described above in **Section II.C.1** left DRP undercapitalized, compromising its ability to finance the PAMA projects through debt.⁴⁰⁵ DRP was instead forced to finance the PAMA using proceeds from the Facility’s operations.⁴⁰⁶ Moreover, the report revealed that during the PAMA period, DRP had distributed USD 96.4 million to related entities.⁴⁰⁷ ESAN concluded that DRP could have funded its PAMA obligations, had it not paid fees and commissions to its affiliates through intercompany agreements.⁴⁰⁸

⁴⁰² **Exhibit C-050**, Letter from DRP (J. C. Mogrovejo) to Ministry of Energy & Mines (J. Bonelli) attaching Request for an Exceptional Extension of Deadline to Complete the Sulfuric Acid Plants Projects, 15 December 2005, pp. 9 and 38.

⁴⁰³ **Exhibit R-289**, Report No. 118-2006-MEM-AAM/AA/RC/FV/AL/HS/PR/AV/FO/CC, 25 May 2006, pp. 12–13; **Exhibit R-193**, *Evaluación de la Solicitud De Prorroga Excepcional de Plazos para el Cumplimiento de Proyectos Medioambientales Específicos Presentados por la Empresa DRP SRL*, Universidad ESAN, February 2006 (“**ESAN Report**”), pp. 100–103, 108.

⁴⁰⁴ **Exhibit R-193**, ESAN report, p. 88.

⁴⁰⁵ **Exhibit R-193**, ESAN report, p. 29 (“[t]he inability to finance the PAMA projects through debt forced DRP to execute the PAMA with own resources generated by the operations. This situation limited the generation of cash flow for the investment of the sulfuric acid plant (project requiring investments of USD 97.5 million between the years 2005 and 2006”).

⁴⁰⁶ **Exhibit R-193**, ESAN report, p. 29 (“[t]he inability to finance the PAMA projects through debt forced DRP to execute the PAMA with own resources generated by the operations. This situation limited the generation of cash flow for the investment of the sulfuric acid plant (project requiring investments of USD 97.5 million between the years 2005 and 2006”).

⁴⁰⁷ **Exhibit R-193**, ESAN Report, p. 21.

⁴⁰⁸ **Exhibit R-193**, ESAN Report, p. 22.

240. The MEM incorporated the ESAN report into its own study of the financial viability of DRP's extension proposal.⁴⁰⁹ According to the MEM's analysis, a period of two years and ten months was sufficient for DRP to finance its PAMA and other related obligations.⁴¹⁰
241. The MEM also conducted a review of several environmental inspections that independent consultants had carried out in La Oroya during the PAMA Period.⁴¹¹ The review found that DRP had repeatedly violated its environmental obligations and employed harmful environmental practices.⁴¹²
242. *The 2006 Extension.* On 29 May 2006, the MEM issued Ministerial Resolution No. 257-2006-MEM/DM (the "**2006 Extension**"), which granted DRP an extension of two years and ten months to complete the Sulfuric Acid Plant Project.⁴¹³ The resolution provided that:

“as a result of the evaluation undertaken, it has been determined that the requested period of four years would be excessive, given that it is a priority for the Peruvian State to adequately protect public health and the environment, and that it would be technically viable to execute the project in a shorter time period.”⁴¹⁴

⁴⁰⁹ [Exhibit R-289](#), Report No. 118-2006-MEM-AAM/AA/RC/FV/AL/HS/PR/AV/FO/CC, 25 May 2006, p. 12.

⁴¹⁰ [Exhibit R-289](#), Report No. 118-2006-MEM-AAM/AA/RC/FV/AL/HS/PR/AV/FO/CC, 25 May 2006, p. 68

⁴¹¹ See [Exhibit R-149](#), Report No. 056-2006-MEM-DGM-FMI/MA, 19 January 2006.

⁴¹² See [Exhibit R-149](#), Report No. 056-2006-MEM-DGM-FMI/MA, 19 January 2006, pp. 10–11. Specifically, the MEM documented the following shortcomings, among others: (i) DRP failed to install sufficient short rotary furnaces to treat particulate matter in the lead and copper circuits and fell far short of the treatment levels required by December 2004; (ii) A 2006 inspection found that DRP had failed to store its mineral concentrates in an enclosed space, despite having been instructed to do so in 2002; (iii) DRP failed to enclose the lead furnaces, even though it was required to do so by 2005; (iv) DRP failed to install helical separators intended to reduce the amount of solids present the effluent discharges into the Mantaro river; (v) DRP increased amount of raw material fed into the lead circuit had risen by 11%, which translated into increases in the amount of lead, arsenic, and sulfur fed into the circuit of 27%, 59%, and 7%, respectively; (vi) DRP transported toxic slag using plugged buckets, which caused the slag to spill onto the ground and into the Mantaro river; (vii) DRP failed to routinely clean the smelter, even though it had been instructed to implement a cleaning program in 2002; (viii) DRP's monitoring equipment failed to capture sulfur dioxide emissions that measured above 6,002 ug/m³; and (ix) DRP had failed worked with civil society to relocate educational centers located in La Oroya Antigua, despite being required to do so. See [Exhibit R-149](#), Report No. 056-2006-MEM-DGM-FMI/MA, 19 January 2006, pp. 10–11.

⁴¹³ [Exhibit R-287](#), Ministerial Resolution No. 257-2006-MEM/DM, 29 May 2006, Art. 1.

⁴¹⁴ [Exhibit R-287](#), Ministerial Resolution No. 257-2006-MEM/DM, 29 May 2006, pp. 4–5.

243. The MEM also accepted DRP’s design proposals to build a separate sulfuric acid plant for each of the smelter’s three circuits, as well as the company’s proposal to pursue additional projects intended to reduce emissions and address various public health concerns.⁴¹⁵
244. Consistent with the text of the 2004 Extension Regulation, the 2006 Extension explicitly provided that it did “not imply any modification of the obligations or the timelines stipulated in the contracts that DRP and its shareholders have signed with Centromín and the Peruvian state...”⁴¹⁶ Additionally, the 2006 Extension specified that the term of the extension was “**final and non-renewable.**”⁴¹⁷
245. The 2006 Extension served to extend only the deadline to conclude the Sulfuric Acid Plant Project, but it did not constitute an extension of the PAMA itself or the PAMA Period.⁴¹⁸ The extension incorporated a report⁴¹⁹ that clarified that
- “[t]he request for an exceptional extension refers to the performance of a specific environmental project, which does not mean an extension to the PAMA of the requesting party, which, for legal purposes, expires without fail on the date established for its termination. The period that is exceptionally extended only refers to the project that is the matter of the request, which does not affect the terms or conditions of compliance with the other obligations arising under the PAMA of the requesting entity.”⁴²⁰
246. The report also highlighted that the extension was “not the result of a legal mandate nor of a unilateral act of the State authority, but rather was the result of a request voluntarily submitted by [DRP].”⁴²¹

⁴¹⁵ [Exhibit R-289](#), Report No. 118-2006-MEM-AAM/AA/RC/FV/AL/HS/PR/AV/FO/CC, 25 May 2006, pp. 36–51.

⁴¹⁶ [Exhibit R-287](#), Ministerial Resolution No. 257-2006-MEM/DM, 29 May 2006, p. 6. *See also, Id.*, Art. 10 (“The Ministerial Resolution does not imply and amendment to any of the obligations or the terms stipulated in the agreement that Doe Run Peru S.R.L. and its shareholders have entered into with Centromín Peru S.A. and with the Peruvian State, specifically those referred to Guarantees and Investment Promotion measures, whose non-compliance by the appellant within the terms agreed upon in said agreement will be subject to the juridical consequences stipulated in said instruments.”).

⁴¹⁷ [Exhibit R-287](#), Ministerial Resolution No. 257-2006-MEM/DM, 29 May 2006, Art. 1.

⁴¹⁸ Alegre Expert Report, ¶¶ 53–54.

⁴¹⁹ [Exhibit R-287](#), Ministerial Resolution No. 257-2006-MEM/DM, 29 May 2006, Art. 1.

⁴²⁰ [Exhibit R-289](#), Report No. 118-2006-MEM-AAM/AA/RC/FV/AL/HS/PR/AV/FO/CC, 25 May 2006, p. 7.

⁴²¹ [Exhibit R-289](#), Report No. 118-2006-MEM-AAM/AA/RC/FV/AL/HS/PR/AV/FO/CC, 25 May 2006, p. 26.

247. Given concerns over DRP’s ability to meet the new deadline, the 2006 Extension created new financial and environmental obligations for DRP. Specifically, DRP agreed to fulfill the following obligations:

- DRP agreed to establish a trust account that would cover 100% of its obligations under the 2006 Extension (the “2006 Trust Account”).⁴²² The company agreed to submit to the MEM a monthly schedule assessing the investments to be made under the 2006 Extension in order to calculate the amounts to be paid into the trust account⁴²³;
- DRP agreed to issue a letter of guarantee in the amount of USD 28,641,094, equivalent to 20% of the value of its obligations under the 2006 Extension (the “2006 Guarantee Letter”).⁴²⁴ The MEM enjoyed the right to execute the letter should DRP violate its obligations⁴²⁵;
- DRP agreed not to make payments to third parties, corporate affiliates, or shareholders that could affect its ability to satisfy its obligations under the ministerial resolution⁴²⁶;
- DRP agreed to notify a trust account auditor of the realization of any payment over USD 1 million, with the exception of payments made in connection with production operating costs⁴²⁷;
- DRP agreed to several obligations regarding inspection, monitoring, and reporting on the progress and efficacy of DRP’s proposed projects to reduce chimney⁴²⁸ and

⁴²² Exhibit R-287, Ministerial Resolution No. 257-2006-MEM/DM, 29 May 2006, Art. 2.

⁴²³ Exhibit R-287, Ministerial Resolution No. 257-2006-MEM/DM, 29 May 2006, Art. 3.

⁴²⁴ Exhibit R-287, Ministerial Resolution No. 257-2006-MEM/DM, 29 May 2006, Art. 5.

⁴²⁵ Exhibit R-287, Ministerial Resolution No. 257-2006-MEM/DM, 29 May 2006, Art. 5.

⁴²⁶ Exhibit R-287, Ministerial Resolution No. 257-2006-MEM/DM, 29 May 2006, Art. 6.

⁴²⁷ Exhibit R-287, Ministerial Resolution No. 257-2006-MEM/DM, 29 May 2006, Art. 7.

⁴²⁸ Exhibit R-289, Report No. 118-2006-MEM-AAM/AA/RC/FV/AL/HS/PR/AV/FO/CC, 25 May 2006, pp. 38–39 (the additional obligations were: (i) “present detailed schedules of activities and investments for the following projects to control emissions through chimneys”; (ii) “Present a concise report every two weeks to the General Division of Mining on the activities taken to implement the measures to reduce particulate material through chimneys”; (iii) “Form a technical team to conduct continuous inspections at all CMLO facilities in order to detect possible failure in gas conduction systems and other possible sources of fugitive emissions with particulate material content, and be able to immediately and efficiently take corrective measures”; (iv) “present the detailed maintenance program of the different teams and channels to implement for control of particulate material through chimneys every month”; (v) “Every six months, analyze the size of dust particles emitted through chimneys in order to take corrective measures for more efficient capture”; (vi) conduct an evaluation of the efficiency of the equipment and whether it was “technically possible to raise the plume from the main chimney”).

fugitive⁴²⁹ emissions;

- DRP agreed to several obligations regarding the implementation of its proposed projects regarding street sweeping and vehicle washing⁴³⁰, public health⁴³¹, modeling and monitoring air quality⁴³², and monitoring dust and soil⁴³³.

248. These conditions were the product of the recommendations of both ESAN University and the independent panel of experts appointed by the World Bank.⁴³⁴ These conditions—termed by Renco as “onerous”⁴³⁵ and “burdensome”⁴³⁶—added negligible cost to the

⁴²⁹ **Exhibit R-289**, Report No. 118-2006-MEM-AAM/AA/RC/FV/AL/HS/PR/AV/FO/CC, 25 May 2006, pp. 42–43 (additional obligations were (i) a concise report every two weeks of measures taken; (ii) continuous maintenance and reporting from a technical team; (iii) “[i]f, after the projects listed above have been implemented as special measures, there are reasonable indications of possible breach of Air Quality Standards, DRP must close the sintering plant, unless it shows that the fugitive emissions created there are not significant contributors to air quality contamination in La Oroya, in addition to evaluating other projects that cover all sources of fugitive emissions, such as “closure of combined grinding systems”; (iv) “approximately 23,000 MT of fine recirculants (balance of fine materials – 2005), with an approximate lead content of 30%, which return to the lead beds, and that will comprise a risk factor to consider in the generation of fugitive emissions. Therefore, no later than January 31, 2007, DRP is required to show through a detailed technical report presented to the General Division of Mining, that the influence of fine recirculants in fugitive emissions close to the plants or reactors that receive these fine materials is not significant, or lacking this, to establish detailed measures to reduce (and eventually eliminate) this source”; (5) control of other metallic elements; (vi) efficiency improvement; and (vii) continuous monitoring and inventory of fugitive emissions).

⁴³⁰ **Exhibit R-289**, Report No. 118-2006-MEM-AAM/AA/RC/FV/AL/HS/PR/AV/FO/CC, 25 May 2006, p. 44 (additional obligations were: (i) “Clean streets while they are wet instead of employing dry sweeping to minimize impacts to the population’s health”; (ii) “a study must be performed to evaluate the frequency of sweeping and the efficiency of the cleaning system, with the possibility of increasing additional shifts for cleaning and/or acquiring additional sweeping units”; (iii) “monitor the dust and its content of heavy metals (especially lead) collected during cleaning activities”; (iv) “If new sweepers are needed, machines or equipment must be acquired to maximize collection of PM10 and to minimize redistribution and emissions”; (v) “use the tire and hopper-washing procedure for all light and heavy vehicles that enter the CMLO upon their exit”; (vi) “present the optimization program for cleaning operations in general, in terms of frequency, coverage and efficiency of the specific tasks, in a period of no more than six months from the issuance of [the 2006 Extension].”).

⁴³¹ **Exhibit R-289**, Report No. 118-2006-MEM-AAM/AA/RC/FV/AL/HS/PR/AV/FO/CC, 25 May 2006, pp. 49–51 (additional obligations were: (i) “continue supporting and promoting the measures intended to protect health that were designed and have been implemented based on the MINSAs-DRP Agreement of 2003, and it must expand and improve them”; (ii) “Present a detailed plan of all actions intended to prevent, control and meet the health care needs of people in La Oroya” (iii) “Expansion of all activities and programs to prevent, evaluate and take care of health needs proposed in the Operating Plan, which is part of the expansion of the MINSAs-DRP 2006 Agreement”; (iv) “A trust or an equivalent mechanism must be formed to independently and transparently administer the funds related to the MINSAs-DRP Agreement.”).

⁴³² **Exhibit R-289**, Report No. 118-2006-MEM-AAM/AA/RC/FV/AL/HS/PR/AV/FO/CC, 25 May 2006, pp. 53–55, and 61.

⁴³³ **Exhibit R-289**, Report No. 118-2006-MEM-AAM/AA/RC/FV/AL/HS/PR/AV/FO/CC, 25 May 2006, pp. 63–64.

⁴³⁴ **Exhibit R-289**, Report No. 118-2006-MEM-AAM/AA/RC/FV/AL/HS/PR/AV/FO/CC, 25 May 2006.

⁴³⁵ Treaty Memorial, ¶ 72.

⁴³⁶ Treaty Memorial, ¶ 73.

overall project budget.⁴³⁷ Furthermore, these conditions were, in the very least, prudent from the standpoint of objective observers having witnessed Renco and DRP's consistent delays and self-inflicted financial constraints over the course of nearly ten years. The financial conditions sought to address concerns over DRP's prior mismanagement of its revenues and ensure that the company would devote sufficient funds to completing the 2006 extension projects.⁴³⁸ The environmental conditions sought to ensure that DRP implemented its proposed additional projects effectively and in a timely manner.⁴³⁹

249. Additionally, the MEM required DRP to complete the remaining modernization projects that it had failed to undertake by their respective deadlines as a condition to granting the extension.⁴⁴⁰ In response, DRP finally completed four projects for which it had previously missed deadlines.⁴⁴¹
250. According to Claimant, the 2006 Extension constituted "a draconian extension."⁴⁴² DRP was not entitled to the 2006 extension under Peruvian Law; nonetheless, the MEM, in the face of fierce opposition and pressure, provided a lifeline to DRP, an actor who had consistently failed to meet its investment and environmental targets and obligations in the context of the very urgent environmental crisis in La Oroya.
251. Had DRP started to begin meaningful work on the Sulfuric Acid Plant Project earlier, it would have had more than "the normal schedule . . . of five to seven years"⁴⁴³ to complete the project. Renco asserts that the project had been "incorrectly designed by Centromín and its consultant, SNC-Lavalin,"⁴⁴⁴ but fails to note the fact that the original PAMA (supported by consultant SNC-Lavalin) foresaw the possibility of constructing three

⁴³⁷ **Exhibit R-289**, Report No. 118-2006-MEM-AAM/AA/RC/FV/AL/HS/PR/AV/FO/CC, 25 May 2006, pp. 91–92 and 97.

⁴³⁸ Isasi Witness Statement, ¶¶ 41–42.

⁴³⁹ Isasi Witness Statement, ¶¶ 41–42.

⁴⁴⁰ **Exhibit R-149**, Report No. 056-2006-MEM-DGM-FMI/MA, 19 January 2006, p. 13, ¶ 7.24.

⁴⁴¹ **Exhibit R-289**, Report No. 118-2006-MEM-AAM/AA/RC/FV/AL/HS/PR/AV/FO/CC, 25 May 2006, pp. 39 and 43–44 (The four completed projects included (i) upgrading the sinter plant ventilation system; (ii) enclosing the blast furnace; (iii) enclosing the dross plant; and (iv) paving the roads in the Facility).

⁴⁴² Treaty Memorial, ¶ 80.

⁴⁴³ Treaty Memorial, ¶ 81 (*citing* Partelpoeg Report, pp. 27–30).

⁴⁴⁴ Treaty Memorial, ¶ 82.

separate sulfuric acid plants.⁴⁴⁵ The redesign DRP proposed in 2005 was also similar to Centromín’s original PAMA design, in that both plans envisioned a separated sulfuric acid plant for the copper circuit.⁴⁴⁶ That is the PAMA that DRP scrapped in 1998, and then returned to in 2005, with only two years remaining to meet the PAMA.⁴⁴⁷ DRP’s 2005 modernization proposal was also substantially similar to Centromín’s original modernization plan. Under both plans, the Facility’s owner would replace the lead and copper smelting technologies with newer “bath smelting” technology.⁴⁴⁸ DRP scrapped this plan and chose not to replace the Facility’s smelting technologies.

252. Renco has not explained why DRP made these critical design choices in 1998, nor why it waited until 2004 to conduct any further design and pre-feasibility studies. As Mr. Dobbelaere explains, “DRP had the information it needed when it took over the [Facility] to begin designing the acid plant or plants.”⁴⁴⁹ Had DRP begun serious work on the Sulfuric Acid Plant Project early in the PAMA Period, it would have had ample time to finish the project.⁴⁵⁰ As Mr. Dobbelaere concludes, there was simply no technical justification for DRP’s delays.⁴⁵¹
253. Renco also asserts that the MEM “imposed” a number of additional projects and conditions that “intensif[ied] the unfair and unnecessary time crunch.”⁴⁵² Omitted from this complaint is the fact that virtually all of the expenses related to these projects and conditions related to the fugitive emissions projects proposed by DRP itself. Furthermore, the cost of the fugitive emissions projects that DRP itself proposed—USD 11.6 million—represented a

⁴⁴⁵ See [Exhibit C-090](#), PAMA 1996 Report, PDF p. 154; Dobbelaere Expert Report, ¶ 156 (“The SNC-Lavalin prefeasibility report also noted that, depending on what approach was taken to the modernization of each of the circuits, another approach would be to build three separate acid plants, one per circuit.”).

⁴⁴⁶ Dobbelaere Expert Report, ¶¶ 162–163.

⁴⁴⁷ Dobbelaere Expert Report, ¶ 157 (“In fact, the plan to build just one sulfuric acid plant for all three circuits, which Dr. Partelpoeg condemns as “inappropriately conceived”, came from DRP itself.”).

⁴⁴⁸ Dobbelaere Expert Report, ¶¶ 162–163

⁴⁴⁹ Dobbelaere Expert Report, ¶¶ 170–178.

⁴⁵⁰ Dobbelaere Expert Report, § VIII.

⁴⁵¹ Dobbelaere Expert Report, § VIII.

⁴⁵² Treaty Memorial, ¶ 83.

small fraction of its overall expenses related to its environmental obligations.⁴⁵³ Likewise, the additional community health conditions that the MEM imposed cost DRP USD 1.4 million.⁴⁵⁴ Renco attempts to distort the magnitude of these additional conditions in order to distract from DRP’s later delays.

254. In addition, Renco asserts that the MEM imposed unreasonable and unexpected emissions standards on DRP.⁴⁵⁵ According to Renco, the MEM required DRP to comply with 2007 emissions standards, even though the MEM supposedly should have imposed the 1997 standards.⁴⁵⁶ In its version of events, Renco neglects to mention that compliance with the 13 January 1997 PAMA deadline was at the heart of the 1997 Stability Agreement, which “froze” the LMPs and ECAs standards applicable to DRP to those in force at the time of the STA.⁴⁵⁷ The Stability Agreement did not, however, freeze emissions standards into perpetuity. The applicable regulation and the Stability Agreement expressly provided that emissions standards would be frozen only during the legally mandated ten-year period of executing the PAMA.⁴⁵⁸ As Ms. Alegre clarifies, the expiration of the PAMA execution period lifted the emissions-standards freeze: “[B]y failing to carry out its PAMA obligations within the 120 months since its approval, DRP lost the benefit of the Stability Agreement, and was then subject to the new regulatory framework that the Peruvian government had in place as of 13 January 2007.”⁴⁵⁹
255. Thus, once the PAMA deadline of 13 January 2007 passed, DRP’s Stability Agreement benefit expired, and Peru had the right to apply fully updated LMPs and ECAs to DRP’s

⁴⁵³ [Exhibit R-237](#), Supervision to the Metallurgical Complex of La Oroya-DRP, OSINERGMIN, PDF pp. 12 and 14.

⁴⁵⁴ [Exhibit R-237](#), Supervision to the Metallurgical Complex of La Oroya-DRP, OSINERGMIN, PDF pp. 12 and 14.

⁴⁵⁵ Treaty Memorial, ¶¶ 84–86.

⁴⁵⁶ Treaty Memorial, ¶ 84.

⁴⁵⁷ Alegre Expert Report, ¶¶ 32–33.

⁴⁵⁸ Alegre Expert Report, ¶¶ 32–40. *See also*, Alegre Expert Report, ¶ 67 (“[E]s preciso remarcar que la prórroga excepcional aprobada por Resolución Ministerial N° 257-2006-MEM/DM no determinó la prórroga de la vigencia del Contrato de Estabilidad del CMLO, el cual venció indefectiblemente el 13 de enero de 2007, dado que, como se ha explicado anteriormente, el Decreto Supremo N° 046-2004-EM no habilitó la prórroga del PAMA, sino únicamente del Proyecto materia de la solicitud de prórroga, que en este caso específico fue el Proyecto N° 1: “Plantas de Ácido Sulfúrico” del PAMA del CMLO.”).

⁴⁵⁹ Alegre Expert Report, ¶ 40 (“[A]l incumplir el PAMA y cumplirse los 120 meses desde su aprobación, DRP perdió el beneficio del Contrato de Estabilidad Administrativa Ambiental, quedando sujeto a los nuevos marcos normativos que estableció el gobierno peruano a partir del 13 de enero de 2007.”).

operations. This is not what Peru did, however. Despite DRP’s repeated failures to timely invest in, design, and construct the Sulfuric Acid Plant Project to address SO₂ emissions, as part of the 2006 Extension, the MEM extended the more lenient ECA standards for SO₂ emissions and all LMP emissions standards during the 2006 Extension period.⁴⁶⁰

c. DRP failed to meet its deadline under the “final and non-extendable” 2006 Extension

256. Following the 2006 Extension, DRP carried out a limited amount of work on the Sulfuric Acid Plant Project and incurred a series of sanctions for violations of emissions standards and other environmental obligations. For instance, in August 2007, Osinergmin (to whom the MEM had transferred its supervisory authority over DRP) fined DRP for having (i) dumped wastewater into the Mantaro River without authorization; (ii) failed to implement required SO₂ controls; and (iii) failed to transport ferrites according to environmental standards.⁴⁶¹
257. Osinergmin later found—on the basis of an independent auditor’s report for the year 2007—that DRP had committed 130 breaches of its environmental obligations under the 2006 Extension,⁴⁶² including repeatedly exceeding applicable emissions standards (LMPs and ECAs),⁴⁶³ water quality standards,⁴⁶⁴ and for failing to comply with several of its monitoring and reporting obligations.⁴⁶⁵ These violations also resulted in Osinergmin levying fines against DRP.⁴⁶⁶
258. In October 2008, Osinergmin inspected the sulfuric acid plant for the lead circuit, which DRP had recently completed.⁴⁶⁷ Osinergmin found DRP had been operating the sulfuric

⁴⁶⁰ [Exhibit R-289](#), Report No. 118-2006-MEM-AAM/AA/RC/FV/AL/HS/PR/AV/FO/CC, 25 May 2006, p. 20 (extending application of 1996 LMPs, and extending ECAs for SO₂ until January 2010); Alegre Expert Report, ¶¶ 19, 74.

⁴⁶¹ [Exhibit R-212](#), Resolution No. 646-2008-OS/CD, OSINERGMIN, 28 October 2008, pp. 10–18.

⁴⁶² [Exhibit R-213](#), Resolution No. 002172, OSINERGMIN, 5 March 2009, pp. 11–23.

⁴⁶³ [Exhibit R-213](#), Resolution No. 002172, OSINERGMIN, 5 March 2009, pp. 11–12, 21–23.

⁴⁶⁴ [Exhibit R-213](#), Resolution No. 002172, OSINERGMIN, 5 March 2009, p. 20.

⁴⁶⁵ [Exhibit R-213](#), Resolution No. 002172, OSINERGMIN, 5 March 2009, pp. 23–28.

⁴⁶⁶ [Exhibit R-213](#), Resolution No. 002172, OSINERGMIN, 5 March 2009, p. 32.

⁴⁶⁷ [Exhibit R-214](#), Report No. GFM-466-2010, OSINERGMIN, 26 July 2010, p. 4.

- acid plant only intermittently and directed the company to ensure its continuous and effective operation within three months.⁴⁶⁸
259. Shortly thereafter, Mr. Isasi visited the Facility to meet with representatives of DRP and evaluate the company's progress on the Sulfuric Acid Plant Project.⁴⁶⁹ He expressed concerns about DRP's ability to finish the project by the October 2009 deadline and reiterated that under the 2006 Extension, DRP would not receive any further extensions.⁴⁷⁰ Mr. Mogrovejo, DRP's Vice President of Environmental Matters, assured Mr. Isasi that the company was on track to finish the project on time, despite the recent fall in metals prices associated with the onset of the 2008 financial crisis.⁴⁷¹
260. In December 2008, Osinergmin returned to the Facility to conduct its routine annual inspection of DRP's progress on the Sulfuric Acid Plant Project, as well as its compliance with its other environmental obligations.⁴⁷² DRP, however, blocked Osinergmin officials from conducting their inspection.⁴⁷³ When the officials returned, they discovered that DRP had halted all work on the sulfuric acid plant for the copper circuit.⁴⁷⁴ DRP had paused the project after having completed only 51% of total work on the plant and just 27% of construction activities.⁴⁷⁵ DRP also had failed to complete several of its additional projects aimed at reducing fugitive emissions and improving public health,⁴⁷⁶ a fact that Renco omits.
261. Nonetheless, DRP assured the MEM that "despite the global crisis characterized by an international fall in metals prices, our company reiterates its commitment made to the Peruvian State.... [T]he construction deadline for the [Sulfuric Acid Plant] project will not

⁴⁶⁸ **Exhibit R-214**, Report No. GFM-466-2010, OSINERGMIN, 26 July 2010, p. 4.

⁴⁶⁹ Isasi Witness Statement, ¶ 45.

⁴⁷⁰ Isasi Witness Statement, ¶ 45.

⁴⁷¹ Isasi Witness Statement, ¶ 45.

⁴⁷² **Exhibit R-214**, Report No. GFM-466-2010, OSINERGMIN, 26 July 2010, p. 4.

⁴⁷³ **Exhibit R-214**, Report No. GFM-466-2010, OSINERGMIN, 26 July 2010, p. 7.

⁴⁷⁴ **Exhibit C-007**, Letter from DRP (J. Carlos Huyhua) to MEM (P. Sanchez), 5 March 2009, p. 1.

⁴⁷⁵ **Exhibit C-055**, Letter from DRP (J. Mogrovejo) to MEM (P. Sánchez) re Request for Extension of Deadline to Complete the Copper Circuit Sulfuric Acid Plant Project Based on Act of God or Force Majeure Grounds, 8 July 2009 ("**2009 DRP Extension Request**"), p. 108.

⁴⁷⁶ **Exhibit R-237**, Supervision to the Metallurgical Complex of La Oroya-DRP, OSINERGMIN, p. 12.

be modified.”⁴⁷⁷ DRP projected that its remaining obligations would require an investment of USD 64.6 million.⁴⁷⁸

262. Shortly thereafter, Osinergmin expressed its concern that DRP’s decision to halt work on the Sulfuric Acid Plant Project had compromised its ability to finish the project by 31 October 2009.⁴⁷⁹ The agency directed DRP to resume work on the project.⁴⁸⁰
263. On 13 February 2009, a syndicate of banks led by BNP Paribas (the “**Banking Syndicate**”) wrote to DRP, notifying the company that it would not renew DRP’s credit line unless (1) the company provided evidence of sufficient liquidity and/or capital to sustain its operations and complete the sulfuric acid plant by the October 2009 deadline; *or* (2) Peru extended the deadline.⁴⁸¹ DRP would satisfy neither condition. The Banking Syndicate’s letter did not mention the financial crisis or the fall in metals prices, but instead expressed concerns over DRP’s “*significantly reduced free cash flow generation*” in the context of DRP’s environmental obligations.⁴⁸²
264. In its recounting of events, Renco omits reference to the long-term source of DRPs liquidity problems, namely, the inter-company debt that Renco created for DRP since its inception, leaving DRP severely undercapitalized and with DRCL as its preferred creditor. As finance expert Ms. Isabel Kunsman explains, this situation made DRP an unattractive debtor to prospective creditors:

“DRP represented a significant default risk because of (1) a liquidity crisis that started on Day 1 of operating the Facility, (2) highly volatile earnings, (3) the compressed timeline to fulfill the capital-

⁴⁷⁷ **Exhibit R-192**, Letter VPAA-268-08 from DRP (J. Mogrovejo Castillo) to MEM (A. Rodríguez Muñoz), 24 December 2008, p. 2; Isasi Witness Statement, ¶ 46.

⁴⁷⁸ **Exhibit R-192**, Letter VPAA-268-08 from DRP (J. Mogrovejo Castillo) to MEM (A. Rodríguez Muñoz), 24 December 2008.

⁴⁷⁹ **Exhibit R-217**, Office Document No. 295-2009-OS-GFM, undated, p. 1.

⁴⁸⁰ **Exhibit R-217**, Office Document No. 295-2009-OS-GFM, undated, p. 1.

⁴⁸¹ **Exhibit C-099**, Letter from BNP Paribas (J. Stufsky *et al.*) to DRP (C. Ward *et al.*), 13 February 2009.

⁴⁸² **Exhibit C-099**, Letter from BNP Paribas (J. Stufsky *et al.*) to DRP (C. Ward *et al.*), 13 February 2009, p. 2 (“The availability of our Facility now depends also on the availability of liquidity, debt and / or equity for, and compliance with, the PAMA because the financial information that you have provided to us indicates significantly reduced company free cash flow generation in the wake of looming compliance-related socio-environmental capital expenditures which, if not addressed in a timely manner could, threaten the company’s economic viability. This creates significant credit concerns for us.”)

and time-intensive Commitments, (4) a failure by the Parent company to fund failing subsidiaries, (5) audit opinions with going concern explanatory language, and (6) the cancellation of credit by other lending institutions, to name a few.”⁴⁸³

265. On 24 February 2009, DRP wrote to Osinergmin and—completely neglecting any reference to the Banking Syndicate’s suspension of credit—reassured it that “the pause in work has not affected compliance with our PAMA within the period established by the Ministry of Energy and Mines.”⁴⁸⁴
266. In a matter of days, and with just seven months before the October 2009 deadline, on 5 March 2009, DRP made a complete about-face. Despite repeated past reassurances that movements in metals markets would not affect the deadline for the Sulfuric Acid Plant Project, DRP now alleged to the MEM that “[t]he sudden and unexpected fall in metal and byproduct prices since October 2008, caused a dramatic income reduction, which required a radical restructuring of the operations and deprived the company from the resources needed to continue executing PAMA projects, which had to be suspended last December 15.”⁴⁸⁵ With this newly formed position, DRP now claimed that it would not be able to meet the October 2009 deadline because it could not renew a revolving loan with the Banking Syndicate.⁴⁸⁶ DRP told the MEM that, unless circumstances changed, the company would close the Facility in 5 days’ time. DRP requested that the MEM “(a) [c]larify up that the current regulatory framework allows for additional adjustment terms in case an infringement to the regulations in force is identified; [and] (b) [c]onsider the likelihood of granting a term extension for the fulfillment of our investment obligations derived from PAMA, as a result of the extreme situation that the international financial crisis has generated in our company.”⁴⁸⁷ The MEM responded that the regulatory

⁴⁸³ Kunsman Expert Report, ¶ 133.

⁴⁸⁴ **Exhibit R-190**, Letter VPAA-054-09 from DRP (J. Mogrovejo Castillo) to Osinergmin (E. Quintanilla Acosta), 24 February 2009.

⁴⁸⁵ **Exhibit C-007**, Letter from DRP (J. Carlos Huyhua) to MEM (P. Sanchez), 5 March 2009, p.1.

⁴⁸⁶ **Exhibit C-007**, Letter from DRP (J. Carlos Huyhua) to MEM (P. Sanchez), 5 March 2009.

⁴⁸⁷ **Exhibit C-007**, Letter from DRP (J. Carlos Huyhua) to MEM (P. Sanchez), 5 March 2009, p. 2.

framework in place did not allow it to grant an extension beyond the October 2009 deadline.⁴⁸⁸

267. In a 7 April 2009 meeting, DRP’s general manager, Mr. Juan Carlos Huyhua, briefed the shareholders on the situation facing the company.⁴⁸⁹ The minutes of the shareholders’ meeting contain a section titled “Information about the Situation of DRP S.R.L.” that is worth quoting at length:

“Mr. Juan Carlos Huyhua presented a comprehensive report about the current situation of DRP, explaining in detail the circumstances that had given place to the recent events and the transitory suspension of the activities of the Smelter and Refinery of La Oroya.

He explained that the Partnership had a credit facility for working capital for US\$ 75 million that was granted by a syndicate of banks: BNP Paribas, Banco de Credito del Peru and Standard Bank Pie. *He pointed out that, because of certain technical matters of the revolving credit agreement; the syndicate of banks had decided to accelerate payments on the working capital and collect amounts owed with the inflows from the payments of the exports and local sales of DRP S.R.L.*

He asserted that this situation generated a sudden lack of liquidity for DRP S.R.L. and the impossibility to pay to concentrate suppliers the amounts owed for such concentrates, which caused the interruption in the supply of mineral concentrates to La Oroya Smelter and Refinery generating the progressive halt of the different production circuits.

This situation has caused concern to the National Government, to the suppliers and to the clients of DRP S. R. L. as well as its workers and partners. As a consequence, *some State Ministers have assumed the task of facilitators to achieve an understanding and the conversations between the several parties involved, including the mining companies, suppliers of mineral concentrates and the corporations involved in the marketing of minerals (trading).*”⁴⁹⁰ (Emphasis added).

268. The minutes make no mention of the global financial crisis or falling metal prices.⁴⁹¹

⁴⁸⁸ Exhibit C-006, Letter MEM (J.F.G. Isasi Cayo) to Doe Run Peru (J.C. Huyhua), 10 March 2009; Isasi Witness Statement, ¶ 50.

⁴⁸⁹ Exhibit C-145, DRP Shareholders’ Meeting Minutes, 7 April 2009.

⁴⁹⁰ Exhibit C-145, DRP Shareholders’ Meeting Minutes, 7 April 2009.

⁴⁹¹ Exhibit C-145, DRP Shareholders’ Meeting Minutes, 7 April 2009.

269. *March 2009, DRP's Draft MOU and First 2009 Extension Request.* As Mr. Huyhua indicated, the MEM assumed a lead role in finding a solution to DRP's financing problem. Officials from the MEM and several other ministries met with DRP's representatives and suppliers several times over the course of March 2009. During that time, DRP presented government officials with a draft Memorandum of Understanding ("**Draft MOU**") that outlined DRP and its shareholders' proposal.⁴⁹² DRP's shareholders would allow DRP to capitalize a USD 156 million debt owed to DRCL, which, in turn, would pledge 100 percent of its shares in DRP.⁴⁹³ This maneuver would make DRP a more palatable debtor to prospective creditors by stripping DRCL of its status as DRP's preferred creditor. The Draft MOU provided that, in exchange, Peru would agree to an extension "for a period to be determined as necessary to complete execution of the PAMA."⁴⁹⁴ The terms of the Draft MOU were not acceptable to the officials representing the government, who refused to sign the document.⁴⁹⁵
270. Renco now alleges that the Peruvian Government committed to signing the Draft MOU but later reneged on its agreement with DRP.⁴⁹⁶ Renco has failed to produce a single document to support its allegations.
271. *April 2009, the MEM-brokered Supplier Financing Option.* Renco omits that in early April, the MEM facilitated a meeting between DRP and fifteen of the company's mineral concentrate suppliers.⁴⁹⁷ The suppliers agreed to grant DRP a line of credit in the range of USD 100 million, and an additional bank-backed loan of USD 75 million.⁴⁹⁸ This financing would be sufficient to cover the remaining costs of the Sulfuric Acid Plant

⁴⁹² [Exhibit C-111](#), Draft Memorandum of Understanding between Peru, DRP, DRCL, and Doe Run Cayman Holdings LLC, 27 March 2009.

⁴⁹³ [Exhibit C-111](#), Draft Memorandum of Understanding between Peru, DRP, DRCL, and Doe Run Cayman Holdings LLC, 27 March 2009, PDF p. 2.

⁴⁹⁴ [Exhibit C-111](#), Draft Memorandum of Understanding between Peru, DRP, DRCL, and Doe Run Cayman Holdings LLC, 27 March 2009, Art. 3.2.

⁴⁹⁵ Isasi Witness Statement, ¶ 52.

⁴⁹⁶ Treaty Memorial, ¶¶ 99–102.

⁴⁹⁷ See [Exhibit C-145](#), DRP Shareholders' Meeting Minutes, 7 April 2009, p. 4; [Exhibit R-098](#), DRP saved by counterparts, EL COMERCIO, 3 April 2009, PDF p. 1.

⁴⁹⁸ See [Exhibit C-145](#), DRP Shareholders' Meeting Minutes, 7 April 2009, p. 4; [Exhibit R-098](#), DRP saved by counterparts, EL COMERCIO, 3 April 2009, PDF p. 1.

Project. In exchange, the suppliers required that DRP capitalize the USD 156 million in debt it owed to DRCL.⁴⁹⁹ This condition would allow the suppliers to take priority over DRCL in the event that DRP entered into bankruptcy.⁵⁰⁰ DRP agreed to the suppliers' conditions.⁵⁰¹

272. This solution would have allowed DRP to finish the Sulfuric Acid Plant Project on time. DRP's revolving credit facility expired on 30 April 2009 (*i.e.*, nearly a month after suppliers offered a new financing option),⁵⁰² such that the company would have faced a minimal period without capital had it accepted the suppliers' financing offer. Moreover, Mr. Isasi explains that DRP enjoyed a grace period of at least three months after the 31 October 2009 deadline to complete the Sulfuric Acid Plant Project.⁵⁰³ DRP therefore would have been able to use its suppliers' credit offer to resume operations and complete the Sulfuric Acid Plant.
273. On 7 April 2009, the Minister of Energy and Mines, Pedro Sánchez, appeared before the Peruvian Congress to brief it on the solution that the MEM had reached with DRP and its suppliers.⁵⁰⁴ Minister Sánchez declared that the solution would allow DRP to restart its operations and salvage the 13,500 jobs directly and indirectly generated by the Facility's operations.⁵⁰⁵ Minister Sánchez also assured the Congress that the solution would allow DRP to complete the Sulfuric Acid Plant Project before the expiry of its deadline.⁵⁰⁶
274. Although the supplier financing option solved the credit issue DRP identified in its 5 March 2009 letter, on the same day, DRP's shareholders refused to accept the suppliers' offer

⁴⁹⁹ See [Exhibit R-098](#), DRP saved by counterparts, EL COMERCIO, 3 April 2009, PDF p. 1.

⁵⁰⁰ [Exhibit R-098](#), DRP saved by counterparts, EL COMERCIO, 3 April 2009.

⁵⁰¹ [Exhibit C-068](#), Peru shall not grant any more term extensions to Doe Run for Environmental plan, MINES AND COMMUNITIES, 20 May 2009, p. 1 (“A creditor of Doe Run Peru said this past Tuesday that the company is not complying with a pact it made with the State and mining companies that would help it to save itself from a financial collapse, going to far as to conditioning its fulfillment of its commitments to the PAMA extension term.”)

⁵⁰² [Exhibit C-099](#), Letter from BNP Paribas (J. Stufsky *et al.*) to DRP (C. Ward *et al.*), 13 February 2009, p. 1 (“Lenders would like to inform you that we will consider extension of the borrowing base facility (the “Facility”) beyond its current expiration date of April 30 2009.”)

⁵⁰³ Isasi Witness Statement, ¶¶ 39, 53.

⁵⁰⁴ [Exhibit R-238](#), Congressional Transcript, Energy and Mines Commission, 7 April 2009.

⁵⁰⁵ [Exhibit R-238](#), Congressional Transcript, Energy and Mines Commission, 7 April 2009, p. 1.

⁵⁰⁶ [Exhibit R-238](#), Congressional Transcript, Energy and Mines Commission, 7 April 2009, p. 2.

unless the Peruvian Government promised to issue another extension.⁵⁰⁷ Renco now justifies DRP's rejection of the suppliers' offer because of "[t]he concern . . . that DRP would capitalize its debt and pledge its shares and that the Government would, in turn, give DRP an unreasonably short extension (or no extension at all) such that DRP would not be able to complete the PAMA."⁵⁰⁸ And yet, DRP's loss of its credit facility alone would not have threatened the company's ability to finish the project—its suppliers had provided a timely and viable financing alternative. The MEM would later discover, however, that DRP had fallen much further behind schedule than it had previously disclosed, *twenty to thirty months* behind schedule.⁵⁰⁹

275. Importantly, Renco also admits that it would not accept the supplier financing option because it refused to reverse the indebtedness into which it had forced DRP with Renco-affiliated entities. Renco explains that "[if] DRP would not be able to complete the PAMA, . . . DRP would be pushed into bankruptcy, and its main shareholder, *DRCL*, would not have any voting rights in the bankruptcy proceedings because it *would have given up its right to claim as a creditor of DRP*."⁵¹⁰
276. Having rejected the one option available to it, DRP proceeded to default on its payment obligations to its suppliers.⁵¹¹
277. On 3 June 2009, the company ceased operations at the Facility.⁵¹²
278. ***June 2009, DRP's Second 2009 Extension Request.*** On 25 June 2009, DRP requested a 30-month extension of the Sulfuric Acid Plant Project and, in return, promised to inject equity from its parent companies and capitalize its inter-company debt.⁵¹³ The next day, the MEM returned the request because DRP had omitted several important details.⁵¹⁴ After

⁵⁰⁷ [Exhibit C-145](#), DRP Shareholders' Meeting Minutes, 7 April 2009, p. 4.

⁵⁰⁸ Treaty Memorial, ¶ 105.

⁵⁰⁹ [Exhibit C-074](#), Letter from DRP (J. Carlos Huyhua) to MEM (P. Sanchez *et al.*), 25 June 2009.

⁵¹⁰ Treaty Memorial, ¶ 105.

⁵¹¹ Neil Witness Statement, ¶ 42.

⁵¹² Neil Witness Statement, ¶ 42.

⁵¹³ [Exhibit C-074](#), Letter from DRP (J. Carlos Huyhua) to MEM (P. Sanchez *et al.*), 25 June 2009.

⁵¹⁴ [Exhibit C-075](#), Letter from MEM (F. Gala Soldevilla) to (DRP) J. Carlos Huyhua, 26 June 2009.

DRP provided the missing information,⁵¹⁵ the MEM denied DRP's request on the grounds that it lacked the legal authority to grant an extension beyond the October 2009 deadline.⁵¹⁶ This decision was consistent with the regulatory framework and the MEM's prior communications with DRP, and it should not have come as a surprise to the company.

279. **July 2009, DRP's Third 2009 Extension Request.** In July 2009, DRP again wrote to the MEM and insisted that it be granted a 30-month extension due to the alleged *force majeure* event of the 2008 financial crisis, even though in late-December 2008, DRP projected that it would require only seven months to complete the project.⁵¹⁷ Additionally, the company estimated that its remaining obligations would require an investment of USD 164 million, more than double the amount it had projected in December 2008.⁵¹⁸ DRP's July 2009 request marked the first time that the company had invoked the *force majeure* clause in the STA, despite nearly ten months having passed since the onset of the 2008 financial crisis and four months since the Bank Syndicate imposed its new conditions.⁵¹⁹ The company did not explain why it suddenly required far more time and money than it had estimated to be necessary just months before. This fact is notable because Claimant repeatedly—and misleadingly—suggests that the MEM violated its purported obligations under the STA's *force majeure* clause between March and June 2009,⁵²⁰ even though DRP had not even invoked that clause at that time. Nor did DRP explain (a) why it was invoking a *contractual force majeure* clause in response to a *regulatory* requirement, or (b) why it

⁵¹⁵ **Exhibit C-100**, Letter from DRP (J.C. Huyhua) to MEM (F. Gala Soldevilla), 2 July 2009.

⁵¹⁶ **Exhibit C-101**, Letter from MEM (F. Gala Soldevilla) to DRP (J.C. Huyhua), 6 July 2009.

⁵¹⁷ **Exhibit C-055**, 2009 DRP Extension Request, p. 1; **Exhibit R-192**, Letter No. VPAA-268-08 from DRP (J. Mogrovejo Castillo) to MEM (A. Rodriguez Muñoz), 24 December 2008.

⁵¹⁸ **Exhibit C-055**, 2009 DRP Extension Request; **Exhibit R-192**, Letter No. VPAA-268-08 from DRP (J. Mogrovejo Castillo) to MEM (A. Rodriguez Muñoz), 24 December 2008.

⁵¹⁹ Isasi Witness Statement, ¶ 55.

⁵²⁰ See, e.g., Treaty Memorial, ¶¶ 98 (“DRP also advised the MEM that concentrate suppliers were going to freeze shipments as of March 9 and that the banks required that DRP obtain a formal PAMA extension. The MEM refused, claiming that a delay in completing the final PAMA project was unacceptable, **notwithstanding the force majeure event**”), ¶ 100 (“As part of the MOU, the Peruvian Government insisted on concessions from DRP in connection with **DRP's request for a force majeure extension**, and DRP acquiesced, **although the terms of the Stock Transfer Agreement entitled DRP to an extension of the PAMA period due to the economic force majeure event**”), 104 (“[T]he capitalization was subject to a firm commitment by the Government to expressly grant the PAMA extension that the Government had promised to provide and **was obligated to provide under the economic force majeure provision** of the Stock Transfer Agreement.”).

would invoke a contractual *force majeure* clause against the MEM, which was not a party to the STA.

280. The MEM rejected DRP’s request, reiterating that there was “no regulatory framework to answer to an extension application or a project extension”⁵²¹ As independent expert Ada Alegre explains, the MEM could not have approved DRP’s extension request unless the regulatory framework expressly empowered it to do so.⁵²² When DRP submitted its extension request, the 2006 Extension Regulation governed the MEM’s ability to extend PAMA projects. That regulation, however, prevented the MEM from considering any extension request submitted after December 31, 2005.⁵²³

d. Peru granted DRP a second lifeline to complete the Sulfuric Acid Plant Project

281. Although the MEM could not grant a new extension, the Peruvian Government appointed a technical commission to evaluate the possibility of granting an extension to DRP (the “**Technical Commission**”).⁵²⁴ The Technical Commission concluded that from a technical perspective, DRP required a minimum of 20 months to complete construction on the Sulfuric Acid Plant Project, with additional time required to obtain financing.⁵²⁵ In other words, it was clear that from a purely technical perspective, DRP had run out of time as early as February 2008 (*i.e.*, 20 months before the October 2009 deadline). This finding laid to rest DRP’s incongruous *force majeure* claim, since the global financial crisis had begun in October 2008, and DRP had only paused work on the Sulfuric Acid Plant Project in December 2008.

282. Shortly after the Technical Commission published its report, Peru’s Congress debated passing a new law to grant DRP an extension. The debate record demonstrates that the Congress was deeply critical of DRP and expected the MEM to impose strict regulations on the company. The record directly contradicts the false narrative set forth by Renco,

⁵²¹ **Exhibit C-076**, Letter from MEM (F.A. Ramirez del Pino) to DRP (J. Mogrovejo), 15 July 2009.

⁵²² Alegre Expert Report, ¶¶ 87-88.

⁵²³ Alegre Expert Report, ¶¶ 87-88.

⁵²⁴ **Exhibit C-043**, La Oroya Technical Commission, Executive Summary, 12 September 2009 (“**2009 Technical Commission Report**”).

⁵²⁵ **Exhibit C-043**, 2009 Technical Commission Report.

according to which the Congress recognized that DRP deserved another extension but was sabotaged by the MEM's misbehavior.

283. Members from all major parties lambasted DRP for its environmental failings and made clear that they supported the extension only to avoid punishing DRP's workers. Two congress members declared that DRP had "made a mockery" of Peru,⁵²⁶ while two others alleged that the company had blackmailed and manipulated its workers and the residents of La Oroya.⁵²⁷ Another congress member referred to DRP as a "mafioso, shameless, cheating" company that was "once again getting away with manipulating the workers' social and economic situation."⁵²⁸ Yet another congress member expressed "indignation" at having to deal with "a company that constantly breaches its environmental obligations."⁵²⁹ All of these congress members voted in favor of the extension. It was clear that, contrary to Claimant's narrative, the Peruvian Congress did not believe that DRP deserved another extension, but instead was loathe to penalize the company's workers.
284. The debate record likewise demonstrates that members of Peru's Congress expected the MEM to impose strict financial regulations on DRP. Congress members expressed concern over DRP's ability and willingness to invest in its environmental obligations, given that "every time the company received extensions from the government, it committed to making investments and did not comply with making such investments."⁵³⁰ According to one member, "that is why one article of the bill specifies that the Government will pass a decree to regulate the law that must define, with precision, sufficient guarantees that the Supreme Government will have in case the company fails to execute its remediation commitments

⁵²⁶ [Exhibit R-239](#), Congressional Transcript, First Ordinary Legislature of 2009, 9th B Session, 24 September 2009, p. 6 (comments of Congress Member Carrasco Tavera); [Exhibit R-240](#), Congressional Transcript, First Ordinary Legislature of 2009, Energy and Mines Commission, 23 September 2009, p. 7 (comments of Congress Member Acosta Zárate).

⁵²⁷ [Exhibit R-239](#), Congressional Transcript, First Ordinary Legislature of 2009, 9th B Session, 24 September 2009, pp. 15, 23, and 34 (comments of Congress Members Reymundo Mercado and Macedo Sánchez).

⁵²⁸ [Exhibit R-239](#), Congressional Transcript, First Ordinary Legislature of 2009, 9th B Session, 24 September 2009, p. 32 (comments of Congress Member Ruiz Delgado).

⁵²⁹ [Exhibit R-239](#), Congressional Transcript, First Ordinary Legislature of 2009, 9th B Session, 24 September 2009, p. 10 (comments of Congress Member Acosta Zárate).

⁵³⁰ [Exhibit R-239](#), Congressional Transcript, First Ordinary Legislature of 2009, 9th B Session, 24 September 2009, p. 7 (comments of Congress Member Carrasco Tavera).

within the relevant deadlines.”⁵³¹ Another congress member expressed that it was “essential” that the MEM pass a regulation imposing financial conditions to ensure DRP’s compliance with its deadlines “because, if not, we will undoubtedly confront a similar situation again.”⁵³² Several congress members specifically called for financial guarantees in the form of a trust account.⁵³³ Another congress member called for the law to establish that if DRP failed to obtain financing within ten months, the extension would expire.⁵³⁴ Yet another congress member said, “[W]e believe that the bill should provide that the extension will enter into effect only if it is approved by the Ministry of Energy and Mines and the Ministry of the Environment, and that during the extension period there will be a permanent and constant supervision [of DRP] on the part of the Executive.”⁵³⁵ Nearly every congress member that spoke made similar comments regarding the necessity of financial conditions.⁵³⁶

285. *September-October 2009, the 2009 Extension Law and Regulation.* On 25 September 2009, the Peruvian Congress passed Law No. 29140, which (i) declared decontaminating the environment in La Oroya to be a high-priority matter of public interest, (ii) granted DRP a 30-month extension of the PAMA, and (iii) required the company to restart operations within ten months (the “**2009 Extension Law**”).⁵³⁷ The law stated that the 30-month period represented a maximum, non-negotiable extension.⁵³⁸

⁵³¹ [Exhibit R-239](#), Congressional Transcript, First Ordinary Legislature of 2009, 9th B Session, 24 September 2009, p. 7 (comments of Congress Member Carrasco Tavera).

⁵³² [Exhibit R-239](#), Congressional Transcript, First Ordinary Legislature of 2009, 9th B Session, 24 September 2009, p. 12 (comments of Congress Member Estrada Choque).

⁵³³ [Exhibit R-240](#), Congressional Transcript, First Ordinary Legislature of 2009, Energy and Mines Commission, 23 September 2009, pp. 26–27; [Exhibit R-239](#), Congressional Transcript, First Ordinary Legislature of 2009, 9th B Session, 24 September 2009, pp. 15–18.

⁵³⁴ [Exhibit R-239](#), Congressional Transcript, First Ordinary Legislature of 2009, 9th B Session, 24 September 2009, p. 10 (comments of Congress Member Acosta Zárate).

⁵³⁵ [Exhibit R-239](#), Congressional Transcript, First Ordinary Legislature of 2009, 9th B Session, 24 September 2009, p. 9 (comments of Congress Member Bedoya de Vivanco).

⁵³⁶ See generally, [Exhibit R-240](#), Congressional Transcript, First Ordinary Legislature of 2009, Energy and Mines Commission, 23 September 2009; [Exhibit R-239](#), Congressional Transcript, First Ordinary Legislature of 2009, 9th B Session, 24 September 2009, pp. 15, 17, 22, 30–31.

⁵³⁷ [Exhibit C-077](#), Law No. 29410, 26 September 2009 (“**2009 Extension Law**”).

⁵³⁸ [Exhibit C-077](#), 2009 Extension Law, Art. 2.

286. The 2009 Extension Law required DRP to submit financial guarantees sufficient to ensure compliance with its obligations “subject to such terms and conditions as may be established by the Ministry of Energy and Mines.”⁵³⁹ Additionally, the law divided the 30-month extension into two phases: (i) a maximum, non-negotiable term of 10 months to secure financing for the project; and (ii) a maximum, non-negotiable term of 20 months for construction and start-up activities.⁵⁴⁰
287. Under the 2009 Extension Law, the Peruvian Congress instructed the MEM to issue supplementary regulations to implement the law’s provisions.⁵⁴¹ Accordingly, the MEM issued Supreme Decree No. 075-2009-EM (the “**2009 Extension Regulation**”), which required DRP to comply with the following obligations:
- The regulation required DRP to channel 100% of gross revenues into a trust account to fund the completion of the remaining sulfuric acid project (the “2009 Trust Account”).⁵⁴² DRP was to establish the 2009 Trust Account within 10 months, *i.e.*, at the deadline for obtaining financing to complete the sulfuric acid plant.⁵⁴³ The regulation provided that “[t]he Trustee shall release the company’s revenues not required for the execution of the Project provided that it shall guarantee the availability of the resources required to fund at least three (3) months of Project Expenses and Works Execution Schedule at all times; subject to the supervision, certification and authorization of the Trust audit firm”⁵⁴⁴;
 - The regulation required DRP or a parent company to issue a letter of guarantee to the MEM covering 100% of the remaining project cost (the “2009 Guarantee Letter”).⁵⁴⁵ The MEM was authorized to foreclose on the 2009 Guarantee Letter in the event that DRP failed to fulfill its obligations within the deadlines established by the 2009 Extension Law.⁵⁴⁶
 - The regulation required DRP not to “make any payment for revenues, royalties, fees, dividends or debts to shareholders or any other payment to natural or legal

⁵³⁹ Exhibit C-077, 2009 Extension Law, Art. 3.

⁵⁴⁰ Exhibit C-077, 2009 Extension Law, Art. 2.

⁵⁴¹ Exhibit C-077, 2009 Extension Law, Art. 5 (“Through a supreme executive order, the Executive shall issue such supplementary provisions as may be necessary for the enforcement of this Law.”).

⁵⁴² Exhibit C-078, Supreme Decree No. 075-2009-EM, 29 October 2009 (“**2009 Extension Regulation**”), Section 4.2.

⁵⁴³ Exhibit C-078, 2009 Extension Regulation, Section 4.2.

⁵⁴⁴ Exhibit C-078, 2009 Extension Regulation, Section 4.2.

⁵⁴⁵ Exhibit C-078, 2009 Extension Regulation, Section 5.

⁵⁴⁶ Exhibit C-078, 2009 Extension Regulation, Section 8.1.

persons directly or indirectly related to the applicant company or its owners . . . until thorough fulfillment of the environmental duties, unless upon prior express authorization of the Ministry of Energy and Mines.”⁵⁴⁷

- The regulation established the following timelines for the 20-month construction and start-up period established by the 2009 Extension Law:
 - construction activities were limited to a maximum term of fourteen months;
 - within the fourteen-month construction period, DRP enjoyed a “maximum term” of two months for the “renegotiation and mobilization of the contractors,” and “up to twelve (12) months for the construction of the Project”; and,
 - project start-up was limited to a maximum term of six months.⁵⁴⁸
288. The trust account requirement was particularly important, given DRP’s repeated failure to finance its PAMA obligations, as well as its failure to honor its commitment to channel sufficient funds into the 2006 Trust Account to cover 100% of its environmental obligations. On 11 June 2010, the MEM loosened the 100% trust account requirement, reducing DRP’s required contribution from 100% of its revenues down to 20%.⁵⁴⁹
289. Expert witness Ada Alegre explains that the 2009 Extension Law represented an extraordinary concession in support of DRP, which was the only company in Peru that enjoyed an additional five years and four months beyond the ten-year PAMA Period.⁵⁵⁰ Such was Peru’s willingness to sustain the Facility’s operations and help DRP complete the final sulfuric acid plant.
290. Notwithstanding Peru’s extraordinary support, DRP failed to meet its obligations under the 2009 Extension Law and Regulation. It remained in a state of paralysis, both with respect to its operations and its progress on the Sulfuric Acid Plant Project. On 27 April 2010, the company committed to issuing the 2009 Guarantee Letter in accordance with the terms of

⁵⁴⁷ Exhibit C-078, 2009 Extension Regulation, Section 6.5.

⁵⁴⁸ Exhibit C-078, 2009 Extension Regulation, Section 3.2.

⁵⁴⁹ Exhibit C-082, Supreme Decree No. 032-2010-EM.

⁵⁵⁰ Alegre Expert Report, ¶¶ 90-91.

the 2009 Extension Law and Regulation.⁵⁵¹ Days later, however, DRP reversed position. It threatened to withhold the guarantee unless the MEM committed not to execute it until after the entire 30-month extension period had lapsed, even in the event that DRP failed to meet the 10-month deadline to secure financing.⁵⁵² This condition made no sense; under the 2009 Extension Law, DRP could not proceed with the Sulfuric Acid Plant Project if it failed to secure financing within ten months.⁵⁵³ In other words, a failure to obtain financing would constitute a final breach, and the MEM would be entitled to execute DRP's guarantee.⁵⁵⁴

291. DRP's pattern and practice in failing to meet and take seriously its environmental and investment obligations was in full view. Again seeking to place blame anywhere other than its own decisions and conduct, Renco takes issue with the truthful statements that followed in the wake of DRP's and Renco affiliates' conduct.⁵⁵⁵ When asked in May 2010 (when DRP had less than three months to secure financing) if DRP would receive an additional extension, Vice Minister of Mines Fernando Gala stated, "I doubt very much that someone would want to propose an additional extension to a company that has had many opportunities and which, despite all the breaks that it has been given, has not yet been able to restart its activities."⁵⁵⁶ The Vice Minister added, "a new extension...is always possible, but that the MEM is not responsible for such decisions. It would have to be reviewed by Congress."⁵⁵⁷ Vice Minister Gala later noted, "There is little will on the part of the company Doe Run to provide fresh contributions and guarantees that it will execute the Environmental Mitigation and Management Program (PAMA)."⁵⁵⁸ In

⁵⁵¹ [Exhibit R-241](#), Doe Run Breaches Commitments Assumed with the Executive and Creates Confusion, RPP NOTICIAS, 14 May 2010, PDF p. 2.

⁵⁵² [Exhibit R-241](#), Doe Run Breaches Commitments Assumed with the Executive and Creates Confusion, RPP NOTICIAS, 14 May 2010, PDF p. 2; [Exhibit C-080](#), Draft Real and Personal Property Security Agreement, p. 3.

⁵⁵³ [Exhibit C-077](#), 2009 Extension Law, Art. 2.

⁵⁵⁴ [Exhibit C-077](#), 2009 Extension Law, Art. 2.

⁵⁵⁵ Treaty Memorial, ¶¶ 120–125.

⁵⁵⁶ [Exhibit C-147](#), MEM: Doe Run has until July to restart operations, ANDINA, 6 May 2010, PDF pp. 1–2.

⁵⁵⁷ [Exhibit C-147](#), MEM: Doe Run has until July to restart operations, ANDINA, 6 May 2010, PDF p. 1.

⁵⁵⁸ [Exhibit C-151](#), The Peruvian government will shut down Doe Run if there is no viable proposal, INVESTING, 16 July 2010, PDF p. 1.

response to reports that DRP had informed its workers that the State had breached its obligations to DRP, Vice Minister Gala clarified that DRP had misinformed its workers—that DRP had in fact breached its obligations to the State, and DRP’s workers should not be “fooled by the company.”⁵⁵⁹ Similarly, when interviewed regarding DRP’s history, the Minister of Energy and Mines pointed out that DRP had “systematically” failed to make good on its promises.⁵⁶⁰ Faced with DRP’s opposition to satisfying the conditions of the 2009 Extension Law and Regulation, President Alan García stated, “We cannot be backed up against the wall by a company that has failed to meet deadlines and make the investments that it promised to make. . . . The State has to ensure that environmental contracts are respected, and it has to enforce mining investment obligations.”⁵⁶¹ According to Claimant, the above statements—all of which are true—constitute a “smear campaign” against DRP.⁵⁶²

292. On 27 July 2010, DRP failed to meet its deadline to secure financing and issue the Guarantee Letter. By this point, one of DRP’s suppliers had initiated bankruptcy proceedings against the company, and it would soon enter liquidation.⁵⁶³ DRP had proven itself to be a failed operation, burdened by its parent company’s extractive and exploitative corporate practices and its own lack of urgency in addressing the Facility’s environmental problems. This failure would have devastating consequences for the people of La Oroya.

D. Renco harmed human health in La Oroya, leading to criticism of the company and legal actions against both Claimant and the Peruvian State

293. When DRP bought the Facility in 1997, Claimant knew of the public health harms caused by the operations of metallurgical facilities. The effects of air pollution from the operation of such facilities had been documented extensively elsewhere, including at Claimant’s own

⁵⁵⁹ Treaty Memorial, ¶ 122 (citing [Exhibit R-241](#), Doe Run Breaches Commitments Assumed with the Executive and Creates Confusion, RPP NOTICIAS, 14 May 2010).

⁵⁶⁰ Treaty Memorial, ¶ 123 (citing [Exhibit C-149](#), Doe Run revives the ghosts of the rejection of large-scale mining in Peru, EL MUNDO, 14 June 2010).

⁵⁶¹ Treaty Memorial, ¶ 123 (citing [Exhibit C-150](#), Peru: García says that Doe Run is trying to blackmail the government, LA NACIÓN, 14 June 2010).

⁵⁶² Treaty Memorial, ¶ 120.

⁵⁶³ [Exhibit C-079](#), Cormin Notice Regarding DRP’s Bankruptcy to INDECOPI, 18 February 2010. **Section II.E** and **II.F** of this Counter-Memorial provides a detailed account of the bankruptcy proceedings.

lead smelter in Herculaneum, Missouri.⁵⁶⁴ Emissions containing lead and SO₂ had been targeted as a particular cause for concern for causing illnesses and disabilities in adults and children living in proximity to smelters in several countries, including in the United States.⁵⁶⁵ At least two independent studies (and other materials provided during the due diligence process) had already reported high lead and SO₂ contamination in the area affected by the La Oroya Facility in particular.⁵⁶⁶ Renco and DRRC knew that DRP's operations would harm the health of La Oroya residents, and that urgent action was required to reduce those risks.

294. Renco and DRRC also knew that ongoing operations (as opposed to historical operations) posed the greatest health risks to those living within the vicinity of a smelter.⁵⁶⁷ At its Herculaneum smelter in Missouri, the U.S. EPA had required DRRC to undertake emissions control projects on a set schedule in order to bring the smelter's emissions within U.S. limits.⁵⁶⁸ The U.S. EPA had also ordered DRRC to limit production at the Herculaneum smelter and refrain from using certain types of more polluting metal concentrate or feedstock (*i.e.*, feedstock with higher levels of impurities or dirtier feedstock).⁵⁶⁹ Thus, when DRP acquired the Facility, Claimant knew that the higher the production levels and the dirtier the feedstock, the greater the adverse impact would be on the environment and human health.
295. Yet, instead of responding with commensurate urgency to the ongoing health risks and making an effort to mitigate them, DRP set off in the opposite direction by ramping up

⁵⁶⁴ **Exhibit R-204**, Proposed Administrative Agreement Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act and the Resource, Conservation and Recovery Act; The Doe Run Resources Corporation, Herculaneum, Missouri, Docket Nos. CERCLA-7-2000-0029 and RCRA-7-2000-0018, FEDERAL REGISTER (VOL. 65, ISSUE 240), 13 December 2000.

⁵⁶⁵ Proctor Expert Report, p. 9 *et seq.*

⁵⁶⁶ See **Exhibit C-108**, Knight Piésold Report, Section 5; **Exhibit R-198**, *Estudio de evaluación integral de impacto ambiental del área afectada por los humos en la fundición de La Oroya*, 1 November 1996, pp. 2, 15–18.

⁵⁶⁷ **Exhibit R-205**, The El Paso Smelter 20 Years Later: Residual Impact on Mexican Children, ENVIRONMENTAL RESEARCH, Fernando Díaz-Barriga *et al.*, 1997.

⁵⁶⁸ **Exhibit R-178**, Herculaneum Orders and Stipulations 5–9, *Air Conservation Commission (State of Missouri), Missouri Department of Natural Resources and The Doe Run Company*, July 1990–1997.

⁵⁶⁹ **Exhibit R-178**, Herculaneum Orders and Stipulations 5–9, *Air Conservation Commission (State of Missouri), Missouri Department of Natural Resources and The Doe Run Company*, July 1990–1997.

production and buying cheaper, dirtier feedstock.⁵⁷⁰ As discussed below, DRP's commercial practices increased blood lead levels (“BLLs”) and incidence rates of respiratory illnesses among people in La Oroya.⁵⁷¹ DRP also embarked on a series of low-cost, ineffective social programs in the community, which effectively shifted blame and responsibility for the health impacts of its operations onto the people of La Oroya themselves.⁵⁷²

296. DRP's behavior quickly drew attention. Its actions became the target of fierce critiques and spawned legal actions against Renco and Peru. When presented with evidence, DRP sought to silence critics through threats and intimidation.
297. In the following sections, Peru will discuss the adverse health impacts of DRP's operations and the resulting backlash. Specifically, Peru will demonstrate that (i) DRP's standards and practices adversely affected the health of the residents of La Oroya (**Section II.D.1**); (ii) DRP sought to shift the responsibility for the harm it was causing onto the community (**Section II.D.2**); (iii) Renco and DRP were criticized before domestic and international standard setting bodies and regulators (**Section II.D.3**); and (iv) Renco's corporate decisions led to lawsuits by La Oroya residents in the United States (**Section II.D.4**).

1. DRP's standards and practices adversely affected the health of the residents of La Oroya

298. The first study of blood lead levels, or BLLs, in La Oroya was conducted in November 1999 by the General Directorate of Environmental Health of the Ministry of Health (the “**Environmental Health Directorate**”). The study showed that blood lead levels of children ages 3-10 years living in La Oroya ranged from 14.7 to 79.9 ug/dL; the mean level was 43.5 ug/dL.⁵⁷³ All participating children from La Oroya had blood lead levels above the World Health Organization (“**WHO**”) limit of 10 ug/dL.⁵⁷⁴ As toxicologist Deborah

⁵⁷⁰ Dobbelaere Expert Report, § IX.

⁵⁷¹ Proctor Expert Report, Sections 3.4, 3.5, 3.7.

⁵⁷² Proctor Expert Report, Section 3.8.

⁵⁷³ **Exhibit C-052**, Study of Blood Lead Levels in a Selected Population of La Oroya, Environmental Health Directorate, 23–30 November 1999, p. 8.

⁵⁷⁴ **Exhibit C-052**, Study of Blood Lead Levels in a Selected Population of La Oroya, Environmental Health Directorate, 23–30 November 1999, p. 8.

Proctor explains, blood lead levels measured in 1999 would have reflected harms caused by the Facility’s emissions under DRP—not Centromín—because blood lead level measurements reflect contemporaneous exposures.⁵⁷⁵

299. DRP undertook its own study over the two years following the publication of the Environmental Health Directorate study. It too found that average blood lead levels in children in La Oroya were well above WHO limits.⁵⁷⁶ Nevertheless, in that same study, DRP attempted to point to potential causes—other than the smelting Facility—of the public health problems plaguing La Oroya.⁵⁷⁷ In November 2001, the Peruvian Government established a technical group (the GESTA Zonal del Aire de La Oroya) to study the sources of contamination in La Oroya.⁵⁷⁸ The study concluded that the Facility’s operations caused 99% of the air contamination.⁵⁷⁹ Among the main toxic emissions were sulfur dioxide, lead, and small particles, as well as considerable levels of arsenic and cadmium.⁵⁸⁰
300. Additional studies confirmed that the Facility’s contemporaneous emissions were the primary human exposure pathway to lead, sulfur dioxide, and other contaminants. For example, in 2005, the Environmental Health Directorate and the U.S. Centers for Disease Control (“CDC”) collaborated with the United States Agency for International Development (“USAID”) to develop a plan for addressing the health problems in La

⁵⁷⁵ Proctor Expert Report, pp. 10-11.

⁵⁷⁶ DRP report revised by Dr. Steven Rothenberg, “Study of Blood Lead Levels in the People of La Oroya 2000-2001” (finding that average BLLs in children up to age 6 were more than 2.5 times above the WHO limit), [Exhibit C-053](#), Study of Blood Lead Levels of the Population of La Oroya 2000-2001, DRP, PDF p. 2.

⁵⁷⁷ DRP report revised by Dr. Steven Rothenberg, “Study of Blood Lead Levels in the People of La Oroya 2000-2001” (finding that average BLLs in children up to age 6 were more than 2.5 times above the WHO limit), [Exhibit C-053](#), Study of Blood Lead Levels of the Population of La Oroya 2000-2001, DRP, PDF p. 4 (“[D]ue to poverty and low levels of child health in our country, children suffer from malnutrition, infectious diseases (tuberculosis, meningitis), poor care of home births, etc., ailments and deficiencies that can cause harm to the nervous systems of children, with signs and symptoms similar to those attributed to lead, that impede their differentiation, therefore, it is necessary that a state institution, which could be Digesa, promote implementation of comprehensive epidemiological studies on the effects of lead in children, centralizing existing information from studies that have been carried out, to make a diagnosis of the reality of our country’s population with respect to lead exposure.”).

⁵⁷⁸ [Exhibit C-093](#), Supreme Decree. No. 074-2001-PCM, 22 June 2001, pp. 7, 10.

⁵⁷⁹ Alegre Expert Report, ¶ 85; [Exhibit C-096](#), Action Plan to Improve the Air Quality and Health of La Oroya, Gesta Zonal del Aire de La Oroya, 1 March 2006, p. 9.

⁵⁸⁰ [Exhibit C-096](#), Action Plan to Improve the Air Quality and Health of La Oroya, Gesta Zonal del Aire de La Oroya, 1 March 2006, pp. 9–11.

Oroya.⁵⁸¹ The project's 2005 Report reached a number of significant conclusions, again confirming the smelting Facility as the main cause of La Oroya's public health crisis:

- It concluded that the "most immediate priority" for protecting human health was to reduce stack and fugitive lead emissions enough to bring children's blood lead levels below the WHO limit of 10 ug/dL. It reasoned that "when the principal pathway of lead exposure, air emissions, is controlled, BLLs decrease."
- The CDC noted that other smelters were able to reduce children's blood lead levels by implementing lead emissions controls instead of just shutting down operations, but also pointed out that when smelters did close, air quality improved and blood lead levels decreased.
- The CDC recommended that DRP establish a new monitoring program to measure the impact of projects meant to reduce emissions. It noted that community hygiene and environmental health programs were not effective in reducing BLLs until "major source-control measures, such as control of fugitive emissions" were implemented.⁵⁸²

301. In 2005 and 2008, DRP commissioned two human health risk assessments from Integral Consulting.⁵⁸³ The two studies, both of which were led by Dr. Rosalind Schoof (Renco and DRRC's toxicology expert), found that the vast majority of lead exposure in La Oroya was due to DRP's ongoing emissions.⁵⁸⁴ The Integral studies also found that DRP's sulfur dioxide emissions harmed the residents of La Oroya (albeit to a lesser extent than did the company's lead emissions).⁵⁸⁵

302. Other contemporaneous sources also sounded the alarm on DRP's sulfur dioxide emissions. The GESTA's 2006 Action Plan to Improve the Air Quality and Health of La Oroya found that due to the Facility's excessive SO₂ emissions a "considerable increase in [acute respiratory episodes] was seen in the last 4 years, where children less than 9 years

⁵⁸¹ [Exhibit C-138](#), Development of an Integrated Intervention Plan to Reduce Exposure to Lead and Other Contaminants in the Mining Center of La Oroya, Perú, Centers for Disease Control, May 2005 ("2005 CDC Report").

⁵⁸² Citing information from the Trail smelter in Canada, the CDC stated that "without reduction of air emissions and remediation of soil, home hygiene and clean neighborhood campaigns are of little value in decreasing elevated BLLs." [Exhibit C-138](#), 2005 CDC Report, p. 32.

⁵⁸³ [Exhibit C-060](#), Integral Consulting Inc., *Human Health Risk Assessment Report, La Oroya Metallurgical Complex*, 2 December 2005 ("2005 Integral Study"); [Exhibit C-139](#), Integral Consulting Inc., *Complementary Human Health Risk Assessment, La Oroya Metallurgical Complex*, 21 November 2008 ("2008 Integral Report").

⁵⁸⁴ [Exhibit C-060](#), 2005 Integral Study, pp. 60–61; Proctor Expert Report, Sections 3.1 & 3.2.

⁵⁸⁵ [Exhibit C-060](#), 2005 Integral Study, p. 129. *See also*, Proctor Expert Report, Section 3.4.

of age were the most affected. A correlation was found between levels of concentration of SO₂ average annual for the 5 stations located in La Oroya for the years between 1998-2001 and the total number of [acute respiratory episodes] recorded at health centers, which is corroborated with the general statistics from the health sector.”⁵⁸⁶

303. Data collected following DRP’s cessation of operations confirmed that the company’s contemporaneous emissions represented the principal cause of La Oroya’s public health crisis.⁵⁸⁷ With regard to lead poisoning, Ms. Proctor shows that blood lead levels fell dramatically in the years after DRP ceased operations of the Facility in June 2009.⁵⁸⁸
304. Likewise, Ms. Proctor explains that sulfur dioxide contamination plummeted after June 2009, since that substance disappates within a matter of days after being released into the environment.⁵⁸⁹

2. DRP sought to shift the responsibility for the harm it was causing onto the community

305. Despite the well-documented harm caused by its own operations, DRP chose not to take effective or significant action. The only way the company could have meaningfully reduced the Facility’s public health impacts was to swiftly implement projects aimed at reducing main-stack and fugitive emissions.⁵⁹⁰ Instead, beginning in 1998, the company implemented community involvement programs, which included teaching good hygiene habits for children and parents, implementing blood lead level testing, and educating the public on ways to reduce lead exposure in households, streets, and schools. These

⁵⁸⁶ [Exhibit C-096](#), Action Plan to Improve the Air Quality and Health of La Oroya, 1 March 2006, p. 11.

⁵⁸⁷ This conclusion comports with the experiences of other smelters. For example, when the old smelter located in Trail, Canada was re-opened with cleaner technology, Cominco reported a decrease of 25% in blood lead levels of children in the first year. The concentrations of heavy metals and sulfur dioxide were also reduced by more than 75%. Similar effects were observed in El Paso. When the smelter in that city closed down, the lead concentrations in the air were immediately and drastically reduced, which led to a decrease of 75% in the total quantity of lead in children’s blood. See [Exhibit R-205](#), The El Paso Smelter 20 Years Later: Residual Impact on Mexican Children, ENVIRONMENTAL RESEARCH, 1997.

⁵⁸⁸ Proctor Expert Report, Figure 15.

⁵⁸⁹ Proctor Expert Report, p. 9. See also, [Exhibit R-220](#), *Estudio comparativo entre las concentraciones de dióxido de azufre y material particulado registradas en el periodo de 24 noviembre al 5 de diciembre del 2007 (fundición en operación) y en el periodo de 24 de noviembre al 5 de diciembre del 2009 (fundición inoperativo) en La Oroya, Yauli, Perú*, Daniel Álvarez Tolentino, Equipo técnico del Proyecto El Mantaro Revive, December 2009, p. 3 and 4.

⁵⁹⁰ Proctor Expert Report, Section 3.8.

programs were, at best, ineffective and failed to significantly reduce the impact of the Facility's unrestrained emissions.⁵⁹¹

306. DRP disseminated information about its community health projects in La Oroya as proof of the company's commitment to community health and environmental stewardship.⁵⁹² At the same time, DRP refused to acknowledge that its ongoing operations posed the single greatest threat to public health in La Oroya. Instead, DRP sought to blame Centromín's operations for both environmental contamination and the residents' lack of nutrition, sanitation, and clean water.⁵⁹³
307. Toxicologist Deborah Proctor explains that DRP's community health programs had a trivial impact, especially in light of the company's practices that caused the Facility's emissions to increase.⁵⁹⁴ She notes that Claimants have provided no evidence that such programs reduced blood lead levels and concludes that "no measure short of reducing emissions would [have] significantly reduce[d] the BLLs of La Oroya's children."⁵⁹⁵
308. Moreover, by focusing on hygiene and cleaning recommendations that residents, NGOs, and schools could undertake, many of DRP's community health projects had the effect of shifting the responsibility of reducing blood lead levels onto the community. Mr. Proctor finds that some of these programs may have even been harmful to residents. For example, she notes that pictures of DRP's street cleaning program—for which the company recruited La Oroya's residents as "volunteers" to clean contaminated streets—"the residents cleaning the streets were provided no personal protective equipment (PPE) (e.g., gloves, protective clothing, masks).⁵⁹⁶ It appears that the volunteers are wearing their own shoes

⁵⁹¹ Proctor Expert Report, Section 3.8.

⁵⁹² [Exhibit R-165](#), Jack V. Matson Expert Report, Document No. 1242-38, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 1 December 2020, p. 11, ¶ 1(b) (referencing DRRCE-00453218, 5 March 2004).

⁵⁹³ [Exhibit R-165](#), Jack V. Matson Expert Report, Document No. 1242-38, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 1 December 2020, p. 11, ¶ 1(b) (referencing DRRCE-00453218, 5 March 2004).

⁵⁹⁴ Proctor Expert Report, Section 3.8..

⁵⁹⁵ Proctor Expert Report, p. 51.

⁵⁹⁶ Proctor Expert Report, p. 50.

and clothes, so after they are exposed during cleaning of DRP’s contaminated dust in the street, they could bring their dirty shoes home and expose the rest of their families.”⁵⁹⁷

309. Ms. Proctor’s conclusions are corroborated by contemporaneous analyses of DRP’s community health programs. For example, Dr. Fernando Serrano headed a team of public health experts from St. Louis University that traveled to La Oroya to collect blood samples for analysis of toxic metals in 2006. When asked about personal and community hygiene and street cleaning programs, he stated that “such measures are helpful when blood lead levels are relatively low,” but that blood lead levels found in La Oroya “will not be lowered significantly unless emissions—including ‘fugitive’ emissions that escape from sources other than the plant’s main stack—are reduced.”⁵⁹⁸
310. The Center for Disease Control had reached the same conclusion in 2005. As noted above, the CDC concluded that DRP’s

“[p]ublic health education and hygiene efforts alone [were] of little benefit in reducing elevated BLLs. Educational interventions may help reduce BLLs after implementation of major source-control measures, such as control of fugitive emissions and construction of new state-of-the-art smelters or smelter closure and soil and dust remediation.”⁵⁹⁹

311. However, as discussed in **Section II.C.2**, DRP *increased* the Facility’s emissions. DRP pursued its harmful policies despite (i) knowing the public health consequences associated with high emissions; and (ii) receiving repeated confirmation of those consequences from several studies, including the Environmental Health Directorate/USAID/CDC study in 1999 and the DRP’s own 2000-2001 study, along with the 2002 MEM study showing that emissions exceeded the MPLs for lead and sulfur dioxide.⁶⁰⁰

⁵⁹⁷ Proctor Expert Report, p. 50.

⁵⁹⁸ **Exhibit R-165**, Jack V. Matson Expert Report, Document No. 1242-38, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 1 December 2020, p. 14.

⁵⁹⁹ **Exhibit C-138**, 2005 CDC Report, pp. 29, 32 (internal citations omitted). It is worth noting that the CDC Report made clear that air emissions, and not soil, constituted the “principal pathway of lead exposure”.

⁶⁰⁰ **Exhibit C-052**, Study of Blood Lead Levels in a Selected Population of La Oroya, Digesa, 23–30 November 1999; **Exhibit C-136**, Consorcio Unión Para El Desarrollo Sustentable (“UNES”), *Evaluation of Lead Levels and Exposure Factors Among Pregnant Women and Children Under 3 Years Old in the City of La Oroya*, March 2000 (“**2000 UNES Report**”); **Exhibit C-046**, Report to Our Communities, DRP, 2001; **Exhibit C-110**, Report No. 732-2002-EM-DGM-DFM/MA from MEM (V. Lozada Garcia) to Director General of DRP, 10 December 2002.

3. Renco and DRP were criticized before domestic and international bodies and regulators

312. Prominent actors in Peruvian industry have also criticized DRP for its environmental failures. Peru's National Society of Mining, Petroleum, and Energy, a private industry association, suspended DRP in June 2009 for its failure to comply with basic mining and environmental regulations.⁶⁰¹ Formal expulsion from the association followed in January 2010, and the association issued a statement declaring that DRP “has not shown . . . any willingness to comply with its environmental commitments and its obligations to the country, its workers, the La Oroya population and its creditors.”⁶⁰² Similarly, the president of Confia, a Peruvian business organization, has stated that companies like DRRC do not belong in Peru.⁶⁰³
313. Additionally, on 24 February 2011, several Peruvian NGOs and Oxfam America filed a complaint against DRP and Renco, alleging that the companies had violated the OECD Guidelines for Multinational Enterprises.⁶⁰⁴ The petitioners alleged that the Facility's emissions under DRP “greatly exceed the international standards” and caused La Oroya's residents to suffer “severe and irreversible” health effects.⁶⁰⁵ The petitioners criticized DRP's repeated failures to meet its PAMA obligations and Peru's decision to grant the company multiple extensions.⁶⁰⁶
314. Members of civil society have even testified before the U.S. House Foreign Relations Committee about DRP's noxious operations in La Oroya. A group of public health experts, international civil society groups, and La Oroya residents testified that DRP had poisoned

⁶⁰¹ Exhibit R-252, Press Release, SOCIEDAD NACIONAL DE MINERÍA, PETRÓLEO Y ENERGÍA, 29 January 2010.

⁶⁰² Exhibit R-252, Press Release, SOCIEDAD NACIONAL DE MINERÍA, PETRÓLEO Y ENERGÍA, 29 January 2010

⁶⁰³ Exhibit R-251, Poison Harvest: Deadly U.S. Mine Pollution in Peru, Hearing before the Subcommittee on Africa, Global Health, and Human Rights of the Committee on Foreign Affairs House of Representatives, 112th Congress, 2nd Session, 19 July 2012, p. 14.

⁶⁰⁴ Exhibit R-211, Specific Instant Complaint (Concerning The Operations of DRP Corporation and The Renco Group in La Oroya, Peru), *United States and Peru National Contact Points Pursuant to the OECD Guidelines for Multinational Enterprises*, 24 February 2011 (“**OECD Complaint**”).

⁶⁰⁵ Exhibit R-211, OECD Complaint, p. 5.

⁶⁰⁶ Exhibit R-211, OECD Complaint, pp. 6–7.

the residents of La Oroya, despite the company’s commitment to resolving the Facility’s environmental problems.⁶⁰⁷ They further testified that

“Doe Run, for more than a decade has been contributing to serious environmental contamination, despite having the resources and the technology to operate in a more responsible way. . . . The [Peruvian] government has already given Doe Run several opportunities to resolve the contamination problems at the metallurgical complex. But the company has never complied with these commitments.”⁶⁰⁸

315. Indeed, DRP became the target of fierce critiques for its management and operation of the La Oroya Facility.

4. Renco and DRRC sought to hold Peru and Activos Mineros responsible for lawsuits based on their own corporate decisions

a. Renco’s corporate decisions led to lawsuits by La Oroya residents in the United States

316. Beginning in 2007, a group of children from La Oroya filed lawsuits in the U.S. state of Missouri (the “**Missouri Litigations**”). The children alleged various personal injury damages as a result of exposure to harmful substances and environmental contamination from the Facility. The named defendants include Renco and DRRC, as well as their U.S.-affiliated companies DR Acquisition Corp., Doe Run Cayman Holdings LLC, and directors and officers Marvin K. Kaiser, Albert Bruce Neil, Jeffrey L. Zelms, Theodore P. Fox III, and Ira L. Rennert (collectively, the “**Renco Defendants**”).

317. Renco and DRRC—two of the Renco Defendants in the Missouri Litigations, and the two Claimants in the present UNCITRAL arbitrations—are not STA Parties, and they do not benefit from the assumption of responsibility provisions on which they purport to rely in the arbitral proceeding based on the STA (PCA Case No. 2019-47 – *The Renco Group, Inc. & Doe Run Resources, Corp. v. The Republic of Peru & Activos Mineros S.A.C.*). DRP and DRCL, the two Renco affiliates who currently *are* STA parties, are not defendants in

⁶⁰⁷ **Exhibit R-251**, Poison Harvest: Deadly U.S. Mine Pollution in Peru, Hearing before the Subcommittee on Africa, Global Health, and Human Rights of the Committee on Foreign Affairs House of Representatives, 112th Congress, 2nd Session, 19 July 2012.

⁶⁰⁸ **Exhibit R-251**, Poison Harvest: Deadly U.S. Mine Pollution in Peru, Hearing before the Subcommittee on Africa, Global Health, and Human Rights of the Committee on Foreign Affairs House of Representatives, 112th Congress, 2nd Session, 19 July 2012, p. 16.

the Missouri Litigations.⁶⁰⁹ Likewise, neither Respondent, Peru or Activos Mineros, is, or has ever been, a party to the Missouri Litigations.

318. The plaintiffs withdrew the lawsuits after the Renco Defendants filed to remove them to federal court. In August and December 2008, the same attorneys filed new lawsuits on behalf of 36 minor plaintiffs. The attorneys later added 933 additional plaintiffs as parties to the suits. Then, in 2015, other attorneys filed suit on behalf of over 1,000 children. In total, the Renco Defendants face negligence claims from over 3,700 minors in Missouri (the “**Missouri Plaintiffs**”). The Missouri Litigations have been consolidated under two different cases, styled as *A.O.A. et al v. Doe Run Resources Corporation et al.*, Case No. 4:11-cv-00044 (the “**Reid Cases**”), and *J.Y.C.C., et al., v. Doe Run Resources, Corp., et al.*, Case No. 4:15-CV-1704-RWS (the “**Collins Cases**”).
319. Although the Missouri Plaintiffs originally filed the lawsuits in state court, Claimant successfully removed the cases to the United States District Court for the Eastern District of Missouri based on the argument that an international arbitration would be affected by the litigations’ outcomes (*viz.*, the *Renco I* arbitration). Although a federal court will hear the Missouri Plaintiffs’ claims, it will apply either Missouri negligence law or Peruvian negligence law to determine the substantive claims.⁶¹⁰
320. The Missouri Plaintiffs raise substantially similar claims and allegations in both suits. To wit, they allege that the Renco Defendants’ decisions concerning DRP’s operations negligently exposed them to toxic substances that cause various cognitive harms, including decreased intellectual capacity, behavioral issues (like ADHD, impulsivity, and irritability), as well as physical health consequences, such as headaches, muscle and bone weakness and pain, abdominal pain, short stature, balance issues, hypertension, and

⁶⁰⁹ See [Exhibit R-225](#), Docket, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), as of 4 March 2022; [Exhibit R-226](#), Docket, *Father Chris Collins et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:15-cv-01704-RWS), as of 4 March 2022.

⁶¹⁰ [Exhibit R-018](#), Memorandum and Order, Document No. 949, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 16 October 2018, p. 2.

lethargy.⁶¹¹ Additionally, the Missouri Plaintiffs claim that they are at an elevated risk of developing renal disease, hypertension, and cancer.⁶¹²

321. The Missouri Plaintiffs enumerate seven of Renco and DRRC’s “significant decisions” that comprise the basis for their case against the companies:

“[T]he acquisition of Metaloroya, the initial undercapitalization of DRP, the renegotiation of the PAMA, the prioritization of environmental projects, the funding for those projects, the establishment of the intercompany agreements and the Back-to-Back Loan, [and] the decision not to inject additional capital into DRP at any point after its inception.”⁶¹³

322. The Missouri Plaintiffs place particular emphasis on Renco and DRRC’s actions that undercapitalized DRP. The plaintiffs allege that the inter-company transactions described in **Section II.C.1** stripped DRP of its capital and made it impossible for the company to bring the Facility into compliance with Peru’s environmental standards.⁶¹⁴ According to the Missouri Plaintiffs,

“DRP’s financial team repeatedly told the Defendants DRP did not have the necessary funds to complete its PAMA obligations. And to all of this, the Defendants turned a blind eye and a deaf ear. By the time they finally got around to doing something to address the lead problem eight years into their ownership, it was too late for the Plaintiffs.”⁶¹⁵

323. The Missouri Plaintiffs allege that as a consequence of Renco and DRRC’s decisions, DRP exacerbated the air-quality crisis in La Oroya:

⁶¹¹ **Exhibit R-017**, Amended Complaint for Damages, Document No. 424, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 21 February 2017.

⁶¹² **Exhibit R-017**, Amended Complaint for Damages, Document No. 424, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 21 February 2017.

⁶¹³ **Exhibit R-288**, Plaintiffs’ Consolidated Memorandum of Law in Opposition to Defendants’ Motions for Summary Judgment (Docs. 1232, 1236, 1241), Document No. 1276, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 24 March 2022, p. 116.

⁶¹⁴ **Exhibit R-288**, Plaintiffs’ Consolidated Memorandum of Law in Opposition to Defendants’ Motions for Summary Judgment (Docs. 1232, 1236, 1241), Document No. 1276, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 24 March 2022, pp. 101–111, 166–170.

⁶¹⁵ **Exhibit R-288**, Plaintiffs’ Consolidated Memorandum of Law in Opposition to Defendants’ Motions for Summary Judgment (Docs. 1232, 1236, 1241), Document No. 1276, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 24 March 2022, p. 169.

“The air quality level is critical not only because the minor plaintiffs must breathe this polluted air but also because the particulate matter within the air is dispersed in a dust form that enters and settles inside the minor plaintiffs’ houses and is deposited on the ground and on all surfaces, including furniture, clothing, water, and crops.”⁶¹⁶

324. The Missouri Plaintiffs likewise emphasize the particularly grave harm they have suffered from inhaling sulfur dioxide released from the facility:

“Sulfur dioxide, another pollutant emitted continuously and at an excessive level from Defendants’ metallurgical complex, damages circulatory and respiratory system, increases mortality, and is linked to lung cancer, especially when present along with elevated levels of particulate matter, as is the case in La Oroya. Due to the wrongful actions of the Defendants described herein, the level of sulfur dioxide in the air of La Oroya is unreasonably high and dangerous to the minor plaintiffs.”⁶¹⁷

325. The Missouri Plaintiffs have specified that their claims relate to the Facility’s release of toxic substances during the course of DRP’s ownership and operation thereof:

“During the course of their ownership, operation, use, management, supervision, storage, maintenance, and/or control of operations of their metallurgical complex and related properties in La Oroya, Peru, and at all times relevant hereto, the Defendants, while located in the States of Missouri and/or New York, negligently, carelessly and recklessly, made decisions that resulted in the release of metals and other toxic and harmful substances, including but not limited to lead, arsenic, cadmium, and sulfur dioxide, into the air and water and onto the properties on which the minor plaintiffs have in the past and/or continue to reside, use and visit, which has resulted in toxic and harmful exposures to minor plaintiffs.”⁶¹⁸ (Emphasis added)

326. According to the Missouri Plaintiffs,

“[a]lthough suitable technologies and processes exist and have existed that would prevent the pollution and contamination caused

⁶¹⁶ **Exhibit R-227**, Petition for Damages and Demand for Jury Trial, *Sister Kate Reid and Megan Heeney as Next Friends of A.O.A. v. Doe Run Resources Corp. et al.* (Mo. Cir. No. 0822-CC08086), 7 August 2008 (“**Missouri Plaintiffs’ Complaint**”), ¶ 21.

⁶¹⁷ **Exhibit R-227**, Missouri Plaintiffs’ Complaint, ¶ 23.

⁶¹⁸ **Exhibit R-227**, Missouri Plaintiffs’ Complaint, ¶ 20. *See also, id.*, ¶ 26 (“As owner of the La Oroya metallurgical complex, Doe Run is liable for the activities and the toxic environmental releases from the complex since the date Defendants purchased the complex, October 24, 1997.”).

by Defendants’ activities related to operating and managing the metallurgical complex, Defendants have not implemented and/or failed to timely implement such technology at the La Oroya Complex.”⁶¹⁹

327. The Missouri Litigations are pending. As of March 2022, discovery is still ongoing in one case, while the other has moved to the summary judgment phase. To date, there has been no trial or judgment on the merits.
328. Over the years, the Renco Defendants have strategically used the Renco international arbitrations to orchestrate ostensible conflicts with the Missouri Litigations. Renco’s removal of the Missouri Litigations to federal court (based on its own initiation of *Renco I*) has allowed it to submit motions to stay the litigations based on the Federal Arbitration Act, which directs federal courts to stay any litigations that present the same “fundamental question” as a pending international arbitration.⁶²⁰ Federal district and appellate courts initially denied the Renco Defendants’ motion to stay the litigations pending the *Renco I* arbitration, finding that the domestic and international proceedings did not present the same fundamental question.⁶²¹ Nonetheless, the Renco Defendants have since revived their motion.⁶²²

⁶¹⁹ [Exhibit R-017](#), Amended Complaint for Damages, Document No. 424, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 21 February 2017, ¶¶ 71, 75; see also [Exhibit R-022](#), Petition for Damages, Document No. 1-5, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 7 January 2011, ¶ 20.

⁶²⁰ [Exhibit R-023](#), Memorandum and Order, Document No. 60, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 7 December 2011.

⁶²¹ [Exhibit R-021](#), Memorandum Opinion, Document No. 45, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 22 June 2011; [Exhibit R-023](#), Memorandum and Order, Document No. 60, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 7 December 2011; [Exhibit R-024](#), Decision, *Sr. Kate Reid v. Doe Run Resources Corp.*, U.S. Court of Appeals, Eight Circuit No. 12-1079, 13 November 2012, p. 11.

⁶²² [Exhibit R-254](#), Defendants’ Reply to Plaintiffs’ Memorandum In Opposition To Defendants’ Motion For A Determination Of Foreign Law, Document No. 244, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 15 September 2014; [Exhibit R-255](#), Memorandum and Order, Document No. 284, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 11 February 2015; [Exhibit R-256](#), Defendants’ Motion For Partial Reconsideration Of The Court’s Order of 11 February 2015, Document No. 291, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 17 April 2015; [Exhibit R-257](#), Defendants’ Reply To Plaintiffs’ Opposition To Motion For Partial Reconsideration Of The Court’s Order of 11 February 2015, Document No. 298, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 7 May 2015; [Exhibit R-253](#), Defendants’ Memorandum Supporting Motion for Summary Judgment, Document No. 1231, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 15 November 2021.

329. The Renco Defendants have also sought to stay the Missouri Litigations on the basis that the lawsuits could not proceed without the participation of Peru and Activos Mineros as “necessary and indispensable parties”.⁶²³ The federal court concluded that the lawsuits can and should proceed without the participation of Peru or Activos Mineros; that decision was upheld on appeal.⁶²⁴

b. Renco and DRRC’s efforts to draw Peru and Activos Mineros into the Missouri Litigations

330. Undeterred, for over a decade Renco and DRRC have attempted to force Peru and Activos Mineros to assume sole responsibility and indemnify Renco and DRRC for any damages awarded and costs incurred in the Missouri Litigations.⁶²⁵ Renco and DRRC’s Contract Memoria begins by alleging: “This dispute arises from ... [Respondents’] refusal to honor their contractual and legal commitments to retain past responsibility and assume future liability for third-party claims of injury from environmental contamination.”⁶²⁶ In their initial formulation of the international arbitration dispute, Renco and DRRC presented the Missouri Litigations as central to their claims under both the Treaty and the STA.⁶²⁷

331. Notwithstanding Renco and DRRC’s efforts to involve Respondents in the Missouri Litigations, and despite the Missouri Litigations being central to their claims, Renco and DRRC refuse Respondents’ access to information related to the Missouri Litigations. This

⁶²³ **Exhibit R-020**, Answer to Amended Complaint for Damages, Document No. 971, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 17 December 2018, ¶¶ 14–15 (asserting that “claims are barred in whole or in part by the doctrine of intervening cause or superseding cause, and any damages that Plaintiffs may have sustained were caused in whole or in part by actions of independent third parties, including, but not limited to, the Republic of Peru, Empresa Minera del Centro Del Peru S.A. (Centromin Peru S.A.), and Activos Mineros S.A.C.”; and that “Plaintiffs have failed to join parties that are necessary and indispensable under Federal Rule of Civil Procedure 19”).

⁶²⁴ See, e.g., **Exhibit R-023**, Memorandum and Order, Document No. 60, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 7 December 2011; **Exhibit R-024**, Decision, *Sr. Kate Reid v. Doe Run Resources Corp.*, U.S. Court of Appeals, Eight Circuit No. 12-1079, 13 November 2012; **Exhibit R-018**, Memorandum and Order, Document No. 949, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 16 October 2018, p. 14. The Missouri Court also has ruled that the “essence of plaintiffs’ claims against [Renco owner Ira] Rennert and Renco is that they took actions in Missouri that caused injuries to the plaintiffs in Peru.”

⁶²⁵ See, e.g., **Exhibit R-258**, Letter from King & Spalding LLP to MEM, MEF, and Activos Mineros, 12 October 2010.

⁶²⁶ Contract Statement of Claim, ¶ 1.

⁶²⁷ See, e.g., **Exhibit R-012-02**, Notice of Arbitration and Statement of Claim, *The Renco Group Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, 4 April 2011, ¶¶ 83–84.

behavior contradicts Renco and DRRC’s agreement under the 2017 Framework Agreement to “provide such information [as to the status of and developments in Missouri] at the time and in the manner reasonably requested by Peru.”⁶²⁸

332. Starting in 2010, Renco and DRRC and their affiliates sent untimely and unfounded requests to Respondents demanding that they intervene in the Missouri Litigations. Renco and DRRC’s argument that “Activos Mineros has refused to comply with its contractual obligations and Peru has never responded”⁶²⁹ contradicts the record and ignores that there is no legal basis for their request, as Peru and Activos Mineros have articulated over time.
333. On 12 October 2010, Renco and its affiliates, through counsel, sent a letter to Activos Mineros, the MEM, and the Ministry of Economy and Finance of Peru requesting that “Centromín, Activos Mineros S.A.C., and the Republic of Peru honor their contractual commitments to assume and accept liability for claims by third parties relating to the La Oroya Metallurgical Complex.”⁶³⁰
334. Activos Mineros responded on 5 November 2010, reserving all rights and advising that it had “not received any notice from DRP,” and that it had “not received any notice of said proceedings that per your letter, occurred more than two years ago.”⁶³¹ Activos Mineros also pointed out that the STA “involved only and exclusively Metaloroya S.A. (later absorbed by DRP) and Centromín Perú S.A.,” that “the contractual clauses that exclusively referred to Metaloroya (today DRP) and not the companies and persons that you state that you represent;” and “the contract establishes a basis where DRP is who must assume responsibility and in its case must protect and hold Centromín Perú and/or Activos Mineros SAC harmless against third party claims for any damages and responsibilities or obligations that may arise regarding same.”⁶³²
335. On 11 November 2010, DRP sent a letter to Activos Mineros stating that “representatives of DRP and its affiliates advised you of the Lawsuits at numerous meetings around the time

⁶²⁸ Exhibit R-010, Framework Agreement, 14 March 2017, ¶ 4(c).

⁶²⁹ Renco and DRRC’s Contract Notice of Arbitration, 23 October 2018, ¶ 46.

⁶³⁰ Exhibit R-258, Letter from King & Spalding to MEM, MEF, and Activos Mineros, 12 October 2010, p. 2.

⁶³¹ Exhibit R-259, Letter from Activos Mineros to King & Spalding, 5 November 2010, p. 2.

⁶³² Exhibit R-259, Letter from Activos Mineros to King & Spalding, 5 November 2010, p. 2.

that the Lawsuits were filed,” as evidenced by a “letter dated October 31, 2007, from the then-President of the Council of Ministers Jorge del Castillo Galvez to the United States Ambassador to Peru Michael McKinley.”⁶³³

336. On 26 November 2010, Activos Mineros reiterated that “we have not been able to locate any communication in which Doe Run Perú S.R. LTDA informs us about the lawsuits and requests, as it does now, to assume the defense or indemnification,” and that “the letter of Mr. Del Castillo to the US ambassador does not constitute such communication and does not reveal that the provisions of the STA have been complied with.”⁶³⁴ Activos Mineros also explained that DRP did not have the right to invoke the allocation of responsibility clauses in the STA, given that it had pursued standards and practices that were less protective of the environment than those pursued by Centromín.⁶³⁵ DRP responded on 14 December 2010, disagreeing with Activos Mineros’ arguments.⁶³⁶
337. In December 2010, Renco sent a notice of intent to commence arbitration against the Republic of Peru pursuant to the Peru–United States Trade Promotion Agreement. The notice of intent alleged, *inter alia*, that “Activos Mineros’s and Peru’s refusal to assume liability for third-party lawsuits brought against claimants, their affiliates, and executives constitutes a breach of the investment agreements.”⁶³⁷
338. On 21 January 2011, Activos Mineros reiterated its position that “there is no basis in what has been expressed and presented by DRP so far for it to assert that the liability that may eventually result from the particular proceedings initiated against its shareholders in Missouri corresponds to Activos Mineros.”⁶³⁸ In addition, Activos Mineros notified DRP that, given the STA Parties’ disagreement over whether DRP’s environmental practices were less protective of the environment, they should submit the dispute to an independent

⁶³³ [Exhibit R-260](#), Letter from DRP (J. C. Huyhua) to Activos Mineros (V. Carlos Estrella), 11 November 2010.

⁶³⁴ [Exhibit R-261](#), Letter from Activos Mineros (V. Carlos Estrella) to DRP (J. C. Huyhua), 26 November 2010, p. 3.

⁶³⁵ [Exhibit R-261](#), Letter from Activos Mineros (V. Carlos Estrella) to DRP (J. C. Huyhua), 26 November 2010, p. 2.

⁶³⁶ [Exhibit R-262](#), Letter from King & Spalding to MEM, MEF, and Activos Mineros, 14 December 2010.

⁶³⁷ [Exhibit R-012-01](#), Claimant’s Notice of Intent to Commence Arbitration under United States-Peru Trade Promotion Agreement, *The Renco Group Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, 29 December 2010, Section V.A.1.

⁶³⁸ *See, e.g.*, [Exhibit R-263](#), Letter from Activos Mineros (V. Carlos Estrella) to King & Spalding, 21 January 2011, p. 2.

technical expert, as required under Clauses 5.3(a) and 5.4(c) of the STA.⁶³⁹ DRP ignored Activos Mineros’ invocation of Clauses 5.3(a) and 5.4(c), and Renco proceeded to submit claims in the *Renco I* arbitration based on Activos Mineros’ alleged responsibility for damages incurred in the Missouri Litigations.⁶⁴⁰

339. Notwithstanding Renco and DRRC’s efforts to involve Respondents in the Missouri Litigations, and despite the Missouri Litigations being central to their claims, Renco and DRRC continue to refuse Respondents’ access to information related to the Missouri Litigations. Respondents’ access to information regarding the Missouri Litigations is limited to the public docket, even though a significant amount of evidence exchanged between the litigation parties has not been filed on the public docket. In addition, at various times, the Renco Defendants and the Missouri Plaintiffs have filed documents “under seal,”⁶⁴¹ which precludes non-parties from viewing them. In consequence, Peru and Activos Mineros remain largely uninformed as to the reality of the Missouri Litigations.
340. Renco and DRRC’s Contract Memorial fails to shed additional light on the Missouri Litigations. Renco and DRRC devote a mere *three paragraphs* of their Statement of Claim to the Missouri Litigations (largely unchanged from the *Renco I* memorial seven years ago) along with one lone exhibit (an initial complaint filed thirteen years ago).⁶⁴² This conduct highlights that Renco and DRRC are keeping Respondents (and the Tribunal) in the dark on a matter at the heart of the present dispute and central to their claim.

E. Renco’s actions drove DRP into bankruptcy

1. Renco, not the financial crisis or Peru, drove DRP into bankruptcy

341. Renco’s financial mismanagement of DRP and poor planning of the obligations it assumed under the STA and the PAMA drove DRP into bankruptcy.

⁶³⁹ **Exhibit R-263**, Letter from Activos Mineros (V. Carlos Estrella) to King & Spalding, 21 January 2011, p. 2.

⁶⁴⁰ **Exhibit R-264**, Letter from King & Spalding to Activos Mineros (V. Carlos Estrella), 18 February 2011.

⁶⁴¹ **Exhibit R-225**, Docket, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), as of 4 March 2022.

⁶⁴² See Claimants’ Statement of Claim ¶¶ 78–80. Claimants’ Memorial in the Treaty Case does not address Missouri at all.

342. Renco alleges that the global financial crisis and the denial of its PAMA extension request purportedly drove DRP into bankruptcy in 2009.⁶⁴³ The post hoc nature of this assertion is evident. As explained in further detail before, years earlier, in the wake of Renco depleting DRP of its financial resources, DRP was already publicly disclosing “substantial doubt” that it could continue as a going concern.⁶⁴⁴ DRP confirmed as much in public regulatory filings with the U.S. Securities and Exchange Commission. For example, an August 2006 filing stated, *inter alia*:

- a. “*Doe Run Peru is highly leveraged* and has significant commitments for environmental matters and for [PAMA] expenditures....
- b. These factors [] increase *Doe Run Peru’s vulnerability* to general adverse conditions, limit Doe Run Peru’s flexibility in planning for or reacting to changes in its business and industry, and limit Doe Run Peru’s ability to obtain financing required to fund working capital and capital expenditures and for other general corporate purposes....
- c. Doe Run Peru *has significant capital requirements under environmental commitments and guarantees and substantial contingencies* related to taxes and has *significant debt service obligations* under the revolving credit facility, each of which, if not satisfied, could result in a default under Doe Run Peru’s credit agreement and *collectively raise substantial doubt about Doe Run Peru’s ability to continue as a going concern.*”⁶⁴⁵ (Emphasis added)

343. As explained earlier, the negative ramifications for DRP of the intercompany deals benefitting the U.S. Renco entities were evident for years. DRP’s own documents are replete with warnings by DRP executives, auditors, financial experts, and banks that the

⁶⁴³ Treaty Memorial, Section II.G.1.

⁶⁴⁴ [Exhibit R-086](#), DRP Combined Financial Statements, as of 31 October 2001 and 2000, p. 2 (KPMG Independent Auditor’s Report, 5 December 2001); [Exhibit R-087](#), DRP Financial Statements, as of 31 October 2003 and 2002, p. 2 (KPMG Independent Auditor’s Report, 4 February 2004).

⁶⁴⁵ [Exhibit R-096](#), Securities and Exchange Commission Form 10-Q/A (Amendment No. 1 to Quarterly Report ended in 30 April 2006), DRRC, as of 19 October 2006, p. 41.

business model was fundamentally flawed and threatened DRP's ability to meet its obligations or even to remain a going concern.⁶⁴⁶

344. This was DRP's precarious financial footing prior to closing the Facility in June of 2009. For years before the Facility's closing, DRP's ruin at the hands of Renco was conspicuous. For example, in August 2008, DRP claimed that it failed to pay dividends to shareholders in three years because of its environmental clean-up expenses.⁶⁴⁷ Further, amidst falling commodity prices and a high debt burden, DRP reportedly suffered losses in the final quarter of 2008, leading its creditors to cancel its working capital line on 24 February 2009.⁶⁴⁸ Indeed, in February 2009 DRP halted payments to its suppliers, and in April 2009, a group of fifteen firms responsible for supplying the Facility with minerals granted DRP a line of credit in the range of USD 100 million, and an additional bank-backed loan of USD 75 million.⁶⁴⁹
345. As public health problems mounted, Peru became concerned that DRP was not going to be able to meet its environmental obligations. In November 2009, *EFE* reported that "the Economy Ministry also ordered Doe Run to provide at least USD100 million in financial guarantees to suppliers as a condition for resumption of operations at La Oroya. DRP owes some USD110 million to its suppliers, which stopped providing the smelter with mineral

⁶⁴⁶ See, e.g., [Exhibit R-067](#), Eric Peitz Deposition (excerpts), Document No. 764-6, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 27 July 2017, pp. 73:20–75:2; see also *id.*, p. 75:17–19.

⁶⁴⁷ "Company spokesman Victor Andres Belaunde said that DRP - which extracts copper, zinc and lead and is the town's primary employer - has not paid dividends to its shareholders for three years because it is investing all of its profits in projects to improve the environment." [Exhibit R-138](#), Polluted Peruvian town paying the price for mining bonanza; Peru-Pollution, *EFE NEWSWIRE*, 29 August 2008.

⁶⁴⁸ [Exhibit R-097](#), Renco Group Uses Trade Pact Foreign Investor Provisions to Chill Peru's Environment and Health Policy, Undermine Justice, *PUBLIC CITIZEN*, 1 March 2012 ("Mining filial Doe Run Peru has been able to thrash out a solution to its dire financial troubles and should be able to get the Complejo Metalurgico de La Oroya, Peru, up and working again. The aid has come not from the State as at first suggested but instead from 15 firms from the same sector that use La Oroya for foundry and refinery services on their minerals. The fifteen include Sociedad Minera El Brocal, Compania de Minas Buenaventura, Cormin, Glencore and Volcan; they have committed to a concentrates loan of US\$100mil and have guaranteed a working-capital credit-line from the banks to the tune of US\$75mil. The firms will activate this aid once Doe Run has taken the filial's capital up by the equivalent of US\$156mil (the debt it has run up with the firm's main shareholder, Renco). They are also set to appoint an overseer who will monitor the books at Doe Run Peru until the debts are paid off." (Original in Spanish). See [Exhibit R-098](#), Doe Run Peru saved by counterparts, *EL COMERCIO*, 3 April 2009.

⁶⁴⁹ [Exhibit R-098](#), Doe Run Peru saved by counterparts, *EL COMERCIO*, 3 April 2009.

concentrates due to the company's financial problems.”⁶⁵⁰ The 15 January 2010, *EFE* story also noted:

“Peru's Energy and Mines Ministry said it has retained USD14 million that mining company Doe Run Peru had placed in escrow to guarantee completion of an environmental clean-up operation. The decision to seize the funds was taken after a Jan. 8 deadline for renewing the surety bond expired, the ministry said Thursday... The performance bond was established as a requirement in 2006, when the ministry approved Doe Run's request for an extension of its deadline for completing an environmental clean-up at its metals processing complex in the central city of La Oroya, which environmental organizations say is one of the world's most polluted places.”⁶⁵¹

346. In January 2010, DRP was suspended from Peru's National Mining, Petroleum and Energy Society (a private sector body) until it could show that it would be able to comply with the PAMA.⁶⁵²
347. It was Renco that compromised DRP's ability to meet its environmental and investment obligations, and Renco's own actions that drove DRP into bankruptcy, not the financial crisis or Peru.

2. DRP's creditors, not Peru, initiated bankruptcy proceedings against DRP

348. In light of the hole DRP was in because of Renco's financial mismanagement, a DRP supplier initiated the bankruptcy process after DRP defaulted on its payment obligations to that supplier, among others.
349. Specifically, starting in 1998, Cormín entered into agreements with DRP to supply concentrates of diverse minerals for DRP's operations in La Oroya.⁶⁵³ In February 2009,

⁶⁵⁰ [Exhibit R-136](#), Peru retains \$14 mn in Doe Run funds to ensure clean-up, *EFE NEWSWIRE*, 15 January 2010.

⁶⁵¹ [Exhibit R-136](#), Peru retains \$14 mn in Doe Run funds to ensure clean-up, *EFE NEWSWIRE*, 15 January 2010 (emphasis added).

⁶⁵² [Exhibit R-135](#), Peru mining union expels Doe Run for not fulfilling its commitments, *EFE NEWSWIRE*, 30 January 2010.

⁶⁵³ [Exhibit R-099](#), *Solicitud de Inicio de Procedimiento Concursal Ordinario por Acreedor*, Cormín, 18 February 2010, ¶ 1.5.

DRP began to fall behind on payments to Cormín pursuant to the supply agreements.⁶⁵⁴ In discussions related to DRP's outstanding balances due to Cormín, DRP blamed its failure to pay on a series of factors, none of them related to the MEM. DRP explained that (i) "DRP has a \$ 75 million revolving credit," (ii) "[t]he credit line has a covenant to maintain the ratio of selected debt to EBITDA less than 2.5," (iii) "[d]ue to the severe economic downturn, DRP suffered a large negative EBITDA impact in the last quarter of 2008," and (iv) "[c]onsequently, the ratio was 4.27."⁶⁵⁵ In this same correspondence, DRP blamed its failure to meet the imposed debt ratio on "quotational period adjustments, one-time labor costs due to signing long term collection agreements with unions," and "increased power costs."⁶⁵⁶

350. On 5 March 2009, Cormín notified DRP that it had formally defaulted on its payment obligations, and accordingly, Cormín would suspend delivery to DRP of mineral concentrates.⁶⁵⁷ On 2 June 2009, Cormín again demanded payment from DRP.⁶⁵⁸ Despite Cormín's multiple requests, DRP did not pay Cormín.⁶⁵⁹
351. On 18 February 2010, Cormín requested that bankruptcy proceedings be commenced against DRP, before the Commission for Bankruptcy Proceedings of the National Institute for the Defense of Free Competition and the Protection of Intellectual Property ("INDECOPI").⁶⁶⁰ According to Cormín's request to initiate bankruptcy proceedings, DRP was indebted to Cormín for USD 24 million of missing payments under their supply

⁶⁵⁴ **Exhibit R-099**, *Solicitud de Inicio de Procedimiento Concursal Ordinario por Acreedor*, Cormín, 18 February 2010, ¶ 1.6.

⁶⁵⁵ **Exhibit R-100**, Letter from DRP (C. Ward) to Cormín (G. Andrade), 26 February 2009.

⁶⁵⁶ **Exhibit R-100**, Letter from DRP (C. Ward) to Cormín (G. Andrade), 26 February 2009.

⁶⁵⁷ **Exhibit R-101**, Letter from Cormín (R. Trovarelli and G. Andrade Nicoll) to DRP (C. Ward), 5 March 2009.

⁶⁵⁸ **Exhibit R-102**, Letter from Cormín (R. Trovarelli and G. Andrade Nicoll) to DRP (C. Ward), 2 June 2009.

⁶⁵⁹ **Exhibit R-099**, *Solicitud de Inicio de Procedimiento Concursal Ordinario por Acreedor*, Cormín, 18 February 2010, ¶¶ 1.9–1.10.

⁶⁶⁰ **Exhibit R-099**, *Solicitud de Inicio de Procedimiento Concursal Ordinario por Acreedor*, Cormín, 18 February 2010. *See also* Neil First Witness Statement, ¶ 51; Sadlowski First Witness Statement, ¶ 49.

- agreements. Per INDECOPI's request, Cormín subsequently submitted receipts and additional information to support the existence of DRP's debt to Cormín.⁶⁶¹
352. On 28 May 2010, DRP submitted a response to Cormín's request to initiate bankruptcy proceedings. DRP did not dispute the existence of the debt or the circumstances related to its failure to pay. Instead, DRP proposed a plan to repay its debt to Cormín.⁶⁶² On 2 July 2010, Cormín advised INDECOPI that it rejected the payment plan and requested that DRP's bankruptcy be ordered immediately.⁶⁶³
353. On 14 July 2010, in accordance with Law No. 27809, the General Law of the Bankruptcy System of Peru⁶⁶⁴ ("**Bankruptcy Law**"), INDECOPI declared DRP in bankruptcy, holding that Cormín's request was supported and that Cormín had rejected DRP's payment plan. INDECOPI published the commencement of DRP's bankruptcy in the official bulletin on 16 August 2010.⁶⁶⁵
354. As a result, and as addressed above, Renco's allegation that the "MEM's undermining of the extension of time granted by Congress to DRP forced DRP into bankruptcy" is misplaced and disingenuous.⁶⁶⁶ DRP's default on payment obligations to a supplier, stemming from its financial mismanagement at the hands of Renco, led to DRP's bankruptcy. Moreover, as addressed in the Counter Memorial, the DRP bankruptcy was not the first time Renco and its affiliates had used bankruptcy to evade obligations.⁶⁶⁷

⁶⁶¹ **Exhibit R-099**, *Solicitud de Inicio de Procedimiento Concursal Ordinario por Acreedor*, Cormín, 18 February 2010; **Exhibit R-103**, Letter from Indecopi (J. Gaviño Sagástegui) to Cormín, 7 April 2010.

⁶⁶² **Exhibit R-104**, DRP Response to Cormín's Request before INDECOPI, 28 May 2010.

⁶⁶³ **Exhibit R-105**, Cormín Response to INDECOPI for the Rejection of the Payment Plan and Request that DRP's bankruptcy be ordered immediately, 2 July 2010.

⁶⁶⁴ In Peru, this is commonly referred to as the "LGSC".

⁶⁶⁵ **Exhibit R-106**, INDECOPI Announcement, EL PERUANO, 16 August 2010.

⁶⁶⁶ Treaty Memorial ¶ 126.

⁶⁶⁷ See **Exhibit R-030**, Herky Jerk: Doe Run's Owner Has Done This Before—And That Has Regulators Braced for Trouble, RIVERFRONT TIMES, 20 February 2002.

3. In September 2010, the MEM filed a valid credit claim against DRP, which was properly approved by INDECOPI

355. On 14 September 2010, the MEM filed a request for INDECOPI to recognize a USD 163,046,495.00 (plus interest) debt related to DRP's future investment plans for the completion of environmental cleanup program PAMA at the Facility
356. Although the INDECOPI Bankruptcy Commission denied the MEM's initial credit request,⁶⁶⁸ on 18 November 2011, the highest administrative body in bankruptcy proceedings (INDECOPI Chamber No. 1 for the Defense of Competition (“**INDECOPI Chamber No. 1**”))⁶⁶⁹, through Resolution No. 1743-2011/SC1-INDECOPI, revoked the decision of the INDECOPI Bankruptcy Commission, and thus recognized the MEM's credit claim against DRP for USD 163,046,495.00 plus interest.⁶⁷⁰
357. The validity of INDECOPI Chamber No. 1's decision is explained in detail in the merits of this Counter Memorial, but in sum, INDECOPI Chamber No. 1 reasoned that the credit invoked by the MEM is valid in accordance with Article 1 of the Bankruptcy Law, because it derives from a relationship emanating from the environmental regulations themselves, consisting of the MEM's right to obtain from DRP its promise to perform its obligations that were stipulated in the PAMA.⁶⁷¹

4. DRP dragged the MEM through exhaustive and meritless challenges of the MEM's credit claim, all of which failed

358. As a matter of Peruvian law, the MEM is a creditor of DRP on the basis of DRP's unfulfilled PAMA obligations. In an effort to prevent the MEM from participating in the bankruptcy proceedings, Renco's affiliates have baselessly challenged the MEM's status as a creditor of DRP before INDECOPI and the Peruvian courts:

⁶⁶⁸ **Exhibit C-168**, Resolution No. 1105-2011/CCO-INDECOPI, 23 February 2011.

⁶⁶⁹ In Spanish, the “*Sala Concursal, en ese entonces Sala de Defensa de la Competencia No. 1.*”; see also, Hundskopf Expert Report, ¶ 97.

⁶⁷⁰ **Exhibit C-174**, Resolution No. 1743-2011/SC1-INDECOPI, 18 November 2011; see also **Exhibit C-169**, MEM Appeal of INDECOPI Resolution, 2 March 2011.

⁶⁷¹ Hundskopf Expert Report, ¶ 62 (Spanish original: “*Estoy de acuerdo con el análisis y la conclusión de la Sala Concursal en su Resolución 1743-2011. En efecto, la Sala Concursal ha realizado un correcto análisis integral de diversas normas que conforman el ordenamiento jurídico peruano para verificar si existía o no un crédito a favor del MEM.*”).

- a. **INDECOPI Challenge:** As discussed above, DRP filed an opposition to the MEM’s request for recognition of its credit to INDECOPI in 2010. DRP’s challenge failed.
 - b. **Constitutional *Amparo* Suit:** As discussed below, DRP filed a constitutional *amparo* suit with the Superior Court of Justice of Lima in 2010 and filed two appeals in 2011. DRP’s *amparo* suit failed.
 - c. **Administrative Contentious Action:** As discussed below, DRP filed a contentious administrative action with the Specialized Administrative Contentious Tribunal of Lima in 2012, and, together with DRCL, filed a cassation action in 2014. DRP and DRCL’s contentious administrative action failed.
359. As explained below, and further in the merits of Peru’s Treaty Counter-Memorial, despite repeated challenges, the validity of the MEM’s credit against DRP has been properly upheld in each proceeding.
- a. DRP filed a baseless constitutional *amparo* recourse in an attempt to overturn INDECOPI Chamber No. 1’s decision to recognize the MEM’s credit against DRP, which failed
360. On 22 November 2010, DRP filed an *amparo* recourse before the First Instance Constitutional Court, alleging its property, enterprise, and due process rights would be harmed if INDECOPI were to recognize DRP’s credit. DRP also argued that its PAMA obligations were not quantifiable credits as contemplated under Peruvian bankruptcy provisions; that the MEM is not expressly authorized to request credits; and that the MEM could become the dominant creditor and gain impermissible control over DRP’s future, if the credit were recognized.⁶⁷²
361. On 11 January 2011, through Resolution No. 01, the First Instance Constitutional Court⁶⁷³ dismissed DRP’s constitutional *amparo* recourse against the MEM credit, holding that DRP’s pleadings failed to show that INDECOPI’s recognition of the MEM’s credit was imminent.⁶⁷⁴ Indeed, DRP filled the *amparo* action while the proceedings before

⁶⁷² **Exhibit C-164**, DRP’s Constitutional Amparo Recourse, 22 November 2010, pp. 3, 17, 41 (the suit was filed before the “*1er Juzgado Constitucional de la Corte Superior de Justicia de Lima*”).

⁶⁷³ In Spanish, the “*1er Juzgado Constitucional de la Corte Superior de Justicia de Lima*.”

⁶⁷⁴ **Exhibit C-165**, Dismissal of DRP’s Constitutional Amparo Recourse, 11 January 2011.

INDECOPI were still pending, so the claims were not ripe. Under Peruvian law, *amparo* proceedings cannot take place if there are other avenues for a party to defend its rights and interests.

362. On 3 February 2011, DRP appealed the decision, and on 18 August 2011 the appellate court affirmed on jurisdictional grounds.⁶⁷⁵

363. In response to the appellate court’s rejection of DRP’s *amparo* action, DRP filed a constitutional grievance (*agravio constitucional*), which took DRP’s case to the Constitutional Court of Peru. Through a judgment issued on 24 June 2016, the Constitutional Court of Peru confirmed the inadmissibility of DRP’s claim, explaining that “constitutional claims do not proceed when there are specific equally satisfactory procedural channels for the protection of the constitutional right threatened or violated” and holding that “claimant not only has not sufficiently justified the need to resort to the process of *amparo* initiated as an urgent and suitable protection, but, in addition, its claims are susceptible to be addressed by ordinary channels.”⁶⁷⁶

364. Professor Hundskopf explains the sound reasoning of the Constitutional Court of Peru:

“For the Constitutional Court—which did consider the constitutional court competent—DRP not only did not sufficiently justify the need to resort to the *amparo* process initiated as an urgent and correct remedy, but also, its claims were likely to be addressed in the ordinary process [(i.e., the proceedings before INDECOPI were still pending)].”⁶⁷⁷

365. DRP’s meritless constitutional *amparo* suit was a complete failure.

⁶⁷⁵ Hundskopf Expert Report, ¶¶ 125–126.

⁶⁷⁶ Exhibit R-134, Constitutional Tribunal, Exp. No. 04620-2011PA/TC, Lima, Numerals 5 and 9, 24 June 2016.

⁶⁷⁷ Hundskopf Expert Report, ¶ 127 (Spanish original: “Para el Tribunal Constitucional –que sí consideró competente al juzgado constitucional– DRP no solo no justificó suficientemente la necesidad de recurrir al proceso de *amparo* incoado como vía de tutela urgente e idónea, sino que, además, sus pretensiones eran susceptibles de ser atendidas en la vía ordinaria”).

- b. DRP filed a baseless administrative contentious action in an attempt to overturn INDECOPI Chamber No. 1’s decision to recognize the MEM’s credit against DRP, which failed
366. After INDECOPI Chamber No. 1 issued Resolution No. 1743-2011/SC1-INDECOPI, whereby INDECOPI recognized the MEM’s credit claim for USD 163,046,495.00 plus interest, DRP filed an administrative contentious action.⁶⁷⁸ As explained below, DRP’s administrative contentious action was firmly rejected in three instances.
367. On 18 January 2012, DRP challenged the INDECOPI Chamber No. 1’s decision in Peruvian court by presenting an administrative contentious action⁶⁷⁹ against INDECOPI and the MEM. DRP argued, *inter alia*, that DRP’s PAMA obligation requires compliance with environmental regulations and not investments and that the only legal consequence of non-compliance with the PAMA is the imposition of sanctions and/or the forced shut down of operations.⁶⁸⁰
368. Through Resolution No. 24 of 18 October 2012, the 4th Transitory Administrative Contentious Court issued a judgment, finding DRP’s claim unfounded and upholding the decision of INDECOPI Chamber No. 1, which approved the MEM’s credit against DRP.⁶⁸¹
369. On 31 October and 5 November 2012, DRCL, and DRP, represented by its liquidator, appealed the 4th Transitory Administrative Contentious Court’s decision.⁶⁸² The appeal was assigned to the 4th Chamber for Administrative Contentious Actions of the Superior Court of Justice (“**4th Chamber**”).
370. On 25 July 2014, the 8th Chamber for Contentious Administrative Actions with a Sub-Specialty in INDECOPI matters⁶⁸³ (“**8th Chamber**”) rejected DRP and DRCL’s administrative contentious action. The 8th Chamber majority considered that DRP’s

⁶⁷⁸ Right Business S.A. represented DRP in the process because after INDECOPI Chamber No. 1 issued Resolution No. 1743-2011, the Creditor’s Board designated Right Business S.A. as liquidator 1. Doe Run Cayman participated in the proceedings as a “*tercero coadyuvante*”.

⁶⁷⁹ In Spanish, “*demanda contencioso administrativa*”.

⁶⁸⁰ **Exhibit R-141**, DRP Request for Annulment of Administrative Decision, 16 January 2012.

⁶⁸¹ **Exhibit C-181**, Judgment of the Annulment of Administrative Act, Case No. 2012-00368, 18 October 2012.

⁶⁸² **Exhibit C-186**, DRP Appeal to the 18 October 2012 First Instance Judgment, 5 November 2012.

⁶⁸³ Treaty Memorial, ¶ 317.

PAMA obligations were incorporated into the STA. The 8th Chamber further opined that the rights of the MEM derive from the STA, and, in this way, INDECOPI did not violate the principle of legality under Peruvian law, because the rights of the MEM are supported by the Civil Code on non-performance of obligations. The majority also found that DRP breached its contractual obligation to complete the PAMA, a breach that is covered by the rules of the Civil Procedure Code, which establish that the performance of an obligation can be demanded through a process of compulsory execution.⁶⁸⁴ Additionally, the 8th Chamber considered that it could identify the debt DRP owed the MEM, as DRP quantified the cost to complete the Metaloroya PAMA.

371. In August 2014, following a final judgment of the 8th Chamber—in a last ditch effort to evade the MEM’s credit—DRP and DRCL filed an extraordinary cassation recourse (*recurso de casación*) to the Supreme Court of Justice of Peru (“**Supreme Court**”).⁶⁸⁵ On 6 July 2015 the Supreme Court dismissed DRP and DRCL’s cassation recourse for not complying with the strict requirements of the Peruvian Civil Procedure Code.⁶⁸⁶ The justification under Peruvian law for the the Supreme Court’s dismissal is discussed in the merits of Peru’s Treaty Counter-Memorial.
372. Despite repeated challenges, and as confirmed by Professor Hundskopf, the validity of the MEM’s credit against DRP has been properly upheld in each proceeding.

5. DRP’s creditors, not Peru, challenged DRCL’s credit as unlawful

373. DRCL applied to INDECOPI seeking recognition of a USD 153 million credit against DRP, which was primarily comprised of a promissory note for USD 139,062,500.00.⁶⁸⁷ As explained above, the promissory note and debt originated in a complex financing process that was obtained from the Overseas Credit Bank in charge of Doe Run Mining. The loan was acquired by DRRC and then passed to DRCL, while Doe Run Mining was absorbed by DRP, whereupon DRP became the debtor. As a result, on 11 April 2011

⁶⁸⁴ In Peru, a concept known as “*ejecución forzada*”.

⁶⁸⁵ [Exhibit C-191](#), DRP’s *Recurso de Casación* filed before the Peruvian Supreme Court of Justice, 25 August 2014; [Exhibit C-192](#), DRCL’s *Recurso de Casación* filed before the Peruvian Supreme Court of Justice, 22 August 2014.

⁶⁸⁶ [Exhibit C-193](#), Peruvian Supreme Court of Justice, Decision on the *Recurso de Casación*, 3 November 2015.

⁶⁸⁷ See [Exhibit R-235](#), Recognition of Credit Request of DRCL against DRP, 24 September 2010.

Cormín challenged DRCL's status as a creditor of DRP, alleging that DRCL's credit was derived from unlawful transactions that were aimed at defrauding the Peruvian State.⁶⁸⁸

374. Cormín's position was based on the fact that Ira Rennert had established a large and complex network of entities to obtain shares of Metaloroya and assume the ownership and management of the Facility.⁶⁸⁹ Indeed, as explained earlier, after Renco emerged the winner of the auction to purchase the Facility, Ira Rennert obtained funds for the purchase of its shares and capital. While those funds should have been used as Metaloroya's working capital, DRP instead diverted the funds to use as a loan against DRP, the proceeds of which were paid to Ira Rennert himself, through a complex business system, including corporate reorganizations and assignment of credits.⁶⁹⁰ In light of these fraudulent activities, Cormín also initiated criminal proceedings in Peru against Ira Rennert and other DRP executives, which is explained in further detail below.
375. On 18 November 2011 the INDECOPI Chamber ruled against Cormín's challenge, noting that the loan by Doe Run Mining and Banco de Crédito Overseas and its successive transfers would be valid as long as they are not declared void by the competent authority.⁶⁹¹ In that respect, the INDECOPI Chamber noted that without that declaration, the existence, legitimacy and amount of the credit invoked by DRCL against DRP had been proven.⁶⁹² In this respect, Professor Hundskopf notes that only a criminal judge has the competence to decide whether the alleged crimes had been committed by Renco, Ira Rennert, and others.⁶⁹³

⁶⁸⁸ See [Exhibit R-218](#), Cormín's Complaint for the Nullification of DRCL's credit against DRP, 11 April 2011, pp. 15–17.

⁶⁸⁹ See [Exhibit R-218](#), Cormín's Complaint for the Nullification of DRCL's credit against DRP, 11 April 2011, pp. 5–14.

⁶⁹⁰ See [Exhibit R-218](#), Cormín's Complaint for the Nullification of DRCL's credit against DRP, 11 April 2011, p. 9 (“Mr. RENNERT, through DRM, substituted one debt for another (he paid the balance of Loan A and contracted Loan B); however, most importantly, he used Loan B to pay himself through the payment of DRRC Subordinated Loan. Thus, out of the US\$25 million (US\$23 million as DRRC Subordinated Loan and US\$2 million as capital contribution).”).

⁶⁹¹ See [Exhibit R-168](#), Resolution No. 1742-2011/SC1-INDECOPI, 18 November 2011, p. 27.

⁶⁹² See [Exhibit R-168](#), Resolution No. 1742-2011/SC1-INDECOPI, 18 November 2011, p. 27.

⁶⁹³ Hundskopf Expert Report, ¶ 196.

376. After INDECOPI recognized DRCL’s credits against DRP, the INDECOPI Bankruptcy Commission received an order from the 12th Commercial Court of Lima⁶⁹⁴ through which an interim measure had been granted, at Cormín's request, suspending DRCL’s voting rights on DRP’s board of creditors. The INDECOPI Bankruptcy Commission did not comply with the interim measure order, however. As explained by Professor Hundskopf, the issuance of the interim measure did not follow the proper procedure (that is, it was applied for prior to the filing of the relevant claim⁶⁹⁵).⁶⁹⁶ On 19 January 2016, through Resolution No. 30, the 12th Commercial Court of Lima voided the interim measure that Cormín had obtained against DRCL. On 28 May 2019, through Resolution No. 48, the challenge of DRCL’s credit was declared abandoned because Cormín had not continued with the legal proceeding.
377. In short, Ira Rennert’s companies were represented in DRP, both as shareholders who could control DRP’s expenditure patterns, and also as debtors who were owed money by DRP.

6. Cormín, not Peru, filed a criminal complaint against officers of Renco and DRRC, which were dismissed by the Peruvian judiciary

378. On 25 April 2011, Cormín (DRP’s supplier who had initiated the bankruptcy proceedings) filed a criminal complaint against Claimant’s Charmain Ira Rennert and DRRC officer Bruce Neil (the “**Criminal Defendants**”) with the Lima District Attorney. Cormín accused the Criminal Defendants of crimes—most notably, fraud—in connection with the INDECOPI bankruptcy proceeding and the USD 125 million intercompany note DRP issued to Doe Run Mining immediately after signing the STA (the “**Intercompany Note**”).
379. The Lima District Attorney directed police accounting experts to review the impugned transaction. The experts found that the debt under the Intercompany Note was irregular and recommended that the District Attorney indict the Criminal Defendants.⁶⁹⁷ The

⁶⁹⁴ In Spanish, “*12avo Juzgado Civil Sub-especialidad Comercial de la Corte de Justicia de Lima*”.

⁶⁹⁵ That is, the claim by Cormín requesting the nullification of DRCL’s credit against DRP.

⁶⁹⁶ See Hundskopf Expert Report, ¶ 196 (Spanish original: “*si bien Cormín había alegado diversas connotaciones penales que se presentarían en las transacciones que dieron origen a la acreencia reconocida a favor de DR Cayman frente a DRP, es el juez penal el competente para determinar si tales hechos efectivamente configuraban delitos a través de la expedición de la sentencia condenatoria respectiva.*”)

⁶⁹⁷ [Exhibit C-084](#), Criminal Case issued by Judge Flores of the 39th Criminal Court in Lima, 2 December 2011, ¶ 2.

District Attorney heeded the experts' recommendation and indicted the Criminal Defendants for the alleged crimes of: (i) fraudulent insolvency (based on the transactions supporting the debt under the Intercompany Note); and (ii) false statement in an administrative proceeding (based upon DRCL's request that INDECOPI recognize the Intercompany Note as a bankruptcy credit).⁶⁹⁸ The case came under the purview of Judge Flores of the 39th Criminal Court in Lima, who formally opened a criminal case against the Criminal Defendants pursuing both charges.⁶⁹⁹

380. The Criminal Defendants presented three unsuccessful defenses against the District Attorney's case. On appeal, however, the Superior Court of Appeals accepted each of the three defenses and dismissed the criminal proceedings.⁷⁰⁰ When Cormín challenged that decision, the Permanent Criminal Chamber of the Supreme Court dismissed Cormín's challenge and upheld the appellate court's ruling.⁷⁰¹

F. DRP's Board of Creditors guides the bankruptcy

1. DRP's Board of Creditors, not Peru, guides the bankruptcy

381. The bankruptcy is guided by a board of DRP's recognized creditors, which includes, among others, DRP's labor creditors, Cormín, Volcan Compañía Minera S.A.A. ("Volcan"), AYS, Depositos Quimicos Mineros, the MEM, and DRCL, a company wholly-owned by Renco ("**Board of Creditors**"). Each creditors' voting power is proportional to its credit amount relative to DRP's total debt.⁷⁰²

382. Indeed, DRCL, a Renco affiliate, is one of DRP's largest creditors, with an approximate 30% stake. DRCL has been an active participant throughout the bankruptcy process.⁷⁰³

⁶⁹⁸ [Exhibit C-209](#), Indictment No. 339-2011 against I. Rennert and B. Neil issued by the District Attorney, 14 November 2011.

⁶⁹⁹ [Exhibit C-084](#), Criminal Case issued by Judge Flores of the 39th Criminal Court in Lima, 2 December 2011.

⁷⁰⁰ [Exhibit C-210](#), Opinions issued by the Superior Court of Appeals of Lima, 1 February 2013, p. 5.

⁷⁰¹ [Exhibit C-211](#), Permanent Criminal Chamber of the Superior Court of Peru Decision on *Queja Excepcional No. 311-2013*, 22 January 22, 2014.

⁷⁰² Hundskopf Expert Report, ¶ 32.

⁷⁰³ Witness Statement of Guillermo Shinno Huamani, 8 March 2022 ("**Shinno Witness Statement**"), ¶ 13.

383. The MEM is a creditor and participates on the Board of Creditors. Mr. Shinno explains in his witness statement how the MEM has participated in the process as a creditor, and has taken into account the views of stakeholders, including the workers and citizens of La Oroya.⁷⁰⁴ To this end, the MEM has encouraged consensus among creditors and has focused on solutions.⁷⁰⁵
384. DRCL has repeatedly voted with the MEM and other creditors regarding the destiny of DRP.⁷⁰⁶
385. In January 2012, after INDECOPI approved DRP’s creditors, including, among others, the MEM and DRCL, DRP’s Board of Creditors was formed, whose objective is to decide the future of the company. On 13 January 2012, the Board of Creditors established the general rules governing the bankruptcy process.⁷⁰⁷

2. DRP’s Board of Creditors rejected DRP’s inadequate restructuring proposals, and agreed to liquidate DRP pursuant to the *Ley General del Sistema Concursal* of Peru

386. Renco erroneously asserts, “the MEM helped to defeat DRP’s reasonable restructuring plan.”⁷⁰⁸ On the contrary, DRP’s restructuring plan was rejected because it was based on proposed financing that was conditioned on unreasonable demands and operations that would violate applicable environmental standards, as Renco itself admits.⁷⁰⁹ A robust summary of the relevant discussions and decisions of the Board of Creditors is discussed below.

⁷⁰⁴ Shinno Witness Statement, Section VI.

⁷⁰⁵ Shinno Witness Statement, ¶ 47.

⁷⁰⁶ **Exhibit R-107**, DRP Creditors’ Meeting Minutes, 22 and 25 May 2012 (97% vote appointing Right Business as liquidator, including DRCL’s vote); **Exhibit R-108**, DRP Creditors’ Meeting Minutes, 19 and 24 Sept. 2014, p. 196 (96.9% vote appointing Profit as the new liquidator, including DRCL’s vote); **Exhibit R-109**, DRP Creditors’ Meeting Minutes, 19 March 2015, p. 35 (96.2% vote approving the bid bases for the sale of DRP’s assets, including a DRCL’s vote).

⁷⁰⁷ **Exhibit R-110**, DRP Creditors’ Meeting Minutes, 13 and 18 January 2012.

⁷⁰⁸ Treaty Memorial, ¶ 140.

⁷⁰⁹ Treaty Memorial, ¶ 201. *See also*, Treaty Memorial, ¶ 144.

387. On 13 January 2012, the Board of Creditors approved the restructuring of DRP with 99.8% of the approved creditors voting in favor of the restructuring.⁷¹⁰ The MEM voted in favor of restructuring DRP and voiced its support for a restructuring plan that respected the environmental standards of Peru.⁷¹¹
388. Unfortunately, on 30 March 2012, DRP sent a restructuring plan to the Board of Creditors that was wholly unviable.⁷¹² The plan did not address various issues facing the Facility, and did not incorporate concerns and observations made by the creditors.⁷¹³ The MEM's representative highlighted the many issues with DRP's restructuring plan in the Board of Creditors' meeting of 9 April 2012.⁷¹⁴ Notably problematic in DRP's restructuring plan was DRP's condition for financing the project, which required the Peruvian State to assume, without limitation, responsibility for third-party claims relating to damages caused by environmental contamination. The MEM clarified that such assignment of liability was regulated by the STA, should not be part of the restructuring plan, and must be completely removed from the restructuring plan in order for the plan to be considered.⁷¹⁵ Notwithstanding the various flaws in DRP's restructuring plan, at the 9 April 2012 meeting the MEM made clear that it supported a restart of operations at the Facility that respected the environmental standards of Peru.⁷¹⁶
389. Other creditors of DRP also took issue with DRP's restructuring plan. For example, Cormín was not persuaded by DRP's restructuring plan, noting that DRP's conditions for financing the project amounted to "blackmail" (*chantaje*), and were utterly unacceptable.⁷¹⁷

⁷¹⁰ [Exhibit R-110](#), DRP Creditors' Meeting Minutes, 13 and 18 January 2012.

⁷¹¹ [Exhibit R-110](#), DRP Creditors' Meeting Minutes, 13 and 18 January 2012, p. 13.

⁷¹² [Exhibit R-146](#), Restructuring Plan of DRP, 29 March 2012.

⁷¹³ [Exhibit C-231](#), DRP Creditors' Meeting Minutes, 9 and 12 April 2012, PDF pp. 3–4.

⁷¹⁴ [Exhibit C-231](#), DRP Creditors' Meeting Minutes, 9 and 12 April 2012, PDF pp. 3–4.

⁷¹⁵ [Exhibit C-231](#), DRP Creditors' Meeting Minutes, 9 and 12 April 2012, PDF p. 3.

⁷¹⁶ [Exhibit C-231](#), DRP Creditors' Meeting Minutes, 9 and 12 April 2012, PDF p. 3.

⁷¹⁷ [Exhibit C-231](#), DRP Creditors' Meeting Minutes, 9 and 12 April 2012, PDF p. 4.

390. As a result, in the Board of Creditors’ meeting of 12 April 2012, the majority of the Board of Creditors voted against the restructuring plan (disapproved by 59% of the vote).⁷¹⁸ Similar to the 9 April 2012 meeting, in the 12 April 2012 meeting DRP’s restructuring plan was rejected by multiple parties. For example, Apoyo Consultoría S.A. (“**Apoyo**”)—the third party the Board of Creditors appointed as DRP’s environmental supervising entity— noted that DRP’s restructuring plan would result in SO₂ and lead emissions beyond the acceptable standards under Peruvian law, and as a result there would not be a way to implement the plan.⁷¹⁹
391. In the Board of Creditors’ meeting of 12 April 2012, the MEM reiterated its support for the restructuring of DRP, but emphasized that such support was premised on a plan that satisfied the environmental laws of Peru.⁷²⁰ Furthermore, the MEM again firmly objected to the conditions DRP placed on financing the project, which included a request for a blanket assumption of liability by the MEM for third-party claims far beyond the allocation of liability for third-party claims contemplated in the STA.⁷²¹
392. As a result of the rejection of DRP’s restructuring plan, the president of the Board of Creditors, Volcan, explained that the next option under the Bankruptcy Law was to decide whether to place DRP in general liquidation (*liquidación ordinaria*) or operational liquidation (*liquidación en marcha*).⁷²² Consequently, in the 12 April 2012 Board of Creditors’ meeting, 97% of DRP’s creditors—including DRCL—voted to liquidate DRP. Indeed, Renco’s statement that “[t]he creditors, led by the MEM, voted to put DRP into liquidation proceedings under Right Business” is misleading, insofar as it does not mention that DRCL was one of those creditors.⁷²³ Specifically, DRP’s creditors placed DRP in operational liquidation, which places the debtor in liquidation but allows it to continue

⁷¹⁸ **Exhibit C-231**, DRP Creditors’ Meeting Minutes, 9 and 12 April 2012, PDF p. 16.

⁷¹⁹ **Exhibit C-231**, DRP Creditors’ Meeting Minutes, 9 and 12 April 2012, PDF p. 13.

⁷²⁰ **Exhibit C-231**, DRP Creditors’ Meeting Minutes, 9 and 12 April 2012, PDF p. 14.

⁷²¹ **Exhibit C-231**, DRP Creditors’ Meeting Minutes, 9 and 12 April 2012, PDF p. 14.

⁷²² **Exhibit C-231**, DRP Creditors’ Meeting Minutes, 9 and 12 April 2012, PDF p. 18.

⁷²³ Counter-Memorial on Waiver, ¶ 97; **Exhibit C-231**, DRP Creditors’ Meeting Minutes, 9 and 12 April 2012, PDF pp. 18–19; **Exhibit R-107**, DRP Creditors’ Meeting Minutes, 22 and 25 May 2012, pp. 30–31.

operations through the liquidation process.⁷²⁴ Further, as the MEM noted at the end of the meeting on 12 April 2012, operational liquidation was the only option that could create the conditions necessary to return to a process of restructuring.⁷²⁵

393. Thereafter, on 14 May 2012 DRP submitted an “amended” restructuring plan that ostensibly removed the items that troubled the Board of Creditors.⁷²⁶ Upon receiving the plan, the MEM immediately confirmed receipt and welcomed a meeting with DRP representatives to discuss the project.⁷²⁷
394. At the Board of Creditors’ meeting on 25 May 2012, the committee agreed to designate Right Business as DRP’s liquidator.⁷²⁸ In the same meeting, the Board of Creditors—including DRCL—approved the operational liquidation plan (*convenio de liquidación en marcha*).⁷²⁹
395. Notwithstanding the Board of Creditors’ decision to approve the operational liquidation plan, the MEM continued to support DRP and remained open to discuss viable restructuring plans. In that respect, on 26 June 2012, the MEM sent a letter to Renco in response to DRP’s restructuring plan of 14 May 2012, outlining the many issues it identified.⁷³⁰ Notably problematic was DRP’s failure to guaranty the completion of the projects.
396. Despite DRP’s continued struggles and refusal to submit an adequate restructuring proposal, in the same letter of 26 June 2012, the MEM reiterated its commitment to support

⁷²⁴ **Exhibit C-231**, DRP Creditors’ Meeting Minutes, 9 and 12 April 2012, PDF pp. 8–10, 13–16, 18–19; **Exhibit DS-034**, General Law of the Bankruptcy System (*Ley General Del Sistema Concursal* (LGSC)), Legislative Decree No. 1189, EL PERUANO, 21 August 2015, Art. 74.2.

⁷²⁵ **Exhibit C-231**, DRP Creditors’ Meeting Minutes, 9 and 12 April 2012, p. 18.

⁷²⁶ *See, e.g.*, Treaty Memorial, ¶ 144 (“After the April plan was rejected, DRP submitted another amended restructuring plan on May 14, 2012. This new Plan was based on the same business model but removed all of the major items to which the MEM had objected, demonstrating DRP’s continued flexibility and cooperation. The only meaningful right DRP attempted to retain in the new plan was its right to operate all Circuits in the Complex to generate the necessary funds to complete the PAMA”); **Exhibit R-113**, Letter from DRP (J.C. Huyhua M.) to MEM (J. Merino Tafur), 14 May 2012 *attaching* DRP Restructuring Plan, 14 May 2012.

⁷²⁷ **Exhibit R-114**, Email from the Advisor to the Ministry (R. Patiño) to Renco Group (I. Rennert), 14 May 2012; **Exhibit R-115**, List of Participants in Meeting with MEM and Renco, 16 May 2012.

⁷²⁸ **Exhibit R-107**, DRP Creditors’ Meeting Minutes, 22 and 25 May 2012, p. 8.

⁷²⁹ **Exhibit R-107**, DRP Creditors’ Meeting Minutes, 22 and 25 May 2012, p. 27.

⁷³⁰ **Exhibit R-111**, Letter from MEM (M. Patiño) to Renco Group, Inc. (I. Leon Rennert), 26 June 2012, pp. 1–3.

a viable restructuring plan. Indeed, the MEM noted that it “remains open to continue dialogue regarding [the restructuring plan] and related topics.”⁷³¹ Further to the MEM’s commitment to support DRP in the restructuring efforts, the MEM and DRP had a meeting on 12 July 2012, during which the MEM afforded DRP the opportunity to present its revised restructuring plan.⁷³² However, as noted in a letter from the MEM to Renco the day after the meeting, DRP’s “amended” restructuring plan *continued to not* address the various issues that made it unviable, including by proposing a plan that was not in accordance with the environmental laws of Peru, and whose financing was not guaranteed.⁷³³ For the avoidance of doubt, and to assist DRP, on 20 July 2012 the MEM provided DRP with specific comments regarding the flaws in the restructuring plan.⁷³⁴

397. Despite the MEM’s guidance, however, DRP was unwilling to budge on matters that were nonnegotiable and continued to insist on an unviable restructuring plan. To that effect, on 9 August 2012 the MEM notified Renco that DRP’s responses to the MEM’s comments outlined in the letter of 20 July 2012 did not provide solutions the were discussed.⁷³⁵
398. Notwithstanding the continued deficiencies in DRP’s restructuring plan, the MEM “invite[ed] Renco to present a new plan to resolve the [aforementioned] issues as well as other points[.]”⁷³⁶ Soon after the MEM’s invitation to continue discussions, on 13 August 2012, Renco made clear to the MEM that it had no intention of presenting a restructuring plan for DRP that complied with the MEM’s basic, yet necessary requests.⁷³⁷ Indeed, Renco made clear that despite the discussions with the MEM from May through August

⁷³¹ **Exhibit R-111**, Letter from MEM (M. Patiño) to Renco Group, Inc. (I. Leon Rennert), 26 June 2012, p. 3.

⁷³² **Exhibit R-116**, Letter from MEM (M. Patiño) to Renco Group (D. Sadlowski), 13 July 2012.

⁷³³ **Exhibit R-116**, Letter from MEM (M. Patiño) to Renco Group (D. Sadlowski), 13 July 2012.

⁷³⁴ **Exhibit R-117**, Letter from MEM (M. Patiño) to Renco Group (D. Sadlowski), 20 July 2012 *attaching* Observations of the Project of the DRP Restructuring Plan.

⁷³⁵ **Exhibit R-118**, Letter from MEM (M. Patiño) to Renco Group (D. Sadlowski), 9 August 2012.

⁷³⁶ **Exhibit R-118**, Letter from MEM (M. Patiño) to Renco Group (D. Sadlowski), 9 August 2012, p. 2 (Spanish original: “Invitamos a Renco a presentar un nuevo texto de plan solucionando estos y los otros puntos, de acuerdo a la manera en que se conversó, en lugar de caracterizar los comentarios de otros”).

⁷³⁷ See **Exhibit C-198**, Letter from Renco Group, Inc. (D. Sadlowski) to MEM (M. Patiño), 13 August 2012, PDF p. 2.

2012 that presumably would have modified the restructuring plan, it would stick to its restructuring proposal from 14 May 2012.⁷³⁸

399. Although Renco's letter of 13 August 2012 could have ended all discussions, on 20 August 2012, the MEM replied to Renco, reiterating its commitment to find a resolution and agreeable terms for DRP's restructuring plan.⁷³⁹ The MEM, however, noted that Renco's letters in the month of August 2012⁷⁴⁰ did not reflect the parties' discussions and that the MEM was expecting to receive a full revised plan (as the MEM had requested before) instead of simply receiving DRP's theoretical comments about the plan.⁷⁴¹ As the MEM maintained at the time, Renco's comments from May to August 2012 did not address the various concerns with DRP's restructuring plan, and in certain instances Renco's comments even regressed certain points that were previously agreed by the parties.⁷⁴² Nevertheless, the MEM invited Renco to reconsider its position and present an amended restructuring plan that reflected DRP's creditors' comments, including the MEM's.⁷⁴³
400. With the restructuring plan discussions stalled, on 25 and 29 August 2012, the Board of Creditors convened and continued voting on topics related to advancing the operational liquidation plan of DRP.⁷⁴⁴ Notably, in the Board of Creditors' meeting of 25 August 2012, DRP's elected liquidator, Right Business, noted that DRP's restructuring plan of 14 May 2012 was unacceptable.⁷⁴⁵

⁷³⁸ See [Exhibit C-198](#), Letter from Renco Group, Inc. (D. Sadlowski) to MEM (M. Patiño), 13 August 2012, PDF p. 2 (“we stand in the position which is comprised in the proposal of Restructuring Plan filed before INDECOPI on May 13th, 2012 and inform you that we will not submit a new proposal to the creditors meeting.”).

⁷³⁹ [Exhibit R-119](#), Letter from MEM (R. Patiño) to Renco Group (D. Sadlowski), 20 August 2012.

⁷⁴⁰ See [Exhibit C-197](#), Letter from Renco Group (D. Sadlowski) to MEM (R. Patiño), 2 August 2012; [Exhibit C-198](#), Letter from Renco Group, Inc. (D. Sadlowski) to MEM (M. Patiño), 13 August 2012.

⁷⁴¹ [Exhibit R-119](#), Letter from MEM (R. Patiño) to Renco Group (D. Sadlowski), 20 August 2012, p. 1.

⁷⁴² [Exhibit R-119](#), Letter from MEM (R. Patiño) to Renco Group (D. Sadlowski), 20 August 2012, p. 1.

⁷⁴³ [Exhibit R-119](#), Letter from MEM (R. Patiño) to Renco Group (D. Sadlowski), 20 August 2012, p. 1.

⁷⁴⁴ [Exhibit R-120](#), *Junta de Acreedores no Aprobó plan de Restructuración de Doe Run para Retomar Complejo de La Oroya*, MEM, 25 August 2012; [Exhibit R-121](#), *Aprueban Términos de Referencia para venta internacional del Complejo Metalúrgico de La Oroya*, MEM, 30 August 2012.

⁷⁴⁵ [Exhibit R-122](#), DRP Creditors' Meeting Minutes, 24 and 29 August 2012, p. 17.

401. From August 2012 to March 2013, Right Business focused on advancing the liquidation of DRP.⁷⁴⁶ In the Board of Creditors meeting of 9 April 2013, however, the creditors voted to abandon the operational liquidation plan and instead turn to restructuring DRP (the MEM voted in favor of restructuring DRP).⁷⁴⁷ At the meeting, Right Business noted that there were indications that shifting to restructuring would be best for DRP.⁷⁴⁸ In the same meeting, 90.26% of the creditors voted to designate Right Business as the Administrator of DRP.⁷⁴⁹ With the favorable vote of the Board of Creditors, on 30 April 2013 Right Business sent the committee its proposed restructuring plan for the creditors' consideration to discuss in the following meeting.⁷⁵⁰
402. On 5 July 2013, the Board of Creditors convened and approved the restructuring plan proposed by Right Business. Among the parties that voted in favor of the restructuring plan was the MEM, noting that Right Business' proposed plan appeared to take environmental laws into consideration, but that the MEM would continue to closely evaluate the technical aspects of the proposal.⁷⁵¹ The MEM further stated that the creditors' concerns would need to be addressed in order for the plan to be sustainable and viable.⁷⁵² Finally, the MEM voiced that it was open to the rest of the creditors' suggestions, and stressed that in order to approve the plan, the creditors' observations about the plan had to be resolved.⁷⁵³ At the end of the meeting, 99% of the creditors voted to approve the restructuring plan proposed by Right Business.⁷⁵⁴
403. From July 2013 to May 2014, Right Business focused on addressing the creditors' concerns with the restructuring plan.⁷⁵⁵ At the Board of Creditors' meeting held on 9 June 2014,

⁷⁴⁶ [Exhibit R-112](#), DRP Creditors' Meeting Minutes, 9 April 2012, p. 3.

⁷⁴⁷ [Exhibit R-112](#), DRP Creditors' Meeting Minutes, 9 April 2012, p. 6.

⁷⁴⁸ [Exhibit R-112](#), DRP Creditors' Meeting Minutes, 9 April 2012, p. 5.

⁷⁴⁹ [Exhibit R-112](#), DRP Creditors' Meeting Minutes, 9 April 2012, p. 7.

⁷⁵⁰ [Exhibit R-123](#), Restructuring Plan of DRP, 30 April 2013.

⁷⁵¹ [Exhibit R-124](#), DRP Creditors' Meeting Minutes, 5 July 2013, p. 5.

⁷⁵² [Exhibit R-124](#), DRP Creditors' Meeting Minutes, 5 July 2013, p. 5.

⁷⁵³ [Exhibit R-124](#), DRP Creditors' Meeting Minutes, 5 July 2013, p. 5.

⁷⁵⁴ [Exhibit R-124](#), DRP Creditors' Meeting Minutes, 5 July 2013, p. 14.

⁷⁵⁵ See, e.g., [Exhibit R-125](#), DRP Creditors' Meeting Minutes, 13 and 16 August 2013, p. 2.

Right Business summarized the status of the restructuring plan that was approved on 5 June 2013, noting that the plan was at risk.⁷⁵⁶ It became clear to many creditors that the plan was unviable, and the creditors voiced a preference to explore liquidating DRP.⁷⁵⁷

404. At the following Board of Creditors' meeting of 27 August 2014, a member of the Board of Creditors, Sociedad Minera Brocal S.A.A, proposed that the restructuring plan be abandoned and that the committee instead place DRP in operational liquidation (*liquidación en marcha*).⁷⁵⁸ Before the proposal was submitted to vote, the workers' representative⁷⁵⁹ voiced the workers' strong support for the plan to place DRP back in operational liquidation.⁷⁶⁰ As a result, in the same meeting 100% of DRP's creditors—including DRCL—voted to place DRP in operational liquidation.⁷⁶¹
405. As explained by Mr. Shinno, since August 2014, the Board of Creditors has worked on advancing DRP's liquidation in the best interest of all relevant parties, while respecting the environmental laws of Peru.⁷⁶² Throughout the process, the MEM has been consistent in its position that it participates in the process as one of DRP's creditors, does not control the liquidation process, and continuously collaborates with the other creditors to advance the process.⁷⁶³ Renco's allegation that the "MEM greatly influenced the actions and decisions of the Creditors Committee,"⁷⁶⁴ is disingenuous insofar as DRCL's voting power was practically identical to the MEM's. DRP's liquidation process has run like a typical

⁷⁵⁶ [Exhibit R-126](#), DRP Creditors' Meeting Minutes, 9 June 2014, p. 4.

⁷⁵⁷ [Exhibit R-126](#), DRP Creditors' Meeting Minutes, 9 June 2014, p. 4.

⁷⁵⁸ [Exhibit R-127](#), DRP Creditors' Meeting Minutes, 22 and 27 August 2014, p. 14.

⁷⁵⁹ In the bankruptcy proceedings referred to as the "*Acreeedor Laboral*."

⁷⁶⁰ [Exhibit R-127](#), DRP Creditors' Meeting Minutes, 22 and 27 August 2014, p. 14.

⁷⁶¹ [Exhibit R-127](#), DRP Creditors' Meeting Minutes, 22 and 27 August 2014, p. 14.

⁷⁶² See Shinno Witness Statement, ¶¶ 20–47.

⁷⁶³ Shinno Witness Statement, ¶¶ 20–47; see generally [Exhibit R-107](#), DRP Creditors' Meeting Minutes, 22 and 25 May 2012; [Exhibit R-108](#), DRP Creditors' Meeting Minutes, 19 and 24 Sept. 2014; [Exhibit R-109](#), DRP Creditors' Meeting Minutes, 19 March 2015; [Exhibit R-110](#), DRP Creditors' Meeting Minutes, 13 and 18 January 2012; [Exhibit C-231](#), DRP Creditors' Meeting Minutes, 9 and 12 April 2012; [Exhibit R-122](#), DRP Creditors' Meeting Minutes, 24 and 29 August 2012; [Exhibit R-112](#), DRP Creditors' Meeting Minutes, 9 April 2012; [Exhibit R-123](#), Restructuring Plan of DRP, 30 April 2013.

⁷⁶⁴ Treaty Memorial, ¶ 140.

liquidation for a company in bankruptcy in Peru, with the recognized creditors voicing their positions and voting on the direction and future of the company in bankruptcy.

406. From 2012 to 2015, Volcan served as the president of the Board of Creditors. As explained by Mr. Shinno, however, in September 2015 the creditors unanimously elected the MEM to act as president of the Board of Creditors.⁷⁶⁵ This election occurred after no other creditor was willing to accept the position.⁷⁶⁶

3. The Facility was reopened in compliance with environmental law

407. On 21 June 2012, DRP, as managed by Right Business, notified the MEM of its intention to restart operations of the Facility's zinc and lead circuits, which already had functional sulfuric acid plants.⁷⁶⁷ DRP's creditors sought to initiate a process "operational liquidation," meaning that while the creditors would not approve the company's restructuring plan, they would "allow the company to resume production while the board of creditors further analyzed DRP's situation and prepare to make a final decision."⁷⁶⁸
408. The MEM determined that Right Business could proceed so long as the Facility's operations complied with the applicable ECAs and LMPs.⁷⁶⁹ After determining that the zinc circuit could comply with the emissions standards, Right Business restarted operations of the circuit on 28 July 2012.⁷⁷⁰ The lead circuit restarted operations in November of the same year.⁷⁷¹
409. Right Business continued to operate the zinc and lead circuits while staying almost entirely within the emissions limits.⁷⁷² The few times that the Facility exceeded the permissible

⁷⁶⁵ See Shinno Witness Statement, ¶ 46; [Exhibit R-145](#), DRP Creditors' Meeting Minutes with Liquidation in Process, 15 and 18 September 2015, p. 6.

⁷⁶⁶ See Shinno Witness Statement, ¶ 46; [Exhibit R-145](#), DRP Creditors' Meeting Minutes with Liquidation in Process, 15 and 18 September 2015, p. 6.

⁷⁶⁷ [Exhibit R-233](#), Letter from DRP (A. L. Cano Algorta and R. Chavez Pimentel) to MEM, 21 July 2012.

⁷⁶⁸ [Exhibit C-199](#), After 3 years, DRP's La Oroya finally restarts, MINEWEB, 30 July 2012, PDF p. 2.

⁷⁶⁹ [Exhibit R-234](#), Memo No. 0484-2012/MEM, MEM, 18 July 2012, p. 3.

⁷⁷⁰ [Exhibit C-199](#), After 3 years, DRP's La Oroya finally restarts, MINEWEB, 30 July 2012; [Exhibit C-200](#), Doe Run Peru announces smelter restart, FOX LATINO NEWS, 28 July 2012.

⁷⁷¹ [Exhibit R-231](#), New owner of the La Oroya refinery in August 2013, GESTIÓN, 13 November 2012; [Exhibit R-232](#), Peru's La Oroya smelter to restart lead production Nov. 28, MINEWEB, 27 November 2012.

⁷⁷² [Exhibit R-230](#), Questions and Answers to understand the Doe Run Case, MEM, July 2016, pp. 11–12.

limits, the Environmental Evaluation and Enforcement Organ (*Organismo de Evaluación y Fiscalización Ambiental*, “OEFA”) applied the sanctions provided for in the applicable regulations.⁷⁷³ OEFA continues to monitor the Facility’s operations and ensure compliance with emissions standards.⁷⁷⁴

410. In November 2014, the MEM issued Supreme Decree No. 040-2014, which established the Corrective Environmental Management Instrument (*Instrumento de Gestión Ambiental Correctivo*, “IGAC”) for existing mining and smelting operations whose facilities had not come into compliance with Peruvian environmental standards.⁷⁷⁵ The IGAC effectively replaced the PAMA regime, since 2014, all outstanding PAMAs had lapsed.⁷⁷⁶ The MEM approved the IGAC for the La Oroya Facility on 10 July 2015 (the “La Oroya IGAC”).⁷⁷⁷
411. The La Oroya IGAC aims to bring the Facility’s operations into compliance with new emissions standards approved in 2008 and 2011.⁷⁷⁸ The MEM has established a period of 14 years for the Facility to implement measures that would guarantee that all three circuits would comply with the new standards. During that period, the Facility is allowed to operate only if it meets ECAs for average annual SO₂ levels of 80 ug/m³ and average daily levels of 365 ug/m³, which constitute significantly stricter emissions standards than those that applied to DRP before it ceased operations in 2009.⁷⁷⁹ Notably, the IGAC’s 14-year term is less than the amount of time that DRP enjoyed under the PAMA and the extended deadlines, even though the La Oroya IGAC seeks to achieve much more ambitious environmental objectives than those of the PAMA and was designed for a company that was (and remains) in liquidation.⁷⁸⁰

⁷⁷³ Alegre Expert Report, ¶¶ 101-102.

⁷⁷⁴ Alegre Expert Report, ¶¶ 101-102.

⁷⁷⁵ [Exhibit R-229](#), Supreme Decree No. 040-2014-EM, 5 November 2014; Alegre Expert Report, ¶ 104.

⁷⁷⁶ Alegre Expert Report, ¶¶ 104-107.

⁷⁷⁷ [Exhibit R-228](#), Directorial Resolution No. 272-2015-MEM/DGAAM, 10 July 2015 *attaching* Report No. 581-2015-MEM-DGAA/DNAM/DGAM/CMLO, 10 July 2015; Alegre Expert Report, ¶ 105.

⁷⁷⁸ Alegre Expert Report, ¶¶ 105-108.

⁷⁷⁹ Alegre Expert Report, ¶¶ 106-107. As expert Ada Alegre explains, the 250 ug/m³ standard adopted in 2017 does not apply to the Facility’s operations, whose emissions are governed by the La Oroya IGAC. Alegre Expert Report, ¶¶ 107-108.

⁷⁸⁰ Alegre Expert Report, ¶¶ 106-107.

4. Current status of DRP's bankruptcy

412. The bankruptcy of DRP is ongoing and continues to run in accordance with the Bankruptcy Law. Notably, the operational liquidation ended on 18 November 2020, and since that date DRP has been in the process of ordinary liquidation.⁷⁸¹ The Board of Creditors has collaborated to try to sell DRP's assets since 2015, but has not had success in the process.
413. With the bankruptcy proceedings ongoing, the MEM has yet to receive any of the USD 163 million credit it is owed by DRP.

G. Renco's Second Attempt to use a Treaty Claim to Pressure Peru

414. Following the dismissal of Renco's claims in *The Renco Group, Inc. v. Republic of Peru* (ICSID Case No. UNCT/13/1) pursuant to the Treaty ("**Renco I**"), Renco sent Peru a new Notice of Intent to Commence Arbitration under the Treaty dated 12 August 2016; and Renco and DRRC sent Peru and Activos Mineros a notice dated 12 August 2016, regarding a dispute under the contract. In addition, Renco requested that Peru stipulate that time stopped running when Renco submitted its Amended Notice of Arbitration in *Renco I*, thereby waiving its Treaty rights with respect to temporal jurisdiction in future proceedings.⁷⁸²
415. Peru and Activos Mineros advised that they disagreed with the allegations set forth in the notices and confirmed their continuous reservation of all of their rights.⁷⁸³ They also advised that the resolution of the prior arbitration proceeding facilitated a renewed opportunity to focus on solutions to La Oroya.
416. Consistent with Article 10.15 of the Treaty, which encourages resolution through consultation and negotiation, Peru (together with Activos Mineros) entered into a Consultation Agreement with Renco (and DRRC) dated 10 November 2016. Following subsequent agreements, Peru (together with Activos Mineros) entered into a

⁷⁸¹ [Exhibit R-128](#), Resolution No. 1240-2021/CCO-INDECOPI, 11 March 2021, p. 3.

⁷⁸² Response to the Notice of Arbitration, p. 7, fn. 28 (*citing* the Letter from Peru to Renco, 21 July 2016) ("In light of the Tribunal's Partial Award on Jurisdiction dated July 15, 2016 in the above referenced matter, The Renco Group, Inc. requests that the Republic of Peru advise in writing whether it accepts that time stopped running for purposes of Article 10.18(1) of the Treaty when Renco filed its Amended Notice of Arbitration in the above referenced case on August 9, 2011.").

⁷⁸³ Response to the Notice of Arbitration, p. 8, fn. 29 (*citing* the Letter from Renco to Peru, 12 August 2016).

Framework Agreement with Renco (and DRRC) dated 14 March 2017 to address related issues and facilitate further consultations.⁷⁸⁴ The period of consultations ended on 20 October 2018.

417. On 23 October 2018, Renco filed two “new” cases: (i) the present proceeding, styled as *The Renco Group, Inc. v. The Republic of Peru*, PCA Case No. 2019-46 (“**Renco II**” or the “**Treaty Case**”) and (ii) the case, styled as *The Renco Group, Inc. and Doe Run Resources, Corp. v. The Republic of Peru and Activos Mineros S.A.C.*, PCA Case No. 2019-47 (“**Renco III**” or the “**Contract Case**”).
418. As explained in Peru’s Treaty Counter-Memorial and Peru and Activos Mineros’ Contract Counter-Memorial, both of these cases should be dismissed for lack of jurisdiction, or, if the Tribunal finds it has jurisdiction, should fail on the merits. The Contract Case should also be dismissed on admissibility grounds.

H. Renco and DRRC are polluters that have received similar treatment in the United States for failing to meet their environmental obligations

419. Renco and DRRC’s history demonstrates a dismaying environmental track record beyond La Oroya. In the U.S. states of Missouri and Utah, in particular, Renco and DRRC have had to face the environmental negligence caused by their actions. As these examples, among others, demonstrate, while Renco and DRRC positively promote environmental achievements and community work on their websites, these results came about through actions required as part of multiple settlements with governmental authorities; indeed, Renco and DRRC have a history of purchasing failing companies with significant environmental and public health liabilities, stripping them of their assets, and walking away.

1. Renco and DRRC violated their environmental obligations in Missouri, USA, and faced significant environmental penalties and fines, and public outcry

420. In 1994, Renco acquired DRRC, the owner of a smelter in Herculaneum, Missouri. At the time of Renco’s acquisition, DRRC was facing pending expensive environmental

⁷⁸⁴ The Parties agreed that communications and interactions by and among them during the Consultation Period were without prejudice and shall be kept confidential. Peru reserves all rights in this regard.

upgrades, a string of toxic tort exposure cases in Missouri, and an ongoing labor dispute.⁷⁸⁵ A small Missouri town that historically relied on the production of its lead smelting industry, Herculaneum, much like La Oroya, is a victim of Renco’s business practices.⁷⁸⁶

421. Multiple studies and reports in the early 2000s revealed the effects of DRRC’s continued negligence in Herculaneum. Testing of Herculaneum streets found dangerously high levels of lead, up to 300,000 per million in some places,⁷⁸⁷ leading residents of Herculaneum to be advised that they “shouldn’t walk on certain residential streets because of dust that’s spilled from trucks hauling lead concentrate.”⁷⁸⁸ Additional tests in 2002 found that nearly half of children tested who lived near the smelter had significantly elevated levels of lead in their blood stream that placed them at risk of health problems, including reduced intelligence and impaired growth.⁷⁸⁹
422. By 2005, the Herculaneum Lead Smelter had been designated as a Superfund site, which enabled regulators to force Renco/DRRC to remediate the contamination caused by its facilities, but the effects of the contamination would continue.⁷⁹⁰ In 2007, the Missouri Department of Health and Senior Services identified a cluster of amyotrophic lateral sclerosis (more commonly known as Lou Gehrig’s disease) around the Herculaneum lead

⁷⁸⁵ [Exhibit R-037](#), Company Information, THE DOE RUN COMPANY, last accessed on 16 February 2008.

⁷⁸⁶ [Exhibit R-038](#), Doe Run is Out of the Closet, SIERRA CLUB: MISSOURI CHAPTER, 2005 Archive, last accessed on 3 May 2018 (noting a series of violations and fines throughout Doe Run’s history).

⁷⁸⁷ [Exhibit R-039](#), After Doe Run: Former company town adjusts to a new reality, ST. LOUIS TODAY, 7 April 2018, p. 17 (“2001: A reading of 1,200 parts per million or above is typically considered in need of urgent remediation in residential areas, but that threshold drops to 400 parts per million if children live there.”).

⁷⁸⁸ [Exhibit R-042](#), Heavy-Metal Racket, RIVERFRONT TIMES, 26 December 2001, p. 2.

⁷⁸⁹ [Exhibit R-039](#), After Doe Run: Former company town adjusts to a new reality, ST. LOUIS TODAY, 7 April 2018, p. 11; *see also* [Exhibit R-041](#), Herculaneum Master Plan 2006, Contamination of the Historic Area: Depth of the Lead Issue—A Recent History, July 2006, p. 4 (noting that a 26 February 2001 health consultation found that “[f]orty-five percent (45%) of the children residing east of Highway 61/Commercial Boulevard had blood lead levels (BLL) known to cause adverse health effects” and “[t]wenty-eight percent (28%) of children in [the Herculaneum] community had blood lead levels (BLL) known to cause adverse health effects”).

⁷⁹⁰ [Exhibit R-043](#), What is Superfund?, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, 9 November 2017 (explaining that the Comprehensive Environmental Response, Compensation and Liability Act, commonly known as “Superfund” allows the EPA to clean up contaminated sites and “forces the parties responsible for the contamination to either perform cleanups or reimburse the government for EPA-led cleanup work”); [Exhibit R-044](#), Community Involvement Plan: Herculaneum Lead Smelter Superfund Site, Herculaneum, Missouri, United States Environmental Protection Agency: Region 7, 1 February 2007, p. 4.

smelter.⁷⁹¹ As of 2009, nearly a third of Herculaneum’s residential yards and lots were found to be contaminated.⁷⁹²

423. Referred to as a “bad actor” by the State of Missouri in 1990, DRRC was the subject of a litany of violations and citations for its operations in Herculaneum prior to the site’s closure, including a sulfuric acid spill of over 40,000 gallons in the Herculaneum residential area and over 313 violations by the U.S. Occupational Safety and Health Administration (a federal regulatory agency charged with setting and enforcing safe working condition standards), including 283 willful violations (meaning DRRC knew about but did not rectify the violations).⁷⁹³ More recently, the EPA and the State of Missouri have cited DRRC for environmental violations near the Big River Mine Tailings Site and at its Iron County lead battery recycling center.⁷⁹⁴

⁷⁹¹ [Exhibit R-045](#), Health Alert: Disease Clusters Spotlight the Need to Protect People from Toxic Chemicals, Natural Resources Defense Council and National Disease Clusters Alliance, undated, p. 15 (“The MDHSS stated that the lead contamination in Herculaneum presented ‘a clear and present risk to public health’”); *see also* [Exhibit R-046](#), Herculaneum Smelter is among 42 disease clusters, group says, ST. LOUIS TODAY, 29 March 2011.

⁷⁹² [Exhibit R-039](#), After Doe Run: Former company town adjusts to a new reality, ST. LOUIS TODAY, last accessed on 7 May 2018, p.14.

⁷⁹³ [Exhibit R-038](#), Doe Run is Out of the Closet, SIERRA CLUB: MISSOURI CHAPTER, 2005 Archive, last accessed on 3 May 2018 (noting a series of violations and fines throughout Doe Run’s history, including, February, 1990: Doe Run does not report sulfuric acid spill of 40,000 gallons in Herculaneum residential area; March, 1990: Doe Run issued penalty of \$50,000 for violations in Herculaneum; January, 1992: Department of Natural Resources finds violations at Doe Run’s Buick, Missouri facility including 15,000 drums, open burning, leaking battery bunker, “releases too numerous to quantify”, “an unbelievable mess”, resulting in a \$300,000 fine by the State of Missouri; February, 1993: Notice of violation issued against Doe Run for exceeding air standards by four times the limit at Herculaneum; May, 1993: Doe Run tops Toxic Release Inventory list for top polluter in state; August, 1993: Doe Run cited for 313 violation by OSHA, including 283 willful violations and 136 instances of failing to record occupational injuries; May, 1995: EPA and Doe Run sign stipulated agreement to address violations).

⁷⁹⁴ *See* [Exhibit R-047](#), The United States and Missouri Reach Agreement with Doe Run Resources Corporation on Cleanup of More than 4,000 Lead-Contaminated Residential Yards in Missouri, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, 4 April 2018; [Exhibit R-048](#), Missouri fines Doe Run \$1.2 million for illegal lead emissions, several other breaches, ST. LOUIS TODAY, 12 November 2019.

2. Renco violated its environmental obligations in Utah, USA, and faced significant environmental penalties and fines, and public outcry

424. Another example of Renco’s violations of environmental obligations is a Utah magnesium facility (“**Magnesium Facility**”) that for years ranked as the United States’ worst polluter (no. 1 emitter of toxic pollution).⁷⁹⁵
425. The Magnesium Facility was owned by Magnesium Corporation of America (“**MagCorp**”) for years until US Magensium LLC (“**USM**”) acquired it in June 2002.⁷⁹⁶ Renco has owned the Magnesium Facility through its ownership and control of both of these companies.
426. The Magnesium Facility is located adjacent to the Great Salt Lake in the state of Utah, United States.⁷⁹⁷ The 4,525-acre facility has been producing magnesium and other materials since 1972. Much like the process at the La Oroya Facility, the process at the Magnesium Facility is complicated and technical, but, simply stated, the waste streams at the facility contain toxins such as dioxins, furans, hexachlorobenzene and polychlorinated biphenyls.⁷⁹⁸ The wastewater from the Magnesium Facility is highly acidic.⁷⁹⁹ The Magnesium Facility operations and waste disposal practices illegally contaminated soil, air, surface water and groundwater.⁸⁰⁰
427. As explained below, Renco’s polluting Magnesium Facility resulted in years of investigations by the US Environmental Protection Agency (“**EPA**”), millions of dollars

⁷⁹⁵ **Exhibit R-049**, EPA: U.S. Magnesium Wastes Endanger Workers, Families, Birds, HEALTHY ENVIRONMENT ALLIANCE OF UTAH, 28 August 2008; *see also* **Exhibit R-030**, Herky Jerk: Doe Run’s owner has done this before—and that has regulators braced for trouble, RIVERFRONT TIMES, 20 February 2002, p. 3.

⁷⁹⁶ **Exhibit R-050**, First Amended Complaint, Document No. 100, *United States of America v. Magnesium Corporation of America, et al.* (C.D. Utah Case No. 2:01-cv-0040-DAK), 4 October 2002, p. 10.

⁷⁹⁷ **Exhibit R-054**, Case Summary: EPA Issues RCRA Corrective Action Order to Expedite Cleanup at the US Magnesium Facility, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, 6 December 2016, p. 1.

⁷⁹⁸ **Exhibit R-054**, Case Summary: EPA Issues RCRA Corrective Action Order to Expedite Cleanup at the US Magnesium Facility, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, 6 December 2016, p. 1.

⁷⁹⁹ **Exhibit R-054**, Case Summary: EPA Issues RCRA Corrective Action Order to Expedite Cleanup at the US Magnesium Facility, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, 6 December 2016, p. 1.

⁸⁰⁰ **Exhibit R-054**, Case Summary: EPA Issues RCRA Corrective Action Order to Expedite Cleanup at the US Magnesium Facility, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, 6 December 2016, p. 1.

in fines, extensive mandatory environmental cleanup, a bankruptcy proceeding, and over 20 years of litigation.

428. **The United States Department of Justice sued Renco and various of its subsidiaries:** The United States, on behalf of the EPA, filed a complaint on 16 January 2001 in the United States District Court for the District of Utah in the lawsuit entitled *United States of America v. Magnesium Corporation of America, et al.*, Civil Action No. 2:01CV0040B, alleging that Renco and various Renco subsidiaries (including MagCorp and Renco Metals, Inc. (“**Renco Metals**”)) violated the Resource Conservation and Recovery Act of 1976 (“**RCRA**”) at the Magnesium Facility (“**Magnesium Facility Litigation**”).⁸⁰¹ The RCRA is a federal law in the United States governing the disposal of solid waste and hazardous waste.⁸⁰² The complaint alleged that Renco and its subsidiaries were responsible for polluting the air, soil, surface water, and ground water in the area around the Magnesium Facility.⁸⁰³
429. **Magcorp and Renco Metals filed for bankruptcy:** In 2001, MagCorp and Renco Metals, Inc., two defendants in the Magnesium Facility Litigation, filed petitions for reorganization under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York (“**Magnesium Bankruptcy**”).⁸⁰⁴ In June 2002, over the objection of the United States, the bankruptcy court approved MagCorp’s request to sell the Magnesium Facility and substantially all of its other assets to USM.⁸⁰⁵ On 24

⁸⁰¹ **Exhibit R-051**, Consent Decree, Document No. 456, *United States of America v. Magnesium Corporation of America, et al.* (C.D. Utah Case No. 2:01-cv-0040-DAK), 30 June 2021, p. 3.

⁸⁰² See generally **Exhibit R-051**, Consent Decree, Document No. 456, *United States of America v. Magnesium Corporation of America, et al.* (C.D. Utah Case No. 2:01-cv-0040-DAK), 30 June 2021.

⁸⁰³ See generally **Exhibit R-051**, Consent Decree, Document No. 456, *United States of America v. Magnesium Corporation of America, et al.* (C.D. Utah Case No. 2:01-cv-0040-DAK), 30 June 2021.

⁸⁰⁴ See **Exhibit R-052**, Plaintiff’s Motion to Enter Proposed Consent Decree and Memorandum in Support, Document No. 452, *United States of America v. Magnesium Corporation of America, et al.* (C.D. Utah Case No. 2:01-cv-0040-DAK), 8 June 2021, p. 9.

⁸⁰⁵ See **Exhibit R-052**, Plaintiff’s Motion to Enter Proposed Consent Decree and Memorandum in Support, Document No. 452, *United States of America v. Magnesium Corporation of America, et al.* (C.D. Utah Case No. 2:01-cv-0040-DAK), 8 June 2021, p. 9.

September 2003, the court converted the case to a Chapter 7 liquidation and appointed a trustee.⁸⁰⁶

430. Following the filing and conversion of the Magnesium Bankruptcy in 2001 and 2003, the case was dormant for several years while the trustee of the MagCorp and Renco Metals estates (“**Magnesium Trustee**”) pursued a fraudulent conveyance action against Renco, the Ira Leon Rennert Revocable Trusts and Mr. Ira Leon Rennert (the “**Magnesium Parent Entities**”) in an effort to recover meaningful assets for distribution to creditors.⁸⁰⁷ In February of 2015, the Magnesium Trustee obtained a jury verdict against the Magnesium Parent Entities on claims of fraudulent conveyance, breach of fiduciary duty, payment of unlawful dividends, and corporate waste and mismanagement.⁸⁰⁸ A judgment was entered in favor of the MagCorp and Renco Metals bankruptcy estates against the Magnesium Parent Entities for over \$213 million.⁸⁰⁹ The Second Circuit Court of Appeals of the United States affirmed the district court judgment, and the Supreme Court denied a petition for certiorari.⁸¹⁰ Notably, one of MagCorp’s largest creditors was “the United States on behalf of the Environmental Protection Agency.”⁸¹¹
431. **The EPA placed the Magnesium Facility on the National Priorities List for its contamination:** After years of investigation, in September 2008, the EPA, with support from the Utah Department of Environmental Quality (“**UDEQ**”), announced its proposal to add the Magnesium Facility to the National Priorities List. The National Priorities List

⁸⁰⁶ See [Exhibit R-052](#), Plaintiff’s Motion to Enter Proposed Consent Decree and Memorandum in Support, Document No. 452, *United States of America v. Magnesium Corporation of America, et al.* (C.D. Utah Case No. 2:01-cv-0040-DAK), 8 June 2021, p. 9.

⁸⁰⁷ See [Exhibit R-052](#), Plaintiff’s Motion to Enter Proposed Consent Decree and Memorandum in Support, Document No. 452, *United States of America v. Magnesium Corporation of America, et al.* (C.D. Utah Case No. 2:01-cv-0040-DAK), 8 June 2021, p. 13.

⁸⁰⁸ See [Exhibit R-052](#), Plaintiff’s Motion to Enter Proposed Consent Decree and Memorandum in Support, Document No. 452, *United States of America v. Magnesium Corporation of America, et al.* (C.D. Utah Case No. 2:01-cv-0040-DAK), 8 June 2021, p. 13.

⁸⁰⁹ See [Exhibit R-052](#), Plaintiff’s Motion to Enter Proposed Consent Decree and Memorandum in Support, Document No. 452, *United States of America v. Magnesium Corporation of America, et al.* (C.D. Utah Case No. 2:01-cv-0040-DAK), 8 June 2021, p. 14.

⁸¹⁰ See [Exhibit R-052](#), Plaintiff’s Motion to Enter Proposed Consent Decree and Memorandum in Support, Document No. 452, *United States of America v. Magnesium Corporation of America, et al.* (C.D. Utah Case No. 2:01-cv-0040-DAK), 8 June 2021, p. 14.

⁸¹¹ [Exhibit R-243](#), MagCorp Makes Distribution To Creditors, PR NEWSWIRE, 22 July 2019.

is a list of *some of the nation's most contaminated sites*, commonly referred to as Superfund sites. Listing the Magnesium Facility on the National Priorities List makes the cleanup of the site a *high priority nationally* and enables EPA and UDEQ to use Superfund authority to initiate and oversee the cleanup of the site.⁸¹² Once the Magnesium Facility was added to the National Priorities list, CERCLA (a reference to the Comprehensive Environmental Response, Compensation, and Liability Act) environmental investigations followed, finding high levels of environmental contamination at the Magnesium Facility. Contaminants consisted of: metals, including arsenic, chromium, mercury, copper, and zinc; acidic waste water; chlorinated organics; polychlorinated biphenyls (PCBs); dioxins/furans, hexachlorobenzene (HCB); and polycyclic aromatic hydrocarbons (PAHs).⁸¹³ The investigations noted that these wastes were being released into the environment and were largely *uncontrolled*.⁸¹⁴

432. In the context of the Magnesium Bankruptcy, MagCorp and Renco Metals entered an agreement where they accepted accountability for contaminating the environment. As part of the overall negotiations in the Magnesium Facility Litigation, the parties sought to settle the Magnesium Bankruptcy, and succeeded.⁸¹⁵ In 2018, the United States entered into a settlement with the Magnesium Trustee and other stakeholders resolving the distribution of the assets of the estates (“Magnesium Bankruptcy Settlement”).⁸¹⁶ Under the Magnesium Bankruptcy Settlement, the EPA recovered over \$23 million for CERCLA

⁸¹² [Exhibit R-055](#), Superfund Program: U.S. Magnesium, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, April 2010, p. 1.

⁸¹³ [Exhibit R-055](#), Superfund Program: U.S. Magnesium, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, April 2010, p. 1; [Exhibit R-056](#), US Magnesium Tooele County, UT, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, last accessed on 17 January 2022, p. 2.

⁸¹⁴ [Exhibit R-055](#), Superfund Program: U.S. Magnesium, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, April 2010, p. 1.

⁸¹⁵ See [Exhibit R-052](#), Plaintiff’s Motion to Enter Proposed Consent Decree and Memorandum in Support, Document No. 452, *United States of America v. Magnesium Corporation of America, et al.* (C.D. Utah Case No. 2:01-cv-0040-DAK), 8 June 2021, p. 14.

⁸¹⁶ See [Exhibit R-052](#), Plaintiff’s Motion to Enter Proposed Consent Decree and Memorandum in Support, Document No. 452, *United States of America v. Magnesium Corporation of America, et al.* (C.D. Utah Case No. 2:01-cv-0040-DAK), 8 June 2021, p. 14.

response cost claims.⁸¹⁷ The Parent Entities agreed in turn that their \$5.8 million recovery under the Bankruptcy Settlement would be deposited in an escrow account from which USM may seek reimbursement only for specified activities relating to environmental actions at the Magnesium Facility.⁸¹⁸

433. The Magnesium Bankruptcy Settlement also included express reservations of rights by the government to ensure that nothing in the Magnesium Bankruptcy Settlement precluded the EPA from pursuing claims against the Parent Entities for environmental liabilities at the Magnesium Facility under alter-ego and direct operator liability theories.⁸¹⁹ As U.S. Attorney Geoffrey S. Berman said in the context of the Magnesium Bankruptcy Settlement:

“Polluters will be held to account, even in bankruptcy, for contaminating the environment. As a result of today’s settlement, MagCorp and Renco Metals will pay more than \$33 million to fund clean-up of the hazardous substances at the US Magnesium Superfund Site.”⁸²⁰

434. The Magnesium Facility entered into an agreement with the EPA, which was necessary to remediate its years of contamination and improve its facilities: After over 20 years of litigation, in January 2021, the Department of Justice of the United States lodged a proposed consent decree in order to settle the Magnesium Facility Litigation (“Consent Decree”).⁸²¹ The EPA determined the CERCLA Response Action⁸²² to be performed at

⁸¹⁷ See [Exhibit R-052](#), Plaintiff’s Motion to Enter Proposed Consent Decree and Memorandum in Support, Document No. 452, *United States of America v. Magnesium Corporation of America, et al.* (C.D. Utah Case No. 2:01-cv-0040-DAK), 8 June 2021, p. 14.

⁸¹⁸ See [Exhibit R-052](#), Plaintiff’s Motion to Enter Proposed Consent Decree and Memorandum in Support, Document No. 452, *United States of America v. Magnesium Corporation of America, et al.* (C.D. Utah Case No. 2:01-cv-0040-DAK), 8 June 2021, p. 15.

⁸¹⁹ See [Exhibit R-052](#), Plaintiff’s Motion to Enter Proposed Consent Decree and Memorandum in Support, Document No. 452, *United States of America v. Magnesium Corporation of America, et al.* (C.D. Utah Case No. 2:01-cv-0040-DAK), 8 June 2021, p. 15.

⁸²⁰ [Exhibit R-057](#), Manhattan U.S. Attorney Announces Bankruptcy Settlement With Responsible Parties At US Magnesium Superfund Site, UNITED STATES DEPARTMENT OF JUSTICE, 15 July 2019, p. 1.

⁸²¹ [Exhibit R-058](#), Notice of Lodging of Proposed Consent Decree Under the Resource Conservation and Recovery Act, FEDERAL REGISTER, 3 February 2021.

⁸²² [Exhibit R-051](#), Consent Decree, Document No. 456, *United States of America v. Magnesium Corporation of America, et al.* (C.D. Utah Case No. 2:01-cv-0040-DAK), 30 June 2021, p. 10 (“‘CERCLA Response Action’ means those activities necessary to eliminate uncontrolled releases of hazardous substances from the Current Waste Pond and retrofit it in compliance with the Ground Water Discharge Permit in accordance with the CERCLA SOW.”).

the Magnesium Facility was necessary to protect the public health, welfare, and the environment.⁸²³

435. The Magnesium Facility Litigation was officially closed on 30 June 2021 pursuant to the Consent Decree.⁸²⁴ The Consent Decree's objective was to resolve the civil claims for violations of RCRA and to address uncontrolled releases of hazardous substances at the Magnesium Facility by, among other things: (1) establishing injunctive relief whereby USM would modify certain Magnesium Facility operations with respect to the management of certain wastes and modify the policies to ensure additional safeguards for worker health; (2) requiring USM to establish appropriate financial assurance for closure or corrective action of certain waste management areas in the operating areas of the Magnesium Facility; 3) assessing an appropriate penalty; and 4) providing for the performance by USM of the CERCLA Response Action and the payment of EPA costs incurred in connection with the CERCLA Response Action. The Consent Decree also implemented the 2019 Bankruptcy Settlement that resolved claims between the United States and USM's predecessors.⁸²⁵ The Consent Decree included extensive process modifications at the Magnesium Facility that would reduce the environmental impacts from its production operations and ensure greater protection for its workers.⁸²⁶
436. Renco is no novice to facing steep environmental penalties, lawsuits, and causing public outcry for its poor management of facilities. Indeed, Renco's Magnesium Facility for years ranked as the United States' worst polluter, and, much like the MEM rightfully did in Peru,

⁸²³ **Exhibit R-051**, Consent Decree, Document No. 456, *United States of America v. Magnesium Corporation of America, et al.* (C.D. Utah Case No. 2:01-cv-0040-DAK), 30 June 2021, pp. 5, 15.

⁸²⁴ **Exhibit R-053**, Judgment, Document No. 457, *United States of America v. Magnesium Corporation of America, et al.* (C.D. Utah Case No. 2:01-cv-0040-DAK), 30 June 2021, p. 1 ("This matter is before the court on Plaintiff United States of America's Motion to Enter Proposed Consent Decree. (ECF No. 452.) In the court's order, dated 30 June 2021, the court granted Plaintiff's Motion. According to the terms of that Order, the Consent Decree (ECF No. 456) is made the final judgment in this case. This action is closed.").

⁸²⁵ **Exhibit R-058**, Notice of Lodging of Proposed Consent Decree Under the Resource Conservation and Recovery Act, FEDERAL REGISTER, 3 February 2021, p. 1.

⁸²⁶ **Exhibit R-059**, U.S. settles with U.S. Magnesium, the largest producer of magnesium metal in the Northern Hemisphere, for alleged illegal disposal of hazardous waste at Rowley, Utah facility, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, 19 January 2021, p. 1.

the EPA in the United States successfully filed a credit claim in the Magnesium Bankruptcy relating to environmental cleanup costs.⁸²⁷

3. DRRC’s “environmental achievements and community work” occurred as part of multiple settlements with governmental authorities

437. While DRRC positively promotes environmental achievements and community work on its website, these results came about through actions required as part of multiple settlements with governmental authorities. A few examples include:

- a. On 26 April 2002, Missouri Department of Natural Resources and the Missouri Attorney General’s Office entered into a Settlement Agreement with DRRC requiring DRRC to purchase residential properties within 3/8 of a mile of the smelter.⁸²⁸
- b. In October 2010, DRRC, the US Department of Justice, the EPA and the Missouri Department of Natural Resources entered into a settlement in which DRRC agreed to spend approximately US\$65.8 million for violations of several environmental laws at ten of its facilities in Missouri, as well as a US\$7 million civil penalty.⁸²⁹ The settlement required DRRC to institute significant changes to its operations, including the shutdown of its smelter operation by the end of 2013.⁸³⁰ The settlement also obligated DRRC to establish financial assurance trust funds amounting to about US\$28-30 million for the cleanup of Herculaneum and other Missouri facilities, in addition to a further US\$2 million allocated toward

⁸²⁷ **Exhibit R-060**, EPA: U.S. Magnesium Wastes Endanger Workers, Families, Birds, HEALTHY ENVIRONMENT ALLIANCE OF UTAH, 28 August 2008.

⁸²⁸ **Exhibit R-041**, Herculaneum Master Plan 2006, Contamination of the Historic Area: Depth of the Lead Issue—A Recent History, July 2006, p. 5.

⁸²⁹ See **Exhibit R-040**, Doe Run to pay millions in fines; operations at Herculaneum smelter to stop in 2013, ST. LOUIS TODAY, 8 October 2010; **Exhibit R-061**, Doe Run Resources Corporation Settlement, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, 8 October 2010, p. 1 (The ten facilities are 1) Herculaneum Smelter in Herculaneum, Mo.; 2) Buick Mine/Mill in Boss, Mo.; 3) Buick Resource Recycling, in Boss, Mo.; 4) Bushy Creek Mine/Mill in Boss, Mo.; 5) Fletcher Mine/Mill in Centerville, Mo.; 6) Glover Facility in Annapolis, Mo.; 7) Sweetwater Mine/Mill in Ellington, Mo.; 8) Viburnum Mine #35 (Casteel) in Bixby, Mo.; 9) Viburnum Mine/Mill in Viburnum, Mo.; 10) West Form Mine/Mill in Bunker, Mo.); see also **Exhibit R-062**, Doe Run Settles with EPA: Lead Company to Close Herculaneum Smelter, Spend Millions, RIVERFRONT TIMES, 8 October 2010, p. 1.

⁸³⁰ **Exhibit R-061**, Doe Run Resources Corporation Settlement, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, 8 October 2010, p. 2.

community-based projects to mitigate the effects of the contamination caused in southeastern Missouri.⁸³¹

- c. In 2018, another settlement with the State of Missouri and the EPA required DRRC to clean up more than 4,000 lead contaminated properties near its Big River Tailings Site and additional cleanup at the Hayden Creek mine waste area.⁸³²

438. As a result, much of DRRC’s purported “environmental achievements and community work” occurred because they were required as part of a settlement with governmental authorities.

4. Renco and DRRC’s history of purchasing failing companies with significant environmental and public health liabilities, stripping them of their assets, and walking away

439. Renco, under the control of Ira Rennert, has a well-established history of purchasing failing companies with significant environmental and public health liabilities, stripping them of their assets, and walking away.⁸³³ Described as a “New York financier who’s collected distressed companies at fire-sale prices since the mid-1970s,” Ira Rennert centers his dealings on the transfer of assets from newly acquired companies to his holding company, the Renco Group, and consistent payout of dividends to its shareholders.

440. After acquisition, Renco has a history of putting a financial structure in place that destines the new company to fail. As evidenced by its actions in the United States and La Oroya, this usually includes one or more of the following strategies: (1) burdening the subsidiary with the debt of its own purchase price; (2) jeopardizing future financing of the subsidiary by making it guarantor for Renco’s debt or another subsidiary’s debt; (3) limiting the

⁸³¹ **Exhibit R-062**, Doe Run Settles with EPA: Lead Company to Close Herculaneum Smelter, Spend Millions, RIVERFRONT TIMES, 8 October 2010, p. 2; **Exhibit R-040**, Doe Run to pay millions in fines; operations at Herculaneum smelter to stop in 2013, ST. LOUIS TODAY, 8 October 2010, p. 1.

⁸³² **Exhibit R-064**, Remedial Design/Remedial Action Consent Decree, Document No. 7, *United States of America and State of Missouri v. The Doe Run Resources Corporation, et al.* (E.D. Mo. Case No. 4:18-cv-00502-RLW), 22 May 2018; *see also* **Exhibit R-047**, The United States and Missouri Reach Agreement with Doe Run Resources Corporation on Cleanup of More than 4,000 Lead-Contaminated Residential Yards in Missouri, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, 4 April 2018, p. 1; **Exhibit R-063**, Doe Run ordered to cleanup more than 4,000 lead-contaminated Missouri properties, KSDK NEWS, 4 April 2018, pp. 1–2.

⁸³³ *See, e.g.*, **Exhibit R-030**, Herky Jerk: Doe Run’s Owner Has Done This Before—And That Has Regulators Braced for Trouble, RIVERFRONT TIMES, 20 February 2002.

subsidiary's access to working capital from financing arrangements; (4) actively withdrawing funds from the subsidiary through intercompany "agreements"; and (5) when the company is unable to make payments on its debts, Rennert strips the company of any remaining assets and shifts the blame for the failure elsewhere, including falling commodities prices.

441. As described herein, this pattern is evident in the financing for the acquisition and management of the La Oroya Facility.⁸³⁴ The circumstances surrounding the financial state of some of the Renco Group's other companies similarly demonstrate this pattern:

a. DRRC: In early 1998, DRRC obtained US\$255 million in debt financing, providing US\$5 million to The Renco Group in the form of dividends and investment-banking fees.⁸³⁵ Later and as noted above, DRRC agreed to decommission the Herculanum lead smelter in 2013, three years ahead of the 2016 timeline required by state regulations for sulfur dioxide emissions.⁸³⁶ As described by the EPA, the company "made a business decision" to shut down the facility instead of making the investments necessary to bring the smelter into compliance with environmental regulations.⁸³⁷ In the midst of its settlement-based environmental cleanup in Herculanum, DRRC announced a restructure of US\$305 million in bond debt, blaming the decline in lead prices for its inability to make the interest payments on its debt.⁸³⁸

⁸³⁴ See [Exhibit R-036](#), Memorandum in Opposition to Defendants' Motion for a Determination of Foreign Law, Document No. 214, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 10 June 2014 (noting that the Renco Group and Ira Rennert requested loans for large amounts using the Herculanum refinery as a guarantee in order to acquire other refineries, namely, another in Missouri and a refinery in La Oroya, Peru.).

⁸³⁵ [Exhibit R-065](#), *Hamptons Mansion Turns Focus on Multimillionaire*, THE WALL STREET JOURNAL, 18 June 1998, p. 2.

⁸³⁶ [Exhibit R-040](#), *Doe Run to pay millions in fines; operations at Herculanum smelter to stop in 2013*, ST. LOUIS TODAY, 8 October 2010, p. 1.

⁸³⁷ [Exhibit R-040](#), *Doe Run to pay millions in fines; operations at Herculanum smelter to stop in 2013*, ST. LOUIS TODAY, 8 October 2010, p. 1; [Exhibit R-062](#), *Doe Run Settles with EPA: Lead Company to Close Herculanum Smelter, Spend Millions*, RIVERFRONT TIMES, 8 October 2010, p. 2.

⁸³⁸ See [Exhibit R-030](#), *Herky Jerk: Doe Run's Owner Has Done This Before—And That Has Regulators Braced for Trouble*, RIVERFRONT TIMES, 20 February 2002.

- b. Lodestar: In the late 1990s, the Renco Group purchased a nearly bankrupt coal-producer, Lodestar Holdings of Lexington, Kentucky, for US\$32.5 million.⁸³⁹ Within a year, Lodestar borrowed US\$150 million in high-interest bonds and used US\$27.8 million of the proceeds to pay cash dividends to the sole shareholder, Ira Rennert.⁸⁴⁰ By November 2000, Lodestar had defaulted on making interest payments on the bonds, blaming the depressed price of coal. In March 2001, the bondholders forced Lodestar into involuntary bankruptcy, which Lodestar ultimately managed to turn into a voluntary reorganization.⁸⁴¹
 - c. Renco Steel Holdings: In 1998, Renco Steel Holdings raised US\$120 million in junk bond debt and paid out US\$100 million to The Renco Group.⁸⁴²
 - d. MagCorp: Adding basis to the US Department of Justice allegations regarding the financial state of the company, in August 2001, MagCorp filed for bankruptcy.⁸⁴³ In 2017, Rennert was ordered to pay a \$213 million judgment after a US federal appeals court upheld a jury verdict finding him guilty of looting funds from the now-defunct MagCorp in order to build his 21-bedroom mansion in the Hamptons.⁸⁴⁴ As noted above, the proceedings culminated in a US\$33 million settlement in July 2019.⁸⁴⁵
442. For Peru and the citizens of La Oroya, this pattern and practice of polluting, extracting profit, and leaving are all too familiar.

⁸³⁹ **Exhibit R-030**, Herky Jerk: Doe Run’s Owner Has Done This Before—And That Has Regulators Braced for Trouble, RIVERFRONT TIMES, 20 February 2002, p. 1.

⁸⁴⁰ **Exhibit R-030**, Herky Jerk: Doe Run’s Owner Has Done This Before—And That Has Regulators Braced for Trouble, RIVERFRONT TIMES, 20 February 2002, p. 1.

⁸⁴¹ **Exhibit R-030**, Herky Jerk: Doe Run’s Owner Has Done This Before—And That Has Regulators Braced for Trouble, RIVERFRONT TIMES, 20 February 2002, pp. 1–2.

⁸⁴² **Exhibit R-065**, Hamptons Mansion Turns Focus on Multimillionaire, WALL STREET JOURNAL, 18 June 1998, p. 1.

⁸⁴³ **Exhibit R-030**, Herky Jerk: Doe Run’s Owner Has Done This Before—And That Has Regulators Braced for Trouble, RIVERFRONT TIMES, 20 February 2002, p. 3 (noting that “[i]n its petition, the U.S. alleged that because of ‘various financial transactions’ among Rennert-controlled companies, MagCorp may have been stripped of sufficient assets to pay any legal judgments”).

⁸⁴⁴ *See, e.g.*, **Exhibit R-066**, Appeals court rules billionaire Ira Rennert must pay \$213.2 million judgment, ST. LOUIS POST DISPATCH, 8 March 2017, p. 1.

⁸⁴⁵ *See* **Exhibit R-057**, Manhattan U.S. Attorney Announces Bankruptcy Settlement With Responsible Parties At US Magnesium Superfund Site, UNITED STATES DEPARTMENT OF JUSTICE, 15 July 2019, p. 1.

III. THE TRIBUNAL LACKS JURISDICTION OVER ALL BUT ONE OF RENCO'S CLAIMS

A. The Tribunal lacks jurisdiction over Renco's expropriation claims for failure to establish a *prima facie* case

443. The Tribunal lacks jurisdiction over Claimant's expropriation claims because Claimant has failed to establish a *prima facie* case on the merits. For jurisdictional purposes, Claimant is required to make out a *prima facie* case on the merits of its claims: it must establish that its alleged facts, if accepted by the Tribunal, could constitute a breach of the relevant obligation.⁸⁴⁶
444. Arbitral tribunals have consistently applied the *prima facie* test, based on *Judge Higgins's* separate opinion in the *Oil Platforms* case.⁸⁴⁷ The *prima facie* test is composed of two steps. First, a tribunal accepts the claimant's alleged facts as true.⁸⁴⁸ Second, based on an objective interpretation of the relevant law, the tribunal determines whether the facts accepted as true could result in a breach of the relevant obligation.⁸⁴⁹

⁸⁴⁶ See [RLA-191](#), *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, ¶ 91 (“At the jurisdictional stage, the Claimant must establish . . . that it has a *prima facie* cause of action under the Treaty, that is that the facts which it alleges are susceptible of constituting a treaty breach if they are ultimately proved to be true.”); [RLA-192](#), *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, ¶¶ 237–54; [RLA-187](#), *Achmea B.V. v. The Slovak Republic*, PCA Case No. 2013-12, Award on Jurisdiction and Admissibility, 20 May 2014, ¶ 216.

⁸⁴⁷ See [RLA-191](#), *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, ¶ 91; [RLA-192](#), *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, ¶¶ 237–54; [RLA-187](#), *Achmea B.V. v. The Slovak Republic*, PCA Case No. 2013-12, Award on Jurisdiction and Admissibility, 20 May 2014, ¶ 215; see also [RLA-193](#), *Case Concerning Oil Platforms*, ICJ, Separate Opinion of Judge Higgins, 12 December 1996, ¶ 32.

⁸⁴⁸ See [RLA-193](#), *Case Concerning Oil Platforms*, ICJ, Separate Opinion of Judge Higgins, 12 December 1996, ¶ 32; [RLA-187](#), *Achmea B.V. v. The Slovak Republic*, PCA Case No. 2013-12, Award on Jurisdiction and Admissibility, 20 May 2014, ¶ 216 (“The *prima facie* test thus entails two consequences. First, the facts alleged by the Claimant are in principle accepted to be true pro tem, without prejudice to any further examination of the same facts which may be relevant at a further stage of the proceedings.”).

⁸⁴⁹ See [RLA-193](#), *Case Concerning Oil Platforms*, ICJ, Separate Opinion of Judge Higgins, 12 December 1996, ¶ 32 (“The only way in which, in the present case, it can be determined whether the claims of Iran are sufficiently plausibly based upon the 1955 Treaty is to accept pro tem the facts as alleged by Iran to be true and *in that light to interpret Articles 1, IV and X for jurisdictional purposes - that is to say, to see if on the basis of Iran's claims of fact there could occur a violation of one or more of them.*”) (emphasis added); [RLA-187](#), *Achmea B.V. v. The Slovak Republic*, PCA Case No. 2013-12, Award on Jurisdiction and Admissibility, 20 May 2014, ¶¶ 216–17 (“The *prima facie* test thus entails two consequences Second, the onus is on the Claimant to show that the substantive BIT provision which is relied upon is susceptible of finding application to the alleged facts.”); [RLA-194](#), *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Decision on Jurisdiction, 15 December 2014, ¶ 322 (English Translation: “Also the claimant must, once the facts have been identified, establish

445. Claimant has the burden to articulate a cognizable expropriation claim and provide evidence to support that claim.⁸⁵⁰ Here, Claimant’s shifting expropriation claims suffer from significant inconsistencies and vague assertions that lead to one conclusion: Claimant’s expropriation claim fails. Claimant attempts to put various theories forward hoping one will convince the Tribunal. At times Claimant claims it suffered an “indirect expropriation” of its investment, but also claims elsewhere that the same measures were a “direct expropriation.”⁸⁵¹ These are not arguments in the alternative. Claimant cannot piece together a cognizable expropriation claim by layering theories without support or clarity. The claims must therefore be dismissed in their entirety.

1. Claimant has failed to articulate a cognizable direct expropriation claim

446. *First, Claimant lacks any basis to claim the measures at issue were a direct expropriation.* A direct expropriation claim is not viable even if the Tribunal were to accept all of Claimant’s allegations as true. The alleged measures do not permit the Tribunal to find a direct expropriation has occurred because on Claimant’s own recitation of the facts a direct expropriation could not have occurred.

447. International investment law is not controversial on this point: “[t]he difference between a direct or formal expropriation and an indirect expropriation turns on whether the legal title of the owner is affected by the measures in questions.”⁸⁵² “Today direct expropriations have become rare,”⁸⁵³ precisely because direct expropriation typically involves a scenario

that these facts are capable of constituting a breach of the treaty.”) (Spanish Original: “*También la parte demandante debe, una vez identificados estos hechos, establecer que los mismos son susceptibles de constituir una violación del tratado.*”).

⁸⁵⁰ [RLA-176](#), *Spence International Investments, LLC et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award on Jurisdiction, 25 October 2016 (“**Spence (Interim Award on Jurisdiction)**”), ¶ 29; [RLA-177](#), *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award, 24 January 2003, ¶ 311; [RLA-214](#), *Azurix Corp. v. the Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic 1 September 2009, ¶ 215; [RLA-170](#), *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 27 1990, ¶ 56.

⁸⁵¹ Treaty Memorial, ¶ 254.

⁸⁵² [RLA-106](#), Rudolph Dolzer *et al.*, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (3RD EDITION)*, January 2022, p. 153.

⁸⁵³ [RLA-106](#), Rudolph Dolzer *et al.*, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (3RD EDITION)*, January 2022, p. 153.

where the government measure in question results in a state-sanctioned compulsory *transfer of property* from the foreigner to either the government or a state-mandated third party.⁸⁵⁴ That simply did not occur here. Claimant provides no evidence to the contrary.

448. Second, there is no clear articulation of what measure or which measures are the subject of this alleged direct expropriation claim – a burden Claimant has failed to discharge. Claimant’s shifting expropriation claim lacks specificity and is at various points contradictory. Claimant does not explain which measure or measures resulted in the direct expropriation of its investment.
449. On the one hand, Claimant claims “Peru’s failure to grant DRP an effective extension of time to finish its final PAMA project resulted in the expropriation of Renco’s investments.”⁸⁵⁵ On the other hand, Claimant claims the following: “The key question for the Tribunal is whether the actions and omissions of Peru, when viewed as a whole,” expropriated Renco.⁸⁵⁶
450. Leaving aside what “viewed as a whole” is meant to mean in this context, the more obvious point is that a future measure (*i.e.*, “opposition to DRP’s restructuring plans”⁸⁵⁷) *cannot* expropriate an alleged investment that was supposedly already expropriated by a past measure (*i.e.*, “failure to grant DRP an extension of time to complete its final PAMA project”⁸⁵⁸).

⁸⁵⁴ **RLA-107**, Andrew Newcombe and Lluís Paradell, *LAW AND PRACTICE OF INVESTMENT TREATISE: STANDARDS OF TREATMENT*, 2009, p. 325; *see also, id.* 324–325 (“The majority of expropriation cases in international law have involved a deprivation of a foreign investor’s acquired rights and a corresponding acquisition, or appropriation, of those acquired rights by the state or a state-mandated third party. The classic forms of direct expropriation fall into this category – nationalizations of strategic industries or expropriations for public infrastructure, such as roads or parks. A variety of terms are used to describe direct expropriations. Expropriations of entire industries or sectors of the economy are called nationalizations. Expropriations of property during wartime or national emergency are often called requisitions. Confiscation is used to describe compulsory acquisitions of property where the acquisition is not accompanied by compensation, for example in the case of forfeiture of property acquired by crime or left intestate. The term spoliation is sometimes used to describe takings of property without compensation.”).

⁸⁵⁵ Treaty Memorial, ¶ 256.

⁸⁵⁶ Treaty Memorial, ¶ 258.

⁸⁵⁷ Treaty Memorial, ¶ 248.

⁸⁵⁸ Treaty Memorial, ¶ 248.

451. Claimant’s allegations are insufficient to establish the elements of its claim. Under the *prima facie* test, Claimant’s alleged facts are accepted *pro tem*.⁸⁵⁹ But vague references are not the same as statements of facts. As the tribunal in *Cervin* explained, the alleged facts must be, at least, identifiable, and they must permit the Tribunal to rule for Claimant in a merits determination.⁸⁶⁰
452. Claimant makes no cognizable articulation of what measures resulted in a direct expropriation, provides no evidence to support a theory of direct expropriation, and instead simply tries to cast as wide a net as possible hoping the Tribunal itself will discharge its burden.

2. Claimant has failed to articulate a cognizable indirect or creeping expropriation claim

453. After hundreds of pages, it remains unclear whether Claimant is claiming an “indirect expropriation” or a “creeping expropriation,” and if so, what measures are at issue and what standard it thinks the Tribunal should apply in assessing those measures. Further, Renco has failed to address Annex 10-B.3.b of the Treaty, let alone state a *prima facie* case under the annex.
454. *First*, the distinction between indirect expropriation and creeping expropriation matters. Indirect expropriation claims are different than creeping expropriation claims. International investment law recognizes that creeping expropriation claims are reserved for claims where *none of the measures standing alone* could constitute an expropriation.⁸⁶¹ Perhaps this is what Claimant means when it suggests the Tribunal look at the claim “taken

⁸⁵⁹ **RLA-191**, *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, ¶ 91.

⁸⁶⁰ **RLA-194**, *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Decision on Jurisdiction, 15 December 2014, ¶ 322 (“Although at this stage the factual allegations must be admitted *pro tem*, the Arbitral Tribunal nevertheless considers that such allegations must be sufficiently precise to allow the Tribunal to verify whether there is a possible violation of the Treaty. It is not enough to allege in the jurisdictional phase, without providing any explanation, that the State acted in violation of international law: the claimant must explain what are the facts that, if true, should constitute the basis for an attribution of responsibility to the State.”).

⁸⁶¹ See **RLA-108**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012 (“**Burlington (Decision)**”), ¶ 345.

as a whole,”⁸⁶² but nowhere does it say so or offer a standard or application of fact and evidence to that standard.⁸⁶³ That work is not the Tribunal’s responsibility, it is not Respondent’s responsibility, it is Claimant’s responsibility – absent which, its claim must fail.

455. Assuming Claimant has argued that a “creeping expropriation” occurred, the time to raise that claim was in the Memorial, which it failed to do. Respondent reserves its right to object to a repackaged claim, refashioned under the guise of clarity. The Tribunal should not reward Claimant’s lack of specificity with the opportunity to “clarify” its claims after Peru’s Counter-Memorial.

456. *Second*, Article 10.7 of the Treaty states that it “shall be interpreted in accordance with Annex 10-B.” Annex 10-B, in turn, provides:

“Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.”

457. Renco has failed to (i) explain why its claim of indirect expropriation is the “rare circumstance” that would constitute indirect expropriation, (ii) put forth a *prima facie* case of discrimination in accordance with investment treaty jurisprudence, (iii) articulate or allege how Peru’s regulatory actions were not designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment. In short, Renco has failed to articulate a claim of indirect expropriation over which this Tribunal would have jurisdiction.

458. To illustrate Claimant’s failure to put forth a *prima facie* case of discrimination in accordance with investment treaty jurisprudence, Peru notes that Claimant devotes one paragraph⁸⁶⁴ to the notion of whether Peru’s actions were “discriminatory,” without

⁸⁶² See e.g., Treaty Memorial, ¶¶ 248, 258 (where Claimant alleges that *several* measures resulted in the expropriation of its investment).

⁸⁶³ See [RLA-108](#), *Burlington Resources* (Decision), ¶ 345.

⁸⁶⁴ Treaty Memorial, ¶ 268 (the entire section entitled “Peru’s Expropriation of DRP was Discriminatory” reads: “Peru’s expropriatory measures also were illegal under Article 10.7 of the Treaty and international law because they were discriminatory. As discussed above, Peru’s unjustified failure to grant DRP an effective extension of time to finish its final PAMA project contrasts significantly with its decision to grant a PAMA extension to Centromin in 2000.”).

providing a legal standard for determining whether those actions are discriminatory, let alone applying that standard.

459. The term “discriminatory” has a technical meaning under investment treaty jurisprudence. Various investment tribunals agree that for State conduct to be discriminatory, the party alleging discrimination must establish that it,

“(i) was accorded *treatment* by the Respondent with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments;

(ii) was *in like circumstances* with the identified *domestic* or *foreign* investors or investments as comparators; and

(iii) received treatment *less favourable* than that accorded to those identified investors or investments.”⁸⁶⁵ (Emphasis in original)

460. Ignoring the fact that Claimant has failed to articulate a legal standard for discrimination, if the Tribunal were to entertain Claimant’s discrimination allegation it would still fail: Claimant has not identified a comparator in “like circumstances.” In its FET claim, Renco argues that “the MEM’s explanation for its rejection of DRP’s request squarely conflicted with its decision to grant a PAMA extension to Centromín in 2000, which it did without even suggesting that additional legal authority was needed.”⁸⁶⁶ Claimant’s argument misunderstands the applicable legal framework under Peruvian environmental law. The MEM did not “grant a PAMA extension to Centromín in 2000”; it transferred one of Centromín’s PAMA projects to its “Closing Plan.”⁸⁶⁷ Such a transfer was permitted by the applicable regulation in place in the year 2000.⁸⁶⁸ In contrast, the Sulfuric Acid Plant Project was governed by the 2004 Extension Regulation, which expressly forbade the MEM from issuing an additional extension.⁸⁶⁹ The two scenarios are not comparable. Peru reserves its right to expand on this defense should Claimant try to plead its claim.

⁸⁶⁵ RLA-154, *Mercer International Inc. v. Canada*, ICSID Case No. ARB(AF)/12/3, Award, 6 March 2018 (Veeder, Orrego Vicuña, Douglas), ¶ 7.6.

⁸⁶⁶ Treaty Memorial, ¶ 112.

⁸⁶⁷ Alegre Expert Report, ¶¶ 109–111.

⁸⁶⁸ Alegre Expert Report, ¶¶ 109–111.

⁸⁶⁹ Alegre Expert Report, § IV.B.

461. In sum, Claimant does not have a cognizable expropriation claim under any theory, under any standard, or on any reading of the evidence. For these reasons alone, the Tribunal should find it lacks jurisdiction over Claimant’s expropriation claim for failure to establish a *prima facie* case.

B. The Tribunal lacks jurisdiction *ratione temporis* over all fair and equitable treatment claims, save Renco’s meritless denial of justice claim

462. As discussed during the expedited preliminary objections phase of this arbitration, the plain text of the Treaty, as well as rules of customary international law, place strict limits on this Tribunal’s jurisdiction *ratione temporis*.⁸⁷⁰ This Tribunal lacks jurisdiction over claims of Treaty breaches based on alleged State acts or omissions that pre-dated the Treaty’s entry into force on 1 February 2009 (based on Article 10.1.3 of the Treaty and the customary international law principle of non-retroactivity).

463. Despite bearing the burden of proof to establish the Tribunal’s jurisdiction, Claimant offers no argument in its Memorial on the subject of this Tribunal’s jurisdiction *ratione temporis*. Indeed, the Tribunal left the question of its jurisdiction *ratione temporis* over Claimant’s FET claims open for the present phase of the proceedings,⁸⁷¹ noting that Peru “may yet convince the Tribunal that MEM did nothing but uphold its prior decisions and hold DRP to its existing contractual and environmental obligations.”⁸⁷²

464. International law and arbitral practice require that a claimant must demonstrate, and a tribunal must be satisfied, that each claim is within the jurisdictional grant of the treaty.⁸⁷³ As with any jurisdictional element, a claimant bears the burden of proving that it has

⁸⁷⁰ See generally Peru’s Memorial on Preliminary Objections, §§ III.A, III.B.

⁸⁷¹ See Decision on Expedited Preliminary Objections, ¶ 151 (“The Tribunal will need to scrutinize closely which of the foregoing accounts is correct when it turns to the merits of the Claimant’s FET claims. In particular, the Tribunal will need to establish with precision the legal situation as it stood on 1 February 2009 and how it evolved thereafter.”).

⁸⁷² Decision on Expedited Preliminary Objections, ¶ 151.

⁸⁷³ See, generally [RLA-013](#), *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶¶ 60–61; [RLA-022](#), *Corona Materials v. Dominican Republic*, ICSID Case No. ARB/AF/14/3, Submission of the United States of America, 11 March 2016, ¶ 7; [RLA-016](#), *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, ¶ 57.

complied with all requirements for submitting a claim under the Treaty.⁸⁷⁴ The governing UNCITRAL Rules expressly confirm this requirement.⁸⁷⁵

465. The Parties and the Tribunal agree that claims based on State acts or omissions that took place before the Treaty entered into force fall outside of the jurisdiction *ratione temporis* of the Tribunal.⁸⁷⁶ The Parties disagree, however, on how to approach a *ratione temporis* inquiry when the alleged State conduct straddles the treaty's entry into force.⁸⁷⁷ The question presented here is not one of first impression in the jurisprudence of international investment law. Tribunals faced with similar questions have been cautious not to allow mere reference to post treaty events to create jurisdiction to review conduct that is otherwise rooted in pre-treaty measures.⁸⁷⁸ Deciding whether the claim is rooted in pre-treaty or post-treaty conduct is not always clear and recent tribunals have found questions of whether the post-treaty act altered the pre-treaty "status quo,"⁸⁷⁹ or whether that post-

⁸⁷⁴ See, e.g., **RLA-022**, *Corona Materials v. Dominican Republic*, ICSID Case No. ARB/AF/14/3, Submission of the United States of America, 11 March 2016 ¶ 7 (stating, with respect to identical preconditions under the DR-CAFTA, that, "because the claimant bears the burden to establish jurisdiction under Chapter Ten, including with respect to Article 10.18[], the claimant must prove the necessary and relevant facts"); **RLA-016**, *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, ¶ 57 ("[T]he claimant must prove the facts necessary for the establishment of jurisdiction.") (quotation omitted; emphasis in original); **RLA-013**, *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶¶ 60–61 (holding that a tribunal "cannot take all the facts alleged by the Claimant as granted facts," and that "if jurisdiction rests on the existence of certain facts, they have to be proven").

⁸⁷⁵ UNCITRAL Arbitration Rules 2013, Art. 27(1) ("Each party shall have the burden of proving the facts relied on to support its claims or defence.").

⁸⁷⁶ See Decision on Expedited Preliminary Objections, ¶¶ 142–144 ("The foregoing provisions reflect the general principle that the lawfulness of State conduct must be assessed contemporaneously with that conduct. Since a State is not bound by a conventional obligation it has assumed under a treaty until such treaty enters into force, that treaty obligation cannot be breached until the treaty giving rise to that obligation has come into force. In this case, the Treaty entered into force on 1 February 2009. Therefore, the Treaty cannot be applied to acts or facts that took place before 1 February 2009. This much is uncontroversial between the Parties.").

⁸⁷⁷ Treaty Memorial, ¶¶ 66–73.

⁸⁷⁸ See, e.g., **RLA-026**, *Spence International Investments, LLC et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017 ("**Spence (Interim Award)**"), ¶ 217 ("pre-entry into force conduct cannot be relied upon to establish the breach in circumstances in which the post-entry into force conduct would not otherwise constitute an actionable breach in its own right"); **RLA-023**, *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016 ("**Corona (Award on Preliminary Objections)**"), ¶ 215 ("[W]here a 'series of similar and related actions by a respondent State' is at issue, an investor cannot evade the limitations period by basing its claim on 'the most recent transgression in that series[.]'").

⁸⁷⁹ See, e.g., **RLA-023**, *Corona (Award on Preliminary Objections)*, ¶ 212 (analyzing whether the State act after the relevant date "was understood by the Claimant itself at that time as not producing any separate effects on its investment other than those that were already produced by the initial decision"); **RLA-027**, *Eurogas (Award)*, ¶ 455 (where, referring to a chart establishing the timeline of events, the tribunal concluded that "the situation was exactly the same

treaty act is “independently actionable” as helpful guides.⁸⁸⁰ These tribunals have articulated this inquiry in different ways, but they have all sought to identify the instances in which a claimant is invoking a post-treaty act to assert claims that are actually rooted in pre-treaty conduct.⁸⁸¹

466. Before applying a *ratione temporis* analysis to the present case, a reminder of the claims Claimant presents may prove instructive. Claimant’s claims are in part based on: (i) the “expansion of DRP’s undertaking to improve the Complex’s environmental performance[;]”⁸⁸² (ii) the expansion of “the cost and complexity of DRP’s environmental obligations in May 2006;”⁸⁸³ (iii) the MEM’s “extracting [of] key concessions from DRP as a pre-condition to granting an extension;”⁸⁸⁴ (iv) the MEM’s alleged “undermining of the 30-month extension granted by Congress;”⁸⁸⁵ (v) the alleged “rejection” of DRP’s 2009 extension request;⁸⁸⁶ and (vi) the Board of Creditors’ rejection of DRP’s restructuring plans. Each of these claims is either pre-Treaty conduct or rooted in pre-Treaty conduct (collectively, the “**Pre-Treaty Acts**”). Thus, many of Claimant’s claims (all of its FET claims and most of its expropriation claims⁸⁸⁷) relating to these acts or facts fall outside of the jurisdiction *ratione temporis* of the Treaty.

on 3 May 2005, before the BIT entered into force, and 1 August 2012, after the BIT entered into force: the mining rights that were lost by Rozmin were reassigned to another company. In other words, the mining rights were taken from Rozmin in 2005, allegedly in violation of Belmont’s rights under the Canada-Slovakia BIT and international law, and several decisions of the mining authorities (not the judicial authorities) refused to reconstitute the rights to Rozmin. The [subsequent judicial decisions] did not change Belmont’s legal and factual situation”); **RLA-085**, *Carrizosa* (ICSID Award), ¶ 131.

⁸⁸⁰ See, e.g., **RLA-026**, *Spence* (Interim Award), ¶ 221 (“[T]he Tribunal considers that, to move beyond a jurisdictional assessment, any such alleged breach must relate to independently actionable conduct within the permissible period”); **RLA-085**, *Carrizosa* (ICSID Award), ¶ 153.

⁸⁸¹ **RLA-026**, *Spence* (Interim Award), ¶ 246; **RLA-085**, *Carrizosa* (ICSID Award), ¶¶ 162–164.

⁸⁸² Treaty Memorial, ¶ 202.

⁸⁸³ Treaty Memorial, ¶ 203.

⁸⁸⁴ Treaty Memorial, ¶ 189.

⁸⁸⁵ Treaty Memorial, ¶ 199; see also, *id.*, ¶ 189.

⁸⁸⁶ Treaty Memorial, ¶ 206 see also, *id.*, ¶ 189.

⁸⁸⁷ Claimant asserts its **FET claim** on the basis of the following measures that either occurred before the entry into force of the Treaty, or that are rooted in pre-Treaty conduct such that they are outside of the jurisdiction *ratione temporis* of the Tribunal: (i) the “expansion of DRP’s undertaking to improve the Complex’s environmental performance[;]” (ii) the expansion of “the cost and complexity of DRP’s environmental obligations in May 2006;” (iii) subjecting of “DRP to more stringent environmental standards than other companies;” (iv) “extracting key concessions from DRP as a pre-condition to granting an extension;” (v) MEM’s undermining of the 30-month

467. The basis for Claimant’s claims is not – as Claimant alleges – MEM’s “undermining” of the 30-month extension granted by Congress, MEM’s “rejection” of the 2009 extension request, or the Board of Creditors’ rejection of DRP’s restructuring plans, but rather about the 2006 Extension and the terms of Metaloroya’s PAMA and the STA, which were all in effect well before the Treaty entered into force. The events that occurred post-Treaty simply reaffirmed what the MEM had expressed to DRP for many years before the Treaty entered into force. Namely, *prior to the Treaty’s entry into force*, (i) DRP was well aware of the strict and immovable PAMA deadline; (ii) the fact that if it purchased the Facility, it would need to modify the PAMA to ensure environmental compliance within ten years, and that such modifications could significantly increase the PAMA’s scope and price;⁸⁸⁸ (iii) that the extension it received in 2006 to complete the Sulfuric Acid Plant Project was extraordinary, final, and non-renewable; and (iv) that it was not entitled to extensions and knew that if it did obtain any extension, MEM could condition the approval.
468. As discussed in the following subsections: (i) the Treaty does not apply retroactively to claims based on State acts that predate the entry into force of the Treaty (**Section III.B.1**); (ii) the Treaty does not apply to claims based on post-Treaty State acts that are rooted in pre-Treaty conduct (**Section III.B.2**); and (iii) all of Claimant’s claims based on the Pre-Treaty Acts are either pre-Treaty conduct or rooted in pre-Treaty conduct, because those acts or facts did not alter the status quo of Claimant’s alleged investment, and are not independently actionable (**Section III.B.3**).
469. Peru has not consented to arbitrate a dispute relating to the Pre-Treaty Acts and Renco has not meet its burden with respect to the Treaty’s temporal limitations. It certainly cannot. The Tribunal has therefore no jurisdiction to hear these claims.

extension granted by Congress;” (vi) the rejection of DRP’s 2009 extension request; and (vi) the Board of Creditors’ rejection of DRP’s restructuring plans. Claimant asserts its **expropriation claim** on the basis of the following measures that either occurred before the entry into force of the Treaty, or that are rooted in pre-Treaty conduct such that they are outside of the jurisdiction *ratione temporis* of the Tribunal: (i) the MEM’s failure to “grant DRP an effective extension of time to finish its final PAMA project;” (ii) “dilatatory tactics employed by the MEM to hinder the extension process;” (iii) MEM’s undermining of the 30-month extension granted by Congress;” (iv) the Board of Creditors’ rejection of DRP’s restructuring plans.

⁸⁸⁸ **Exhibit R-094**, DRRC SEC Form S-4, PDF p. 135 (stating that DRP had “advised the MEM that it intend[ed] to seek changes in certain PAMA projects that it believes will more effectively achieve compliance.”)

1. The Treaty does not apply retroactively to claims of breach based on State acts or omissions that pre-date its entry into force

470. The Parties agree that a claimant cannot bring a claim under the Treaty based on State acts or omissions that predate the Treaty’s entry into force.⁸⁸⁹ As the Tribunal noted in its Decision on Expedited Preliminary Objections, this rule is codified in Article 10.1.3 of the Treaty, and is fully consistent with Article 28 of the Vienna Convention on the Law of Treaties (“VCLT”) and Article 13 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts (“**ILC Articles on State Responsibility**”).⁸⁹⁰
471. In its recent written submissions, Claimant is vague and inconsistent about the specific State measures that it is challenging as violations of Peru’s FET and expropriation obligations. It is evident, however, that Claimant bases its entire FET claim, and most of its expropriation claim, on State conduct that predates the entry into force of the Treaty. Renco’s Notice of Intent to Commence Arbitration in the Renco I matter is telling. In that proceeding, Renco made clear that it was asserting an FET claim based on conduct that occurred before the Treaty entered into force on 1 February 2009:
- a. “When DRP reasonably sought extensions of time to complete its PAMA obligations in light of these changes, after extensive extension request processes, Peru failed to grant adequate extensions and instead granted limited extensions and imposed upon DRP more obligations [(i.e., the 2006 Extension)]. [. . .] This pattern of unfair and inequitable treatment of DRP by Peru eventually led to one of DRP’s suppliers placing DRP in an involuntary bankruptcy proceeding in February 2010[.]”⁸⁹¹

⁸⁸⁹ See Decision on Expedited Preliminary Objections, ¶¶ 143–144 (“In this case, the Treaty entered into force on 1 February 2009. Therefore, the Treaty cannot be applied to acts or facts that took place before 1 February 2009. **This much is uncontroversial between the Parties**”) (emphasis added).

⁸⁹⁰ See Decision on Expedited Preliminary Objections, ¶¶ 139–141; **RLA-083**, Responsibility of States for Internationally Wrongful Acts, International Law Commission, 2001 (“**ILC’s Articles on State Responsibility**”), Art. 13 (“An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.”).

⁸⁹¹ **Exhibit R-012-01**, Claimant’s Notice of Intent to Commence Arbitration, *The Renco Group Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, 29 December 2010, ¶ 7.

- b. “In 2006 Peru extended the deadline by only two years and ten months, until October 3, 2009, while simultaneously imposing on DRP various new and onerous obligations, including “complementary projects,” more stringent environmental standards, and continuous and daily inspections.”⁸⁹²
- c. “Peru has engaged in a pattern of conduct of unfair treatment in violation of Article 10.5 of the Treaty by, inter alia, repeatedly imposing on DRP additional environmental projects and requirements, which increased the amount of time and money that DRP was required to spend, while simultaneously and improperly refusing to timely grant DRP the needed additional time to fulfill these new obligations.”⁸⁹³

All of these statements implicate actions by MEM in 2006, or in any event, before 1 February 2009.

- 472. Renco’s Notice Arbitration and Statement of Claim in the Renco I matter is also instructive. For instance, referring to the extension that MEM granted DRP in 2006, Renco noted that “Peru granted only a limited extension [to complete the Sulfuric Acid Plant Project] and imposed additional and onerous obligations upon DRP.”⁸⁹⁴ As will be explained in further detail below, in 2009 Claimant’s complaint is about the same pre-Treaty act or fact, that is, the fact that DRP did not receive the extension to complete the Sulfuric Acid Plant Project that it desired.
- 473. Fast forward to Claimant’s Memorial in this matter, and it is clear that Claimant believes it has overcome the temporal hurdle. However, a close reading reveals the pre-Treaty nature of its claims:
 - a. “Peru’s woeful underestimate of the total cost of DRP’s PAMA projects also contributes to the gross unfairness of its failure to grant the company an effective

⁸⁹² Exhibit R-012-01, Claimant’s Notice of Intent to Commence Arbitration, *The Renco Group Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, 29 December 2010, ¶ 31.

⁸⁹³ Exhibit R-012-01, Claimant’s Notice of Intent to Commence Arbitration, *The Renco Group Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, 29 December 2010, ¶ 48.

⁸⁹⁴ Exhibit R-012-02, Claimants’ Notice of Arbitration and Statement of Claim, *The Renco Group Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, 4 April 2011, ¶ 63.

extension of time to finish its final PAMA project.”⁸⁹⁵ This alleged “woeful underestimate” could only have occurred pre-Treaty.

- b. “The MEM issued its final report and regulation in May 2006, granting a draconian extension.”⁸⁹⁶ It is clear that Claimant’s complaint is about DRP not receiving the extension to complete the Sulfuric Acid Plant Project that it desired, which can be traced back to May 2006.
- c. “The radical transformation and expansion of DRP’s undertaking to improve the Complex’s environmental performance and the health of the local population contributes to the grossly unfair and arbitrary character of Peru’s failure to grant DRP an effective extension of time to finish its final PAMA project. Notably, during the five-year period after DRP’s acquisition of the Complex, the MEM approved major design and engineering changes to DRP’s PAMA projects, increasing its investment commitment by 62% from US\$ 107.6 million to US\$ 174.0 million.”⁸⁹⁷ As has been explained, DRP knew about the alleged “radical transformation and expansion” of DRP’s undertaking since it signed the STA. In any event, here Claimant explicitly concedes that these “radical transformations and expansions” occurred “during the five-year period after DRP’s acquisition of the Complex” (*i.e.*, before the Treaty entered into force).
- d. “[T]he MEM required DRP to undertake numerous new projects to reduce stack and fugitive emissions of particulate matter. At the same time, the MEM granted DRP an extension of only two years and ten months to complete the expanded sulfuric acid plants project, even though the technical consultant hired by the MEM to evaluate DRP’s December 2005 extension request considered that five years was a reasonable estimate.”⁸⁹⁸ Again, it is clear that Claimant’s complaint is about DRP not receiving the extension to complete the Sulfuric Acid Plant Project that it desired, which can be traced back to May 2006.

⁸⁹⁵ Treaty Memorial, ¶ 205.

⁸⁹⁶ Treaty Memorial, ¶ 80.

⁸⁹⁷ Treaty Memorial, ¶ 202.

⁸⁹⁸ Treaty Memorial, ¶ 203.

474. Claimant’s claim is, and has always been, about the terms of the PAMA, DRP’s agreement through the STA, and the MEM’s position from 2002 through 2006 as to DRP’s obligations under both instruments.⁸⁹⁹
475. The principle of non-retroactivity is clear⁹⁰⁰ and Claimant’s claims based on pre-treaty State conduct fall outside of the Tribunal’s jurisdiction *ratione temporis*.

2. When faced with situations in which the alleged State conduct straddles the entry into force of the treaty, State acts that are rooted in pre-treaty conduct fall outside of the tribunal’s jurisdiction *ratione temporis*

476. The question of whether alleged State conduct is properly understood as pre-Treaty, and therefore outside the jurisdictional grant, or post-Treaty, and therefore subject to dispute resolution procedures offered by Peru, necessarily turns on the facts and the nature of the claims as pled.
477. As stated above, tribunals have been cautious not to allow mere reference to post treaty events to create jurisdiction to review conduct that is otherwise rooted in pre-treaty measures.⁹⁰¹ If the claims are rooted on conduct that occurred pre-treaty, the measure is not made viable for dispute resolution simply by reference to the natural post-treaty extension of that conduct.⁹⁰² Deciding whether the claim is rooted in pre-treaty or post-treaty conduct is not always clear and recent tribunals have found questions of whether the

⁸⁹⁹ See e.g., Treaty Memorial, ¶¶ 80, 202–203, 205.

⁹⁰⁰ See Decision on Expedited Preliminary Objections, ¶¶ 142–144.

⁹⁰¹ See, e.g., **RLA-026**, *Spence International Investments, LLC et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017 (“**Spence (Interim Award)**”), ¶ 217 (“pre-entry into force conduct cannot be relied upon to establish the breach in circumstances in which the post-entry into force conduct would not otherwise constitute an actionable breach in its own right”); **RLA-023**, *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent’s Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016 (“**Corona (Award on Preliminary Objections)**”), ¶ 215 (“[W]here a ‘series of similar and related actions by a respondent State’ is at issue, an investor cannot evade the limitations period by basing its claim on ‘the most recent transgression in that series[.]’”).

⁹⁰² See, e.g., **RLA-023**, *Corona* (Award on Preliminary Objections), ¶ 212 (analyzing whether the act after the relevant date “was understood by the Claimant itself at that time as not producing any separate effects on its investment other than those that were already produced by the initial decision”); **RLA-027**, *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Award, 18 August 2017 (“**EuroGas (Award)**”), ¶ 455; **RLA-086**, *ST-AD GmbH v. Republic of Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013 (“**ST-AD (Award on Jurisdiction)**”), ¶ 332; **RLA-085**, *Carrizosa* (ICSID Award), ¶ 153; **RLA-026**, *Spence* (Interim Award), ¶ 246.

post-treaty act altered the pre-treaty “status quo,”⁹⁰³ (see Section III.B.2.a below) or whether that post-treaty act is “independently actionable” (see Section III.B.2.b below) as helpful guides.⁹⁰⁴ These tribunals have articulated this inquiry in different ways, but they have all sought to identify the instances in which a claimant is invoking a post-treaty act to assert claims that are actually rooted in pre-treaty conduct.⁹⁰⁵

- a. When faced with situations in which the alleged State conduct straddles the entry into force of the treaty, State acts that did not alter the “status quo” of Renco’s alleged investment fall outside of the Tribunal’s jurisdiction *ratione temporis*

478. In situations in which a claimant alleges treaty breaches based on a series of acts that straddle entry into force, tribunals have assessed the post-treaty acts to determine whether those acts produced a separate effect on the claimant’s investment,⁹⁰⁶ or whether the post-treaty act is instead “rooted” in the pre-treaty conduct, such that it did not materially change the circumstances that existed at the time of the treaty’s entry into force.⁹⁰⁷ If the post-treaty act did not change the status quo that exists after the pre-treaty act, it cannot be used to form the basis of a treaty claim. In other words, the post-treaty act cannot be used to establish jurisdiction *ratione temporis* where none would exist otherwise. This reasoning

⁹⁰³ See, e.g., **RLA-023**, *Corona* (Award on Preliminary Objections), ¶ 212 (analyzing whether the State act after the relevant date “was understood by the Claimant itself at that time as not producing any separate effects on its investment other than those that were already produced by the initial decision”); **RLA-027**, *Eurogas* (Award), ¶ 455 (where, referring to a chart establishing the timeline of events, the tribunal concluded that “the situation was exactly the same on 3 May 2005, before the BIT entered into force, and 1 August 2012, after the BIT entered into force: the mining rights that were lost by Rozmin were reassigned to another company. In other words, the mining rights were taken from Rozmin in 2005, allegedly in violation of Belmont’s rights under the Canada-Slovakia BIT and international law, and several decisions of the mining authorities (not the judicial authorities) refused to reconstitute the rights to Rozmin. The [subsequent judicial decisions] did not change Belmont’s legal and factual situation”); **RLA-085**, *Carrizosa* (ICSID Award), ¶ 131.

⁹⁰⁴ See, e.g., **RLA-026**, *Spence* (Interim Award), ¶ 221 (“[T]he Tribunal considers that, to move beyond a jurisdictional assessment, any such alleged breach must relate to independently actionable conduct within the permissible period”); **RLA-085**, *Carrizosa* (ICSID Award), ¶ 153.

⁹⁰⁵ **RLA-026**, *Spence* (Interim Award), ¶ 246; **RLA-085**, *Carrizosa* (ICSID Award), ¶¶ 162–164.

⁹⁰⁶ See, e.g., **RLA-023**, *Corona* (Award on Preliminary Objections), ¶ 212 (analyzing whether the act after the relevant date “was understood by the Claimant itself at that time as not producing any separate effects on its investment other than those that were already produced by the initial decision”).

⁹⁰⁷ **RLA-026**, *Spence* (Interim Award), ¶ 246; see also, *id.*, ¶ 245 (observing that “[t]he appreciations that lie at the core of every allegation that the Claimants advance can be traced back to pre-10 June 2010 conduct, and indeed to pre-1 January 2009 conduct, by the Respondent.”).

has been followed by numerous tribunals in investment arbitrations. For example, the tribunal in *Corona* noted:

“[W]here a ‘series of similar and related actions by a respondent State’ is at issue, ***an investor cannot evade the limitations period by basing its claim on ‘the most recent transgression in that series’***. To allow an investor to do so would, as the tribunal in Grand River recognized, ‘render the limitations provisions ineffective’[.]”⁹⁰⁸ (Emphasis added)

479. In *Corona*, the government of the respondent State had denied the claimant’s application for a mining license prior to the relevant date. After the critical date under the applicable treaty, the claimant had requested reconsideration of such denial, but had received no response. The claimant then filed for arbitration, arguing that the tribunal had jurisdiction *ratione temporis* because the reconsideration request (and failure by the State to respond thereto) had post-dated the critical date. The tribunal rejected this argument on the basis that the denial of the license after the relevant date had not changed the status quo:

“In this context, the Respondent’s failure to reconsider the refusal to grant the license is nothing but an implicit confirmation of its previous decision. As will be seen when the Tribunal examines the issue of a denial of justice, the filing of a Motion for Reconsideration cannot be considered as a separate action.”⁹⁰⁹

480. The tribunal concluded that the claimant had actual knowledge of the alleged breach before the critical date, and “as a consequence, its claims [were] time-barred by DR-CAFTA Article 10.18.1.”⁹¹⁰
481. Further, the fact that the claimant alleged that the later-in-time act amounted to a denial of justice did not alter the tribunal’s analysis. Indeed, the tribunal found that “all of the alleged breaches relate to the same theory of liability,”⁹¹¹ predicated on the invalidity of the denial of the license application. Such theory of liability included the denial of justice claim, which did “not produc[e] any separate effects on [the claimant’s] investment other than

⁹⁰⁸ RLA-023, *Corona* (Award on Preliminary Objections), ¶ 215.

⁹⁰⁹ RLA-023, *Corona* (Award on Preliminary Objections), ¶ 211.

⁹¹⁰ RLA-023, *Corona* (Award on Preliminary Objections), ¶ 238.

⁹¹¹ RLA-023, *Corona* (Award on Preliminary Objections), ¶ 210.

those that were already produced by the initial decision.”⁹¹² As a result, the tribunal concluded that “there is no valid basis for treating the alleged denial of justice as distinct from the non-issuance of the environmental license.”⁹¹³ For these reasons, the tribunal determined that it did not have jurisdiction *ratione temporis* over the claimant’s claims.⁹¹⁴

482. As in *Corona*, the tribunals in *Eurogas* and *ST-AD* likewise assessed pre- and post-date acts for purposes of deciding on compliance with temporal requirements imposed by the relevant investment treaty. In *EuroGas*, certain mining rights held by the claimant had been reassigned by the State prior to the treaty’s entry into force. In arguing that its treaty arbitration claims fell within the tribunal’s jurisdiction, the claimant sought to rely on certain post-entry into force decisions by the Slovakian judiciary, refusing to reconstitute the relevant mining rights to the claimant that were otherwise impacted prior to the entry into force of the treaty. Referring to the timeline of events,⁹¹⁵ the tribunal concluded that:

“the situation was exactly the same on 3 May 2005, before the BIT entered into force, and 1 August 2012, after the BIT entered into force: the mining rights that were lost by Rozmin were reassigned to another company. In other words, the mining rights were taken from Rozmin in 2005, allegedly in violation of Belmont’s rights under the Canada-Slovakia BIT and international law, and several decisions of the mining authorities (not the judicial authorities) refused to reconstitute the rights to Rozmin. The [subsequent judicial decisions] did not change Belmont’s legal and factual situation: since the reassignment of the Mining Area in 2005, it had lost its rights on the Mining Area and was not present on the site.”⁹¹⁶
(Emphasis added)

483. Because the post-treaty government decisions had not altered (but rather had merely confirmed) the pre-treaty status quo, or in the words of the *Corona* tribunal, they did not have “separate effects,” the *Eurogas* tribunal held that it did not have jurisdiction *ratione temporis* over those acts, even though they post-dated the treaty’s entry into force. According to the *Eurogas* tribunal, to rule otherwise “would require the Tribunal to

⁹¹² RLA-023, *Corona* (Award on Preliminary Objections), ¶ 212.

⁹¹³ RLA-023, *Corona* (Award on Preliminary Objections), ¶ 214.

⁹¹⁴ See RLA-023, *Corona* (Award on Preliminary Objections), ¶ 270.

⁹¹⁵ RLA-027, *Eurogas* (Award), ¶ 454.

⁹¹⁶ RLA-027, *Eurogas* (Award), ¶ 455.

engineer a legalistic and artificial reasoning to bypass” the temporal limits on the application of the treaty.⁹¹⁷

484. In *ST-AD*, the claimant described at length the alleged conduct of the State that occurred before the claimant became a protected investor under the BIT, and such conduct included a judicial decision by a lower court concerning the investment, as well as a rejection by the Supreme Cassation Court of an application by the claimant to set aside the lower court decision.⁹¹⁸ Both of those decisions predated the critical date under the treaty.⁹¹⁹ Subsequently, after the critical date, the claimant had filed a new set-aside application with the Supreme Cassation Court, and that application was also rejected.⁹²⁰
485. In arguing that the tribunal had jurisdiction *ratione temporis* over its claims, the claimant in *ST-AD* had relied upon the single event that had occurred after the critical date, which was the rejection by the Supreme Cassation Court of the second set-aside application.⁹²¹ The tribunal observed that this judicial rejection was “the only possible relevant event that happened after the critical date.”⁹²² It also characterized the post-critical date set-aside application as merely “a ‘repackaging’ of the first application to set aside that same Decision, rendered six years before the [critical date].”⁹²³ Having confirmed that “nothing new happened after” the relevant date,⁹²⁴ the tribunal upheld the respondent’s objection to its jurisdiction *ratione temporis*:

“[I]f a claimant, before coming under the protection of a given BIT, had asked for and been refused a license, it could not simply purport to create an event posterior to it becoming a protected investor by presenting the very same request for a license that would, no doubt, be similarly refused. In the present case, the Claimant cannot establish jurisdiction for this Tribunal by presenting a request to set aside [the underlying judicial decision] after it became an investor

⁹¹⁷ [RLA-027](#), *Eurogas* (Award), ¶ 458.

⁹¹⁸ [RLA-086](#), *ST-AD* (Award on Jurisdiction), ¶¶ 307–308, 311.

⁹¹⁹ [RLA-086](#), *ST-AD* (Award on Jurisdiction), ¶ 300.

⁹²⁰ [RLA-086](#), *ST-AD* (Award on Jurisdiction), ¶ 311.

⁹²¹ [RLA-086](#), *ST-AD* (Award on Jurisdiction), ¶ 314.

⁹²² [RLA-086](#), *ST-AD* (Award on Jurisdiction), ¶ 316.

⁹²³ [RLA-086](#), *ST-AD* (Award on Jurisdiction), ¶ 331.

⁹²⁴ [RLA-086](#), *ST-AD* (Award on Jurisdiction), ¶ 318.

on similar grounds than the request that was denied prior to its becoming a protected investor.”⁹²⁵

486. On this basis, the tribunal concluded that the claimant had not satisfied the relevant temporal jurisdiction requirement, and dismissed the claim.⁹²⁶
487. The *Corona*, *Eurogas*, and *ST-AD* decisions are all apposite and offer useful guidance for analyzing whether a claimant’s claims are within a tribunal’s jurisdiction *ratione temporis* in a context in which the conduct at issue straddles the entry into force of the treaty. Specifically, those tribunals assessed whether the acts that occurred after the relevant date (i) produced a separate effect on the claimant’s investment, or (ii) instead, did not change the circumstances that existed at the time of the treaty’s entry into force. As articulated by the Tribunal in its Decision on Expedited Preliminary Objections, “the Tribunal will need to establish with precision the legal situation as it stood on 1 February 2009 and how it evolved thereafter.”⁹²⁷ Indeed, the alleged “post-Treaty” acts by Peru that form the basis of most of Claimant’s claims have no separate effects on Claimant’s investment apart from acts that allegedly took place prior to entry into force of the treaty. Therefore, any claims that rely on the Pre-Treaty Acts are barred.

- b. When faced with situations in which the State conduct straddles the entry into force of the treaty, State acts that are not independently actionable fall outside of the Tribunal’s jurisdiction *ratione temporis*

488. When faced with situations in which the alleged State conduct straddles the entry into force of the treaty, tribunals have also assessed the post-treaty conduct to determine whether it is “independently actionable.”⁹²⁸ As put by this Tribunal in its Decision on Expedited Objections, “[t]he key question is thus whether the Claimant’s FET [. . .] claims necessarily depend on the alleged wrongfulness of Peru’s conduct prior to 1 February 2009 or whether they are based on independently actionable breaches that arose after 1 February 2009.”⁹²⁹ In other words, “pre-entry into force conduct cannot be relied upon to establish the breach

⁹²⁵ **RLA-086**, *ST-AD* (Award on Jurisdiction), ¶ 332.

⁹²⁶ **RLA-086**, *ST-AD* (Award on Jurisdiction), ¶ 333.

⁹²⁷ Decision on Expedited Preliminary Objections, ¶ 151.

⁹²⁸ **RLA-026**, *Spence* (Interim Award), ¶ 237(b); *see also*, **RLA-085**, *Carrizosa* (ICSID Award), ¶ 153.

⁹²⁹ Decision on Expedited Preliminary Objections, ¶ 146.

in circumstances in which the post-entry into force conduct would not otherwise constitute an actionable breach in its own right.”⁹³⁰

489. It would be too rough for the Tribunal to wholly disregard pre-treaty acts. Indeed, pre-treaty acts “can form part of the ‘circumstantial evidence’ or factual background,”⁹³¹ and thus “can indeed help the Tribunal to understand [subsequent] events.”⁹³² But the extent to which such acts can be taken into account is necessarily “limited.”⁹³³ Pre-treaty acts “cannot, by any means, serve as an independent basis for a claim.”⁹³⁴ Instead, “it must still be possible to point to conduct of the State after that date which is itself a breach.”⁹³⁵
490. In determining whether a post-treaty act can “serve as an independent basis for a claim,”⁹³⁶ tribunals have considered whether “the claim that is alleged [based on the post-treaty act] can be sufficiently detached from pre-entry into force acts and facts so as to be independently justiciable” (emphasis added).⁹³⁷ The *Spence v. Costa Rica* tribunal, for example, reasoned that:

“[a]n alleged breach will not come within the jurisdiction of the Tribunal if the Tribunal’s adjudication would necessarily and unavoidably require a finding going to the lawfulness of conduct

⁹³⁰ RLA-026, *Spence* (Interim Award), ¶ 217.

⁹³¹ RLA-026, *Spence* (Interim Award), ¶ 217 (“Pre-entry into force acts and facts cannot therefore, in the Tribunal’s estimation, constitute a cause of action. Such conduct may constitute circumstantial evidence that confirms or vitiates an apparent post-entry into force breach, for example, going to the intention of the respondent (where this is relevant), or to establish estoppel or good faith or bad faith, or to enable recourse to be had to the legal or regulatory basis of conduct that took place subsequently, etc.”).

⁹³² RLA-086, *ST-AD* (Award on Jurisdiction), ¶ 308; see also, RLA-008, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 (“*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.”).

⁹³³ RLA-086, *ST-AD* (Award on Jurisdiction), ¶ 308.

⁹³⁴ RLA-086, *ST-AD* (Award on Jurisdiction), ¶ 308; RLA-026, *Spence* (Interim Award), ¶ 222 (“The Tribunal may have regard to pre-entry into force acts and facts for evidential and similar purposes, as discussed above. Such acts and facts cannot, however, form the foundation of a finding of liability even in respect of a post-entry into force, or a post-critical limitation date, actionable breach.”).

⁹³⁵ RLA-008, *Mondev* (Award), ¶ 70.

⁹³⁶ RLA-086, *ST-AD* (Award on Jurisdiction), ¶ 308.

⁹³⁷ RLA-026, *Spence* (Interim Award), ¶ 222; RLA-086, *ST-AD* (Award on Jurisdiction), ¶ 332.

judged against treaty commitments that were not in force at the time.”⁹³⁸

491. In *Spence*, the claimants alleged that Costa Rica’s development of a national park for the protection of nesting leatherback turtles had unlawfully deprived them of real estate property. There, as here, the underlying regulatory actions occurred before the entry into force of the treaty. The claimants nevertheless argued that the tribunal had jurisdiction *ratione temporis* on the basis that the assessment of the amount of compensation that was due to the claimants for the expropriation of their property had not been finalized until after the treaty came into force.⁹³⁹ Specifically, the claimants “assert[ed] that the fact that the underlying expropriations commenced before [the entry into force of the DR-CAFTA] is not relevant to the question of whether the compensation eventually determined was consistent with the Respondent’s CAFTA obligations.”⁹⁴⁰ Costa Rica pointed out that the post-treaty acts identified by the claimants were merely “the lingering effects of pre-1 January 2009 acts or as dependent acts that did not in-and-of-themselves constitute independent breaches of the CAFTA.”⁹⁴¹ The *Spence* tribunal agreed with Costa Rica:

“[T]he Claimants have failed to show, again *manifestly*, in the face of this pre-entry in force, pre-limitation period conduct, that the breaches that they allege are independently actionable breaches, separable from the pre-entry into force conduct in which they are deeply rooted. The Tribunal further considers that the Claimants have failed to show that, even were the Tribunal to accept the existence of an actionable breach post-10 June 2010, that that breach could properly be evaluated on the merits without requiring a finding going to the lawfulness of pre-1 January 2009 conduct.”⁹⁴²
(Emphasis in original)

492. On that basis, the *Spence* tribunal concluded that “it ha[d] no jurisdiction to entertain the Claimants claims.”⁹⁴³ In a similar fashion, the *Carrizosa v. Colombia* tribunal noted that it “ha[d] no jurisdiction to assess the lawfulness of the [respondent State’s] pre-treaty

⁹³⁸ RLA-026, *Spence* (Interim Award), ¶ 222.

⁹³⁹ RLA-026, *Spence* (Interim Award), ¶¶ 229–230.

⁹⁴⁰ RLA-026, *Spence* (Interim Award), ¶ 231.

⁹⁴¹ RLA-026, *Spence* (Interim Award), ¶ 233.

⁹⁴² RLA-026, *Spence* (Interim Award), ¶ 246.

⁹⁴³ RLA-026, *Spence* (Interim Award), ¶ 247.

conduct, be it under the [applicable treaty] or under any other source, such as customary international law.”⁹⁴⁴ The *Carrizosa* tribunal reasoned that:

“unless the post-treaty conduct [. . .] is itself capable of constituting a breach of the [applicable treaty], *independently from the question of (un)lawfulness of the pre-treaty conduct*, claims arising out of such post-treaty conduct would also fall outside the Tribunal’s jurisdiction.”⁹⁴⁵ (Emphasis added)

493. Simply put, State acts that are not independently actionable are outside of the *ratione temporis* scope of the Treaty.

3. Renco’s claims based on the Pre-Treaty Acts are outside of the *ratione temporis* scope of the Treaty because they did not alter the status quo of Claimant’s investment and are not independently actionable

a. The Pre-Treaty Acts did not alter the status quo of Claimant’s investment

494. The arguments presented by Claimant are similar to those unsuccessfully presented by the claimants in *Corona*, *Eurogas*, and *ST-AD*. As discussed above, Claimant here bases its claims on a series of acts (or as Claimant calls it, a “pattern”⁹⁴⁶), most of which pre-date the entry into force of the Treaty. The post-Treaty acts were merely “the most recent transgression in that series,”⁹⁴⁷ simply confirming what Claimant knew pre-Treaty (as had occurred in *Corona*, *Eurogas*, and *ST-AD*).

495. Accordingly, it is necessary to assess the impact of the Pre-Treaty Acts to determine whether they altered the status quo that existed at the time of the Treaty’s entry into force. In that context, it is useful to analyze the situation as it stood before the Treaty’s entry into force.

496. DRP understood the PAMA requirements and the risk it assumed from the moment it signed the STA, and understood that it must comply with Peru’s environmental laws. When it acquired the Facility, DRP understood that it would be required to implement the

⁹⁴⁴ RLA-085, *Carrizosa* (ICSID Award), ¶ 153.

⁹⁴⁵ RLA-085, *Carrizosa* (ICSID Award), ¶ 153.

⁹⁴⁶ Treaty Memorial, ¶ 256; Claimant’s Notice of Arbitration and Statement of Claim, ¶ 62.

⁹⁴⁷ RLA-023, *Corona* (Award on Preliminary Objections), ¶ 215.

PAMA and bring the Facility into compliance with Peruvian environmental standards within ten years (i.e., by 13 January 2007).⁹⁴⁸

497. Given the the detailed information available during the bidding process and Claimant’s extensive due diligence, DRP understood that if it purchased the Facility, it would need to ensure environmental compliance within ten years, and that the environmental projects necessary to reach compliance within ten years could significantly increase the PAMA’s scope and price.⁹⁴⁹
498. As further explained in Section II.A, DRRC confirmed that it had indeed identified such risk when it filed its statement (the Form S-4) with the United States Securities Exchange Commission shortly after purchasing the Facility. In the filing, DRRC acknowledged that it had committed to implement the PAMA projects by January 2007 and estimated that the investment needed to implement those projects was USD 195 million.⁹⁵⁰ DRRC also acknowledged that it had assumed the risk that it would not be able to implement the PAMA projects by January 2007, or that its implementation would not achieve compliance with the applicable legal requirements.⁹⁵¹
499. In other words, DRP knew that the January 2007 PAMA completion date could not be modified, and that its scope of work could drastically change, at DRP’s expense and risk.
500. Between 2004 and 2006, DRP understood that that it was not entitled to additional extensions; if it did receive an extension, such grant of additional time would be exceptional and it would be limited to a specific project (in this case, the Sulfuric Acid Plant Project); and, moreover, if it did receive an additional extension, it would include conditions to ensure DRP’s compliance. When DRP submitted its extension request in 2004, the relevant regulations in place were, inter alia, Supreme Decree Nos. 016-93-EM and 022-2002-EM.⁹⁵² Both regulations provided that the MEM could not extend any

⁹⁴⁸ See Section II.B, *supra*.

⁹⁴⁹ **Exhibit R-094**, DRC SEC Form S-4, PDF pp. 134–135 (stating that DRP had “advised the MEM that it intend[ed] to seek changes in certain PAMA projects that it believes will more effectively achieve compliance.”)

⁹⁵⁰ **Exhibit R-094**, DRC SEC Form S-4, PDF p. 91.

⁹⁵¹ **Exhibit R-094**, DRC SEC Form S-4, PDF p. 134.

⁹⁵² Alegre Expert Report, ¶ 87.

PAMA projects beyond the original ten-year term (in the case of DRP’s PAMA, 13 January 2007).⁹⁵³ DRP’s proposal to delay construction of the Sulfuric Acid Plant Project until 31 December 2011—nearly five years after the original deadline—was legally impossible.⁹⁵⁴ In late 2004, the MEM published a draft of the regulation meant to allow DRP to request an exceptional extension of time to complete a specific project beyond the PAMA Period.⁹⁵⁵ The draft drew criticism from DRP, which objected to the conditions placed on the exceptional grante of additional time, including at a condition that would require the company to establish a trust account to guarantee financing for the remaining projects.⁹⁵⁶

501. In December 2004, the Peruvian government enacted the 2004 Extension Regulation, which allowed companies until 31 December 2005 to apply for a *one-time, limited* extension.⁹⁵⁷ The regulation provided that “the extension of the timeline shall only apply to the solicited work project, and will not affect the timelines [...] for the other PAMA projects,”⁹⁵⁸ and allowed the Peruvian authorities to *condition approval of the extension* on the adoption of *additional* environmental mitigation measures⁹⁵⁹ “intended to reduce the risks to the environment, health or the safety of the population, and to ensure adequate performance of the PAMA.”⁹⁶⁰ To reduce financing risks associated with fluctuations in metal prices, the regulation also *required* any company receiving an extension to establish (i) a trust account with funds dedicated to completing any outstanding PAMA projects; and

⁹⁵³ Alegre Expert Report, ¶ 55.

⁹⁵⁴ See Isasi Witness Statement, ¶ 23 (Spanish original: “*el Reglamento Ambiental no permitía otorgar una prórroga como la que solicitaba DRP.*”).

⁹⁵⁵ See Isasi Witness Statement, ¶ 27 (Spanish original: “*En octubre de 2004, pre-publicamos un borrador de lo que sería el Decreto Supremo No 046-2004-EM (el “DS-046”), el cual le daría a DRP la posibilidad de acceder a una prórroga con ciertas condiciones y bajo ciertas garantías. El objetivo de esta pre-publicación era que todas las partes interesadas pudieran revisarlo y enviaran sus comentarios. El DS-046 se convirtió en objeto de intenso escrutinio público y fue debatido hasta en el Congreso, algo que no es usual para la aprobación de este tipo de decretos.*”).

⁹⁵⁶ See Isasi Witness Statement, ¶ 29.

⁹⁵⁷ **Exhibit R-029**, Supreme Decree No. 046-2004-EM, 29 December 2004, Art. 1.1–1.2.

⁹⁵⁸ **Exhibit R-029**, Supreme Decree No. 046-2004-EM, 29 December 2004, Art. 1.3.

⁹⁵⁹ **Exhibit R-029**, Supreme Decree No. 046-2004-EM, 29 December 2004, Art. 4.

⁹⁶⁰ **Exhibit R-289**, Report No. 118-2006-MEM-AAM/AA/RC/FV/AL/HS/PR/AV/FO/CC, 25 May 2006, p. 7.

(ii) a guarantee letter in the amount of 20% of the value of the outstanding PAMA projects, meant to cover future penalties for missing the extended deadline.⁹⁶¹

502. On May 29, 2006, the MEM, in good faith and in the spirit of cooperation, issued the 2006 Extension, which granted DRP an extension of two years and ten months to complete the Sulfuric Acid Plant Project, allowing DRP until October 2009.⁹⁶² Notably, the 2006 Extension specified that the term of the extension was “**final and non-renewable.**”⁹⁶³ The 2006 Extension served to extend only the deadline to conclude the Sulfuric Acid Plant Project, but it did not constitute an extension of the PAMA itself or the PAMA Period. The extension incorporated a report,⁹⁶⁴ which clarified that:

“[t]he request for an **exceptional extension** refers to the performance of a specific environmental project, **which does not mean an extension to the PAMA of the requesting party, which, for legal purposes, expires without fail on the date established for its termination.** The period that is exceptionally extended only refers to the project that is the matter of the request, **which does not affect the terms or conditions of compliance with the other obligations arising under the PAMA** of the requesting entity.”⁹⁶⁵

503. Given concerns over DRP’s ability to meet the new deadline, and in light of pressure from environmental and community stakeholders, *the 2006 Extension created new financial and environmental obligations* for DRP. DRP has referred to the 2006 extension as a “draconian extension.”⁹⁶⁶ Mr. Isasi explains in a witness statement that DRP vehemently opposed the MEM’s required conditions at the time and demanded an extension without conditions and longer than permitted under the 2006 Extension.⁹⁶⁷ As Mr. Isasi further

⁹⁶¹ [Exhibit R-029](#), Supreme Decree No. 046-2004-EM, 29 December 2004.

⁹⁶² [Exhibit R-287](#), Ministerial Resolution No. 257-2006-MEM/DM, 29 May 2006, pp. 5–7.

⁹⁶³ [Exhibit R-287](#), Ministerial Resolution No. 257-2006-MEM/DM, 29 May 2006, Art. 1.

⁹⁶⁴ [Exhibit R-287](#), Ministerial Resolution No. 257-2006-MEM/DM, 29 May 2006, Art. 1.

⁹⁶⁵ [Exhibit R-289](#), Report No. 118-2006-MEM-AAM/AA/RC/FV/AL/HS/PR/AV/FO/CC, 25 May 2006, p. 7.

⁹⁶⁶ Treaty Memorial, ¶ 80.

⁹⁶⁷ See Isasi Witness Statement, ¶ 29 (Spanish original: “DRP se había negado rotundamente que este requisito le fuera exigido; querían una prórroga amplia y sin condicionamientos, lo cual alimentaba el temor del MEM de que DRP no tuviera intención alguna de cumplir con sus obligaciones.”).

explains, the MEM made clear that the 2006 Extension was final and unmodifiable, and that “DRP would not receive more extensions.”⁹⁶⁸

504. *In 2009, the MEM reiterated to DRP what it knew since at least 2006.* On March 5, 2009, DRP sent a letter to the MEM suggesting that DRP be granted another extension.⁹⁶⁹ On 25 June 2009, DRP requested a 30-month PAMA extension, which, as explained in more detail in the facts of this Counter-Memorial, the MEM denied on the grounds that it lacked the legal authority to grant an extension beyond the October 2009 deadline.⁹⁷⁰ When Peru’s Congress did change the legal framework to try and help DRP, the MEM passed a regulation implementing the 2009 Extension Law, as it was required to do. Through that regulation in 2009, the MEM established conditions that had to be met in order to consider granting such an extraordinary extension, much like it did in 2006 in accordance with the 2004 Extension Regulation. Notably, the 2004 Extension Regulation allowed the Peruvian authorities to condition approval of the extension on the adoption of additional environmental mitigation measures⁹⁷¹ “intended to reduce the risks to the environment, health or the safety of the population, and to ensure adequate performance of the PAMA.”⁹⁷² To reduce financing risks associated with fluctuations in metal prices, the 2004 Extension Regulation required any company receiving an extension to establish (i) a trust account with funds dedicated to completing any outstanding PAMA projects; and (ii) a guarantee letter in the amount of 20% of the value of the outstanding PAMA projects, meant to cover future penalties for missing the extended deadline.⁹⁷³
505. Claimant argues that “the radical transformation and expansion” of DRP’s environmental obligations “contributes to the grossly unfair and arbitrary character of Peru’s failure to grant DRP an effective extension of time to finish its final PAMA project.”⁹⁷⁴ This argument is both factually and legally incorrect. DRP’s environmental obligations

⁹⁶⁸ See Isasi Witness Statement, ¶ 43 (Spanish original: “*La RM-257 también precisó que el plazo de la prórroga otorgada era “final e improrrogable”. Era así como estaba previsto en el DS- 046 y como había quedado claro durante las reuniones con los representantes de DRP. DRP no recibiría más prórrogas*”) (emphasis added).

⁹⁶⁹ **Exhibit C-007 (Treaty)**, Letter from DRP (J. Carlos Huyhua) to MEM (P. Sanchez), 5 March 2009, p.1.

⁹⁷⁰ **Exhibit C-101**, Letter from MEM (F. Gala Soldevilla) to Doe Run Peru (J.C. Huyhua), 6 July 2009.

⁹⁷¹ **Exhibit R-029**, Supreme Decree No. 046-2004-EM, 29 December 2004, Article 4.

⁹⁷² **Exhibit R-289**, Report No. 118-2006-MEM-AAM/AA/RC/FV/AL/HS/PR/AV/FO/CC, 25 May 2006, p. 7.

⁹⁷³ **Exhibit R-029**, Supreme Decree No. 046-2004-EM, 29 December 2004.

⁹⁷⁴ Treaty Memorial, ¶ 202.

(namely, bringing the Facility into compliance with modern environmental standards) did not change over the course of the PAMA period. Rather, as explained before, DRP was required to adjust its PAMA in order to meet those standards, and it knew that since 1997, and reiterated that it understood on multiple occasions before 2009.

506. Claimant’s argument reveals that the true basis for its claims is not the 2009 Extension Regulation, but rather the 2006 Extension and the conditions of the PAMA that it knew about since 1997. Claimant criticizes the 2006 Extension because it “significantly expanded the cost and complexity of DRP’s environmental obligations” while granting the company “an extension of only two years and ten months to complete the expanded sulfuric acid plants project, even though the technical consultant hired by the MEM to evaluate DRP’s December 2005 extension request considered that five years was a reasonable estimate, and any less was ‘very aggressive.’”⁹⁷⁵ This argument confirms that Claimant’s claim concerning the allegedly “ineffective” extension in 2009 is a disguised claim about the alleged unfair extension in 2006 (or, as Claimant puts it, the “draconian extension”⁹⁷⁶).
507. As summarized below, none of the acts or facts that Claimant claims violated the Treaty changed the pre-Treaty status quo of Claimant’s investment:
- a. **The alleged “expansion of DRP’s undertaking to improve the [Facility’s] environmental performance.”**⁹⁷⁷ DRP understood that if it purchased the Facility, it would need to ensure environmental compliance within ten years, and that the environmental projects necessary to reach compliance within ten years could significantly increase the PAMA’s scope and price.⁹⁷⁸ If it was not clear at the moment of purchase — which it was — then it certainly was clear by 2006, well before the Treaty entered into force.

⁹⁷⁵ Treaty Memorial, ¶ 203.

⁹⁷⁶ Treaty Memorial, ¶ 80.

⁹⁷⁷ Treaty Memorial, ¶ 202; *see also, id.* ¶ 203.

⁹⁷⁸ **Exhibit R-094**, DRC SEC Form S-4, PDF pp. 134–5 (stating that DRP had “advised the MEM that it intend[ed] to seek changes in certain PAMA projects that it believes will more effectively achieve compliance.”)

- b. **The alleged expansion of “the cost and complexity of DRP’s environmental obligations in May 2006.”**⁹⁷⁹ This allegation directly addresses an act or fact that occurred in 2006 before the Treaty entered into force. In any event, much like the previously addressed act or fact, this was something that DRP understood well before the Treaty entered into force. When DRP received the extraordinary 2006 Extension, the MEM *conditioned* approval of the extension on the adoption of additional environmental mitigation measures⁹⁸⁰ “intended to reduce the risks to the environment, health or the safety of the population, and to ensure adequate performance of the PAMA.”⁹⁸¹ Additionally, to reduce financing risks, the MEM *required* DRP to establish (i) a trust account with funds dedicated to completing any outstanding PAMA projects; and (ii) a guarantee letter in the amount of 20% of the value of the outstanding PAMA projects, meant to cover future penalties for missing the extended deadline.⁹⁸² This was clear since at least 2006, before the Treaty entered into force.
- c. **The alleged rejection of DRP’s 2009 extension request.**⁹⁸³ First, the MEM did not “reject” DRP’s 2009 extension request, rather, the MEM informed DRP that it did not have the legal capacity to consider an extension (the MEM did the same in 2006).⁹⁸⁴ Moreover, when DRP received the extension, DRP did not want to comply with the requirements for that extension. In any event, in addition to DRP understanding that it had assumed the risk that it might not be able to implement the PAMA projects by January 2007, it also understood that the 2006 extension was a one-time, limited extension,⁹⁸⁵ was “final and non-renewable,”⁹⁸⁶ and did not “affect the terms or conditions of compliance with the other obligations arising

⁹⁷⁹ Treaty Memorial, ¶ 203.

⁹⁸⁰ **Exhibit R-029**, Supreme Decree No. 046-2004-EM, 29 December 2004, Art. 4.

⁹⁸¹ **Exhibit R-289**, Report No. 118-2006-MEM-AAM/AA/RC/FV/AL/HS/PR/AV/FO/CC, 25 May 2006,, p. 7.

⁹⁸² **Exhibit R-029**, Supreme Decree No. 046-2004-EM, 29 December 2004.

⁹⁸³ Treaty Memorial, ¶ 206 *see also, id.* ¶ 189.

⁹⁸⁴ **Exhibit C-076**, Letter from MEM (F.A. Ramirez del Pino) to DRP (J. Mogrovejo), 15 July 2009.

⁹⁸⁵ **Exhibit R-029**, Supreme Decree No. 046-2004-EM, 29 December 2004, Art. 1.1–1.2.

⁹⁸⁶ **Exhibit R-287**, Ministerial Resolution No. 257-2006-MEM/DM, 29 May 2006, Art. 1.

under the PAMA of the requesting entity.⁹⁸⁷ This was clear since at least 2006, before the Treaty entered into force.

d. **The alleged “undermining of the 30-month extension granted by Congress.”⁹⁸⁸**

As explained above, DRP knew (i) the risk it took to complete the PAMA by 2007; (ii) understood that the extension it received in 2006 to complete the Sulfuric Acid Plant Project by October 2009 was extraordinary, final, and non-renewable; (iii) understood it was not entitled to additional extensions; and (iv) knew that if it did obtain any extension, MEM could condition approval. This was all clear since at least 2006, before the Treaty entered into force.

e. **The Board of Creditors’ rejection of DRP’s restructuring plans.**

Notwithstanding the fact that the rejection of the restructuring plans was *not* a State act, the fact that the Board of Creditors was considering extending DRP an opportunity to provide a new plan for the Facility, it does not change the fact that DRP understood since before 2009 that: (i) it would not be entitled to an extension to complete the Sulfuric Acid Plant Project; (ii) that it would be held to comply with Peru’s environmental regulations; and (iii) that if an extension would be considered, it would come with conditions necessary to protect the health of the community and ensure the timely completion of its obligations.

508. The Pre-Treaty Acts *did not produce any separate effects* other than those that had already been produced or known since at least 2006. The Pre-Treaty Acts thus did not alter in any way the pre-treaty status quo with respect to Claimant’s investment. This had been the case in *ST-AD* and *Corona*, the post-treaty act — as alleged by Claimant — was no more than the rejection of an additional attempt engineered by Claimant itself to reopen a government decision that was already final prior to the Treaty’s entry into force. The alleged rejection of the 2009 extension request, the conditions that MEM required in order to consider the 2009 extension, and even the Board of Creditors’ rejection of DRP’s restructuring plans, were just “the most recent transgression in th[e] series.”⁹⁸⁹ Peru notes

⁹⁸⁷ [Exhibit R-289](#), Report No. 118-2006-MEM-AAM/AA/RC/FV/AL/HS/PR/AV/FO/CC, 25 May 2006, p. 7.

⁹⁸⁸ Treaty Memorial, ¶ 199.

⁹⁸⁹ [RLA-023](#), *Corona* (Award on Preliminary Objections), ¶ 215.

that it presents its objection assuming *arguendo* that Claimant is correct in alleging that the 2009 Extension was ineffective.

509. To recall the words of the *Eurogas* tribunal, “the situation was exactly the same”⁹⁹⁰ before and after the entry into force of the Treaty. By the time of the Treaty’s entry into force in 2009, Claimant knew that: (i) it had to complete the Sulfuric Acid Plant Project by October 2009; (ii) it was not entitled to additional extensions (as was clear in 2006); (iii) it had to comply with Peru’s environmental laws; and (iv) even if an extension were passed, the MEM would impose conditions to enforce the environmental standards and protect the health of the community, as it did in 2006. As a result, the post-treaty act that began with DRP’s request for yet another extension in 2009 is insufficient to create jurisdiction *ratione temporis* for the Tribunal over Claimant’s claims. Accordingly, such acts (along with the Pre-Treaty Acts challenged by Claimant) are outside the jurisdiction of this Tribunal.

b. The Pre-Treaty Acts are not independently actionable

510. The Pre-Treaty Acts are also not “independently actionable,” because the alleged breach caused by the Pre-Treaty Acts cannot be evaluated on the merits without a finding going to the lawfulness of pre-treaty conduct.

511. The reasoning from the *Spence* and *Carrizosa* tribunals applies to Claimant’s case. The Pre-Treaty Acts of which Claimant complains are not “independently actionable,” because they cannot be evaluated without evaluating the legality of the earlier communications and decisions of the MEM, all of which predated the Treaty’s entry into force; *i.e.* the Pre-Treaty Acts cannot be assessed “without requiring a finding going to the lawfulness of pre-[treaty] conduct.”⁹⁹¹

512. As explained above, prior to DRP’s 2009 extension request: (i) DRP was well aware of the strict and immovable PAMA deadline; (ii) the fact that if it purchased the Facility, it would need to modify the PAMA to ensure environmental compliance within ten years, and that such modifications could significantly increase the PAMA’s scope and price;⁹⁹² (iii) that the extension it received in 2006 to complete the Sulfuric Acid Plant Project was

⁹⁹⁰ RLA-027, *Eurogas* (Award), ¶ 455.

⁹⁹¹ RLA-026, *Spence* (Interim Award), ¶ 246.

⁹⁹² Exhibit R-094, DRC SEC Form S-4, PDF pp. 134–135 (stating that DRP had “advised the MEM that it intend[ed] to seek changes in certain PAMA projects that it believes will more effectively achieve compliance.”)

extraordinary, final, and non-renewable; and (iv) that it was not entitled to extensions and knew that if it did obtain any extension, MEM could condition the approval. DRP knew this before the entry into force of the Treaty.

513. Through the Pre-Treaty Acts the MEM merely reaffirmed its previous positions. Moreover, as admitted by Claimant itself, the Pre-Treaty Acts concerned the validity of underlying acts and facts that took place long before the Treaty's entry into force in 2009 (*i.e.*, "Peru's woeful underestimate of the total cost of DRP's PAMA projects also contributes to the gross unfairness of its failure to grant the company an effective extension of time to finish its final PAMA project;"⁹⁹³ "[t]he MEM issued its final report and regulation in May 2006, granting a draconian extension."⁹⁹⁴).
514. For this reason, the Pre-Treaty Acts are not independently actionable, and thus cannot, without more, give rise to jurisdiction *ratione temporis*.
515. The Tribunal left the question of its jurisdiction *ratione temporis* over most of Claimant's claims open for the present phase of the proceedings,⁹⁹⁵ noting that Peru "may yet convince the Tribunal that MEM did nothing but uphold its prior decisions and hold DRP to its existing contractual and environmental obligations."⁹⁹⁶
516. With a more complete in place in this phase of the proceedings, the Tribunal will note that Claimant's theory is simply a Trojan horse, designed to potentiate a claim that, at its core, challenges pre-Treaty rather than post-treaty conduct. Under Claimant's theory, a claimant in a treaty arbitration would always be able to: (i) present a post-treaty request before the relevant authority — even if the relevant authority has previously provided a clear and final response — for the sole purpose of generating some form of post-treaty State conduct in response; and (ii) use such conduct as a post-treaty jurisdictional hook for its claims.

⁹⁹³ Treaty Memorial, ¶ 205.

⁹⁹⁴ Treaty Memorial, ¶ 80.

⁹⁹⁵ See Decision on Expedited Preliminary Objections, ¶ 151 ("The Tribunal will need to scrutinize closely which of the foregoing accounts is correct when it turns to the merits of the Claimant's FET claims. In particular, the Tribunal will need to establish with precision the legal situation as it stood on 1 February 2009 and how it evolved thereafter.").

⁹⁹⁶ Decision on Expedited Preliminary Objections, ¶ 151.

517. Previous tribunals have cautioned against allowing claimants to do that. For example, the *Eurogas* tribunal held that to rule that it did have jurisdiction *ratione temporis* over the claimant's claims “would require the Tribunal to engineer a legalistic and artificial reasoning to bypass’ the temporal limits on the application of the treaty.”⁹⁹⁷
518. As a result, this Tribunal lacks jurisdiction *ratione temporis* over all of Claimant's claims that are based on the Pre-Treaty Acts.

⁹⁹⁷ [RLA-027](#), *Eurogas* (Award), ¶ 458.

IV. PERU HAS COMPLIED WITH ITS OBLIGATIONS UNDER THE TREATY

519. All but one of the measures that Renco claims violated the Treaty face insurmountable hurdles on jurisdiction for failure to state a *prima facie* case and/or violating the Treaty's temporal limitations. Even assuming that the Tribunal finds that Renco's claims can survive their fatal jurisdictional hurdles, all of Renco's claims are wholly devoid of merit and should be dismissed. Prior to addressing why Claimant's claims must fail, Peru highlights two important principles that the Tribunal must consider as it reviews the merits.
520. The *first* is that international tribunals apply the principle of *onus probandi actori incumbit*, according to which the party who makes an assertion bears the burden of proving it.⁹⁹⁸ As noted by Professor Bin Cheng, "the international responsibility of the State is not to be presumed[,] [t]he party alleging a violation of international law giving rise to international responsibility has the burden of proving the assertion."⁹⁹⁹ The UNCITRAL Arbitration Rules, which govern this proceeding, codify this principle.¹⁰⁰⁰ Because Claimant is the party alleging that Peru violated its obligations under the Treaty, it bears the burden of proving the existence of such breaches.¹⁰⁰¹

⁹⁹⁸ See, e.g., **RLA-134**, *Case Concerning Pulp Mills on the River Uruguay*, ICJ, Judgment, 20 April 2010, ¶ 162 ("[T]he Court considers that, in accordance with the well-established principle of *onus probandi incumbit actori*, it is the duty of the party which asserts certain facts to establish the existence of such facts. This principle . . . has been consistently upheld by the Court."); **RLA-110**, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007, ¶ 121 ("The principle of *onus probandi actori incumbit* - that a claimant bears the burden of proving its claims - is widely recognized in practice before international tribunals."); **RLA-135**, *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, 13 September 2016 ¶ 205 (noting the existence of "the general principle in international judicial proceedings that each party bears the burden of establishing the allegations on which it relies").

⁹⁹⁹ **RLA-170**, *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, ¶ 56 (citing to Bin Cheng, *General Principles of Law As Applied by International Courts and Tribunals*, pp.305-306); see also, **RLA-171**, *Eli Lilly and Company v. Government of Canada*, ICSID Case No. UNCT/14/2, Final Award, 16 March 2017, ¶ 109 ("The Tribunal shall apply the well-established principle that the party alleging a violation of international law giving rise to international responsibility has the burden of proving it.").

¹⁰⁰⁰ UNCITRAL Arbitration Rules, Art. 27 ("Each party shall have the burden of proving the facts relied on to support its claim or defence.").

¹⁰⁰¹ See **RLA-136**, *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, ¶ 154 ("The Tribunal starts with the premise that it is [the claimant] which bears the burden of proving its case under the ECT's FET standard."); **CLA-048**, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003 ¶ 185 ("The Investor, of course, in the end has the burden of sustaining its charge of inconsistency with Article 1105(1) [of the NAFTA]."); **RLA-090**, *Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Final Award, 23 April 2012 (Kaufmann-Kohler, Wladimiroff, Trapl), ¶ 274 ("In the present case . . . the question is whether the judicial system of the Slovak Republic breached the BIT by refusing to entertain a suit, subjecting it to undue delay, administering justice in a seriously inadequate way, or by an arbitrary or

521. Further, a claimant must provide the necessary evidence to establish its claim; merely presenting evidence is not enough.¹⁰⁰² A claimant must also “convince the Tribunal of their [claims’] truth, lest they be disregarded for want, or insufficiency, of proof.”¹⁰⁰³ The Tribunal will note that Claimant falls short of meeting its burden of proof in every claim.
522. The *second* principle is the particular investment law context in which this arbitration takes place. The text of the Treaty is consistent with the precept that it is a State's sovereign right to protect public health and the environment, and that promotion of investment should not be taken at the expense of the welfare of the environment.¹⁰⁰⁴ Chapter 18 (entitled “Environment”) of the United States-Peru Trade Promotion Agreement makes plain that each State Party is obligated to refrain from derogating or weakening its environmental protections in order to promote investment:

“The Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in their respective environmental laws. Accordingly, a Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws in a manner affecting trade or investment between the Parties.”¹⁰⁰⁵

523. A key provision from the Treaty which seeks to balance the Contracting States’ obligations in Chapters 10 and 18 is Article 10.11, which provides that:

“Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.”¹⁰⁰⁶

malicious misapplication of the law. The burden of proof is on the Claimants to demonstrate such a systemic injustice.”).

¹⁰⁰² See [RLA-172](#), Frédéric Gilles Sourgens, *et al.*, Burden and Standard of Proof in International Investment Arbitration, EVIDENCE IN INTERNATIONAL INVESTMENT ARBITRATION, 2018, ¶ 2.10.

¹⁰⁰³ [RLA-170](#), *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, ¶ 549.

¹⁰⁰⁴ [RLA-001](#), Treaty, Art. 10.11.

¹⁰⁰⁵ [RLA-001](#), United States-Peru Trade Promotion Agreement, signed on 12 April 2006, entered into force on 1 February 2009 (“**Treaty**”), Art. 18.3.2.

¹⁰⁰⁶ [RLA-001](#), Treaty, Art. 10.11.

524. As held by the *Arvin v. Costa Rica* tribunal, which involved identical language contained in DR-CAFTA, Article 10.11 “essentially subordinate[s] the rights to investors under Chapter Ten to the right of [the State] to ensure that the investments are carried out ‘in a matter sensitive to environmental concerns.’”¹⁰⁰⁷ While this subordination is not absolute,¹⁰⁰⁸ Article 10.11 does give “preference to the standards of environmental protection that were stated to be of interest to the Treaty Parties at the time it was signed.”¹⁰⁰⁹ Peru has a right to promulgate, maintain, and implement its environmental laws in a fair, non-discriminatory fashion, following principles of due process.¹⁰¹⁰ In other words, Article 10.11 permits “a Party to ensure that investment activity is undertaken in a manner sensitive to environmental concerns.”¹⁰¹¹
525. Peru’s 2009 Extension Law and accompanying Regulation, was an extraordinary accommodation on the part of Peru to grant DRP additional time to complete the Sulfuric Acid Plant Project. In the wake of DRP’s consistent historical delays and failure to capitalize and complete this critical environmental project in accordance with the PAMA and the 2006 Extension, the 2009 Extension Law and Regulation established conditions with which DRP had to comply in order to benefit from this extraordinary accommodation. The MEM established these conditions in pursuit of Peru’s legitimate environmental interests protected under the Treaty and in accordance with Peru’s environmental laws and international obligations. Indeed, Peru passed the 2006 Extension and the 2009 Extension Law and Regulation to ensure that investment activity in its territory is undertaken in a manner sensitive to the protection of the environment and health of its people. The enforcement of such regulation is consistent with Article 18.3 of the Treaty (Enforcement of Environmental Laws), which states that “it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in their respective environmental laws.”¹⁰¹²

¹⁰⁰⁷ **RLA-173**, *David Aven et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award, 18 September 2018 (“*Aven (Final Award)*”), ¶ 412.

¹⁰⁰⁸ **RLA-173**, *Aven* (Final Award), ¶ 412.

¹⁰⁰⁹ **RLA-173**, *Aven* (Final Award), ¶ 412.

¹⁰¹⁰ **RLA-173**, *Aven* (Final Award), ¶¶ 412–413.

¹⁰¹¹ **RLA-174**, Meg Kinnear *et al.*, Article 1114 - Environmental Measures, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, 2006, pp. 1114-7–1114-8.

¹⁰¹² **RLA-001**, Treaty, Chapter 18, Article 18.3.2.

526. The context of the State's sovereign right to protect public health and the environment is particularly relevant here because Claimant, a notorious serial polluter, made through DRP, specific promises and undertakings to comply with various environmental and investment obligations (mandated by law and contract). Through its signing of the STA, DRP specifically committed to complete the PAMA within the legally mandated ten-year timeline and bring the Facility into compliance with all applicable emissions standards. That commitment included the obligation to complete the Sulfuric Acid Plant Project, which was the most important project aimed at remediating SO₂ emissions. Without the completion of the Sulfuric Acid Plant Project, it would be impossible for the Facility to operate without posing severe negative impacts on the environment and health of the population of La Oroya. The conditions that Peru imposed on DRP in order to grant the 2009 Extension were aimed at ensuring the completion of the Sulfuric Acid Plant Project, particularly in light of DRP's repeated failure to comply with, and finance its PAMA obligations, as well as its failure to honor its commitments under the 2006 Extension. Having been given extraordinary accommodations, DRP never fulfilled its environmental commitments.
527. When contemplating the manner in which Claimant entered into and directed the finances and operations of DRP, Peru urges the Tribunal to consider whether Renco can be considered to have carried out an investment to which the Treaty affords protection. Investment treaties are only intended to protect good faith investors and investment.¹⁰¹³ Renco's pattern and practice as a polluter, and Renco's purposeful financial and operational neglect of DRP's environmental commitments does not suggest that Renco is an investor or investment covered by the Treaty. The totality of the circumstances suggest that Renco never planned to comply with its investment obligations in Peru. Providing protective status to Renco under the Treaty would be making a mockery of the investment treaty system and is a complete disregard for the good faith investors that investment agreements were intended to protect.

¹⁰¹³ **RLA-080**, *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (Oreamuno, Landy, von Wobeser), 2 August 2006, ¶¶ 230-239.

528. A detailed review of the factual record in this case reveals the disturbing actions of Renco with respect to its supposed investment in La Oroya and its failure to abide by applicable environmental laws and regulations. Peru thus reserves its right, after the document disclosure phase of this proceeding, to file a counterclaim under Article 10.11 of the Treaty.¹⁰¹⁴

A. Peru has complied with its obligation under Article 10.5 to treat protected investments in accordance with international law

529. Given the totality of the facts and circumstances that have transpired in Peru at Renco’s bidding, it is nothing short of perverse that Renco — an entity that has proved itself time and again unwilling to satisfy its critical environmental investment obligations — would feel itself entitled to claim an international treaty violation of the obligation to accord fair and equitable treatment. Renco was permitted to acquire the Facility with the express understanding that it, through its investment vehicle DRP was required to design and implement critical environmental programs in a strict timeframe.

530. While Renco got busy extracting profit from DRP’s ramped-up and highly contaminating operations, it stalled DRP’s environmental investment obligations. Peru had no obligation to accommodate DRP’s repeated requests to delay execution of its environmental obligations (in 1998, 2000, 2001, 2002, 2004, 2005, and 2009). The allegedly “arbitrary” or “unreasonable” conditions that Peru placed on DRP’s continued operations in La Oroya were a direct, fair, and equitable response and consequence to Renco’s abject failure and unwillingness — from the inception of its ostensible “investment” — to honor its environmental investment obligations. The investment treaty regime was not intended to provide shelter to corporate misconduct, least of all in the context of protection of the

¹⁰¹⁴ See [RLA-173](#), *Aven* (Final Award), ¶¶ 737, 739, 742, 743 (“It is true that the enforcement of environmental law is primarily to the States, but it cannot be admitted that that a foreign investor could not be subject to international law obligations in this field, particularly in the light of Articles 10.9.3, 10.11 and 17 of DR-CAFTA. . . . There are no substantive reasons to exempt foreign investor of the scope of claims for breaching obligations under Article 10 Section A DR-CAFTA, particularly in the field of environmental law. . . . Thus, the Tribunal has *prima facie* jurisdiction over the counterclaim filled in by the Respondent. The foregoing notwithstanding, . . . the Tribunal believes that the language of articles Article 10.9.3.c and 10.11 seeks to ensure that States retain a significant margin of appreciation in respect of environmental measures in their respective jurisdictions, but they do not -in and of themselves- impose any affirmative obligation upon investors. Nor do they provide that any violation of state-enacted environmental regulations will amount to a breach of the Treaty.”). The bifurcation of the damages phase in this proceeding reasonably justifies Peru’s deferment of a full articulation of its counterclaim, including a comprehensive damages submission. See UNCITRAL Arbitration Rules 20.2, 20.4, 21.

environment and public health. Renco’s claims of unfair and inequitable treatment are abjectly without merit and belie a disregard for and an abuse of the investment treaty system.

531. Renco submits that Peru breached its obligation under Article 10.5 of the Treaty to accord fair and equitable treatment (“**FET**”) to covered investments¹⁰¹⁵ by allegedly: (i) acting in an arbitrary and unfair manner¹⁰¹⁶; (ii) violating Renco’s legitimate expectations¹⁰¹⁷; (iii) violating principles of transparency¹⁰¹⁸; (iv) treating Renco’s investment disproportionately¹⁰¹⁹; (v) treating Renco’s investment inconsistently¹⁰²⁰; and (vi) harassing and coercing Renco, its officers, and its investment.¹⁰²¹ To support this claim, Renco relies on a faulty interpretation of the import of the minimum standard of treatment and presents a skewed and incomplete version of the facts.
532. In this section, Peru will demonstrate that each of Renco’s FET claims is without merit. Specifically, Peru will demonstrate that (i) Article 10.5 provides a narrow protection to investors and is not equivalent to an autonomous FET clause (**Section IV.C.1**); (ii) Peru did not treat Claimant’s investment in an arbitrary or unfair manner (**Section IV.C.2**); (iii) Article 10.5 does not protect Claimant’s alleged “legitimate expectations,” and, to the extent that Claimant had any expectations, they were not “legitimate” for investment treaty purposes (**Section IV.C.3**); (iv) Article 10.5 does not establish a transparency obligation, and to the extent that it does, Peru did not violate that obligation (**Section IV.C.4**); (v) Article 10.5 does not establish an obligation to treat investors proportionately, and to the extent that it does, Peru did not violate that obligation (**Section IV.C.5**); (vi) Article 10.5 does not include an obligation to treat investors consistently, and to the extent that it does, Peru did not violate that obligation (**Section IV.C.6**); (vii) Article 10.5 does not protect against harassment or coercion, and to the extent that it does, Peru did not coerce or harass

¹⁰¹⁵ Treaty Memorial, § 4.A.

¹⁰¹⁶ Treaty Memorial, § 4.A.2(a).

¹⁰¹⁷ Treaty Memorial, § 4.A.2(b).

¹⁰¹⁸ Treaty Memorial, § 4.A.2(c).

¹⁰¹⁹ Treaty Memorial, § 4.A.2(d).

¹⁰²⁰ Treaty Memorial, § 4.A.2(e).

¹⁰²¹ Treaty Memorial, § 4.A.2(f).

Claimant’s investment (**Section IV.C.7**); and (viii) DRP never had a right to multiple, condition-free extensions under customary international law (**Section IV.C.8**).

1. The content of the fair and equitable treatment standard under customary international law

533. The Treaty’s FET obligation is set forth in Article 10.5, which provides that “[e]ach Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment.”¹⁰²² It further specifies that, “[f]or greater certainty,” this “prescribes the customary international law minimum standard of treatment,” and “[t]he concept[] of ‘fair and equitable treatment’ . . . do[es] not require treatment in addition to or beyond that which is required by that standard, and do[es] not create additional substantive rights.”¹⁰²³

534. Additionally, Annex 10-A of the Treaty provides as follows:

“The Parties confirm their shared understanding that ‘customary international law’ generally and as specifically referenced in Article 10.5 results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 10.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.”

535. Annex 10-A thus addresses the methodology for interpreting customary international law rules covered by the minimum standard of treatment. Namely, the Contracting Parties confirmed that one determines the content of the minimum standard of treatment by looking to State practice and *opinio juris*. This approach is “widely endorsed in the literature” and “generally adopted in the practice of States and the decisions of international courts and tribunals, including the International Court of Justice.”¹⁰²⁴

¹⁰²² **RLA-001**, Treaty, Art. 10.5.1.

¹⁰²³ **RLA-001**, Treaty, Art. 10.5.2; *see also* **RLA-001**, Treaty, Annex 10-A.

¹⁰²⁴ *See* **RLA-137**, *Jurisdictional Immunities of the State*, ICJ, Judgment, 3 February 2012, ¶ 55 (“In particular . . . the existence of a rule of customary international law requires that there be ‘a settled practice’ together with *opinio juris*.” (*citing* **RLA-138**, *North Sea Continental Shelf Cases*, ICJ, Judgment, 20 February 1969)); **RLA-139**, *Case Concerning the Continental Shelf*, ICJ, Judgment, 3 June 1985, ¶ 29–30 (“It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States[.]”); **RLA-140**, Second Report on Identification of Customary International Law, INTERNATIONAL LAW COMMISSION: SIXTY-SIXTH SESSION, U.N. DOC. A/CN.4/672, Michael Wood (Special Rapporteur), 22 May 2014, ¶ 21. *See also id.*,

536. The burden is on Claimant to establish that a purported rule of customary international law meets the requirements of State practice and *opinio juris*.¹⁰²⁵ “The party which relies on a custom,” therefore, “must prove that this custom is established in such a manner that it has become binding on the other Party.”¹⁰²⁶ In the context of investor-State arbitration, tribunals have confirmed that the party seeking to rely on a rule of customary international law must establish its existence. The tribunal in *Cargill, Inc. v. Mexico*, for example, acknowledged that

“the proof of change in a custom is not an easy matter to establish. However, the burden of doing so falls clearly on Claimant. If the Claimant does not provide the Tribunal with proof of such evolution, it is not the place of the Tribunal to assume this task. Rather, the Tribunal, in such an instance, should hold that Claimant fails to establish the particular standard asserted.”¹⁰²⁷

Annex, Proposed Draft Conclusion 3, p. 14 (stating that in order to determine the “existence of a rule of customary international law and its content, it is necessary to ascertain whether there is a general practice accepted as law”); [RLA-141](#), Fourth Report on Identification of Customary International Law, INTERNATIONAL LAW COMMISSION: SIXTY-EIGHT SESSION, U.N. DOC. A/CN.4/695, Michael Wood (Special Rapporteur), 8 March 2016, ¶ 31; *id.*, Annex, p. 21 (proposing minor modifications to Draft Conclusion 3).

¹⁰²⁵ [RLA-132](#), *Asylum Case*, ICJ, Judgement, 20 November 1950, ¶ 276; *see also*, [RLA-138](#), *North Sea Continental Shelf Cases*, ICJ, Judgment, 20 February 1969, p. 43; [CLA-081](#), *Glamis Gold v. United States of America*, UNCITRAL, Award, June 8, 2009, ¶¶ 601–602 (noting that the claimant bears the burden of establishing a change in customary international law, by showing “(1) a concordant practice of a number of States acquiesced in by others, and (2) a conception that the practice is required by or consistent with the prevailing law (*opinio juris*)” (citations and internal quotation marks omitted)).

¹⁰²⁶ [RLA-142](#), *Case Concerning Rights of Nationals of the United States of America in Morocco*, ICJ, Judgment, 27 August 1952, 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.”) (citation and internal quotation marks omitted); [RLA-143](#), *Case of the S.S. Lotus*, PCIJ, Judgment, 7 September 1927, ¶ 67 (holding that the claimant had failed to “conclusively prove” the existence of a rule of customary international law).

¹⁰²⁷ [RLA-144](#), *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB/(AF)/05/2, Award, 18 September 2009, ¶ 273. The *ADF*, *Glamis*, and *Methanex* tribunals likewise placed on the claimant the burden of establishing the content of customary international law. *See* [CLA-048](#), *ADF Group, Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, ¶ 185 (“The Investor, of course, in the end has the burden of sustaining its charge of inconsistency with Article 1105(1). That burden has not been discharged here and hence, as a strict technical matter, the Respondent does not have to prove that current customary international law concerning standards of treatment consists only of discrete, specific rules applicable to limited contexts.”); [CLA-081](#), *Glamis Gold* (Award), ¶ 601 (noting “[a]s a threshold issue . . . that it is Claimant’s burden to sufficiently” show the content of the customary international law minimum standard of treatment); [RLA-145](#), *Methanex Corp. v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part IV, Ch. C, ¶ 26 *citing* [RLA-132](#), *Asylum Case*, ICJ, Judgement, 20 November 1950, for placing burden on claimant to establish the content of customary international law, and finding that claimant, which “cited only one case,” had not discharged burden.).

- a. The relevant standard is the minimum standard of treatment under customary international law, which provides a narrow protection to investors

537. Only if a rule of customary international law has been established, may a claimant then show that the respondent State has engaged in conduct that violates that rule.¹⁰²⁸ Determining a breach of the minimum standard of treatment “must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their borders.”¹⁰²⁹
538. The tribunal in *Waste Management II* provided an often-cited interpretation of the minimum standard of treatment. The award in that case, which is also cited by Claimant,¹⁰³⁰ summarizes the relevant jurisprudence as follows:

“The minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is **arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory** and exposes the claimant to sectional or racial prejudice, or **involves a lack of due process leading to an outcome which offends judicial propriety.**”¹⁰³¹
(Emphasis added)

539. The tribunal in *Glamis Gold v. United States* articulated a similarly stringent definition of the minimum standard of treatment:

“[T]o violate the customary international law minimum standard of treatment codified in Article 1105 of the NAFTA, an act must be

¹⁰²⁸ **RLA-117**, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶ 177 (“[I]t is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defence.”).

¹⁰²⁹ **RLA-123**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, ¶ 263; see also **RLA-146**, *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, ¶ 505 (“when defining the content of [the minimum standard of treatment] one should . . . take into consideration that international law requires tribunals to give a good level of deference to the manner in which a state regulates its internal affairs.”); **CLA-087**, *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL Ad hoc, Award, 26 January 2006, ¶ 127 (noting that states have a “wide regulatory ‘space’ for regulation,” can change their “regulatory polic[ies]” and have “wide discretion” with respect to how to carry out such policies by regulation and administrative conduct); **RLA-123**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, ¶ 263.

¹⁰³⁰ Treaty Memorial, ¶¶ 170–171.

¹⁰³¹ **CLA-140**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, ¶ 98.

sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons—so as to fall below accepted international standards.”¹⁰³²

540. Other tribunals have endorsed the *Waste Management II* tribunal’s formulation of the minimum standard of treatment.¹⁰³³ The tribunal in *GAMI v. Mexico* identified four implications that follow from the *Waste Management II* award:

“(1) The failure to fulfil the objectives of administrative regulations without more does not necessarily rise to a breach of international law. (2) A failure to satisfy requirements of national law does not necessarily violate international law. (3) Proof of a good faith effort by the Government to achieve the objectives of its laws and regulations may counter-balance instances of disregard of legal or regulatory requirements. (4) The record as a whole – not isolated events – determines whether there has been a breach of international law.”¹⁰³⁴

541. In *Alex Genin v. Estonia*, the tribunal explained that acts violating the customary international law minimum standard are those “showing a willful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith.”¹⁰³⁵ Similarly, the *Tamimi v. Oman* tribunal held that

“to establish a breach of the minimum standard of treatment . . . the Claimant must show that Oman has acted with a **gross or flagrant disregard** for the basic principles of fairness, consistency, even-handedness, due process, or natural justice expected by and of all States under customary international law.”¹⁰³⁶ (Emphasis added).

¹⁰³² **CLA-081**, *Glamis Gold v. United States of America*, UNCITRAL, Award, June 8, 2009, ¶ 22.

¹⁰³³ See, e.g., **RLA-148**, *Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012, ¶ 219 (finding that “*Waste Management II* persuasively integrates the accumulated analysis of prior NAFTA Tribunals and reflects a balanced description of the minimum standard of treatment.”); **RLA-146**, *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, ¶ 501 (“[T]he decision in *Waste Management II* correctly identifies the content of the customary international law minimum standard of treatment found in Article 1105.”).

¹⁰³⁴ **RLA-149**, *GAMI Investments Inc. v. Government of the United Mexican States*, UNCITRAL, Final Award, 15 November 2004, ¶ 97 (citing **CLA-140**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004); see also, **CLA-048**, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1, Award, 9 January 2003 (Feliciano, de Mestral, Lamm), ¶ 190.

¹⁰³⁵ **RLA-150**, *Alex Genin et al. v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, ¶ 367.

¹⁰³⁶ **RLA-133**, *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015, ¶ 390.

The *Tamimi* tribunal noted further that “[s]uch a standard requires more than that the Claimant point to some inconsistency or inadequacy in [the host State’s] regulation of its internal affairs.”¹⁰³⁷

542. As the *AES v. Hungary* tribunal similarly observed, “[i]t is only when a state’s acts or procedural omissions are, on the facts and in the context before the adjudicator, **manifestly unfair or unreasonable (such as would shock, or at least surprise a sense of juridical propriety)** . . . that the standard can be said to have been infringed”¹⁰³⁸ (Emphasis added). In *Biwater Gauff v. Tanzania*, the tribunal confirmed that this “threshold is a high one.”¹⁰³⁹
543. As explained by the *GAMI v. Mexico* tribunal, failure to satisfy requirements of domestic law likewise does not necessarily violate the minimum standard of treatment.¹⁰⁴⁰ Rather, “something more than simple illegality or lack of authority under the domestic law of a state is necessary to render an act or measure inconsistent with the customary international

¹⁰³⁷ **RLA-133**, *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015, ¶ 390 (“[A] breach of the minimum standard requires a failure, wilful or otherwise egregious, to protect a foreign investor’s basic rights and expectations. It will certainly not be the case that every minor misapplication of a State’s laws or regulations will meet that high standard”).

¹⁰³⁸ **RLA-151**, *AES Summit Generation Ltd. and AES-Tisza Erömu Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, ¶ 9.3.40; see also, e.g., **CLA-131**, *Técnicas Medioambientales TECMED S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 154 (ruling that a State breaches its obligation to provide fair and equitable treatment where the State’s conduct “shocks, or at least surprises, a sense of juridical propriety”) (internal quotations omitted).

¹⁰³⁹ **CLA-056**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶¶ 597–599; **RLA-152**, *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Award, 16 January 2013, ¶ 227 (accepting the Waste Management formulation of the standard as “the correct approach” and confirming that this is a “high threshold”); **RLA-021**, *William Ralph Clayton et al. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, ¶¶ 442–444 (noting that the Waste Management formulation is “particularly influential” and concluding that “[a]cts or omissions constituting a breach must be of a serious nature”).

¹⁰⁴⁰ **CLA-048**, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, ¶ 190 (“[E]ven if the U.S. measures were somehow shown or admitted to be *ultra vires* under the internal laws of the United States, that by itself does not necessarily render the measures grossly unfair or inequitable under the customary international law standard of treatment. . . . [T]he Tribunal has no authority to review the legal validity and standing of U.S. measures here in question under *U.S. internal administrative law*. We do not sit as a court with appellate jurisdiction with respect to the U.S. measures. (citation omitted) Our jurisdiction is confined by NAFTA Article 1131(1) to assaying the consistency of the U.S. measures with relevant provisions of NAFTA Chapter 11 and applicable rules of international law.”) (emphasis in original); **CLA-087**, *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL Ad hoc, Award, 26 January 2006, ¶ 160 (“[I]t is not up to the Tribunal to determine how [the state regulatory authority] should have interpreted or responded to the [proposed business operation], as by doing so, the Tribunal would interfere with issues of purely domestic law and the manner in which governments should resolve administrative matters (which may vary from country to country).”)

law requirements. . . .”¹⁰⁴¹ Accordingly, a departure from domestic law does not *per se* constitute a violation of Article 10.5.

544. The aforementioned authorities demonstrate that, while numerous investment claimants have attempted to erode the contours of the customary international law minimum standard, it is beyond doubt that the threshold for showing a breach of this standard is high. As Peru will demonstrate in the next section, the minimum standard of treatment is distinct from the autonomous FET standard, and Renco’s attempt to equate the two fails.

b. The minimum standard of treatment has not converged with the autonomous FET standard

545. Renco attempts to widen the scope of the minimum standard of treatment by arguing that the customary international law standard has converged with the autonomous standard such that the two standards are now “functionally identical.”¹⁰⁴² Renco’s argument is inconsistent with the applicable case law and fails to satisfy the requirements for establishing a rule of customary international law.

546. The tribunal in *Glamis Gold v. United States*, for example, expressly confirmed that the two standards are not identical:

“**Claimant** has agreed with this distinction between customary international law and autonomous treaty standards but **argues that**, with respect to this particular standard, **BIT jurisprudence has “converged with customary international law in this area.” The Tribunal finds this to be an over- statement.**”¹⁰⁴³ (Emphasis added)

547. As Claimant, Renco bears the burden of proving its thesis that customary international law has evolved such that it now includes the same elements as the autonomous standard of fair and equitable treatment.¹⁰⁴⁴ Specifically, Renco must supply evidence of “a general

¹⁰⁴¹ **CLA-048**, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, ¶ 190.

¹⁰⁴² Treaty Memorial, ¶ 178.

¹⁰⁴³ **CLA-081**, *Glamis Gold v. United States of America*, UNCITRAL, Award, June 2009, ¶ 609.

¹⁰⁴⁴ **RLA-144**, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB/(AF)/05/2, Award, 18 September 2009, ¶ 273 (“The burden of establishing any new elements of this custom is on Claimant.”).

and consistent practice of States that they follow from a sense of legal obligation.”¹⁰⁴⁵
Renco has not satisfied that burden.

548. Renco does not cite any evidence of state practice or *opinio juris* to prove its thesis that the autonomous FET standard has converged with the minimum standard of treatment. Instead, Renco cites four arbitral decisions,¹⁰⁴⁶ which constitute neither State practice nor *opinio juris*.¹⁰⁴⁷ As the United States explained in a recent non-disputing party submission analyzing the Treaty:

“[D]ecisions of international courts and arbitral tribunals interpreting “fair and equitable treatment” as a concept of customary international law are not themselves instances of “State practice” for purposes of evidencing customary international law, although such decisions can be relevant for determining State practice when they include an examination of such practice. A formulation of a purported rule of customary international law based entirely on arbitral awards that lack an examination of State practice and *opinio juris* fails to establish a rule of customary international law as incorporated by Article 10.5.”¹⁰⁴⁸

Peru agrees with the position expressed by the United States.

549. In any event, three of those four decisions do not support Renco’s position. First, Renco misconstrues the tribunal’s decision in *OIEG v. Venezueala*, which actually undermines any contention that the minimum standard of treatment is “functionally identical” to the autonomous FET standard. Renco quotes a passage in which the *OIEG* tribunal speculates that “is quite possible that currently the minimum customary standard and the FET

¹⁰⁴⁵ [RLA-001](#), Treaty, Annex 10-A. See also, [RLA-138](#), *North Sea Continental Shelf*, ICJ, Judgment, 20 February 1969, ¶ 77.

¹⁰⁴⁶ See Treaty Memorial, ¶¶ 175-177 (citing [CLA-042](#), *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015, ¶¶ 480, 489; [CLA-083](#), *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 567; [CLA-048](#), *ADF Affiliate Group v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, ¶¶ 179-81; [CLA-125](#), *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, ¶ 520).

¹⁰⁴⁷ See [RLA-144](#), *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB/(AF)/05/2, Award, 18 September 2009, ¶ 273; [RLA-145](#), *Methanex Corp. v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part IV, Chapter C, ¶ 26.

¹⁰⁴⁸ [RLA-166](#), *Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru*, ICSID Case No. ARB/19/28, Submission of the United States of America, 19 November 2021, ¶ 22 (citing [CLA-081](#), *Glamis Gold* (Award), ¶ 605; [RLA-157](#), *Obligation to Negotiate Access to the Pacific Ocean*, ICJ, Judgment, 1 October 2018, ¶ 162).

envisaged **in the treaties** have converged, according the investor substantially equivalent levels of protection”¹⁰⁴⁹ (emphasis added). Claimant presents this passage as if the *OIEG* tribunal were comparing the minimum standard of treatment with an autonomous FET standard. In reality, that tribunal was comparing a treaty that referenced *the minimum standard of treatment “under international law”* with a treaty that referenced “*fair and equitable treatment in accordance with international law.*”¹⁰⁵⁰ While the *OIEG* tribunal opined that it was “quite possible” that *those* two standards had converged, it never suggested that the minimum standard of treatment under customary international law had converged with an autonomous FET standard.

550. In fact, the *OIEG* decision suggests just the opposite. When the claimant in that case argued that FET “in accordance with international law” offered a superior level of protection than the minimum standard of treatment, the tribunal rejected that argument by explicitly contrasting the term “fair and equitable treatment in accordance with international law” with an autonomous FET standard:

“[I]t is not true that the Treaty with the United Kingdom offers superior treatment to the minimum customary standard, since in reality it only offers protected investors FET “in accordance with international law.” *The Treaty therefore does not guarantee FET in abstract*, but rather only as recognized by international law. And *the level of protection that international law offers and ensures to foreign nationals is precisely what is known as the minimum customary standard.*”¹⁰⁵¹ (Emphasis added).

It is thus clear that the *OIEG* award does not support Claimant’s contention that the minimum standard of treatment provides a level of protection that is “functionally identical” to that provided by treaties that “guarantee FET in abstract” (*i.e.*, treaties that contain autonomous FET clauses).

¹⁰⁴⁹ Treaty Memorial, ¶ 176 (citing [CLA-042](#), *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015, ¶ 489).

¹⁰⁵⁰ [CLA-042](#), *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015, ¶¶ 477–483.

¹⁰⁵¹ [CLA-042](#), *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015, ¶ 482.

551. In the same footnote in which Claimant cites to *OIEG v. Venezuela*, it also includes citations to *ADF v. United States* and *Gold Reserve v. Bolivia*.¹⁰⁵² The *OIEG* decision cites these two cases to support the assertion that “both Customary International Law and the [minimum] standard itself are constantly evolving.”¹⁰⁵³ Neither award contains any reasoning that supports Claimant’s attempt to equate the minimum standard of treatment with the autonomous FET standard.
552. Only the one of the cases that Claimant cites, *Rusoro Mining v. Venezuela*, supports its contention that the minimum standard of treatment is identical to the autonomous standard.¹⁰⁵⁴ Although the tribunal in that case did not find any meaningful difference between the two standards, such position does not reflect the majority view among States, tribunals, and qualified commentators.¹⁰⁵⁵

2. The MEM’s treatment of DRP in connection with the 2009 extension request and restructuring requests was fair and in no way arbitrary

553. Claimant alleges that Peru violated Article 10.5 by engaging “in grossly unfair and arbitrary treatment of DRP in connection with DRP’s requests for an extension” to complete the Sulfuric Acid Plant Project.¹⁰⁵⁶ Claimant falsely claims that the MEM undermined the 2009 Extension Law and alleges eight facts that, in its view, demonstrate that the MEM’s actions constituted arbitrary treatment under customary international law: (i) Centromín’s environmental consultant recognized that achieving compliance with Peru’s environmental standards may require more than ten years; (ii) the scope of DRP’s environmental obligations “radically” increased between 1997 and 2009; (iii) the cost of the PAMA projects exceeded DRP’s original expectations; (iv) the 2008 financial crisis constituted a *force majeure* event; (v) Peru sought to extract concessions from DRP as conditions to granting the 2009 Extension; (vi) the MEM allegedly violated Peruvian law

¹⁰⁵² Treaty Memorial, ¶ 176, note 402.

¹⁰⁵³ **CLA-042**, *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015, ¶ 489.

¹⁰⁵⁴ Treaty Memorial, ¶ 177.

¹⁰⁵⁵ See **RLA-167**, Christoph H. Schreuer, Fair and Equitable Treatment (FET): Interactions with other Standards, *TRANSNATIONAL DISPUTE MANAGEMENT*, September 2007, pp. 10–18.

¹⁰⁵⁶ Treaty Memorial, ¶ 192.

when it implemented the 2009 Extension Regulation; (vii) the MEM insisted on an “unreasonably” short period to foreclose on DRP’s proposed guarantee; and (viii) Peru treated DRP unfairly when it refused to approve its restructuring plans.¹⁰⁵⁷

554. In this section, Peru will (i) demonstrate that the minimum standard of treatment establishes a high threshold for finding a violation of the prohibition on arbitrary treatment; and (ii) refute each of Renco’s arguments identified above.

a. The minimum standard of treatment establishes a high threshold for finding a violation of the prohibition on arbitrary treatment

555. Renco alleges that “Peru engaged in grossly unfair and arbitrary treatment of DRP in connection with DRP’s requests for an extension of time to complete one of the three sub-projects comprising its final PAMA project.”¹⁰⁵⁸ International courts and tribunals have consistently articulated a high threshold for arbitrary conduct under customary international law. For example, in *ELSI v. Italy*, the International Court of Justice established that “[a]rbitrariness is not so much something opposed to a rule of law, as something opposed to *the* rule of law. . . . It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.”¹⁰⁵⁹ The *Siemens v. Argentina* tribunal noted that the *ELSI* interpretation of arbitrariness was “the most authoritative interpretation of international law,”¹⁰⁶⁰ and many other tribunals have likewise adopted that standard.¹⁰⁶¹

556. The Treaty’s Contracting Parties agree that a claim of arbitrariness under Article 10.5 “‘must be [evaluated] in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate within their borders,’”

¹⁰⁵⁷ Treaty Memorial, ¶¶ 199–225.

¹⁰⁵⁸ Treaty Memorial, ¶ 192.

¹⁰⁵⁹ **RLA-096**, *Case Concerning Elettronica Sicula S.p.A. (ELSI)*, ICJ, Judgment, 20 July 1989, ¶ 128.

¹⁰⁶⁰ **CLA-129**, *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/08, Award, 6 February 2007, ¶ 318.

¹⁰⁶¹ See, e.g., **RLA-087**, *Philip Morris Brands Sàrl et al. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, ¶ 390; **RLA-154**, *Mercer International Inc. v. Canada*, ICSID Case No. ARB(AF)/12/3, Award, 6 March 2018, ¶ 7.78.

such that even “[a] failure to satisfy requirements of domestic law does not necessarily violate international law.”¹⁰⁶²

557. Tribunals assessing claims of arbitrary conduct likewise emphasize that the State’s conduct must be treated with “a high level of deference for reasons of their expertise and competence.”¹⁰⁶³ States enjoy a “‘margin of appreciation’ to be recognized to regulatory authorities when making public policy determinations.”¹⁰⁶⁴ As the *GAMI* tribunal declared, tribunals:

“[do] not have an open-ended mandate to second-guess government decision-making. Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some values over others and adopted solutions that are ultimately ineffective or counterproductive.”¹⁰⁶⁵

558. Likewise, in *Philip Morris v. Uruguay*, the tribunal explained that this rule applies to issues of great national interest: “‘The sole inquiry for the Tribunal . . . is whether or not there was a manifest lack of reasons for the legislation.’”¹⁰⁶⁶ Thus, for example, the tribunal in *Eastern Sugar v. Czech Republic* rejected an arbitrariness claim even where the measures

¹⁰⁶² **RLA-066**, *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Submission of the United States of America, 21 June 2019, ¶ 35 (citing **RLA-123**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, ¶ 263); **RLA-166**, *Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru*, ICSID Case No. ARB/19/28, Submission of the United States of America, 19 November 2021, ¶ 24.

¹⁰⁶³ See, e.g., **RLA-087**, *Philip Morris Brands Sàrl et al. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016 ¶¶ 391–400; **CLA-081**, *Glamis Gold v. United States of America*, UNCITRAL, Award, 8 June 2009, ¶ 625; **CLA-088**, *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL Ad hoc, Award, 26 January 2006, ¶ 194; **RLA-123**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, ¶ 263 (determinations of arbitrariness “must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders. The determination must also take into account any specific rules of international law that are applicable to the case.”).

¹⁰⁶⁴ **RLA-087**, *Philip Morris Brands Sàrl et al. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, ¶ 398.

¹⁰⁶⁵ **RLA-149**, *GAMI Investments Inc. v. Government of the United Mexican States*, UNCITRAL, Final Award, 15 November 2004, ¶ 93 (citing **RLA-123**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000 ¶ 261).

¹⁰⁶⁶ **RLA-087**, *Philip Morris Brands Sàrl et al. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, ¶ 399 (citing **CLA-081**, *Glamis Gold v. United States of America*, UNCITRAL, Award, 8 June 2009, ¶ 805).

were “rashly introduced on an insufficient legislative basis, ineffectively implemented, and had a disturbing feature.”¹⁰⁶⁷

- b. Peru’s treatment of DRP was fair, equitable, and reasonable after DRP repeatedly reneged on its environmental investment obligations; Peru’s treatment of DRP did not breach the prohibition of arbitrary conduct under customary international law

559. Renco bases its arbitrariness claim on a misleading and incomplete version of the events leading up to the passage of the 2009 Extension Law and Regulation. Not only does Renco omit information that undermines its arguments, but it also distorts key events beyond recognition. Peru has refuted Renco’s misrepresentations of these events in **Section II.C.3.c**, and—unlike Renco—Peru has provided documentary evidence to prove each of its factual assertions. Peru will not repeat its factual narrative in this section, but it will summarize key facts and point the Tribunal to corresponding sections of this Counter-Memorial, where necessary.
560. As a threshold matter, Renco’s entire arbitrariness claim rests on the premise that the MEM’s 2009 Extension Regulation undermined the 2009 Extension Law. Claimant alleges eight facts that, in its view, “make clear that **the MEM’s undermining of the 30-month extension** granted by Congress for DRP to finish the Copper Circuit sub-project, described above, constituted grossly unfair and arbitrary treatment.”¹⁰⁶⁸ In other words, those eight alleged facts are relevant only insofar as they sustain Claimant’s argument that the MEM’s 2009 Extension Regulation undermined the 2009 Extension Law. However, as Peru explained in detail in **Section II.C.3.d** and will recall below, the MEM *did not undermine the 2009 Extension Law*. Thus, the entirety of Claimant’s arbitrariness argument—which is dedicated solely to discussing those eight facts—is moot.
561. Even if the MEM did somehow undermine the 2009 Extension Law (*quod non*), Peru will demonstrate that Claimant distorts each of the eight facts it relies on to argue that it had a right to an extension under customary international law, and that Peru violated that right. Bereft of any support, Claimant’s arbitrariness claim cannot meet the high threshold for

¹⁰⁶⁷ **RLA-156**, *Eastern Sugar B.V. v. Czech Republic*, UNCITRAL, SCC No. 088/2004, Partial Award, 27 March 2007, ¶ 274.

¹⁰⁶⁸ Treaty Memorial, ¶ 199.

establishing a finding of arbitrary conduct under customary international law, particularly given the “high level of deference” States enjoy “for reasons of their expertise and competence.”¹⁰⁶⁹

- (i) DRP agreed to complete the environmental remediation plan within a legally mandated ten-year deadline, but failed to do so

562. As set forth in detail in **Section II.A**, DRP understood that should it decide to acquire the Facility, it would be legally required to implement the PAMA and bring the Facility into compliance with Peruvian environmental standards within ten years. Not only was this timeline reiterated to DRP throughout the bidding process, but it was also enshrined in the Peruvian legal framework and the STA.¹⁰⁷⁰ Peru made it clear that addressing the environmental crisis in La Oroya was a national priority, and that it would sell the Facility only to firms that could turn around the Facility’s environmental performance within the ten-year timeline.¹⁰⁷¹ As described in detail above, Renco had full access to all relevant documentation during the bidding process. This documentation included the Knight Piésold Report, but also the SNC Report, and the PAMA, all of which clearly warned Renco of the ten-year, statutorily set deadline to complete the PAMA. The Knight Piésold Report further warned that complying with the PAMA deadline would be difficult and costly.¹⁰⁷²

563. When DRP signed the STA in 1997, it confirmed that it had conducted sufficient due diligence to understand the extension of its environmental responsibilities under the PAMA and potential risks.¹⁰⁷³ Renco’s understanding of DRP’s obligation to complete its PAMA obligations within the ten-year timeline was again confirmed in DRRC’s 1998 SEC

¹⁰⁶⁹ See, e.g., **RLA-123**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000 (Hunter, Schwartz, Chiasson), ¶ 263 (determinations of arbitrariness “must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders. The determination must also take into account any specific rules of international law that are applicable to the case.”); **CLA-071**, *Crystallex v. Venezuela* (Award), ¶ 583.

¹⁰⁷⁰ **Exhibit C-088**, Supreme Decree. No. 016-93, Art. 9; STA, Clause 4.1.

¹⁰⁷¹ See generally, **Exhibit C-117**, Offering Memorandum, La Oroya Metallurgical Complex, October 1996.

¹⁰⁷² See *supra* Sections II.A.2, II.A.3., II.A.5.

¹⁰⁷³ **Exhibit R-001**, STA, Clause 7.

Form S-4 filing.¹⁰⁷⁴ Then, between 1998 and 2002, DRP submitted several rounds of PAMA modification and extension requests, each seeking to delay design and construction of the Sulfuric Acid Plant Project; with each request, DRP pledged to meet the legally mandated ten-year PAMA deadline.¹⁰⁷⁵

564. Finally, as the January 2007 deadline approached, DRP asked for yet another extension on the deadline for completing the Sulfuric Acid Plant Project.¹⁰⁷⁶ This time, however, DRP requested a five-year extension *beyond* the PAMA Period. As Mr. Isasi explains, the MEM decided to consider DRP's extension request, not because the company deserved it, but rather because the alternative was to shut down the Facility, which would mean thousands of individuals out of work and a stranded community around the shuttered plant.¹⁰⁷⁷
565. Weighing these unacceptable consequences, in 2006, the MEM ultimately decided to extend DRP its first lifeline, allowing it until October 2009 (two years and ten months beyond the PAMA deadline) to complete the Sulfuric Acid Plant Project. In the two years that followed, DRP repeatedly confirmed that it planned to meet the new October 2009 deadline, including three times after the onset of the 2008 financial crisis, which it ten months later fashioned post hoc as a *force majeure* event.¹⁰⁷⁸

¹⁰⁷⁴ See [Exhibit R-094](#), Securities and Exchange Commission Form S-4, The Doe Run Resources Corporation, 11 May 1998, PDF pp. 134, 137 (“Doe Run Peru has committed under its PAMA to implement the following projects over the next nine years”); *supra* Section II.A.5.

¹⁰⁷⁵ [Exhibit R-155](#), Report to the Ministry of Energy and Mines on the PAMA and Request for Approval of Modifications in the Program, DRP, December 1998, p. 2; [Exhibit R-158](#), Directorial Resolution No. 133-2001-EM-DGAA, 10 April 2001 *attaching* Report No. 046-2001-EM-DGAA/LS, 5 March 2001, PDF p. 2, Annex, Arts. 1–2; [Exhibit R-157](#), Directorial Resolution No. 28-2002-EM/DGAA, 25 January 2002 *attaching* Report No. 009-2002-EM-DGAA/LS, 25 January 2002, Annex 1, pp. 1–2.

¹⁰⁷⁶ [Exhibit C-045](#), Letter from DRP (B. Neil) to MEM (M. Chappuis) *attaching* PAMA for the Metallurgical Complex of La Oroya 2004-2011 Period, 17 February 2004.

¹⁰⁷⁷ Isasi Witness Statement, ¶¶ 21, 24.

¹⁰⁷⁸ Compare [Exhibit R-192](#), Letter VPAA-268-08 from DRP (J. Mogrovejo Castillo) to MEM (A. Rodríguez Muñoz), 24 December 2008, p. 1 (“[D]espite the global crisis characterized by an international fall in metals prices, our company reiterates its commitment made to the Peruvian State. . . . [T]he [October 2009] construction deadline for the [Sulfuric Acid Plant] project will not be modified.”); [Exhibit R-190](#), Letter VPAA-054-09 from DRP (J. Mogrovejo Castillo) to Osinergmin (E. Quintanilla Acosta), 24 February 2009 (“[T]he pause in work has not affected compliance with our PAMA within the [October 2009] period established by the Ministry of Energy and Mines.”) and Isasi Witness Statement ¶ 45 (after an October 2008 inspection of the Facility, Mr. Mogrovejo assured Mr. Mogrovejo, DRP’s Vice President of Environmental Matters, assured Mr. Isasi that DRP was on track to finish the project on time, despite the recent fall in metals prices associated with the onset of the 2008 financial crisis.) with [Exhibit C-055](#), 2009 DRP Extension Request (DRP’s July 2009 extension request (ten months following the onset of the 2008 financial crisis) marked the first time that the company had invoked the *force majeure* clause in the STA).

566. Claimant now argues that Peru’s treatment of DRP in connection with both the 2006 and 2009 extensions was arbitrary because, according to Claimant, the consultant Knight Piésold in 1996 opined “that achieving compliance with Peru’s existing SO₂ standards would take more than ten years.”¹⁰⁷⁹ Renco now, more than 20 years after the report’s issuance, cites the Knight Piésold report as evidence that the original PAMA deadline of January 2007 was unreasonable. Inconveniently for Renco, however, the Knight Piésold report was one of the critical documents it had at its disposal during its own due diligence process, and DRP thereafter repeatedly committed to completing the PAMA within ten years. In any case, Claimant not only places outsized weight on statements contained in a non-technical report, but it also mischaracterizes the content and context of that consultant’s statement.
567. First, the Knight Piésold Report does not state that the Sulfuric Acid Plant Project achieving compliance with Peru’s existing SO₂ standards would take “more” than ten years. Knight Piésold actually wrote that compliance with Peru’s 1996 SO₂ standards “*may be unrealistic for an older facility such as La Oroya*” and “cannot be [achieved] except by multiple process changes and/or modifications to the smelter. *Such changes or modifications will be required over a 10-year period*” (Emphasis added).¹⁰⁸⁰ Here, the word “over” is a preposition that refers to something taking place *within* an extended period of time. It does not mean, as the Claimants pretend,¹⁰⁸¹ *extending beyond* that period of time.
568. Knight Piésold did warn that:
- “There is no simple remedy to the existing air quality situation as the selection of an economical and effective pollution control technology for La Oroya will require detailed engineering evaluation which is beyond the scope of the present evaluation. Compliance with future standards will require a number of control improvements, process changes, and major facility additions. Many of the necessary changes will be costly, and *implementation of adequate controls to meet standards may well take in excess of the ten year implementation schedule being considered by the Peruvian Ministry.*”¹⁰⁸²

¹⁰⁷⁹ Treaty Memorial, § 4.A.2(a) (i).

¹⁰⁸⁰ [Exhibit C-108](#), Knight Piésold, pp. 32–33.

¹⁰⁸¹ Treaty Memorial, ¶ 201.

¹⁰⁸² [Exhibit C-108](#), Knight Piésold Report, p. 33.

Even this passage, however — conditioned by the word “may” —does not quite reach the tenor of inevitability of Renco’s argument that it “would take more than ten years.” This passage also is not what Renco cites to support its SO₂ emissions standard argument. This may be because this passage is not speaking to SO₂ emissions standards, the necessary focal point of Renco’s creative post hoc justification of DRP’s serial delay in designing and constructing the Sulfuric Acid Plant Project.¹⁰⁸³ Regardless, the Knight Piésold report does not say what Renco claims it says.

569. Second, even supposing the Knight Piésold report actually stated, as Renco claims, that the Sulfuric Acid Plant Project “would take more than ten years”, (*quod non*) Knight Piésold was not qualified or engaged to opine on the PAMA’s technical engineering aspects. Indeed, Knight Piesold acknowledged as much when it observed that “detailed engineering evaluation [...] is beyond the scope of the present evaluation” and that “CENTROMÍN is presently evaluating alternatives (i.e., process changes) to bring the facility into compliance with existing and proposed Peruvian and international standards.”¹⁰⁸⁴ In fact, Centromín was consulting with engineering firm SNC-Lavalin, which proposed process changes that it considered would succeed in bringing emissions under control within ten years.¹⁰⁸⁵ The SNC Lavalin’s Report influenced the PAMA and was shared with DRP during the bid process.
570. Moreover, had Knight Piésold concluded that more than ten years were required to complete the Sulfuric Acid Plant Project, such a conclusion would have been incorrect. As process engineering expert Mr. Dobbelaere explains, the technology to construct the sulfuric acid plants planned for the Facility was already in use elsewhere in 1996.¹⁰⁸⁶ Indeed, SNC Lavelin had proposed several viable plans to adopt such technology and bring the Facility into compliance with Peru’s SO₂ standards within the ten-year deadline.¹⁰⁸⁷

¹⁰⁸³ See Treaty Memorial, ¶ 201.

¹⁰⁸⁴ Exhibit C-108, Knight Piésold Report, p. 58.

¹⁰⁸⁵ Exhibit R-267, Kilborn SNC Lavalin Study Report, October 1996.

¹⁰⁸⁶ Dobbelaere Expert Report, Sections VI-VII.

¹⁰⁸⁷ Exhibit R-267, Kilborn SNC Lavalin Study Report, October 1996, pp. 34–51.

571. Based on his expertise and experience of building a sulfuric acid plant, Mr. Dobbelaere estimates that, had DRP followed the PAMA or adopted another plan based on available alternatives, it could have completed the Sulfuric Acid Plant Project and brought the facility into compliance with SO₂ standards by the deadline.¹⁰⁸⁸
572. The third reason Claimant’s attempt to rely on the Knight Piésold report fails is that the report supports a finding that DRP should have acted with the utmost urgency, which it did not do. Rather than justify DRP’s many delays, the Knight Piésold report should have served as a warning that, if DRP intended to fulfill its obligations to reduce emissions within ten years, it needed to embark on its PAMA obligations immediately. As Claimant points out, Knight Piésold emphasized that the Facility’s owner would need to implement “multiple process changes and/or modifications to the smelter . . . over a 10-year period.”¹⁰⁸⁹ DRP, however, *abandoned* Centromín’s plan to modernize each of the circuits.¹⁰⁹⁰ DRP did not correct the fatal misstep regarding the copper circuit until the PAMA Period had almost expired, when it submitted its extension requests and blamed Centromín for its own blunders.¹⁰⁹¹ As Mr. Dobbelaere explains, there was no technical justification for DRP’s decision to abandon Centromín’s modernization plan and delay meaningful work on the Sulfuric Acid Plant Project for seven years.¹⁰⁹²
573. Fourth, even assuming that the Knight Piésold report concluded that the original PAMA Period was unworkable (*quod non*), the MEM allowed DRP significantly “more than ten years” to complete the Sulfuric Acid Plant Project. As Renco points out, the Knight Piésold report recommended that the MEM adopt “considerable flexibility in the implementation and application of new standards.”¹⁰⁹³ The MEM displayed such flexibility when it granted DRP numerous PAMA extensions and modifications, and when, despite DRP’s continual failures to timely address the Sulfuric Acid Plant Project to improve SO₂

¹⁰⁸⁸ Dobbelaere Expert Report, Sections VI-VIII.

¹⁰⁸⁹ [Exhibit C-108](#), Knight Piésold, pp. 32–33.

¹⁰⁹⁰ Dobbelaere Expert Report, ¶¶ 76–79; [Exhibit WD-015](#), 10 Year Master Plan Report, Fluor Daniel, September 1998, p. 11, Section 3.2.1, Copper Process Changes, p.11, Section 3.3, Lead Plant.

¹⁰⁹¹ Dobbelaere Expert Report, Section V.

¹⁰⁹² Dobbelaere Expert Report, Sections VI–VIII.

¹⁰⁹³ [Exhibit C-108](#), Knight Piésold Report, p. 33.

emissions, the MEM extended the period during which Peru's older, more lenient SO₂ emissions standards would apply to DRP while it ostensibly worked to complete the Sulfuric Acid Plant Project during the 2006 and 2009 extensions.¹⁰⁹⁴ Indeed, the MEM granted DRP a total of fifteen years and four months to complete its environmental obligations.¹⁰⁹⁵ DRP still failed.

574. Claimant offers one more feeble excuse for DRP's failures, claiming in its Memorial that the MEM unfairly changed the environmental goals on DRP. Specifically, Claimant complains that, "in 2008 Peru imposed far more stringent SO₂ standards, lowering the ECA daily value for SO₂ from 365 µg/m³ to 80 µg/m³."¹⁰⁹⁶ This meant, according to the Claimant, that even more extensive technological changes would be required than Knight Piésold anticipated in order to achieve compliance with Peru's SO₂ emissions standards. As a preliminary matter, it is not true that Peru imposed new and more stringent standards on DRP in 2008. The MEM extended the period during which Peru's older, more lenient SO₂ emissions standards would apply to DRP through the 2006 and 2009 Extensions and until 27 March 2012. What is more, there was no technical reason for the Facility not to carry on down a path of continual improvement once the break-through Sulfuric Acid Plant Project was completed and the Facility brought into compliance with the previous SO₂ requirements.¹⁰⁹⁷ It may have been costly and inconvenient for DRP to continually seek to improve the Facility's performance, but Claimant cannot seriously have expected anything else when it bought a Facility that it knew posed serious risks to the environment and human health.

(ii) Renco undertook due diligence and understood the environmental obligations that were essential to DRP's acquisition and operation of the Facility

575. As Peru explained in **Section II.A**, the MEM created the PAMA regime to allow existing mining and metallurgy operations to gradually come into compliance with modern

¹⁰⁹⁴ See **Section II.C.3**; **Exhibit R-289**, Report No. 118-2006-MEM-AAM/AA/RC/FV/AL/HS/PR/AV/FO/CC, 25 May 2006, p. 20 (extending application of 1996 LMPs, and extending ECAs for SO₂ until January 2010); **Exhibit C-140**, Ministerial Resolution No. 122-2010-MEM/DM concerning amendment requiring permanent health agreement with MINSAs, 18 March 2010 (extending application of ECAs for SO₂ until 27 March 2012); Alegre Expert Report, ¶¶ 19, 74.

¹⁰⁹⁵ See **Section II.C.3**.

¹⁰⁹⁶ Treaty Memorial, ¶ 201.

¹⁰⁹⁷ Dobbelaere Expert Report, ¶¶ 27-34.

environmental standards. Each individual PAMA—including the Facility’s PAMA—was designed with that singular goal in mind. Accordingly, while the Facility’s original PAMA provided a useful framework for modernization, it was only useful insofar as it would achieve the goal of bringing the Facility into compliance with environmental standards. Renco understood that if it purchased the Facility, DRP may need to modify the PAMA to ensure environmental compliance within ten years, and that such modifications could significantly increase the PAMA’s scope and price.¹⁰⁹⁸

576. Aware of the potential consequences of making such a commitment, Renco conducted an extensive due diligence process before submitting its purchase bid.¹⁰⁹⁹ It sent a team of 18 professionals to La Oroya to evaluate the Facility’s financial, technical, and environmental conditions before submitting its purchase bid.¹¹⁰⁰ It reviewed an extensive archive of documents related to the Facility, including the PAMA and the materials generated during its design, such as the 1996 SNC Lavelin Report and the Knight Piésold report discussed above. Renco also participated in two rounds of consultations with CEPRI, in which it was allowed to ask questions about any matter relating to the Facility or the STA.¹¹⁰¹ It represented to the SEC that it had undertaken thorough due diligence before making the investment.¹¹⁰² DRP also warranted in the STA that it had conducted sufficient due diligence to understand the extent of its responsibilities and potential risks.¹¹⁰³

¹⁰⁹⁸ **Exhibit R-094**, DRRC SEC Form S-4, PDF p. 135 (stating that DRP had “advised the MEM that it intend[ed] to seek changes in certain PAMA projects that it believes will more effectively achieve compliance.”).

¹⁰⁹⁹ Peru describes the due diligence process in detail in Section II.B of this Counter-Memorial.

¹¹⁰⁰ **Exhibit R-197**, *Por qué se revocó la Buena pro concedida a Penoles S.A. para adquirir Metaloroya S.A.*, CENTROMIN PERU, 16 July 1997; see also **Exhibit C-123**, 1997 White Paper.

¹¹⁰¹ **Exhibit R-200**, Question and Answers Round 1, 27 February 1997; **Exhibit R-201**, Question and Answers Round 2, 26 March 1997; **Exhibit R-167**, Bidding Terms (First Round); **Exhibit R-187**, Bidding Terms (Second Round).

¹¹⁰² **Exhibit R-094**, DRRC SEC Form S-4, PDF p. 135 (stating that DRP had “advised the MEM that it intend[ed] to seek changes in certain PAMA projects that it believes will more effectively achieve compliance.”)

¹¹⁰³ **Exhibit R-001**, STA & Renco Guaranty, Clause Seven read as follows: “*The investor represents that it has carried out its own investigation, examination, information and evaluation during the ‘due diligence’ process, directly or through third parties, on the basis of information accessible, available and provided by Centromin [...] To the investor’s knowledge, the information concerning the company has been entirely available to the investor through the ‘due diligence’ process. Within this context, the investor assumes the responsibility of the due diligence on the basis of information accessible and provided by Centromin. consequently, the investor cannot claim any responsibility from Copri, its members, from Cepri-Centromin, its members or advisers, from Centromin, or the Peruvian State for the information that the investor has failed to review concerning the company or the la Oroya Metallurgical Complex, which has been provided to the investor through the due diligence process...*”

Accordingly, Renco's argument that Renco and DRP failed to learn about the environmental crisis facing the Facility and what needed to be done to address it only after acquiring the Facility is, at best, fanciful.

577. Renco and DRP would have known that completing the PAMA projects, including the Sulfuric Acid Plant Project, was a necessary, but potentially insufficient, step towards turning around the Facility's performance. As expressly noted in executive summary of the Knight Piésold report, "[t]he responsibility for continued regulatory compliance and for the implementation of any necessary environmental controls and remediation technologies lies with the owner and/or operator of the metallurgical unit."¹¹⁰⁴ Renco and DRP's corporate managers and technical staff were highly qualified, both in terms of their education levels and their experience with managing environmental issues at other smelters.¹¹⁰⁵ As expert Dr. Wim Dobbelaere explains, any firm with DRRC's expertise and experience would have known that the PAMA was a solid starting point, but that the Facility's buyer would need to undertake additional studies to determine the best way to control emissions.¹¹⁰⁶
578. DRRC confirmed this understanding when it filed a statement with the United States Securities Exchange Commission in 1998, shortly after purchasing the Facility. In the filing, DRRC acknowledged that it had committed to implementing the PAMA projects by January 2007 and estimated that the investment needed to implement those projects was USD 195.0 million, even though the original PAMA was estimated to cost USD 107.5 million.¹¹⁰⁷ DRRC also acknowledged that it had assumed the risk that it would not be

¹¹⁰⁴ **Exhibit C-108**, Knight Piésold Report, p. 4.

¹¹⁰⁵ See **Exhibit R-165**, Jack V. Matson Expert Report, Document No. 1242-38, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 1 December 2020, PDF p. 6 (profiles of the Claimant's corporate managers).

¹¹⁰⁶ Dobbelaere Expert Report, Section IV.

¹¹⁰⁷ **Exhibit R-094**, DRRC SEC Form S-4, PDF p. 134 ("DRP has committed under its PAMA to implement the following projects over the next nine years, estimated in the PAMA to cost approximately \$107.5 million: (i) new sulfuric acid plants; (ii) elimination of fugitive gases from the coke plant; (iii) use of oxygenated gases in the anodic residue plant; (iv) water treatment plant for the copper refinery; (v) a recirculation system for cooling waters at the smelter; (vi) management and disposal of acidic solutions at the silver refinery; (vii) industrial waste water treatment plant for the smelter and refinery; (viii) containment dam for the lead muds near the zileret plant; (ix) granulation process water at the lead smelter; (x) anode washing system at the zinc refinery; (xi) management and disposal of lead and copper slag wastes; and (xii) domestic waste water treatment and domestic waste disposal. The actual current estimate for the environmental projects and related process changes for DRP is \$195.0 million.").

able to implement the PAMA projects by January 2007 and that its scope of work could change, at DRP's expense and risk.¹¹⁰⁸

579. Renco was also aware of the preferential environmental regime that would apply to DRP through the Stability Agreement. The preferential environmental regime would not last into perpetuity, however. The Stability Agreement “froze” LMPs and ECAs in force at the time of signing of the STA and during the PAMA execution period, *i.e.* until 13 January 2007.¹¹⁰⁹ Thus, during the pendency of the ten-year PAMA period, even if Peru passed new, more rigorous emissions standards, the emissions standards that would apply to DRP would remain those that were in force at the time the STA was signed in 1997. Once the PAMA period expired on 13 January 2007, however, the Stability Agreement expired as well, and any updates in standards would then apply to DRP.¹¹¹⁰ The Stability Agreement was express regarding its object and purpose, term and resolution:

“The object of the present contract is to guarantee [DRP] environmental administrative stability for the works that address environmental issues included in “THE PAMA”, in such a way that the possible changes in regulations and maximum permissible levels do not negatively affect them during the valid term of this contract . . . *The Present Contract will enter into force on the date executed by the parties, and must conclude in the period of ten years following the approval of the PAMA. . . . The period for executing the PAMA is ten years, which will expire 13 January 2007. . . . The failure to fulfil the PAMA during [the PAMA execution period expiring 13 January 2007] is grounds for resolution of the present contract, except for cases of force majeure or caso fortuito.*”¹¹¹¹ (Emphasis added)

¹¹⁰⁸ **Exhibit R-094**, DRRC SEC Form S-4, PDF p. 134 (“No assurance can be given that implementation of the PAMA projects is feasible or that their implementation will achieve compliance with the applicable legal requirements by the end of the PAMA period.”).

¹¹⁰⁹ **Exhibit R-199**, Environmental Administrative Stability Contract, 4 May 1998; Alegre Expert Report, ¶¶ 32–40.

¹¹¹⁰ Alegre Expert Report, ¶¶ 32-40.

¹¹¹¹ **Exhibit R-199**, Environmental Administrative Stability Contract, 4 May 1998, Clauses 2, 3, 6.1, 11 (“El objeto del presente contrato es garantizar a “El Titular” estabilidad administrativa ambiental para los trabajos de solución de problemas ambientales comprendidos en “EL PAMA” de tal forma que los posibles cambios en las normas Y niveles máximos permisibles, no los afecten negativamente durante la vigencia del presente contrato. . . . El presente Contrato entrará en vigencia en la fecha de su suscripción por las partes, debiendo culminar en el plazo de diez años desde la aprobación del PAMA. . . . El plazo de ejecución de “EL PAMA” es de diez años, que vencerá el 13 de Enero del 2007. . . . Es causal de resolución del presente contrato, la omisión de cumplir con “EL PAMA” dentro del plazo señalado en el numeral 6.1 de la Cláusula Sexta, salvo por causas de fuerza mayor o caso fortuito.”).

580. Given these express terms, as Ms. Alegre explains, the expiration of the PAMA execution period lifted the standard freeze: “[B]y failing to carry out its PAMA obligations within the 120 months since its approval, DRP lost the benefit of the Stability Agreement, and was then subject to the new regulatory framework that the Peruvian government had in place as of 13 January 2007.”¹¹¹² DRP, through its own failures, had lost the benefit of the original bargain it struck. Through the 2006 and 2009 extensions, however, the MEM still allowed DRP to extend the application of more lenient values to certain standards.¹¹¹³ Renco finds fault with the MEM’s leniency, however, labeling it — and the other conditions the MEM placed on the 2006 and 2009 extensions — “unfair”.¹¹¹⁴ Renco apparently believes DRP was entitled to more.
581. It is remarkable that Renco now attempts to argue that DRP’s repeated and flagrant failures to fulfil its environmental obligations, somehow (i) entitled DRP to dictate the terms of the extensions it requested as a consequence of its own reckless decisions, and (ii) obligated Peru to refrain from placing reasonable conditions on the extraordinary extensions DRP requested to ensure the performance from a recidivist evader. Renco knowingly entered into the bargain that led to its acquisition of the Facility. Renco was unable to fulfill the terms of that bargain, and now it seeks to use customary international law as insurance for the risk it assumed when DRP knowingly agreed to bring the Facility into compliance with emissions standards within ten years. In this context, Renco’s second fair and equitable treatment argument is uniquely cavalier:

“The radical transformation and expansion of DRP’s undertaking to improve the Complex’s environmental performance and the health of the local population contributes to the grossly unfair and arbitrary character of Peru’s failure to grant DRP an effective extension of time to finish its final PAMA project.”¹¹¹⁵

¹¹¹² Alegre Expert Report, ¶ 40 (“[A]l incumplir el PAMA y cumplirse los 120 meses desde su aprobación, DRP perdió el beneficio del Contrato de Estabilidad Administrativa Ambiental, quedando sujeto a los nuevos marcos normativos que estableció el gobierno *peruano* a partir del 13 de enero de 2007.”).

¹¹¹³ See **Section II.C.3**; **Exhibit R-289**, Report No. 118-2006-MEM-AAM/AA/RC/FV/AL/HS/PR/AV/FO/CC, 25 May 2006, p. 20 (extending application of 1996 LMPs, and extending ECAs for SO₂ until January 2010); **Exhibit C-140**, Ministerial Resolution No. 122-2010-MEM/DM concerning amendment requiring permanent health agreement with MINSA, 18 March 2010 (extending application of ECAs for SO₂ until 27 March 2012); Alegre Expert Report, ¶¶ 19, 74.

¹¹¹⁴ See Treaty Memorial, ¶¶ 84–85, 201 *et seq.*

¹¹¹⁵ Treaty Memorial, ¶ 202.

582. To the extent that Renco is claiming that Peru somehow changed the original agreement, such claim is false. In its acquisition of the Facility, DRP agreed to the requirement to invest as necessary to meet applicable environmental standards. DRP’s environmental obligations under the original agreement (namely, bringing the Facility into compliance with modern environmental standards) did not change.
583. For instance, Renco alleges that the MEM, through the 2006 Extension, added new projects to address fugitive emissions and incorporated design changes to the Sulfuric Acid Plant Project.¹¹¹⁶ Renco omits, however, that *DRP* specifically requested those changes in order to fulfill its longstanding obligation to meet Peruvian emissions standards.¹¹¹⁷ DRP only has itself to blame for the new projects DRP itself proposed and requested.
584. Claimant also alleges that for certain pollutants, the MEM imposed more stringent environmental requirements on DRP than the national standards.¹¹¹⁸ For lead, Renco asserts that it was owed a five-year grace period during which lead ECAs should not have applied to the Facility.¹¹¹⁹ This is incorrect. Claimant misinterprets the regulation. The five-year grace period to comply with the 0.5 µg/m³ annual lead value was not directed to facility operators, but as the relevant provision clearly states, to: “cities and zones”.¹¹²⁰ This grace period did not therefore apply to DRP. The lead value that it had to comply with was set in 1996 and remained unchanged.¹¹²¹ Claimant also complains about new

¹¹¹⁶ Treaty Memorial, ¶¶ 202–203.

¹¹¹⁷ [Exhibit C-045](#), Letter from DRP (B. Neil) to MEM (M. Chappuis) *attaching* PAMA for the Metallurgical Complex of La Oroya 2004-2011 Period, 17 February 2004, p. 1.

¹¹¹⁸ Treaty Memorial, ¶¶ 85–86.

¹¹¹⁹ Treaty Memorial, ¶ 85.

¹¹²⁰ [Exhibit C-093](#), Decree No. 074-2001, Seventh at 12 reads as follows: “Such cities or zones as after the monitoring stipulated in Article 12th of this regulation has been performed show values above those established in Annex 2, shall establish in their Action Plans measures designed such that the values established in Annex 2 are not exceeded within a period of no more than 5 years from approval of the Action Plan, and shall achieve the values contained in Annex 1 within the time frames established in the Zonal GESTA”

¹¹²¹ See [Exhibit C-128](#), Ministerial Resolution No. 315-96, Annex 3; [Exhibit C-093](#), Decree No. 074-2001, Annex 1; [Exhibit C-098](#), Supreme Decree No. 069-2003, Article 1.

more stringent ECA SO₂ standards being approved in 2008.¹¹²² However, Claimant was never required to comply with these 2008 standards.¹¹²³

585. Claimant also alleges that the MEM “imposed” emissions standards for several substances that were not regulated under national emissions standards, including antimony, thallium, bismuth and cadmium.¹¹²⁴ Claimant omits, however, that these standards were proposed by DRP in its 2005 Extension Request.¹¹²⁵ In any case, Claimant has not even attempted to show that the emissions standards contemplated in the 2006 Extension had a material effect on DRP’s ability fulfill its obligations in a timely manner.¹¹²⁶
586. Renco also omits that DRP waited until 2004 (with less than three years left to meet the ten-year PAMA deadline) to notify the MEM that it suddenly was unable comply with emissions standards unless it modified its PAMA design to include new projects to reduce the Facility’s fugitive emissions.¹¹²⁷ DRP’s decision to blame its delays on the issue of fugitive emissions was particularly egregious because that issue was caused by DRP’s own missteps. As Mr. Dobbelaere explains, Centromín’s original PAMA and modernization plan would have required DRP to control the Facility’s fugitive emissions.¹¹²⁸ DRP, however, scrapped those plans in 1998 in favor of a strategy that neglected fugitive emissions and curtailed DRP’s ability to implement the Sulfuric Acid Plant Project.¹¹²⁹ Six years later and with the January 2007 PAMA deadline looming, DRP presented the fugitive emissions issue to the MEM, as if it were adding a new priority area to the scope of its environmental obligations.¹¹³⁰ Had DRP implemented Centromín’s original plan (or timely chosen and implemented a viable alternative), it would have controlled fugitive

¹¹²² Treaty Memorial, ¶ 201.

¹¹²³ [Exhibit C-059](#), Report No. 118-2006, p. 20.

¹¹²⁴ Treaty Memorial, ¶ 86.

¹¹²⁵ [Exhibit R-289](#), Report No. 118-2006-MEM-AAM/AA/RC/FV/AL/HS/PR/AV/FO/CC, 25 May 2006, pp. 20–21.

¹¹²⁶ Treaty Memorial, ¶ 86.

¹¹²⁷ [Exhibit C-045](#), Letter from DRP (B. Neil) to MEM (M. Chappuis) *attaching* PAMA for the Metallurgical Complex of La Oroya 2004-2011 Period, 17 February 2004.

¹¹²⁸ Dobbelaere Expert Report, ¶¶ 287–300.

¹¹²⁹ Dobbelaere Expert Report, ¶¶ 76–79.

¹¹³⁰ Dobbelaere Expert Report, ¶¶ 90–93.

emissions and completed the Sulfuric Acid Plant Project well before the January 2007 deadline.¹¹³¹

587. Although DRP generated an impression of novelty around fugitive emissions in its 2004 Extension Request, the fugitive emissions issue was not new to DRP. As Peru explained in **Section II.A**, Renco and DRP’s own due diligence consultant warned the companies in 1997 that fugitive emissions were a critical source of the Facility’s emissions, and that DRP would need to control fugitive emissions in order to meet environmental standards.¹¹³² Additionally, the Knight Piésold report advised that fugitive emissions likely impacted the air quality in the community more than the main stack emissions.¹¹³³ The report—which Renco and DRP reviewed during due diligence—recommended that the buyer of the Facility conduct a survey to identify sources of emissions, “**including fugitive sources**,” and then ascertain methods and costs for controlling emissions.”¹¹³⁴ Another study that DRP reviewed during due diligence found that “the main source of contamination in the case [of the Facility] comes from fugitive emissions.”¹¹³⁵ Moreover, DRP’s managers had significant experience with fugitive lead emissions stemming from DRRC’s operations in Missouri.¹¹³⁶ Accordingly, when DRP chose in 1998 to modify Centromín’s viable PAMA design—a choice it made for commercial, not environmental reasons—its new design should have included projects aimed at reducing fugitive emissions at that time. It is inexcusable that DRP failed to do so until it submitted its 2004 Extension Request.
588. As Peru explains in **Section II.C.3**, DRP submitted its 2004 Extension Request just as it was ostensibly scheduled to ramp up its already delayed environmental expenditures. At

¹¹³¹ Dobbelaere Expert Report, ¶¶ 287-300. *See also*, Dobbelaere Expert Report, Sections V–VIII.

¹¹³² **Exhibit R-166**, Jack V. Matson Supplemental Expert Report, Document No. 1225-5, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), May 2021, p. 7 (warning that “fugitive emissions may continue to contribute significantly to the non-compliance status” for lead, and noting that “fugitive emissions from the lead furnaces and the dross treatment plant would be expected. . . . Capturing fugitive emissions from the sinter plant/blast furnace and better controls in the lead circuit should ensure future, consistent compliance with the lead standard.”).

¹¹³³ **Exhibit C-108**, Knight Piésold Report.

¹¹³⁴ **Exhibit C-108**, Knight Piésold Report, p. 34.

¹¹³⁵ **Exhibit R-198**, *Estudio de Evaluación Integral de Impacto Ambiental del Area Afectada Por Los Humos en la Fundación de La Oroya*, Servicios Ecológicos S.A., 1 November 1996, pp. 33–34.

¹¹³⁶ *See* Section II.A. **Exhibit R-165**, Jack V. Matson Expert Report, Document No. 1242-38, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 1 December 2020, pp. 5, 8.

that point, DRP had invested very little in the PAMA and was exceedingly behind schedule with respect to the Sulfuric Acid Plant Project, which was the central and most expensive component of the PAMA.¹¹³⁷ DRP had also run out of funding to complete the Sulfuric Acid Plant Project in time.¹¹³⁸ Of course, describing DRP as “running out of funding” strips Renco and DRP of their own financial agency. Better stated, the way in which Renco and DRP orchestrated DRP’s finances to be in service of Renco-affiliated entities made DRP’s financial straits inevitable.¹¹³⁹ In any event, when DRP informed the MEM of the fugitive emissions problem that it had yet to address, it urged the MEM to reorder the PAMA to allow DRP to control fugitive emissions first, before implementing the Sulfuric Acid Plant Project. This reordering allowed DRP to once again delay its most significant environmental investment obligations, as the proposed fugitive emissions projects were approximately twelve times cheaper than the proposed sulfuric acid plants (with the projected remaining project costs totaling USD 11.4 million and USD 105.4 million, respectively).¹¹⁴⁰ Moreover, DRP’s 2004 claim that fugitive emissions should take priority over the Sulfuric Acid Plant Project was misleading, given that the project would have abated fugitive emissions.¹¹⁴¹ DRP did not inform the MEM of this fact when it argued that the additional projects should take priority over the Sulfuric Acid Plant Project.

589. DRP waited yet another year, until 2005, to notify the MEM that the Sulfuric Acid Plant Project’s design—which DRP itself had proposed in 1998—would need to be completely overhauled. As Dr. Dobbelaere explains, there was no valid reason for DRP to wait that long to select an adequate design.¹¹⁴² The design DRP had inherited from Centromín was

¹¹³⁷ By 2004, DRP had met just five percent of its investment obligations with respect to the sulfuric acid plant. **Exhibit R-160**, Report No. 194-2004-MEM-DGM-FMI/MA, 12 April 2004.

¹¹³⁸ **Exhibit R-273**, Securities and Exchange Commission Form 10-K, DRRC, 31 October 2004, p. 10 (“DRP expects that it will not be able to comply with the spending requirements of La Oroya’s PAMA investment schedule in 2005 and 2006 with respect to the construction of the sulfuric acid plant required by the PAMA and, as a result, could be subject to penalties.”).

¹¹³⁹ Kunsman Expert Report, ¶ 13.

¹¹⁴⁰ **Exhibit C-050**, Letter from DRP (J. C. Mogrovejo) to MEM (J. Bonelli) *attaching* Request for an Exceptional Extension of Deadline to Complete the Sulfuric Acid Plants Projects, 15 December 2005, pp. 51, 57, 59.

¹¹⁴¹ Dobbelaere Expert Report, ¶¶ 287–300.

¹¹⁴² Dobbelaere Expert Report, Sections VI–VIII.

a viable one.¹¹⁴³ Once DRP had decided to scrap Centromín’s design, it was fully capable of choosing one of the several project designs identified by SNC-Lavelin in 1996 and beginning work on the Sulfuric Acid Plant Project immediately, allowing the company to meet its environmental obligations before the PAMA Period expired.¹¹⁴⁴ Instead, DRP adopted an unworkable project design in 1998 and failed to make any meaningful progress on the project for six years. When it finally commissioned a pre-feasibility study in late-2004 and settled on a suitable design in December 2005, it submitted a proposal that was substantially similar to Centromín’s original design and closely resembled an alternative that had been outlined in the 1996 SNC-Lavalin Report.¹¹⁴⁵

590. But by that point, it was too late. If DRP was only receiving a pre-feasibility study in the fall of 2004 for a modernization process that needed to be completed alongside the construction of sulfuric acid plants by January 2007, it was going to miss the deadline.¹¹⁴⁶ In view of the foregoing, Claimant cannot cite DRP’s 2005 redesign of the Sulfuric Acid Plant Project as a justification for the company’s delays.

591. Claimant also argues that “the MEM significantly expanded the cost and complexity of DRP’s environmental obligations in May 2006” when it “required DRP to undertake numerous new projects to reduce stack and fugitive emissions.”¹¹⁴⁷ Claimant exaggerates the cost of those projects. The new emissions projects—*which DRP proposed*¹¹⁴⁸—ultimately cost the company an additional USD 16 million, which represented only five percent of DRP’s total environmental expenditures.¹¹⁴⁹ Similarly, DRP spent just USD 4.2 million on the complementary public health projects required under the 2006 Extension,

¹¹⁴³ Dobbelaere Expert Report, Sections VI–VII.

¹¹⁴⁴ Dobbelaere Expert Report, Sections VI–VII.

¹¹⁴⁵ Dobbelaere Expert Report, ¶¶ 156, 162–163. *See also*, [Exhibit C-090](#), PAMA 1996 Report, PDF p. 154

¹¹⁴⁶ Dobbelaere Expert Report, ¶ 95.

¹¹⁴⁷ Treaty Memorial, ¶ 203.

¹¹⁴⁸ [Exhibit C-050](#), Letter from DRP (J. C. Mogrovejo) to MEM (J. Bonelli) *attaching* Request for an Exceptional Extension of Deadline to Complete the Sulfuric Acid Plants Projects, 15 December 2005, pp. 57-61 (“[W]e are including new projects for reducing chimney dust emissions and fugitive emissions”).

¹¹⁴⁹ [Exhibit R-297](#), PAMA to the Metallurgical Complex of La Oroya-DRP, OSINERGMIN, 4 December 2008, PDF p. 5.

most of which DRP also proposed.¹¹⁵⁰ Given that the MEM was requiring DRP to expend the necessary funds on the projects DRP proposed to address the environmental issues for which it was responsible, and the small fraction of the overall PAMA budget that these projects represented, it is misleading for Claimant to argue that the 2009 Extension Regulation was unfair because “the MEM [had] significantly expanded the cost and complexity of DRP’s environmental obligations in May 2006.”¹¹⁵¹

592. Claimant cites the expert report of Dr. Partelpoeg (one of the MEM’s technical consultants for the 2006 Extension) in the present arbitration, in which he opines that the typical timeframe for a project of similar complexity to the Sulfuric Acid Plant Project would be in the range of five to seven years.¹¹⁵² Dr. Partelpoeg, however, has not retracted his 2006 finding that a timeline of 2 years and 10 months was achievable. Moreover, Mr. Partelpoeg’s contemporaneous assessment that the 2006 Extension provided a “very aggressive”—but achievable¹¹⁵³—timeline does not support Claimant’s argument that Peru’s actions were “grossly unfair” or “manifestly arbitrary.” Mr. Partelpoeg’s 2006 assessment of the timeline was prospective and did not account for DRP’s previous failures over the course of seven years to begin work on the Sulfuric Acid Plant Project. Accordingly, Mr. Partelpoeg’s assessment that five years represented a more reasonable timeline¹¹⁵⁴ actually undermines Claimant’s argument. Had DRP started the project after acquiring the Facility in 1997, it would have had significantly more than five years to complete it. Given the urgent environmental crisis in La Oroya, and DRP’s prior failures to meet its investment and construction targets, it was not inappropriate, arbitrary or unfair for the MEM to establish an aggressive, but achievable, timeline.

¹¹⁵⁰ [Exhibit R-297](#), PAMA to the Metallurgical Complex of La Oroya-DRP, OSINERGMIN, 4 December 2008, PDF p. 5.

¹¹⁵¹ Treaty Memorial, ¶ 203.

¹¹⁵² Treaty Memorial, ¶¶ 81–82.

¹¹⁵³ [Exhibit C-062](#), Expert Comments on Exceptional Fulfillment Extension Request for the Sulfuric Acid Plant Project of La Oroya Metallurgical Complex PAMA, S. Clark, E. Partelpoeg, and James W.S. Young, 10 May 2006, pp. 15–16.

¹¹⁵⁴ Treaty Memorial, ¶ 203.

593. Finally, Renco argues that DRP’s voluntary “complementary environmental and public health projects outside the scope of its PAMA” added to its environmental costs.¹¹⁵⁵ As Peru explained in **Section II.D**, however, Ms. Proctor and experts from the CDC and St. Louis University have each concluded that DRP’s complementary public health programs provided little benefit to the community in La Oroya in the face of the Facility’s massive emissions.¹¹⁵⁶ Ms. Proctor also opines that some of DRP’s community health projects may have even increased La Oroya residents’ exposure to lead.¹¹⁵⁷
594. Even assuming that DRP’s voluntary projects were impactful (*quod non*), DRP’s assumption of those projects does not support Claimant’s argument that DRP had a right to multiple extensions under customary international law. DRP knew the PAMA deadline was fixed by law, and it chose to allocate its resources elsewhere. That choice did not relieve it of its obligations under Peruvian environmental law.
595. Claimant likewise points to the “remarkable results” that DRP’s efforts allegedly achieved with respect to main stack emissions.¹¹⁵⁸ Claimant skews the relevant data in two ways. First, it cites its emissions results as of the end of 2008, nearly two years after the PAMA Period expired.¹¹⁵⁹ Renco ignores that DRP *failed* to reach Peru’s relatively permissive emissions standards by the end of the PAMA Period; that was the reason it needed an extension. Second, Renco cites only data relating to reductions in main stack emissions,¹¹⁶⁰ even though DRP’s own consultant found that fugitive emissions were eight times as harmful.¹¹⁶¹ Mr. Dobbelaere explains that fugitive emissions must have increased for the

¹¹⁵⁵ Treaty Memorial, ¶ 202.

¹¹⁵⁶ Proctor Expert Report, Section 3.8; **Exhibit C-138**, 2005 CDC Report, pp. 29, 32; **Exhibit R-165**, Jack V. Matson Expert Report, Document No. 1242-38, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 1 December 2020, p. 13.

¹¹⁵⁷ Proctor Expert Report, Section 3.8.

¹¹⁵⁸ Treaty Memorial, ¶ 204.

¹¹⁵⁹ Treaty Memorial, ¶ 203.

¹¹⁶⁰ Treaty Memorial, ¶ 204.

¹¹⁶¹ **Exhibit C-045**, Letter from DRP (B. Neil) to MEM (M. Chappuis) *attaching* PAMA for the Metallurgical Complex of La Oroya 2004-2011 Period, 17 February 2004, pp. 5–6.

first several years of DRP's operations, given that the company had ramped up lead production without implementing any measures aimed at reducing fugitive emissions.¹¹⁶²

596. While Renco accuses the MEM of an international treaty violation for adding reasonable conditions to the 2006 Extension, Renco ignores the dire environmental and public health issues that DRP's own dilatory conduct has provoked and exacerbated. The 2006 Extension was nothing but lenient and generous, particularly in light of the censure Peru has faced from other stakeholders and international organizations.¹¹⁶³ Indeed, the Inter-American Commission of Human Rights found that the extension was *too* generous, thereby "compromis[ing] [Peru's] obligation to guarantee human rights and creat[ing] a situation that translated into acquiescence and tolerance."¹¹⁶⁴
597. With its Memorial, Renco is pushing the unsupported false narrative that the 2006 Extension was a sham meant to sabotage DRP.¹¹⁶⁵ This thinly veiled conspiracy theory contradicts the factual record and defies common sense. As Peru described above, DRP's 2004 Extension Request drove the MEM to create a special regulatory regime to allow all companies to extend the deadlines to complete outstanding PAMA projects. The MEM passed the 2004 Extension Regulation after almost a year's worth of focused and time-consuming debate. When DRP submitted its 2005 Extension Request, the MEM conducted a thorough and participative review process, which included engaging several teams of independent experts and consulting with other government agencies, civil society, and DRP itself. It is inconceivable that the MEM, which had no domestic or international legal obligation to grant an extension, would undertake such an onerous and costly process just to, as Renco claims, "set Doe Run Peru up to fail."

¹¹⁶² Dobbelaere Expert Report, Section IX. *See also*, Section II.D.2.

¹¹⁶³ *See* Section II.D.

¹¹⁶⁴ [Exhibit R-221](#), IACHR Petition for Precautionary Measures, Movement for the Health of La Oroya, 2002.

¹¹⁶⁵ *See* Treaty Memorial, ¶ 88; Mogrovejo Statement, ¶ 47. 1. In 2005, a group of NGOs and several residents of La Oroya filed a case against Peru before the Inter American Commission of Human Rights ("IACHR"). The petitioners specifically criticized Peru for allowing DRP to modify and postpone completion of its obligations under the PAMA. The IACHR twice granted precautionary measures against the State, and it ultimately decided to file an application with the Inter-American Court of Human Rights. The IACHR found that Peru did not comply with its duties to "regulate, supervise, and oversee the behavior of companies regarding the rights that they might jeopardize, nor with its duty to prevent violations of those rights." The case is currently pending with the Inter-American Court of Human Rights.

598. Renco similarly complains about the conditions that the MEM placed on the 2009 Extension. For instance, Renco complains about the milestones that the MEM established for the 20-month construction and start-up period.¹¹⁶⁶ According to Mr. Mogrovejo, the milestones “eliminated flexibility, and made compliance more difficult.”¹¹⁶⁷ Claimant ignores that (i) the establishment of milestones is the norm in large-scale construction projects; (ii) the Congress had specifically envisioned that the MEM would establish a detailed timeline with milestones;¹¹⁶⁸ and (iii) the milestones adopted by the MEM had been recommended by the Technical Commission.¹¹⁶⁹ Given that DRP had repeatedly missed such milestones over the previous decade, it was reasonable for the MEM to incorporate them into the 2009 Extension Regulation.
599. Although this last complaint regards the 2009 Extension, it is worth noting here the volume of Renco’s arguments that are focused on the 2006 Extension — an event that happened years before the Treaty went into force. Renco’s arguments reveal that the true basis for its FET claim is not the 2009 Extension Regulation, but rather the 2006 Extension. Claimant criticizes the 2006 Extension because it “significantly expanded the cost and complexity of DRP’s environmental obligations” while granting the company “an extension of only two years and ten months to complete the expanded sulfuric acid plants project, even though the technical consultant [Mr. Partelpoeg] hired by the MEM to evaluate DRP’s December 2005 extension request considered that five years was a reasonable estimate, and any less was ‘very aggressive.’”¹¹⁷⁰ This argument confirms that Renco’s claim concerning the allegedly “ineffective” 2009 Extension is a disguised claim about the allegedly unfair 2006 Extension. However, as Peru explains in **Section II.G**, Claimant has no right to base its claims on State actions that predate the Treaty’s entry into force (*viz.*, February 2009).

¹¹⁶⁶ Treaty Memorial, ¶¶ 116–117.

¹¹⁶⁷ Treaty Memorial, ¶ 116 (*citing* Mogrovejo Statement, ¶ 61).

¹¹⁶⁸ **Exhibit R-240**, Congressional Transcript, First Ordinary Legislature of 2009, Energy and Mines Commission, 23 September 2009, p. 28 (“Mr. PRESIDENT. . . . [T]he Executive Power will be the one to ultimately determine the guarantees, and the question of the project timeline as well.”).

¹¹⁶⁹ **Exhibit R-274**, Final Report of the Technical Commission, 14 September 2006, PDF pp. 8–9, 11.

¹¹⁷⁰ Treaty Memorial, ¶ 203.

(iii) DRP underinvested in its PAMA projects

600. As Peru explained in detail in **Section II.C.1**, DRP repeatedly failed to meet its financial obligations with respect to multiple PAMA projects. Claimant now blames its own failures to fund its environmental obligations on Peru’s supposed “underestimate of the total cost of DRP’s PAMA projects,” which, in Claimant’s view, “contributes to the gross unfairness of its failure to grant the company an effective extension of time to finish its final PAMA project.”¹¹⁷¹ Even assuming that the 2009 Extension was ineffective (*quod non*), Claimant misrepresents the financial risks and obligations it assumed when it purchased the Facility, and omits how DRP and its parent companies (including Renco) are responsible for DRP’s financial ruin and inability to complete its environmental commitments.
601. While DRP’s PAMA projects were initially valued at USD 107.5 million,¹¹⁷² Renco asserts that by “December 2008, DRP had spent over USD 300 million on its PAMA projects and related environmental projects, and it estimated that it would need to spend an additional amount of USD 120.6 million to finish the last project.”¹¹⁷³ According to Claimant, “[g]iven the exponential increase in the cost of DRP’s PAMA projects, and DRP’s willingness to dedicate even significantly more financial resources, it was grossly unfair for Peru not to provide the company with an effective extension of time to finish its last project.”¹¹⁷⁴
602. Claimant’s argument distorts the facts in three ways. First, Claimant skews the numbers by bundling or conflating DRP’s total investments in both PAMA and modernization projects (approximately USD 300 million), and comparing that total with the original estimated cost of only the PAMA projects, USD 107.5 million (as opposed to the PAMA project and modernization projects total estimate of USD 247.5 million). Thus, while Renco asserts that DRP spent over USD 300 million “on its PAMA projects and related environmental projects,” that figure includes USD 62.4 million spent on modernizing the

¹¹⁷¹ Treaty Memorial, ¶ 205.

¹¹⁷² **Exhibit C-089**, Directorial Resolution No. 334-97-EM/DGM, 16 October 1997.

¹¹⁷³ Treaty Memorial, ¶ 205.

¹¹⁷⁴ Treaty Memorial, ¶ 205.

Facility's copper circuit.¹¹⁷⁵ Renco's assertion that in December 2008 DRP had projected an outstanding cost of USD 120.6 million to finish the last project is equally, if not more, misleading. In accordance with contemporaneous documentation from December 2008, by that date, the company projected that remaining costs would total USD 64.6 million (a figure that also included modernization costs).¹¹⁷⁶

603. Second, as Peru explained in the previous section, Claimant knew that the original PAMA cost was a significant underestimate, and that DRP had been selected to purchase the Facility precisely because Renco and DRRC had (and, indeed held themselves as having) *more* expertise than Centromín and could better assess the eventual price and scope of the PAMA. Moreover, Claimant omits that most of the increase in estimated projected investment in PAMA projects occurred with DRP's own updated investment projections in 1998, when DRP reported that it projected spending USD 168 million (USD 61.5 million more than Centromín's estimate from the 1996 bidding documents). Moreover, as Peru explains in **Section II.C.3**, DRP thereafter repeatedly assured the MEM that it could complete the PAMA by the original deadline.¹¹⁷⁷ After DRP failed to uphold this commitment, it presented a new design of the Sulfuric Acid Plant Project, which again increased estimated projected costs.¹¹⁷⁸ The MEM granted DRP an additional two years and ten months to finish the project, and DRP again repeatedly confirmed thereafter that it would meet the new October 2009 deadline, including three times after the onset of the 2008 financial crisis.¹¹⁷⁹ Claimant's argument that DRP was blindsided by a sudden increase in cost is nothing but a revisionist, post hoc excuse. Indeed, as Ms. Isabel Kunsman explains, DRP's actions, including by decapitalizing Metaloroya on the day it

¹¹⁷⁵ Treaty Memorial, ¶ 205, note 468 (*citing* **Exhibit C-055**, 2009 DRP Extension request, PDF p. 110 ("The Cost of Capital of the Changes in Copper Smelting amounts to US\$ 139.46 million of which US\$62.41 million have already been executed. The remaining US \$77.05 million appears in detail in Annex 9").

¹¹⁷⁶ **Exhibit R-192**, Letter VPAA-268-08 from DRP (J. Mogrovejo Castillo) to MEM (A. Rodríguez Muñoz), 24 December 2008, p. 1.

¹¹⁷⁷ **Exhibit R-155**, Report to the MEM on the PAMA and Request for Approval of Modifications in the Program, DRP, December 1998, p. 2; **Exhibit R-157**, Directorial Resolution No. 28-2002-EM/DGAA, 25 January 2002, Annexes.

¹¹⁷⁸ **Exhibit C-050**, 2005 Extension Request.

¹¹⁷⁹ **Exhibit R-192**, Letter VPAA-268-08 from DRP (J. Mogrovejo Castillo) to MEM (A. Rodríguez Muñoz), 24 December 2008, p. 1; **Exhibit R-190**, Letter VPAA-054-09 from DRP (J. Mogrovejo Castillo) to Osinergmin (E. Quintanilla Acosta), 24 February 2009; Isasi Witness Statement, ¶ 43.

executed the STA, plus the various inter-company agreements, “handicapped DRP’s ability to timely meet its PAMA Commitments.”¹¹⁸⁰ In short, DRP “initiated a liquidity crisis from which [it] never recovered.”¹¹⁸¹

604. Third, as Peru explains in **Section II.B.5**, Claimant omits that DRP systematically delayed investing in the PAMA and pushed back its capital expenditures. As Mr. Dobbelaere explains, DRP’s PAMA modifications served to delay DRP’s environmental costs and prioritize short-term profits.¹¹⁸² Ms. Isabel Kunsman explains the necessity behind DRP’s repeated delays, namely, that DRP’s self-inflicted liquidity problems made compliance with its PAMA obligations unattainable.¹¹⁸³
605. DRP consistently fell behind on its financial obligations from the very start. When DRP submitted its 2004 Extension Request, the company was woefully delayed even according to the investment schedule it had proposed in 1998. By that date, DRP had invested a mere \$33.2 million of the \$174 million it had pledged to spend on environmental cleanup, and it had completed just 23% of its PAMA obligations.¹¹⁸⁴ In 2005, the MEM fined DRP for having met only 49.2% of its investment obligations for three PAMA projects in the years 2001, 2002 and 2003.¹¹⁸⁵
606. Claimant omits that DRP and its parent companies (including Renco) had a heavy hand in DRP’s financial ruin. On the very day that the purchase of the Facility was concluded, DRP took nearly the entire USD 126.5 million capital contribution it was obligated to pay into Metaloroya under the STA and gave it to Doe Run Mining (DRP’s parent and Renco’s subsidiary) in the form of an interest-free USD 125 million loan.¹¹⁸⁶ Indeed, Doe Run

¹¹⁸⁰ Kunsman Expert Report, ¶ 137.

¹¹⁸¹ Kunsman Expert Report, ¶ 137.

¹¹⁸² Dobbelaere Expert Report, ¶¶ 68–80.

¹¹⁸³ Kunsman Expert Report, § VI.

¹¹⁸⁴ **Exhibit C-045**, Letter from DRP (B. Neil) to MEM (M. Chappuis) *attaching* PAMA for the Metallurgical Complex of La Oroya 2004-2011 Period, 17 February 2004, p. 19.

¹¹⁸⁵ **Exhibit R-195**, Directorial Resolution No. 129-2005-MEM/DGM, 22 April 2005. These projects were: (a) Copper Refinery Mother Water Treatment Plant (Project 5); (b) Industrial Liquid Effluent Treatment Plant (Project 8); and (c) Wastewater/Garbage Disposal (Project 16).

¹¹⁸⁶ *See* **Exhibit R-095**, Acquisition Loan, p. 45, Clause 2.5(f); **Exhibit R-094**, Securities and Exchange Commission Form S-4, The Doe Run Resources Corporation, 11 May 1998, p. 31; Kunsman Expert Report, ¶ IV.A.

Mining diverted the funds that were contractually intended to fund DRP’s environmental and investment obligations. Instead, Doe Run Mining used those funds to repay more than half of the Acquisition Loan used to finance the purchase.¹¹⁸⁷ As Ms. Kunsman confirms, depleting the working capital at the outset compromised DRP’s ability to meet environmental and investment obligations in the years to come:

“[T]he US% 126 million outflow [of capital] – on Day 1 of operations – handicapped DRP’s ability to timely meet its PAMA Commitments. In short, DRM initiated a liquidity crisis from which DRP never recovered.”¹¹⁸⁸

607. In the months and years that followed, Renco further compromised DRP through a series of intercompany deals that benefitted Renco, including by burdening DRP with its own acquisition debt and other commitments and sending significant cash payments upstream from DRP to Renco and its U.S. subsidiaries.¹¹⁸⁹
608. DRP’s own documents are replete with warnings by DRP executives, auditors, financial experts, and banks alerting stakeholders that the business model was fundamentally flawed and threatened DRP’s ability to meet its obligations or even to remain a going concern.¹¹⁹⁰ As noted by financial and accounting expert, Ms. Kunsman, “[t]hroughout the Early Years and the Latter Years, DRP spent more on these Related Party Agreements than it had on its PAMA Projects.”¹¹⁹¹
609. In light of the foregoing, it is disingenuous for Claimant to blame DRP’s delays on an alleged “exponential increase in the cost of DRP’s PAMA.”¹¹⁹²

¹¹⁸⁷ See [Exhibit R-095](#), Acquisition Loan, p. 45, Clause 2.5(f); [Exhibit R-094](#), Securities and Exchange Commission Form S-4, The Doe Run Resources Corporation, 11 May 1998, p. 31; Kunsman Expert Report, ¶ IV.A.

¹¹⁸⁸ Kunsman Expert Report, ¶ 137.

¹¹⁸⁹ See, e.g., [Exhibit R-068](#), DRP Intercompany Note: Summary of Facts, undated, pp. 3–4; [Exhibit R-069](#), Indenture between DRRC and State Street Bank and Trust Company, 12 March 1998, p. 1, 15–16, 55–56; [Exhibit R-068](#), DRP Intercompany Note: Summary of Facts, undated, p. 6; [Exhibit R-070](#), Special Term Deposit Contract, 12 March 1998; [Exhibit R-071](#), Contract for a Loan in Foreign Currency, 12 March 1998; [Exhibit R-068](#), DRP Intercompany Note: Summary of Facts, undated, p. 7.

¹¹⁹⁰ Kunsman Expert Report, ¶ 77.

¹¹⁹¹ 2004 is the last year I see capital outlay for Related Party Agreements. I understand that the amounts of PAMA Commitments spend disclosed in DRP’s Audited Financial Statements may be different than amounts disclosed to the MEM or other environmental auditors.

¹¹⁹² Treaty Memorial, ¶ 205.

(iv) The 2008 financial crisis did not excuse DRP's failure to perform its obligations under Peruvian environmental law

610. Renco submits that the 2008 financial crisis constituted a *force majeure* event under both the STA and Peruvian environmental law.¹¹⁹³ Specifically, Claimant argues that the crisis caused metal prices to fall, forcing DRP to cease work on the sulfuric acid plant and causing the company to lose its financing for the project.¹¹⁹⁴

611. Claimant's *force majeure* argument fails for four reasons: (i) the *force majeure* clause in the STA does not apply to DRP's non-contractual obligations, including its obligations to complete the PAMA under Peruvian law; (ii) even if the *force majeure* clause in the STA did apply to DRP's non-contractual obligations (*quod non*), DRP could not in 2009 retrospectively invoke the *force majeure* clause from a contractual obligation that had expired and that had already been breached on 13 January 2007; (iii) the MEM's impugned conduct does not fall within the scope of DRP's right to *force majeure* treatment under the applicable regulation; and (iv) in any case, the 2008 financial crisis and its impact on DRP did not constitute a *force majeure* event.

(a) The *force majeure* clause in the STA does not apply to DRP's obligation to complete the PAMA under Peruvian law

612. First, Renco erroneously claims that the *force majeure* clause in the STA relieved it of its obligation to complete the Sulfuric Acid Plant Project under the PAMA, the 2006 Extension, and the 2009 Extension Law. That *force majeure* clause, however, applied only to DRP's obligations that it owed to Centromín (and later, Activos Mineros) under the STA, including its *contractual* obligation to complete the Sulfuric Acid Plant Project under Clause 4.1.¹¹⁹⁵ It did not—and could not—release DRP from its separate obligation to complete the project under Peruvian laws and regulations.

613. Peruvian civil law expert Dr. Enrique Varsi explains that contractual provisions—including *force majeure* clauses—govern only the private-law rights and obligations that

¹¹⁹³ Treaty Memorial, § 4.B(a)(iv).

¹¹⁹⁴ Treaty Memorial, ¶ 209.

¹¹⁹⁵ Varsi Expert Report, ¶ 6.8.

contracting parties owe each other.¹¹⁹⁶ Private contracts cannot modify the obligations that parties owe to the Peruvian State under its laws and regulations, such as DRP’s obligations to comply with the PAMA and ensuing extensions.¹¹⁹⁷ If contracting parties could relieve themselves of their obligations under Peruvian law, they would effectively be able usurp the Peruvian Congress’s legislative powers.¹¹⁹⁸

614. The language of the *force majeure* clause reflects the principle that the STA could establish or modify rights and obligations only between DRP, DRCL, and Activos Mineros. Clause 15 provides that

“neither of the *Contracting Parties* may demand from the other the fulfillment of the obligations assumed in this contract, when the fulfillment is delayed, hindered or obstructed by causes that arise that are not imputable to the obliged party and this obligation has not been foreseen at the time of the execution of this contract.”¹¹⁹⁹
(Emphasis added).

615. Two implications flow from the phrasing of Clause 15. First, the clause restricts its scope to demands made by “Contracting Parties” for “fulfillment of the obligations. . . .” Claimant, however, addresses its *force majeure* argument not at any demand made by Centromín or Activos Mineros, but rather at the MEM’s alleged failure to provide DRP an “effective extension” to complete the Sulfuric Acid Plant Project. The MEM is not, however, an STA Party.
616. Claimant argues that the MEM was bound under the STA’s *force majeure* clause because “Peru agreed in Clause 2.1 of the Peru Guaranty not only to perform the ‘obligations’ undertaken by Centromín in the STA, but also to honor Centromín’s ‘representations, securities [and] guaranties.’”¹²⁰⁰ Claimant provides no support for this argument, nor can it.

¹¹⁹⁶ Varsi Expert Report, ¶¶ 6.9–6.13, 6.15.

¹¹⁹⁷ Varsi Expert Report, ¶¶ 6.9–6.13.

¹¹⁹⁸ Varsi Expert Report, ¶ 6.13.

¹¹⁹⁹ [Exhibit R-001](#), STA & Renco Guaranty, Clause 15.

¹²⁰⁰ Treaty Memorial, ¶ 207.

617. As Dr. Enrique Varsi explains (and as Peru and Activos Mineros explain in **Section III** of their Contract Counter-Memorial), Peru is not a “Contracting Party” to the STA, and it did not directly assume the obligations thereunder.¹²⁰¹ Peru is therefore not bound by the *force majeure* clause found in Clause 15.¹²⁰² Dr. Varsi points out that under Claimant’s interpretation of the Peru Guaranty, every organ of the Peruvian State would be required to afford DRP *force majeure* treatment whenever the company’s obligations under Peruvian law happened to overlap with its obligations under the STA.¹²⁰³ Such an interpretation would be absurd.¹²⁰⁴
618. Second, the STA’s *force majeure* clause restricts its scope to “obligations assumed in the contract.”¹²⁰⁵ While the STA does include a contractual obligation to complete the PAMA, that obligation does not encompass DRP’s administrative obligation to complete the Sulfuric Acid Plant Project under the 2006 Extension. Indeed, the 2006 Extension expressly provided that it did not modify DRP’s contractual obligations with Centromín¹²⁰⁶ or constitute an extension of the PAMA.¹²⁰⁷ Therefore, the MEM’s impugned actions—which relate to DRP’s obligations under the 2006 Extension—do not fall within the scope of the STA’s *force majeure* clause.
- (b) Even if the *force majeure* clause in the STA did apply, DRP could not invoke the clause in 2009 for an STA obligation it already breached in 2007

¹²⁰¹ Varsi Expert Report, ¶¶ 6.15–6.17.

¹²⁰² Varsi Expert Report, ¶¶ 6.15–6.17.

¹²⁰³ Varsi Expert Report, ¶ 6.17.

¹²⁰⁴ Varsi Expert Report, ¶ 6.17.

¹²⁰⁵ **Exhibit R-001**, STA & Renco Guaranty, Clause 15.

¹²⁰⁶ Alegre Expert Report, § IV.D.iv; **Exhibit C-058**, Ministerial Resolution No. 257-2006-MEM/DM, 29 May 2006, Article 10 (“The Ministerial Resolution does not imply and amendment to any of the obligations or the terms stipulated in the agreement that DRP S.R.L. and its shareholders have entered into with Centromin Peru S.A. and with the Peruvian State, specifically those referred to Guarantees and Investment Promotion measures, whose non-compliance by the appellant within the terms agreed upon in said agreement will be subject to the juridical consequences stipulated in said instruments.”).

¹²⁰⁷ Alegre Expert Report, § IV.D.iv; **Exhibit C-059**, Report No. 118-2006-MEM-AAM/AA/RC/FV/AL/HS/PR/AV/FO/CC, 25 May 2006, p. 7 (“[t]he request for an exceptional extension refers to the performance of a specific environmental project, which does not mean an extension to the PAMA of the requesting party, which, for legal purposes, expires without fail on the date established for its termination.”).

619. The second reason that Claimant’s *force majeure* argument fails is that even if Clause 15 of the STA did bind the MEM (*quod non*), DRP could not in 2009 retrospectively invoke the force majeure clause from a contractual obligation that had expired and that had already been breached on 13 January 2007.¹²⁰⁸ Dr. Varsi explains that under Peruvian civil law, if a party is already in breach of a contract at the time of a *force majeure* event, the party cannot rely on that event to shield itself from responsibility for its breach.¹²⁰⁹ In the present case, DRP breached its contractual obligation to complete its PAMA obligations on 13 January 2007, well before the onset of the 2008 financial crisis, which DRP eventually got around to claiming as a force majeure event in 2009.¹²¹⁰
620. Dr. Varsi explains that the 2006 and 2009 extensions did not affect DRP’s contractual obligation to complete its PAMA projects by 13 January 2007.¹²¹¹ Under Article 62 of the Peruvian Constitution, administrative and legislative acts cannot modify contractual obligations—only contractual parties may subsequently modify their obligations.¹²¹² The extensions, however, were granted by the MEM and by the Peruvian Congress, neither of which are parties to the STA.¹²¹³ Claimant’s contention that the extensions modified an obligation DRP owed to Centromín directly contravenes the Peruvian Constitution.¹²¹⁴
621. Moreover, each extension expressly clarified that it did not constitute an extension of the PAMA Period or otherwise affect DRP’s contractual obligations towards Centromín and Activos Mineros.¹²¹⁵ The 2006 Extension provided that

“This Ministerial Resolution does not imply an amendment to any of the obligations or the terms stipulated in the agreements that DRP S.R.L and its shareholders have entered into with Centromín Peru S.A. and with the Peruvian State”¹²¹⁶

¹²⁰⁸ Varsi Expert Report, ¶¶ 6.18–6.23.

¹²⁰⁹ Varsi Expert Report, ¶ 6.18.

¹²¹⁰ Alegre Expert Report, ¶¶ 50–51, 57.

¹²¹¹ Varsi Expert Report, ¶ 6.20.

¹²¹² Varsi Expert Report, ¶ 6.21.

¹²¹³ Varsi Expert Report, ¶ 6.21.

¹²¹⁴ Varsi Expert Report, ¶ 6.21.

¹²¹⁵ Varsi Expert Report, ¶ 6.22.

¹²¹⁶ [Exhibit C-058](#), Ministerial Resolution No. 257-2006-MEM/DM, 29 May 2006, Art. 10.

622. The 2006 Extension also clarified that

“[t]he request for an exceptional extension refers to the performance of a specific environmental project, which does not mean an extension to the PAMA of the requesting party, which, for legal purposes, expires without fail on the date established for its termination. The period that is exceptionally extended only refers to the project that is the matter of the request, which does not affect the terms or conditions of compliance with the other obligations arising under the PAMA of the requesting entity.”¹²¹⁷

623. The 2009 Extension Regulation likewise clarified that the new framework did not affect DRP’s contractual obligations or constitute an extension of the PAMA Period:

“Pursuant to Section 62 of the Political Constitution, none of the provisions established in Law No. 29410 or this Executive Decree may be construed as an Extension to the PAMA or amendment of the terms, duties or responsibilities established in the Contracts executed between Doe Run Perú S.R.L. and/or its related companies with CENTROMÍN PERU S.A. and with the Government, which shall remain subject to the legal effects established in those instruments within the contractual terms originally agreed upon.”¹²¹⁸

624. The 2006 and 2009 extensions did not, and could not, affect DRP’s *contractual* obligation to complete the PAMA by 13 January 2007. Given that DRP breached its STA obligation to complete the PAMA in 2007, it could not later, in 2009, claim *force majeure*, based on events in 2008, to justify a breach that occurred in 2007.

625. Even if DRP could claim *force majeure* under the STA (*quod non*), Renco has not satisfied its burden of proving that DRP’s *force majeure* claim satisfied the elements of *force majeure* under Peruvian contract law. Article 1315 of the Peruvian Civil Code defines *force majeure* as “an extraordinary, unforeseeable and irresistible event that prevents the execution of an obligation or causes its partial, late or defective fulfillment.”¹²¹⁹ Under Article 1315, an event is (i) “extraordinary” when it “interrupts and ruptures the natural

¹²¹⁷ **Exhibit C-059**, Report No. 118-2006-MEM-AAM/AA/RC/FV/AL/HS/PR/AV/FO/CC, 25 May 2006, p. 7.

¹²¹⁸ **Exhibit C-078**, Supreme Decree No. 075-2009-EM, 29 October 2009, Final, Temporary and Supplementary Provisions, p. 6.

¹²¹⁹ **RLA-062**, Peruvian Civil Code, Art. 1984. *See also*, Varsi Expert Report, ¶ 4.4.

and normal course of events”;¹²²⁰ (ii) “unforeseeable” when the parties to the contract would not have foreseen the event at the time of contracting;¹²²¹; and (iii) “unavoidable” when a party could not have overcome the consequences of the event, despite demonstrating a willingness to sacrifice and employing its best efforts to do so.¹²²² Additionally, Article 1315 requires that that a *force majeure* event be “not imputable” to the obligor.¹²²³ In the same vein, the claimed *force majeure* event must be the sole and direct cause of the obligor’s default.¹²²⁴

626. Renco has not even identified the elements of *force majeure* under Peruvian contract law, let alone has it demonstrated that DRP’s *force majeure* claim would have satisfied them.¹²²⁵ In any case, Peru will explain below that the 2008 financial crisis and its impact on DRP did not constitute a *force majeure* event.
627. Moreover, assuming *arguendo* that Peru did breach an obligation to DRP under the STA’s *force majeure* clause, such a contractual breach does not amount to a violation of customary international law. As explained above, a State will only breach the minimum standard of treatment under customary international law insofar as it acts in its sovereign capacity.¹²²⁶ Conversely, a State does not breach the minimum standard of treatment where it acts as a mere contracting party, even if its actions amount of a violation of the contract to which it is a party.¹²²⁷ Renco’s argument, however, specifically identifies Peru’s wrongful act as a breach of Clause 2.1 of the Peru Guaranty. In other words, Renco asserts that Peru harmed

¹²²⁰ Varsi Expert Report, ¶¶ 4.11–4.13.

¹²²¹ Varsi Expert Report, ¶¶ 4.14–4.18.

¹²²² Varsi Expert Report, ¶¶ 4.18–4.20.

¹²²³ Varsi Expert Report, ¶¶ 4.6–4.10.

¹²²⁴ Varsi Expert Report, ¶ 6.28.

¹²²⁵ Varsi Expert Report, ¶ 6.29.

¹²²⁶ **RLA-178**, Articles on Responsibility of States for Internationally Wrongful Acts with Commentary, INTERNATIONAL LAW COMMISSION, 2001, Art. 4, ¶ 6 (“The breach by a State of a contract does not as such entail a breach of international law. Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party”).

¹²²⁷ **RLA-178**, Articles on Responsibility of States for Internationally Wrongful Acts with Commentary, INTERNATIONAL LAW COMMISSION, 2001, Art. 4, ¶ 6 (“The breach by a State of a contract does not as such entail a breach of international law. Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party”).

DRP in its capacity as a contractual party, which does not amount to a breach of customary international law.

- (c) The MEM's impugned conduct does not fall within the scope of DRP's right to *force majeure* treatment under the applicable regulation

628. The third reason Renco's *force majeure* argument fails is that the MEM's impugned conduct does not fall within the scope of DRP's right to *force majeure* treatment under the applicable regulation.
629. Renco submits that the MEM violated DRP's right to *force majeure* treatment under Peruvian regulations when it denied DRP's extension requests and later enacted the 2009 Extension Regulation. Renco bases this argument on Article 48 of Peru's Regulations for Environmental Protection in Mining and Metallurgy, which, according to Renco, "expressly provides that a company's non-compliance with its PAMA (including its failure to complete its PAMA by the end of its PAMA period) cannot result in any sanctions 'in cases of fortuitous circumstances or force majeure.'"¹²²⁸
630. While Renco misidentifies the relevant regulation, it is true that under Peruvian environmental law, DRP's failure to complete the Sulfuric Acid Plant Project could not result in any *sanctions* in the case of a *force majeure* event.¹²²⁹ More specifically, the 2004 Extension Regulation provided that *Osinergmin* and *OEFA* could not initiate the *sanction regimes* established in the 2006 Extension if DRP failed to complete the project due to a *force majeure* event.¹²³⁰ That regulatory *force majeure* provision, however, does not affect the MEM's authority to grant extensions, nor does it include the term "extraordinary economic alternation."¹²³¹

¹²²⁸ Treaty Memorial, ¶ 207.

¹²²⁹ **Exhibit R-029**, 2004 Extension Regulation, Art. 11 ("If a mining enterprise has applied for benefits under this Supreme Decree and, except in cases of fortuitous circumstances or *force majeure*, fails to perform the modified PAMA, the DGM shall proceed as follows . . .").

¹²³⁰ **Exhibit R-029**, 2004 Extension Regulation, Art. 11. While Article 11 of the 2004 Extension names the DGM as the supervising authority, *Osinergmin* and *OEFA* assumed that role in 2007 and 2009, respectively. *See* Expert Report of Ada Alegre, ¶ 26 (citing Law No. 28964 and Law No. 29325).

¹²³¹ **Exhibit R-029**, 2004 Extension Regulation, Art. 11.

631. Therefore, Claimant’s allegations against the MEM, even if true, fall outside the scope of the regulatory *force majeure* provision. Claimant seeks to impugn the MEM’s denial of its July 2009 extension request, as well as the MEM’s imposition of allegedly onerous conditions by means of the 2009 Extension Regulation.¹²³² Neither action falls within the scope of DRP’s *force majeure* rights under the 2004 Extension Regulation because they (i) are not attributable to Osinergmin or OEFA and (ii) do not seek to initiate the relevant sanctions regime (*viz.*, the gradual imposition of progressively higher fines, followed by closure of the plant in the event of a sustained default). Indeed, by July 2009, no government authority had attempted to sanction DRP for failure to meet the October 2009 deadline.

(d) The 2008 financial crisis and its impact on DRP did not constitute a *force majeure* event under the applicable Peruvian regulation

632. The fourth reason that Claimant’s *force majeure* argument fails is that the 2008 financial crisis and its impact on DRP did not constitute a *force majeure* event under the applicable regulation, in this case the 2004 Extension Regulation.

633. To the extent that Claimant seeks to impugn Osinergmin’s decision to sanction DRP in 2010,¹²³³ Claimant’s argument would still fail because DRP’s *force majeure* claim did not satisfy the pertinent requirements under Peruvian law. To recall, in 2010, Osinergmin sanctioned DRP for its failure to complete its obligations in connection with the Sulfuric Acid Plant Project.¹²³⁴ When DRP claimed that its failure was due to *force majeure* events resulting from the 2008 financial crisis, Osinergmin rejected that claim and provided the company with a detailed analysis supporting its decision.¹²³⁵

¹²³² Treaty Memorial, ¶¶ 206–209.

¹²³³ For the avoidance of doubt, Claimant has not made this argument in its Memorial, and Peru reserves its rights accordingly.

¹²³⁴ [Exhibit R-191](#), Resolution No. 008018, OSINERGMIN, 21 July 2010; [Exhibit R-268](#), File No. 001-10-EO, DRP, CMLO (Financial Plan), 2010; [Exhibit R-269](#), File No. 002-10-EO, DRP, CMLO (Financial Plan), 2010; [Exhibit R-270](#), File No. 002-2010-DFSAI/PAS, DRP (Financial Plan), 11 November 2010; [Exhibit R-271](#), File No. 008-10-EO, DRP, OSINERGMIN, 2010; [Exhibit R-271](#), File No. 009-10-EO, DRP, OSINERGMIN, 2010.

¹²³⁵ [Exhibit R-191](#), Resolution No. 008018, OSINERGMIN, 21 July 2010, pp. 10.

634. Specifically, DRP claimed that the 2008 financial crisis, the resulting drop in metals prices, and its inability to finance its operations each constituted a *force majeure* event that excused its default on its obligations related to the Sulfuric Acid Plant Project. This claim, however, failed to satisfy the elements of force majeure under Peruvian law, as set forth above.¹²³⁶
635. DRP’s claim that the 2008 financial crisis itself constituted a *force majeure* event failed as a matter of Peruvian law. Under Peruvian law, large-scale economic events such as national or international economic recessions, high inflation rates, and so on do not qualify as force majeure events.¹²³⁷ Otherwise, any legal subject would be free of all of its obligations for the duration of the economic event, which cannot be the case.¹²³⁸
636. DRP’s claim that the fall in metal prices constituted a *force majeure* event also failed. Specifically, the company failed to establish that the fall in metals prices was unforeseeable, given that metal prices consistently fluctuate in the global market.¹²³⁹ Before the 2008 crisis, metals prices had reached an all-time high, and the “steep decline in metals prices” cited by Claimant actually represented a correction in prices.¹²⁴⁰ Indeed, even after said decline, lead, copper, and zinc prices remained higher than they were when DRP acquired the Facility.¹²⁴¹ As Isabel Kunsman confirms in her expert report:

“[T]he period of time when Management believed that commodity prices were “good” was actually the start of a broader multi-year upward trend. To say that the fall in commodity prices between 2007 and 2008 was a “force majeure” event that catalyzed DRP’s downfall is to ignore (1) important broad-market trends in Metal

¹²³⁶ To recall, a *force majeure* claim must show that the event was “extraordinary” and “unforeseeable,” and that the resulting breach was “unavoidable” and not attributable to the obligor’s own actions or lack of effort. *See* Varsi Expert Report, ¶¶ 4.11–4.20.

¹²³⁷ [Exhibit R-191](#), Resolution No. 008018, OSINERGMIN, 21 July 2010, p. 5.

¹²³⁸ [Exhibit R-191](#), Resolution No. 008018, OSINERGMIN, 21 July 2010, p. 5.

¹²³⁹ Kunsman Expert Report, ¶¶ 162–165.

¹²⁴⁰ [Exhibit R-191](#), Resolution No. 008018, OSINERGMIN, 21 July 2010, p. 6; Kunsman Expert Report ¶¶ 155–165.

¹²⁴¹ *See* Partelpoeg Expert Report, p. 52, Figure 7-7.

Prices, and (2) Management’s own view of the state of Metal Prices while operating the Facility.”¹²⁴²

637. It therefore could not be said that the drop in metals prices was unforeseeable to DRP. To say that the fall in commodity prices between 2007 and 2008 was a “force majeure” event that catalyzed DRP’s downfall is to ignore “important broad-market trends in Metal Prices.”¹²⁴³
638. Additionally, DRP failed to show that the drop in metals prices constituted an “unavoidable cause” of its failure to build the Sulfuric Acid Plant.¹²⁴⁴ DRP itself assured the MEM in late-December 2008 and late-February 2009 that the fall in metals prices would not affect its ability to complete the Sulfuric Acid Plant Project.¹²⁴⁵ Moreover, metals prices recovered by the second trimester of 2009,¹²⁴⁶ but DRP sought to delay construction of the Sulfuric Acid Plant Project by an additional thirty months.¹²⁴⁷ Furthermore, DRP’s auditor’s opinions signaled a financial crisis at DRP years before metals prices declined. For the years 1997 to 2009 DRP’s auditors issued multiple “Unqualified with going concern” opinions, which, as explained by Ms. Kunsman, signifies the auditors’ “concern about DRP’s liquidity and ability to continue meeting its financial obligations.”¹²⁴⁸ The auditor’s opinions are significant because “companies with significant going concern issues tend to never recover [from metals markets price volatility] because their underlying financial position is too burdensome to overcome.”¹²⁴⁹
639. DRP’s high leverage made it more susceptible to the effects of adverse market conditions. As Ms. Kunsman explains:

¹²⁴² Kunsman Expert Report, ¶ 164.

¹²⁴³ Kunsman Expert Report, ¶ 164.

¹²⁴⁴ [Exhibit R-191](#), Resolution No. 008018, OSINERGMIN, 21 July 2010, p. 6; Varsi Expert Report, ¶¶ 6.35–6.36.

¹²⁴⁵ [Exhibit R-192](#), Letter No. VPAA-268-08 from DRP (J. Mogrovejo Castillo) to MEM (A. Rodriguez Muñoz), 24 December 2008; [Exhibit R-190](#), Letter No. VPAA-054-09 from DRP (J. Mogrovejo Castillo) to OSINERGMIN (E. Quintanilla Acosta), 24 February 2009. *See also*, [Exhibit R-191](#), Resolution No. 008018, OSINERGMIN, 21 July 2010, pp. 6–7.

¹²⁴⁶ [Exhibit R-191](#), Resolution No. 008018, OSINERGMIN, 21 July 2010, p. 6.

¹²⁴⁷ [Exhibit R-191](#), Resolution No. 008018, OSINERGMIN, 21 July 2010, p. 6.

¹²⁴⁸ Kunsman Expert Report, ¶ 105.

¹²⁴⁹ Kunsman Expert Report, ¶ 111.

“Leverage describes the relative amount of fixed costs in a firm’s overall cost structure. Leverage creates risk because those fixed costs must be covered regardless of the level of sales.

Financial leverage arises from high use of debt in the firm’s financing structure. In other words, a high debt load will burden a firm’s cash flow regardless of the level of sales. If sales fall, interest and principal on debt must still be paid, thus burdening a firm’s financial position. Because of this, firms with a high level of financial leverage are negatively affected by market fluctuations that affect their revenue streams.”¹²⁵⁰

640. DRP’s financial statements demonstrate that DRP’s Earnings Before Interest and Taxes were not enough even to cover the interest expense on its high debt load, most of which was tied to inter-company agreements with Renco affiliated entities.¹²⁵¹ Further, DRP’s financial leverage in 2001 and 2004 was more than three times the financial leverage for comparable companies.¹²⁵² It is therefore disingenuous for Renco to claim that the drop in metals prices was the cause of DRP’s delays.
641. DRP also failed to prove that its inability to secure financing constituted a *force majeure* event. DRP failed to demonstrate that the Banking Syndicate’s refusal to renew its USD 75 million revolving line of credit was due to the financial crisis.¹²⁵³ Claimant alleges that the Banking Syndicate was “reeling from the financial crisis” and was “unwilling to provide financing, because of . . . the Peruvian Government’s negative campaign against DRP in the media.”¹²⁵⁴ Claimant provides no support for that assertion, nor does it identify any document in which the lender cited the financial crisis or the government’s actions as a reason for denying DRP’s credit renewal request. According to the only relevant document that Claimant cites, the Banking Syndicate’s concerns about DRP’s liquidity:

¹²⁵⁰ Kunsman Expert Report, ¶¶ 85–86.

¹²⁵¹ Kunsman Expert Report, ¶ 87 (Referencing DRP’s financial statements of the following years: 2000, 2002-2003, and 2009-2011).

¹²⁵² Kunsman Expert Report, ¶ 88.

¹²⁵³ **Exhibit R-191**, Resolution No. 008018, OSINERGMIN, 21 July 2010, pp. 7–8.

¹²⁵⁴ Treaty Memorial, ¶ 97. Claimant cites two articles that describe statements by Peruvian officials expressing that DRP would not receive an extension. Those statements, however, were made *after* the Banking Syndicate had denied DRP’s revolving credit line. See **Exhibit C-143**, Doe Run Won’t Get Government Bailout, Minister Says, BLOOMBERG BUSINESS NEWS, Alex Emery & Heather Walsh, 28 April 2009; **Exhibit C-144**, The Multisectoral Commission Will Supervise the PAMA’s Progress, EL COMERCIO, 26 September 2009.

“the financial information that you have provided to us indicates significantly reduced company free cash flow generation in the wake of looming compliance-related socio-environmental capital expenditures which, if not addressed in a timely manner could, threaten the company's economic viability.”¹²⁵⁵

There is no mention in the Banking Syndicate’s letter of the financial crisis or the Peruvian government’s alleged negative media campaign against DRP.

642. Additionally, the Banking Syndicate offered to renew DRP’s credit line if (i) the company provided evidence of sufficient liquidity and/or capital to finance its operations and complete the Sulfuric Acid Plant Project by the October 2009 deadline; or (ii) Peru extended the PAMA deadline.¹²⁵⁶ Claimant neglects to mention this first option, undoubtedly because it is fatal to DRP’s *force majeure* claim.
643. The fact that the Banking Syndicate would have renewed DRP’s line of credit had the company possessed sufficient capital to complete the plant demonstrates that DRP’s failure to build the plant was not an “unavoidable” consequence of the 2008 financial crisis. Given that metal prices were extraordinarily high in 2006-2008, DRP could have channeled its extra revenues into the trust account established under the 2006 Extension.¹²⁵⁷ To recall, the MEM required DRP to establish this trust account and contribute enough funds to finance 100% of its outstanding environmental obligations.¹²⁵⁸ The MEM created the 2006 Trust Account because DRP had failed to finance its PAMA obligations within the PAMA deadline.¹²⁵⁹ DRP, however, yet again ran out of funding to finish the Sulfuric Acid Plant Project. Had DRP complied with its obligation under the 2006 extension to contribute enough funds to cover 100% of its remaining obligations, it would have been able to satisfy

¹²⁵⁵ **Exhibit C-099**, Letter from BNP Paribas (J. Stufsky *et al.*) to DRP (C. Ward *et al.*), 13 February 2009, p. 2 (“The availability of our Facility now depends also on the availability of liquidity, debt and / or equity for, and compliance with, the PAMA because the financial information that you have provided to us indicates significantly reduced company free cash flow generation in the wake of looming compliance-related socio-environmental capital expenditures which, if not addressed in a timely manner could, threaten the company's economic viability. This creates significant credit concerns for us.”)

¹²⁵⁶ **Exhibit C-099**, Letter from BNP Paribas (J. Stufsky *et al.*) to DRP (C. Ward *et al.*), 13 February 2009, p. 1.

¹²⁵⁷ **Exhibit R-191**, Resolution No. 008018, OSINERGMIN, 21 July 2010, p. 6.

¹²⁵⁸ **Exhibit C-099**, Ministerial Resolution No. 257-2006-MEM/DM, Art. 2.

¹²⁵⁹ Alegre Expert Report, § IV. G.

the Banking Syndicate’s condition that the company possess sufficient liquidity and/or capital to finance its operations and environmental obligations.

644. Moreover, DRP did not show that it made a good faith effort to secure other forms of financing. As Peru explained in **Section II.C.3**, after the Banking Syndicate denied the line of credit, DRP’s suppliers offered it a USD 100 million line of credit and an additional bank-backed loan of \$75 million.¹²⁶⁰ In exchange, the suppliers required that DRP capitalize the USD 156 million in debt it owed to DRCL.¹²⁶¹ DRP refused to agree to these terms because, as Renco contends, if DRP were to enter bankruptcy, “its main shareholder, DRCL, would not have any voting rights in the bankruptcy proceedings because it would have given up its right to claim as a creditor of DRP. DRCL would thus lose its ability to appoint DRP’s management, and ultimately it would lose its entire investment in the company.”¹²⁶² Renco and its affiliates were unwilling to sacrifice the upstream cash flows they had extracted from DRP for over a decade. Nevertheless, under Peruvian law, an obligor claiming *force majeure* must use its best efforts and make any sacrifices necessary to avoid defaulting on its obligations.¹²⁶³ DRP did not do so.
645. Despite the meritless nature of Renco’s *force majeure* claim, Renco argues that “the MEM’s explanation for its rejection of DRP’s request squarely conflicted with its decision to grant a PAMA extension to Centromín in 2000, which it did without even suggesting that additional legal authority was needed.”¹²⁶⁴ Claimant’s argument badly misunderstands the applicable legal framework under Peruvian environmental law. The MEM did not “grant a PAMA extension to Centromín in 2000;” it transferred one of Centromín’s PAMA projects to its “Closing Plan.”¹²⁶⁵ Such a transfer was permitted by the applicable regulation in place in the year 2000.¹²⁶⁶ In contrast, the Sulfuric Acid Plant Project was

¹²⁶⁰ See **Exhibit R-098**, DRP saved by counterparts, EL COMERCIO, 3 April 2009.

¹²⁶¹ See **Exhibit R-098**, DRP saved by counterparts, EL COMERCIO, 3 April 2009.

¹²⁶² Treaty Memorial, ¶ 105.

¹²⁶³ Varsi Expert Report, ¶ 6.35.

¹²⁶⁴ Treaty Memorial, ¶ 112.

¹²⁶⁵ Alegre Expert Report, ¶¶ 109–111.

¹²⁶⁶ Alegre Expert Report, ¶¶ 109–111.

governed by the 2004 Extension Regulation, which expressly forbade the MEM from issuing an additional extension.¹²⁶⁷ The two scenarios are not comparable.

646. Finally, DRP's *force majeure* claim failed because it was unable to prove that DRP would have met the October 2009 extension deadline but-for the alleged *force majeure* events. As Dr. Varsi explains, an obligor can only claim *force majeure* if it can demonstrate that it would have been able to fulfil its obligations but-for the *force majeure* event — and DRP is incapable of proving this but-for case. The 2008 financial crisis began one year before the October 2009 deadline, and DRP lost its credit facility just over six months before that deadline. And yet, DRP requested an additional thirty months to complete the project.¹²⁶⁸ Aside from the fact that DRP made multiple assurances after the inception of the 2008 financial crisis that it would finish the Sulfuric Acid Plant Project before the October 2009 deadline, the math does not add up. Moreover, the Technical Commission found that independent of financing issues, from a purely technical perspective, DRP required a minimum of 20 months to complete construction of the plant.¹²⁶⁹ Even Claimant's own expert admits that "[i]n [his] opinion there was a risk, that even absent force majeure problems, some of the final construction tasks would be pushed into early 2010."¹²⁷⁰ Claimant therefore cannot credibly argue that DRP's failure to meet the 2009 deadline was due to *force majeure* circumstances.
647. The foregoing demonstrates that Osinergmin's decision to deny DRP's *force majeure* claim was not arbitrary under customary international law. Much to the contrary, Dr. Varsi concludes that it was perfectly consistent with Peruvian principles of force majeure.¹²⁷¹
648. Nonetheless, even assuming that Osinergmin's decision lacked a legally sound basis (*quod non*), it would not cross the high threshold under customary international law for finding a violation of the prohibition on arbitrary treatment. As Peru explained above, "[a]rbitrariness is not so much something opposed to a rule of law, as something opposed

¹²⁶⁷ Exhibit R-029, 2004 Extension Regulation, Art. 1.

¹²⁶⁸ Exhibit C-055, 2009 DRP Request for Extension.

¹²⁶⁹ Exhibit C-043, 2009 Technical Commission Report.

¹²⁷⁰ Partelpoeg Expert Report, p. 51, note 6.

¹²⁷¹ Varsi Expert Report, ¶¶ 6.25, 6.47–6.48.

to the rule of law. . . . It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.”¹²⁷²

649. Nothing about Osinergmin’s decision to deny DRP’s *force majeure* claim comports with this high standard. Contrary to Claimant’s baseless allegation that “Peru ignored, without refuting, DRP’s entitlement to an extension . . . under the doctrine of *force majeure*,” Osinergmin conducted a rigorous analysis of DRP’s *force majeure* claim and articulated its reasons for denying said claim.¹²⁷³

(v) The MEM’s actions in March and April 2009 were consistent with DRP’s rights under Peruvian law

650. Renco contends that the MEM “sought to extract concessions from DRP as conditions to granting the PAMA extension to which DRP was clearly entitled under the economic force majeure clause in the Stock Transfer Agreement.”¹²⁷⁴ Claimant rests this contention on a series of unsupported assertions that have no basis in fact.

651. First, Renco asserts that “Peru never disputed that the 2008 world financial crisis constituted an event of economic force majeure under the Stock Transfer Agreement . . . [but] adopted an aggressive and confrontational stance by both refusing to grant DRP’s extension requests and seeking to extract concessions from DRP before it would agree to the extension to which DRP was entitled.”¹²⁷⁵ As an initial matter, Renco’s claim that Peru never disputed DRP’s argument that the 2008 financial crisis constituted a *force majeure* event is false. Osinergmin’s 2010 reasoned decision *rejecting* DRP’s *force majeure* claim evidences this fact. With regard to Renco’s assertion concerning the supposed extraction of concessions, Renco neglects to mention that while the “concessions” it criticizes were proposed in March 2009, DRP did not even claim that the 2008 crisis was a *force majeure* event until July 2009.¹²⁷⁶ Therefore, even if DRP had a right to *force majeure* treatment (which it did not), the MEM’s actions that allegedly amounted to extracting concessions would not have violated that right.

¹²⁷² RLA-096, *Case Concerning Elettronica Sicula S.p.A. (ELSI)*, CIJ, Judgement, 20 July 1989, ¶ 128.

¹²⁷³ See Exhibit R-191, Resolution No. 008018, OSINERGMIN, 21 July 2010, pp. 2–9.

¹²⁷⁴ Treaty Memorial, § 4.A.2(a) (vii).

¹²⁷⁵ Treaty Memorial, ¶ 210.

¹²⁷⁶ Exhibit C-055, 2009 DRP Extension Request, pp. 91–96.

652. Second, Renco alleges that on 5 March 2009, “DRP advised the MEM that it needed an extension as concentrate suppliers were going to freeze shipments and the banks required that DRP obtain a formal extension. The MEM refused.” In reality, DRP asked the MEM if it would be possible under the regulatory framework to request another extension to complete the Sulfuric Acid Plant Project,¹²⁷⁷ and the MEM responded — in accordance with the law — in the negative.¹²⁷⁸
653. Third, Renco asserts that the MEM “sought a number of concessions from DRP. For example, in late March 2009, the Government and DRP negotiated an MOU (which the Government never signed), but which required that DRP capitalize its Intercompany Note and that DRCL pledge all of its shares in DRP.”¹²⁷⁹ Renco also claims that Peru’s supposed “demands for concessions caused great damage to DRP’s business and prohibited it from obtaining a new revolving loan or making payment to its suppliers.”¹²⁸⁰ As Peru explained in **Section II.C.3**, the government never agreed to sign the Draft MOU presented by DRP,¹²⁸¹ and Claimant has not produced any evidence to the contrary. Peru also explained that the requested “concessions” that (i) DRP capitalize its debt to DRCL and (ii) DRCL pledge all of its shares in DRP were actually conditions requested by DRP’s suppliers, not the MEM.¹²⁸² These conditions would have made DRP a more palatable debtor to prospective creditors by stripping DRCL of its status as DRP’s preferred creditor. In securing these concessions, the MEM brokered a deal between the suppliers and DRP that provided the company with a viable financing alternative.¹²⁸³ DRP refused the suppliers’ offer of credit, demanding a year-long extension from the MEM.¹²⁸⁴

¹²⁷⁷ **Exhibit C-007**, Letter from DRP (J. Carlos Huyhua) to MEM (P. Sanchez), 5 March 2009, p. 2.

¹²⁷⁸ **Exhibit C-006**, Letter MEM (J.F.G. Isasi Cayo) to Doe Run Peru (J.C. Huyhua), 10 March 2009; Isasi Witness Statement, ¶ 50; Alegre Expert Report, ¶¶ 73, 74.

¹²⁷⁹ Treaty Memorial, ¶ 211.

¹²⁸⁰ Treaty Memorial, ¶ 213

¹²⁸¹ Isasi Witness Statement, ¶ 51.

¹²⁸² See **Exhibit R-098**, DRP saved by counterparts, EL COMERCIO, 3 April 2009.

¹²⁸³ See **Exhibit R-098**, DRP saved by counterparts, EL COMERCIO, 3 April 2009.

¹²⁸⁴ **Exhibit C-145**, DRP Shareholders’ Meeting Minutes, 7 April 2009, PDF p. 4.

(vi) The MEM did not violate Peruvian law by imposing the trust account requirement

654. Renco argues that “by imposing the Trust Account requirement *inter alia*, the MEM violated Peruvian law.”¹²⁸⁵ Renco bases this argument solely on the premise that the trust account requirement undermined the 2009 Extension Law, which, according to Renco, violates the Peruvian Constitution. However, Renco has altogether failed to support its factual claim that the trust account requirement undermined the 2009 Extension Law. Claimant asserts that “[n]o bank would loan money to DRP without taking a security interest in its assets, but DRP could not pledge any of its revenues as collateral, because the decree required that all of its revenues be channeled into the trust account.”¹²⁸⁶ Renco does not produce a single document to support this claim. Renco also does not explain why it did not offer its own capital as collateral in order to provide a security interest for any credit extended to DRP.
655. Claimant asserts that “the Peruvian Government itself later recognized that the trust account requirement imposed by the MEM improperly nullified DRP’s rights, and reduced the trust requirement to 20% of DRP’s revenues (not 100%).”¹²⁸⁷ Claimant again distorts the record. Claimant does not cite a single instance in which the MEM or any other representative of the Peruvian Government “recognized that the trust account requirement imposed by the MEM improperly nullified DRP’s rights.” On the contrary, the MEM simply loosened the trust account requirement to facilitate DRP’s financing efforts. Claimant additionally submits that by the time the MEM did so, there “was not nearly enough [time] to obtain the USD 187 million needed.”¹²⁸⁸ Claimant again fails to cite a single document to support this statement. Furthermore, Renco omits that DRP had previously reached a financing deal in a shorter period of time. Namely, in April 2009, DRP received—but rejected—a suitable financing offer from its suppliers less than one month after notifying the MEM that the Banking Syndicate had imposed new conditions

¹²⁸⁵ Treaty Memorial, § 4.A.2(a) (vi).

¹²⁸⁶ Treaty Memorial, ¶ 114.

¹²⁸⁷ Treaty Memorial, ¶ 216.

¹²⁸⁸ Treaty Memorial, ¶ 216.

on its credit facility. Moreover, that deal had been struck at the height of the financial crisis, whereas by June 2010, metals prices had largely recovered.¹²⁸⁹ Claimant does not explain how it would have been more difficult for DRP to obtain financing in a healthy metals market.

656. Claimant asserts that the trust account requirement violated the constitutional principle of “legal hierarchy,” according to which a regulation may not undermine the law it seeks to implement.¹²⁹⁰ Claimant, however, fails to articulate any standard under which the Tribunal could assess whether the trust account requirement “undermined” the 2009 Extension Law, nor does it provide any examples of cases in which the Peruvian judiciary has found that a regulation undermined a piece of legislation. Rather, without providing any factual context, Claimant cites a single sentence of *dicta* from a case in which the Peruvian Constitutional Tribunal stated, “[I]n order for a higher ranking instrument to achieve its purpose, it is crucial that it cannot be distorted by the lower-ranking instrument that regulates it.”¹²⁹¹
657. It is worth noting that neither Claimant nor DRP ever challenged the constitutionality of the trust account requirement before the Peruvian judiciary. Instead, as Claimant itself admits, “DRP did what it could to obtain passage of another law.”¹²⁹² That is to say, DRP lobbied the same Congress¹²⁹³ to reverse the 2009 Extension Regulation. Nevertheless, the Congress refused to do so.¹²⁹⁴ The Peruvian Congress’ refusal constitutes *prima facie* evidence that the 2009 Extension Regulation and the trust account requirement did not undermine the 2009 Extension Law.

¹²⁸⁹ Kunsman Expert Report, § VI.D.

¹²⁹⁰ Treaty Memorial, ¶ 215.

¹²⁹¹ Treaty Memorial, ¶ 215.

¹²⁹² Treaty Memorial, ¶ 118.

¹²⁹³ Peru’s legislature is elected to five-year terms, and Congress did not see a change in composition during the relevant timeframe.

¹²⁹⁴ Claimant asserts that the MEM “thwarted” its efforts to lobby Congress, but it provides no support for that assertion. Treaty Memorial, ¶ 118.

658. Indeed, as Peru explained in **Section II.C.3**, the Peruvian Congress directed the MEM to issue a Supreme Decree to regulate the 2009 Extension Law.¹²⁹⁵ The 2009 Extension Law’s legislative history demonstrates that the Peruvian Congress was deeply skeptical of DRP’s willingness to finance its obligations, and several Congress members expressly called for the imposition of a trust account requirement.¹²⁹⁶ The Congress’ actions thus constitute further evidence that the 2009 Extension Regulation did not undermine its intentions.

659. In any case, as Peru explained above, a host State’s breach of domestic law does not necessarily violate the minimum standard of treatment.¹²⁹⁷ Rather, “something more than simple illegality or lack of authority under the domestic law of a state is necessary to render an act or measure inconsistent with the customary international law requirements. . . .”¹²⁹⁸ Thus, even if the 2009 Extension Regulation were unconstitutional (*quod non*), that fact alone would not mean that the regulation constituted a violation of the minimum standard of treatment.

(vii) Peru did not treat DRP unfairly in connection with the asset guarantees required under the 2009 Extension Law

660. Renco contends that Peru treated it unfairly in the course of negotiations over the 2009 Guarantee Letter meant to ensure that if DRP did not complete the sulfuric acid plant, the

¹²⁹⁵ **Exhibit C-077**, Law No. 29410, 26 September 2009 (“**2009 Extension Law**”).

¹²⁹⁶ **Exhibit R-240**, Congressional Transcript, First Ordinary Legislature of 2009, Energy and Mines Commission, 23 September 2009, pp. 26, 27; **Exhibit R-239**, Congressional Transcript, First Ordinary Legislature of 2009, 9th B Session, 24 September 2009, pp. 15, 18.

¹²⁹⁷ **CLA-048**, *ADF* (Award), ¶ 190 (“[E]ven if the U.S. measures were somehow shown or admitted to be *ultra vires* under the internal laws of the United States, that by itself does not necessarily render the measures grossly unfair or inequitable under the customary international law standard of treatment. . . . [T]he Tribunal has no authority to review the legal validity and standing of U.S. measures here in question under *U.S. internal administrative law*. We do not sit as a court with appellate jurisdiction with respect to the U.S. measures. (citation omitted) Our jurisdiction is confined by NAFTA Article 1131(1) to assaying the consistency of the U.S. measures with relevant provisions of NAFTA Chapter 11 and applicable rules of international law.”) (emphasis in original); *International Thunderbird Award* ¶ 160 (“[I]t is not up to the Tribunal to determine how [the state regulatory authority] should have interpreted or responded to the [proposed business operation], as by doing so, the Tribunal would interfere with issues of purely domestic law and the manner in which governments should resolve administrative matters (which may vary from country to country).”); **RLA-166**, *Latam Hydro v. Peru*, Non-Disputing Party Submission of the United States of America, ¶ 24.

¹²⁹⁸ **CLA-048**, *ADF* (Award), ¶ 190.

MEM would be able to recover the value of the cost of the project from DRP.¹²⁹⁹ Specifically, Renco complains that the MEM sought to structure the 2009 Guarantee Letter such that it could be executed in the event that DRP failed to satisfy the requirement that it secure financing for the project within ten months. DRP, on the other hand, insisted that the MEM not execute the Guarantee Letter until the expiry of the 30-month extension provided under the Extension Law, even in the event that DRP failed to meet the 10-month deadline to secure financing.¹³⁰⁰

661. DRP's position was irrational; under the 2009 Extension Law, the company could not proceed with its PAMA project if it failed to secure financing within ten months.¹³⁰¹ In other words, such a failure would constitute a final breach. It therefore made sense that the MEM sought the ability to execute the Guarantee Letter in the event that DRP failed to secure financing within ten months. Had the MEM adopted DRP's position, it would have been forced to wait an additional 20 months to execute the Guarantee Letter for no reason whatsoever, even further delaying urgently needed actions to protect the environment and public health of La Oroya. DRP ultimately refused to issue the Guarantee Letter required under the 2009 Extension Law and its accompanying Regulation.
662. Given that Renco does not criticize the 2009 Extension Law, it is puzzling that it attempts to impugn the MEM's actions in connection with the 2009 Guarantee Letter, which were consistent with that law's terms.
663. Renco also incorrectly alleges that the MEM's actions were inconsistent with the terms of the 2009 Extension Regulation. Renco points to Section 5.2 of the 2009 Extension Regulation, which provides that the "guarantees shall remain in full force and effect until full and thorough discharge of the duties of Doe Run Perú S.R.L. with regard to Project construction and startup and until the issuance of the relevant consent by the mining authority."¹³⁰² Claimant argues that under Section 5.2, the 2009 Guarantee Letter should

¹²⁹⁹ Treaty Memorial, § 4.A.2(a) (vii).

¹³⁰⁰ [Exhibit C-080](#), Draft Real and Personal Property Security Agreement, p. 3.

¹³⁰¹ [Exhibit C-077](#), 2009 Extension Law, Art. 2.

¹³⁰² [Exhibit C-078](#), 2009 Extension Regulation, Section 5.2.

have remained in force until the end of the full 30-month extension period.¹³⁰³ Nonetheless, Section 5.2's requirement that the guarantees remain in force is directly linked to DRP's ability to discharge its duties related to construction and startup."¹³⁰⁴ If DRP were to fail to obtain financing within ten months, it could not have discharged those duties.¹³⁰⁵ The MEM's position was therefore consistent with Section 5.2 of the 2009 Extension Regulation and was not "the essence of grossly unfair and inequitable conduct," as Renco submits.¹³⁰⁶

(viii) Peru did not treat DRP unfairly in refusing to approve DRP's restructuring plans

664. Claimant contends that the MEM "continued its unfair treatment of DRP by opposing DRP's restructuring plan" in the context of DRP's bankruptcy proceeding.¹³⁰⁷ This claim does not have a legal basis and is premised on gross omissions of the record.
665. First, the decision to remove DRP's management and not accept DRP's restructuring plan is not attributable to the State. All decisions in DRP's bankruptcy proceeding were made by the Board of Creditors, not by Peru, and were made after a fair voting procedure in accordance with the Bankruptcy Law.¹³⁰⁸ The Board of Creditors is not Peru. Indeed, DRP's restructuring plan was rejected because many creditors found it unviable and problematic.¹³⁰⁹
666. For example, Cormin – a third party who was DRP's biggest supplier – was not persuaded by DRP's restructuring plan, noting that DRP's conditions for financing the project amounted to "blackmail" (in Spanish *chantaje*), and were utterly unacceptable.¹³¹⁰ The company, Apoyo – the third party the Board of Creditors appointed as DRP's environmental supervising entity – expressed similar reservations about DRP's

¹³⁰³ Treaty Memorial, ¶ 220.

¹³⁰⁴ [Exhibit C-078](#), 2009 Extension Regulation, Section 5.2.

¹³⁰⁵ [Exhibit C-077](#), 2009 Extension Law, Art. 2.

¹³⁰⁶ Treaty Memorial, ¶ 220.

¹³⁰⁷ Treaty Memorial, ¶ 222.

¹³⁰⁸ Hundskopf Expert Report, ¶ 32.

¹³⁰⁹ [Exhibit C-231](#), DRP Creditors' Meeting Minutes, 9 and 12 April 2012, pp. 4, 11.

¹³¹⁰ [Exhibit C-231](#), DRP Creditors' Meeting Minutes, 9 and 12 April 2012, p. 4.

restructuring plan. Apoyo noted that DRP's restructuring plan would result in SO₂ and lead emissions beyond the acceptable standards under Peruvian law, and as a result, there would not be a way to implement the plan.¹³¹¹

667. As explained by Mr. Shinno, DRP's liquidation process has run like a typical liquidation for a company in bankruptcy in Peru, with the recognized creditors voicing their positions and voting on the direction and future of the company in bankruptcy.¹³¹² As a result, Claimant's allegations spring from a flawed factual premise, and for those reasons, Claimant's FET claim must fail.
668. Second, Claimant omits that the MEM went to great lengths to help DRP elaborate a viable restructuring plan, but DRP neglected the MEM's suggestions and requests (as well as many other creditors' requests). Indeed, DRP's restructuring plan was based on proposed financing that was conditioned on unreasonable demands and operations that would violate applicable environmental standards, a plan that was rejected by the majority of the Board of Creditors, not just the MEM.
669. In summary, on 30 March 2012, DRP sent a restructuring plan to the Board of Creditors that was wholly unviable. The plan did not address various issues facing the Facility, and did not incorporate concerns and observations made by the creditors.¹³¹³ The MEM's representative highlighted the many issues of concern with the plan in the Board of Creditors meeting of 9 April 2012.¹³¹⁴ Notwithstanding the various flaws in DRP's restructuring plan, at the 9 April 2012 meeting, the MEM made clear that it supported the

¹³¹¹ **Exhibit C-231**, DRP Creditors' Meeting Minutes, 9 and 12 April 2012, p. 13 (In Spanish original: "*En resumen, el Plan de Reestructuración propuesto por Doe Run Perú S.R.L. implicaría emisiones de SO₂ y Plomo por encima de los estándares establecidos en la Resolución Ministerial N° 257-2006-MEM/DM durante el período de ejecución del proyecto de la planta de ácido sulfúrico de cobre*") (English translation: "In summary, the Restructuring Plan proposed by Doe Run Perú S.R.L. would imply emissions of SO₂ and Lead above the standards established in Ministerial Resolution No. 257-2006-MEM/DM during the execution period of the copper sulfuric acid plant Project").

¹³¹² See Shinno Witness Statement, § VI.

¹³¹³ **Exhibit C-231**, DRP Creditors' Meeting Minutes, 9 and 12 April 2012, pp. 3–4.

¹³¹⁴ **Exhibit C-231**, DRP Creditors' Meeting Minutes, 9 and 12 April 2012, pp. 3–4 (The MEM noted among other things, that (i) DRP's plan proposed that operations be permitted without having to comply with the applicable environmental regulation limits; and (ii) DRP's condition for financing the project required the Peruvian State to assume, without limitation, responsibility for third-party claims relating to damages caused by environmental contamination.).

restructuring of DRP, which would allow a restart of operations at the Facility that respected the environmental standards of Peru and that did not include unviable conditions.¹³¹⁵ As explained above, other creditors also took issue with DRP's restructuring plan.¹³¹⁶ As a result, in the Board of Creditors meeting of 12 April 2012, the majority of the Board of Creditors voted against the restructuring plan. In this meeting, the MEM reiterated its support for the restructuring of DRP, but emphasized that such support was premised on a plan that satisfied the environmental laws of Peru.¹³¹⁷

670. On 14 May 2012, DRP submitted an “amended” restructuring plan that ostensibly removed the items that troubled the Board of Creditors.¹³¹⁸ The MEM responded, outlining the many remaining issues with DRP's restructuring plan, but continuing to express its support for a viable restructuring plan.¹³¹⁹ Further to the MEM's commitment to support DRP with restructuring efforts, the MEM and DRP held a meeting on 12 July 2012, where the MEM afforded DRP the opportunity to present its revised restructuring plan.¹³²⁰ However, as noted in a letter from the MEM to Renco the day after the meeting, DRP's “amended” restructuring plan *continued to not* address the various issues that made it unviable, including a plan that was not in accordance with the environmental laws of Peru, and whose financing was not guaranteed.¹³²¹ For the avoidance of doubt, and to assist DRP and

¹³¹⁵ **Exhibit C-231**, DRP Creditors' Meeting Minutes, 9 and 12 April 2012, p. 3.

¹³¹⁶ **Exhibit C-231**, DRP Creditors' Meeting Minutes, 9 and 12 April 2012, p. 4 (Spanish original: “*Con relación al condicionamiento de la vigencia del Plan, del financiamiento y de las condiciones a que no se produzca ningún cambio en la administración de la empresa y que no exista ninguna injerencia por parte de los acreedores en la gestión y administración de la empresa constituye un chantaje que es inadmisibles e inaceptable que significaría una renuncia del derecho y la facultad de los acreedores de controlar y supervisar a la administración de la empresa deudora*”) (Emphasis added).

¹³¹⁷ **Exhibit C-231**, DRP Creditors' Meeting Minutes, 9 and 12 April 2012, p. 14.

¹³¹⁸ See e.g., Treaty Memorial, ¶ 144; **Exhibit R-113**, Letter from DRP, S.R.L. (J.C. Huyhua M.) to MEM (J. Merino Tafur), 14 May 2012 *attaching* DRP, S.R.L. Restructuring Plan, 14 May 2012.

¹³¹⁹ **Exhibit R-111**, Letter from MEM (R. Patiño) to Renco Group, Inc. (I. Leon Rennert), 26 June 2012, pp. 1–3 and p. 3 (Spanish original: “*El Ministerio se mantiene abierto a seguir dialogando sobre estos y otros temas relacionados.*”).

¹³²⁰ **Exhibit R-116**, Letter from MEM (R. Patiño) to Renco Group (D. Sadlowski), 13 July 2012.

¹³²¹ **Exhibit R-116**, Letter from MEM (R. Patiño) to Renco Group (D. Sadlowski), 13 July 2012.

Renco, on 20 July 2012 the MEM provided DRP with specific comments regarding the flaws in the restructuring plan.¹³²²

671. Despite the MEM’s assistance, DRP was unwilling to collaborate and insisted on an unviable restructuring plan. To that effect, on 9 August 2012 the MEM notified Renco that DRP’s responses to the MEM’s specific comments outlined in the letter of 20 July 2012 did not provide solutions to the issues.¹³²³ Notwithstanding the continued deficiencies in DRP’s restructuring plan, the MEM “invite[ed] Renco to present a new plan to resolve the [aforementioned] issues as well as other points[.]”¹³²⁴
672. Soon after the MEM’s invitation to continue discussions, Renco made clear to the MEM that it had no intention of presenting a restructuring plan for DRP that addressed the identified concerns.¹³²⁵ Indeed, Renco made clear that despite the discussions with the MEM, from May through August 2012, about modifications to make the plan viable, it would stick to its restructuring proposal from 14 May 2012,¹³²⁶ which notably included Facility operations that would not comply with the applicable environmental regime.¹³²⁷
673. Although Renco’s letter of 13 August 2012 could have ended all discussions, on 20 August 2012 the MEM replied to Renco, reiterating its commitment to find a resolution and agreeable terms for DRP’s restructuring plan.¹³²⁸ The MEM noted that Renco’s letters in the month of August 2012¹³²⁹ failed to reflect the parties’ discussions, address identified concerns, or include a fully revised plan as the MEM had requested.¹³³⁰ Nevertheless, the MEM still did not end discussions, and invited Renco to reconsider its position and present

¹³²² **Exhibit R-117**, Letter from MEM (R. Patiño) to Renco Group (D. Sadlowski), 20 July 2012 *attaching* Observations of the Project of the DRP, S.R.L. Restructuring Plan.

¹³²³ **Exhibit R-118**, Letter from MEM (R. Patiño) to Renco Group (D. Sadlowski), 9 August 2012.

¹³²⁴ **Exhibit R-118**, Letter from MEM (R. Patiño) to Renco Group (D. Sadlowski), 9 August 2012, p. 2.

¹³²⁵ *See* **Exhibit C-198**, Letter from Renco Group, Inc. (D. Sadlowski) to MEM (R. Patiño), 13 August 2012, p. 2.

¹³²⁶ *See* **Exhibit C-198**, Letter from Renco Group, Inc. (D. Sadlowski) to MEM (R. Patiño), 13 August 2012, p. 2 (“we stand in the position which is comprised in the proposal of Restructuring Plan filed before INDECOPI on May 13th, 2012 and inform you that we will not submit a new proposal to the creditors meeting.”).

¹³²⁷ **Exhibit C-231**, DRP Creditors’ Meeting Minutes, 9 and 12 April 2012, PDF pp. 3–4.

¹³²⁸ **Exhibit R-119**, Letter from MEM (R. Patiño) to Renco Group (D. Sadlowski), 20 August 2012.

¹³²⁹ *See* **Exhibit C-197**, Letter from Renco Group (D. Sadlowski) to MEM (R. Patiño), 2 August 2012; **Exhibit C-198**, Letter from Renco Group, Inc. (D. Sadlowski) to MEM (R. Patiño), 13 August 2012.

¹³³⁰ **Exhibit R-119**, Letter from MEM (R. Patiño) to Renco Group (D. Sadlowski), 20 August 2012, p. 1.

an amended restructuring plan that reflected all of the Board of Creditors' comments, including the MEM's.¹³³¹

674. With the restructuring plan discussions stalled, on 25 and 29 August 2012, the Board of Creditors convened and continued voting on topics related to advancing the operational liquidation plan of DRP.¹³³² Notably, in the Board of Creditors meeting of 25 August 2012, DRP's elected liquidator, Right Business, noted that DRP's restructuring plan of 14 May 2012 was unacceptable.¹³³³
675. The Board of Creditors, not just the MEM, rejected DRP's restructuring proposals because DRP proposed financing that was conditioned on unreasonable demands, including requiring Peru to assume, without limitation, responsibility for third-party claims relating to damages caused by environmental contamination, and proposed operations that would violate applicable environmental standards. Renco's contention that the due process that the Board of Creditors (including MEM) has afforded DRP in the bankruptcy proceeding was somehow unfair is baseless and requires no further attention from this Tribunal.

3. DRP had no legitimate expectation of receiving extensions without conditions

- a. The minimum standard of treatment does not protect an investor's legitimate expectations

676. Claimant contends that "the fair and equitable treatment standard under Article 10.5 of the Treaty protects an investor's legitimate expectations."¹³³⁴ As Peru explained above, customary international law does not embrace the legitimate expectation standard, and if Renco insists on pressing this line of argument, Renco bears the burden of proving this supposed evolution of customary international law.¹³³⁵ Specifically, Claimant must supply evidence of a widespread and consistent practice amongst States that is supported by a

¹³³¹ **Exhibit R-119**, Letter from MEM (R. Patiño) to Renco Group (D. Sadlowski), 20 August 2012, p. 1.

¹³³² **Exhibit R-120**, *Junta de Acreedores no Aprobó plan de Restructuración de Doe Run para Retomar Complejo de La Oroya*, MEM, 25 August 2012; **Exhibit R-121**, *Aprueban Términos de Referencia para venta internacional del Complejo Metalúrgico de La Oroya*, MEM, 30 August 2012.

¹³³³ **Exhibit R-122**, DRP Creditors' Meeting Minutes, 24 and 29 August 2012.

¹³³⁴ Treaty Memorial, ¶ 226.

¹³³⁵ **RLA-144**, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB/(AF)/05/2, Award, 18 September 2009, ¶ 273 ("The burden of establishing any new elements of this custom is on Claimant.").

conviction by States that such practice is legally required by them under international law.¹³³⁶ Claimant, however, cites only a handful of arbitral decisions, which constitute neither State practice nor *opinio juris*.¹³³⁷ Moreover, most of the decisions cited by Claimant were made in the context of the autonomous FET standard and lack any interpretive value when it comes to interpreting Article 10.5.

677. When arbitral tribunals have addressed the question of whether the minimum standard of treatment protects an investor's legitimate expectations, they have generally failed to find the consistent State practice and *opinio juris* necessary to establish such a rule.¹³³⁸ Moreover, both the International Court of Justice¹³³⁹ and several States¹³⁴⁰ have pronounced that the minimum standard of treatment does not protect an investor's legitimate expectations.
678. The United States has persistently objected to the notion that the minimum standard of treatment requires States to guarantee investors' legitimate expectations.¹³⁴¹ Most relevant to the present analysis, the United States has confirmed that *Article 10.5 of the present Treaty* does not protect an investor's legitimate expectations:

¹³³⁶ See, e.g., **RLA-138**, *North Sea Continental Shelf*, ICJ, Judgment, 20 February 1969, ¶ 77.

¹³³⁷ See **RLA-144**, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB/(AF)/05/2, Award, 18 September 2009, ¶ 273; **RLA-145**, *Methanex Corp. v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part IV, Chapter C, ¶ 26.

¹³³⁸ **CLA-081**, *Glamis Gold v. United States of America*, UNCITRAL, Award, 8 June 2009, ¶ 620 (“Merely not living [up] to expectations cannot be sufficient to find a breach of Article 1105 of the NAFTA.”); **RLA-146**, *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, ¶ 502; **RLA-144**, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB/(AF)/05/2, Award, 18 September 2009, ¶ 290.

¹³³⁹ **RLA-157**, *Obligation to Negotiate Access to the Pacific Ocean*, ICJ, Judgment, 1 October 2018, ¶ 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.”).

¹³⁴⁰ See, e.g., **RLA-147**, *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Canada’s Response to 1128 Submissions, 26 June 2015, ¶ 12; **RLA-148**, *Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012, ¶¶ 209–211 (citing the non-disputing party submissions of Honduras and El Salvador).

¹³⁴¹ See, e.g., **RLA-158**, *Spence International Investments, LLC et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Submission of the United States of America, 17 April 2015, ¶¶ 17–18; **RLA-159**, *Vento Motorcycles, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/17/3, Submission of the United States of America, 23 August 2019, ¶ 17.

“The concept of “legitimate expectations” is not a component element of “fair and equitable treatment” under customary international law that gives rise to an independent host State obligation. **The United States is aware of no general and consistent State practice and *opinio juris* establishing an obligation under the minimum standard of treatment not to frustrate investors’ expectations.** An investor may develop its own expectations about the legal regime governing its investment, but those expectations impose no obligations on the State under the minimum standard of treatment. The mere fact that a Party takes or fails to take an action that may be inconsistent with an investor’s expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.”¹³⁴² (Emphasis added).

The United States has expressed this same position as recently as November 2021.¹³⁴³

679. Assuming *arguendo* that Article 10.5 of the Treaty does protect an investor’s legitimate expectations (*quod non*), Peru notes that Renco has failed to articulate a cognizable legal standard. Nevertheless, in order to dispose of this meritless argument, Peru provides here the legitimate expectations standard articulated by the tribunal in *Wirtgen, et al. v. Czech Republic*: For legitimate expectations to exist, a claimant must demonstrate that its expectations (i) were legitimate and reasonable in light of all the circumstances of the case; (ii) derive from specific representations or assurances that it relied upon in making its investment; and (iii) account for the State’s right to regulate within its territory.¹³⁴⁴
680. Tribunals applying the autonomous FET standard have concluded that the investor’s expectations “cannot be solely the subjective expectations of the investor,”¹³⁴⁵ but must

¹³⁴² **RLA-066**, *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Submission of the United States of America, 21 June 2019, ¶ 38. See also, **RLA-164**, *Omega Engineering LLC and Mr. Oscar Rivera v. Republic of Panama*, ICSID Case No. ARB/16/42, Submission of the United States of America, 3 February 2020, ¶ 24.

¹³⁴³ **RLA-166**, *Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru*, ICSID Case No. ARB/19/28, Submission of the United States of America, 19 November 2021, ¶ 28.

¹³⁴⁴ **RLA-129**, *Mr. Jürgen Wirtgen, et al. v. Czech Republic*, PCA Case No. 2014-03, Final Award, 11 October 2017, ¶¶ 410–411.

¹³⁴⁵ **RLA-101**, *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶ 219; see also **RLA-076**, *Mobil Investments Canada Inc. v. Government of Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, 13 July 2018, ¶¶ 152–153; **CLA-043**, *Mr. Frank Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, ¶¶ 535–536

rather be “based on an objective standard or analysis.”¹³⁴⁶ Further, as observed by the *EDF v. Romania* tribunal, they “must be examined as the expectations at the time the investment is made, as they may be deduced from all the circumstances of the case, due regard being paid to the host State’s power to regulate its economic life in the public interest.”¹³⁴⁷ As affirmed by the tribunal in *Duke v. Ecuador*, the relevant circumstances include “the political, socioeconomic, cultural and historical conditions prevailing in the host State.”¹³⁴⁸

681. Further, the legitimate expectations protection does not shield investors from ordinary changes to the regulatory environment. Rather, an investor claiming a breach of legitimate expectations must identify State conduct that “entirely transform[ed] and alter[ed] the legal and business environment under which the investment was made.”¹³⁴⁹ Investment treaties are not intended to be insurance policies for poor investment decisions.¹³⁵⁰
682. Arbitral tribunals have found that breach of contract on the part of a host State does not constitute a violation of an investor’s legitimate expectations as protected by the State’s FET obligations. As the *Parkerings* tribunal explained:

“It is evident that not every hope amounts to an expectation under international law. The expectation a party to an agreement may have of the regular fulfilment of the obligation by the other party is not necessarily an expectation protected by international law. In other words, contracts involve intrinsic expectations from each party that do not amount to expectations as understood in international law.”¹³⁵¹

¹³⁴⁶ **RLA-160**, *Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain*, SCC No. V062/2012, Final Award, 21 January 2016, ¶ 495.

¹³⁴⁷ **RLA-101**, *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶ 219; *see also* **RLA-076**, *Mobil Investments Canada Inc. v. Government of Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, 13 July 2018, ¶¶ 152–153; **CLA-043**, *Mr. Frank Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, ¶¶ 535–536.

¹³⁴⁸ **RLA-161**, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, ¶ 340.

¹³⁴⁹ **CLA-068**, *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶¶ 275–281.

¹³⁵⁰ *See* **RLA-162**, *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000, ¶ 64; **RLA-101**, *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶ 217.

¹³⁵¹ **RLA-130**, *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, ¶ 344.

As the tribunal in *Impregilo v. Argentina* held, so far as a host State’s acts were “exclusively contractual, they cannot amount to a violation of the fair and equitable treatment standard based on a theory of legitimate expectations.”¹³⁵²

b. The MEM’s treatment of DRP in connection with the extension and restructuring requests did not violate Renco’s legitimate expectations

683. Assuming *arguendo* that the minimum standard of treatment protects Renco’s legitimate expectations, Renco’s legitimate expectations claim fails because it (i) rests on Renco’s incorrect interpretation of the STA’s *force majeure* clause; and (ii) does not satisfy the elements of a legitimate expectations claim.
684. Renco bases its claim entirely on the premise that Peru owed DRP an obligation to grant DRP an extension in the event of an “extraordinary economic alteration.”¹³⁵³ As Peru demonstrates above, however, neither the STA nor Peruvian law required the MEM to grant DRP’s improper *force majeure* claim.¹³⁵⁴ Claimant therefore fails to establish the sole basis of its legitimate expectations claim.
685. Moreover, even assuming *arguendo* that the MEM could somehow be bound by the STA’s *force majeure* clause, Claimant does not even attempt to satisfy the elements of a legitimate expectations claim. Namely, Claimant has failed to demonstrate that its expectations (i) were legitimate and reasonable in light of all the circumstances of the case; (ii) derive from specific representations or assurances that it relied upon in making its investment; and (iii) account for the State’s right to regulate within its territory.¹³⁵⁵ Claimant has neither identified these requirements nor shown that its claim fulfills them.
686. In any case, Claimant’s legitimate expectations claim does not satisfy any of these elements. Claimant argues that under the STA, Peru undertook a contractual obligation to grant an extension to DRP in the case of an “extraordinary economic event.”¹³⁵⁶ As a

¹³⁵² RLA-131, *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011, ¶ 294.

¹³⁵³ Treaty Memorial, ¶¶ 227–229.

¹³⁵⁴ For the sake of brevity, Peru will not repeat itself on the question of *force majeure*, but instead refers the Tribunal to Section IV.A.2.b(iv), *supra*.

¹³⁵⁵ RLA-129, *Mr. Jurgen Wirtgen, et al. v. Czech Republic*, PCA Case No. 2014-03, Final Award, 11 October 2017, ¶¶ 410–411.

¹³⁵⁶ Treaty Memorial, ¶¶ 227–229.

parting premise, it is difficult to fathom how Peru took on or specifically articulated a *force majeure* obligation in a contract to which it was never a party. Moreover, as Peru explained above, a host State's breach of contract cannot in itself constitute a violation of an investor's legitimate expectations.¹³⁵⁷ The STA's *force majeure* clause therefore did not establish a legitimate and reasonable expectation under customary international law.

687. Renco's argument based on Peruvian law likewise fails. Renco asserts that "Peru was also bound under Article 48 of its 1993 Regulations for Environmental Protection in Mining and Metallurgy to allow DRP additional time to finish its PAMA in the event of a major economic crisis constituting a force majeure circumstance."¹³⁵⁸ Contrary to Renco's assertion, however, that cited regulation does not specifically provide that major economic crises constitute *force majeure* events,¹³⁵⁹ and Renco has not cited a single legal authority that says otherwise.
688. Further, Renco cherry picks the 1993 regulation's *force majeure* provision while ignoring that the same regulation prescribed a maximum ten-year deadline to complete the PAMA.¹³⁶⁰ The 1993 regulation's provisions, including its *force majeure* clause, governed DRP's environmental obligations only during the PAMA Period.¹³⁶¹ Afterwards, DRP's obligations were governed by the 2004 and 2009 Extension Regulations.¹³⁶² Given that those regulations were not in place when DRP signed the STA, Claimant certainly could not have relied on 2004 and 2009 *force majeure* provisions as a basis for its expectations when making its investment in 1997. Thus, even if Claimant could demonstrate that it relied on the 1993 regulation's *force majeure* provision, such provision only generated the expectation that Claimant would have received *force majeure* treatment through the end of the PAMA Period (*i.e.*, January 2007).

¹³⁵⁷ RLA-130, *Parkerings* (Award), ¶ 344; RLA-131, *Impregilo* (Award), ¶ 294.

¹³⁵⁸ Treaty Memorial, ¶ 229 (citing Exhibit C-088, Supreme Decree No. 016-93-EM, 28 April 1993, Art. 48, p. 13).

¹³⁵⁹ Exhibit C-088, Supreme Decree No. 016-93-EM, 28 April 1993, Art. 48.

¹³⁶⁰ Exhibit C-088, Supreme Decree No. 016-93-EM, 28 April 1993, Art. 9.

¹³⁶¹ Alegre Expert Report, ¶¶ 53, 54.

¹³⁶² Alegre Expert Report, ¶¶ 56, 72, 73.

689. Finally, Peru notes that the subheading of the section containing Claimant’s legitimate expectations claim asserts that the “MEM’s mistreatment of DRP in connection with the extension requests *and proposed restructuring plans* frustrated Renco’s legitimate expectations” (Emphasis added).¹³⁶³ Claimant does not even mention the restructuring plans in the body of that section and has therefore failed to particularize any legitimate expectations claim with regard to the bankruptcy process.

4. The MEM treated DRP transparently and fairly and warned DRP in 2006 that it would receive no further extensions

a. The minimum standard of treatment does not include an obligation to treat investors transparently

690. Renco alleges that “the MEM’s mistreatment of DRP in connection with the extension requests and proposed restructuring plans involved a complete lack of transparency and candor.”¹³⁶⁴ As Peru has demonstrated, this claim has no basis in fact whatsoever. Furthermore, even if Renco could meet its factual burden (*quod non*), it has failed to discharge its burden of proving that the minimum standard of treatment includes an obligation of transparency. Claimant cites a handful of arbitral decisions, which constitute neither State practice nor *opinio juris*¹³⁶⁵ and, in any case, do not support Claimant’s transparency claim.

691. Numerous courts and tribunals have explicitly held that the minimum standard of treatment under customary international law does *not* encompass a requirement of transparency.¹³⁶⁶ In *Cargill v. Mexico*, for example, the tribunal held that,

“Claimant has not established that a general duty of transparency is included in the customary international law minimum standard of treatment owed to foreign investors per Article 1105’s requirement to afford fair and equitable treatment. The principal authority relied on by the Claimant— *Tecmed*— involved the interpretation of a treaty-based autonomous standard for fair and equitable treatment

¹³⁶³ Treaty Memorial, § 4.A.2 (b) (vi).

¹³⁶⁴ Treaty Memorial, § 4.A.2(c).

¹³⁶⁵ See [RLA-144](#), *Cargill* (Award), ¶ 273; [RLA-145](#), *Methanex* (Final Award), Part IV, Chapter C, ¶ 26.

¹³⁶⁶ See, e.g., [RLA-154](#), *Mercer* (Award), ¶ 7.77; [RLA-117](#), *Feldman* (Award), ¶ 133; [RLA-163](#), *United Mexican States v. Metalclad Corp.*, BCSC Case No. L0022904, Decision on the Challenge to the Arbitral Award, 2 May 2001; [RLA-144](#), *Cargill* (Award), ¶ 294.

and treated transparency as an element of the “basic expectations” of an investor rather than as an independent duty under customary international law.”¹³⁶⁷

692. The Treaty’s Contracting Parties agree that the minimum standard of treatment does not include an obligation to treat investors transparently. The United States has expressed this position when interpreting Article 10.5 of the present Treaty:

“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. The United States is aware of no general and consistent State practice and opinio juris establishing an obligation of host State transparency under the minimum standard of treatment.”¹³⁶⁸

Other States have made similar pronouncements.¹³⁶⁹

693. To support its transparency claim, Renco cites just two cases in which the tribunals applied the minimum standard of treatment: *Waste Management v. Mexico* and *Teco v. Guatemala*.¹³⁷⁰ Neither decision supports Renco’s argument.

694. Renco misleadingly extracts a fragment from *Waste Management* that, out of context, appears to suggest that the minimum standard of treatment includes a freestanding transparency obligation.¹³⁷¹ The *Waste Management* award, however, discusses the existence of “a complete lack of transparency and candour” as factor that could indicate a breach of due process, not as a separate obligation under the minimum standard of treatment.¹³⁷²

¹³⁶⁷ [RLA-144](#), *Cargill* (Award), ¶ 294.

¹³⁶⁸ [RLA-066](#), *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Submission of the United States of America, 21 June 2019, ¶ 38; [RLA-166](#), *Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru*, ICSID Case No. ARB/19/28, Submission of the United States of America, 19 November 2021, ¶ 28. See also, [RLA-164](#), *Omega Engineering LLC and Mr. Oscar Rivera v. Republic of Panama*, ICSID Case No. ARB/16/42, Submission of the United States of America, 3 February 2020, ¶ 26.

¹³⁶⁹ See, e.g., [RLA-165](#), *Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, ¶ 515 (citing Canada’s non-disputing party submission affirming that “customary international law does not contain a general duty of transparency.”).

¹³⁷⁰ Treaty Memorial, ¶ 231.

¹³⁷¹ See Treaty Memorial, ¶ 231.

¹³⁷² [CLA-140](#), *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Award, 30 April 2004, ¶ 98.

695. The passage Claimant cites from *Teco* likewise relates to the due process obligation and does not even include the word “transparency”: the *Teco* tribunal held that “a willful disregard of the fundamental principles upon which the regulatory framework is based, a complete lack of candor or good faith on the part of the regulator in its dealings with the investor, as well as a total lack of reasoning, would constitute a breach of the minimum standard.”¹³⁷³ This standard is qualitatively different from the freestanding transparency obligation articulated by certain tribunals applying the autonomous FET standard.
696. Claimant cites *Crystallex v. Venezuela* as an example of a tribunal that found that the minimum standard of treatment includes a transparency obligation,¹³⁷⁴ but—contrary to Claimant’s assertion—that tribunal applied an autonomous FET standard.¹³⁷⁵ Indeed, the *Crystallex* tribunal expressly held that an autonomous FET standard “cannot – by virtue of that [treaty’s] formulation or otherwise – be equated to the ‘international minimum standard of treatment’ under customary international law.”¹³⁷⁶ Claimant’s reliance on the *Crystallex* award therefore fails to support its transparency claim.
697. The only other case Claimant discusses to support its transparency claim is *Saluka v. Czech Republic*, which even Claimant recognizes as a decision analyzing an autonomous FET standard.¹³⁷⁷ Claimant mistakenly asserts that the *Saluka* tribunal “quoted the *Waste Management* tribunal’s formulation” of the minimum standard of treatment,¹³⁷⁸ but the *Saluka* tribunal did so only in the context of summarizing the position of the claimant in that case.¹³⁷⁹

¹³⁷³ **CLA-132**, *Teco Guatemala Holdings LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, 19 December 2013, ¶ 458.

¹³⁷⁴ Treaty Memorial, ¶ 232.

¹³⁷⁵ **CLA-071**, *Crystallex* (Award), ¶ 530.

¹³⁷⁶ **CLA-071**, *Crystallex* (Award), ¶ 530.

¹³⁷⁷ Treaty Memorial, ¶ 234 (citing **CLA-127**, *Saluka* (Award), ¶ 309).

¹³⁷⁸ Treaty Memorial, ¶ 233 (citing **CLA-127**, *Saluka* (Award), ¶ 288).

¹³⁷⁹ **CLA-127**, *Saluka* (Award), ¶ 288 (“The Claimant endorses, however, and commends as a useful guide, even in the present context, the threshold defined by the Tribunal in *Waste Management, Inc. v. United Mexican States* . . .”).

698. Furthermore, Claimant quotes the following passage from *Saluka* in an attempt to characterize the decision as equating the minimum standard of treatment with an autonomous FET standard:

“[I]t appears that the difference between the Treaty standard laid down in Article 3.1 of the [Netherlands-Czech Republic BIT] and the customary minimum standard, when applied to the specific facts of a case, may well be more apparent than real.”¹³⁸⁰

Claimant’s citation is incomplete and grossly misleading. Immediately following the quoted passage, the *Saluka* tribunal found that autonomous FET clauses establish a higher standard of protection than the minimum standard of treatment.¹³⁸¹ Moreover, the *Saluka* tribunal noted that the Netherlands-Czech Republic BIT established a particularly strong FET protection because its preamble linked “the ‘fair and equitable treatment’ standard directly to the stimulation of foreign investments and to the economic development of both Contracting Parties.”¹³⁸² In light of the foregoing, Claimant’s citations to *Saluka* are inappropriate and do not support its transparency claim.

699. In any event, Renco does not even attempt to explain the content of the alleged transparency obligation. Professor Schreuer explains that, “[t]ransparency means that the legal framework for the investor’s operations is readily apparent and that any decision affecting the investor can be traced to that legal framework.”¹³⁸³ Renco has not demonstrated that the foregoing elements were missing in connection with its supposed investment in Peru.

¹³⁸⁰ Treaty Memorial, ¶ 233 (citing **CLA-127**, *Saluka* (Award), ¶ 291).

¹³⁸¹ **CLA-127**, *Saluka* (Award), ¶¶ 292–293 (“Also, it should be kept in mind that the customary minimum standard is in any case binding upon a State and provides a minimum guarantee to foreign investors, even where the State follows a policy that is in principle opposed to foreign investment; in that context, the minimum standard of “fair and equitable treatment” may in fact provide no more than “minimal” protection. Consequently, **in order to violate that standard, States’ conduct may have to display a relatively higher degree of inappropriateness.** Bilateral investment treaties, however, are designed to promote foreign direct investment as between the Contracting Parties; in this context, investors’ protection by the “fair and equitable treatment” standard is meant to be a guarantee providing a positive incentive for foreign investors. **Consequently, in order to violate the standard, it may be sufficient that States’ conduct displays a relatively lower degree of inappropriateness.**”). (Emphasis added).

¹³⁸² **CLA-127**, *Saluka* (Award), ¶ 298.

¹³⁸³ **RLA-169**, Christoph Schreuer, Fair and Equitable Treatment in Arbitral Practice, *THE JOURNAL OF WORLD INVESTMENT AND TRADE* (JANUARY 2005), p. 374

b. The MEM treated DRP transparently and with candor

700. Claimant alleges that the “MEM’s mistreatment of DRP in connection with the extension requests and proposed restructuring plans involved a complete lack of transparency and candor.”¹³⁸⁴ This allegation ignores critical facts and misunderstands the law applicable to Renco’s claim.
701. As Peru explained above, the minimum standard of treatment does not include an obligation to treat investors transparently. Nonetheless, even if the minimum standard did include a transparency obligation, Claimant makes no attempt to identify a relevant standard and apply the facts of the case to that standard. Rather, it recounts a skewed version of *Saluka v. Czech Republic* and attempts to draw analogy with the facts in the present case.
702. Moreover, Claimant’s transparency argument relies on an inaccurate and unsubstantiated version of the facts that, even if true, does not support its claim. Specifically, Claimant alleges that: (i) the MEM initially responded that an extension beyond October 2009 would be legally impossible; (ii) shortly thereafter, the Peruvian government agreed to sign an MOU agreeing to grant the extension; (iii) Peruvian government officials then made public statements denying that DRP would receive an extension; (iv) Peru’s Congress granted DRP an extension; and (v) the MEM passed the 2009 Extension Regulation, which effectively undermined the 2009 Extension Law.
703. It is true that in March 2009, the MEM informed DRP that an extension would be impossible. This position was legally correct; as Dr. Alegre explains, the 2004 Extension Regulation did not empower the MEM to grant an additional extension.¹³⁸⁵ It is not true, however, that Peru agreed later that month to sign an MOU committing to grant an extension.¹³⁸⁶ Claimant fails to produce a single document evidencing such a commitment. Claimant also fails to substantiate its claim that “[i]n May 2009, other Peruvian Government officials made public statements denying that DRP would receive any

¹³⁸⁴ Treaty Memorial, Section IV.A.2.c.

¹³⁸⁵ Alegre Expert Report, ¶¶ 19, 55.

¹³⁸⁶ Isasi Witness Statement, ¶ 51.

extension of time to finish its last PAMA project.”¹³⁸⁷ Claimant cites to a mining industry news article, according to which the Vice Minister of Mines stated that the Congress had not changed the legal framework, and that the MEM therefore could not grant another extension.¹³⁸⁸ Once again, this statement was legally sound; the framework had not changed since the MEM articulated the same position in March 2009. When Peru’s Congress did change the legal framework, the MEM passed a regulation implementing the 2009 Extension Law, as it was required to do.

704. The above events do not support Renco’s specious transparency argument, but rather demonstrate that Peru’s actions were consistent with the Peruvian legal framework. Peru’s conduct therefore satisfies the transparency obligation even under the here inapplicable autonomous FET standard, which, as explained above, requires only that “the legal framework for the investor’s operations is readily apparent and that any decision affecting the investor can be traced to that legal framework.”¹³⁸⁹ Claimant’s transparency claim does not identify a single action that cannot be traced to Peru’s legal framework.

5. The trust account requirement and other conditions were a proportionate response to DRP’s repeated failures to fulfill its environmental obligations

a. The minimum standard of treatment does not include an obligation to treat investors proportionately

705. Renco alleges that “the MEM’s imposition of the Trust Account requirement, and other erroneous conditions, was not a proportionate response.”¹³⁹⁰ According to Renco, there exists “a growing body of law” under which “a host State’s reaction to an investor’s actual or perceived breach of contract or legal violation must be proportionate.”¹³⁹¹ Renco does

¹³⁸⁷ Treaty Memorial, ¶ 238.

¹³⁸⁸ **Exhibit C-068**, Peru shall not grant any more term extensions to Doe Run for Environmental plan, MINES AND COMMUNITIES, 20 May 2009, p. 1.

¹³⁸⁹ **RLA-169**, Christoph Schreuer, Fair and Equitable Treatment in Arbitral Practice, THE JOURNAL OF WORLD INVESTMENT AND TRADE, January 2005, p. 374.

¹³⁹⁰ Treaty Memorial, § 4.B(d).

¹³⁹¹ Treaty Memorial, ¶ 240.

not clarify whether this purported legal duty is a constituent element of the minimum standard of treatment.¹³⁹²

706. To the extent that Renco does intend to assert that the minimum standard of treatment includes a proportionality requirement, Renco again fails to meet its burden of demonstrating widespread State practice and *opinio juris* to support its assertion. Renco cites one case—*Occidental Petroleum v. Ecuador*—in which the underlying treaty’s FET requirement was not tied to the minimum standard of treatment.¹³⁹³ Additionally, Claimant neglects to mention that each of the cases cited by the *Occidental Petroleum* tribunal as part of the “growing body of arbitral law” on proportionality was decided under an autonomous FET clause.¹³⁹⁴

b. The imposition of the trust account requirement and other conditions was a proportionate response

707. Even if the minimum standard of treatment were to include a proportionality requirement (*quod non*), Renco fails to prove that Peru treated DRP so disproportionately so as to violate customary international law.¹³⁹⁵ According to Renco, “the MEM imposed a punitive trust account requirement that ensured that DRP could not take advantage of the 30-month extension granted by Congress. This requirement was completely out of proportion to any alleged ‘wrongdoing’ by DRP, and it was also completely out of proportion to the Peruvian Government’s policy interest”¹³⁹⁶ Renco again fails to propose a legal standard for demonstrating a violation of the purported obligation to treat investors proportionally. Instead, Renco misconstrues the facts in *Occidental Petroleum v. Ecuador* and attempts to draw analogy with the facts in the present case, and omits key facts that support the MEM’s proportionate response.

¹³⁹² Treaty Memorial, ¶ 240.

¹³⁹³ Treaty Memorial, ¶¶ 240–241 (citing **CLA-111**, *OPC* (Award), ¶¶ 404–405).

¹³⁹⁴ See **CLA-106**, *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, ¶ 107; **CLA-096**, *LG&E Energy Corp. et al. v. Republic of Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶¶ 121–125; **CLA-131** *Técnicas Medioambientales TECMED S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶¶ 152–156; **CLA-052**, *Azurix Corp. v. Republic of Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 361.

¹³⁹⁵ Treaty Memorial, § 4.A.2(d).

¹³⁹⁶ Treaty Memorial, ¶ 242.

708. *Occidental Petroleum* is not an analogous case. In *Occidental Petroleum*, the claimant executed an agreement pursuant to which another oil company, AEC, would acquire 40% of its shares in a “participation contract” to explore certain Ecuadorian oil fields.¹³⁹⁷ The agreement, which was announced in 2000, violated the laws of Ecuador by transferring certain oil rights without prior approval from the Ecuadoran Ministry of Energy.¹³⁹⁸ The Ministry of Energy analyzed the situation and, in an internal memorandum, concluded that “AEC was already party to a participation contract for other fields and was the operator of those fields, that it had demonstrated technical solvency, and that there would be ‘no impediment for [the] assignment of rights [in OEPC’s Participation Contract].’”¹³⁹⁹ Four years later, however, the Ecuadoran Attorney General wrote the Minister of Energy and requested that he terminate the participation contract as a result of Occidental Petroleum’s agreement with AEC.¹⁴⁰⁰ Following a period of significant debate, the Minister of Energy terminated the contract in May 2006.¹⁴⁰¹
709. The *Occidental Petroleum* tribunal found that Ecuador’s conduct violated the principle of proportionality because the termination of an investment worth hundreds of millions of dollars was not proportionate to Ecuador’s sole policy goal of deterring violations of its oil laws.¹⁴⁰² Critical to that tribunal’s decision was its finding that Ecuador suffered *no harm whatsoever* as a result of the claimant’s breach of Ecuadoran law, as well as the fact that the Ecuadoran Ministry of Energy had previously determined that AEC was qualified to acquire shares in the participation contract.¹⁴⁰³ The *Occidental Petroleum* tribunal also criticized Ecuador for allowing the participation contract to remain operative for years before suddenly reversing its position.¹⁴⁰⁴

¹³⁹⁷ CLA-111, OPC (Award), ¶ 438.

¹³⁹⁸ CLA-111, OPC (Award), ¶ 438.

¹³⁹⁹ CLA-111, OPC (Award), ¶ 438.

¹⁴⁰⁰ CLA-111, OPC (Award), ¶ 438.

¹⁴⁰¹ CLA-111, OPC (Award), ¶ 438.

¹⁴⁰² CLA-111, OPC (Award), ¶ 450.

¹⁴⁰³ CLA-111, OPC (Award), ¶ 447.

¹⁴⁰⁴ CLA-111, OPC (Award), ¶ 632.

710. The present case is manifestly distinguishable from *Occidental Petroleum*. Peru had a strong policy interest beyond mere deterrence of violations of formal approval requirements: protecting the health of thousands of people living in a city that, by Claimant’s own description, constituted one of the most polluted places on Earth.¹⁴⁰⁵ As Peru explains in **Sections II.C and II.D**, Renco and DRP’s actions caused substantial delays in implementing the Facility’s PAMA, which led to severe health consequences for the people of La Oroya. Peru sought to protect its fundamental interest in ensuring the PAMA’s completion by imposing financial conditions on the 2009 Extension. Even if, as Renco alleges, those conditions were counterproductive (*quod non*), it is beyond dispute that Peru’s actions were motivated by an urgent, legitimate and grave State interest. The same cannot be said about the respondent State in *Occidental Petroleum*.
711. The Trust Account requirement was also proportionate to DRP’s repeated failures to finance the sulfuric acid plant. As Peru explains in **Section II.C**, DRP was losing the bulk of its operational income to Renco affiliated entities based on inter-company agreement, and DRP consistently failed to meet its financing obligations during the original PAMA Period. DRP requested an extension in 2005 due to its inability to finance the Sulfuric Acid Plant Project.¹⁴⁰⁶ Accordingly, when the MEM granted that request in 2006, it required DRP to establish a trust account that would cover 100% of the company’s remaining investment obligations.¹⁴⁰⁷ DRP established the trust account but failed to channel enough money into it to cover its environmental costs, despite record metals prices in the years following the 2006 Extension.¹⁴⁰⁸ When the metals boom cycled into a bust—as it was bound to do— DRP found itself without sufficient funds to finance its obligations.¹⁴⁰⁹ The company then requested yet another extension in 2009 and “committed itself to us[ing] one hundred per cent of its available cash flow to finance the

¹⁴⁰⁵ Claimant’s Treaty Memorial, Section II.A.

¹⁴⁰⁶ **Exhibit C-050**, Letter from DRP (J. C. Mogrovejo) to Ministry of Energy & Mines (J. Bonelli) attaching Request for an Exceptional Extension of Deadline to Complete the Sulfuric Acid Plants Projects, 15 December 2005, pp. 9 and 38; Isasi Witness Statement, ¶¶ 35–38.

¹⁴⁰⁷ **Exhibit R-287**, Ministerial Resolution No. 257-2006-MEM/DM, 29 May 2006, Art. 2.

¹⁴⁰⁸ See Kunsman Expert Report, § VI.D.

¹⁴⁰⁹ Isasi Witness Statement, ¶ 48.

expenses corresponding to the remaining part of PAMA”¹⁴¹⁰ The MEM thus acted proportionately when it implemented a trust account condition that required DRP to channel 100% of its revenues into the account.

712. Additionally, Renco omits key facts that support the MEM’s proportionate response and shed light on Renco’s mismanagement of its environmental obligations. As explained in **Section II.C.1**, the day DRP signed the STA, Renco compromised DRP’s ability to meet its obligations,¹⁴¹¹ and in the months and years that followed, Renco further compromised DRP through a series of intercompany deals that benefitted Renco, including by burdening DRP with its own acquisition debt and sending significant cash payments upstream from DRP to Renco and its U.S. subsidiaries.¹⁴¹²
713. Finally, although Claimant submits that the MEM’s “other erroneous conditions” were disproportionate, it neglects to specify to which conditions it refers. It has therefore failed to articulate its disproportionate response claim with respect to those particular conditions.¹⁴¹³

¹⁴¹⁰ **Exhibit C-100**, Letter from DRP (J.C. Huyhua) to MEM (F. Gala Soldevilla), 2 July 2009, p. 2.

¹⁴¹¹ *See, e.g.*, **Exhibit R-095**, Acquisition Loan, p. 45, Clause 2.5(f) (“On the Closing Date, Metaloroya shall loan \$125,000,000 to the Borrower, which shall be represented by a Promissory Note and the Borrower shall apply 100% of the proceeds of such loans from Metaloroya to repay the Term Loans”); **Exhibit R-094**, Securities and Exchange Commission Form S-4, The Doe Run Resources Corporation, 11 May 1998, p. 31 (Where Doe Run Resources, Doe Run Mining’s immediate parent company, disclosed this financing arrangement in filings with the U.S. Securities and Exchange Commission. “Doe Run Mining has an intercompany payable due to DRP reflecting an interest free loan of \$125.0 million made by Metaloroya to Doe Run Mining on the closing date of the Acquisition. The proceeds of the intercompany payable were used to reduce the outstanding term loans obtained by Doe Run Mining . . . to consummate the Acquisition.”); **Exhibit R-091**, Jeffrey Zelms Deposition (excerpts), Document No. 764-1, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 14 June 2017, pp. 161:1–14, 163:5–9.

¹⁴¹² *See, e.g.*, **Exhibit R-068**, DRP Intercompany Note: Summary of Facts, undated, pp. 3–4; **Exhibit R-069**, Indenture between DRRC and State Street Bank and Trust Company, 12 March 1998, p. 1, 15–16, 55–56; **Exhibit R-068**, DRP Intercompany Note: Summary of Facts, undated, p. 6; **Exhibit R-070**, Special Term Deposit Contract, 12 March 1998; **Exhibit R-071**, Contract for a Loan in Foreign Currency, 12 March 1998; **Exhibit R-068**, DRP Intercompany Note: Summary of Facts, undated, p. 7.

¹⁴¹³ Treaty Memorial, § IV.A.(2)(d).

6. The 2009 Extension Regulation was consistent with the actions of Congress and the Technical Commission

- a. The minimum standard of treatment does not include an obligation to treat investors consistently

714. Claimant alleges that “the MEM’s undermining of the extension was inconsistent with the actions of Congress and the Technical Commission.”¹⁴¹⁴ Claimant argues that Peru thereby breached international law because, according to Claimant, the minimum standard of treatment requires that a host State treat investors consistently.¹⁴¹⁵ Rather than supporting this assertion with evidence of State practice and *opinio juris*, Claimant discusses two cases, neither of which supports its position.¹⁴¹⁶
715. First, Claimant incorrectly states that the tribunal in *Lauder v. Czech Republic* held that a “host State’s inconsistent conduct may violate the obligation of stability contained in the fair and equitable treatment standard.”¹⁴¹⁷ Setting aside the fact that *Lauder* was decided under the autonomous FET standard,¹⁴¹⁸ the passage that Claimant cites merely summarizes the argument of the claimant in that case; it does not purport to reflect the *Lauder* tribunal’s view.¹⁴¹⁹
716. Second, Claimant cites *Crystallex v. Venezuela*, even though the tribunal in that case applied an autonomous FET standard.¹⁴²⁰ As discussed above, the *Crystallex* tribunal expressly held that an autonomous FET standard cannot be equated to the minimum standard of treatment.¹⁴²¹

¹⁴¹⁴ Treaty Memorial, § 4.B(e).

¹⁴¹⁵ Treaty Memorial, ¶ 243.

¹⁴¹⁶ Treaty Memorial, ¶ 243.

¹⁴¹⁷ Treaty Memorial, ¶ 243 (citing [CLA-120](#), *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001, ¶ 290).

¹⁴¹⁸ [CLA-120](#), *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001, ¶ 292.

¹⁴¹⁹ [CLA-120](#), *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001, ¶ 290 (“The Claimant argues that the obligation to provide fair and equitable treatment has its basis in the general principle of good faith. The State bound by the Treaty must indeed pursue the stated goal of achieving a stable framework for investment. The minimum requirement is that the State not engage in inconsistent conduct, e.g. by reversing to the detriment of the investor prior approvals on which he justifiably relied.”).

¹⁴²⁰ [CLA-071](#), *Crystallex* (Award), ¶ 530.

¹⁴²¹ [CLA-071](#), *Crystallex* (Award), ¶ 530.

717. Claimant has made no additional effort to establish that under customary international law, States must treat foreign investors in a consistent manner. It has therefore failed to discharge its burden of proof.

718. Claimant also fails to articulate a standard for evaluating whether Peru breached its alleged obligation to treat Claimant’s investment consistently. The only guidance Claimant provides is a brief reference to the *Crystallex* award, which, according to Claimant, establishes that “the [FET] standard is infringed by treatment involving inconsistency of action between two arms of the same government.”¹⁴²² As Peru will demonstrate, however, the respondent State’s actions in *Crystallex* are not analogous to the facts in the present case.

b. The MEM and the Peruvian Congress acted consistently in connection with the 2009 Extension Law and Regulation

719. Claimant contends that “the MEM’s undermining of the extension recommended by the Technical Commission and granted by Congress constituted a breach of the consistency requirement under the fair and equitable treatment standard in Article 10.5 of the Treaty.”¹⁴²³ Assuming *arguendo* that the minimum standard of treatment includes a consistency requirement, Claimant fails to particularize its claim, which it presents in six brief sentences.¹⁴²⁴

720. Claimant does not articulate a cogent legal standard, but instead states that “inconsistent conduct,” which includes “inconsistency of action between two arms of the same government,” “*may* violate the obligation of stability contained in the fair and equitable treatment standard” (Emphasis added).¹⁴²⁵ Claimant provides no discussion of the type or degree of inconsistent action that would supposedly violate the minimum standard of treatment, nor does it provide any examples of inconsistent actions that tribunals have found to violate that standard in other cases. The sole case cited by Claimant, *Crystallex*, presented a scenario in which two arms of the same government reversed each other’s

¹⁴²² Treaty Memorial, ¶ 243.

¹⁴²³ Treaty Memorial, ¶ 244.

¹⁴²⁴ Treaty Memorial, ¶¶ 243–244.

¹⁴²⁵ Treaty Memorial, ¶ 243.

actions no less than twelve times over a three year period.¹⁴²⁶ If that is the standard Claimant proposes, then its claim fails on its face.

721. Claimant likewise provides no real application of the legal standard to the facts of the present case. Rather, it merely states that the MEM undermined the Peruvian Congress's 2009 extension and summarily concludes that such "inconsistent treatment of DRP's extension request by different arms of the Peruvian Government violated the fair and equitable treatment standard."¹⁴²⁷ This utter lack of legal analysis cannot form the basis of a claim under customary international law.
722. In any case, the 2009 Extension Regulation was consistent with the 2009 Extension Law. As Peru explained in **Section II.C.3**, the 2009 Extension Law provided that "[t]hrough a supreme executive order, the Executive shall issue such supplementary provisions as may be necessary for the enforcement of this Law."¹⁴²⁸ The law also provided that "Doe Run Perú S.R.L. shall submit the relevant guarantees of full compliance with the terms, commitments, and investments referred to in the above article, *subject to the terms and conditions established by the Ministry of Energy and Mines*."¹⁴²⁹ As the 2009 Extension Law's legislative history reveals, the trust account requirement was consistent with the Congress's intentions and could not have undermined the 2009 Extension Law.

7. Peru did not coerce or harass Renco or DRP

- a. Renco has not established that the minimum standard of treatment protects against coercion or harassment

723. Renco's final FET claim is that "Peru coerced and harassed Renco and DRP" in violation of the minimum standard of treatment.¹⁴³⁰ Renco submits that "freedom from harassment and coercion is another key protection of the fair and equitable treatment standard,"¹⁴³¹ but

¹⁴²⁶ **CLA-071**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶¶ 47–59.

¹⁴²⁷ Treaty Memorial, ¶ 244.

¹⁴²⁸ **Exhibit C-077**, 2009 Extension Law, Art. 5.

¹⁴²⁹ **Exhibit C-077**, 2009 Extension Law, Art. 3.

¹⁴³⁰ Treaty Memorial, § 4.B(f).

¹⁴³¹ Treaty Memorial, ¶ 245.

it supports this assertion with only a string citation to several investment awards and a dissenting opinion.¹⁴³² Renco does not discuss any of these awards or clarify whether they relate to the minimum standard of treatment or autonomous FET clauses.¹⁴³³

724. Instead, Renco quotes a passage from a treatise that does not even purport to assert that the minimum standard of treatment protects investors from coercion or harassment. The passage states only that:

“once an investment has been made, foreign investors can be vulnerable to government pressure or harassment. Particularly in capital-intensive sectors, long-term projects are in some sense hostage to the host State. As one might expect, this type of government conduct is precisely one of the areas targeted by investment protection treaties.”¹⁴³⁴

The notion that investment protection treaties target government pressure or harassment does not support Renco’s assertion that customary international law protects investors from coercion or harassment.

725. Renco also fails to articulate the type or degree of harassment or coercion that would supposedly violate the minimum standard of treatment, nor does it provide any examples of unlawful harassment or coercion. It is beyond doubt, however, that the threshold for finding a violation of the minimum standard of treatment remains high. Accordingly, even if Claimant is able to prove that Peru harassed or coerced Renco and DRP (*quod non*), it must demonstrate that such harassment or coercion constituted “a gross or flagrant disregard for the basic principles of fairness, consistency, even-handedness, due process, or natural justice expected by and of all States under customary international law.”¹⁴³⁵

¹⁴³² Treaty Memorial, ¶ 245, fn. 542.

¹⁴³³ Treaty Memorial, ¶ 245.

¹⁴³⁴ **CLA-066**, Christopher F. Dugan *et al.*, INVESTOR-STATE ARBITRATION, 2008, p. 523.

¹⁴³⁵ **RL-133**, *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015, ¶ 390

b. Neither President Garcia nor the Lima District Attorney harassed Renco or DRP

726. Even if Claimant had discharged its burden of proving that Article 10.5 prohibits coercion and harassment (*quod non*), it fails to provide any legal analysis to support its claim. Rather, Claimant concludes in a single paragraph—with no explanation whatsoever—that Peru coerced and harassed DRP when (i) “President Garcia issued an emergency decree that deliberately targeted Renco and DRP;”¹⁴³⁶ and (ii) “Peru pursued baseless criminal charges against Messrs. Rennert and Neil relating to the Intercompany Note.”¹⁴³⁷ The brevity of Claimant’s argument betrays the frivolity of its claim.
727. Claimant provides no evidence that President Garcia’s bankruptcy decree deliberately targeted Renco and DRP. The decree, which restricted creditors’ voting rights in related entities’ bankruptcy proceedings, was passed in the context of the global financial crisis, during which innumerable entities had declared bankruptcy.¹⁴³⁸ Claimant does not even attempt to show that the decree was passed with DRP and Renco in mind, let alone that it was meant to harass them. Indeed, when President Garcia enacted the decree in May 2009, DRP was not even close to bankruptcy. It is inconceivable that President Garcia would pass a decree affecting thousands of companies’ bankruptcy proceedings in order to harass DRP, a company that might someday enter bankruptcy.
728. Renco’s claim regarding the criminal investigations against Messrs. Rennert and Neil is equally frivolous. As Peru explains in **Section II.E.6**, those investigations were not initiated by Peruvian officials, but by Cormín, DRP’s creditor in the bankruptcy proceedings. Although a first-instance court rejected a motion to dismiss presented by Messrs. Rennert and Neil, an appellate court reversed that decision.¹⁴³⁹ When Cormín challenged the appellate court’s decision, the Peruvian Supreme Court dismissed the

¹⁴³⁶ Treaty Memorial, ¶ 246.

¹⁴³⁷ Treaty Memorial, ¶ 246.

¹⁴³⁸ **Exhibit C-112**, Emergency Decree No. 061-2009, 27 March 2009 (“[D]ue to the actual international crisis situation, it is imperative to adopt extraordinary and urgent measures in economic and financial matters that allow to minimize risks that affect the productive national engine and help the patrimonial restructuring of the companies.”).

¹⁴³⁹ **Exhibit C-210**, Opinions issued by the Superior Court of Appeals of Lima, 1 February 2013, p. 5.

challenge and brought an end to the criminal proceedings.¹⁴⁴⁰ Claimant simply cannot show that Peru’s conduct constituted a “gross or flagrant disregard for the basic principles of fairness, consistency, even-handedness, due process, or natural justice expected by and of all States under customary international law.”¹⁴⁴¹

729. Finally, Claimant’s allegations that Peru harassed Renco and Messrs. Rennert (chair of Renco) and Neil (CEO of DRRC) fall outside the scope of the FET requirement found in Article 10.5. The obligations in Paragraph 1 of Article 10.5 apply only to “covered investments”, not investors: “Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment.” This language stands in contrast to other obligations in the Treaty’s investment chapter (*viz.*, Chapter 10, Section A). For example, the obligation to accord national treatment found in Article 10.3 explicitly applies to both investors and covered investments.¹⁴⁴² Similarly, the obligation to accord most-favored-nation treatment found in Article 10.4¹⁴⁴³ and the obligation in Article 10.6 regarding treatment in case of strife¹⁴⁴⁴ also apply to both investors and covered investments.

730. The rules of treaty interpretation dictate that Article 10.5 of the Treaty does not apply to treatment of investors. Article 31 of the Vienna Convention on the Law of Treaties

¹⁴⁴⁰ **Exhibit C-211**, Permanent Criminal Chamber of the Superior Court of Peru Decision on *Queja Excepcional No. 311-2013*, 22 January 2014.

¹⁴⁴¹ **RLA-133**, *Tamimi* (Award), ¶ 390.

¹⁴⁴² **RLA-001**, Treaty, Art. 10.3 (“1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.”)

2. Treaty, Art. 10.4.2 (“Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”)

¹⁴⁴³ **RLA-001**, Treaty, Art. 10.4 (“1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”)

¹⁴⁴⁴ **RLA-001**, Treaty, Art. 10.6 (“[E]ach Party shall accord to investors of another Party, and to covered investments, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.”)

provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹⁴⁴⁵ According to the ordinary meaning of Article 10.5, the Treaty guarantees FET treatment for “covered investments” only: “[e]ach Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment.” Moreover, the context of Article 10.5 (specifically, the other articles in Chapter 10 that apply to “investors” and covered investments”) indicates that the Treaty’s contracting parties chose to exclude investors from Article 10.5’s scope of protection.

731. Claimant, however, alleges that:

“President Garcia issued an emergency decree that deliberately targeted **Renco** and **DRP** by restricting the participation of related creditors in the INDECOPI Bankruptcy Proceedings. In addition, Peru pursued baseless criminal charges against [Renco and DRRC executives] **Messrs. Rennert** and **Neil** relating to the Intercompany Note.”¹⁴⁴⁶ (Emphasis added).

Insofar as these allegations do not relate to Peru’s treatment of **DRP**, they do not fall within the scope of Article 10.5 and therefore must be dismissed.

8. DRP never had a right to receive multiple, condition-free extensions under customary international law

732. At the heart of Claimant’s FET claim is the theory that under customary international law, Peru was obligated to grant **DRP** multiple, condition-free extensions. This theory is incorrect. Peru had the right to regulate its environment in line with policies that pre-dated Claimant’s investment and served to implement its obligations. In fact, Article 18.2 of the Treaty recognizes “the sovereign right of each Party to establish its own levels of domestic environmental protection and environmental development priorities, and to adopt or modify accordingly its environmental laws and policies.” Because of that right, the Treaty clarifies that “each Party shall strive to ensure that those laws and policies provide for and encourage high levels of environmental protection and shall strive to continue to improve

¹⁴⁴⁵ **RLA-003**, VCLT, Art. 31.

¹⁴⁴⁶ Treaty Memorial, ¶ 246.

its respective levels of environmental protection.” What is more, the Treaty enshrines each State’s obligation to refrain from weakening or reducing environmental protections:

“[I]t is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in their respective environmental laws. Accordingly, a Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws in a manner affecting trade or investment between the Parties.”¹⁴⁴⁷ (Emphasis added)

733. Given DRP’s flagrant disregard for Peru’s environmental laws, policies, and protective measures, Peru would have been justified had it denied the company’s extension requests outright. Therefore, *a fortiori*, Peru cannot be said to have breached customary international law by granting DRP’s extension requests subject to certain conditions.

734. Peru explained above that determining a breach of the minimum standard of treatment “must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their borders.”¹⁴⁴⁸ As the *GAMI* tribunal declared, tribunals:

“[do] not have an open-ended mandate to second-guess government decision-making. Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some values over others and adopted solutions that are ultimately ineffective or counterproductive.”¹⁴⁴⁹

None of these circumstances, however, would violate the minimum standard of treatment.¹⁴⁵⁰

¹⁴⁴⁷ [RLA-001](#), Treaty, Art. 18.3.2.

¹⁴⁴⁸ [RLA-123](#), *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, ¶ 263; see also [RLA-146](#), *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, ¶ 505 (“when defining the content of [the minimum standard of treatment] one should . . . take into consideration that international law requires tribunals to give a good level of deference to the manner in which a state regulates its internal affairs.”).

¹⁴⁴⁹ [RLA-149](#), *GAMI v. Mexico*, Award ¶ 93 (quoting [RLA-123](#), *S.D. Myers v. Canada*, First Partial Award, ¶ 261).

¹⁴⁵⁰ [RLA-149](#), *GAMI v. Mexico*, Award ¶ 93 (quoting [RLA-123](#), *S.D. Myers v. Canada*, First Partial Award, ¶ 261).

735. In 1993, Peru made the policy choice to implement the PAMA regime and give smelters ten years to bring their operations into compliance with modern environmental standards.¹⁴⁵¹ Peru made this choice in direct furtherance of its international environmental commitments under the Rio Declaration. Peru also made this policy decision in response to the horrific public health impacts caused by mines and smelters nationwide, most notably the smelter in La Oroya. Not only did DRP purchase the Facility aware of Peru’s new policy under the PAMA regime, but a fundamental basis for DRP’s successful tender to acquire the Facility was DRP’s representation that it could implement that policy.¹⁴⁵²
736. DRP, however, breached its commitment. It ramped up production, increased emissions for several years, and failed to meet its PAMA deadline because of its own business decisions and missteps.¹⁴⁵³ It then concocted excuses for its failures and attempted to shift the blame.¹⁴⁵⁴
737. Each time DRP requested an extension beyond its legal deadlines, Peru had to craft a response that would balance its environmental obligations against the economic consequences of closing the Facility.¹⁴⁵⁵ Peruvian policymakers faced strong pressure to deny DRP’s extension requests from various domestic and international stakeholders, including the victims of DRP’s environmental contamination.¹⁴⁵⁶ On the other hand, Peru faced pressure from DRP and its workers to keep the Facility open.¹⁴⁵⁷
738. Against this background, Peru *twice* created new legal regimes so as to grant DRP extensions to fulfill its environmental obligations. While Claimant characterizes these extensions as “draconian,”¹⁴⁵⁸ the reality is that Peru had no legal obligation to grant DRP any extensions whatsoever. But Peru made extraordinary efforts to help DRP finally fulfill its obligation to bring the La Oroya Facility into environmental compliance. It is thus clear

¹⁴⁵¹ See Section II.A.

¹⁴⁵² See Section II.A.

¹⁴⁵³ See Sections II.C.2–II.C.3.

¹⁴⁵⁴ See Sections II.C.2–II.C.3.

¹⁴⁵⁵ See Section II.C.3.

¹⁴⁵⁶ See Section II.D.

¹⁴⁵⁷ See Section II.C.3.

¹⁴⁵⁸ Treaty Memorial, ¶ 80.

that when Peru conditioned those extensions on requirements aimed at ensuring DRP's environmental compliance, such conduct constituted an appropriate use of Peru's regulatory authority, and could not evidence "a gross or flagrant disregard for the basic principles of fairness, consistency, even-handedness, due process, or natural justice expected by and of all States under customary international law."¹⁴⁵⁹

B. Peru did not expropriate Renco's investment in breach of Article 10.7 of the Treaty

739. Claimant alleges that Peru expropriated its investment, and that the alleged expropriation was illegal because it did not comply with the requirements set forth under Article 10.7 of the Treaty. Article 10.7 provides as follows:

"No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation") except:

(i) for a public purpose;

(ii) in a non-discriminatory manner;

(iii) on payment of prompt, adequate, and effective compensation;
and

(iv) in accordance with due process of law and Article 10.5."¹⁴⁶⁰

740. Annex 10-B.3.b of the Treaty further provides:

"Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."

741. As explained in Peru's jurisdictional objections, Claimant's expropriation claim must fail due to its failure to state a *prima facie* case on the merits.¹⁴⁶¹ Even if the Tribunal were to find that Claimant has pleaded a *prima facie* case on the merits, quod non, Claimant's

¹⁴⁵⁹ RLA-133, *Tamimi* (Award), ¶ 390.

¹⁴⁶⁰ RLA-001, Treaty, Art. 10.7.

¹⁴⁶¹ See RLA-191, *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, ¶ 91 ("At the jurisdictional stage, the Claimant must establish . . . that it has a *prima facie* cause of action under the Treaty, that is that the facts which it alleges are susceptible of constituting a treaty breach if they are ultimately proved to be true."); RLA-192, *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, ¶¶ 237–54; RLA-187, *Achmea B.V. v. The Slovak Republic*, PCA Case No. 2013-12, Award on Jurisdiction and Admissibility, 20 May 2014, ¶ 216.

expropriation claim nonetheless fails because, as demonstrated below, (i) Claimant has failed to identify the correct legal standard for expropriation, and instead relies on a superficial and incorrect summary of the applicable standard; and (ii) Claimant’s summary of the alleged measures it claims resulted in the expropriation of its investment are mischaracterized, filled with material omissions, and do not meet the standard.

1. Renco has failed to identify the correct legal standard for expropriation, and instead relies on a superficial and incorrect summary of the applicable standard

742. The standard for expropriation offered by Claimant to support its shifting theories is both incomplete and incorrect. Article 10.7.1 of the Treaty prohibits the host State from expropriating or nationalizing protected investments, unless it complies with the requirements established in that provision (in which case it would constitute a lawful expropriation).

743. To determine if there was an expropriation, the Tribunal must evaluate three things: (1) the impact of the measure on the value of the investment; (2) the causal link between the measure and the impact; and (3) that the causal link is attributable to the State. Claimant bears the burden of proving the impact of the State’s measure as well as the causal link.¹⁴⁶²

744. Annex 10-B of the Treaty confirms the elements of the expropriation analysis. Annex 10-B, which memorializes the joint understanding of Peru and the United States on the interpretation of what constitutes an expropriation pursuant to Article 10.7 of the Treaty, explains that determining whether “an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure” requires “a case-by-case, fact-based inquiry that considers, among other factors”:

“(i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and

¹⁴⁶² See [RLA-110](#), *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007, ¶ 121.

(iii) the character of the government action.”¹⁴⁶³

745. As Peru explained in its jurisdictional objections, Annex 10-B further provides:

“Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.”

746. Claimant has not met its burden of proof to establish that the measures it invokes meet the elements identified in Annex 10-B of the Treaty. Each element of the standard for expropriation is explained in turn.

a. Claimant must prove that the value of its investment was radically affected or effectively destroyed

747. The degree to which the state measure affected the value of an investment is often used to establish if the alleged measure rises to the level of an expropriation.¹⁴⁶⁴ International tribunals agree that it is not just any State interference that generates an expropriation, but only one that *radically affects*, or *effectively destroys*, the value of the investment.¹⁴⁶⁵ The tribunal in *Electrabel v. Hungary* summarized the relevant jurisprudence and doctrine as follows:

“[T]he Tribunal considers that the accumulated mass of international legal materials, comprising both arbitral decisions and doctrinal writings, describe for both direct and indirect expropriation, consistently albeit in different terms, the requirement under international law for the investor to establish the **substantial, radical, severe, devastating or fundamental deprivation of its rights or the virtual annihilation, effective neutralisation or factual destruction of its investment, its value or enjoyment.**”¹⁴⁶⁶
(Emphasis added)

¹⁴⁶³ RLA-001, Treaty, Annex 10-B.

¹⁴⁶⁴ See RLA-205, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009 (“*Glamis Gold (Award)*”), ¶¶ 356–357; see CLA-074, *El Paso Energy International Company v. Republic of Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011 (“*El Paso Energy (Award)*”), ¶ 245.

¹⁴⁶⁵ See CLA-128, *Sempra Energy International v. Republic of Argentina*, ICSID Case No. ARB/02/16, Award, 28 September 2007 (“*Sempra Energy (Award)*”), ¶ 285.

¹⁴⁶⁶ RLA-111, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 (“*Electrabel (Decision)*”), ¶ 6.62; see also RLA-112, *Indian Metals & Ferro Alloys Ltd. v. Government of the Republic of Indonesia*, PCA Case No. 2015-40, Award, 29 March 2019, ¶ 305; RLA-113, *Hydro Energy I S.à.r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB/15/42,

748. The tribunal in *IMFA v. Indonesia* highlighted that the expropriation standard expressed by the tribunal in *Electrabel* reflects jurisprudence on the issue.¹⁴⁶⁷
749. An expropriation requires beyond just a substantial deprivation of the economic value of an investment. Indeed, the “substantial deprivation” standard has been rejected by many investment arbitration tribunals. For example, in the *El Paso v. Argentina* award, the tribunal concluded that a “necessary condition for expropriation is the neutralisation of the use of the investment.”¹⁴⁶⁸ The *El Paso* tribunal clarified this meant “that at least one of the essential components of the property rights must have disappeared”¹⁴⁶⁹ and “that a mere loss in value of the investment, **even an important one, is not an indirect expropriation**”¹⁴⁷⁰ (emphasis added).
750. A mere reduction in the value of the investment, even if significant, does not constitute an expropriation.¹⁴⁷¹ Take for example the award in *Glamis Gold v. United States*, where the tribunal was opining on treaty language nearly identical to the language here. The *Glamis Gold* tribunal determined that the state measure had caused a reduction of almost 60% in the value of the investment, but nevertheless concluded that an expropriation had not occurred because the investment had not been affected “radically” enough.¹⁴⁷² The *Tza Yap Shum v. Peru* tribunal expressed a similar position:

“Even where the Claimant may have suffered financial harm as a result of the Respondent's actions, it must be serious enough to constitute an expropriation under international law. If there is no evidence of appropriation or even destruction of the value of the property ("taking"), the Plaintiff's claim must be dismissed.”¹⁴⁷³

Decision on Jurisdiction, Liability and Damages, 9 March 2020, ¶ 530; **RLA-114**, *InfraRed Environmental Infrastructure GP Ltd. et al. v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Award, 2 August 2019, ¶ 505.

¹⁴⁶⁷ **RLA-112**, *Indian Metals & Ferro Alloys Ltd. v. Government of the Republic of Indonesia*, PCA Case No. 2015-40, Award, 29 March 2019, ¶ 305.

¹⁴⁶⁸ **CLA-074**, *El Paso Energy* (Award), ¶ 233.

¹⁴⁶⁹ **CLA-074**, *El Paso Energy* (Award), ¶ 233.

¹⁴⁷⁰ **CLA-074**, *El Paso Energy* (Award), ¶ 233.

¹⁴⁷¹ **CLA-074**, *El Paso Energy* (Award), ¶ 233.

¹⁴⁷² **RLA-205**, *Glamis Gold* (Award), ¶¶ 361, 536.

¹⁴⁷³ **RLA-093**, *Señor Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award, 7 July 2011, ¶ 151; see also **CLA-131**, *Tecmed* (Award), 29 May 2003, ¶ 116 (In Spanish original: “*Incluso cuando el Demandante puede haber sufrido un perjuicio económico como consecuencia de las acciones de la parte Demandada, debe ser lo*”).

751. Example after example make this point. The tribunal in *Burlington v. Ecuador* added that the expropriation analysis must be applied to the investment in its totality: “[T]he criterion of loss of the economic use or viability of the investment implies that the investment as a whole has become unviable.”¹⁴⁷⁴
752. Claimant must prove that the value of its investment was radically affected by the challenged measure and that it amounts to a near total deprivation of its property. Claimant does not even articulate the prevailing standard, let alone discharge its burden.
- b. Claimant must prove that the State caused the alleged damage.
753. Claimant also has the burden of proving “the causal link between the measures complained of and the deprivation of its business.”¹⁴⁷⁵ Claimant again fails to acknowledge the prevailing standard and does not discharge its burden.
754. As explained by the tribunal in *Oostergetel v. Slovakia*, the mere fact that one invokes “the word ‘expropriation’ . . . or a literal quotation of another case cannot stand in lieu of an allegation of specific facts giving rise to a treaty breach. ‘ Labelling’ – as an investment tribunal once wrote – ‘is no substitute for analysis.’”¹⁴⁷⁶

suficientemente grave como para constituir una expropiación bajo el derecho internacional. Si no se evidencia la toma de apropiación o incluso la destrucción del valor de la propiedad (“taking”) el reclamo del Demandante debe ser desestimado”); **CLA-084**, *Grand River* (Award), ¶ 151 (“Non-NAFTA tribunals also have held that an expropriation requires very great loss or impairment of all of a claimant’s investment. The Iran-U.S. Claims Tribunal looked to actions ‘depriving the owner of virtually all of its property or property rights’”).

¹⁴⁷⁴ **RLA-108**, *Burlington Resources* (Decision), ¶ 398; see **RLA-116**, *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006, ¶ 67 (“The Tribunal considers that, in the present case at least, the investment must be viewed as a whole and that the test the Tribunal has to apply is whether, viewed as a whole, the investment has suffered substantial erosion of value.”); **CLA-101**, *Merrill & Ring Forestry L. P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Award, 31 March 2010, ¶ 144 (“[T]he business of the investor has to be considered as a whole and not necessarily with respect to an individual or separate aspect, particularly if this aspect does not have a stand-alone character.”); **RLA-117**, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶¶ 151–152.

¹⁴⁷⁵ **RLA-119**, *Link-Trading Joint Stock Company v. Department for Customs Control of the Republic of Moldova*, UNCITRAL, Final Award, 18 April 2002, ¶ 87. See also **CLA-056**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶¶ 786–787; **RLA-120**, *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Award, 29 April 1999, ¶¶ 177, 200; **RLA-121**, *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, 19 December 2016, ¶ 366 (where the Tribunal rejected an expropriation claim because, “[i]n the view of the Tribunal, the termination of the Contract and the subsequent actions by the Turkmen courts were largely either the result of choices made by Garanti Koza, including the decision not to seek an extension or renewal of the bank guarantee, or were caused by circumstances within its control”).

¹⁴⁷⁶ **RLA-090**, *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, ¶ 319.

755. The causal link between the alleged affect and the challenged measures cannot be established if the destruction of the investment has been the result of actions or omissions of the claimant itself or of third parties, and not of actions or omissions attributable to the State.¹⁴⁷⁷ In *Elettronica Sicula (United States v. Italy)* (“**ELSI**”)¹⁴⁷⁸ the ICJ held that although the alleged measure was one of the causes that produced the damage alleged, other factors served as the underlying cause and therefore no liability should be attributed to the State:

“There were several causes acting together that led to the disaster to ELSI. No doubt the effects of the requisition might have been one of the factors involved. But the underlying cause was ELSI’s headlong course towards insolvency; which state of affairs it seems to have attained even prior to the requisition.”¹⁴⁷⁹

756. In short, the damage must be “proximate”, and the State must be responsible for the underlying cause.¹⁴⁸⁰ In explaining the causal link required between the alleged measure and damage, the tribunal in *El Paso Energy v. Argentina* explained that the relevant question is whether the alleged expropriation “was or was not the **automatic consequence, i.e. the only and unavoidable consequence**, of the measures taken [by the State]”¹⁴⁸¹ (emphasis added). In *El Paso Energy*, although the measures adopted by the State contributed to the loss of value of the investment, “the quasi-total loss of El Paso’s investment, was not an unavoidable and direct consequence of Argentina’s measures, and

¹⁴⁷⁷ See **RLA-007**, ILC’s Articles on State Responsibility, Art. 2.(a).

¹⁴⁷⁸ **RLA-096**, *ELSI* (Judgment), ¶¶ 98, 101.

¹⁴⁷⁹ **RLA-096**, *ELSI* (Judgment), ¶ 101.

¹⁴⁸⁰ **RLA-096**, *ELSI* (Judgment), ¶¶ 101; **CLA-074**, *El Paso Energy* (Award), ¶ 682; **RLA-122**, *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Award, 27 September 2019, ¶ 74; **CLA-056**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶¶ 785–787; **CLA-096**, *LG&E Energy Corp. et al. v. Republic of Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 50; **CLA-054**, *BG Group Plc v. Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007, ¶ 428; **RLA-124**, *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Partially Dissenting Opinion of Zachary Douglas, 8 October 2017, ¶ 13 (“International law requires that the recoverable loss could have been anticipated or foreseen by the parties at the time of the conclusion of the contract”); **RLA-007**, ILC’s Articles on State Responsibility, Art. 31, § 10, p. 92 (“Various terms are used to describe the link which must exist between the wrongful act and the injury in order for the obligation of reparation to arise. For example, reference may be made to losses attributable [to the wrongful act] as a proximate cause, or to damage which is too indirect, remote and uncertain to be appraised.”).

¹⁴⁸¹ **CLA-074**, *El Paso Energy* (Award), ¶ 270.

cannot be the basis of a claim for expropriation[.]”¹⁴⁸² In other words, for an expropriation claim to succeed, the claimant must prove that the total loss of the value of its investment was an automatic and unavoidable consequence of the measures adopted by the State.

c. Claimant must prove that government action interfered with reasonable and objective investment-backed expectations.

757. To find that an expropriation has occurred, the government measure must interfere with reasonable and objective investment-backed expectations.

758. The tribunal in *Ríos v. Chile* recently interpreted the meaning of “unequivocal and reasonable expectations of the investment” under the Free Trade Agreement between the Republic of Colombia and the Republic of Chile, which contains identical language to Annex 10-B of the Treaty.¹⁴⁸³ The *Ríos* tribunal states:

“[A]n expectation is unequivocal when its foundation is unequivocal. In other words, only if the State violates expectations arising from obligations, commitments or declarations that do not admit doubt or mistake can there be an expropriation under the Treaty. This implies that the obligation, commitment or declaration must be expressed or, if it is implicit, that there can be no doubt about its existence or scope and, in both cases, it must refer to specific parameters linked to the investment.”¹⁴⁸⁴

759. The *Ríos* tribunal concluded that expectations must be reasonable and objective: “[g]iven the terms of the Treaty (which speaks of investment expectations), this reasonableness must be objective; subjective expectations of investors are not enough.”¹⁴⁸⁵ The expectations “must have served as a basis for the investment, so that, in the absence of such expectations, the investment would not have been made.”¹⁴⁸⁶

¹⁴⁸² **CLA-074**, *El Paso Energy* (Award), ¶ 279.

¹⁴⁸³ **RLA-125**, Free Trade Agreement between Chile and Colombia, signed 27 November 2006, entered into force 8 May 2009, Ch. 9, Annex 9-C.

¹⁴⁸⁴ **RLA-126**, *Carlos Ríos and Francisco Javier Ríos v. Republic of Chile*, ICSID Case No. ARB/17/16, Award, 11 January 2021 (“**Ríos (Award)**”), ¶ 254 (Spanish original: “una expectativa es inequívoca cuando su fundamento es inequívoco. En otras palabras, sólo si el Estado vulnera expectativas que surjan de obligaciones, compromisos o declaraciones que no admitan duda o equivocación podrá existir una expropiación bajo el Tratado. Ello implica que la obligación, compromiso o declaración debe ser expresa o, en caso de ser implícita, que no pueda existir duda sobre su existencia o alcance y, en ambos casos, debe referirse a parámetros concretos ligados a la inversión”).

¹⁴⁸⁵ **RLA-126**, *Ríos* (Award), ¶ 255.

¹⁴⁸⁶ **RLA-126**, *Ríos* (Award), ¶ 256.

760. None of the challenged measures interfered with Claimant’s reasonable and objective expectations.

d. Claimant must prove its claim of indirect expropriation is the “rare circumstance” that would constitute indirect expropriation, discrimination, and Peru’s actions were not applied to protect legitimate public welfare objectives

761. As explained in Peru’s jurisdictional objections, in order to succeed on an indirect expropriation claim, Claimant would have to: (i) prove that its claim of indirect expropriation is the “rare circumstance” that would constitute indirect expropriation, (ii) prove that it experienced discrimination in accordance with investment treaty jurisprudence; and (iii) prove that Peru’s regulatory actions were not designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment. Claimant has categorically failed to address these issues, which are required under Annex 10-B.3.b of the Treaty. Since Claimant devotes no time whatsoever to address these requirements, Peru reiterates its position set forth in jurisdiction and reserves its right to expand on this defense on the merits should Claimant try to plead its claim.

2. Peru did not expropriate Renco’s investment

762. None of the measures that Claimant challenges as an alleged expropriation meets the applicable legal standards for any of Claimant’s shifting theories. Peru did not expropriate Renco’s investment through (i) the MEM’s alleged denial of DRP’s request for an extension of time request to complete the the Sulfuric Acid Plant Project; (ii) the MEM’s filing of a valid credit claim against the bankrupt DRP; or (iii) the bankruptcy proceedings of DRP.

a. Peru did not expropriate Renco’s investment when the MEM allegedly denied DRP’s request for an extension of time to complete the Sulfuric Acid Plant Project

763. Claimant alleges that the MEM rejected DRP’s request for an extension of time to finish its PAMA obligations, and that such measures amounted to an expropriation of its investment by Peru.¹⁴⁸⁷ This claim is meritless.

¹⁴⁸⁷ Treaty Memorial, ¶ 256.

764. *First*, Claimant mischaracterizes the events. The MEM did not reject DRP’s extension request in 2009. Rather, DRP did not benefit from an extraordinary extension of time to complete the Sulfuric Acid Plant Project because it was unwilling to comply with the MEM’s reasonable and predictable conditions.
765. Specifically, in March 2009, DRP sought another time extension to complete the very same project that the MEM had granted an extraordinary and final extension for in 2006 (the Sulfuric Acid Plant Project). The request for an extension in March 2009 was legally impossible because there was “no regulatory framework to answer to an extension application or a project extension”¹⁴⁸⁸ As an independent expert in Peruvian Environmental Law Ada Alegre explains, the MEM could not have approved DRP’s extension request unless the regulatory framework expressly empowered it to do so.¹⁴⁸⁹
766. Although the MEM could not grant a new extension, the Peruvian Government worked to try to find a way of granting an extension to DRP. In this regard, Peru’s Congress debated passing a new law to grant DRP an extension. The debate record demonstrates that the Congress was deeply critical of DRP and expected the MEM to impose strict regulations on the company.
767. On 25 September 2009, the Peruvian Congress passed the 2009 Extension Law, which: (i) declared decontaminating the environment in La Oroya to be a high-priority matter of public interest; (ii) granted DRP a 30-month extension to complete the Sulfuric Acid Plant Project; and (iii) required the company to restart operations within ten months.¹⁴⁹⁰ Under the 2009 Extension Law, the Peruvian Congress instructed the MEM to issue supplementary regulations to implement the law’s provisions.¹⁴⁹¹ Accordingly, the MEM issued the 2009 Extension Regulation, which required DRP to comply with the several conditions that were similar to those imposed by the 2006 Extension. These conditions were aimed at ensuring the completion of the Sulfuric Acid Plant Project, particularly in light of DRP’s repeated failure to comply with and finance its PAMA obligations, as well as its failure to honor its commitments under the 2006 Extension. Further, as explained in

¹⁴⁸⁸ [Exhibit C-076](#), Letter from MEM (F.A. Ramirez del Pino) to DRP (J. Mogrovejo), 15 July 2009.

¹⁴⁸⁹ Alegre Expert Report, ¶ 88.

¹⁴⁹⁰ [Exhibit C-077](#), Law No. 29410, 26 September 2009 (“**2009 Extension Law**”).

¹⁴⁹¹ [Exhibit C-077](#), 2009 Extension Law, Art. 5.

detail in **Section IV.A**, Claimant’s complaints about the conditions (the requirement for a trust account and asset guarantees) pursuant to the 2009 Extension Law are unfounded.

768. Notwithstanding Peru’s extraordinary support, DRP failed to meet the conditions under the 2009 Extension Law and Regulation. As a result, Claimant mischaracterizes DRP’s failure to obtain an extension to complete the Sulfuric Acid Plant Project.
769. *Second*, Claimant has not demonstrated how the alleged denial of DRP’s extension request affected the economic value of Renco’s investment. Claimant must demonstrate that the measure radically affected, or effectively destroyed, the value of the investment. Claimant simply states (without explanation) that the alleged denial of the extension request resulted in an expropriation of its investment. A State cannot be held responsible for an expropriation on so thin a claim: no evidence, no proof – provided or attempted – to demonstrate a causal radical impact to the reasonable and objective expectations of return on investment. That is what the Treaty requires and that is Claimant’s burden. The MEM’s alleged rejection of the extension request to complete the Sulfuric Acid Plant Project reaffirmed the limits imposed by Peruvian law and the terms of the STA. Indeed, the alleged rejection did not cause “[a] virtual annihilation, effective neutralisation or factual destruction of its investment, its value or enjoyment.”¹⁴⁹²
770. *Third*, even if the Tribunal found that the MEM’s alleged rejection of DRP’s request for an extension to complete the Sulfuric Acid Plant Project radically affected the value of the investment to the point that rises to the level of an expropriation, *quod non*, Claimant has not proven, because it cannot prove, that the MEM’s alleged rejection of DRP’s extension request was the proximate cause of DRP’s failure. A state is not responsible for an expropriation if the destruction of the investment has been the result of underlying actions or omissions of the claimant itself or of third parties.¹⁴⁹³ The demise of DRP was the result of underlying actions or omissions of Claimant for the following two reasons: (i) DRP and its parent companies (including Renco) are responsible for DRP’s financial ruin and inability to complete its environmental commitments under the STA and the PAMA; and

¹⁴⁹² **RLA-111**, *Electrabel* (Decision), ¶ 6.62.

¹⁴⁹³ **RLA-096**, *ELSI* (Judgment), ¶¶ 98, 101.

(ii) Renco focused on extracting as much profit as possible from DRP and not on performing DRP's environmental obligations. These two reasons are explained in turn.

771. **DRP and its parent companies (including Renco) are responsible for DRP's financial ruin.** As explained earlier and in Ms. Kunsman's independent expert report, Claimant orchestrated the decapitalization of DRP over a decade before the extension request was denied.¹⁴⁹⁴ On the very day that DRP concluded the purchase of the Facility, DRP took nearly the entire USD 126.5 million capital contribution it was obligated to pay under the STA and gave it to Doe Run Mining in the form of an interest-free USD 125 million loan. With this financial sleight of hand, Doe Run Mining diverted the funds that were contractually intended to fund DRP's environmental and investment obligations; instead, Doe Run Mining used those funds to repay more than half of the Acquisition Loan used to finance the purchase. These transactions were made at the direction of Renco, with immediate benefits for Renco. At the same time, depleting the working capital at the outset compromised DRP's ability to meet environmental and investment obligations in the years to come. That the MEM allegedly refused to extend time to complete the Sulfuric Acid Plant Project was beside the point and a convenient, although ultimately flimsy, hook to hang an expropriation claim upon.

772. As put by DRP's Treasurer in a deposition in the Missouri Litigations,

“it's reasonably foreseeable that the disposition of Doe Run Peru today is a result of some role that that lack of capitalization played.... So if you start out undercapitalized, it's – it's pie in the sky to expect that certain business conditions will change at a certain level and that your results will be so good that you can make up a capital deficit.”¹⁴⁹⁵

773. Thus, years before any purported Treaty violation by Peru, Renco and its affiliates had placed DRP in a difficult, if not untenable, financial position that posed significant risks to DRP's ability to meet its obligations and remain viable as a going concern. Indeed, DRP had managed its finances poorly and had wasted time focusing on production rather than

¹⁴⁹⁴ See Kunsman Expert Report, § IV.A.

¹⁴⁹⁵ **Exhibit R-067**, Eric Peitz Deposition (excerpts), Document No. 764-6, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 27 July 2017, pp. 73:20–75:2; see also *id.*, p. 75:17–19 (confirming “decisions that were made that resulted in the capitalization only being \$2 million”).

environmental remediation projects; as a result, it was destined to fail to meet its deadline under the “final and non-extendable” extension it received in 2006.

774. This kind of factual scenario is not novel. The facts of this case echo those in *Plama v. Bulgaria*.¹⁴⁹⁶ In *Plama*, the tribunal determined that the claimant “undertook a high risk project, without having the financial assets of their own to carry it out. [The investment] was based on an ambitious plan to borrow enough money to get the Refinery into operation.”¹⁴⁹⁷ The tribunal considered that the failure of the claimant’s investment was due to “reasons which, in the [t]ribunal’s opinion, were not attributable to any unlawful actions of Bulgaria”¹⁴⁹⁸ but instead were attributable to the commercial strategy adopted by the claimant.
775. Similarly, the tribunal in *STEAG v. Spain* noted that the financing structure adopted by the claimants “played a role in causing the damage.”¹⁴⁹⁹ According to the *STEAG* tribunal, “the damage alleged to have been suffered by the [c]laimant is due in part to the manner in which Steag conducted the successive project finance negotiations.”¹⁵⁰⁰
776. **DRP and its parent companies did not focus on performing DRP’s environmental obligations.** DRP purchased the Facility with a timeline already in place to address the Facility’s environmental footprint and bring it into compliance with Peru’s emissions standards. Rather than comply with that timeline, *DRP delayed*. It postponed internal deadlines for the Sulfuric Acid Plant Project, which comprised the largest, most costly, and time-consuming project aimed at bringing the Facility to compliance with environmental law. After years of making no meaningful progress on that project, DRP concocted excuses for its delays and demanded that the MEM extend the project’s legal deadline, lest the company be forced to close the Facility. Eventually, DRP ran out of time—already years past the expiry of the PAMA Period, it ceased operations and requested another

¹⁴⁹⁶ RLA-127, *Plama Consortium Ltd v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008 (“*Plama (Award)*”).

¹⁴⁹⁷ RLA-127, *Plama (Award)*, ¶ 305.

¹⁴⁹⁸ RLA-127, *Plama (Award)*, ¶ 305.

¹⁴⁹⁹ RLA-128, *STEAG GmbH v. Kingdom of Spain*, ICSID Case ARB/15/4, Decision on Jurisdiction, Liability and Damages, 8 October 2020 (“*STEAG (Decision)*”), ¶ 794 (in Spanish original: “*jugó un papel en la causación del daño*”).

¹⁵⁰⁰ RLA-128, *STEAG (Decision)*, ¶ 794 (in Spanish original: “*el perjuicio que alega haber sufrido la Demandante se debe parcialmente a la manera como Steag condujo las sucesivas negociaciones del project finance*”).

unwarranted extension in 2009, which Peru granted in a final effort to help DRP and its workers. DRP, however, refused to comply with the terms of the final extension and left its operations paralyzed until its suppliers forced it into bankruptcy.

777. Claimant decided to decapitalize DRP and hold off major PAMA projects until it was too late. The fact that under these circumstances, the MEM did not grant DRP an “effective extension”, even if accepted as true, would not constitute an expropriation under any definition of the term.

778. *Fourth*, the MEM’s alleged rejection of the extension request did not violate Claimant’s reasonable and objective expectations. Article 10.7 establishes a high burden for Claimant to demonstrate “reasonable investment-backed expectations,” and Respondent agrees with the tribunal in *Ríos v. Chile* that the expectations “must have served as a basis for the investment, so that, in the absence of such expectations, the investment would not have been made.”¹⁵⁰¹

779. Claimant has not offered evidence, credible or otherwise, to demonstrate that it made its investment in reliance on the reasonable expectation that it would receive extensions to complete its PAMA obligations. Even if Claimant had that expectation, it would be neither reasonable nor objective.

780. *Fifth*, Claimant has categorically failed to address the requirements under Annex 10-B.3.b of the Treaty for establishing an indirect expropriation. Since Claimant devotes no time whatsoever to addressing these requirements, Peru reiterates its position set forth in **Section III** and reserves its right to expand on this defense should Claimant try to plead its claim.

781. Under any theory, the MEM’s alleged rejection of DRP’s request for an extension of time to complete the Sulfuric Acid Plant Project does not constitute an expropriation under the Treaty.

b. Peru did not expropriate Renco’s investment through the MEM’s legitimate claim for credit against the bankrupt DRP

782. Claimant also alleges that its investment was expropriated when the MEM asserted its USD 163 million credit claim in the INDECOPI Bankruptcy Proceedings.¹⁵⁰² This claim is

¹⁵⁰¹ RLA-126, *Ríos* (Award), ¶ 256.

¹⁵⁰² Contract Memorial, ¶ 255.

likewise meritless. Claimant fails to articulate how a legitimate claim for a credit in a bankruptcy proceeding is an expropriation under Article 10.7 of the Treaty. It is not for Respondent, or the Tribunal to speculate on how this claim makes sense under international investment law. Nevertheless, Claimant's explanation of the MEM's credit claim is mischaracterized and suffers from material omissions. With regard to this novel and baseless theory of expropriation, Claimant has once again failed to meet its burden of proving the elements necessary before the Tribunal can find liability on behalf of the State under the Treaty.

783. *First*, as a threshold matter, Claimant cannot argue that the MEM's mere request for recognition of a credit against DRP, in exercise of its rights under Peruvian law, constitutes an act of expropriation. Such a broad and sweeping understanding of expropriation does not exist and Claimant points to no authority in support. While the Tribunal need not even agree with the following statement to dismiss Claimant's expropriation claim related to the bankruptcy: Renco's own financial and business decisions drove it into an unstable position, which then prompted one of DRP's most important suppliers, Cormin, not the MEM, to put DRP into bankruptcy.¹⁵⁰³ Thereafter, *like all of DRP's other creditors*, the MEM exercised its right under Peruvian law to request the recognition of its claim.

784. Professor Hundskopf confirms that INDECOPI Chamber No. 1 was correct when it recognized that the credit invoked by the MEM is valid under Peruvian Bankruptcy Law. The credit is valid because it emanates from the environmental regulations themselves, and MEM's right to obtain from DRP its promise to perform its obligations that it agreed to in the PAMA.¹⁵⁰⁴ In an effort to prevent the MEM from exercising its right to participate in the bankruptcy proceedings, Renco's affiliates have baselessly challenged the MEM's status as a creditor of DRP before INDECOPI and the Peruvian courts. How does this impact the Tribunal's expropriation analysis? It does not. The MEM is a valid creditor under Peruvian law. That MEM asserting a claim in a bankruptcy already underway is not

¹⁵⁰³ **Exhibit R-099**, *Solicitud de Inicio de Procedimiento Concursal Ordinario por Acreedor, Consorcio Minero S.A.*, 18 February 2010. *See also*, Neil First Witness Statement, ¶ 51; Sadlowski First Witness Statement, ¶ 49.

¹⁵⁰⁴ **Exhibit C-175**, Resolution No. 9340-2011/COO-INDECOPI, Recognition of Credits - Mandate of the Court for Defense of Competition No. 1, 21 December 2011; *see also* Hundskopf Expert Report, ¶ 61(a) (In Spanish original: "La Sala Concursal analizó si el crédito (acreencia) invocado por el MEM podía ser considerado como tal conforme al artículo 1 de la LGSC. Así para la Sala Concursal una fuente de una obligación puede surgir de una norma.").

an expropriation under the Treaty or any reasonable reading of international investment law.

785. *Second*, Claimant provides no explanation as to how MEM's credit claim destroyed the value of its investment. The MEM simply exercised its right to claim a credit for a debt that DRP owed to the MEM for not completing the Sulfuric Acid Plant Project, which represents an approximate 30% stake in DRP.
786. *Third*, even if the Tribunal were to assume that the MEM's credit claim against the bankrupt DRP affected the value of the investment to the point that rises to the level of an expropriation, quod non, Claimant has not proven, because it cannot, that the MEM's credit claim against the bankrupt DRP was the proximate cause of DRP's failure.
787. The negative ramifications for DRP from the intercompany deals benefitting Renco entities were evident for years. DRP's own documents are replete with warnings by DRP executives, auditors, financial experts, and banks that the business model was fundamentally flawed and threatened DRP's ability to meet its obligations or even to remain a going concern.¹⁵⁰⁵ DRP had a precarious financial footing prior to closing the Facility in June of 2009. For years before the Facility's closure, DRP's ruin at the hands of Renco was conspicuous.¹⁵⁰⁶
788. What Claimant fails to demonstrate, among other failures, is how any of this is the fault of the MEM. DRP halted payments to its suppliers, one of those suppliers being Cormin, who placed DRP into bankruptcy for failing to pay its debts.¹⁵⁰⁷ Neither the MEM nor any other Peruvian government entity, agency, or ministry placed DRP into bankruptcy. Further, numerous non-Peruvian government, third-parties filed successful credit claims against DRP.

¹⁵⁰⁵ See e.g., [Exhibit R-067](#), Eric Peitz Deposition (excerpts), Document No. 764-6, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 27 July 2017, pp. 73:20–75:2; see also, *id.* p. 75:17–19.

¹⁵⁰⁶ See generally Kunsman Expert Report, §§ IV.A, IV.B, IV.C.

¹⁵⁰⁷ [Exhibit R-099](#), *Solicitud de Inicio de Procedimiento Concursal Ordinario por Acreedor, Consorcio Minero S.A.*, 18 February 2010. See also Neil First Witness Statement, ¶ 51; Sadlowski First Witness Statement, ¶ 49.

789. As a result, even if the Tribunal were to assume that Claimant’s investment was radically affected, quod non, the MEM’s credit claim against the bankrupt DRP was not the proximate cause of the radical change.
790. *Fourth*, the MEM’s credit claim against the bankrupt DRP did not violate Claimant’s reasonable and objective expectations. Claimant has not provided evidence that it had any reason to believe the MEM would not exercise its right to claim a credit in the event DRP entered bankruptcy. Such an expectation would be unprecedented and unreasonable. In any event, Claimant’s complaints about the MEM’s credit are premised on misinterpretations of Peruvian law (as explained by Professor Hundskopf¹⁵⁰⁸) and were rejected in at least three instances in Peruvian courts.¹⁵⁰⁹
791. *Fifth*, Claimant has categorically failed to address the requirements under Annex 10-B.3.b of the Treaty for establishing an indirect expropriation. Since Claimant devotes no time whatsoever to address these requirements, Peru reiterates its position set forth in jurisdiction and reserves its right to expand on this defense should Claimant try to plead its claim.
792. As a result, Claimant has failed to meet its burden of proving the elements necessary for an expropriation under the Treaty.
- c. Peru did not expropriate Renco’s investment through the bankruptcy proceedings of DRP
793. Claimant alleges that Peru unlawfully expropriated Renco’s investments through DRP’s bankruptcy proceedings when it “remov[ed] DRP’s management”¹⁵¹⁰ and “oppos[ed] DRP’s restructuring plans.”¹⁵¹¹ This claim is at best facetious, without legal basis, and premised on gross omissions of the record.

¹⁵⁰⁸ Hundskopf Expert Report, § V.A.

¹⁵⁰⁹ See [Exhibit C-175](#), Resolution No. 9340-2011/COO-INDECOPI, Recognition of Credits - Mandate of the Court for Defense of Competition No. 1, 21 December 2011; [Exhibit C-181](#), Judgment of the Annulment of Administrative Act, Case No. 2012-00368, 18 October 2012; [Exhibit C-190](#), 8th Chamber of the Lima Superior Court, Decision No. 38, 25 July 2014; [Exhibit C-0193](#), Peruvian Supreme Court of Justice, Decision on the *Recurso de Casación*, 3 November 2015; [Exhibit C-165](#), Dismissal of DRP’s Constitutional Amparo Recourse, 11 January 2011.

¹⁵¹⁰ Treaty Memorial, ¶¶ 248, 255.

¹⁵¹¹ Treaty Memorial, ¶¶ 248, 255.

794. All decisions in DRP’s bankruptcy have been taken by the Board of Creditors in accordance with Peruvian Bankruptcy Law.
795. In that respect, DRP’s restructuring plan was rejected by the Board of Creditors for being unviable. Indeed, DRP’s restructuring plan was based on proposed financing that was conditioned on unreasonable demands and operations that would violate applicable environmental standards, a plan that was rejected by the majority of the Board of Creditors, not just the MEM. The Board of Creditors is not Peru.
796. For example, Cormin – a third party who was DRP’s biggest supplier – was not persuaded by DRP’s restructuring plan, noting that DRP’s conditions for financing the project amounted to “blackmail” (*chantaje*), and were utterly unacceptable.¹⁵¹² Apoyo – the third party the Board of Creditors appointed as DRP’s environmental supervising entity – made similar reservations about DRP’s restructuring plan. Apoyo noted that DRP’s restructuring plan would result in SO₂ and lead emissions beyond the acceptable standards under Peruvian law, and as a result there would not be a way to implement the plan.¹⁵¹³
797. As noted before, and as explained by Mr. Shinno, since 2012 the Board of Creditors has worked on advancing DRP’s liquidation in the best interest of all relevant parties, while respecting the environmental laws of Peru.¹⁵¹⁴ Throughout the process, the MEM has been consistent in its position that it participates in the process as one of DRP’s creditors, does not control the liquidation process, and continuously collaborates with the other creditors to advance the process.¹⁵¹⁵ DRP’s liquidation process has run like a typical liquidation for a company in bankruptcy in Peru, with the recognized creditors voicing their positions and

¹⁵¹² [Exhibit C-231](#), DRP Creditors’ Meeting Minutes, 9 and 12 April 2012, p. 4.

¹⁵¹³ [Exhibit C-231](#), DRP Creditors’ Meeting Minutes, 9 and 12 April 2012, p. 13 (In Spanish original: “*En resumen, el Plan de Reestructuración propuesto por Doe Run Perú S.R.L. implicaría emisiones de SO₂ y Plomo por encima de los estándares establecidos en la Resolución Ministerial N° 257-2006-MEM/DM durante el período de ejecución del proyecto de la planta de ácido sulfúrico de cobre*”) (English translation: “In summary, the Restructuring Plan proposed by Doe Run Perú S.R.L. would imply emissions of SO₂ and Lead above the standards established in Ministerial Resolution No. 257-2006-MEM/DM during the execution period of the copper sulfuric acid plant Project”).

¹⁵¹⁴ See Shinno Witness Statement, § VI.

¹⁵¹⁵ Shinno Witness Statement, § VI; see generally [Exhibit R-107](#), DRP Creditors’ Meeting Minutes, 22 and 25 May 2012; [Exhibit R-108](#), DRP Creditors’ Meeting Minutes, 19 and 24 Sept. 2014; [Exhibit R-109](#), DRP Creditors’ Meeting Minutes, 19 March 2015; [Exhibit R-110](#), DRP Creditors’ Meeting Minutes, 13 and 18 January 2012; [Exhibit C-231](#), DRP Creditors’ Meeting Minutes, 9 and 12 April 2012; [Exhibit R-122](#), DRP Creditors’ Meeting Minutes, 24 and 29 August 2012; [Exhibit R-112](#), DRP Creditors’ Meeting Minutes, 9 April 2013; [Exhibit R-123](#), Restructuring Plan of DRP, 30 April 2013.

voting on the direction and future of the company in bankruptcy. In the face of all of this, Claimant does not even attempt to demonstrate how actions by the Board of Creditors are attributable to Peru.

798. As a result, the factual premise of Claimant’s allegations is misguided, and for those reasons alone Claimant’s expropriation claim must fail. In any event, as explained below, Claimant fails to meet any of the elements necessary to prove an expropriation has occurred as a result of the bankruptcy proceedings of DRP.
799. *First*, the Board of Creditors’ decision to remove DRP’s management and not accept DRP’s restructuring plans cannot be considered to have effectively destroyed the value of the investment such that Claimant’s investment has been expropriated. In fact, the decisions taken by the Board of Creditors did the opposite and were taken to ensure the best outcome for DRP after a vote pursuant to Peruvian Bankruptcy Law.
800. *Second*, the decision to remove DRP’s management and not accept DRP’s restructuring plan are not attributable to the State. All decisions were made by the Board of Creditors, not by Peru, and were made after a fair voting procedure in accordance with the Bankruptcy Law.¹⁵¹⁶ Indeed, DRP’s restructuring plan was rejected because many creditors found it unviable and problematic.¹⁵¹⁷
801. Not only did Peru not cause the decisions of the Board of Creditors, but, as explained before, Claimant itself made decisions that sabotaged DRP.¹⁵¹⁸ As recognized by the ICJ, the causal link between the alleged affect and the challenged measures *cannot* be established if the destruction of the investment has been the result of actions or omissions of the claimant itself or of third parties, and not of actions or omissions attributable to the State.¹⁵¹⁹

¹⁵¹⁶ Hundskopf Expert Report, ¶ 32 (Spanish original: “*Otro de los principios fundamentales consagrado en el Título Preliminar de la LGSC (artículo VIII) es el principio de proporcionalidad, por el cual los acreedores participan proporcionalmente en el resultado económico de los procedimientos concursales, ante la imposibilidad del deudor de satisfacer con su patrimonio los créditos existentes, salvo los órdenes de preferencia previstos por la ley.*”).

¹⁵¹⁷ **Exhibit C-231**, DRP Creditors’ Meeting Minutes, 9 and 12 April 2012, pp. 4, 11.

¹⁵¹⁸ **Exhibit R-067**, Eric Peitz Deposition (excerpts), Document No. 764-6, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 27 July 2017, pp. 73:20–75:2; *see also id.*, p. 75:17–19 (confirming “decisions that were made that resulted in the capitalization only being \$2 million”).

¹⁵¹⁹ *See* **RLA-007**, ILC’s Articles on State Responsibility, Art. 2(a); **RLA-096**, *ELSI* (Judgment), ¶¶ 98, 101.

802. *Third*, even if one were to assume that the MEM alone decided to replace DRP's management and oppose DRP's restructuring plans, which is not true, Claimant had no reason to expect that the MEM would approve a restructuring plan that was unviable. In various Board of Creditors' meetings the MEM noted the issues with DRP's proposed restructuring plan, which included, among other things, the fact that it: (i) contemplated environmental standards that did not comply with the laws of Peru; (ii) was only viable if there was a change in the environmental law of Peru; and (iii) conditioned the financing of the project on the Peruvian State assuming, without limitation, responsibility for third-party claims relating to damages caused by environmental contamination.¹⁵²⁰
803. Claimant could not have had the reasonable and objective expectation that the MEM would accept such a proposal. Claimant cannot rely on its groundless, evidence-bereft, subjective expectations.
804. *Fourth*, Claimant has categorically failed to address the requirements under Annex 10-B.3.b of the Treaty for establishing an indirect expropriation. Since Claimant devotes no time whatsoever to address these requirements, Peru reiterates its position set forth in jurisdiction and reserves its right to expand on this defense should Claimant try to plead its claim.
805. Claimant has failed to demonstrate that the decision to replace DRP's management and oppose DRP's restructuring plans constitutes an expropriation of its investment.
- * * *
806. In conclusion, Claimant has not met its burden of proof to show that there was an expropriation pursuant to Article 10.7 of the Treaty, so the claim must fail.¹⁵²¹

¹⁵²⁰ [Exhibit C-231](#), DRP Creditors' Meeting Minutes, 9 and 12 April 2012.

¹⁵²¹ Claimant has failed to articulate its claim and state expressly whether it is claiming an "indirect expropriation" or a "creeping expropriation." Indeed, Claimant did not even try to provide the standard for creeping expropriation, which international investment law recognizes is different from indirect expropriation (see [RLA-108](#), *Burlington Resources* (Decision), ¶ 345). While the standard for expropriation that Peru has set forth above also applies to a creeping expropriation, there are several points that the Tribunal must note that are unique to the standard for creeping expropriation. In the event Claimant has argued that a "creeping expropriation" has occurred, the time to raise that claim was in the Memorial, which it failed to do. Peru reserves its right to object to an untimely creeping expropriation claim, and, in any event, reserves its right to demonstrate that, even when viewed as a creeping expropriation, the alleged measures do not amount to an expropriation.

C. Peru’s refusal to invalidate the MEM’s legitimate credit against DRP does not constitute a denial of justice

807. Claimant alleges that Peru committed a denial of justice in breach of Article 10.5 of the Treaty. Article 10.5 provides as follows:

“1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

2. For greater certainty . . . ‘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...”¹⁵²²

808. According to Claimant the decision of INDECOPI Chamber No. 1 to recognize the MEM’s credit against DRP “lacked legal basis or justification in excess of mere judicial error” and constituted a “rank misapplication of the law” and was “unduly influenced by the Peruvian government.” Claimant further contends that DRP’s and DRCL’s case was transferred to the newly created 8th Chamber, amounting to “unconscionable delay” and “serious procedural defects.” Finally, Claimant alleges that the Peruvian Supreme Court’s decision to reject DRP’s extraordinary cassation recourse “incorrectly interpreted and applied Peruvian law on two issues” and failed to provide “any substantive explanation” for its decision. None of that is correct, but more to the point, none of that amounts to a denial of justice even if it were true.

809. Claimant’s denial of justice allegations fail to meet the high standard set by customary international law for finding a state’s judiciary in breach. Although Claimant does not make submissions on customary international law, that is the body of law that the Treaty requires the Tribunal to apply in assessing this question. Peru does not have the burden to prove or make submissions on these points and Claimant’s abject failure to do so with particularity should itself render this claim doomed. Nevertheless, it should be manifest to any casual practitioner of international law that a denial of justice claim requires more than the misapplication of domestic law, speculative observations of undue influence, or disagreement with the structure and operation of a judicial system. Failing on every metric of proof – or indeed citation to customary international law as required by the Treaty –

¹⁵²² RLA-001, Treaty, Art. 10.5.

Claimant’s denial of justice claim is in reality nothing more than an impermissible appeal prefaced on mischaracterizations and material omissions dressed up to look like a treaty claim.

1. Customary international law imposes a high standard for claims of denial of justice

810. Customary international law imposes a high standard for claims of denial of justice.¹⁵²³

There are good reasons for this heightened standard. To allege a denial of justice is to allege the wholesale and categorical failure of the entire domestic legal system of a state.

As eloquently stated by the tribunal in *Corona v. Dominican Republic*:

“The international delict of denial of justice rests upon a specific predicate, namely, *the systemic failure of the State’s justice system*. When a claim is successfully made out at international law, it is because the international court or tribunal accepts that the respondent’s legal system as a whole has failed to accord justice to the claimant.”¹⁵²⁴ (Emphasis added)

811. It is Claimant’s burden to articulate how Peru’s judiciary was a categorical systemic failure.

Claimant has not even articulated a cognizable standard under customary international law let alone attempted to meet its heightened requirements.

812. Neither the Treaty nor customary international law empowers the Tribunal to find what Claimant seeks: that Peruvian courts misapplied Peruvian law. A claim for denial of justice requires far more and the Tribunal is not an international court of appeal.¹⁵²⁵ Ignoring its

¹⁵²³ **CLA-121**, *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Final Award, 12 September 2010 (“**RosInvestCo (Final Award)**”), ¶ 280; **RLA-087**, *Philip Morris Brands Sàrl et al. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016 (“**Philip Morris Brands (Award)**”), ¶ 500; **RLA-088**, *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15, Award, 6 May 2014 (“**H&H Enterprises (Award)**”), ¶ 400; **RLA-089**, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award, 22 June 2010 (“**Liman (Award)**”), ¶ 274; **RLA-090**, *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Final Award, 23 April 2012 (“**Oostergetel (Final Award)**”), ¶ 291; **RLA-079**, Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW, 2005, p. 87.

¹⁵²⁴ **RLA-023**, *Corona* (Award on the Preliminary Objections), ¶ 254; see also **RLA-089**, *Liman* (Award), ¶ 279; **CLA-121**, *RosInvestCo* (Final Award), ¶ 279; **CLA-084**, *Grand River Enterprises Six Nations, Ltd. et al. v. United States of America*, UNCITRAL, Award, 12 January 2011 (“**Grand River (Award)**”), ¶ 223; **RLA-090**, *Oostergetel* (Final Award), ¶ 225; **CLA-043**, *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013 (“**Arif (Award)**”), ¶ 345; **CLA-026**, *Apotex Inc. v. Government of the United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, 14 June 2013 (“**Apotex (Award on Jurisdiction)**”), ¶¶ 281–282; **RLA-088**, *H&H Enterprises* (Award), ¶ 400.

¹⁵²⁵ See **CLA-118**, *Robert Azinian et al v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999 (“**Azinian (Award)**”), ¶ 99; **RLA-008**, *Mondev* (Award), ¶¶ 126–127; **RLA-089**, *Liman* (Award), ¶

responsibility to prove its case by recourse to customary international law, Claimant relies heavily on Jan Paulsson’s book on the subject.¹⁵²⁶ Absent from Claimant’s careful recitation of Paulsson, however, is his clear summary of customary international law: “The mere violation of internal law may never justify an international claim based on denial of justice.”¹⁵²⁷

813. Indeed, tribunal after tribunal agree that misapplication or even errors in law are not sufficient to find a state has committed a denial of justice under customary international law. Claimant surprisingly cites *Loewen v. United States*¹⁵²⁸, which stated:

“Too great a readiness to step from outside into the domestic arena, attributing the shape of an international wrong to what is really a local error (however serious), will damage both the integrity of the domestic judicial system and the viability of NAFTA itself.”¹⁵²⁹

814. Again, the *H&H Enterprises Investments* tribunal noted:

“As to the Claimant’s allegation of denial of justice and denial of effective means, the Tribunal points out that its role is not to correct procedural or substantive errors that might have been committed by the local courts.”¹⁵³⁰

815. So too the *Philip Morris* tribunal, which observed:

“The high standard required for establishing this claim in international law means that it is not enough to have an erroneous

274; **CLA-121**, *RosInvestCo* (Final Award), ¶ 489; **CLA-043**, *Arif* (Award), ¶ 441; **RLA-091**, *ECE Projektmanagement International GmbH and Kommanditgesellschaft Panta Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic*, PCA Case No. 2010-5, Award, 19 September 2013 (“**ECE (Award)**”), ¶ 4.764; **RLA-092**, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, ¶ 159; **CLA-091**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶ 283; **RLA-093**, *Señor Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award, 7 July 2011, ¶ 184; **RLA-094**, *Enkev Beheer B.V. v. Republic of Poland*, PCA Case No. 2013-01, First Partial Award, 29 April 2014, ¶ 327.

¹⁵²⁶ See, e.g., Treaty Memorial, fns. 572–573, 577, 580, 602–603, 605.

¹⁵²⁷ **RLA-079**, Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW, 2005, p. 73.

¹⁵²⁸ See, e.g., Treaty Memorial, ¶ 282, fns. 575, 578.

¹⁵²⁹ **RLA-080**, *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB (AF)/98/3, Award, 26 June 2003 (“**Loewen (Award)**”), ¶ 242.

¹⁵³⁰ **RLA-088**, *H&H Enterprises* (Award), ¶ 400.

decision or an incompetent judicial procedure, arbitral tribunals not being courts of appeal.”¹⁵³¹

816. Instead, in order to find a violation of the obligation not to deny justice, a tribunal must find a violation of customary international law,¹⁵³² such as “a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.”¹⁵³³ Claimant does not even come close to this standard and it is therefore no wonder it does not even try to meet it.

817. Instead, Claimant suggests that serious errors in the substance of court judgments may amount to a denial of justice.¹⁵³⁴ To the extent Claimant is citing to Paulsson’s book as reflective of customary international law – because again, that is the body of law the Tribunal must apply, Paulsson has flatly rejected this conception of denial of justice:

“[I]n modern international law there is no place for substantive denial of justice. Numerous international awards demonstrate that the most perplexing and unconvincing national judgments are upheld on the grounds that international law does not overturn determinations of national judiciaries with respect to their own law. To insist that there is a substantive denial of justice reserved for ‘grossly’ unconvincing determinations is to create an unworkable distinction.”¹⁵³⁵

818. Paulsson does note that in his opinion:

“Denial of justice is always procedural. There may be extreme cases where the proof of the failed process is that the substance of a decision is so egregiously wrong that no honest or competent court could possibly have given it. Extreme cases should [] be dealt with on the footing that they are so unjustifiable that they could have been

¹⁵³¹ [RLA-087](#), *Philip Morris Brands* (Award), ¶ 500.

¹⁵³² See [RLA-095](#), *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, 6 July 2012 (“*Swisslion (Award)*”), ¶ 264 (“ICSID tribunals are not directly concerned with the question whether national judgments have been rendered in conformity with the applicable domestic law. They only have to consider whether they constitute a violation of international law, and in particular whether they amount to a denial of justice”).

¹⁵³³ See also [RLA-080](#), *Case Concerning Elettronica Sicula S.p.A. (ELSI)*, ICJ, Judgment, 20 July 1989 (“*ELSI (Judgment)*”), ¶ 131; [RLA-080](#), *Loewen* (Award), ¶ 132.

¹⁵³⁴ Treaty Memorial, ¶¶ 302–303, 305–309.

¹⁵³⁵ [RLA-079](#), Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW, 2005, p. 82.

only the product of bias or some other violation of the right of due process.”¹⁵³⁶

819. Whether this opinion is reflective of customary international law is not for the Respondent to assert or prove. Claimant does not assert it is reflective of customary international law, and more importantly, Claimant doesn’t prove it is reflective of customary international law. Claimant instead offers selective sources where states were found in breach because of “corruption, threats, unwarrantable delay, flagrant abuse of judicial procedure, a judgment dictated by the executive, or so manifestly unjust that no court which was both competent and honest could have given it,”¹⁵³⁷ but Claimant’s own sources make it clear that a judgment that “is reasoned, understandable, coherent and embedded in a legal system that is characterized by a division between public and private law as well as civil and administrative procedures” cannot meet the threshold for a denial of justice claim.¹⁵³⁸ Stated another way: “the factual circumstances must be egregious if state responsibility is to arise on the grounds of denial of justice.”¹⁵³⁹
820. Instead of the comprehensive proof and clear articulation of customary international law required by the Treaty, Claimant offers the *Chevron* award as instructive. In *Chevron*, however, the tribunal stated that a claimant’s burden of proof for a denial of justice under customary international law is “not lightly discharged, given that a national legal system will benefit from the general evidential principle . . . that the court or courts have acted properly.”¹⁵⁴⁰

¹⁵³⁶ **RLA-079**, Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW, 2005, pp. 98, 82. According to Fitzmaurice, “if all that a judge does is to make a mistake, i.e. to arrive at a wrong conclusion of law or fact, even though it results in serious injustice, the state is not responsible.” (citing Sir Gerald Fitzmaurice, The Meaning of the Term “Denial of Justice,” 13 BR. Y.B. INT’L L. 93 (1932)).

¹⁵³⁷ See Treaty Memorial, ¶ 281(citing **CLA-061**, *Case Concerning the Barcelona Traction, Light and Power Company, Limited*, 1970 I.C.J. 3 Separate Opinion of Judge Fitzmaurice at 144 *et seq.*).

¹⁵³⁸ **CLA-079**, *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015 (“**Mamidoil (Award)**”), ¶ 769.

¹⁵³⁹ **RLA-079**, Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW, 2005, p. 60.

¹⁵⁴⁰ **CLA-039**, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II, 30 August 2018 (“**Chevron (Second Partial Award)**”), ¶¶ 8.41–8.42 (“A claimant’s legal burden of proof is therefore not lightly discharged, given that a national legal system will benefit from the general evidential principle known by the Latin maxim *as omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium*. It presumes (subject to rebuttal) that the court or courts have acted properly This general

821. Claimant does allege breaches of *due process*, but breaches and facts untethered to customary international law or the standard that even their preferred scholar asserts (Paulsson states that a claimant must provide evidence of “[f]undamental breaches of due process” (emphasis added)).¹⁵⁴¹ Again, this is not Respondent’s burden and Claimant has not offered anything more than allegations. Where is the evidence of serious violations that may give rise to international responsibility such as the lack of access to any court;¹⁵⁴² absence of an impartial decision maker;¹⁵⁴³ absence of any opportunity to be heard;¹⁵⁴⁴ and absence of a reasoned decision (*i.e.*, no reasons given whatsoever)?¹⁵⁴⁵ There is no evidence, only accusations, allegations, and disappointment in the outcome DRP was able to achieve in Peruvian courts. Were the Tribunal to decide that these facts were sufficient for a state to breach of denial of justice, not only would it be ignoring the high standard established by customary international law that Claimant failed to plead, it would also be doing exactly what it cannot do – establish itself as a supranational court of appeal for redress of a disappointed investor’s domestic grievance.

2. The MEM’s credit and the local proceedings do not place Peru in breach of the customary international law standard of denial of justice

822. The Tribunal’s inquiry into Claimant’s denial of justice claims can stop with the above – they utterly failed to assert or prove the customary international law standard required for a denial of justice breach. Nevertheless, out of an abundance of caution, and to give the Tribunal all the comfort it needs to dismiss this claim in its entirety, Peru is compelled to respond to Claimant’s baseless, unproven, and improperly articulated allegations in turn.

principle subsumes a second principle, namely that a court is permitted a margin of appreciation before the threshold of a denial of justice can be met”).

¹⁵⁴¹ [RLA-079](#), Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW, 2005, p. 103.

¹⁵⁴² See [RLA-095](#), *Swisslion* (Award), ¶ 263 (“Not to deny justice implies at a minimum giving access to the courts.”).

¹⁵⁴³ [CLA-039](#), *Chevron* (Second Partial Award) ¶ 8.37; [CLA-118](#), *Azinian* (Award), ¶¶ 102–03.

¹⁵⁴⁴ [CLA-118](#), *Azinian* (Award), ¶¶ 102–103.

¹⁵⁴⁵ [RLA-097](#), Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, ICJ, Advisory Opinion, 12 July 1973, ¶ 92; see also [RLA-098](#), Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization Upon a Complaint Filed Against the International Fund for Agricultural Development, Advisory Opinion, 1 February 2012, ¶ 30.

823. At bottom, Claimant’s denial of justice allegations ultimately are as follows¹⁵⁴⁶: (i) the decision of INDECOPI Chamber No. 1 to recognize the MEM’s credit against DRP “lacked legal basis or justification in excess of mere judicial error” and constituted a “rank misapplication of the law” (**Section IV.C.2.a**); (ii) the “transitory courts” were “considered to be unduly influenced by the Peruvian government,” (**Section IV.C.2.b**); (iii) DRP’s and DRCL’s case was transferred to the newly created 8th Chamber, amounting to “unconscionable delay” and “serious procedural defects” (**Section IV.C.2.c**); (iv) in and the Supreme Court’s decision to reject DRP’s extraordinary cassation recourse “incorrectly interpreted and applied Peruvian law”, and failed to provide “any substantive explanation” for its decision (**Section IV.C.2.d**). Even if true, none of these allegations meet the standard of a customary international law denial of justice as required by Article 10.5 of the Treaty. None of it is true in any event.

a. INDECOPI Chamber No. 1’s approval of the MEM’s credit against DRP

824. Much as Claimant attempts to do here, DRP and DRCL have attempted to persuade various adjudicators to overturn the decision of INDECOPI Chamber No. 1 that approved the MEM’s credit against DRP. Claimant disagrees with INDECOPI Chamber No. 1’s understanding and application of Peruvian law. Claimant encourages the Tribunal to re-examine the evidence, and asserts that the Tribunal must understand the relevant Peruvian law to see whether INDECOPI Chamber No. 1 properly applied it in this instance.¹⁵⁴⁷ The Tribunal should not, because it cannot, hear Claimant’s appeal.¹⁵⁴⁸

825. **Claimant asks the Tribunal to sit as a court of appeal.** Although Claimant attempts to stuff its substantive Peruvian law-based arguments awkwardly into an international law framework that looks principally at procedure, each of Claimant’s purported “due process”

¹⁵⁴⁶ See Treaty Memorial, ¶ 290 (“Throughout the bankruptcy proceedings before INDECOPI and domestic courts, Peru treated DRP in a fundamentally unfair manner by causing unconscionable delay, rendering decisions under Peruvian bankruptcy law that were clearly subject to outside influences (*i.e.*, the State’s executive), and which lacked legal basis or justification in excess of mere judicial error. As described below, serious procedural defects and rank misapplication of the law, including a perfunctory dismissal by the Peruvian Supreme Court, deprived DRP of its most basic due process rights and were adopted merely to the detriment of DRP.”).

¹⁵⁴⁷ See generally Treaty Memorial, § IV.C.2.

¹⁵⁴⁸ **CLA-118**, *Azinian* (Award), ¶ 99; **RLA-008**, *Mondev* (Award), ¶¶ 126, 127; **RLA-089**, *Liman* (Award), ¶ 274; **CLA-121**, *RosInvestCo* (Final Award), ¶ 489; **CLA-043**, *Arif* (Award), ¶ 441; **RLA-091**, *ECE* (Award), ¶ 4.764.

claims are simply arguments about INDECOPI Chamber No. 1’s alleged misapplication of Peruvian law.¹⁵⁴⁹ Tellingly, while Claimant alleges violations of the Peruvian Civil Code and INCECOPI’s practices, not once in over 25 pages does Claimant discuss, cite, or apply international standards of due process.¹⁵⁵⁰

826. Unsurprisingly, in his witness statement, the Vice President of Law for Renco from 1996 to February 2020, Mr. Sadlowski, testifies that after INDECOPI Chamber No. 1 recognized the MEM’s credit claim on 18 November 2011, DRP appealed the decision and believed its chances were strong because the “MEM had no legal authority to receive compensation as a result of a company’s failure to complete a PAMA,”¹⁵⁵¹ which is the same claim Claimant makes in this arbitration. Indeed, Mr. Sadlowski proceeds to explain how DRP continued to search for ways to overturn the decision of INDECOPI Chamber No. 1, all based on DRP’s and Renco’s opinion that under Peruvian law “a breach of PAMA does not create a credit in favor of the MEM.”¹⁵⁵² Now, in the Memorial, Claimant asserts the same.¹⁵⁵³ Claimant has made it clear to all who will listen that it disagrees with the INDECOPI Chamber No. 1’s decision, but that disagreement does not constitute a cognizable breach under the Treaty.¹⁵⁵⁴
827. **Claimant’s criticisms regarding the approval of the MEM’s credit by Peruvian courts are incorrect.** In the Memorial, Claimant sets forth an incomplete and inaccurate description of IDECOPI Chamber No. 1 proceedings. On the basis of this distorted description, Claimant asserts that INDECOPI Chamber No. 1 misapplied various provisions of Peruvian law — or, as Claimant puts it, throughout the bankruptcy

¹⁵⁴⁹ Treaty Memorial, § IV.C.2.c.

¹⁵⁵⁰ Treaty Memorial, § IV.C.2.c.

¹⁵⁵¹ Sadlowski Witness Statement, ¶¶ 64–65.

¹⁵⁵² Sadlowski Witness Statement, ¶ 68.

¹⁵⁵³ Treaty Memorial, § IV.C.2.c.

¹⁵⁵⁴ See, e.g., [RLA-099](#), *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision on Annulment, 1 March 2011, ¶ 213 (The ad hoc committee took note of the respondent’s argument that the Tribunal misapplied domestic law. It stated: “Peru may well disagree with the view that the Tribunal formed as to the correct solution of the issue before it under Peruvian law. But an ad hoc committee may not enter upon an assessment of whether a tribunal made a correct assessment of the content of the applicable law”); [RLA-100](#), *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision of the Ad Hoc Committee, 25 March 2010 (“[Rumeli \(Annulment Decision\)](#)”), ¶ 96.

proceedings before INDECOPI and domestic courts, Peru . . . render[ed] decisions under Peruvian bankruptcy law that . . . lacked legal basis or justification,”¹⁵⁵⁵ which constitutes a “rank misapplication of the law[.]”¹⁵⁵⁶ Claimant offers three primary disagreements with INDECOPI Chamber No. 1’s decision:

- a. **First disagreement:** “INDECOPI, ‘cannot under any circumstances determine the existence of compensation derived from civil liability;’”¹⁵⁵⁷
- b. **Second disagreement:** “[T]here was no scope to apply the Peruvian Civil Code to award damages to the MEM, as the majority mistakenly had done, because a breach of a PAMA obligation under no circumstances could grant the MEM a credit or a right to compensation;”¹⁵⁵⁸
- c. **Third disagreement:** “INDECOPI Chamber No. 1 [. . .] ruled *ultra petita* by deciding matters beyond the MEM’s request.”¹⁵⁵⁹

828. By enumerating these alleged flaws — and invoking the dissent of one member of INDECOPI Chamber No. 1 — Claimant tries to paint a picture of a proceeding replete with substantive violations, a bankruptcy system determined to rule against DRP, and a decision that is incorrect on its face. Under the light of fact, that picture simply does not exist.

829. **First: INDECOPI can determine the existence of compensation derived from civil liability.** Claimant argues that administrative bodies (including INDECOPI) cannot establish compensation amounts, because such power corresponds solely to the judiciary (*Poder Judicial*) and other jurisdictional bodies (such as arbitration and military tribunals).¹⁵⁶⁰ However, Professor Hundskopf is clear: “there is no law in the Peruvian

¹⁵⁵⁵ Treaty Memorial, ¶ 290.

¹⁵⁵⁶ Treaty Memorial, ¶ 290.

¹⁵⁵⁷ Treaty Memorial, ¶ 305.

¹⁵⁵⁸ Treaty Memorial, ¶ 303; *see also, id.*, ¶ 302 (“the only available remedies in light of a company’s breach of its PAMA obligations were administrative sanctions, such as fines or shutting down that company’s operations. She clearly stated that neither Peruvian law nor the Stock Transfer Agreement provided that the breach of the PAMA could give rise to a claim in favor of the MEM or any other public or private entity”).

¹⁵⁵⁹ Treaty Memorial, ¶ 309.

¹⁵⁶⁰ Treaty Memorial, ¶ 303.

legal system that establishes such prohibition on INDECOPI, nor is there any law that establishes that such function only corresponds to the judiciary.”¹⁵⁶¹

830. Pursuant to Articles 3 and 38 of the Bankruptcy Law, INDECOPI is the competent authority to hear bankruptcy proceedings under such law, one proceeding being to recognize credits.¹⁵⁶² Notably, INDECOPI Chamber No. 1 was the second and last resort administrative chamber with respect to hearing credit applications.¹⁵⁶³
831. The credit recognition procedure is of utmost importance in the bankruptcy framework because, through the procedure, credit rights are determined against the assets of the bankrupt debtor in order to obtain the timely payment and the composition of the Creditors' Committee.¹⁵⁶⁴
832. As confirmed by articles 38 and 39 of the Bankruptcy Law, and as confirmed by bankruptcy chamber decisions, to perform the credit recognition process, the Bankruptcy Law grants broad powers to the bankruptcy authority (*i.e.*, INDECOPI) in evidentiary and investigative matters.¹⁵⁶⁵
833. In this respect, although the judiciary has the power to establish claims derived from compensation, Professor Hundskopf explains the Peruvian legal system does not preclude the bankruptcy authority from recognizing credits derived from compensation, provided that the compensation amount can be determined by an evaluation of the evidence, the law, contract, or declaration of the parties.¹⁵⁶⁶ Contrary to Claimant’s belief, this *has been* applied in previous bankruptcy cases.¹⁵⁶⁷
834. Far from targeted retribution against Claimant, the same bankruptcy chamber (*i.e.*, INDECOPI Chamber No. 1) has issued similar rulings in cases in the employment context.

¹⁵⁶¹ Hundskopf Expert Report, ¶ 72.

¹⁵⁶² **Exhibit OHE-056**, Law No. 27809, General Law of the Bankruptcy System, Arts. 3 and 38.

¹⁵⁶³ Hundskopf Expert Report, ¶ 73.

¹⁵⁶⁴ *See* Hundskopf Expert Report, ¶ 74.

¹⁵⁶⁵ *See* Hundskopf Expert Report, ¶ 76; **Exhibit OHE-056**, Law No. 27809, General Law of the Bankruptcy System, Arts. 3 and 38; **Exhibit R-244**, Resolution No. 0466-2014/SCO-INDECOPI, 12 August 2014.

¹⁵⁶⁶ *See* Hundskopf Expert Report, ¶ 77.

¹⁵⁶⁷ *See* Hundskopf Expert Report, ¶ 97.

For example, in Resolution No. 0687-2014/SCO-INDECOPI, the same chamber recognized credits derived from compensation that had not been previously verified by the judiciary.¹⁵⁶⁸

835. As a result, Mr. Schmerler’s opinion that administrative authorities, like INDECOPI, “cannot under any circumstances determine the existence of compensation derived from civil liability” is incorrect.¹⁵⁶⁹ Further, and contrary to Claimant’s allegation, in the administrative context the power to issue a credit based on a compensation is also not exclusive to the bankruptcy chambers. As Professor Hundskopf demonstrates, through Resolution No. 0781-2021/SPC-INDECOPI of 8 April 2021, the INDECOPI chamber specialized in consumer protection matters heard a case where the consumer argued that a real estate agency failed to pay a contractually agreed penalty for late delivery of a property the consumer acquired.¹⁵⁷⁰ The consumer protection chamber declared the complaint for violation of consumer protection regulations well-founded, sanctioned the real estate agency, and as a corrective measure, ordered the real estate agency to pay the contractually agreed penalty to the consumer.¹⁵⁷¹
836. Peruvian law makes it clear, unsurprisingly, that when the compensation can be derived from the evidence, the law, contract, or declaration of the parties, INDECOPI Chamber No. 1 can establish/determine the existence of compensation owed from civil liability.
837. **Second: INDECOPI Chamber No. 1 had the authority to apply the Peruvian Civil Code to award damages to the MEM and as a result to grant the MEM a credit.** As explained by Professor Hundskopf, in issuing Resolution No. 1743-2011, INDECOPI Chamber No. 1 carried out a comprehensive analysis of various applicable laws of the Peruvian legal system to verify whether or not the MEM had a valid credit against DRP.¹⁵⁷²

¹⁵⁶⁸ [Exhibit R-245](#), Resolution No. 0687-2014/SCO-INDECOPI, 23 October 2014, p. 5.

¹⁵⁶⁹ Treaty Memorial, ¶ 305.

¹⁵⁷⁰ [Exhibit R-129](#), Resolution No. 0781-2021/SPC-INDECOPI, 8 April 2021; *See* Hundskopf Expert Report, ¶ 105.

¹⁵⁷¹ [Exhibit R-129](#), Resolution No. 0781-2021/SPC-INDECOPI, 8 April 2021, pp. 1–2.

¹⁵⁷² *See* Hundskopf Expert Report, ¶ 62.

- Indeed, as stated by INDECOPI Chamber No. 1 and confirmed by professor Hundskopf, an obligation can arise under a contract or agreement, or by law.¹⁵⁷³
838. Thus, INDECOPI Chamber No. 1 relied not only on the Bankruptcy Law, but also on the Peruvian Civil Code, which is also applicable under Peruvian law. The Peruvian Civil Code includes provisions regarding, among others, personal rights, family law, successions, obligations, and contracts.¹⁵⁷⁴
839. The law on “obligations” of the Peruvian Civil Code regulates the “obligation to perform” (*obligación de hacer*), that is, the obligation to perform a certain activity or conduct (*i.e.*, to build a plant or complete a project in accordance with the PAMA).¹⁵⁷⁵
840. Considering that the Peruvian Civil Code establishes that the breach of an obligation to perform enables a party to demand compensation for such breach, then the bankruptcy chamber may recognize compensation as a credit if a party, in this case the MEM, demonstrates that the other party, in this case DRP, breached an obligation to perform.¹⁵⁷⁶
841. Here, in accordance with Supreme Decree 016-93-EM, DRP had an obligation to implement the PAMA.¹⁵⁷⁷ DRP’s non-performance of its obligation under PAMA constituted a breach of an “obligation to perform” (*obligación de hacer*) under the Peruvian Civil Code. Such breach by DRP resulted in the obligation to compensate the MEM for the cost to perform the PAMA that DRP had committed to DRP itself quantified the cost to perform the PAMA that it had committed to in the context of the proceedings before INDECOPI Chamber No. 1.
842. Claimant and its expert have argued that only the judiciary can establish compensation, but as discussed in the previous segment, under certain circumstances administrative bodies, such as INDECOPI, can order a credit based on a compensation.¹⁵⁷⁸

¹⁵⁷³ See Hundskopf Expert Report, ¶ 60(a).

¹⁵⁷⁴ See generally [RLA-062](#), Peruvian Civil Code; Hundskopf Expert Report, ¶ 63.

¹⁵⁷⁵ See [RLA-062](#), Peruvian Civil Code, Arts. 1148–1157; Hundskopf Expert Report, ¶ 64.

¹⁵⁷⁶ See Hundskopf Expert Report, ¶ 65.

¹⁵⁷⁷ See [Exhibit C-088](#), Supreme Decree No. 016-93, Art. 9.

¹⁵⁷⁸ See *eg.*, [Exhibit R-245](#), Resolution No. 0687-2014/SCO-INDECOPI, 23 October 2014, pp. 5, 24.

843. Indeed, as held on multiple instances by the *highest chamber* of INDECOPI in bankruptcy, INDECOPI has the authority to establish compensation.¹⁵⁷⁹ In this case, DRP itself had established the amount of its unfulfilled obligation – *i.e.*, the cost of completing its PAMA – that was equivalent to the compensation that could be claimed by the MEM as a credit in the bankruptcy proceeding against DRP.
844. Even if the Tribunal allows Claimant to press its disagreements with Peruvian law in this forum, which it should not, where are the due process violations? Notably, Claimant does not allege that the Peruvian legal system egregiously deprived DRP of its opportunity to be heard or present arguments in the proceeding before INDECOPI Chamber No. 1. Claimant cannot allege due process violations because DRP exercised its right to present arguments regarding the recognition of the MEM’s credit on every occasion.¹⁵⁸⁰
845. **Third: INDECOPI Chamber No. 1 did not rule on matters beyond the MEM’s request.** As Professor Hundskopf explains throughout his expert report, INDECOPI has the powers to interpret the pertinent regulations of the legal system in order to recognize credits.¹⁵⁸¹ In Claimant’s Memorial, they call this an “egregious due process violation.”¹⁵⁸² At no point during the administrative contentious proceedings did DRP or DRCL raise such an argument at any level or at any time.

¹⁵⁷⁹ Hundskopf Expert Report, ¶ 68 (Spanish original: “*Así pues, como lo ha señalado la Sala Concursal, el Indecopi se encuentra facultado a establecer montos indemnizatorios cuando ello pueda ser determinado sin mayor dificultad, esto es sin que exista una controversia judicial o administrativa destinada establecer o cuestionar el monto de indemnización, esto es que deba ser dilucidada por órganos jurisdiccionales (Poder Judicial o Tribunal Arbitral).*”).

¹⁵⁸⁰ Hundskopf Expert Report, ¶ 69; *see also* [Exhibit OHE-005](#), Response of Doe Run Peru SRL before INDECOPI opposing MEM’s credit claim, 11 November 2010; [Exhibit OHE-006](#), Additional arguments in support of Doe Run Peru SRL’s Response before INDECOPI opposing MEM’s credit claim, 15 November 2010; [Exhibit OHE-009](#), Letter from DRP to INDECOPI, 15 December 2010; [Exhibit OHE-010](#), Additional arguments in support of Doe Run Peru SRL’s opposition of MEM’s credit claim, 20 December 2010; [Exhibit OHE-013](#), Doe Run Peru’s Response to MEM’s Appeal, 18 May 2011.

¹⁵⁸¹ *See* Hundskopf Expert Report, ¶ 114 (Spanish original: “*como se explica a lo largo de este informe, el Indecopi como autoridad administrativa tiene plenas facultades para interpretar las normas pertinentes del ordenamiento jurídico a fin de reconocer créditos, no advirtiéndose un defecto en la motivación de sus resoluciones.*”).

¹⁵⁸² Treaty Memorial, ¶ 309.

846. Claimant has not demonstrated that the decision to recognize the MEM’s credit could not be justified on any grounds and that it affronted not *a* rule of law, but *the* rule of law itself.¹⁵⁸³

b. The proceeding before the 4th Transitory Administrative Contentious Court

847. Claimant alleges the following complaints regarding the 4th Transitory Administration Contentious Court:

a. **First complaint:** “The case was assigned to a specially-created transitory court, which many eminent Peruvian legal scholars considered to be unduly influenced by the Peruvian government,” and shortly after issuing the decision, the 4th Transitory Administrative Contentious Court “was dissolved and converted into a mixed jurisdiction court.”¹⁵⁸⁴

b. **Second complaint:** “On October 18, 2012, exactly nine months after DRP filed its appeal, a judge sitting on this transitory court issued an unsigned decision, in breach of the Peruvian Code of Civil Procedure, upholding the split decision of Chamber No. 1.”¹⁵⁸⁵

c. **Third complaint:** “In affirming the split decision of Chamber No. 1, the transitory court judge ignored the opinion of the Civil District Attorneys’ Office, issued during the court proceedings”¹⁵⁸⁶

848. Claimant again tries to paint a picture of a bankruptcy system determined to work against DRP, and again, Claimant’s picture does not reflect the reality.

(i) There was nothing unusual or unfair about the “transitory” nature of the court.

849. Claimant argues that the “specially-created transitory court” (*i.e.*, the 4th Transitory Administrative Contentious Court) was “considered to be unduly influenced by the

¹⁵⁸³ RLA-080, *ELSI* (Judgment), ¶ 131. Interestingly, this was not the first time that a Renco company had a State as a creditor in the context of a bankruptcy and its failure to comply with environmental obligations. Indeed, in Utah, MagCorp's largest creditor was the United States on behalf of the EPA.

¹⁵⁸⁴ Treaty Memorial, ¶¶ 312–313 (*citing Exhibit C-178, Poder Judicial: ¡Cuidado con las salas transitorias y especializadas!*, INSTITUTO DE DEFENSA LEGAL MAGAZINE (Issue 130), 2000, p. 28).

¹⁵⁸⁵ Treaty Memorial, ¶ 313.

¹⁵⁸⁶ Treaty Memorial, ¶ 314.

Peruvian government,” and that shortly after issuing the decision, “the transitory court was dissolved and converted into a mixed jurisdiction court.” It is unclear whether Claimant is implying that the fact the 4th Transitory Administrative Contentious Court was a “transitory court” or the fact that the court was “dissolved” shortly after issuing the decision is evidence of impropriety. Assuming that Claimant intended to argue that the aforementioned is evidence of impropriety, these arguments fall flat because they completely misunderstand the Peruvian legal system.

850. In Peru, there is nothing unusual or improper for a court to be “transitory.” As explained by Professor Hundskopf, the fact that a court is transitory has nothing to do with its power, independence or importance.¹⁵⁸⁷ In fact, to ensure efficiency the judiciary (*Poder Judicial*) regularly creates transitory courts in order to handle a high volume of cases when necessary.¹⁵⁸⁸
851. It is axiomatic that a transitory court, created for a temporary duration, can also be dissolved as needed. In the case of the 4th Transitory Administrative Contentious Court, on 1 August 2013, through Resolution No. 154-2013-CE-PJ, the judiciary (*Poder Judicial*) reorganized many of the courts at a national level in order to attend to the caseload in different regions and divisions.¹⁵⁸⁹ Far from the shadowy implication that Claimant seeks to project, many courts were dissolved in 2013 and the action was, as echoed by Professor Hundskopf, common practice for the judiciary and in no way directed against DRP.¹⁵⁹⁰
852. Claimant next alleges that the “specially-created transitory court” was “considered” to be “unduly influenced by the Peruvian government.” Considered by whom and how is this evidence of the very serious charge that Claimant seems to be implying: judicial corruption? In the event that Claimant later takes it vague accusations and attempts to allege the “undue influence” amounts to “corruption,” the Tribunal should insist upon

¹⁵⁸⁷ Hundskopf Expert Report, ¶ 138 (In Spanish original: “*Debemos señalar en primer lugar que el hecho que el juzgado sea “Transitorio”, no significa que sea un órgano jurisdiccional de menor grado o importancia.*”).

¹⁵⁸⁸ Hundskopf Expert Report, ¶ 138.

¹⁵⁸⁹ Hundskopf Expert Report, ¶ 140; [Exhibit C-185](#), Administrative Resolution No. 154-2013-CE-PJ, 1 August 2013.

¹⁵⁹⁰ Hundskopf Expert Report, ¶ 140 (Spanish original: “*Lo anterior fue un acto normal y propio de la organización del Poder Judicial, mas no alguna orden dirigida en contra de los intereses de DRP o de Renco.*”).

proof. To be clear, Claimant cannot provide proof of judicial corruption because none exists. Indeed, “[t]he seriousness of the accusation of corruption,” particularly when it “involves officials at the highest level of the [respondent’s] Government”¹⁵⁹¹ requires that the party alleging corruption¹⁵⁹² provide “clear and convincing evidence” of corruption.¹⁵⁹³ In other words, “[i]t is not sufficient to present evidence which could possibly indicate that there might have been or even probably was corruption. Rather, [a claimant] ha[s] to prove corruption.”¹⁵⁹⁴ Because this allegation is merely insinuated by Claimant, Peru reserves its right to put in additional submissions on this point should Claimant seek to explain itself or provide evidence. Respondent does not think additional submissions on this point it will be necessary because Claimant has nothing to corroborate its insinuations irrespective of its assertions that “many eminent Peruvian legal scholars considered to be unduly influenced by the Peruvian government.”¹⁵⁹⁵ The musings of so-called “eminent scholars” does not come close to meeting the applicable standard for a denial of justice finding or to sustaining the very serious charge of judicial corruption.

- (ii) The process before the 4th Transitory Administrative Contentious Court was timely and the alleged unsigned decision cannot possibly amount to a denial of justice

853. Astonishingly, Claimant asserts that a decision issued “nine months after DRP filed its appeal” is an “unconscionable delay” sufficient to justify a denial of justice claim. Such a claim must fail because it falls grossly short of the type of delay that could possibly amount to a denial of justice. Were it otherwise, hundreds of legal appellate systems throughout the world would be in jeopardy, which cannot possibly reflect customary international law. In any event, Claimant’s allegation yet another example of its willful lack of appreciation

¹⁵⁹¹ **RLA-101**, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009 (“**EDF Services (Award)**”), ¶ 221.

¹⁵⁹² See **RLA-102**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award, 10 December 2014 (“**Fraport (Award)**”), ¶ 491; **RLA-168**, *Wena Hotels Ltd. Arab Republic of Egypt*, ICSID Case No. ARB/98/4 (Award, 8 December 2000), ¶¶ 77, 117.

¹⁵⁹³ **RLA-101**, *EDF Services (Award)*, ¶ 221. See also **RLA-103**, *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017, ¶ 492; **RLA-090**, *Oostergetel (Final Award)*, ¶ 303; **RLA-089**, *Liman (Award)*, ¶¶ 422, 424; **RLA-104**, *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20, Award, 16 May 2012, fn. 8; **RLA-102**, *Fraport (Award)*, ¶ 491.

¹⁵⁹⁴ **RLA-089**, *Liman Caspian (Award)*, ¶ 424.

¹⁵⁹⁵ Treaty Memorial, ¶ 312.

of the Peruvian legal system. In this regard, Professor Hundskopf explains the reasonableness of the duration of the proceedings:

“Considering the procedure of the process [. . .] and the incidents that occurred (appearances, opinions, hearing, etc.), the issuance of the decision in the first instance after 9 months of starting the process is not unusual. Currently, decisions can take more than a year and in no way can one evidence wrongdoing based on such ‘delay’.”¹⁵⁹⁶

854. Claimant also appears to argue that the 4th Transitory Administrative Contentious Court’s issuance of an unsigned decision constitutes a denial of justice. Claimant’s complaint about the unsigned decision of the 4th Transitory Administrative Contentious Court fails for two reasons.
855. *First*, the copy of the decision that Claimant has submitted, which only includes the signature of the judge’s assistant, does not appear to be a final and certified copy.¹⁵⁹⁷ Claimant bears the burden for proving that the original decision is in fact not signed. As explained by Professor Hundskopf, if the original decision was truly not signed, then DRP and/or DRCL would have raised the issue in their appeals, and they did not.¹⁵⁹⁸
856. *Second*, even if the Tribunal assumed that there was an unsigned decision, for such a claim to succeed, the Tribunal would have to adopt a denial of justice standard even lower than the standard proposed by Claimant. Indeed, for a tribunal to find a denial of justice there must be a “systemic failure of the State’s justice system.”¹⁵⁹⁹ As echoed by the *Loewen v. United States* tribunal (upon which Claimant also relies¹⁶⁰⁰), “attributing the shape of an international wrong to what is really a local error (however serious), will damage both the

¹⁵⁹⁶ Hundskopf Expert Report, ¶ 146 (In Spanish original: “[C]onsiderando el trámite del proceso, relatado en numerales anteriores, y las incidencias que se dieron (apersonamientos, dictamen, audiencia, etc.), la emisión de la sentencia en primera instancia luego de 9 meses de iniciado el proceso no es fuera de lo común (en la actualidad, las sentencias pueden demorar más de un año) y de ningún modo puede evidenciar una conducta indebida basada en tal “demora”).

¹⁵⁹⁷ Hundskopf Expert Report, ¶ 145.

¹⁵⁹⁸ Hundskopf Expert Report, ¶ 145.

¹⁵⁹⁹ **RLA-023**, *Corona* (Award on the Preliminary Objections), ¶ 254; *see also* **RLA-089**, *Liman* (Award), ¶ 279; **CLA-121**, *RosInvestCo* (Final Award), ¶ 279; **CLA-084**, *Grand River* (Award), ¶ 223; **RLA-090**, *Oostergetel* (Final Award), ¶ 225; **CLA-043**, *Arif* (Award), ¶ 345; **CLA-026**, *Apotex* (Award on Jurisdiction and Admissibility), ¶ 281; **RLA-088**, *H&H Enterprises* (Award), ¶ 400.

¹⁶⁰⁰ *See, e.g.*, Treaty Memorial, ¶¶ 281–282, fns. 575, 578.

integrity of the domestic judicial system and the viability of NAFTA itself.”¹⁶⁰¹ Even assuming Claimant’s is correct that the decision is unsigned, such a flaw, if any, would be nothing more than a “local error” that cannot possibly constitute an international wrong that amounts to a denial of justice, particularly in light of DRP and DRCL’s failure to raise the issue during the subsequent local proceedings. Again, were the law as Claimant suggests, technical errors throughout the world would conceivably run afoul of the denial of justice obligations to investors – this cannot reflect customary international law and Claimant offers no argument that it does.

(iii) The 4th Transitory Administrative Contentious Court did not ignore opinion of the Civil District Attorneys’ Office, and in any event the court has the authority to weigh evidence

857. Claimant’s complaint about the fact that the 4th Transitory Administrative Contentious Court “ignored the opinion of the Civil District Attorneys’ Office” is a nonstarter.

858. *First*, it is squarely within the discretion — and mandate — of a domestic court to weigh the evidence and reach a decision in favor of one party. Indeed, an international tribunal has no competence to retrace and reappraise the factual evidence.¹⁶⁰² This has been echoed by numerous arbitral tribunals, including the *Arif v. Republic of Moldova* Tribunal:

“The Tribunal is not entitled to make a final finding on the question. That would amount to a revision of the merits and be beyond its competence[.]

[. . .]

The Tribunal is not in apposition and has no competence to retrace and reappraise the factual evidence.”¹⁶⁰³

859. It seems beyond controversy to assert that national courts have autonomy to admit and assess evidence without implicating denial of justice. In *Liman v. Kazakhstan*, for example,

¹⁶⁰¹ **RLA-080**, *Loewen* (Award), ¶ 242.

¹⁶⁰² **CLA-043**, *Arif* (Award), ¶¶ 463, 485; **RLA-105**, *Adem Dogan v. Turkmenistan*, ICSID Case No. ARB/09/9, Decision on Annulment, 15 January 2016 (“*Adem Dogan (Annulment Decision)*”), ¶ 129.

¹⁶⁰³ **CLA-043**, *Arif* (Award), ¶¶ 463, 485; *see also* **RLA-105**, *Adem Dogan* (Annulment Decision), ¶ 129 (“It is not within an ad hoc committee’s remit to re-examine the facts of the case to determine whether a tribunal erred in appreciating or evaluating the available evidence. If the Committee were to proceed to a re-examination of the facts of the present case and an assessment of how the Tribunal evaluated the evidence before it, it would act as an appellate body”).

the tribunal considered that the treatment of some minutes might have violated the Kazakh law on evidence and that there were “irregularities” in the Court’s approach, but ultimately held, “particularly in view of the discretion courts have in the evaluation of evidence” that the claimants did not discharge their burden of proving that such irregularities amounted to a misapplication of domestic law sufficient to breach the Energy Charter Treaty’s guarantee of fair and equitable treatment (let alone meet the standard to constitute a denial of justice).¹⁶⁰⁴ Similarly, annulment committees under the ICSID Convention, when considering the treatment of evidence as an error sufficiently grave to amount to “serious [] depart[ures] from a fundamental rule of procedure” within the meaning of Article 52 of the ICSID Convention, have accepted that tribunals have broad discretion in their treatment and handling of evidence.¹⁶⁰⁵

860. *Second*, the 4th Transitory Administrative Contentious Court examined the opinion of the Civil District Attorneys’ Office, but disagreed, which is squarely within its rights. Under Peruvian law the court has the authority to decide whether it takes into consideration the opinion of an organ that is outside of the judiciary. Specifically, Professor Hundskopf notes that “the courts are free to take into consideration or not such opinions in their decisions, what is fundamental is the reasoning of the judicial body.”¹⁶⁰⁶ As is evident in Resolution No. 24 of 18 October 2012,¹⁶⁰⁷ the 4th Transitory Administrative Contentious Court provided a reasoned explanation for its decision to uphold the decision of INDECOPI Chamber No. 1 that approved the MEM’s credit against DRP.¹⁶⁰⁸
861. As explained by the *Philip Morris* tribunal, only “grave procedural errors” will satisfy the “elevated standard of proof [that] is required for finding a denial of justice.”¹⁶⁰⁹ Weighing

¹⁶⁰⁴ [RLA-089](#), *Liman* (Award), ¶ 377.

¹⁶⁰⁵ [RLA-100](#), *Rumeli* (Annulment Decision), ¶ 104.

¹⁶⁰⁶ See Hundskopf Expert Report, ¶ 136 (Spanish original: “*Los juzgados o tribunales son libres de tomar en cuenta o no dichos dictámenes en su sentencia, pues lo fundamental es el razonamiento propio del órgano jurisdiccional.*”).

¹⁶⁰⁷ [Exhibit C-181](#), Judgment of the Annulment of Administrative Act, Case No. 2012-00368, 18 October 2012.

¹⁶⁰⁸ See Hundskopf Expert Report, ¶ 141 (Spanish original: “*Analizando la sentencia emitida por el 4to Juzgado se verifica que dicho órgano jurisdiccional fundamentó su decisión en lo siguiente.*” Professor Hundskopf proceeds to summarize the seven main reasons why the 4th Transitory Administrative Contentious Court arrived to its decision.).

¹⁶⁰⁹ [RLA-087](#), *Philip Morris Brands* (Award), ¶¶ 501, 499; see also [RLA-088](#), *H&H Enterprises* (Award), ¶ 403 (“Even if the Tribunal were to assume for the sake of argument that the decision was as erroneous and defective as the Claimant claims, the Claimant has failed to prove that the decision of the Cairo Court of Appeals was “manifestly

evidence within its competence is not a “grave procedural error”¹⁶¹⁰ nor is it “a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.”¹⁶¹¹

c. The proceeding before the 8th Chamber

862. Claimant states that when “DRP’s and DRCL’s lawyers went to the courthouse for oral argument, court personnel refused to let them enter and said the judges were in a meeting and unavailable.”¹⁶¹² Claimant then asserts that “[t]he case was then reassigned to the newly created 8th Chamber for Contentious Administrative Actions with a Sub-Specialty in INDECOPI matters”¹⁶¹³ (“**8th Chamber**”) Claimant then rushes forward to assume that these acts were “patently improper and illegal” and that they “resulted in a delay of over a year before oral argument was heard and a decision rendered on DRP’s appeal.”¹⁶¹⁴ Claimant leaves out a few consequential facts and misunderstands the Peruvian legal system.
863. On 31 October and 5 November 2012, DRCL, and DRP, represented by its liquidator, appealed the 4th Transitory Administrative Contentious Court’s decision.¹⁶¹⁵ The appeal was assigned to the 4th Chamber. It is undisputed that all the involved parties had the

unjust”, or that there had been a “gross deficiency” in the administration of the process, resulting in a denial of justice. The evidence presented by the Parties, including the Claimant’s own submissions confirm, if anything, that the Claimant had the opportunity not only to participate in the local proceedings but also to present its claims and counterclaims”); [CLA-098](#), *Mamidoil* (Award), ¶¶ 769–770 (“[A] review of the material before it and a careful reading of the Supreme Court’s decision enabled the Tribunal to conclude that it is not clearly improper, discreditable or in shocking disregard of Albanian law. The judgment is reasoned, understandable, coherent and embedded in a legal system that is characterized by a division between public and private law as well as civil and administrative procedures. Therefore, the Tribunal rejects the claim for denial of justice”).

¹⁶¹⁰ See [RLA-095](#), *Swisslion* (Award), ¶ 264 (“ICSID tribunals are not directly concerned with the question whether national judgments have been rendered in conformity with the applicable domestic law. They only have to consider whether they constitute a violation of international law, and in particular whether they amount to a denial of justice”).

¹⁶¹¹ See also [RLA-080](#), *ELSI* (Judgment), ¶ 131; [RLA-080](#), *Loewen* (Award), ¶ 132.

¹⁶¹² Treaty Memorial, ¶ 317.

¹⁶¹³ Treaty Memorial, ¶ 317.

¹⁶¹⁴ Treaty Memorial, ¶ 318.

¹⁶¹⁵ [Exhibit C-186](#), DRP Appeal to the 18 October 2012 First Instance Judgment, 5 November 2012.

opportunity to present their written submissions and oral arguments, and that at no point was DRP or DRCL not given an opportunity to argue their case.¹⁶¹⁶

864. The 4th Chamber received the appellate file and the submissions of all of the parties, and through Resolution No. 03 of 12 April 2013 scheduled an oral argument for 3 July 2013.¹⁶¹⁷ However, oral arguments were not held on 3 July 2013 because *all* the superior court judges had a *mandatory* meeting in the plenary chamber. As explained by Professor Hundskopf, these are mandatory meetings held pursuant to Article 93 of the *Ley Orgánica del Poder Judicial*, and *all* judges of the Superior Court of Lima *must* attend.¹⁶¹⁸ This is a scheduling conflict not a denial of justice.
865. Around the same time as the hearing in the 4th Chamber was originally scheduled to take place, the *Poder Judicial* created administrative contentious chambers with a subspecialty in INDECOPI matters.¹⁶¹⁹ As a result of the creation of new specialized chambers, when the rescheduling of the hearing took place, the matter was transferred from the 4th Chamber to the 8th Chamber.¹⁶²⁰
866. Pursuant to article 141 of the *Ley Orgánica del Poder Judicial*, Superior Courts, such as the 8th Chamber, need three favorable votes in order to render a decision through a resolution. The 8th Chamber was initially composed of three judges, not five as Claimant

¹⁶¹⁶ Hundskopf Expert Report, ¶¶ 154–156 (Spanish original: “*Se debe recalcar que de la revisión de las actuaciones procesales, las partes han presentado ante esta instancia sus escritos de alegatos en toda oportunidad que han tenido para hacerlo. Dichos alegatos han sido considerados por los distintos órganos jurisdiccionales al momento de emitir su decisión. Asimismo, todas las partes han sido convocadas a las distintas audiencias de informe oral previas a la emisión de las sentencias. Incluso, no ha existido ninguna denuncia de parte de DRP o DR Cayman sobre alguna supuesta vulneración de su derecho de defensa en referencia a que se les haya restringido presentar escritos o que los mismos no hayan sido considerados al momento de resolver.*”).

¹⁶¹⁷ [Exhibit C-187](#), 4th Chamber for Contentious Administrative Actions of the Superior Court of Justice, Resolution No. 9, 4 July 2013; [Exhibit C-232](#), 4th Chamber for Contentious Administrative Actions of the Superior Court of Justice, Resolution No. 3, 12 April 2013.

¹⁶¹⁸ Hundskopf Expert Report, ¶ 157 (Spanish original: “*En el trámite del proceso en segunda instancia (inicialmente ante la 4ta Sala), se convocó a una primera audiencia de informe oral (3 de julio del 2013). Sin embargo dicha audiencia no pudo llevarse a cabo, no porque hayan impedido participar únicamente a los abogados de DRP, sino porque los jueces superiores estaban reunidos en Sala Plena (como todos los jueces de la Corte Superior de Lima), esto es en reunión obligatoria para todos los jueces superiores, de ninguna manera por una decisión específica para el caso de DRP.*”).

¹⁶¹⁹ See [Exhibit OHE-063](#), Administrative Resolution 206-2012-CE-PJ, 20 October 2012; [Exhibit OHE-064](#), Administrative Resolution 102-2013-CE-PJ, 12 June 2013.

¹⁶²⁰ See Hundskopf Expert Report, ¶ 162.

incorrectly states. It is common practice for superior courts like the 8th Chamber to start matters with three judges, as three favorable votes are enough to render a decision. However, of the three judges who initially made up the 8th Chamber, two voted to confirm the decision of the 4th Transitory Administrative Contentious Court and one voted to revoke the decision. Given the disagreement, a fourth judge was summoned, and that judge agreed with the judge that voted to revoke. That process working in Claimant’s favor – although it omits this fact from its Memorial. Because of the tie in votes (2-to-2), an additional judge was summoned, and the additional judge sided with the two judges that voted to confirm the decision of the 4th Transitory Administrative Contentious Court, thus becoming the majority vote (*i.e.*, three votes in favor of confirming the decision of the 4th Transitory Administrative Contentious Court). As explained by Professor Hundskopf, the majority vote is the binding decision under Peruvian law.¹⁶²¹

867. Through Resolution No. 38 of 25 July 2014, the 8th Chamber found DRP's appeal without merit, upholding the 4th Transitory Administrative Contentious Court’s decision to reject DRP’s administrative contentious action.¹⁶²²
868. Professor Hundskopf, an expert in Peruvian bankruptcy proceedings with over 45 years of experience, notes that the length of the process in DRP’s matter “is typical of the large number of cases processed by the administrative and judicial bodies in [Peru.]”¹⁶²³
869. Again, for a denial of justice claim based on the proceeding before 8th Chamber to prevail, “the factual circumstances must be egregious” in the very least – and that is only if Claimant discharges its burden of demonstrating that is a proper articulation of customary international law.¹⁶²⁴ Scheduling conflicts and a process by which Claimant’s claim was give more beneficial scrutiny is not a denial of justice under any formulation. It certainly is not “a willful disregard of due process of law, an act which shocks, or at least surprises,

¹⁶²¹ Hundskopf Expert Report, ¶ 149.

¹⁶²² [Exhibit C-190](#), 8th Chamber of the Lima Superior Court, Decision No. 38, 25 July 2014.

¹⁶²³ Hundskopf Expert Report, ¶ 7 (Spanish original: “*Lo prolongado del procedimiento administrativo, y sobre todo de los procesos judiciales es propio de la gran cantidad de casos que tramitan los órganos administrativos y judiciales en nuestro país, más no consecuencia de medidas que se hayan dictado específicamente en contra de los intereses de Doe Run Perú S.R.L. y Doe Run Cayman Ltd.*”).

¹⁶²⁴ [RLA-079](#), Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW, 2005, p. 60.

a sense of judicial propriety”¹⁶²⁵ or where a party had been given “no notice[,]” “no invitation[,]” and “no opportunity to appear” in the proceedings.¹⁶²⁶

870. Similar to its criticism of the decision of INDECOPI Chamber No. 1, here Claimant states, “[d]espite Peruvian law being clearly and unequivocally to the contrary, the majority concluded that INDECOPI could grant, and that the MEM could be awarded, compensation for breaches of those PAMA obligations under the Peruvian Civil Code.”¹⁶²⁷ Again, Claimant’s denial of justice claim is based entirely on alleged errors in the application of Peruvian law. This is further confirmed by DRP’s extraordinary cassation recourse application to the Supreme Court, where DRP argued that “the majority of the 8th Chamber had incorrectly interpreted and applied Peruvian law on two issues: the existence of a credit and the consequences of a breach of a PAMA obligation.”¹⁶²⁸
871. To avoid burdening the Tribunal with redundancy, Respondent reiterates its position articulated above, where it argues that Claimant’s denial of justice claim should be rejected because this Tribunal is not a supranational court of appeal.¹⁶²⁹
872. Claimant again takes issue with the fact that the 8th Chamber confirmed INDECOPI Chamber No. 1’s opinion that “under Peruvian law,” INDECOPI could issue a credit to the MEM based on compensation owed by DRP for breach of the PAMA obligation.¹⁶³⁰ Notably, Professor Hundskopf observed that the administrative contentious chambers (*i.e.*, the 4th Transitory Administrative Contentious Court and the 8th Chamber) did not grant compensation, all they did was confirm that INDECOPI Chamber No. 1 issued a decision in accordance with Peruvian law.¹⁶³¹ As a result, Claimant’s denial of justice claim here

¹⁶²⁵ See also [RLA-080](#), *ELSI* (Judgment), ¶ 131; [RLA-080](#), *Loewen* (Award), ¶ 132.

¹⁶²⁶ [CLA-102](#), *Metalclad* (Award), ¶ 91.

¹⁶²⁷ Treaty Memorial, ¶ 318.

¹⁶²⁸ Treaty Memorial, ¶ 321.

¹⁶²⁹ [CLA-118](#), *Azinian* (Award), ¶ 99; [RLA-008](#), *Mondev* (Award), ¶¶ 126, 127; [RLA-089](#), *Liman* (Award), ¶ 274; [CLA-121](#), *RosInvestCo* (Final Award), ¶ 489; [CLA-043](#), *Arif* (Award), ¶ 441; [RLA-091](#), *ECE* (Award), ¶ 4.764.

¹⁶³⁰ Treaty Memorial, ¶ 318.

¹⁶³¹ Hundskopf Expert Report, ¶¶ 142–143 (“*Se observa en este punto, que a diferencia de lo señalado por el Prof. Schmerler (numeral 316 de su informe) el 4to Juzgado no otorgó una indemnización en este proceso contencioso administrativo, sino más bien verificó que la Sala Concursal había emitido una decisión en base a las leyes y la Constitución, lo cual correspondía conforme a su función y en el marco de las pretensiones planteadas por el demandante. El hecho que el juzgado haya confirmado el criterio del Indecopi sobre la existencia de una*”).

is based on the same lack of understanding of Peruvian law as its claim regarding the decision of INDECOPI Chamber No. 1. To avoid redundancy, Peru reiterates its position articulated above.¹⁶³²

d. The Supreme Court’s decision to reject DRP’s extraordinary cassation recourse

873. Claimant argues that the Supreme Court “without any substantive explanation, [. . .] summarily dismissed both DRP’s and DRCL’s” extraordinary cassation recourse regarding the 8th Chamber’s decision to reject their appeal.¹⁶³³ This claim is incorrect and completely ignores the nature of an extraordinary cassation recourse, which Claimant’s inappropriately characterize as an “appeal”.

874. In August 2014, following a *final* judgment of the 8th Chamber — in a last ditch effort to avoid the MEM’s credit — DRP and DRCL filed an extraordinary cassation recourse (*recurso de casación*) to the Supreme Court.¹⁶³⁴

875. A decision of the 8th Chamber is final and not usually subject to appeal,¹⁶³⁵ however, under the Peruvian law, a cassation recourse may be available as an extraordinary means to challenge a final decision of one of the Superior Courts of Justice (in this case, a decision of the 8th Chamber). A cassation recourse can be filed and granted only if there are specific grounds for the Supreme Court to hear the case.¹⁶³⁶

indemnización por incumplimiento de obligación no implicaba crear una nueva orden o mandato, sino más bien dar conformidad a dicha posición emitida en sede administrativa.”)

¹⁶³² [RLA-080](#), *ELSI* (Judgment), ¶ 131; *see also* [RLA-079](#), Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW, 2005, pp. 98, 82 (“Denial of justice is always procedural. There may be extreme cases where the proof of the failed process is that the substance of a decision is **so egregiously wrong that no honest or competent court could possibly have given it**. Extreme cases should [] be dealt with on the footing that **they are so unjustifiable that they could have been only the product of bias or some other violation of the right of due process**”) (emphasis added).

¹⁶³³ Treaty Memorial, ¶ 322.

¹⁶³⁴ [Exhibit C-191](#), DRP’s *Recurso de Casación* filed before the Peruvian Supreme Court of Justice, 25 August 2014; [Exhibit C-192](#), Doe Run Cayman Ltd.’s *Recurso de Casación* filed before the Peruvian Supreme Court of Justice, 22 August 2014.

¹⁶³⁵ *See* [RLA-179](#), Peruvian Civil Procedure Code, Art. 386; Hundskopf Expert Report, ¶¶ 169–170.

¹⁶³⁶ *See* [RLA-179](#), Peruvian Civil Procedure Code, Arts. 384–400; Hundskopf Expert Report, ¶ 167 (Spanish original: “*Conforme a lo establecido en dicho Código, la doctrina y la jurisprudencia de la Corte Suprema de Justicia de la República, el recurso de casación es un medio impugnatorio extraordinario esto es se puede interponer y conceder sólo si es que concurren causales específicas para que la Corte Suprema pueda conocer el caso.*”).

876. The Supreme Court cannot analyze a case like a Superior Court in second instance (in this case, like the 8th Chamber); that is, the Supreme Court does not review all the arguments presented by the parties, assess evidence, or impart justice based on the principle of *iura novit curia*.¹⁶³⁷ As a result, if the cassation recourse does not adhere to the *specific requirements* of the Peruvian Civil Procedure Code, the Supreme Court will declare it inadmissible.¹⁶³⁸
877. After reviewing the parties' arguments, on 6 July 2015 the Supreme Court dismissed DRP and DRCL's cassation recourse for not complying with the requirements of the Peruvian Civil Procedure Code.¹⁶³⁹ Among other reasons, the Supreme Court dismissed DRP and DRCL's cassation recourse because:
- a. DRCL, failed to provide what a correct interpretation should be, as required by Peruvian law;¹⁶⁴⁰
 - b. DRCL had failed to prove the relevance of the provision that was not applied;
 - c. DRCL's and DRP's did not provide the requisite detail regarding the substantive errors in the 8th Chamber's decision.¹⁶⁴¹
878. Failing to make an application to the Supreme Court consistent with the Peruvian Civil Procedure Code that results in a dismissal is malpractice, not a denial of justice. Had the cassation recourses adequately detailed the alleged infractions and complied with the requirements of the Peruvian Civil Procedure Code, then the Supreme Court may have been enabled to carry out a more exhaustive analysis.¹⁶⁴²
879. The Supreme Court only needs to review the cassation recourses that fully comply with the filing requirements — the filing of a cassation recourse does not transform the Supreme

¹⁶³⁷ See Hundskopf Expert Report, ¶ 170.

¹⁶³⁸ See **RLA-179**, Peruvian Civil Procedure Code, Art. 391 (Spanish original: “Recibido el recurso, la Corte Suprema procederá a examinar el cumplimiento de los requisitos previstos en los artículos 387 y 388 y resolverá declarando inadmisibile, procedente o improcedente el recurso, según sea el caso.”).

¹⁶³⁹ **Exhibit C-193**, Peruvian Supreme Court of Justice, Decision on the *Recurso de Casación*, 6 July 2015.

¹⁶⁴⁰ **Exhibit C-193**, Peruvian Supreme Court of Justice, Decision on the *Recurso de Casación*, 6 July 2015, pp. 4–5.

¹⁶⁴¹ **Exhibit C-193**, Peruvian Supreme Court of Justice, Decision on the *Recurso de Casación*, 6 July 2015, p. 5

¹⁶⁴² See Hundskopf Expert Report, ¶ 184.

Court into an appellate court that must review the merits or documentation of the matter.¹⁶⁴³
After an exhaustive review of the entire administrative contentious proceeding, Professor Hundskopf concluded that the Supreme Court’s opinion adheres to the Peruvian Civil Procedure Code.¹⁶⁴⁴

880. As a result, Claimant’s allegation that the Supreme Court “without any substantive explanation, [. . .] summarily dismissed both DRP’s and DRCL’s”¹⁶⁴⁵ extraordinary cassation recourse regarding the 8th Chamber’s decision to reject their appeal is incorrect.

¹⁶⁴³ See Hundskopf Expert Report, ¶¶ 185–186.

¹⁶⁴⁴ See Hundskopf Expert Report, ¶ 187.

¹⁶⁴⁵ Treaty Memorial, ¶ 322.

V. PRAYER FOR RELIEF

881. For the foregoing reasons, Peru respectfully requests that the Tribunal:
- a. Dismiss Claimant's claims for an alleged violation of FET under Article 10.5 of the Treaty in their entirety, for lack of jurisdiction;
 - b. Dismiss Claimant's claims for an alleged expropriation under Article 10.7 of the Treaty, for lack of jurisdiction;
 - c. Dismiss Claimant's claims for an alleged denial of justice under Article 10.5 of the Treaty in their entirety, for lack of merit; or
 - d. In the event the Tribunal finds it has jurisdiction over Claimant's claims for an alleged violation of FET under Article 10.5 of the Treaty and Claimant's claims for an alleged expropriation under Article 10.7 of the Treaty, dismiss all of Claimant's claims for lack of merit.
882. Peru further requests that the Tribunal order Claimant to pay all of Peru's costs, including the totality of the arbitral costs that Peru incurred in connection with this proceeding, as well as the totality of its legal fees and expenses.
883. Should Renco's claims proceed to a quantum phase, Peru reserves its rights to request that the Tribunal order the appropriate set off to any damages award to account for Renco's contribution to DRP's failure to satisfy its obligations, including its environmental obligations under the PAMA and its obligations under Clause 2 of the Legal Stability Agreement between the Peruvian State and Doe Run Perú S.R.Ltda.¹⁶⁴⁶

¹⁶⁴⁶ [Exhibit R-094](#), Securities and Exchange Commission Form S-4, DRRC, 11 May 1998, pp. 1578-1584 (Legal Stability Agreement between the Peruvian State and Doe Run Perú S.R.Ltda, Clause 10: "In the event that [DRP] incurs in one of the previously mentioned causes of termination of the present Agreement, and if as a result of the legal stability conferred by the authority of the same agreement [DRP] enjoyed a lighter tax burden that would have corresponded to it if it had not been under the authority of said Agreement, it shall be obliged to reimburse the STATE for the actual amount of the taxes that would have affected it if such Agreement had not been signed, plus the corresponding surcharges referred to in the Tax Code.").

Respectfully submitted,

Allen & Overy

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