UNDER THE UNCITRAL ARBITRATION RULES (2013)

The Renco Group, Inc., and Doe Run Resources, Corp.
Claimants,

v.

The Republic of Peru and Activos Mineros S.A.C.
Respondents.

PCA Case No. 2019-47

Respondents' Counter-Memorial

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1 April 2022

ALLEN & OVERY

CONTENTS

Glossary

Term	English	Spanish
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, *inter alia*, 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 establezer 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.

Term	English	Spanish
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 PRl-016-97
Metaloroya Business Plan	Business Plan for Metaloroya for 1997-2011, June 1996	1997-2011 Business Plan para Metaloroya, junio 1996
Claimants (Demandantes)	Renco Group, Inc. and Doe Run Resources Corp.	Renco Group, Inc. y Doe Run Resources Corp.
Respondents (Demandadas)	Republic of Peru and Activos Mineros S.A.C.	República del Perú y Activos Mineros S.A.C.
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	Consorcio Minero S.A.	Consorcio Minero S.A.

Term	English	Spanish
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

Term	English	Spanish
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

Term	English	Spanish
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 period de tiempo posterior al 13 de enero de 2007
Peru (Perú)	The Republic of Peru	La República del Perú

Term	English	Spanish
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	*The Renco Group v. Republic of Peru*, 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)**	*The Renco Group, Inc. v. Republic of Peru*, PCA Case No. 2019-46 (the instant proceedings)	*The Renco Group, Inc. c. la Republica del Perú*, Caso CPA N° 2019-46 (el proceso instantáneo)
***Renco III* (or Contract Case)**	*The Renco Group, Inc. and Doe Run Resources Corp. v. Republic of Peru and Activos Mineros S.A.C.*, PCA Case No. 2019-47	*The Renco Group, Inc. y Doe Run Resources Corp. c. la Republica del Perú y Activos Mineros S.A.C.*, 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

Term	English	Spanish
STA Parties	The contracting parties of the Stock Transfer Agreement, identified therein as "Centromin," "the Investor," and "the Company" The legal persons that constitute the contracting parties have changed through a corporate absorption and contractual assignments	Las partes contratantes del Contrato de Transferencia de Acciones, identificadas como "Centromin," "el Inversionista," y "la Empresa" Las personas jurídicas que constituyen las partes contratantes han cambiado mediante una absorción corporativa y cesiones de posiciones contractuales
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 Contecioso Administrativo con Subespecialidad en tema de INDECOPI de la Corte Superior

I. INTRODUCTION

1. According to Robert Graves, "there is no such thing as good writing, only good rewriting."[1] The Renco Group, Inc. ("**Renco**") and Doe Run Resources Corporation ("**DRRC**") (together, "**Claimants**") apparently agree with the late British poet. Rewriting is why Claimants brought this arbitration against Activos Mineros S.A.C. ("**Activos Mineros**") and the Republic of Peru ("**Peru**") (together, "**Respondents**"). Their aim is to have the Tribunal act as their ghostwriter, and redraft contracts executed by contracting parties, Peruvian law promulgated by the Congress of the Republic of Peru, and international law created by *usus* and *opinio juris*.

2. Claimants ask the Tribunal to find that Respondents have breached contractual and legal obligations to indemnify Claimants for damages, pay their litigation costs, and defend them in litigation.[2] Additionally, Claimants argue that the Respondents breached a contractual obligation to implement remediation measures.[3] They theorize that they may have subrogation, contribution, and unjust enrichment claims in the future.[4] And Claimants contend that Peru breached its obligations under the minimum standard of treatment under customary international law.[5]

3. To find for Claimants, however, the Tribunal must write them—and nine other entities and individuals—into contracts to which they are not parties. It would have to expand the scope of the underlying contracts to, as Claimants contend, "anyone who could be sued."[6] It needs to import supposed United States law into a Peruvian-law-governed contract.[7] The Tribunal would be required to bypass the principle of privity under Peruvian law. And it would have to derogate, on Peru's behalf, from the customary international law rule that it

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[1] *See* **Exhibit R-298**, There's No Such Thing as Good Writing: Craig Nova's Radical Revising Process, THE ATLANTIC, 11 June 2013.

[2] *See* Contract Memorial, ¶¶ 161, 164, 264.

[3] *See* Contract Memorial, ¶ 208.

[4] *See* Contract Memorial, § IV.C.

[5] *See* Contract Memorial, § IV.D.

[6] Contract Memorial, ¶ 166.

[7] Contract Memorial, ¶¶ 162–164.

is the home State of a foreign alien that has standing to bring a claim against another State for a violation of international law.

4. But the Tribunal is not a contracting party, nor a legislature, nor the community of States. It is empowered to decide Claimants' claims only under the contracts and law as written.[8] In this case, doing so requires the Tribunal to issue an award holding **(i)** that it has no jurisdiction over Claimants' claims, **(ii)** that Claimants' claims are otherwise inadmissible, or, **(iii)** in the alternative, that Claimants' claims are meritless. Anything else would be good rewriting for Claimants, but it would not be an application of the contracts and law as written.

A. Background

5. In 1922, a refinery complex and copper smelter were founded in La Oroya, an Andean Mountain community, by the U.S. Cerro de Pasco Corporation, which also built a lead smelter in 1928, and a zinc refinery in 1952 ("**Facility**").[9] The Republic of Peru ("**Peru**") nationalized the installations of Cerro de Pasco in 1974, and founded Empresa Minera del Centro del Perú S.A. ("**Centromín**") as the State entity in charge of operating the Facility.[10] In the mid-1990s, Peru decided to privatize operational units of Centromín.[11] To that end, it created the Empresa Metalúrgica La Oroya Sociedad Anónima ("**Metaloroya**") to serve as an investment vehicle to own and operate the Facility.[12] And in 1997, Peru's the Special Committee for the Promotion of Private Investment for Centromín ("**CEPRI**"),[13] conducted an international tender for private investors to bid for Metaloroya.[14]

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[8] UNCITRAL Arbitration Rules (2013), art. 35.

[9] **Exhibit C-020**, Environmental Impact Program, La Oroya Metallurgical Complex, Centromín, 12 December 1996 ("**PAMA 1996 Report**"), PDF p. 25; *See also* **Exhibit C-012**, White Paper - Fractional Privatization of Centromín, 1999 ("**1999 White Paper**").

[10] **Exhibit C-020**, PAMA 1996 Report, PDF p. 26.

[11] **Exhibit C-104**, 1999 White Paper, p. 38.

[12] **Exhibit R-183**, Supreme Resolution No. 016-96-PCM; *See also* **Exhibit C-012**, 1999 White Paper, p. 38.

[13] **Exhibit C-122**, Supreme Resolution No. 102-92 PCM, 21 February 1992, Art. 1.

[14] **Exhibit R-187**, Bases and Model Contracts (Second Round), Centromín, 26 March 1997 ("**Bidding Terms (Second Round)**"); *See also* **Exhibit C-012**, 1999 White Paper, p. 72.

6. Described as a "New York financier who's collected distressed companies at fire-sale prices since the mid-1970s,"[15] Ira Rennert, Claimants' owner, centers his dealings on the transfer of assets from newly acquired companies to Renco, to obtain a consistent payout of dividends to its shareholders. In particular, Claimants have an appetite for purchasing failing companies with aging equipment and significant environmental and public health liabilities, stripping them of their assets, extracting what they can, and walking away.[16]

7. After acquisition of a distressed asset, Claimants put financial structures 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: (i) burdening the subsidiary with the debt of its own purchase price; (ii) jeopardizing future financing of the subsidiary by making it guarantor for Renco or DRRC's debt or another subsidiary's debt; (iii) limiting the subsidiary's access to cash flows; (iv) actively withdrawing funds from the subsidiary through intercompany "agreements"; (v) stripping the company of assets when—as preordained—it is unable to make payments on its debts; and (vi) shifting blame elsewhere and seeking bankruptcy protection.

8. That strategy resulted in the accumulation of numerous environmental liabilities for Claimants in the United States in the years leading up to their participation in the tender for Metaloroya.[17] 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 DRRC, which Renco acquired in 1994, had been compelled by federal authorities to undertake a number of environmental remediation projects.[18] By 1993, DRRC had already entered into

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[15] *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.

[16] *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.

[17] **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.

[18] **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.

a series of consent decrees requiring it to complete emissions control projects at its Herculaneum smelter in Missouri.[19]

9. Faced with the consequences of numerous civil and criminal lawsuits, regulatory actions, and bankruptcies, Claimants looked abroad for new opportunities. It would turn out, however, that they would not leave their conduct at home. What Mr. Rennert and Claimants did to distressed companies, they did to La Oroya—an unfortunate move from companies to communities.

10. Renco and DRRC participated in the tender process for Metaloroya, and in the end were declared the winners of the auction.[20] Subsequently, Renco and DRRC established Doe Run Peru S.R. Ltda. ("**DRP**"), a Peruvian subsidiary, to sign the sales contract for Metaloroya, and to own and operate the Facility.[21] Accordingly, Renco and DRRC ceded the rights they had obtained as winners of the auction in favor of DRP.[22] Centromín, in turn, approved the execution of the sales contract with DRP.[23]

11. On 23 October 1997, Centromín, DRP, and Metaloroya executed the Contract of Stock Transfer for 99.93% shares of Metaloroya ("**STA**").[24] The heading of the STA identified and defined the contracting parties as Metaloroya (the "Company"), DRP (the "Investor"), and Centromín ("Centromín") ("**STA Parties**," individually "**STA Party**").[25]

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

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

[21] **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**").

[22] **Exhibit R-282**, Centromín Agreement No. 54-97, 15 September 1997; *see also* **Exhibit R-001**, STA & Renco Guaranty, p. 7 ("In accordance with the bidding conditions, the aforementioned consortium has assigned its rights to the Investor and this assignment has been authorized by the Cepri-Centromín agreement dated September 11, 1997.").

[23] **Exhibit R-283**, Centromín Agreement No. 77-97, 15 September 1997.

[24] **Exhibit R-001**, STA & Renco Guaranty.

[25] **Exhibit R-001**, STA & Renco Guaranty, p. 5.

12. In 1997, Metaloroya merged with DRP, and DRP thus assumed all of Metaloroya's rights and obligations as the Company under the STA.[26] In 2001, DRP assigned its contractual position as the Investor to Doe Run Cayman Ltd. ("**DRCL**"). [27] In 2007, Centromín assigned its contractual position to Activos Mineros.[28] The following is a table of the STA Parties over time:

Table 1: STA Parties			
	At Execution	After Absorption of Metaloroya[29]	After Assignments[30]
"Centromín"	Centromín	Centromín	Activos Mineros
"The Investor"	DRP	DRP	DRCL
"The Company"	Metaloroya	DRP	DRP
Not STA Parties			
Renco, DRRC, Peru			

13. The STA contains a series of rights and obligations that run between the STA Parties. Those obligations can be divided into two categories: purchase rights and obligations and environmental responsibility rights and obligations.

14. The STA's purchase rights and obligations involve the duties of the STA Parties relative to the acquisition and capitalization of Metaloroya. Under Clauses 1, 2, 3, and 4, Centromín transferred 99.9% of Metaloroya's shares to DRP in exchange for USD 124 million; DRP agreed to make a capital contribution to Metaloroya of USD 126 million; and Metaloroya agreed to invest USD 120 million over five years to execute its environmental and other obligations.[31]

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[26] *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.

[27] **Exhibit R-004**, Assignment of Contractual Position between Due Run Peru S.R.L and DRCL, 1 June 2001 ("**Contract Assignment**"), clause 1.3.

[28] **Exhibit R-284**, Assignment of Centromin's Contractual Position to Activos Mineros, 19 March 2007.

[29] 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, p. 7.

[30] **Exhibit R-004**, Assignment of Contractual Position between Due Run Peru S.R.L and DRCL, 1 June 2001 ("**Contract Assignment**"), clause 1.3.

[31] **Exhibit R-001**, STA & Renco Guaranty, Clauses 1-4.

15. The STA's environmental responsibility rights and obligations allocate responsibility for **(i)** the execution of remediation projects and **(ii)** for third-party claims relating to the Facility. That distribution was split between Centromín and Metaloroya.

16. As to remediation, environmental and investment obligations were mostly 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 Sulfur Dioxide ("**SO_2**") emissions—a critical source of contamination—were particularly important. To achieve the remediation of SO_2 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**")[32] set a strict, *ten-year deadline* to complete the PAMA and bring the Facility into compliance with applicable environmental standards.

17. A few days before the contract was executed, Peru's Ministry of Energy and Mines (the "**MEM**") issued Directorial Resolution No. 334-97-EM/DGM, which modified the PAMA to separate the obligations that Metaloroya and Centromín would fulfill.[33] Clause 5.1 of the STA contains Metaloroya's obligation to fulfill its PAMA obligations.[34] Clause 6.1 of the STA contains Centromín's obligation to fulfill its PAMA obligations.[35]

18. With regard to third-party claims, Clauses 5 and 6 distribute responsibility between Centromín and the Company (as noted above, first Metaloroya, then DRP). Under Clauses 5.3, 5.4, 6.2, and 6.3, Centromín and the Company identified which of them would be

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[32] *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**").

[33] **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.

[34] **Exhibit R-001**, STA & Renco Guaranty, Clause 5.1.

[35] **Exhibit R-001**, STA & Renco Guaranty, Clause 6.1.

responsible for particular third-party claims relating to the Facility.[36] Three other clauses establish the consequences of that distribution. Under Clause 5.8, the Company agreed to indemnify Centromín against third-party claims for which the former is responsible.[37] Under Clause 6.5, Centromín agreed to indemnify the Company against third-party claims for which the former is deemed to be responsible under Clauses 6.2, and 6.3.[38] Finally, Clause 8.14 provides that if Centromín receives notice from the Company of a suit (or similar claim) within a reasonable time that is related to a fact or act for which Centromín is responsible, then Centromín will defend the Company in litigation.[39]

19. Renco and DRRC intervened in the public deed that contains the STA as guarantors for DRP. Specifically, under an "Additional Clause" at the end of the public deed, Renco and DRRC agreed to "warrant the compliance with the obligations contracted by the Investor, Doe Run Peru" ("**Renco Guaranty**").[40] Likewise, 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 ("**Peru Guaranty**").[41]

20. Despite making specific promises and undertakings to comply with environmental obligations under the PAMA and the STA within a legally mandated ten-year timeframe, starting in 1998, DRP made a series of requests to the MEM to modify the project and capital expenditure schedule, consistently delaying work on the most critical PAMA projects. DRP's practice of requesting modifications and extensions to complete the Sulfuric Acid Plant Project never stopped.

21. In fact, DRP ramped up production, using dirtier and cheaper concentrates instead of performing its environmental obligations. As noted above, one of the environmental obligations that DRP repeatedly postponed (and never completed) was the Sulfuric Acid Plant Projects. Without completion of the Sulfuric Acid Plant Project, it would be

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[36] **Exhibit R-001**, STA & Renco Guaranty, Clauses 5.3, 5.4, 6.2, 6.3.

[37] **Exhibit R-001**, STA & Renco Guaranty, Clause 5.8.

[38] **Exhibit R-001**, STA & Renco Guaranty, Clause 6.5.

[39] **Exhibit R-001**, STA & Renco Guaranty, Clause 8.14.

[40] **Exhibit R-001**, STA & Renco Guaranty, Additional Clause.

[41] [**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].")

impossible for the Facility to operate without severely impacting the environment and the health of the population of La Oroya.

22. 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 ("**Missouri Litigations**"). The initial arbitration brought by Renco, as well as the current proceedings, are brought in the context of the Missouri Litigations. Peru is not a defendant in the Missouri Litigations, and neither are the STA Parties—not the former STA Parties, and not the current STA Parties.

23. Renco and DRRC wish to use these proceedings to escape the consequences of their actions. Above, Respondents identified Claimants' traditional six-step strategy. In this case, Claimants have added another step: contorting the arbitral process to force Peru and Activos Mineros to pay for the injuries that Claimants have caused. But as Respondents will explain, the Tribunal should not allow the current manifestation of Claimants' pollution-to-profit scheme to succeed.

B. The Tribunal lacks jurisdiction and Claimants' claims are inadmissible

24. In Procedural Order No. 3, the Tribunal noted that "all three of the Respondents' [jurisdictional] objections are serious and substantial."[42] Claimants have since submitted their Statement of Claim. Based on a review of Claimants' submission, Respondents' three preliminary objections merely scratched the surface of Claimants' jurisdictional and admissibility barriers. To exercise jurisdiction over this case and admit Claimants' claims would require the Tribunal to put pen to paper and draft a new STA, a new Peru Guaranty, new Peruvian law, and new customary international law.

25. The Tribunal lacks jurisdiction over this case for numerous reasons. The arbitral clause of both the STA and the Peru Guaranty limits the contracting parties' consent to disputes "between the parties."[43] Yet Claimants are not parties to the STA. An interpretation of

[42] Procedural Order No. 3 – PCA Case No. 2019-47, 29 July 2020, ¶ 4.2.

[43] **Exhibit R-001**, STA & Renco Guaranty, clause 12; **Exhibit R-002**, Peru Guaranty, art. 3.

the STA under the canons of interpretation of Peruvian law makes that clear. An intra-Renco group document makes it clear too.[44] Claimants are also not parties to the Peru Guaranty. Claimants have been forced to drop their previous contention otherwise.[45] Claimants' Peruvian law expert concedes that "in accordance with its terms, the [Peru Guaranty] does not extend to DRR or Renco," but argues that Peru "is obliged to extend its guarantee" to cover Claimants.[46] Under Peruvian law, contracting parties have the freedom to choose who they contract with, the contractual terms, and whether they consent to arbitration.[47] Claimants are not parties to the STA and the Peru Guaranty (nor are they parties to the respective arbitral clauses), and the Tribunal cannot write them in.

26. Although Claimants at least attempt to argue that *they* are contracting parties, they omit presenting any such argument on behalf of the nine other individuals and entities for whom they bring claims.[48] Indeed, Claimants argue that the relevant provisions of the STA (and, as a corollary, the Peru Guaranty) "extend[ ] to anyone who could be sued."[49] Claimants also bring a claim using DRP's rights under the STA.[50] But DRP is not a party to this arbitration either. The claims of those "phantom-claimants" are kilometers away from the boundaries of this Tribunal's jurisdiction.

27. The Tribunal also lacks jurisdiction over Claimants' non-contractual claims under Peruvian law and the minimum standard of treatment under customary international law. Claimants' lack of contracting-party status divests this Tribunal of jurisdiction over all claims, contractual and non-contractual. With regard to Claimants' Peruvian law claims, the

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[44] **Exhibit R-004**, Assignment of Contractual Position between Due Run Peru S.R.L and DRCL, 1 June 2001 ("**Contract Assignment**"), clause 1.3 ("The [STA] was executed by the Empresa Minera del Centro de Perú S.A. (Centromin), Doe Run Perú as the Investor and Metaloroya as the Company receiving the investment.")

[45] *See* Claimants' Comments on Notice of Bifurcation, 11 February 2020, p. 3 ("Claimants are parties to [the STA and the Peru Guaranty] and to the arbitration agreements contained and/or referenced therein.").

[46] Expert Report of José Antonio Payet Puccio, ¶¶ 294–95.

[47] **RLA-062**, Peruvian Civil Code, Legislative Decree No. 295, 24 July 1984, art. 1354.

[48] Contract Memorial, ¶ 80 ("DR Acquisition Corp. and Renco Holdings, Inc., and directors and officers Marvin K. Kaiser, Albert Bruce Neil, Jeffery L. Zelms, Theodore P. Fox III, Daniel L. Vornberg, Jerry Pyatt, and Ira L. Rennert."), ¶ 264 (requesting that the Tribunal find that Respondents are responsible for indemnifying "the Renco Consortium members and related entities and individuals").

[49] Contract Memorial, ¶ 166.

[50] Contract Memorial, ¶ 204.

viability of at least two of them depend on the inexistence of arbitral consent.[51] And as to Claimants' minimum standard of treatment claim, Peru has not derogated from the customary international law rule that it is the foreign national's home State that has standing to bring claims against another State for violations of international law.[52]

28. If the Tribunal were to find that it has jurisdiction over the case (it does not), Claimants' claims are nevertheless inadmissible. Claimants have no standing to bring any claim because they are not parties to the STA or the Peru Guaranty.[53] Claimants lack standing also because they hold none of the rights for which they bring claims.[54] Lastly, Claimants' claims are inadmissible because they are either evidently unfounded, unripe, or inadequately articulated.[55] Indeed, the dearth of factual support and legal analysis is so grave, in violation of article 20(2) of the UNCITRAL Arbitration Rules, that Respondents have been forced to reserve their rights to present the appropriate arguments in the future should Claimants properly present their case.[56]

C. Claimants' claims are meritless

29. Even assuming that the Tribunal finds that Claimants' claims can survive the fatal jurisdictional and admissibility hurdles, all of Claimants' claims lack merit.

30. Claimants allege that Respondents violated the STA and the Peru Guaranty by failing to indemnify them for damages, pay for their litigation costs, and defend them in the Missouri Litigations. Claimants have not demonstrated—because they cannot—that Activos Mineros, let alone Peru, have violated obligations owed to DRP under the STA. Respondents demonstrate in this Counter-Memorial that ruling in favor of Claimants' contractual claims requires redrafting the STA and the Peru Guaranty. Finding in favor of

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[51] *See* Sections III.E.

[52] *See* Sections III.F.2; **RLA-204**, *Dunkwa Continental Goldfields Ltd. and Continental Construction & Mining Company Ltd. v. Government of the Republic of Ghana*, ICC Case No. 18294/ARP/MD/TO, Final Award, 30 July 2015, ¶ 345.

[53] *See* Sections III.E, IV.A..

[54] *See* Sections IV.

[55] *See* Sections IV.

[56] UNCITRAL Arbitration Rules, Article 20(2)(b), (e).

Claimants on the merits, like on jurisdiction and admissibility, would require the Tribunal to accept unacceptable premises and impose illogical consequences. Indeed, in order to rule in favor of Claimants, the Tribunal would have to believe that through the STA, DRP obtained a limitless waiver of responsibility that allowed it to pollute at will, without any regard to the consequences.

31. In the alternative, Claimants also allege that "if Renco and [DRRC's] contract claim fails,"[57] Respondents should be found liable under the Peruvian law concepts of (i) pre-contractual liability, (ii) subrogation, (iii) contribution, and (iv) unjust enrichment. But Claimants have abjectly failed to meet their burden of proof for each Peruvian law claim.

32. Finally, Claimants contend that Peru breached its obligations under the minimum standard of treatment under customary international law. But even if the Tribunal had jurisdiction over that claim, Claimants have failed to make even a basic showing.

33. All of Claimants' claims must fail on the merits. The Tribunal should not countenance Claimants' attempt to use Peru's fisc as financial immunity from suit.

D. Claimants' pleading is filled with material omissions of fact

34. Claimants' omissions of key facts are too numerous to list in the introduction, but two sets of factual omissions are particularly relevant and detrimental to Claimants' claims: (i) while repeatedly delaying performance of the most critical environmental projects at the Facility, Renco focused on ramping up production using cheaper and dirtier concentrates in order to extract as much profit as possible from DRP; and (ii) DRP and its parent companies (including Renco and DRRC) caused DRP's inability to complete its environmental commitments under the STA, the PAMA, and Peruvian environmental law.

35. DRP and its parent companies focused on ramping up production with dirtier and cheaper concentrates instead of 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 acquiring the Facility, DRP

[57] Contract Memorial, ¶ 210.

ramped up production and introduced dirtier crude metal concentrates into the smelter.[58] Indeed, DRP exceeded the lead circuit's installed capacity, which compromised the circuit's ability to clean exhaust gasses and thus increased lead emissions. These actions damaged the environment and human health in and around La Oroya.

36. DRP and its parent companies (including Renco and DRRC) are responsible for DRP's inability to complete its environmental commitments. 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.[59] 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.[60] Depleting the working capital at the outset compromised DRP's ability to meet environmental and investment obligations in the years to come.

37. 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.[61] 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 environmental obligations or even to remain a going concern.

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[58] *See* Expert Report of Wim Dobbelaere ("**Dobbelaere Expert Report**"), § IX.

[59] *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.

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

[61] *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.

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38. In summary, Claimants' claims suffer from numerous defects, regarding jurisdiction, admissibility, and merits, which justify the dismissal of the dispute in its totality. Given the abusive nature of these claims, in addition to the dismissal of all claims, a full award of costs and legal fees against Claimants is justified.

39. The present Counter-Memorial is supported by six expert reports, two witness statements, exhibits R-036 to R-300 and legal authorities RL-083 to RL-218.

40. The six reports are from the following experts:

- Enrique Varsi, a Peruvian civil and contract law expert, who provides an expert report on Peruvian law and contract interpretation, in particular on Claimants' Peruvian law claims and the interpretation of the STA, the Renco Guaranty, and the Peru Guaranty ("**Varsi Expert Report-Contract**").

- 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**").

- 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**").

- Isabel Kunsman, a financing and accounting expert from AlixPartners, who provides an expert report that explains how DRP was too 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**").

- 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**").

41. 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, DRP's 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.

42. Additionally, Respondents include a Glossary at the beginning of this Counter-Memorial to assist the Tribunal.

II. FACTUAL BACKGROUND

43. 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

44. "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.[62] More than half of these explorations were for copper and a quarter for gold, the prices for which were rising on the international market.[63] Like its neighbors, Peru adopted legislation to privatize State-owned mining and metallurgical facilities, providing for a stable legal framework, generous tax treatment and the repatriation of profits.[64] According to the president of DRRC, Jeffrey Zelms: "[F]ree-trade policies … ma[de] Peru a promising place to do business."[65]

45. 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.[66]

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[62] **Exhibit R-137**, South American Mining: The New El Dorado, THE ECONOMIST, 2 September 1995, p. 1.

[63] **Exhibit R-137**, South American Mining: The New El Dorado, THE ECONOMIST, 2 September 1995, p. 1.

[64] **Exhibit C-081**, Supreme Decree No. 014-92-EM, Consolidated Text of the General Mining Law, 3 June 1992.

[65] **Exhibit R-139**, Doe Run's Globalization Lesson, AMERICAN METAL MARKET, 19 January 1998.

[66] **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.").

46. 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."[67]

47. In the U.S., Renco was accumulating environmental liabilities and the Environmental Protection Agency was moving in.[68] 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.[69] 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.[70] 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.[71]

48. Claimants turned their sights on a new home: Peru. In 1997, DRP, Claimants' 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."[72] Mr. Zelms, of DRRC, also explained that, while

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[67] **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.

[68] **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.

[69] **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.

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

[71] *See* **Section II.H** below.

[72] **Exhibit R-139**, Doe Run's Globalization Lesson, AMERICAN METAL MARKET, 19 January 1998.

improving the site's conditions would take time and money:[73] "I expect to see a day when you can look at the horizon at La Oroya and not see any emissions."[74]

49. Peru was simultaneously embarking on its own environmental reforms. Peru passed its first Environment and Natural Resources Code (the "**Environment Code**") in 1990,[75] 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.[76] 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**").[77] Claimants were well apprised of this backdrop.[78]

50. 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.

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[73] **Exhibit R-139**, Doe Run's Globalization Lesson, AMERICAN METAL MARKET, 19 January 1998.

[74] **Exhibit R-139**, Doe Run's Globalization Lesson, AMERICAN METAL MARKET, 19 January 1998.

[75] In Spanish "*Código del Medio Ambiente y los Recursos Naturales*" approved by Legislative Decree No. 613 on 8 September 1990. *See* **Exhibit C-085 (Treaty)**, Legislative Decree No. 613, 9 September 1990.

[76] **RLA-036**, Peruvian Constitution, 29 December 1993, Art. 62. *See* Alegre Report, ¶ 96.

[77] 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 Report, Section IV(B).

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

51. 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

52. 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.[79] 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)[80] and the precautionary approach (Principle 15).[81] 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).

53. 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".[82]

54. 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).[83] The Constitution also affirms the Government's sovereign right to determine the country's

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[79] *See* **Exhibit R-180**, The Rio Declaration on Environment and Development, The Earth Summit, 3–4 June 1992.

[80] *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.").

[81] *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.").

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

[83] **RL-036**, Peruvian Constitution, 29 December 1993, Arts. 2 and 7.

environmental policy and promote the sustainable use of its natural resources (Article 67).[84]

55. 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.[85] Facilities would then have to undertake a PAMA for the operational phase,[86] and a closure plan for the post-operational phase.[87] 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*"),[88] and ambient air quality standards (or "**ECAs**" for its Spanish initials "*Estándares de Calidad Ambiental*").[89]

56. Existing mining operations were given five (5) years to complete PAMAs and meet LMPs and ECAs,[90] while metallurgical facilities were given ten (10) years.[91] 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.[92] Both mining and metallurgical facilities were required to spend at least 1% of their annual revenues on environmental remediation and control programs and to submit an annual report to the MEM regarding their operations' emissions.[93]

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[84] **RL-036**, Peruvian Constitution, 29 December 1993, Art. 67.

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

[86] **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.

[87] **Exhibit R-025**, Supreme Decree No. 016-93, Art. 16.

[88] **Exhibit R-025**, Supreme Decree No. 016-93, Art. 5.

[89] **Exhibit C-081**, 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.

[90] **Exhibit R-025**, Supreme Decree No. 016-93, Art. 9.

[91] **Exhibit R-025**, Supreme Decree. No. 016-93, Art. 9.

[92] **Exhibit R-025**, Supreme Decree. No. 016-93, Art. 48.

[93] **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.

57. 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 1998[94] and then to the Ministry of Environment in 2008).[95] 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.[96] On July 16, 1996, The MEM set LMPs[97] and ECAs[98] for lead and SO_2, among other pollutants.

58. The Environmental Mining Law also permitted mining and metallurgical operators to enter into administrative stability agreements with the MEM.[99] 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.

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

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

[96] **Exhibit C-086 (Treaty)**, Legislative Decree No. 757, 13 November 1991.

[97] **Exhibit C-128 (Treaty)**, Ministerial Resolution No. 315-96, Art. 1, 2, and Annex I; **Exhibit C-127 (Treaty)**, 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 Report,¶¶ 5–7.

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

[99] 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

59. 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.[100]

60. 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

[100] **Exhibit C-020**, Environmental Impact Program, La Oroya Metallurgical Complex, Centromín, 12 December 1996 ("**PAMA 1996 Report**"), PDF p. 25; *See also* **Exhibit C-104 (Treaty)**, White Paper - Fractional Privatization of Centromín, 1999 ("**1999 White Paper**").

and the Mantaro River.[101] Climactic temperature inversions cause environmental 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.[102]

61. 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.[103]

62. In 1974, Peru nationalized the installations of Cerro de Pasco and founded Centromín as the State entity in charge of operating the Facility,[104] and by 1997, the Facility had become one of the largest and most complex metal refining complexes in the western world.[105] It is able to recover 11 metals (including copper, zinc, silver and lead), and various by-products (including sulfuric acid and arsenic trioxide).[106] 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.[107]

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[101] **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.

[102] **Exhibit C-020**, PAMA 1996 Report, PDF p. 17.

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

[104] **Exhibit C-020**, PAMA 1996 Report, PDF p. 26.

[105] **Exhibit C-020**, 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 (Treaty)**, 1999 White Paper, p. 1.

[106] **Exhibit C-020**, 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.

[107] **Exhibit C-020**, PAMA 1996 Report, PDF p. 18 "In 1995, 255 I 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."

63. The copper circuit and the lead circuit systems undertake three main processes to create metals: roasting, smelting, and refining.[108] The zinc circuit undertakes three similar processes: roasting, leaching, and refining.[109] These processes generate pollution via emissions of gas and particles, liquid effluents, and solid waste that contaminate the air, soil, and water.[110]

64. 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.[111] 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.[112]

65. In 1992, Peru created CEPRI,[113] 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.[114]

66. 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"**).[115] 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

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

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

[110] **Exhibit C-020**, PAMA 1996 Report, PDF p. 83.

[111] *See, e.g.*, **Exhibit C-020**, PAMA 1996 Report, PDF p. 19.

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

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

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

[115] **Exhibit R-184 (Treaty)**, Metaloroya Business Plan (1997–2011), La Oroya Metallugical Complex, June 1996.

problems" by investing *at least* another USD 137.5 million capital.[116] 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 … Potential buyers [would] need to undertake a due diligence of the [Facility] and proposed business plan to establish the value of La Oroya."[117]

67. 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.[118] 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.[119] The EVAP would serve as a basis for the environmental action plan that Centromín immediately started to implement.[120]

68. 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

[116] **Exhibit R-184 (Treaty)**, Metaloroya Business Plan (1997–2011), La Oroya Metallugical Complex, June 1996, p. 3.

[117] **Exhibit R-184**, Metaloroya Business Plan (1997–2011), La Oroya Metallugical Complex, June 1996, p. 18.

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

[119] **Exhibit C-125 (Treaty)**, 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 (Treaty)**, 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 (Treaty)**, 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, SO_2, lead and arsenic contents.").

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

of environmental monitoring programs and production of the EVAP."[121]

69. The EVAP also noted severe air contamination from three main sources: the main chimney or stack, secondary chimneys or stacks, and fugitive emissions.[122]

70. 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.[123]

71. The MEM reviewed the first PAMA proposal and requested that Centromín amend it to address certain technical observations.[124] To prepare its amended PAMA, Centromín hired various external advisors,[125] including Kilborn SNC-Lavalin Europe, a leading multinational engineering firm, which assisted Centromín in designing technical solutions to address environmental concerns (the "**SNC Report**").[126] The SNC Report provided various options to remediate SO_2 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).

72. 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

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[121] **Exhibit C-125 (Treaty)**, 1995 Centromín Report EVAP, PDF p. 6. See also **Exhibit C-126 (Treaty)**, 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. 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.").

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

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

[124] **Exhibit C-107 (Treaty)**, Environmental Impact Program, La Oroya Metallurgical Complex, Centromín, 29 August 1996 ("**Centromín Preliminary PAMA**"), PDF p. 12.

[125] **Exhibit C-123 (Treaty)**, 1997 White Paper, pp. 8–9.

[126] **Exhibit R-267**, Kilborn SNC Lavalin Study Report, October 1996.

(by 13 January 1998).[127] 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 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.

73. The implementation of the PAMA required a twofold investment. While the sixteen (16) PAMA projects required an estimated investment of USD 129 million,[128] the technological modernization of the Facility required an estimated investment of over USD 141 million.[129] These investment estimates were endorsed by the SNC Report.[130]

74. 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.[131]

75. 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.[132] The table below, included in the PAMA, reflects the investment schedule estimated by Centromín.

[127] **Exhibit C-020**, PAMA 1996 Report, PDF p. 185, table 5.1.2. *See also* PDF p. 186.

[128] **Exhibit C-020**, PAMA 1996 Report, PDF p. 20. Table below, PDF p. 156.

[129] **Exhibit C-020**, PAMA 1996 Report, PDF p. 20; **Exhibit C-054 (Treay)**, Letter from DRP (K. Buckley) to MEM (Director General of Mining), 15 December 1998, Table 2, p. 5.

[130] **Exhibit R-025**, Supreme Decree No. 016-93, Art. 3.

[131] **Exhibit C-020**, PAMA 1996 Report, PDF p. 155, table 5.2/1.

[132] **Exhibit R-026**, Directorial Resolution No. 017-97-EM/DGM, 13 January 1997. Treaty Memorial, ¶ 38 *citing* **Exhibit C-020**, PAMA 1996 Report and **Exhibit C-123 (Treaty)**, 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[133]	**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

[133] 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**

76. 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,[134] it never completed the Sulfuric Acid Plant Project.

77. A major problem at La Oroya was the emission of SO_2 at the Facility's main chimney. The maximum permitted level of SO_2 emissions pursuant to the 1996 parameters set by the MEM, was 195 tonnes per day,[135] meaning that emissions would have to be reduced by 83%.[136] The technical solution proposed by the SNC Report—and incorporated into the PAMA—was the construction of two sulfuric acid plants that would capture SO_2 emissions, convert them into sulfur trioxide ("**SO_3**"), and recover it as sulfuric acid ("**SO_4**"), a by-product that would then be sold or stored.[137] 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.[138]

78. 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

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[134] *See* **Section II.C**.

[135] **Exhibit C-128 (Treaty)**, Ministerial Resolution No. 315-96, Annex I.

[136] **Exhibit C-020**, PAMA 1996 Report, PDF p. 165. *See also* **Exhibit C-020**, PAMA 1996 Report, PDF p. 19 and 21 ("Para mitigar los impactos originados por la descarga de SO_2 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 SO_2 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 SO_2 and particles emissions into the atmosphere, two modules are planned to fix 83% of the total SO_2 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.").

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

[138] **Exhibit C-020**, 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."[139] The report concludes that the sulfuric acid plants would, "ensur[e] the maximum fixation of [SO_2], dust and particulates in the various process gas streams."[140]

79. The SCN Report provided potential buyers with thorough technical guidelines on the available solutions for remediation of SO_2 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."[141]

80. 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.[142] Despite Claimant's claim that it only discovered in 2005 that a third plant might be needed,[143] this requirement was reflected not only in the SNC Report, but also in the PAMA.[144] Both the SNC Report and the PAMA were at the Claimant's disposal when it acquired the Facility.

81. 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 SO_2 and other pollutants that were being emitted from secondary stacks.[145] 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

[139] **Exhibit R-267**, Kilborn SNC Lavalin Study Report, October 1996, PDF p. 10.
[140] **Exhibit R-267**, Kilborn SNC Lavalin Study Report, October 1996, PDF p. 10.
[141] **Exhibit R-267**, Kilborn SNC Lavalin Study Report, October 1996, PDF p. 10.
[142] **Exhibit R-267**, Kilborn SNC Lavalin Study Report, October 1996, PDF p. 71
[143] Treaty Memorial, ¶ 70.
[144] **Exhibit C-020**, PAMA 1996 Report, PDF p. 169.
[145] **Exhibit C-108 (Treaty)**, Knight Piésold Report, PDF pp. 39–40.

fugitive sources, and should then detail potential methods and costs for controlling each of these emissions."[146]

82. 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**."[147]

83. 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 SO_2 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."[148] The specific usage of "over" in this passage indicates that the modifications necessary to comply with SO_2 emissions standards will take place over a period of time.

84. 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]."[149]

85. 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

[146] **Exhibit C-108 (Treaty)**, Knight Piésold Report, PDF p. 34.
[147] **Exhibit C-108 (Treaty)**, Knight Piésold Report, PDF p. 4 (emphasis added).
[148] **Exhibit C-108 (Treaty)**, Knight Piésold Report, PDF p. 33.
[149] **Exhibit C-108 (Treaty)**, Knight Piésold Report, PDF p. 41.

Environmental Mining Law, given a ten-year deadline, was able to complete its PAMA within the prescribed period.[150]

86. Claimants had access to and an opportunity to review—***before they made their 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. Claimants 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.

87. 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.[151] Renco's greatest priority was instead the maximization of production and financial gain by increasing lead production and reducing costs.[152]

88. 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.[153]

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

89. 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.[154] The tender process was conducted by COPRI, CEPRI and investment bank, CS First Boston/Macroinvest, which prepared the Information Offering Memorandum (the "**1996 Offering Memorandum**").[155] The approved PAMA—together with its supporting

[150] Alegre Report, ¶ 91.

[151] Kunsman Expert Report, § VI.

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

[153] Proctor Expert Report, Figures 13, 17.

[154] **Exhibit R-187**, Bases and Model Contracts (Second Round), Centromín, 26 March 1997 ("**Bidding Terms (Second Round)**"); *See also* **Exhibit C-104 (Treaty)**, 1999 White Paper, p. 72.

[155] **Exhibit C-117 (Treaty)**, Offering Memorandum, La Oroya Metallurgical Complex, October 1996.

documentation—was shared with potential buyers of Metaloroya during the bidding process.

90. 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."[156]

91. CEPRI provided the bidding terms and model contracts for the transfer of shares of Metaloroya to 30 bidders—including Renco and DRRC.[157] 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.[158] 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.[159] Further, Renco represented that it possessed a net worth of over USD 50 million and owned 100% of DRRC.[160]

92. 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.[161] For instance, Mr. 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

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

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

[158] **Exhibit R-188**, Renco Prequalification, Centromín, 6 March 1997, p. 35.

[159] **Exhibit R-188**, Renco Prequalification, Centromín, 6 March 1997, p. 34.

[160] **Exhibit R-188**, Renco Prequalification, Centromín, 6 March 1997, p. 35.

[161] *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.

from the Herculaneum smelter resulted in high blood lead levels in children living within close proximity of the smelter.[162]

93. 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.[163] A report prepared by Centromín after visiting Herculaneum notes that Claimants' main interest in acquiring La Oroya was the production of lead and the possibility of diversifying its business.[164] The notes also record that, during the visit, Claimants emphasized their technical and "political" capabilities to manage environmental related issues.[165]

94. The Renco / DRRC consortium was pre-qualified, with five (5) other companies, to move forward with the bidding.[166] 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."[167] 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.[168]

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[162] **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.

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

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

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

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

[167] **Exhibit C-117 (Treaty)**, Offering Memorandum, La Oroya Metallurgical Complex, October 1996, PDF p. 91.

[168] **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 "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,

95. 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.[169] 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.[170] COPRI provided a second round of written answers to questions on 26 March 1997, with revised model contracts.[171] No questions were raised with the respect to the ten-year period to complete the PAMA.

96. 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.[172]

97. Industrias Peñoles won the auction but subsequently withdrew on 9 July 1997 because it could not agree on certain items with CEPRI.[173] CEPRI revoked the award granted to Industrias Peñoles and declared Renco / DRRC consortium the winner of the action on 10

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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 (Treaty)**, Offering Memorandum, La Oroya Metallurgical Complex, October 1996, PDF p. 2.

[169] **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).

[170] **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.

[171] **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).

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

[173] **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, 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.

July 1997.[174] Subsequently, and as required by the bidding conditions, Renco / DRRC consortium established DRP, its Peruvian subsidiary, to own and operate Metaloroya.[175]

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

98. 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.[176] The STA specified that this investment "*must be made necessarily with* [*capital*] *contribution*."[177]

99. 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.[178]

100. 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.[179] DRP also committed to carry out a supplementary control program of air emissions and install bag-houses (*i.e.* air filters) and scrubbers.[180] Further, DRP would benefit from the stability

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

[175] **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**").

[176] **Exhibit R-001**, STA & Renco Guaranty, clause 4.1.

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

[178] **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.

[179] **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.

[180] **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

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**").[181] 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.[182]

101. DRP benefitted from a tax stability agreement as well. In exchange for committing, inter alia, to capitalize Metaloroya, DRP received preferential tax treatment.[183]

102. The STA also included tailored assumption of responsibility clauses with respect to specific third-party claims and independent indeminity 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

103. All bidders, including Claimants, 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.[184] Bidders were permitted to visit the Facility—as Claimants did—ask questions on relevant documentation and carry out a due diligence by themselves or by third parties. At Clause 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.[185]

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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".

[181] **Exhibit R-199**, Environmental Administrative Stability Contract, 4 May 1998 ("**Stability Agreement**"). *See also*, Alegre Report, Section IV(B).

[182] **Exhibit R-001**, STA & Renco Guaranty, clause 6.1.

[183] **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).

[184] See Section II.A.2.

[185] **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.

104. 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.[186] 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,[187] 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."[188]

105. 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:

- implementing the PAMA projects "*over the next nine years*", *i.e.*, no later than January 2007, and that it would cost USD 195 million;[189]

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...").

[186] **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.

[187] **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 (Treaty)**, 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.").

[188] **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.

[189] **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

- 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."[190] According to DRRC, the plants had to be constructed no later than 2006;[191]

- 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";[192]

- it was required "to meet ambient air quality standards and the applicable emissions rate by January 2007." At the time, SO_2 emissions amounted to approximately 990 tons per day and the MEM had "established a maximum [SO_2] 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."[193]

106. DRRC also acknowledged its understanding of the strictures of the environmental programs that DRP had 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 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."[194]

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

107. CEPRI was clear during the bid process that it sought an experienced buyer who could modernize the Facility within ten (10) years.[195] By turning to foreign investment, Peru

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.").

[190] **Exhibit R-094**, DRRC SEC Form S-4, PDF p. 137.

[191] **Exhibit R-094**, DRRC SEC Form S-4, PDF p. 137.

[192] **Exhibit R-094**, DRRC SEC Form S-4, PDF p. 134.

[193] **Exhibit R-094**, DRRC SEC Form S-4, PDF p. 135.

[194] **Exhibit R-094**, DRRC SEC Form S-4, PDF p. 134.

[195] *See* Section II.A, above.

hoped to attract a company able to keep the Facility operating without compromising the government's environmental and public health obligations.

108. 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.

109. 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.

110. 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

111. 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 of its environmental and other contractual obligations.[196] Accordingly, in September 1997, Renco and DRRC established a Peruvian subsidiary, DRP, to own and operate the Facility.[197]

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[196] **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…").

[197] **Exhibit C-132 (Treaty)**, Deed of Incorporation for DRP, S.A., 8 September 1997 ("**DRP Incorporation**").

112. The following month, on 23 October 1997, Centromín, Metaloroya, and DRP executed the STA for 99.93% shares of Metaloroya .[198] The STA indentified 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**").[199] 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.[200] 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.

113. 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 compliance with the obligations contracted by the Investor, Doe Run Peru" (the "**Renco Guaranty**").[201] The Renco Guaranty is a distinct, autonomous contract in which Claimants guaranty the Investor's compliance with its contractual obligations.

114. DRP paid Centromín USD 121,440,608 for Metaloroya's shares[202] and was required to make a separate capital contribution of USD 126,481,383.24 to Metaloroya on the day of the purchase.[203] DRP also committed to invest USD 120 million in the Facility within the first five (5) years in furtherance of its environmental and modernization obligations.[204] DRP agreed to submit an annual report to Centromín regarding its progress on this investment commitment.[205]

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[198] **Exhibit R-001**, STA & Renco Guaranty.

[199] **Exhibit R-001**, STA & Renco Guaranty.

[200] *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.

[201] **Exhibit R-001**, STA & Renco Guaranty, Additional Clause.

[202] **Exhibit R-001**, STA & Renco Guaranty, clause 2.

[203] **Exhibit R-001**, STA & Renco Guaranty, clauses 3.2–3.4.

[204] **Exhibit R-001**, STA & Renco Guaranty, clauses 4.1 and 4.5.

[205] **Exhibit R-001**, STA & Renco Guaranty, clause 4.2

115. Peru did not sign the STA. Rather, Clause 10 of the STA acknowledged that Peru would guarantee Centromín's obligations.[206] 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**").[207]

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

a. The STA Parties' environmental remediation obligations

116. 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).[208] 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.[209] Likewise, Centromín assumed responsibility for any amendments to its PAMA, as well as several other technical obligations.[210]

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

117. 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:

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[206] **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").

[207] [**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].")

[208] **Exhibit R-001**, STA & Renco Guaranty, clause 5.

[209] **Exhibit R-001**, STA & Renco Guaranty, clause 5.1.

[210] **Exhibit R-001**, STA & Renco Guaranty, clause 6.1.

> "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 . . . ."

118. 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)."

119. 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."

120. 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."

121. 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."

122. 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.[211]

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

123. 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).[212] 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.[213]

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[211] **Exhibit R-001**, STA & Renco Guaranty, clauses 5.8.

[212] **Exhibit R-001**, STA & Renco Guaranty, clauses 6.2–6.3.

[213] **Exhibit R-001**, STA & Renco Guaranty, clause 6.5.

124. 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."[214]

125. 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

126. 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 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."[215] 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)

[214] **Exhibit R-001**, STA & Renco Guaranty, clause 8.14.

[215] **Exhibit R-001**, STA & Renco Guaranty, clause 7.1.

127. 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. . . ."[216]

4. Subsequent amendments to the STA and Guaranty

128. On 27 October 1997, Centromín released Renco from its obligations under the Renco Guaranty, per Renco's request.[217]

129. On 1 June 2001, DRP assigned its contractual position as the "Investor" DRCL, a British Virgin Islands company;[218] DRCL thus assumed all of DRP's rights and obligations as the "Investor" under the STA.[219]

130. 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.[220] 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

131. 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.[221] Renco financed the vast majority of the acquisition

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[216] **Exhibit R-001**, STA & Renco Guaranty, clause 15.

[217] *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.

[218] **Exhibit R-004**, Assignment of Contractual Position between DRP and DRCL, 1 June 2001 ("**Contract Assignment**"), clause 2.

[219] **Exhibit R-004**, Contract Assignment, clause 2.

[220] **Exhibit R-284**, Assignment of Centromín's Contractual Position to Activos Mineros, 19 March 2007

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

through a USD 225 million loan ("**Acquisition Loan**") from Bankers Trust Company and other lenders to Doe Run Mining, DRP's direct parent company.[222]

132. As described above, the STA also established an obligation for DRP to invest an additional USD 120 million over the next five (5) years.[223] The STA specified that this investment "must be made necessarily with the [capital] contribution."[224]

133. 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-day transaction.[225] Renco directed these financing arrangements, as confirmed in sworn deposition testimony by DRRC executive Jeffrey Zelms.[226]

134. The following diagram from an internal DRP summary[227] 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:

[222] *See* **Exhibit R-095**, Credit Agreement between Doe Run Mining and Bankers Trust Company, 23 October 1997 ("**Acquisition Loan**").

[223] **Exhibit R-001**, STA & Renco Guaranty, clause 4.1.

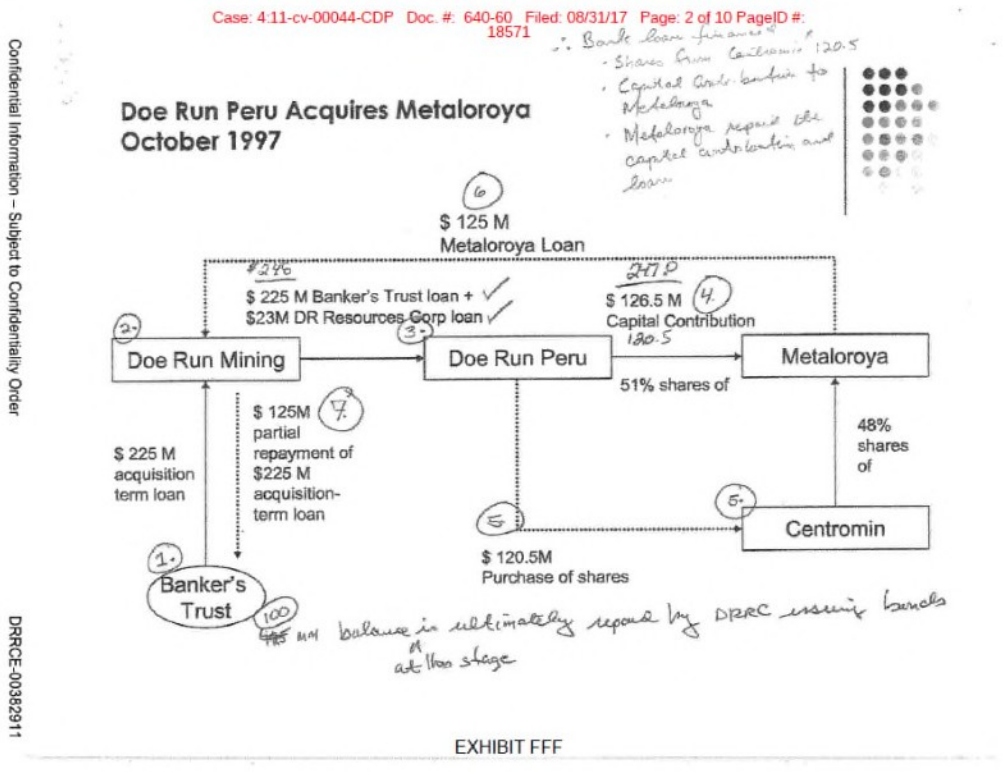
[224] **Exhibit R-001**, STA & Renco Guaranty, clause 4.5 (emphasis added).

[225] *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.").

[226] **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.

[227] **Exhibit R-068**, DRP Intercompany Note: Summary of Facts, p. 2.

Figure 2 – Renco's Circular Rerouting of the purported capital contribution



135. 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."[228]

[228] *See* Kunsman Expert Report, ¶¶ 136-137.

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

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

137. 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,[229] as well as technical engineering studies of ways to address the situation.[230] Centromín prescribed a set of corrective projects for the Facility in the form of the PAMA.[231] 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.[232]

138. 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.

139. 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)

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[229] **Exhibit C-108 (Treaty)**, Knight Piésold Report.

[230] **Exhibit R-267**, SNC 1996 Report.

[231] **Exhibit C-020**, Environmental Impact Program, La Oroya Metallurgical Complex, Centromín, 12 December 1996 ("**PAMA 1996 Report**").

[232] **Exhibit R-001**, STA, clause 4.1.

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

140. 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.[233] 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.[234] These transactions were made at the direction of Renco,[235] 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.

141. 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?
>
> [. . .]

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[233] *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.").

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

[235] **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.

> 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***."[236] (Emphasis added)

142. 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***….
>
> 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."[237] (Emphasis added)

143. 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."[238] Indeed, Mr. Peitz, the DRP Treasurer, concluded that he "didn't miss" the key financial burdens facing

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[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. 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").

[237] **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.

[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.

DRP, which—even in 1998—were as "***plain as an elephant in the room***" (emphasis added).[239]

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

144. 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

145. 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 creditor on the USD 125 million loan to Doe Run Mining (made using the purported capital contribution to Metaloroya).[240]

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.[241]

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[239] **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.

[240] *See, e.g.*, **Exhibit R-068**, DRP Intercompany Note: Summary of Facts, undated, pp. 3–4.

[241] *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.

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.[242] 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."[243] This was the same USD 125 million that Peru had required in the form of a capital contribution.[244] 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).[245]

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

[242] 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.

[243] **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.").

[244] **Exhibit R-001**, Contract of Stock Transfer, Capital Stock Increase and Stock Subscription of Empresa Metalurgica La Oroya S.A., 23 October 1997, clause 4.5f (The STA specified that this investment "must be made necessarily with the [capital] contribution.").

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

125 million, now USD 139.1 million with accumulated interest.[246] 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].[247]

146. 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.

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.[248]

147. 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.

148. 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

[246] *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.

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

[248] *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.").

> "capital stock" from Metaloroya, DRP could have used the capital to begin fulfilling the PAMA Commitments."[249]

149. 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

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

[249] Kunsman Expert Report, ¶ 136.

Figure 3 – Examples of Intercompany Agreements

Date	*Parties*	*Title*	*Fees (Period)*[250]
10/23/1997	DRP	Technical, Managerial and	**USD 3.8 million**
	DRRC	Professional Agreement	(10/1997-03/1998)
01/01/1998	DRP	Foreign Sales Agency &	**USD 1.6 million**
	DRRC	Hedging Services Agreement	(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	Foreign Sales Agency &	**USD 6.8 million**
	DRRC	Hedging Services Agreement	(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)

151. 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.[251] 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 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

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

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

between the parties, how the terms were agreed upon, or who made the decision to enter into them.[252]

152. 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."[253]

153. 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 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

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[252] *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.

[253] **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.").

DRRC—to provide the same services.[254] 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.[255]

154. 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."[256] 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."[257]

155. 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.

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

156. 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

[254] *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.

[255] *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.").

[256] **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.

[257] Kunsman Expert Report, ¶ 81.

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.

157. 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."[258]

158. At that time (in 1998), Kenneth Buckley, the president and general manager of DRP,[259] was "upset" that Mr. Peitz had "exposed the situation."[260] 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***….
>
> 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***."[261] (Emphasis added)

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[258] **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.

[259] *See* Witness Statement of Kenneth Buckley, ¶ 3.

[260] **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.

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

159. 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*** …."[262] (Emphasis added)

160. 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."[263] 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***."[264] (Emphasis added)

161. 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***

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[262] **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.").

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

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

> ***in August 1998 and it did nothing but discredit me with management***…. Aside from the fact that the Company's capital was drained, its currrent [sic] earning power is not strong enough to cover its costs. ***I say again, drastic measures need to be taken***.[265] (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***."[266] (Emphasis added)

162. 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 <u>needs to raise debt</u> 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….
>
> ***<u>Existing Liens and Negative Pledges on Doe Run Peru's assets</u>***. <u>This now needs to be resolved as a priority</u>. 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 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.***

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

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

> ***Conversely, not letting DRP proceed with this Program involves the taking of likely significant risks with the future of the company***…."[267] (Emphasis in original)

163. 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.[268]

164. 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 your liquidity is obviously reducing our liquidity, and is putting in danger the objective to extend the PAMA***."[269] (Emphasis added)

165. 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."[270]

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[267] **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.

[268] **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.").

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

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

166. 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***"[271] (emphasis added). On 30 March 2006 Mr. Peitz also warned that "[t]he company has to stop spending money like it grows on trees."[272]

167. 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

168. 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.

169. In 1997, production of refined lead hit an all-time high, reflecting DRP's choice to increase production from day one.[273] DRP would go on to break its own record every year from 1998 to 2000.[274] 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%.[275] As pyro-metallurgy expert Wim Dobbelaere explains, given that DRP did not implement any meaningful emissions controls for eight

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

[272] **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.").

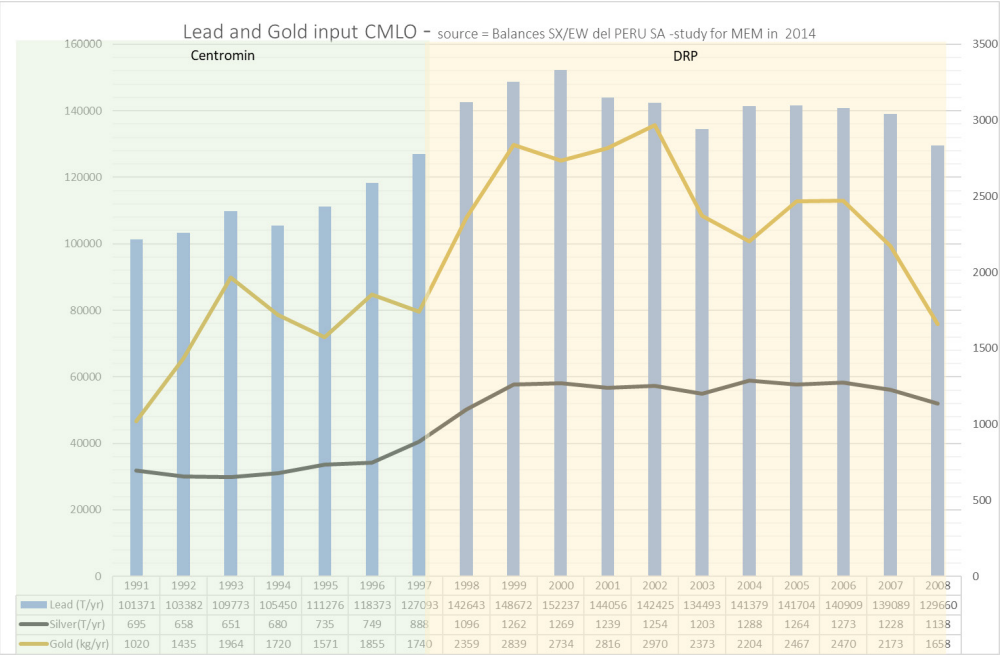
[273] Dobbelaere Expert Report, § IX.

[274] Dobbelaere Expert Report, § IX.

[275] Dobbelaere Expert Report, § IX.

years, any increases in production would have caused a commensurate increase in emissions.[276]

Figure 4



170. 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.[277] DRP's use of these dirty concentrates increased the 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.[278] DRP's use of these concentrates thus increased the Facility's emissions of various contaminants.[279]

[276] Dobbelaere Expert Report, § IX.

[277] **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.

[278] Dobbelaere Expert Report, § IX.A.

[279] Dobbelaere Expert Report, §§ IX.A-C.

171. 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.[280] 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."[281] 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.[282]

172. DRP abandoned Centromín's modernization plan immediately upon acquiring the Facility.[283] DRP attempted to implement the PAMA without upgrading the copper and lead smelting technology, a grievous decision that the company later reversed in 2005.[284] 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.[285] As a result, those circuit's emissions, which were already extreme, continued unabated for years.[286]

173. 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 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.[287]

174. 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

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[280] **Exhibit R-094**, DRRC SEC Form S-4, PDF pp. 20, 126.
[281] **Exhibit R-094**, DRRC SEC Form S-4, PDF pp. 20, 126.
[282] **Exhibit WD-015**, 10 Year Master Plan Report, Fluor Daniel, September 1998, pp. 8, 16.
[283] Dobbelaere Report, ¶¶ 76-79. *See also*, Dobbelaere Report, §§ VI, X.
[284] Dobbelaere Report, ¶¶ 76-79. *See also*, Dobbelaere Report, §§ VI, X.
[285] Dobbelaere Report, ¶¶ 76–79.
[286] Dobbelaere Report, ¶¶ 76-79. *See also*, Dobbelaere Report, §§ VI, X.
[287] Dobbelaere Report, § XI.

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.[288] The commission analyzed air monitoring reports and found that sulfur dioxide concentrations frequently exceeded the maximum level allowed by Peruvian environmental standards.[289]

- 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.[290]

- 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.[291] The MEM documented that, as of 2004, sulfur dioxide emissions had increased 8-9% relative to emissions in 1995.[292]

- 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.[293]

- 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.[294] According to the auditor's report, DRP discharged effluents into the Mantaro River with lead, zinc and arsenic

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[288] **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 (Treaty)**, 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 Atomospheric Basin of La Oroya, CONAM, 2006.

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

[290] **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.

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

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

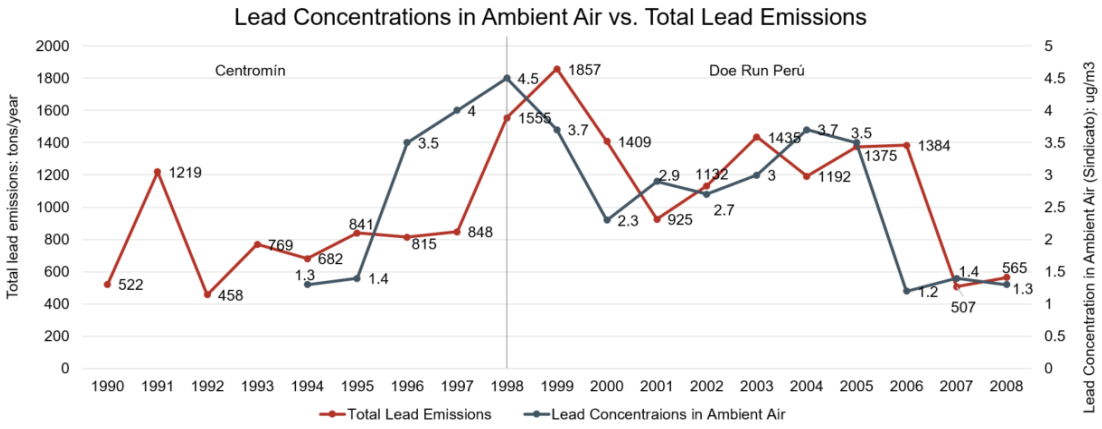
[293] *See* **Exhibit R-149**, Report No. 056-2006-MEM-DGM-FMI/MA, 19 January 2006, p. 11.

[294] **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.

concentrations that exceeded the established LMPs.[295] Additionally, the levels of lead and SO_2 that DRP emitted into the atmosphere did not comply with either the LMPs or the ECAs.[296]

175. Notwithstanding the above, DRP claimed that emissions had decreased during its operation of the Facility.[297] This claim did not comport with data that showed that DRP had dramatically increased lead production in the Facility.[298] 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.[299] The same consultants found that concentrations of lead in ambient air worsened between 1997 and 2007 (after DRP had implemented emissions controls).[300]

Figure 5



[295] **Exhibit R-194**, Report No. 089-2006-MEM-DGM-FMI/MA, 1 February 2006, ¶¶ 3.2–3.4.

[296] **Exhibit R-194**, Report No. 089-2006-MEM-DGM-FMI/MA, 1 February 2006, ¶¶ 3.2–3.4.

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

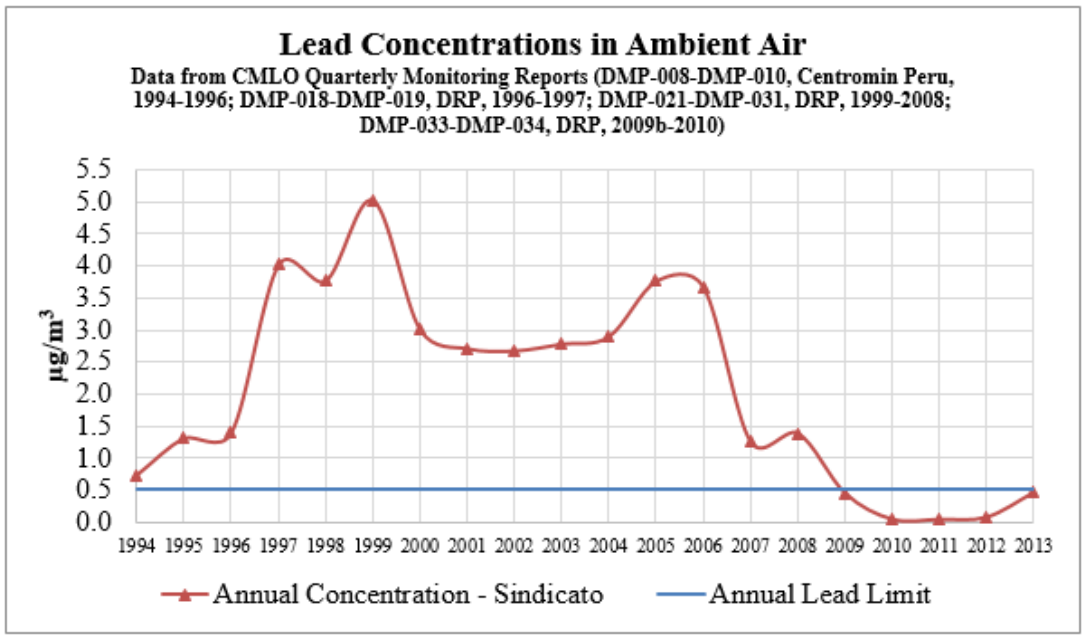
[298] **Exhibit R-150**, Assessment of Lead Loss from the La Oroya Metallurgical Complex and Environmental Contamination (Volume I), January 2013, pp. 17–18.

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

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

176. Pyrometallurgy expert Wim Dobbelaere's own analysis of the Facility's production data shows that lead emissions dramatically increased after DRP acquired the Facility.[301] 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 SO_2 into the environment.[302]

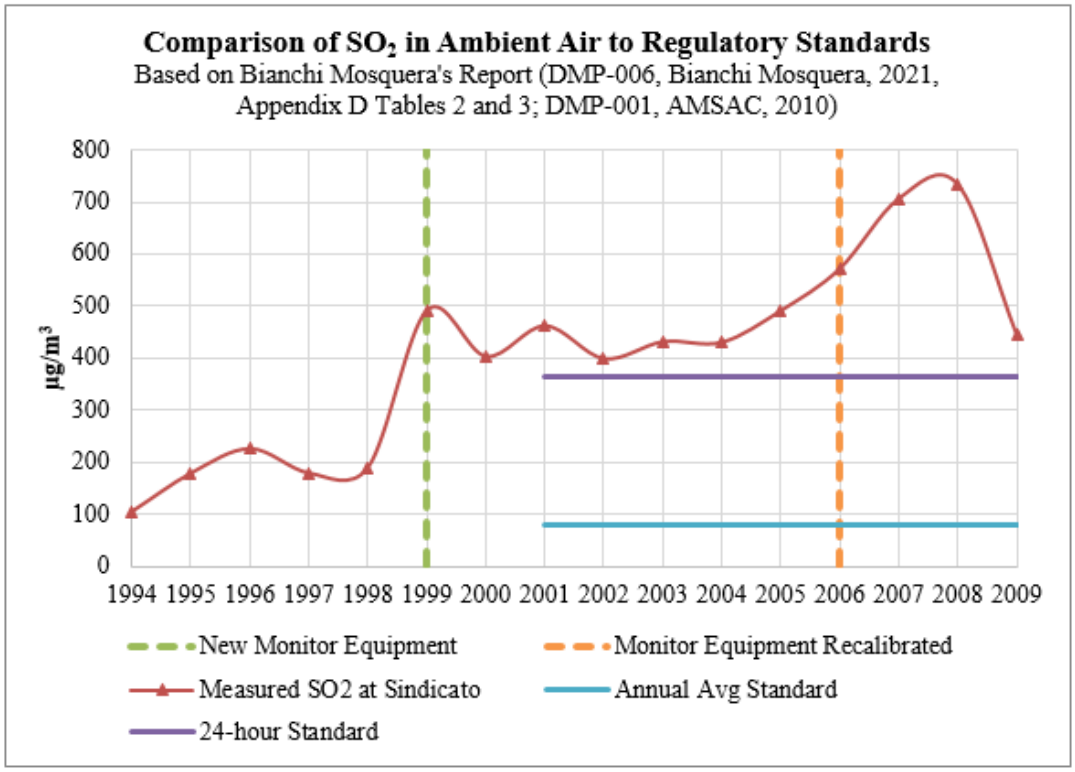
Figure 6



[301] Dobbelaere Report, §§ IX.B-IX.C.

[302] Proctor Report, pp. 31, 36.

Figure 7



177. 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".[303] As a result, DRP's monitoring equipment failed to capture SO_2 emissions that measured above 6,002 ug/m3.[304] DRP also failed to monitor particulate matter in chimneys using the Method 5 isokinetic sampling.[305] DRP's poor monitoring practices mean that the Facility's emissions may have been higher than reflected in the monitoring reports.

178. 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

[303] *See* **Exhibit R-149**, Report No. 056-2006-MEM-DGM-FMI/MA, 19 January 2006, p. 11, ¶ 6.10.
[304] *See* **Exhibit R-149**, Report No. 056-2006-MEM-DGM-FMI/MA, 19 January 2006, p. 11, ¶ 6.10.
[305] *See* **Exhibit R-149**, Report No. 056-2006-MEM-DGM-FMI/MA, 19 January 2006, p. 11, ¶ 6.10.

Stability Agreement, DRP was allowed to operate the Facility according to 1996 LMPs and ECAs until the end of the ten-year PAMA Period,[306] 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.[307] Naturally, air quality markedly improved once the Facility shut down.[308] The incidence of adverse health impacts from the Facility's operations also decreased, as discussed in **Section II.D**, below.[309] These improvements illustrated that the health impacts caused by the Facility's emissions stemmed from DRP's contemporaneous emissions, not Centromín's historical emissions.[310]

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

179. 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

180. The Sulfuric Acid Plant Project was the most obvious and effective way to reduce the Facility's emissions of SO_2 and other contaminants. The smelter's main emission was SO_2,

[306] DRP was permitted to operate in compliance with the 1996 standards for SO_2 through 2012, in accordance with the 2006 Extension and the 2009 Extension Laws, discussed below.

[307] Proctor Report, §§ 3.3-3.4.

[308] Proctor Report, Figure 14.

[309] Proctor Report, Figure 16.

[310] Proctor Report, pp. 30-34.

which represented 97.83% of the emissions from the Facility.[311] The original PAMA envisaged the construction of two sulfuric acid plants—one for the copper circuit, and another for the zinc and lead circuits.[312] The technology to construct the sulfuric acid plants was well-known, available, and tested.[313] The plants were designed to capture SO_2, convert it into sulfur trioxide, and recover it as sulfuric acid, a by-product that DRP would then sell.[314] The sulfuric acid plants would also reduce metal emissions into the ambient air surrounding the Facility.[315]

181. 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.[316]

182. 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.[317]

183. 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 SO_2 from the Facility, and reduce emissions

[311] **Exhibit C-096 (Treaty)**, Action Plan to Improve the Air Quality and Health of La Oroya, 1 March 2006, p. 9.

[312] **Exhibit C-020**, PAMA Report, PDF pp. 169–170.

[313] **Exhibit C-020**, PAMA Report, PDF p. 167.

[314] **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 SO_2 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 SO_2 concentrations. Second, transformation of sulfur dioxide (SO_2) into sulfur trioxide (SO_3) and then to sulfur acid (H_2SO_2). Third, storage of the sulpuric acid (H_2SO_2) produced and transportation of it to consumption points.

[315] Dobbelaere Report, ¶¶ 51-54.

[316] Dobbelaere Report, § VII.

[317] Dobbelaere Report, § VI.

down to legal limits.[318] The way in which DRP met those requirements was left to its experienced judgment.[319]

184. 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.[320]

185. As part of its 1998 request, DRP proposed to modify the design of the Sulfuric Acid Plant Project.[321] 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.[322] In addition, DRP sought to modify several other PAMA projects.[323]

186. DRP also asked the MEM to extend the existing deadlines for designing and constructing the sulfuric acid plant.[324] 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.[325] Under the modified schedule, however, DRP proposed to complete the pre-

[318] Dobbelaere Report, ¶ 67.

[319] Dobbelaere Report, ¶ 67.

[320] **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.").

[321] **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.

[322] **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.

[323] **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.

[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. 4.

[325] **Exhibit C-020**, PAMA Report, pp. 19 and 157.

feasibility studies by 2001, finalize design by 2002 and complete the single sulfuric acid plant by 2006.[326]

187. DRP also proposed to abandon the Facility's modernization plan developed by Centromín and SNC-Lavalin.[327] 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."[328] 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.[329] 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.[330]

188. The MEM, trusting in DRP's expertise, approved the company's first request to modify the PAMA and extend its deadlines.[331] The modification updated the total investment

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[326] **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.

[327] Dobbelaere 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.

[328] Dobbelaere 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.

[329] **Exhibit WD-001**, Environmental Evaluation of La Oroya Metallurgical Complex, Final Report, Knight Piésold 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 I realistic requirements to gradually reduce air and effluent emission*s.").

[330] Dobbelaere Report, ¶ 78.

[331] **Exhibit C-091 (Treaty)**, 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.[332]

189. 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.[333]

190. On 30 May 2000, DRP requested an additional PAMA modification.[334] 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).[335]

191. 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.[336] 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.[337]

192. 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.[338] The

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[332] **Exhibit C-091 (Treaty)**, Directorial Resolution No. 178-99-EM/DG, 19 October 1999 *attaching* Report No. 1237-99-EM-DGM-DFM-DFT, 18 October 1999, ¶ 2.

[333] **Exhibit R-236**, 2017 ESAN Report, PDF p. 127.

[334] *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.

[335] **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.

[336] **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.

[337] **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.

[338] **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.[339]

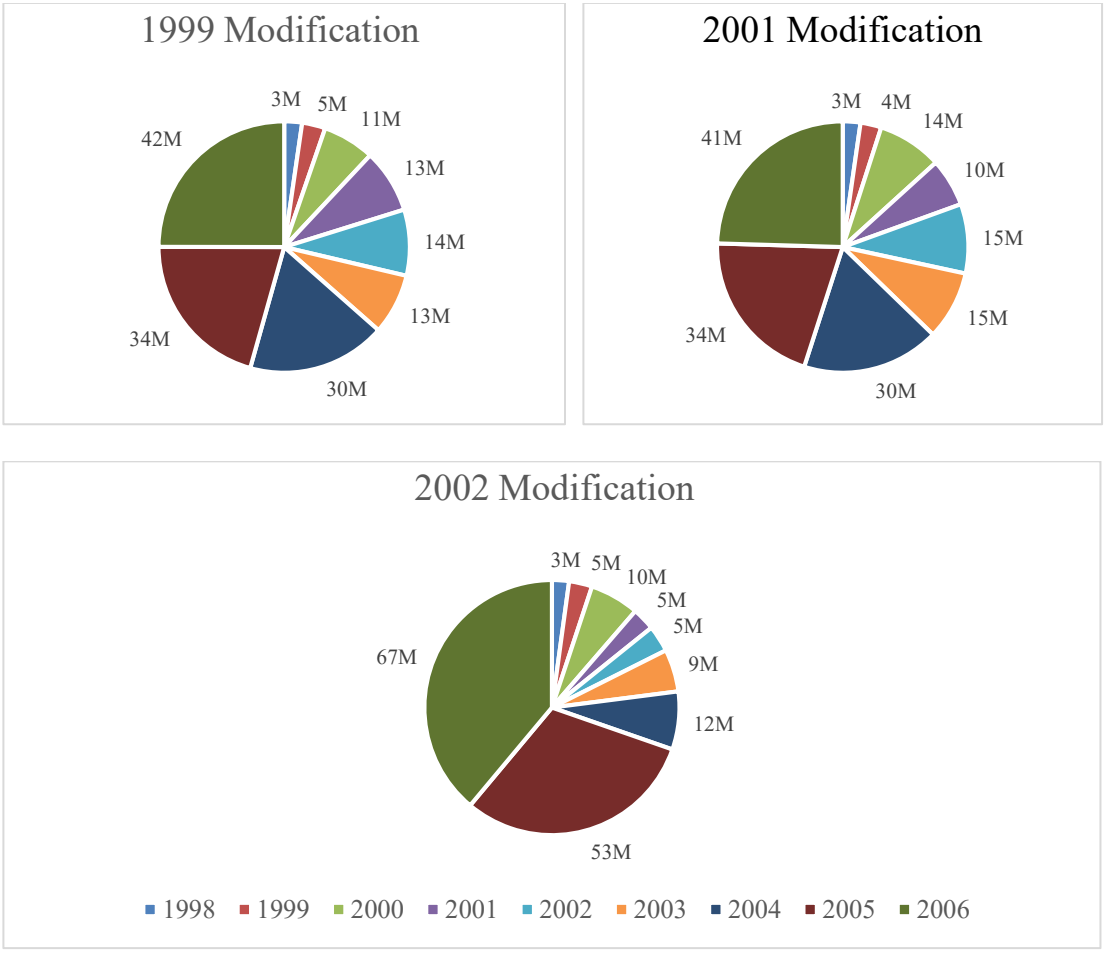
193. Through its 2002 extension, DRP yet again increased production while pushing its capital expenditure of the costliest PAMA projects as far off as possible. DRP's first two PAMA modifications each allocated approximately 55% of total expenditures to the first seven years (1998-2004) and 45% of total expenditures to the final two years (2005-2006).[340] 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).[341] The below graphic illustrates DRP's decision to delay capital expenditures until the last possible moment.

[339] **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.

[340] **Exhibit C-091 (Treaty)**, 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.

[341] **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.

Figure 8



Amount expressed in USD

194. This graphic shows that DRP decided in 2002 to shift its capital expenditure schedule towards 2005 and 2006.[342]

195. 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).[343] For years, the Facility's SO_2 emissions had caused acid rain in the region, which left it virtually devoid of plant life.

[342] **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.

[343] *See* **Exhibit C-020**, PAMA, Project No. 4, PDF pp. 205–214.

Because DRP's delayed Sulfuric Acid Plant Project would not control SO_2 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.[344]

196. 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.[345] 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.[346] The company gave no indication otherwise until 2004,[347] by which time DRP had met just five percent of its investment obligations with respect to the Sulfuric Acid Plant Project.[348] 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.[349]

197. 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 finish the project by the end of the PAMA Period.[350] Nevertheless, even under DRP's own

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[344] **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 Report, ¶ 110.

[345] **Exhibit C-019**, 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.

[346] **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.

[347] **Exhibit C-019**, 2004 DRP Extension Request.

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

[349] **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.

[350] **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.

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.[351]

198. 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.[352] DRP instructed SNC to look at the most economical options to enable sulfur capture, rather than the most environmentally friendly options.[353] 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.[354] 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.

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

199. *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.[355] 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

[351] Alegre Expert Report, ¶¶ 49-50; **Exhibit C-019**, 2004 DRP Extension Request, p. 21.

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

[353] Dobbelaere Report, ¶¶ 82-86.

[354] Dobbelaere Report, ¶¶ 82-86.

[355] Dobbelaere Report, § XI.

General Manager of DRP, and, in December 2003, he became the company's President.[356] 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.[357]

200. At this point, DRP had no viable plan to modernize the Facility and implement the Sulfuric Acid Plant Project,[358] 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.[359] 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.

201. 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.[360] 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 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."[361] DRP also threatened to close the Facility if the MEM refused its extension request.[362]

202. 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

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[356] A. Bruce Neil First Witness Statement, 17 December 2020, ¶ 6.

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

[358] Expert Report of Dr. Eric Partelpoeg, p. 41.

[359] **Exhibit C-019**, 2004 DRP Extension Request, p. 16.

[360] **Exhibit C-019**, 2004 DRP Extension Request.

[361] **Exhibit C-019**, 2004 DRP Extension Request, p. 16.

[362] **Exhibit C-050 (Treay)**, 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.

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.

203. 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).[363] According to the consultants, fugitive emissions affected air quality eight times more than emissions from the main stack.[364] Based on the consultants' study, DRP proposed several additional projects to reduce fugitive emissions.[365]

204. DRP also proposed reordering the environmental projects to prioritize reducing fugitive emissions over sulfur dioxide emissions.[366] Accordingly, DRP's plan would set a December 2006 deadline for controlling fugitive emissions, while yet again delaying construction of the sulfuric acid plant—this time until 31 December 2011.[367] 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.[368]

205. 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

[363] **Exhibit C-019**, 2004 DRP Extension Request, pp. 5–6. *See also*, **Exhibit C-019**, 2004 DRP Extension Request, Annex IV, Relative Contributions of La Oroya Main Stack and Process/Fugitive Emissions to Ground-Level Concentrations.

[364] **Exhibit C-019**, 2004 DRP Extension Request, pp. 5–6.

[365] **Exhibit C-019**, 2004 DRP Extension Request, pp. 5–6.

[366] **Exhibit C-019**, 2004 DRP Extension Request, pp. 6–7.

[367] **Exhibit C-019**, 2004 DRP Extension Request, p. 94.

[368] **Exhibit C-019**, 2004 DRP Extension Request, pp. 6–7. *See also*, **Exhibit C-019**, 2004 DRP Extension Request, Annex VI, Comparison of Human Health Risks Associated with Lead, Arsenic, Cadmium, and SO_2 in La Oroya Antigua, Peru.

the experience has been highly satisfactory."[369] 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).[370] 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.[371] 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.

206. 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 technical reason that DRP could not implement its fugitive emissions projects while working on the Sulfuric Acid Plant Project.[372] 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.[373] Moreover, Ms. Proctor, for her part, opines that main stack emissions remained extraordinarily high for both lead and SO_2, such that DRP should have committed to controlling fugitive emissions at the same time as it addressed emissions

[369] **Exhibit C-019**, 2004 DRP Extension Request, p. 2.

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

[371] **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 (Treaty)**, 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.

[372] Dobbelaere Report, Section VIII.

[373] Dobbelaere Report, ¶¶ 51, 52, 98.

from the main stack[374] 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.[375]

207. 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,[376] 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).[377] As Mr. Dobbelaere explains, Centromín's original PAMA and modernization plans would have required DRP to control fugitive emissions.[378] In its campaign for an extension, DRP neglected to explain that the company itself had abandoned Centromín's viable PAMA and modernization designs and failed to propose a suitable alternative until nearly the end of the PAMA Period.[379] Renco appears to have made the same omission in this proceeding.

208. 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

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[374] Proctor Report, Sections 3.4 & 3.5.

[375] Dobbelaere Report, Section VIII; Proctor Report, Sections 3.4 & 3.5.

[376] Treaty Memorial, ¶¶ 66, 203.

[377] **Exhibit C-019**, 2004 DRP Extension Request, p. 1

[378] Dobbelaere 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 ("46. 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.").

[379] Dobbelaere 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").

USD 105.4 million, respectively).[380] By delaying its environmental expenditures, DRP would buy itself time to address a setback that it had concealed from the MEM: it had in sufficient 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."[381]

209. *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.[382] 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).[383] 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.[384]

210. 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.[385] 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.

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[380] **Exhibit C-050 (Treay)**, 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.

[381] **Exhibit R-273**, Securities and Exchange Commission Form 10-K, DRRC, 31 October 2004, p. 10.

[382] **Exhibit R-025**, Supreme Decree No. 016-93-EM, 28 April 1993.

[383] Alegre Expert Report, ¶ 17.

[384] Alegre Expert Report, ¶¶ 17, 18.

[385] 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.").

211. 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.[386] The MEM also established a technical committee charged with evaluating certain public health risks caused by the smelter's operations.[387] The committee was comprised of members appointed by the MEM, DRP, and Centromín.[388]

212. In October 2004, the MEM published a draft of the regulation meant to allow DRP to request an extension beyond the PAMA Period.[389] 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.[390] 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.[391]

213. 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 of La Oroya from closing the Facility, the MEM could not easily deny DRP's extension request.[392] At the same time, however, the MEM needed to ensure that mining and metallurgy companies respected national environmental standards.[393] The MEM did not want to signal to DRP that it could leverage its influence over La Oroya to obtain infinite, unwarranted extensions.[394]

214. In December 2004, the Peruvian government enacted Supreme Decree No. 046-2004-MEM (the "**2004 Extension Regulation**"), which allowed companies until

[386] **Exhibit R-161**, MEM, DRP, and Centromín Meeting Minutes, 20 April 2004.
[387] **Exhibit R-161**, MEM, DRP, and Centromín Meeting Minutes, 20 April 2004, Second and Third.
[388] **Exhibit R-161**, MEM, DRP, and Centromín Meeting Minutes, 20 April 2004, Second.
[389] Isasi Witness Statement, ¶ 27.
[390] Isasi Witness Statement, ¶¶ 24, 27.
[391] Isasi Witness Statement, ¶ 29.
[392] Isasi Witness Statement, ¶¶ 24–27.
[393] Isasi Witness Statement, ¶¶ 24–27.
[394] Isasi Witness Statement, ¶ 30.

31 December 2005 to apply for a one-time, limited extension.[395] 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…"[396] 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."[397] The 2004 Extension Regulation additionally allowed the Peruvian authorities to condition approval of the extension on the adoption of additional environmental mitigation measures[398] "intended to reduce the risks to the environment, health or the safety of the population, and to ensure adequate performance of the PAMA."[399] 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.[400]

215. The 2004 Extension Regulation also provided for extensive community engagement and input in connection with the process of evaluating a company's extension request,

[395] **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.")

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

[397] **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.")

[398] **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.").

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

[400] **Exhibit R-029**, Supreme Decree No. 046-2004-EM, 29 December 2004, Arts. 7–8.

including at least five mandatory public information sessions and hearings.[401] 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.[402] 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.[403]

216. *DRP's 2005 Extension Request*. DRP requested an extension in accordance with the 2004 Extension Regulation in December 2005 (the "**2005 Extension Request**").[404] 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.

217. 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 design for the sulfuric acid plant project—the plan that DRP scrapped in 1998.[405] According to Mr. Neil, DRP had only just realized that a single sulfuric acid plant would not suffice for the Facility.[406] 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.

218. 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

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

[402] Isasi Witness Statement, ¶¶ 24–27.

[403] "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.

[404] **Exhibit C-050 (Treay)**, 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.

[405] **Exhibit C-050 (Treay)**, 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.

[406] A. Bruce Neil First Witness Statement, 17 December 2020, ¶ 16.

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."[407] 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.[408] In other words, DRP had wasted almost eight years on the project and found itself in the same place that it started.

219. Nevertheless, the MEM adopted an exceptionally participative and transparent procedure to evaluate the DRP's extension request.[409] 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.[410] 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.[411]

220. 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 dire environmental and public health consequences of its operations.[412] 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.[413]

221. 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,"[414] and that "[t]here

[407] A. Bruce Neil First Witness Statement, 17 December 2020, ¶ 25.

[408] Dobbelaere Expert Report, ¶¶ 162-163.

[409] Alegre Expert Report, ¶ 61.

[410] **Exhibit R-287**, Ministerial Resolution No. 257-2006-MEM/DM, 29 May 2006, pp. 2–3.

[411] Alegre Expert Report, ¶ 61.

[412] 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.

[413] **Exhibit C-090**, 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.

[414] **Exhibit C-090**, 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.

appear[ed] to be opportunities to reduce the impact of fugitive emissions beyond the current level of effort."[415] 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."[416]

222. 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.[417] The experts recommended that the MEM grant DRP's extension request, but they conditioned their recommendation on the company's implementation of several process and environmental improvement projects.[418] 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.[419] 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.[420]

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[415] **Exhibit C-090**, 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.

[416] **Exhibit C-090**, 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.

[417] **Exhibit C-090**, 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 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.").

[418] **Exhibit C-090**, 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.

[419] **Exhibit C-090**, 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.

[420] **Exhibit C-090**, 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.

223. DRP's ability to fund the project was also a key factor in the MEM's evaluation of whether to grant an extension.[421] 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.[422] 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.[423] Of the approximately USD 120 million still outstanding, USD 97.3 million corresponded to Sulfuric Acid Plant Project.

224. 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 the required investment demanded by the PAMA and other project.[424] The MEM's experts, however, came to a different conclusion.

225. 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.[425]

226. 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)."[426] The report found that the actions taken by Renco, DRRC, and DRCL described above in

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[421] Isasi Statement, ¶¶ 35–38.

[422] Isasi Statement, ¶¶ 35–38.

[423] **Exhibit C-050 (Treay)**, 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.

[424] **Exhibit C-050 (Treay)**, 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.

[425] **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.

[426] **Exhibit R-193**, ESAN report, p. 88.

Section II.C.1 left DRP undercapitalized, compromising its ability to finance the PAMA projects through debt.[427] DRP was instead forced to finance the PAMA using proceeds from the Facility's operations.[428] Moreover, the report revealed that during the PAMA period, DRP had distributed USD 96.4 million to related entities.[429] ESAN concluded that DRP could have funded its PAMA obligations, had it not paid fees and commissions to its affiliates through intercompany agreements.[430]

227. The MEM incorporated the ESAN report into its own study of the financial viability of DRP's extension proposal.[431] 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.[432]

228. The MEM also conducted a review of several environmental inspections that independent consultants had carried out in La Oroya during the PAMA Period.[433] The review found that DRP had repeatedly violated its environmental obligations and employed harmful environmental practices.[434]

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[427] **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").

[428] **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").

[429] **Exhibit R-193**, ESAN Report, p. 21.

[430] **Exhibit R-193**, ESAN Report, p. 22.

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

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

[433] *See* **Exhibit R-149**, Report No. 056-2006-MEM-DGM-FMI/MA, 19 January 2006.

[434] *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; (ii) DRP failed to enclose the lead furnaces, even though it was required to do so by 2005; (iii) DRP failed to install helical separators intended to reduce the amount of solids present the effluent discharges into the Mantaro river; (iv) 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; (v) DRP transported toxic slag using plugged buckets, which caused the slag to spill onto the ground and into the Mantaro river; (vi) DRP failed to routinely clean the smelter, even though it had been instructed to implement a cleaning program in 2002; (vii) DRP's monitoring equipment failed to capture sulfur dioxide emissions that measured above 6,002 ug/m3; and (viii) 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.

229. *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.[435] 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."[436]

230. 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.[437]

231. 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…"[438] Additionally, the 2006 Extension specified that the term of the extension was "**final and non-renewable**."[439]

232. 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.[440] The extension incorporated a report[441] 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

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[435] **Exhibit R-287**, Ministerial Resolution No. 257-2006-MEM/DM, 29 May 2006, Art. 1.

[436] **Exhibit R-287**, Ministerial Resolution No. 257-2006-MEM/DM, 29 May 2006, pp. 4–5.

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

[438] **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.").

[439] **Exhibit R-287**, Ministerial Resolution No. 257-2006-MEM/DM, 29 May 2006, Art. 1.

[440] Alegre Report, ¶¶ 53–54.

[441] **Exhibit R-287**, Ministerial Resolution No. 257-2006-MEM/DM, 29 May 2006, Art. 1.

> 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."[442]

233. 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]."[443]

234. 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").[444] 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 account[445];
- 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").[446] The MEM enjoyed the right to execute the letter should DRP violate its obligations[447];
- 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 resolution[448];
- 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 costs [449];
- DRP agreed to several obligations regarding inspection, monitoring, and reporting

[442] **Exhibit R-289**, Report No. 118-2006-MEM-AAM/AA/RC/FV/AL/HS/PR/AV/FO/CC, 25 May 2006, p. 7.
[443] **Exhibit R-289**, Report No. 118-2006-MEM-AAM/AA/RC/FV/AL/HS/PR/AV/FO/CC, 25 May 2006, p. 26.
[444] **Exhibit R-287**, Ministerial Resolution No. 257-2006-MEM/DM, 29 May 2006, Art. 2.
[445] **Exhibit R-287**, Ministerial Resolution No. 257-2006-MEM/DM, 29 May 2006, Art. 3.
[446] **Exhibit R-287**, Ministerial Resolution No. 257-2006-MEM/DM, 29 May 2006, Art. 5.
[447] **Exhibit R-287**, Ministerial Resolution No. 257-2006-MEM/DM, 29 May 2006, Art. 5.
[448] **Exhibit R-287**, Ministerial Resolution No. 257-2006-MEM/DM, 29 May 2006, Art. 6.
[449] **Exhibit R-287**, Ministerial Resolution No. 257-2006-MEM/DM, 29 May 2006, Art. 7.

on the progress and efficacy of DRP's proposed projects to reduce chimney[450] and fugitive[451] emissions;

- DRP agreed to several obligations regarding the implementation of its proposed projects regarding street sweeping and vehicle washing[452], public health[453],

[450] **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").

[451] **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).

[452] **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].").

[453] **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 MINSA-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 MINSA-DRP 2006 Agreement"; (iv) "A trust or an equivalent mechanism must be formed to independently and transparently administer the funds related to the MINSA-DRP Agreement.").

modeling and monitoring air quality[454], and monitoring dust and soil[455].

235. These conditions were the product of the recommendations of both ESAN University and the independent panel of experts appointed by the World Bank.[456] These conditions—termed by Renco as "onerous"[457] and "burdensome"[458]—added negligible cost to the overall project budget.[459] 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.[460] The environmental conditions sought to ensure that DRP implemented its proposed additional projects effectively and in a timely manner.[461]

236. 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.[462] In response, DRP finally completed four projects for which it had previously missed deadlines.[463]

237. According to Claimant, the 2006 Extension constituted "a draconian extension."[464] 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

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[454] **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.

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

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

[457] Treaty Memorial, ¶ 72.

[458] Treaty Memorial, ¶ 73.

[459] **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.

[460] Isasi Statement, ¶¶ 41–42.

[461] Isasi Statement, ¶¶ 41–42.

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

[463] **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).

[464] Treaty Memorial, ¶ 80.

consistently failed to meet its investment and environmental targets and obligations in the context of the very urgent environmental crisis in La Oroya.

238. 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"[465] to complete the project. Renco asserts that the project had been "incorrectly designed by Centromín and its consultant, SNC-Lavalin,"[466] but fails to note the fact that the original PAMA (supported by consultant SNC-Lavalin) foresaw the possibility of constructing three separate sulfuric acid plants.[467] 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.[468] That is the PAMA that DRP scrapped in 1998, and then returned to in 2005, with only two years remaining to meet the PAMA.[469] 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.[470] DRP scrapped this plan and chose not to replace the Facility's smelting technologies.

239. 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."[471] Had DRP begun serious work on the Sulfuric Acid Plant Project early in the PAMA Period, it would have had ample time to

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

[466] Treaty Memorial, ¶ 82.

[467] *See* **Exhibit C-020**, PAMA 1996 Report, PDF p. 154; Dobbelaere 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.").

[468] Dobbelaere Report, ¶¶ 162-163.

[469] Dobbelaere 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.").

[470] Dobbelaere Report, ¶¶ 162-163

[471] Dobbelaere Report, ¶¶ 170-178.

finish the project.[472] As Mr. Dobbelaere concludes, there was simply no technical justification for DRP's delays.[473]

240. Renco also asserts that the MEM "imposed" a number of additional projects and conditions that "intensif[ied] the unfair and unnecessary time crunch."[474] 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 small fraction of its overall expenses related to its environmental obligations.[475] Likewise, the additional community health conditions that the MEM imposed cost DRP USD 1.4 million.[476] Renco attempts to distort the magnitude of these additional conditions in order to distract from DRP's later delays.

241. In addition, Renco asserts that the MEM imposed unreasonable and unexpected emissions standards on DRP.[477] According to Renco, the MEM required DRP to comply with 2007 emissions standards, even though the MEM supposedly should have imposed the 1997 standards.[478] 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.[479] 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.[480] As Ms. Alegre clarifies, the expiration of the PAMA execution

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[472] Dobbelaere Report, § VIII.

[473] Dobbelaere Report, § VIII.

[474] Treaty Memorial, ¶ 83.

[475] **Exhibit R-237**, Supervision to the Metallurgical Complex of La Oroya-DRP, OSINERGMIN, PDF pp. 12 and 14.

[476] **Exhibit R-237**, Supervision to the Metallurgical Complex of La Oroya-DRP, OSINERGMIN, PDF pp. 12 and 14.

[477] Treaty Memorial, ¶¶ 84–86.

[478] Treaty Memorial, ¶ 84.

[479] Alegre Report, ¶¶ 32–33.

[480] Alegre Report, ¶¶ 32–40. *See also*, Alegre 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

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."[481]

242. 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 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 SO_2 emissions, as part of the 2006 Extension, the MEM extended the more lenient ECA standards for SO_2 emissions and all LMP emissions standards during the 2006 Extension period.[482]

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

243. 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 SO_2 controls; and (iii) failed to transport ferrites according to environmental standards.[483]

244. 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,[484] including repeatedly exceeding applicable emissions standards (LMPs

materia de la solicitud de prórroga, que en este caso específico fue el Proyecto N° 1: "Plantas de Ácido Sulfúrico" del PAMA del CMLO.").

[481] Alegre 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.").

[482] **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 SO_2 until January 2010); Alegre Report, ¶¶ 19, 74.

[483] **Exhibit R-212**, Resolution No. 646-2008-OS/CD, OSINERGMIN, 28 October 2008, pp. 10–18.

[484] **Exhibit R-213**, Resolution No. 002172, OSINERGMIN, 5 March 2009, pp. 11–23.

and ECAs),[485] water quality standards,[486] and for failing to comply with several of its monitoring and reporting obligations.[487] These violations also resulted in Osinergmin levying fines against DRP.[488]

245. In October 2008, Osinergmin inspected the sulfuric acid plant for the lead circuit, which DRP had recently completed.[489] Osinergmin found DRP had been operating the sulfuric acid plant only intermittently and directed the company to ensure its continuous and effective operation within three months.[490]

246. 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.[491] 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.[492] 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.[493]

247. 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.[494] DRP, however, blocked Osinergmin officials from conducting their inspection.[495] When the officials returned, they discovered that DRP had halted all work on the sulfuric acid plant for the copper circuit.[496] DRP had paused the project after having completed only 51% of total work on the plant and just 27% of

[485] **Exhibit R-213**, Resolution No. 002172, OSINERGMIN, 5 March 2009, pp. 11–12, 21–23.
[486] **Exhibit R-213**, Resolution No. 002172, OSINERGMIN, 5 March 2009, p. 20.
[487] **Exhibit R-213**, Resolution No. 002172, OSINERGMIN, 5 March 2009, pp. 23–28.
[488] **Exhibit R-213**, Resolution No. 002172, OSINERGMIN, 5 March 2009, p. 32.
[489] **Exhibit R-214**, Report No. GFM-466-2010, OSINERGMIN, 26 July 2010, p. 4.
[490] **Exhibit R-214**, Report No. GFM-466-2010, OSINERGMIN, 26 July 2010, p. 4.
[491] Isasi Witness Statement, ¶ 45.
[492] Isasi Witness Statement, ¶ 45.
[493] Isasi Witness Statement, ¶ 45.
[494] **Exhibit R-214**, Report No. GFM-466-2010, OSINERGMIN, 26 July 2010, p. 4.
[495] **Exhibit R-214**, Report No. GFM-466-2010, OSINERGMIN, 26 July 2010, p. 7.
[496] **Exhibit C-007 (Treat)**, Letter from DRP (J. Carlos Huyhua) to MEM (P. Sanchez), 5 March 2009, p. 1.

construction activities.[497] DRP also had failed to complete several of its additional projects aimed at reducing fugitive emissions and improving public health,[498] a fact that Renco omits.

248. 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 be modified."[499] DRP projected that its remaining obligations would require an investment of USD 64.6 million.[500]

249. 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.[501] The agency directed DRP to resume work on the project.[502]

250. 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.[503] 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.[504]

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[497] **Exhibit C-055 (Treay)**, 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.

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

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

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

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

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

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

[504] **Exhibit C-099 (Treaty)**, 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

251. 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- 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."[505]

252. 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."[506]

253. 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."[507] 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.[508] DRP told the MEM that, unless circumstances changed, the

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expenditures which, if not addressed in a timely manner could, threaten the company's economic viability. This creates significant credit concerns for us.")

[505] Kunsman Expert Report, ¶ 133.

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

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

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

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."[509] The MEM responded that the regulatory framework in place did not allow it to grant an extension beyond the October 2009 deadline.[510]

254. In a 7 April 2009 meeting, DRP's general manager, Mr. Juan Carlos Huyhua, briefed the shareholders on the situation facing the company.[511] 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.**

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

[510] **Exhibit C-006 (Treaty)**, Letter MEM (J.F.G. Isasi Cayo) to Doe Run Peru (J.C. Huyhua), 10 March 2009; Isasi Statement, ¶ 50.

[511] **Exhibit C-145 (Treaty)**, DRP Shareholders' Meeting Minutes, 7 April 2009.

> 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).**" [512] (Emphasis added).

255. The minutes make no mention of the global financial crisis or falling metal prices.[513]

256. ***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.[514] 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.[515] 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."[516] The terms of the Draft MOU were not acceptable to the officials representing the government, who refused to sign the document.[517]

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[512] **Exhibit C-145 (Treaty)**, DRP Shareholders' Meeting Minutes, 7 April 2009.

[513] **Exhibit C-145 (Treaty)**, DRP Shareholders' Meeting Minutes, 7 April 2009.

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

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

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

[517] Isasi Witness Statement, ¶ 52.

257. Renco now alleges that the Peruvian Government committed to signing the Draft MOU but later reneged on its agreement with DRP.[518] Renco has failed to produce a single document to support its allegations.

258. ***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.[519] 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.[520] This financing would be sufficient to cover the remaining costs of the Sulfuric Acid Plant Project. In exchange, the suppliers required that DRP capitalize the USD 156 million in debt it owed to DRCL.[521] This condition would allow the suppliers to take priority over DRCL in the event that DRP entered into bankruptcy.[522] DRP agreed to the suppliers' conditions.[523]

259. 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),[524] 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.[525] DRP therefore

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[518] Treaty Memorial, ¶¶ 99–102.

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

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

[521] *See* **Exhibit R-098**, DRP saved by counterparts, EL COMERCIO, 3 April 2009, PDF p. 1.

[522] **Exhibit R-098**, DRP saved by counterparts, EL COMERCIO, 3 April 2009.

[523] **Exhibit C-068 (Treay)**, 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.")

[524] **Exhibit C-099 (Treaty)**, 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.")

[525] Isasi Witness Statement, ¶¶ 39, 53.

would have been able to use its suppliers' credit offer to resume operations and complete the Sulfuric Acid Plant.

260. 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.[526] 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. [527] 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.[528]

261. 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 unless the Peruvian Government promised to issue another extension.[529] 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."[530] 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.[531]

262. 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

[526] **Exhibit R-238**, Congressional Transcript, Energy and Mines Commission, 7 April 2009.
[527] **Exhibit R-238**, Congressional Transcript, Energy and Mines Commission, 7 April 2009, p. 1.
[528] **Exhibit R-238**, Congressional Transcript, Energy and Mines Commission, 7 April 2009, p. 2.
[529] **Exhibit C-145 (Treaty)**, DRP Shareholders' Meeting Minutes, 7 April 2009, p. 4.
[530] Treaty Memorial, ¶ 105.
[531] **Exhibit C-074 (Treay)**, Letter from DRP (J. Carlos Huyhua) to MEM (P. Sanchez *et al.*), 25 June 2009.

have any voting rights in the bankruptcy proceedings because it ***would have given up its right to claim as a creditor of DRP***."[532]

263. Having rejected the one option available to it, DRP proceeded to default on its payment obligations to its suppliers.[533]

264. On 3 June 2009, the company ceased operations at the Facility.[534]

265. ***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.[535] The next day, the MEM returned the request because DRP had omitted several important details.[536] After DRP provided the missing information,[537] the MEM denied DRP's request on the grounds that it lacked the legal authority to grant an extension beyond the October 2009 deadline.[538] 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.

266. ***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.[539] 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.[540] 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

[532] Treaty Memorial, ¶ 105.

[533] Neil Witness Statement, ¶ 42.

[534] Neil Witness Statement, ¶ 42.

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

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

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

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

[539] **Exhibit C-055 (Treay)**, 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.

[540] **Exhibit C-055 (Treay)**, 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.

and four months since the Bank Syndicate imposed its new conditions.[541] 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,[542] 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 would invoke a contractual *force majeure* clause against the MEM, which was not a party to the STA.

267. The MEM rejected DRP's request, reiterating that there was "no regulatory framework to answer to an extension application or a project extension . . . ."[543] 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.[544] 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.[545]

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

268. 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

[541] Isasi Statement, ¶ 55.

[542] *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.").

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

[544] Alegre Expert Report, ¶¶ 87-88.

[545] Alegre Expert Report, ¶¶ 87-88.

"**Technical Commission**").[546] 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.[547] 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.

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

270. 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,[548] while two others alleged that the company had blackmailed and manipulated its workers and the residents of La Oroya.[549] 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."[550] Yet another congress member expressed "indignation" at having to deal with "a company that constantly breaches its environmental

[546] **Exhibit C-043 (Treay)**, La Oroya Technical Commission, Executive Summary, 12 September 2009 ("**2009 Technical Commission Report**").

[547] **Exhibit C-043 (Treay)**, 2009 Technical Commission Report.

[548] **Exhibit R-239**, Congressional Transcript, First Ordinary Legislature of 2009, 9th B Session, 24 September 2009, p. 6 (comments of Congress Member Carrasco Tavara); **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).

[549] **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).

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

obligations."[551] 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.

271. 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."[552] 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 within the relevant deadlines."[553] 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."[554] Several congress members specifically called for financial guarantees in the form of a trust account.[555] Another congress member called for the law to establish that if DRP failed to obtain financing within ten months, the extension would expire.[556] 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

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

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

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

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

[555] **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.

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

permanent and constant supervision [of DRP] on the part of the Executive."[557] Nearly every congress member that spoke made similar comments regarding the necessity of financial conditions.[558]

272. ***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**").[559] The law stated that the 30-month period represented a maximum, non-negotiable extension.[560]

273. 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."[561] 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. [562]

274. Under the 2009 Extension Law, the Peruvian Congress instructed the MEM to issue supplementary regulations to implement the law's provisions.[563] 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

[557] **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).

[558] *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.

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

[560] **Exhibit C-077 (Treay)**, 2009 Extension Law, Art. 2.

[561] **Exhibit C-077 (Treay)**, 2009 Extension Law, Art. 3.

[562] **Exhibit C-077 (Treay)**, 2009 Extension Law, Art. 2.

[563] **Exhibit C-077 (Treay)**, 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.").

Account").[564] 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.[565] 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" [566];

- 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").[567] 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.[568]

- 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 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."[569]

- 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.[570]

275. 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

[564] **Exhibit C-078 (Treay)**, Supreme Decree No. 075-2009-EM, 29 October 2009 ("**2009 Extension Regulation**"), Section 4.2.

[565] **Exhibit C-078 (Treay)**, 2009 Extension Regulation, Section 4.2.

[566] **Exhibit C-078 (Treay)**, 2009 Extension Regulation, Section 4.2.

[567] **Exhibit C-078 (Treay)**, 2009 Extension Regulation, Section 5.

[568] **Exhibit C-078 (Treay)**, 2009 Extension Regulation, Section 8.1.

[569] **Exhibit C-078 (Treay)**, 2009 Extension Regulation, Section 6.5.

[570] **Exhibit C-078 (Treay)**, 2009 Extension Regulation, Section 3.2.

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%.[571]

276. 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.[572] Such was Peru's willingness to sustain the Facility's operations and help DRP complete the final sulfuric acid plant.

277. 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 the 2009 Extension Law and Regulation.[573] 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.[574] 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.[575] In other words, a failure to obtain financing would constitute a final breach, and the MEM would be entitled to execute DRP's guarantee.[576]

278. 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

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[571] **Exhibit C-082 (Treaty)**, Supreme Decree No. 032-2010-EM.

[572] Alegre Report, ¶¶ 90-91.

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

[574] **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 (Treaty)**, Draft Real and Personal Property Security Agreement, p. 3.

[575] **Exhibit C-077 (Treay)**, 2009 Extension Law, Art. 2.

[576] **Exhibit C-077 (Treay)**, 2009 Extension Law, Art. 2.

followed in the wake of DRP's and Renco affiliates' conduct.[577] 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."[578] 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."[579] 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)."[580] In 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."[581] 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.[582] 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."[583] According

[577] Treaty Memorial, ¶¶ 120–125.

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

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

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

[581] Treaty Memorial, ¶ 122 (*citing* **Exhibit R-241**, Doe Run Breaches Commitments Assumed with the Executive and Creates Confusion, RPP NOTICIAS, 14 May 2010).

[582] Treaty Memorial, ¶ 123 (*citing* **Exhibit C-149 (Treaty)**, Doe Run revives the ghosts of the rejection of large-scale mining in Peru, EL MUNDO, 14 June 2010).

[583] Treaty Memorial, ¶ 123 (*citing* **Exhibit C-150 (Treaty)**, Peru: García says that Doe Run is trying to blackmail the government, LA NACIÓN, 14 June 2010).

to Claimant, the above statements—all of which are true—constitute a "smear campaign" against DRP.[584]

279. 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.[585] 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. DRP harmed human health in La Oroya, leading to criticism of the company and legal actions against both Claimant and the Peruvian State

280. When DRP bought the Facility in 1997, Claimants 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 Claimants' own lead smelter in Herculaneum, Missouri.[586] Emissions containing lead and SO_2 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.[587] At least two independent studies (and other materials provided during the due diligence process) had already reported high lead and SO_2 contamination in the area affected by the La Oroya Facility in particular.[588] 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.

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[584] Treaty Memorial, ¶ 120.

[585] **Exhibit C-079 (Treay)**, Cormín 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.

[586] **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.

[587] Proctor Report, p. 9 *et seq*.

[588] *See* **Exhibit C-108 (Treaty)**, 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.

281. Claimants also knew that ongoing operations (as opposed to historical operations) posed the greatest health risks to those living within the vicinity of a smelter.[589] 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.[590] 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).[591] Thus, when DRP acquired the Facility, Claimants 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.

282. 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 production and buying cheaper, dirtier feedstock.[592] As discussed below, DRP's commercial practices increased blood lead levels ("**BLLs**") and incidence rates of respiratory illnesses among people in La Oroya.[593] 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.[594]

283. 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.

284. 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**);

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[589] **Exhibit R-205**, The El Paso Smelter 20 Years Later: Residual Impact on Mexican Children, ENVIRONMENTAL RESEARCH, Fernando Díaz-Barriga *et al.*, 1997.

[590] **Exhibit R-178**, Herculaneum Orders and Stipulations 5–9, *Air Conservation Commission (State of Missori), Missouri Department of Natural Resources and The Doe Run Company*, July 1990–1997.

[591] **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.

[592] Dobbelaere Report, § IX.

[593] Proctor Report, Sections 3.4, 3.5, 3.7.

[594] Proctor Report, Section 3.8.

(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

285. 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.[595] All participating children from La Oroya had blood lead levels above the World Health Organization ("**WHO**") limit of 10 ug/dL.[596] As toxicologist Deborah 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.[597]

286. 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.[598] 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.[599] In November 2001, the Peruvian Government

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[595] **Exhibit C-052 (Treay)**, Study of Blood Lead Levels in a Selected Population of La Oroya, Environmental Health Directorate, 23–30 November 1999, p. 8.

[596] **Exhibit C-052 (Treay)**, Study of Blood Lead Levels in a Selected Population of La Oroya, Environmental Health Directorate, 23–30 November 1999, p. 8.

[597] Proctor Report, pp. 10-11.

[598] 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 (Treay)**, Study of Blood Lead Levels of the Population of La Oroya 2000-2001, DRP, PDF p. 2.

[599] 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 (Treay)**, 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

established a technical group (the GESTA Zonal del Aire de La Oroya) to study the sources of contamination in La Oroya.[600] The study concluded that the Facility's operations caused 99% of the air contamination.[601] Among the main toxic emissions were sulfur dioxide, lead, and small particles, as well as considerable levels of arsenic and cadmium.[602]

287. 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 Oroya.[603] 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.[604]

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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.").

[600] **Exhibit C-093 (Treaty)**, Supreme Decree. No. 074-2001-PCM, 22 June 2001, pp. 7, 10.

[601] Alegre Report, ¶ 85; **Exhibit C-096 (Treaty)**, Action Plan to Improve the Air Quality and Health of La Oroya, Gesta Zonal del Aire de La Oroya, 1 March 2006, p. 9.

[602] **Exhibit C-096 (Treaty)**, 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.

[603] **Exhibit C-138 (Treaty)**, 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**").

[604] 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 (Treaty)**, 2005 CDC Report, p. 32.

288. In 2005 and 2008, DRP commissioned two human health risk assessments from Integral Consulting.[605] 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.[606] 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).[607]

289. 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 SO_2 emissions a "considerable increase in [acute respiratory episodes] was seen in the last 4 years, where children less than 9 years of age were the most affected. A correlation was found between levels of concentration of SO_2 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."[608]

290. 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.[609] 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.[610]

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[605] **Exhibit C-064**, Integral Consulting Inc., *Human Health Risk Assessment Report, La Oroya Metallurgical Complex*, 2 December 2005("**2005 Integral Study**"); **Exhibit C-062**, Integral Consulting Inc., *Complementary Human Health Risk Assessment, La Oroya Metallurgical Complex*, 21 November 2008 ("**2008 Integral Report**").

[606] **Exhibit C-064**, 2005 Integral Study, pp. 60–61; Proctor Report, Sections 3.1 & 3.2.

[607] **Exhibit C-064**, 2005 Integral Study, p. 129. *See also*, Proctor Report, Section 3.4.

[608] **Exhibit C-096 (Treaty)**, Action Plan to Improve the Air Quality and Health of La Oroya, 1 March 2006, p. 11.

[609] 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.

[610] Proctor Report, Figure 15.

291. 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.[611]

2. DRP sought to shift the responsibility for the harm it was causing onto the community

292. 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.[612] 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 programs were, at best, ineffective and failed to significantly reduce the impact of the Facility's unrestrained emissions.[613]

293. DRP disseminated information about its community health projects in La Oroya as proof of the company's commitment to community health and environmental stewardship.[614] 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.[615]

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[611] Proctor Report, p. 9. *See also*, **Exhibit R-220**, *Estudio comparativo entre las concentraciones de dioxide de azufre y material particulado registradas en el periodo de 24 noviembre al 5 de diciembre del 2007 (fundición en operación) y en el período 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.

[612] Proctor Report, Section 3.8.

[613] Proctor Report, Section 3.8.

[614] **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).

[615] **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).

294. 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.[616] 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."[617]

295. 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).[618] It appears that the volunteers are wearing their own shoes 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."[619]

296. 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."[620]

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[616] Proctor Report, Section 3.8..

[617] Proctor Report, p. 51.

[618] Proctor Report, p. 50.

[619] Proctor Report, p. 50.

[620] **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.

297. 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."[621]

298. 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.[622]

3. Renco and DRP were criticized before domestic and international bodies and regulators

299. 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.[623] 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."[624] Similarly, the president

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[621] **Exhibit C-138 (Treaty)**, 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".

[622] **Exhibit C-052 (Treay)**, Study of Blood Lead Levels in a Selected Population of La Oroya, Digesa, 23–30 November 1999; **Exhibit C-136 (Treaty),** 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 (Treay)**, Report to Our Communities, DRP, 2001; **Exhibit C-110 (Treaty)**, Report No. 732-2002-EM-DGM-DFM/MA from MEM (V. Lozada Garcia) to Director General of DRP, 10 December 2002.

[623] **Exhibit R-252**, Press Release, SOCIEDAD NACIONAL DE MINERÍA, PETRÓLEO Y ENERGÍA, 29 January 2010.

[624] **Exhibit R-252**, Press Release, SOCIEDAD NACIONAL DE MINERÍA, PETRÓLEO Y ENERGÍA, 29 January 2010

of Confia, a Peruvian business organization, has stated that companies like DRRC do not belong in Peru.[625]

300. 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.[626] 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.[627] The petitioners criticized DRP's repeated failures to meet its PAMA obligations and Peru's decision to grant the company multiple extensions.[628]

301. 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 the residents of La Oroya, despite the company's commitment to resolving the Facility's environmental problems.[629] 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."[630]

302. Indeed, DRP became the target of fierce critiques for its management and operation of the La Oroya Facility.

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[625] **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.

[626] **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**").

[627] **Exhibit R-211**, OECD Complaint, p. 5.

[628] **Exhibit R-211**, OECD Complaint, pp. 6–7.

[629] **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.

[630] **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.

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

303. 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**").

304. 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 the Missouri Litigations.[631] Likewise, neither Respondent, Peru or Activos Mineros, is, or has ever been, a party to the Missouri Litigations.

305. 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**").

[631] *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.

306. 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.[632]

307. 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 lethargy.[633] Additionally, the Missouri Plaintiffs claim that they are at an elevated risk of developing renal disease, hypertension, and cancer.[634]

308. 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."[635]

309. 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

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[632] **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.

[633] **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.

[634] **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.

[635] **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.

bring the Facility into compliance with Peru's environmental standards.[636] 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."[637]

310. The Missouri Plaintiffs allege that as a consequence of Renco and DRRC's decisions, DRP exacerbated the air-quality crisis in La Oroya:

> "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."[638]

311. 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."[639]

312. 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:

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[636] **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.

[637] **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.

[638] **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.

[639] **Exhibit R-227**, Missouri Plaintiffs' Complaint, ¶ 23.

> "***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."[640] (Emphasis added)

313. According to the Missouri Plaintiffs,

> "[a]lthough suitable technologies and processes exist and have existed that would prevent the pollution and contamination caused 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."[641]

314. 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.

315. 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.[642] Federal district and appellate courts

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[640] **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.").

[641] **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.

[642] **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.

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.[643] Nonetheless, the Renco Defendants have since revived their motion.[644]

316. 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".[645] 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.[646]

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[643] **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.

[644] **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.

[645] **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. (Centromín 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").

[646] *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."

b. Renco and DRRC's efforts to draw Peru and Activos Mineros into the Missouri Litigations

317. 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.[647] Renco and DRRC's Contract Memorial 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."[648] 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.[649]

318. 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 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."[650]

319. 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"[651] contradicts the record and ignores that there is no legal basis for their request, as Peru and Activos Mineros have articulated over time.

320. 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

[647] *See, e.g.*, **Exhibit R-258**, Letter from King & Spalding LLP to MEM, MEF, and Activos Mineros, 12 October 2010.

[648] Contract Statement of Claim, ¶ 1.

[649] *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.

[650] **Exhibit R-010**, Framework Agreement, 14 March 2017, ¶ 4(c).

[651] Renco and DRRC's Contract Notice of Arbitration, 23 October 2018, ¶ 46.

commitments to assume and accept liability for claims by third parties relating to the La Oroya Metallurgical Complex."[652]

321. 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."[653] 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."[654]

322. 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 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."[655]

323. 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."[656] 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

[652] **Exhibit R-258**, Letter from King & Spalding to MEM, MEF, and Activos Mineros, 12 October 2010, p. 2.
[653] **Exhibit R-259**, Letter from Activos Mineros to King & Spalding, 5 November 2010, p. 2.
[654] **Exhibit R-259**, Letter from Activos Mineros to King & Spalding, 5 November 2010, p. 2.
[655] **Exhibit R-260**, Letter from DRP (J. C. Huyhua) to Activos Mineros (V. Carlos Estrella), 11 November 2010.
[656] **Exhibit R-261**, Letter from Activos Mineros (V. Carlos Estrella) to DRP (J. C. Huyhua), 26 November 2010, p. 3.

protective of the environment than those pursued by Centromín.[657] DRP responded on 14 December 2010, disagreeing with Activos Mineros' arguments.[658]

324. 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."[659]

325. 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."[660] 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 technical expert, as required under Clauses 5.3(a) and 5.4(c) of the STA.[661] 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.[662]

326. 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

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[657] **Exhibit R-261**, Letter from Activos Mineros (V. Carlos Estrella) to DRP (J. C. Huyhua), 26 November 2010, p. 2.

[658] **Exhibit R-262**, Letter from King & Spalding to MEM, MEF, and Activos Mineros, 14 December 2010.

[659] **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.

[660] *See, e.g.*, **Exhibit R-263**, Letter from Activos Mineros (V. Carlos Estrella) to King & Spalding, 21 January 2011, p. 2.

[661] **Exhibit R-263**, Letter from Activos Mineros (V. Carlos Estrella) to King & Spalding, 21 January 2011, p. 2.

[662] **Exhibit R-264**, Letter from King & Spalding to Activos Mineros (V. Carlos Estrella), 18 February 2011.

times, the Renco Defendants and the Missouri Plaintiffs have filed documents "under seal,"[663] which precludes non-parties from viewing them. In consequence, Peru and Activos Mineros remain largely uninformed as to the reality of the Missouri Litigations.

327. 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).[664] 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

328. Renco's financial mismanagement of DRP and poor planning of the obligations it assumed under the STA and the PAMA drove DRP into bankruptcy.

329. Renco alleges that the global financial crisis and the denial of its PAMA extension request purportedly drove DRP into bankruptcy in 2009.[665] 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.[666] 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

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[663] **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.

[664] *See* Claimants' Statement of Claim ¶¶ 78–80. Claimants' Memorial in the Treaty Case does not address Missouri at all.

[665] Treaty Memorial, Section II.G.1.

[666] **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).

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***."[667] (Emphasis added)

330. 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 business model was fundamentally flawed and threatened DRP's ability to meet its obligations or even to remain a going concern.[668]

331. 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.[669] 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.[670] Indeed, in February 2009 DRP halted payments to its suppliers, and

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[667] **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.

[668] *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.

[669] "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.

[670] **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, Cormín, Glencore and Volcan; they have committed to a concentrates loan

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.[671]

332. 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 concentrates due to the company's financial problems."[672] 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."[673]

333. 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.[674]

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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.

[671] **Exhibit R-098**, Doe Run Peru saved by counterparts, EL COMERCIO, 3 April 2009.

[672] **Exhibit R-136**, Peru retains $14 mn in Doe Run funds to ensure clean-up, EFE NEWSWIRE, 15 January 2010.

[673] **Exhibit R-136**, Peru retains $14 mn in Doe Run funds to ensure clean-up, EFE NEWSWIRE, 15 January 2010 (emphasis added).

[674] **Exhibit R-135**, Peru mining union expels Doe Run for not fulfilling its commitments, EFE NEWSWIRE, 30 January 2010.

334. 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

335. 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.

336. Specifically, starting in 1998, Cormín entered into agreements with DRP to supply concentrates of diverse minerals for DRP's operations in La Oroya.[675] In February 2009, DRP began to fall behind on payments to Cormín pursuant to the supply agreements.[676] 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."[677] 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."[678]

337. 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

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[675] **Exhibit R-099**, *Solicitud de Inicio de Procedimiento Concursal Ordinario por Acreedor*, Cormín, 18 February 2010, ¶ 1.5.

[676] **Exhibit R-099**, *Solicitud de Inicio de Procedimiento Concursal Ordinario por Acreedor*, Cormín, 18 February 2010, ¶ 1.6.

[677] **Exhibit R-100**, Letter from DRP (C. Ward) to Cormín (G. Andrade), 26 February 2009.

[678] **Exhibit R-100**, Letter from DRP (C. Ward) to Cormín (G. Andrade), 26 February 2009.

concentrates.[679] On 2 June 2009, Cormín again demanded payment from DRP.[680] Despite Cormín's multiple requests, DRP did not pay Cormín.[681]

338. 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**").[682] According to Cormín's request to initiate bankruptcy proceedings, DRP was indebted to Cormín for USD 24 million of missing payments under their supply agreements. Per INDECOPI's request, Cormín subsequently submitted receipts and additional information to support the existence of DRP's debt to Cormín.[683]

339. 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.[684] On 2 July 2010, Cormín advised INDECOPI that it rejected the payment plan and requested that DRP's bankruptcy be ordered immediately.[685]

340. On 14 July 2010, in accordance with Law No. 27809, the General Law of the Bankruptcy System of Peru[686] ("**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.[687]

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[679] **Exhibit R-101**, Letter from Cormín (R. Trovarelli and G. Andrade Nicoll) to DRP (C. Ward), 5 March 2009.

[680] **Exhibit R-102**, Letter from Cormín (R. Trovarelli and G. Andrade Nicoll) to DRP (C. Ward), 2 June 2009.

[681] **Exhibit R-099**, *Solicitud de Inicio de Procedimiento Concursal Ordinario por Acreedor*, Cormín, 18 February 2010, ¶¶ 1.9–1.10.

[682] **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.

[683] **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.

[684] **Exhibit R-104**, DRP Response to Cormín's Request before INDECOPI, 28 May 2010.

[685] **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.

[686] In Peru, this is commonly referred to as the "LGSC".

[687] **Exhibit R-106**, INDECOPI Announcement, EL PERUANO, 16 August 2010.

341. 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.[688] 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.[689]

3. In September 2010, the MEM filed a valid credit claim against DRP, which was properly approved by INDECOPI

342. 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

343. Although the INDECOPI Bankruptcy Commission denied the MEM's initial credit request,[690] on 18 November 2011, the highest administrative body in bankruptcy proceedings (INDECOPI Chamber No. 1 for the Defense of Competition ("**INDECOPI Chamber No. 1**"))[691], 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.[692]

344. 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,

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[688] Treaty Memorial ¶ 126.

[689] *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.

[690] **Exhibit C-168 (Treaty)**, Resolution No. 1105-2011/CCO-INDECOPI, 23 February 2011.

[691] In Spanish, the "*Sala Concursal, en ese entonces Sala de Defensa de la Competencia No. 1.*"; *see also*, Hundskopf Expert Report, ¶ 97.

[692] **Exhibit C-174 (Treaty)**, Resolution No. 1743-2011/SC1-INDECOPI, 18 November 2011; *see also* **Exhibit C-169 (Treaty)**, MEM Appeal of INDECOPI Resolution, 2 March 2011.

consisting of the MEM's right to obtain from DRP its promise to perform its obligations that were stipulated in the PAMA.[693]

4. DRP dragged the MEM through exhaustive and meritless challenges of the MEM's credit claim, all of which failed

345. 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:

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.

346. 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

347. 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

[693] 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*.").

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.[694]

348. On 11 January 2011, through Resolution No. 01, the First Instance Constitutional Court[695] 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.[696] Indeed, DRP filled the *amparo* action while the proceedings before 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.

349. On 3 February 2011, DRP appealed the decision, and on 18 August 2011 the appellate court affirmed on jurisdictional grounds.[697]

350. 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."[698]

351. Professor Hundskopf explains the sound reasoning of the Constitutional Court of Peru:

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[694] **Exhibit C-164 (Treaty)**, 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*").

[695] In Spanish, the "*1er Juzgado Constitucional de la Corte Superior de Justicia de Lima*."

[696] **Exhibit C-165 (Treaty)**, Dismissal of DRP's Constitutional Amparo Recourse, 11 January 2011.

[697] Hundskopf Expert Report, ¶¶ 125–126.

[698] **Exhibit R-134**, Constitutional Tribunal, Exp. No. 04620-2011PA/TC, Lima, Numerals 5 and 9, 24 June 2016.

> "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)]."[699]

352. DRP's meritless constitutional *amparo* suit was a complete failure.

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

353. 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.[700] As explained below, DRP's administrative contentious action was firmly rejected in three instances.

354. On 18 January 2012, DRP challenged the INDECOPI Chamber No. 1's decision in Peruvian court by presenting an administrative contentious action[701] 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.[702]

355. 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.[703]

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[699] 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*").

[700] 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*".

[701] In Spanish, "*demanda contencioso administrativa*".

[702] **Exhibit R-141**, DRP Request for Annulment of Administrative Decision, 16 January 2012.

[703] **Exhibit C-181 (Treaty)**, Judgment of the Annulment of Administrative Act, Case No. 2012-00368, 18 October 2012.

356. On 31 October and 5 November 2012, DRCL, and DRP, represented by its liquidator, appealed the 4th Transitory Administrative Contentious Court's decision.[704] The appeal was assigned to the 4th Chamber for Administrative Contentious Actions of the Superior Court of Justice ("**4th Chamber**").

357. On 25 July 2014, the 8th Chamber for Contentious Administrative Actions with a Sub-Specialty in INDECOPI matters[705] ("**8th Chamber**") rejected DRP and DRCL's administrative contentious action. The 8th Chamber majority considered that DRP's 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.[706] 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.

358. 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**").[707] 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.[708] The justification under Peruvian law for the the Supreme Court's dismissal is discussed in the merits of Peru's Treaty Counter-Memorial.

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[704] **Exhibit C-186 (Treaty)**, DRP Appeal to the 18 October 2012 First Instance Judgment, 5 November 2012.

[705] Treaty Memorial, ¶ 317.

[706] In Peru, a concept known as "*ejecución forzada*".

[707] **Exhibit C-191 (Treaty)**, DRP's *Recurso de Casación* filed before the Peruvian Supreme Court of Justice, 25 August 2014; **Exhibit C-192 (Treaty)**, DRCL's *Recurso de Casación* filed before the Peruvian Supreme Court of Justice, 22 August 2014.

[708] **Exhibit C-193 (Treaty)**, Peruvian Supreme Court of Justice, Decision on the *Recurso de Casación*, 3 November 2015.

359. 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

360. 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.[709] 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 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.[710]

361. 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.[711] 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.[712] 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.

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[709] *See* **Exhibit R-235**, Recognition of Credit Request of DRCL against DRP, 24 September 2010.

[710] *See* **Exhibit R-218**, Cormín's Complaint for the Nullification of DRCL's credit against DRP, 11 April 2011, pp. 15–17.

[711] *See* **Exhibit R-218**, Cormín's Complaint for the Nullification of DRCL's credit against DRP, 11 April 2011, pp. 5–14.

[712] *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).").

362. 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 are declared void by the competent authority.[713] 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.[714] 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.[715]

363. After INDECOPI recognized DRCL's credits against DRP, the INDECOPI Bankruptcy Commission received an order from the 12th Commercial Court of Lima[716] 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 claim[717]).[718] 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.

364. 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.

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[713] *See* **Exhibit R-168**, Resolution No. 1742-2011/SC1-INDECOPI, 18 November 2011, p. 27.

[714] *See* **Exhibit R-168**, Resolution No. 1742-2011/SC1-INDECOPI, 18 November 2011, p. 27.

[715] Hundskopf Expert Report, ¶ 196.

[716] In Spanish, "*12avo Juzgado Civil Sub-especialidad Comercial de la Corte de Justicia de Lima*".

[717] That is, the claim by Cormín requesting the nullification of DRCL's credit against DRP.

[718] *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.*")

6. Cormín, not Peru, filed a criminal complaint against officers of Renco and DRRC, which were dismissed by the Peruvian judiciary

365. 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**").

366. 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.[719] The 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).[720] 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.[721]

367. 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.[722] When Cormín challenged that decision, the Permanent Criminal Chamber of the Supreme Court dismissed Cormín's challenge and upheld the appellate court's ruling.[723]

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[719] **Exhibit C-084 (Treaty)**, Criminal Case issued by Judge Flores of the 39th Criminal Court in Lima, 2 December 2011, ¶ 2.

[720] **Exhibit C-209 (Treaty)**, Indictment No. 339-2011 against I. Rennert and B. Neil issued by the District Attorney, 14 November 2011.

[721] **Exhibit C-084 (Treaty)**, Criminal Case issued by Judge Flores of the 39th Criminal Court in Lima, 2 December 2011.

[722] **Exhibit C-210 (Treaty)**, Opinions issued by the Superior Court of Appeals of Lima, 1 February 2013, p. 5.

[723] **Exhibit C-211 (Treaty)**, Permanent Criminal Chamber of the Superior Court of Peru Decision on *Queja Excepcional No. 311-2013*, 22 January 22, 2014.

F. DRP's Board of Creditors guides the bankruptcy

1. DRP's Board of Creditors, not Peru, guides the bankruptcy

368. 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.[724]

369. 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.[725]

370. 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.[726] To this end, the MEM has encouraged consensus among creditors and has focused on solutions.[727]

371. DRCL has repeatedly voted with the MEM and other creditors regarding the destiny of DRP.[728]

372. 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.[729]

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[724] Hundskopf Expert Report, ¶ 32.

[725] Witness Statement of Guillermo Shinno Huamani, 8 March 2022 ("**Shinno Witness Statement**"), ¶ 13.

[726] Shinno Witness Statement, Section VI.

[727] Shinno Witness Statement, ¶ 47.

[728] **Exhibit R-107**, DRP Creditors' Meeting Minutes, 22 and 25 May 2012 (97% vote appointing Right Business as liquidator, including DRCL's cote); **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).

[729] **Exhibit R-110**, DRP Creditors' Meeting Minutes, 13 and 18 January 2012.

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

373. Renco erroneously asserts, "the MEM helped to defeat DRP's reasonable restructuring plan."[730] 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.[731] A robust summary of the relevant discussions and decisions of the Board of Creditors is discussed below.

374. 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.[732] The MEM voted in favor of restructuring DRP and voiced its support for a restructuring plan that respected the environmental standards of Pere.[733]

375. Unfortunately, on 30 March 2012, DRP sent a restructuring plan to the Board of Creditors that was wholly unviable.[734] The plan did not address various issues facing the Facility, and did not incorporate concerns and observations made by the creditors.[735] The MEM's representative highlighted the many issues with DRP's restructuring plan in the Board of Creditors' meeting of 9 April 2012.[736] 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.[737] Notwithstanding the various flaws in DRP's restructuring plan, at the 9 April 2012 meeting

[730] Treaty Memorial, ¶ 140.
[731] Treaty Memorial, ¶ 201. *See also*, Treaty Memorial, ¶ 144.
[732] **Exhibit R-110**, DRP Creditors' Meeting Minutes, 13 and 18 January 2012.
[733] **Exhibit R-110**, DRP Creditors' Meeting Minutes, 13 and 18 January 2012, p. 13.
[734] **Exhibit R-146**, Restructuring Plan of DRP, 29 March 2012.
[735] **Exhibit C-231 (Treaty)**, DRP Creditors' Meeting Minutes, 9 and 12 April 2012, PDF pp. 3–4.
[736] **Exhibit C-231 (Treaty)**, DRP Creditors' Meeting Minutes, 9 and 12 April 2012, PDF pp. 3–4.
[737] **Exhibit C-231 (Treaty)**, DRP Creditors' Meeting Minutes, 9 and 12 April 2012, PDF p. 3.

the MEM made clear that it supported a restart of operations at the Facility that respected the environmental standards of Peru.[738]

376. 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.[739]

377. 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).[740] 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 SO_2 and lead emissions beyond the acceptable standards under Peruvian law, and as a result there would not be a way to implement the plan.[741].

378. 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.[742] 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.[743]

379. 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*).[744] Consequently, in the 12 April 2012 Board of

[738] **Exhibit C-231 (Treaty)**, DRP Creditors' Meeting Minutes, 9 and 12 April 2012, PDF p. 3.
[739] **Exhibit C-231 (Treaty)**, DRP Creditors' Meeting Minutes, 9 and 12 April 2012, PDF p. 4.
[740] **Exhibit C-231 (Treaty)**, DRP Creditors' Meeting Minutes, 9 and 12 April 2012, PDF p. 16.
[741] **Exhibit C-231 (Treaty)**, DRP Creditors' Meeting Minutes, 9 and 12 April 2012, PDF p. 13.
[742] **Exhibit C-231 (Treaty)**, DRP Creditors' Meeting Minutes, 9 and 12 April 2012, PDF p. 14.
[743] **Exhibit C-231 (Treaty)**, DRP Creditors' Meeting Minutes, 9 and 12 April 2012, PDF p. 14.
[744] **Exhibit C-231 (Treaty)**, DRP Creditors' Meeting Minutes, 9 and 12 April 2012, PDF p. 18.

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.[745] Specifically, DRP's creditors placed DRP in operational liquidation, which places the debtor in liquidation but allows it to continue operations through the liquidation process.[746] 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.[747]

380. Thereafter, on 14 May 2012 DRP submitted an "amended" restructuring plan that ostensibly removed the items that troubled the Board of Creditors.[748] Upon receiving the plan, the MEM immediately confirmed receipt and welcomed a meeting with DRP representatives to discuss the project.[749]

381. At the Board of Creditors' meeting on 25 May 2012, the committee agreed to designate Right Business as DRP's liquidator.[750] In the same meeting, the Board of Creditors—including DRCL—approved the operational liquidation plan (*convenio de liquidación en marcha*).[751]

382. 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

[745] Counter-Memorial on Waiver, ¶ 97; **Exhibit C-231 (Treaty)**, 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.

[746] **Exhibit C-231 (Treaty)**, 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.

[747] **Exhibit C-231 (Treaty)**, DRP Creditors' Meeting Minutes, 9 and 12 April 2012, p. 18.

[748] *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.

[749] **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.

[750] **Exhibit R-107**, DRP Creditors' Meeting Minutes, 22 and 25 May 2012, p. 8.

[751] **Exhibit R-107**, DRP Creditors' Meeting Minutes, 22 and 25 May 2012, p. 27.

response to DRP's restructuring plan of 14 May 2012, outlining the many issues it identified.[752] Notably problematic was DRP's failure to guaranty the completion of the projects.

383. 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 a viable restructuring plan. Indeed, the MEM noted that it "remains open to continue dialogue regarding [the restructuring plan] and related topics."[753] 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.[754] 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.[755] 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.[756]

384. 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.[757]

385. 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[.]"[758] Soon after the MEM's invitation to continue discussions, on 13 August

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[752] **Exhibit R-111**, Letter from MEM (M. Patiño) to Renco Group, Inc. (I. Leon Rennert), 26 June 2012, pp. 1–3.

[753] **Exhibit R-111**, Letter from MEM (M. Patiño) to Renco Group, Inc. (I. Leon Rennert), 26 June 2012, p. 3.

[754] **Exhibit R-116**, Letter from MEM (M. Patiño) to Renco Group (D. Sadlowski), 13 July 2012.

[755] **Exhibit R-116**, Letter from MEM (M. Patiño) to Renco Group (D. Sadlowski), 13 July 2012.

[756] **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.

[757] **Exhibit R-118**, Letter from MEM (M. Patiño) to Renco Group (D. Sadlowski), 9 August 2012.

[758] **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*").

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.[759] Indeed, Renco made clear that despite the discussions with the MEM from May through August 2012 that presumably would have modified the restructuring plan, it would stick to its restructuring proposal from 14 May 2012.[760]

386. 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.[761] The MEM, however, noted that Renco's letters in the month of August 2012[762] 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.[763] 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.[764] 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.[765]

387. 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.[766] Notably, in the Board of Creditors' meeting of 25 August 2012,

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[759] *See* **Exhibit C-198 (Treaty)**, Letter from Renco Group, Inc. (D. Sadlowski) to MEM (M. Patiño), 13 August 2012, PDF p. 2.

[760] *See* **Exhibit C-198 (Treaty)**, 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.").

[761] **Exhibit R-119**, Letter from MEM (R. Patiño) to Renco Group (D. Sadlowski), 20 August 2012.

[762] *See* **Exhibit C-197 (Treaty)**, Letter from Renco Group (D. Sadlowski) to MEM (R. Patiño), 2 August 2012; **Exhibit C-198 (Treaty)**, Letter from Renco Group, Inc. (D. Sadlowski) to MEM (M. Patiño), 13 August 2012.

[763] **Exhibit R-119**, Letter from MEM (R. Patiño) to Renco Group (D. Sadlowski), 20 August 2012, p. 1.

[764] **Exhibit R-119**, Letter from MEM (R. Patiño) to Renco Group (D. Sadlowski), 20 August 2012, p. 1.

[765] **Exhibit R-119**, Letter from MEM (R. Patiño) to Renco Group (D. Sadlowski), 20 August 2012, p. 1.

[766] **Exhibit R-120**, *Junta de Acreedores no Aprobó plan de Restructurcación 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.

DRP's elected liquidator, Right Business, noted that DRP's restructuring plan of 14 May 2012 was unacceptable.[767]

388. From August 2012 to March 2013, Right Business focused on advancing the liquidation of DRP.[768] 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).[769] At the meeting, Right Business noted that there were indications that shifting to restructuring would be best for DRP.[770] In the same meeting, 90.26% of the creditors voted to designate Right Business as the Administrator of DRP.[771] 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.[772]

389. 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.[773] The MEM further stated that the creditors' concerns would need to be addressed in order for the plan to be sustainable and viable.[774] 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.[775] At the end of the meeting, 99% of the creditors voted to approve the restructuring plan proposed by Right Business.[776]

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[767] **Exhibit R-122**, DRP Creditors' Meeting Minutes, 24 and 29 August 2012, p. 17.
[768] **Exhibit R-112**, DRP Creditors' Meeting Minutes, 9 April 2012, p. 3.
[769] **Exhibit R-112**, DRP Creditors' Meeting Minutes, 9 April 2012, p. 6.
[770] **Exhibit R-112**, DRP Creditors' Meeting Minutes, 9 April 2012, p. 5.
[771] **Exhibit R-112**, DRP Creditors' Meeting Minutes, 9 April 2012, p. 7.
[772] **Exhibit R-123**, Restructuring Plan of DRP, 30 April 2013.
[773] **Exhibit R-124**, DRP Creditors' Meeting Minutes, 5 July 2013, p. 5.
[774] **Exhibit R-124**, DRP Creditors' Meeting Minutes, 5 July 2013, p. 5.
[775] **Exhibit R-124**, DRP Creditors' Meeting Minutes, 5 July 2013, p. 5.
[776] **Exhibit R-124**, DRP Creditors' Meeting Minutes, 5 July 2013, p. 14.

390. From July 2013 to May 2014, Right Business focused on addressing the creditors' concerns with the restructuring plan.[777] At the Board of Creditors' meeting held on 9 June 2014, Right Business summarized the status of the restructuring plan that was approved on 5 June 2013, noting that the plan was at risk. [778] It became clear to many creditors that the plan was unviable, and the creditors voiced a preference to explore liquidating DRP.[779]

391. 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*).[780] Before the proposal was submitted to vote, the workers' representative[781] voiced the workers' strong support for the plan to place DRP back in operational liquidation.[782] As a result, in the same meeting 100% of DRP's creditors—including DRCL—voted to place DRP in operational liquidation.[783]

392. 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.[784] 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.[785] Renco's allegation that the "MEM greatly influenced the actions and decisions of the Creditors Committee,"[786] is disingenuous insofar as DRCL's voting power

[777] *See, e.g.*, **Exhibit R-125**, DRP Creditors' Meeting Minutes, 13 and 16 August 2013, p. 2.

[778] **Exhibit R-126**, DRP Creditors' Meeting Minutes, 9 June 2014, p. 4.

[779] **Exhibit R-126**, DRP Creditors' Meeting Minutes, 9 June 2014, p. 4.

[780] **Exhibit R-127**, DRP Creditors' Meeting Minutes, 22 and 27 August 2014, p. 14.

[781] In the bankruptcy proceedings referred to as the "*Acreedor Laboral*."

[782] **Exhibit R-127**, DRP Creditors' Meeting Minutes, 22 and 27 August 2014, p. 14.

[783] **Exhibit R-127**, DRP Creditors' Meeting Minutes, 22 and 27 August 2014, p. 14.

[784] *See* Shinno Witness Statement, ¶¶ 20–47.

[785] 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 (Treaty)**, 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.

[786] Treaty Memorial, ¶ 140.

was practically identical to the MEM's. 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.

393. 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.[787] This election occurred after no other creditor was willing to accept the position.[788]

3. The Facility was reopened in compliance with environmental law

394. 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.[789] 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."[790]

395. The MEM determined that Right Business could proceed so long as the Facility's operations complied with the applicable ECAs and LMPs.[791] After determining that the zinc circuit could comply with the emissions standards, Right Business restarted operations of the circuit on 28 July 2012.[792] The lead circuit restarted operations in November of the same year.[793]

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[787] *See* Shinno Witness Statement, ¶ 46; **Exhibit R-145**, DRP Creditors' Meeting Minutes with Liquidation in Process, 15 and 18 September 2015, p. 6.

[788] *See* Shinno Witness Statement, ¶ 46; **Exhibit R-145**, DRP Creditors' Meeting Minutes with Liquidation in Process, 15 and 18 September 2015, p. 6.

[789] **Exhibit R-233**, Letter from DRP (A. L. Cano Algorta and R. Chavez Pimentel) to MEM, 21 July 2012.

[790] **Exhibit C-199 (Treaty)**, After 3 years, DRP's La Oroya finally restarts, MINEWEB, 30 July 2012, PDF p. 2.

[791] **Exhibit R-234**, Memo No. 0484-2012/MEM, MEM, 18 July 2012, p. 3.

[792] **Exhibit C-199 (Treaty)**, After 3 years, DRP's La Oroya finally restarts, MINEWEB, 30 July 2012; **Exhibit C-200 (Treaty)**, Doe Run Peru announces smelter restart, FOX LATINO NEWS, 28 July 2012.

[793] **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.

396. Right Business continued to operate the zinc and lead circuits while staying almost entirely within the emissions limits.[794] The few times that the Facility exceeded the permissible limits, the Environmental Evaluation and Enforcement Organ (*Organismo de Evaluación y Fiscalización Ambiental*, "**OEFA**") applied the sanctions provided for in the applicable regulations.[795] OEFA continues to monitor the Facility's operations and ensure compliance with emissions standards.[796]

397. 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.[797] The IGAC effectively replaced the PAMA regime, since 2014, all outstanding PAMAs had lapsed.[798] The MEM approved the IGAC for the La Oroya Facility on 10 July 2015 (the "**La Oroya IGAC**").[799]

398. The La Oroya IGAC aims to bring the Facility's operations into compliance with new emissions standards approved in 2008 and 2011.[800] 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 SO_2 levels of 80 ug/m^3 and average daily levels of 365 ug/m^3, which constitute significantly stricter emissions standards than those that applied to DRP before it ceased operations in 2009.[801] 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

[794] **Exhibit R-230**, Questions and Answers to understand the Doe Run Case, MEM, July 2016, pp. 11–12.

[795] Alegre Expert Report, ¶¶ 101-102.

[796] Alegre Expert Report, ¶¶ 101-102.

[797] **Exhibit R-229**, Supreme Decree No. 040-2014-EM, 5 November 2014; Alegre Expert Report, ¶ 104.

[798] Alegre Expert Report, ¶¶ 104-107.

[799] **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.

[800] Alegre Expert Report, ¶¶ 105-108.

[801] Alegre Expert Report, ¶¶ 106-107. As expert Ada Alegre explains, the 250 ug/m^3 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.

environmental objectives than those of the PAMA and was designed for a company that was (and remains) in liquidation.[802]

4. Current status of DRP's bankruptcy

399. 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.[803] The Board of Creditors has collaborated to try to sell DRP's assets since 2015, but has not had success in the process.

400. 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

401. 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.[804]

402. 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.[805] They also advised that the resolution of the prior arbitration proceeding facilitated a renewed opportunity to focus on solutions to La Oroya.

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[802] Alegre Expert Report, ¶¶ 106-107.

[803] **Exhibit R-128**, Resolution No. 1240-2021/CCO-INDECOPI, 11 March 2021, p. 3.

[804] 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.").

[805] Response to the Notice of Arbitration, p. 8, fn. 29 (*citing* the Letter from Renco to Peru, 12 August 2016).

403. 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 Framework Agreement with Renco (and DRRC) dated 14 March 2017 to address related issues and facilitate further consultations.[806] The period of consultations ended on 20 October 2018.

404. 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**").

405. As explained in Peru's Treaty Counter-Memorial and Peru and Activos Mineros' Contract Counter-Memorial, both of these cases should be dismissed on 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

406. 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.

[806] 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.

1. Renco and DRRC violated their environmental obligations in Missouri, USA, and faced significant environmental penalties and fines, and public outcry

407. 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 upgrades, a string of toxic tort exposure cases in Missouri, and an ongoing labor dispute.[807] 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.[808]

408. 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,[809] 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."[810] 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.[811]

409. 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.[812] In 2007, the Missouri

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[807] **Exhibit R-037**, Company Information, THE DOE RUN COMPANY, last accessed on 16 February 2008.

[808] **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).

[809] **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.").

[810] **Exhibit R-042**, Heavy-Metal Racket, RIVERFRONT TIMES, 26 December 2001, p. 2.

[811] **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").

[812] **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

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 smelter.[813] As of 2009, nearly a third of Herculaneum's residential yards and lots were found to be contaminated.[814]

410. 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).[815] 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.[816]

Involvement Plan: Herculaneum Lead Smelter Superfund Site, Herculaneum, Missouri, United States Environmental Protection Agency: Region 7, 1 February 2007, p. 4.

[813] **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.

[814] **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.

[815] **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).

[816] *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

411. 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).[817]

412. The Magnesium Facility was owned by Magnesium Corporation of America ("**MagCorp**") for years until US Magensium LLC ("**USM**") acquired it in June 2002.[818] Renco has owned the Magnesium Facility through its ownership and control of both of these companies.

413. The Magnesium Facility is located adjacent to the Great Salt Lake in the state of Utah, United States.[819] 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.[820] The wastewater from the Magnesium Facility is highly acidic.[821] The Magnesium Facility operations and waste disposal practices illegally contaminated soil, air, surface water and groundwater.[822]

414. As explained below, Renco's polluting Magnesium Facility resulted in years of investigations by the US Environmental Protection Agency ("**EPA**"), millions of dollars

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[817] **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.

[818] **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.

[819] **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.

[820] **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.

[821] **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.

[822] **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.

415. **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**").[823] The RCRA is a federal law in the United States governing the disposal of solid waste and hazardous waste.[824] 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.[825]

416. **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**").[826] 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.[827] On 24

[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, p. 3.

[824] *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.

[825] *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.

[826] *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.

[827] *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.[828]

417. 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.[829] 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.[830] A judgment was entered in favor of the MagCorp and Renco Metals bankruptcy estates against the Magnesium Parent Entities for over $213 million.[831] The Second Circuit Court of Appeals of the United States affirmed the district court judgment, and the Supreme Court denied a petition for certiorari.[832] Notably, one of MagCorp's largest creditors was "the United States on behalf of the Environmental Protection Agency."[833]

418. **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

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[828] *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.

[829] *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.

[830] *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.

[831] *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.

[832] *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.

[833] **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.[834] 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).[835] The investigations noted that these wastes were being released into the environment and were largely *uncontrolled*.[836]

419. 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.[837] 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").[838] Under the Magnesium Bankruptcy Settlement, the EPA recovered over $23 million for CERCLA response cost claims.[839] The Parent Entities agreed in turn that their $5.8 million recovery

[834] **Exhibit R-055**, Superfund Program: U.S. Magnesium, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, April 2010, p. 1.

[835] **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.

[836] **Exhibit R-055**, Superfund Program: U.S. Magnesium, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, April 2010, p. 1.

[837] *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.

[838] *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.

[839] *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.

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.[840]

420. 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.[841] 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."[842]

421. 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").[843] The EPA determined the CERCLA Response Action[844] to be performed at the Magnesium Facility was necessary to protect the public health, welfare, and the environment.[845]

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[840] *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.

[841] *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.

[842] **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.

[843] **Exhibit R-058**, Notice of Lodging of Proposed Consent Decree Under the Resource Conservation and Recovery Act, FEDERAL REGISTER, 3 February 2021.

[844] **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.").

[845] **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.

422. The Magnesium Facility Litigation was officially closed on 30 June 2021 pursuant to the Consent Decree.[846] 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.[847] 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.[848]

423. 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, the EPA in the United States successfully filed a credit claim in the Magnesium Bankruptcy relating to environmental cleanup costs.[849]

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[846] **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.").

[847] **Exhibit R-058**, Notice of Lodging of Proposed Consent Decree Under the Resource Conservation and Recovery Act, FEDERAL REGISTER, 3 February 2021, p. 1.

[848] **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.

[849] **Exhibit R-060**, EPA: U.S. Magnesium Wastes Endanger Workers, Families, Birds, HEALTHY ENVIRONMENT ALLIANCE OF UTAH, 28 August 2008.

3. DRRC's "environmental achievements and community work" occurred as part of multiple settlements with governmental authorities

424. 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.[850]

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.[851] The settlement required DRRC to institute significant changes to its operations, including the shutdown of its smelter operation by the end of 2013.[852] 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 community-based projects to mitigate the effects of the contamination caused in southeastern Missouri.[853]

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[850] **Exhibit R-041**, Herculaneum Master Plan 2006, Contamination of the Historic Area: Depth of the Lead Issue–A Recent History, July 2006, p. 5.

[851] *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.

[852] **Exhibit R-061**, Doe Run Resources Corporation Settlement, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, 8 October 2010, p. 2.

[853] **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.

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.[854]

425. 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

426. 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.[855] 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.

427. 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 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

[854] **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.

[855] *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.

remaining assets and shifts the blame for the failure elsewhere, including falling commodities prices.

428. As described herein, this pattern is evident in the financing for the acquisition and management of the La Oroya Facility.[856] 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.[857] Later and as noted above, DRRC agreed to decommission the Herculaneum lead smelter in 2013, three years ahead of the 2016 timeline required by state regulations for sulfur dioxide emissions.[858] 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.[859] In the midst of its settlement-based environmental cleanup in Herculaneum, 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.[860]

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.[861] Within a year, Lodestar borrowed US$150 million in high-interest bonds and used

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[856] *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 Herculaneum refinery as a guarantee in order to acquire other refineries, namely, another in Missouri and a refinery in La Oroya, Peru.).

[857] **Exhibit R-065**, Hamptons Mansion Turns Focus on Multimillionaire, THE WALL STREET JOURNAL, 18 June 1998, p. 2.

[858] **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.

[859] **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; **Exhibit R-062**, Doe Run Settles with EPA: Lead Company to Close Herculaneum Smelter, Spend Millions, RIVERFRONT TIMES, 8 October 2010, p. 2.

[860] *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.

[861] **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.

US$27.8 million of the proceeds to pay cash dividends to the sole shareholder, Ira Rennert.[862] 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.[863]

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.[864]

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.[865] 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.[866] As noted above, the proceedings culminated in a US$33 million settlement in July 2019.[867]

429. For Peru and the citizens of La Oroya, this pattern and practice of polluting, extracting profit, and leaving are all too familiar.

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[862] **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.

[863] **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.

[864] **Exhibit R-065**, Hamptons Mansion Turns Focus on Multimillionaire, WALL STREET JOURNAL, 18 June 1998, p. 1.

[865] **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").

[866] *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.

[867] *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 CLAIMANTS' CLAIMS

430. In the following sections, Respondents will detail why the Tribunal lacks jurisdiction over Claimants' claims. Those sundry reasons, however, can be distilled into one sentence: What Claimants would like is not what the STA, the Peru Guaranty, Peruvian law, or customary international law provide.

431. To recall, Claimants submit three categories of claims. First, Claimants argue that Respondents breached their duties to indemnify Claimants' for damages, pay their litigation costs, and defend them in the Missouri Litigations.[868] In Claimants' view, these obligations are encompassed by Clauses 6.2 and 6.3 of the STA, the Peru Guaranty, pre-contractual liability under Peruvian law, and estoppel under the minimum standard of treatment under customary international law.[869] Second, Claimants contend that Respondents breached their obligation under Clause 6.1 of the STA to remediate the area surrounding the Facility.[870] Third, Claimants posit that, in the future, they might have subrogation, contribution, and unjust enrichment claims under Peruvian law against Activos Mineros and Peru.[871] All claims are submitted against Activos Mineros and Peru, under the STA and the Peru Guaranty.

432. From a review of the pleadings and supporting documentation, the Tribunal will observe that exercising jurisdiction over Claimants' contractual claims requires redrafting the STA and the Peru Guaranty. As an intra-Renco group legal instrument recognizes, Claimants are not parties to the STA.[872] Yet before this Tribunal, Claimants ask to be written into the STA.[873] And though Claimants are not parties to the Peru Guaranty either, they still contend that the Tribunal has jurisdiction over their Peru Guaranty claims.[874]

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[868] *See* Contract Memorial, ¶¶ 161, 164, 264.

[869] *See* Contract Memorial, ¶¶ 161, 164, 211, 238–45.

[870] *See* Contract Memorial, ¶ 208.

[871] *See* Contract Memorial, ¶¶ 212–237, 264.

[872] **Exhibit R-004**, Assignment of Contractual Position between Due Run Peru S.R.L and DRCL, 1 June 2001 ("**Contract Assignment**"), Clause 1.3 ("The [STA] was executed by the Empresa Minera del Centro de Perú S.A. (Centromín), Doe Run Perú as the Investor and Metaloroya as the Company receiving the investment.")

[873] *See* Contract Memorial, ¶¶ 119–122.

[874] *See* Contract Memorial, ¶¶ 130–131.

433. Implementing Claimants' proposed revisions requires accepting unacceptable premises and imposing illogical consequences. The STA is governed by Peruvian law.[875] But to find that Claimants are parties to the STA and encompassed by the relevant clauses, the Tribunal would have to accept Claimants' premise that United States law governs.[876] Further, under Claimants' interpretation, those clauses "extend[ ] to anyone who could be sued."[877] To be clear, under Claimants' reading, "anyone who could be sued" is not limited to contracting parties or third-party beneficiaries; Claimants bring claims on behalf of nine other entities and individuals, without any allegation that these are parties to the STA or third-party beneficiaries.[878] Redrafting the STA and the Peru Guaranty in Claimants' favor would mean casting aside the principle of privity and opening these contracts to countless, unidentified legal and natural persons.

434. Jurisdiction over Claimants' non-contractual claims similarly requires rewriting Peruvian and international law. Claimants' Peruvian law claims require, among other things, the party invoking them to have already effected payment.[879] But the Missouri Litigations have not progressed to a determination on liability, let alone a determination on damages, much less any payment by Claimants. Claimants also bring a claim under the minimum standard of treatment under customary international law, though their only recourse is diplomatic protection.

435. Respondents conduct a standard interpretation of the STA and Peru Guaranty. The result is simple: The STA and the Peru Guaranty mean what they state—Claimants are not parties to those contracts. As to Claimants' non-contractual claims, Respondents rely on applicable and in-force Peruvian and international law.

436. A proper understanding of the STA, the Peru Guaranty, and Peruvian and international law leads to the conclusion that the Tribunal lacks jurisdiction over all of Claimants' claims.

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[875] **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**"), Clause 11 ("This contract will be governed and executed in accordance with the laws of the Republic of Peru.")

[876] *See* Contract Memorial, ¶¶161–165.

[877] Contract Memorial, ¶ 166.

[878] Contract Memorial, ¶ 80 ("DR Acquisition Corp. and Renco Holdings, Inc., and directors and officers Marvin K. Kaiser, Albert Bruce Neil, Jeffery L. Zelms, Theodore P. Fox III, Daniel L. Vornberg, Jerry Pyatt, and Ira L. Rennert.")

[879] Varsi Expert Report-Contract, ¶¶ 8.29–8.48.

A. Preliminary matters: Burden of proof and contract interpretation under Peruvian law

437. Before detailing the jurisdictional flaws of Claimants' claims, it is important to explain two matters that will be relevant for the Tribunal's analysis: Claimants' burden of proof on jurisdictional matters, and—as the present dispute is based on a Peruvian-law-governed contract—the principles of contract interpretation under Peruvian law.

1. Claimants bear the burden of proving the existence of jurisdiction

438. On Claimants' burden of proof, two principles are relevant in this case. First, Claimants bear the burden of proving the existence of the facts required to establish the Tribunal's jurisdiction. Second, when the existence of arbitral consent is at issue, such consent must be clear and unequivocal.

439. International tribunals have consistently applied the basic burden-of-proof rule that the party who makes an assertion must prove it.[880] Claimants, as the party asserting that the Tribunal possesses jurisdiction, must therefore prove the facts necessary to establish such jurisdiction.[881] As the tribunal in *Pacific Rim* explained, "it is impermissible for the Tribunal to found its jurisdiction on any of the Claimant's . . . claims on the basis of an assumed fact."[882] Instead, as the *AAPL* tribunal noted, a claimant "must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth,

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[880] *See* **RLA-180**, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, ¶ 2.11; **RLA-181**, *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Award, 7 July 2004, ¶ 58 ("In accordance with accepted international (and general national) practice, a party bears the burden of proof in establishing the facts that he asserts."); **RLA-182**, *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, ¶ 64 ("The burden of proof of an allegation in international arbitration rests on the party advancing the allegation, in accordance with the *maxim onus probandi actori incumbit*.").

[881] *See* **RLA-183**, *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB 12/20, Award, 26 April 2017, ¶ 66 ("All facts that are dispositive for purposes of jurisdiction must be proven at the jurisdictional stage. In this regard, the Claimant bears the burden of proving the facts required to establish jurisdiction, insofar as they are contested by the Respondent); **RLA-184**, *Abaclat et al. v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, ¶ 678 ("[I]t is Claimants who bear the burden to prove that all conditions for the Tribunal's jurisdiction and for the granting of the substantive claims are met.").

[882] **RLA-180**, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, ¶ 2.8.

lest they be disregarded for want, or insufficiency, of proof."[883] This principle is also established in Article 27(1) of the UNCITRAL Rules, which govern this proceeding[884].

440. The jurisdiction of international arbitral tribunals is founded on consent. For that reason, when a jurisdictional question involves the existence (or not) of arbitral consent, a claimant bears the burden of proving clear and unequivocal (rather than probable) consent. As the *AMTO* tribunal recognized, "[c]onsent to arbitrate, as the foundation of the jurisdiction of an arbitral tribunal, should be unequivocal."[885] Said another way, "consent should be expressed in a manner that leaves no doubts."[886] And because a tribunal's jurisdiction is coextensive with the scope arbitral consent,[887] the clear and unequivocal threshold applies both to the existence and scope of arbitral consent. As the *Fireman's Fund* tribunal explained, "a foreign investor is [not] entitled to the benefit of the doubt with respect to the existence and scope of an arbitration agreement."[888]

441. The Tribunal should keep in mind those principles as it considers the parties arguments on jurisdiction.

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[883] **RLA-170**, *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, ¶ 56.

[884] UNCITRAL Rules, Art. 27(1).

[885] **RLA-182**, *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, ¶ 46.

[886] **RLA-185**, *Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3, Award, 2 August 2011, ¶ 113.

[887] **RLA-186**, Nigel Blackaby et al., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION (6TH EDITION), 17 September 2015, § 2.63("An arbitration agreement confers a mandate upon an arbitral tribunal to decide any and all of the disputes that come within the ambit of that agreement. It is important that an arbitrator should not go beyond this mandate."); **RLA-187**, *Achmea B.V. v. The Slovak Republic*, PCA Case No. 2013-12, Award on Jurisdiction and Admissibility, 20 May 2014, ¶ 117 ("any conditions to which such consent is subject must be regarded as constituting the limits thereon").

[888] **RLA-188**, *Fireman's Fund Insurance Company v. United Mexican States*, ICSID Case No. ARB(AF)/02/1, Decision on the Preliminary Question, 17 July 2003, ¶ 64 ("[T]the Tribunal does not believe that under contemporary international law a foreign investor is entitled to the benefit of the doubt with respect to the existence and scope of an arbitration agreement."); *see also* **RLA-189**, *National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7, Award, 3 April 2014, ¶ 117; **RLA-190**, *Menzies Middle East & Africa S.A. and Aviation Handling Services International Ltd. v. Republic of Senegal*, ICSID Case No. ARB/15/21, Award, 5 August, 2016, ¶ 130.

2. Contract interpretation under Peruvian law

442. The STA and the Peru Guaranty are governed by Peruvian law.[889] Accordingly, they are to be interpreted under the canons of contractual interpretation of Peruvian law. In their Contract Memorial, Claimants mischaracterize the Peruvian canons of interpretation, in numerous instances omitting important principles regarding proper contract interpretation. As a result, below Peru corrects the record with respect to contract interpretation under Peruvian law.

443. The Peruvian Civil Code contemplates several methods of interpreting contracts. Article 168 requires a literal interpretation contracts.[890] Article 169 provides for the systematic interpretation of contracts.[891] And Article 170 establishes the functional interpretation of contracts.[892] Two overarching Articles help guide the interpretative exercise. Article 1361 establishes the presumption that the text of a contract represents the common will of the contracting parties.[893] Article 1362 mandates that contracts "be negotiated, executed and performed according to the rules of good faith and according to the common intention of the parties."[894] Below Peru will explain each principle in turn.

444. Article 168 of the Peruvian Civil Code provides the starting point for contract interpretation: "A legal act shall be interpreted in accordance with what has been stated in them in accordance with the principle of good faith."[895] Claimants and Professor Payet concede this point, but then incorrectly assert that "the interpretation should not remain at that level."[896] In some cases, that is true. Where the common will of the parties is clear from the text, no other methods of interpretation are necessary.[897] The reason for this, as

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[889] *See* **Exhibit R-001**, STA & Renco Guaranty, Clause 11.

[890] **RLA-062**, Peruvian Civil Code, 24 July 1984, Art. 168; Varsi Expert Report-Contract, ¶¶ 4.28–4.30.

[891] **RLA-062**, Peruvian Civil Code, 24 July 1984, Art. 169; Varsi Expert Report-Contract, ¶¶ 4.33–4.34.

[892] **RLA-062**, Peruvian Civil Code, 24 July 1984, Art. 170; Varsi Expert Report-Contract, ¶¶ 4.39–4.48.

[893] **RLA-062**, Peruvian Civil Code, 24 July 1984, Art. 1361.

[894] **RLA-062**, Peruvian Civil Code, 24 July 1984, Art. 1362.

[895] **RLA-062**, Peruvian Civil Code, 24 July 1984, Art. 168.

[896] *See* Claimants' Contract Memorial, ¶ 145; Payet Expert Report, ¶ 41.

[897] Varsi Expert Report-Contract, ¶¶ 4.33–4.36; **Exhibit JAP-020**, Lohmann, Guillermo, *"La Interpretación del Negocio Jurídico y del Contrato"*, Tratado de la Interpretación del Contrato en América Latina, Tomo III, p. 1679

Professor Varsi explains, is to prevent the use of other interpretative tools to modify the common will of the contracting parties.[898] Contractual interpretation under Peruvian law does not seek to discover some hidden will.[899]

445. In cases where the literal interpretation is not clear, Article 169 of the Peruvian Civil Code provides for systematic interpretation.[900] The meaning of an apparently clear clause can also be confirmed through systematic interpretation. Systematic interpretation is a contextual cannon, providing that a contractual provision should be interpreted in a manner that provides consistency among the different clauses of the contract:

> "An apparently clear clause must be seen and understood as conforming to the unitary set that forms the contract. An apparently questionable clause must be contrasted with the remaining clauses of the contract, in order to eliminate the doubt, apprehending a single meaning of what was initially presented as "questionable," preventing a single clause from being interpreted independently showing a meaning which is not in accordance with the contract as a whole."[901]

446. If after performing a literal interpretation pursuant to Article 168 and a systematic interpretation under Article 169, the common will of the parties is not clear, then Article 170 of the Peruvian Civil Code provides for a teleological approach. Under this functional interpretation, contract provisions that are subject to more than one interpretation are construed in a manner that accords with the contract's nature and object.[902]

(English Translation:"According to the wording of this Article, the objective intention of the agent is the subject of interpretation, adopting what is expressed as a framework and as a starting point. What is declared, thus, constitutes the gateway to the will contained in the declaration and, at the same time, its framework. This rule takes precedence over all the others, so the interpreter must exhaust all the means it offers.") (Spanish original: "*Según la redacción de este artículo es materia de interpretación la intención hecha objetiva por el agente, adoptando lo expresado como marco y como punto de partida. Lo declarado, así, viene a constituirse como la puerta de ingreso a la voluntad contenida en la declaración y, a la vez, marco de la misma. Esta regla tiene preferencia sobre todas las demás por lo que el intérprete debe agotar todos los medios que le ofrece*.").

[898] Varsi Expert Report-Contract, ¶¶ 4.31.

[899] *See* Varsi Expert Report-Contract, ¶ 4.26.

[900] Varsi Expert Report-Contract, ¶¶ 4.33–4.36.

[901] Varsi Expert Report-Contract, ¶¶ 4.314 (internal quotation marks omitted).

[902] **RLA-062**, Peruvian Civil Code, 24 July 1984, Art. 170; Varsi Expert Report-Contract, ¶¶ 4.36–4.38.

447. Professor Varsi explains that Articles 1361 and 1362 of the Peruvian Civil Code must also be taken into consideration in addition to the aforementioned interpretative canons, even though such articles do not set up rules of interpretation.[903] Article 1361 states that "[i]t shall be presumed that the statement contained in the contract corresponds to the common intention of the parties and the party who denies such coincidence shall prove this."[904] In this regard, Professor Varsi explains the following:

> "What is established in the final paragraph of Article 1361 of the Civil Code constitutes a very important and essential directive for the interpreter. One must consider that what is declared in the contract corresponds to the common will of the parties and not enter into dangerous forensic investigations aimed at unraveling what the parties would have wanted or thought, as opposed to what they have declared."[905]

448. Notably, a party seeking to dispel the presumption *cannot* rely on subjective feelings or thoughts about the will of the contracting parties.[906]

449. Article 1362 states that contracts "shall be negotiated, executed and performed according to the rules of good faith and according to the common intention of the parties."[907] Claimants mischaracterize the meaning of good faith under Peruvian law in the context of contract interpretation. For instance, relying on the principle of good faith, Claimants argue that they never would have invested in DRP and the Facility without Respondents' indemnity and defense promises.[908] But, as explained by Professor Varsi, Article 1362 refers to *objective* good faith, meaning that it "requires the parties to behave in accordance with a legal standard, such as the action of a correct and reasonable person, that is, a person who behaves with ordinary diligence."[909] It is an objective, reasonable person standard. Thus, Claimants' subjective thoughts and feelings are not relevant to this inquiry.

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[903] Varsi Expert Report-Contract, ¶ 4.39

[904] **RLA-062**, Peruvian Civil Code, 24 July 1984, Art. 1361.

[905] Varsi Expert Report-Contract, ¶ 4.41.

[906] Varsi Expert Report-Contract, ¶ 4.42.

[907] **RLA-062**, Peruvian Civil Code, 24 July 1984, Art. 1362.

[908] Contract Memorial, Section IV(2)(b).

[909] Varsi Expert Report-Contract, ¶ 4.22

450. Claimants and Professor Payet also omit important considerations that must be taken into account when interpreting the contract under the principle of good faith. For instance, Professor Payet concedes that, "in accordance with its terms, the [Peru Guaranty] does not extend to DRR or Renco."[910] But he then argues that it would be bad faith to exclude Claimants from the Peru Guaranty because they were supposedly promised that they would be protected from third-party claims during the negotiations of the STA.[911] "Good faith," however, cannot be used to change the content of a contract.[912]

451. Finally, without prejudice to the aforementioned cannons of interpretation, under Peruvian law parties are free to agree on how a contract should be interpreted.[913] The parties can determine, for example, which documents form part of the agreement and how they should be read. Thus, in the event that there is an inconsistency between the provisions of the different documents that are part of the contract, the parties may prefer that one prevail over the other in those situations.[914]

452. The Tribunal must apply the aforementioned rules and principles when interpreting the STA and the Peru Guaranty.

B. The Tribunal lacks jurisdiction over Claimants' STA claims

453. Claimants argue that Centromín breached certain obligations under Clause 6 of the STA. In particular, Claimants allege that Centromín breached its obligations under Clauses 6.2 and 6.3 to indemnify them for, and defend them in, the Missouri Litigations.[915] Moreover, Claimants assert that Centromín breached its obligation under Clause 6.1 to remediate the area surrounding the Facility.[916]

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[910] Payet Expert Report, ¶ 294.

[911] *See* Payet Expert Report, ¶ 299.

[912] Varsi Expert Report-Contract, ¶ 4.47.

[913] Varsi Expert Report-Contract, ¶ 4.50.

[914] Varsi Expert Report-Contract, ¶ 4.50.

[915] *See* Contract Memorial, ¶¶ 187–207.

[916] *See* Contract Memorial, ¶ 208.

454. According to Claimants, they can bring their claims because they are parties to the STA.[917] Specifically, in Claimants' view, four entities, "Centromín and DRP, and Renco and DRRC entered into the STA."[918] That is incorrect. The STA identifies only three original contracting parties—Centromín, DRP, and Metaloroya.[919] It defines the three contracting parties, the STA Parties, as "Centromín," "the Investor," and "the Company."[920] Claimants have never been STA Parties.

455. The Tribunal lacks jurisdiction over Claimants' STA claims for three reasons: **(i)** There is no arbitral consent because Claimants fall outside the scope of the STA's arbitral clause ("**STA Arbitral Clause**"), **(ii)** Claimants have no rights under the STA (including the right to arbitrate), **(iii)** Claimants are not otherwise parties to the STA Arbitral Clause.

1. Claimants fall outside the scope of the STA Arbitral Clause because they are not STA Parties

456. Claimants are not encompassed by the STA Arbitral Clause, which reads:

> "Any litigation, controversy, disagreement, difference or claim that may arise *between the parties* with regard to the interpretation, execution or validity derived or in relation to this contract that cannot be resolved by mutual agreement between them, will be submitted to legal arbitration of international character under the rules and procedures as established by UNCITRAL."[921]

457. The text of the STA Arbitral Clause makes clear that arbitral consent is limited to disputes "between the parties." No matter which Peruvian canon of interpretation is applied, Claimants are not STA Parties. This dispute is thus not between STA Parties. Accordingly, there is no consent—let alone clear and unequivocal consent—to arbitrate with Claimants. The Tribunal therefore lacks jurisdiction over Claimants' STA claims.

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[917] *See* Contract Memorial, ¶¶ 120–122.

[918] Contract Memorial, ¶ 57.

[919] **Exhibit R-001**, STA & Renco Guaranty, pp. 4–5.

[920] **Exhibit R-001**, STA & Renco Guaranty, pp. 4–5.

[921] **Exhibit R-001**, STA & Renco Guaranty, Clause 12.

a. A literal interpretation of the STA confirms that Claimants are not STA Parties

458. The first canon of interpretation under Peruvian law, the literal interpretation canon, provides that contracts are interpreted according to their text.[922] That is because the text of a contract represents the objective, common will of the parties.[923] Where the text is clear, there is no need to resort to subsidiary canons of interpretation.[924] The text of the STA is clear: Centromín, DRP, and Metaloroya were the original STA Parties. Renco and DRRC have never been STA Parties.

459. The heading of the STA reads:

> "The [STA] . . . entered into on the one part by **Empresa Minera Del Centro Del Peru S.A. (Centromín Peru S.A.)** . . . hereinafter **Centromín**; and on the other part **Doe Run Peru S.R. LTDA** . . . hereinafter **the Investor** . . . . Intervenes in this contract the **Empresa Metalurgica La Oroya, S.A. (Metaloroya S.A.)** . . . hereinafter **the Company**."[925] (Bold in original)

The heading of the STA therefore identifies and defines three original STA Parties: **(i)** Centromín, defined as "Centromín;" **(ii)** DRP, defined as "the Investor," and **(iii)** Metaloroya, defined as "the Company." As the table below demonstrates, the legal entities that constitute the STA Parties have changed over time, but the STA Parties have always remained Centromín, the Investor, and the Company[926]:

[922] Varsi Expert Report-Contract, ¶¶ 4.28–4.30.

[923] Varsi Expert Report-Contract, ¶¶ 4.27.

[924] Varsi Expert Report-Contract, ¶ 4.31.

[925] **Exhibit R-001**, STA & Renco Guaranty, pp. 4–5.

[926] Due to the changes in the identity of the STA Parties over time, unless otherwise noted Respondents will refer to the STA Parties using the defined terms in the jurisdictional section of this Contract Memorial.

Table 2: STA Parties			
	At Execution	After Absorption of Metaloroya[927]	After Assignments[928]
"Centromín"	Centromín	Centromín	Activos Mineros
"the Investor"	DRP	DRP	DRCL
"the Company"	Metaloroya	DRP	DRP
Not STA Parties			
Renco, DRRC, Peru			

460. Claimants argue that "[t]he STA's title page . . . lists both 'the Doe Run Resources Corporation and the Renco Group, Inc.' as parties to the agreement."[929] That is incorrect. As Claimants' expert, Professor Payet, recognizes, the STA does not identify DRRC and Renco as parties.[930] It identifies Claimants as interveners because they executed the separate Renco Guaranty, which is memorialized in the same public deed as the STA.[931] Moreover, the title page of the public deed that contains the STA is not part of the STA.[932] The heading (quoted in the previous paragraph), which *is* part of the STA, identifies only three contracting parties, Centromín, the Investor, and the Company. As Respondents will explain below, the STA's background section and Clause 13.1 confirm that it is the heading which identifies the STA parties.[933]

461. In this case, Renco and DRRC intervened as guarantors for the Investor. The Renco Guaranty appears at the end of the same public deed that contains the STA, in a section

[927] 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, p. 7.

[928] *See* **Exhibit R-004**, Contract Assignment, Clause 1.3; **Exhibit R-284**, Assignment of Centromin's Contractual Position to Activos Mineros, 19 March 2007.

[929] Contract Memorial, ¶ 120.

[930] *See* Payet Expert Report, ¶ 127 ("The fact that the Contract does not name DRR and Renco as parties is irrelevant.").

[931] Varsi Expert Report-Contract, ¶ 5.26.

[932] Varsi Expert Report-Contract, ¶ 5.18.

[933] **Exhibit R-001**, STA & Renco Guaranty, p. 8 ("By virtue of the above background, the corporations appearing in the heading enter into this contract."), Clause 13.1 ("For the purpose of the execution of this contract, the parties establish as their domiciles in Peru those addresses indicated in the heading of this contract.").

titled "Additional Clause." The Renco Guaranty is a distinct contract in which Claimants guarantee the Investor's compliance with its contractual obligations. The Renco Guaranty does not transform Claimants into STA Parties. Nor does the appearance of DRRC and Renco in the signature block of the public deed, arising solely from their consent to the Renco Guaranty, render them STA Parties.

462. Under Peruvian law, multiple, independent contracts can be memorialized in the same public deed.[934] That is the case here. First, the STA and the Renco Guaranty are different contracts because Peruvian law explicitly considers them distinct and provides unique rules governing each one. Specifically, each contract is a named-codified contract under Peruvian law. "Named" contracts are those that "have a name or denomination that allows their identification and, correlatively, differentiation from others."[935] Being named also signifies that the contract is regulated by a particular set of accepted rules—be they customary rules or legislation[936]. The latter type of named contract—for which legislation provides the regulation—is a "codified" contract[937].

463. Chapter 2 of Book VII of the Peruvian Civil Code provides the laws that regulate thirteen distinct named-codified contracts[938]. The public deed in this case contains two named-codified contracts—a sales contract (the STA) and a surety contract (the Renco Guaranty). Each is governed by its own set of laws: the STA is governed by Title I, Chapter 2, Book VII (Articles 1529 to 1601), while the Renco Guaranty is governed by Title X, Chapter 2,

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[934] Varsi Expert Report-Contract, ¶4.10–4.11, 5.22; **EVR-37**, Decreto Ley No. 26002, Article 51. (English Translation: "The public deed is every original document that is incorporated into the notarial protocol, authorized by the notary, which contains one or more jurídical acts.") (Spanish Original "Escritura pública es todo documento matriz incorporado al protocolo notarial, autorizado por el notario, que contiene uno o más actos jurídicos".).

[935] Varsi Expert Report-Contract, ¶ 5.29; **EVR-38**, Ortega Piana, *Marco A. Contratos nominados e innominados, típicos y atípicos, y su relación con las normas legales*, Revista Ius Et Praxis, No. 32, p. 98.

[936] Varsi Expert Report-Contract, ¶ 5.29; **EVR-38**, Ortega Piana, *Marco A. Contratos nominados e innominados, típicos y atípicos, y su relación con las normas legales*, Revista Ius Et Praxis, No. 32, p. 98.

[937] Varsi Expert Report-Contract, ¶ 5.29; **EVR-38**, Ortega Piana, *Marco A. Contratos nominados e innominados, típicos y atípicos, y su relación con las normas legales*, Revista Ius Et Praxis, No. 32, p. 100.

[938] Varsi Expert Report-Contract, ¶ 5.29; **RLA-062**, Peruvian Civil Code, 24 July 1984, Arts. 1529–1949.

Book VII (Articles 1868 to 1905).[939] In short, under Peruvian law, the STA and Renco Guaranty are distinct contracts, regulated by different provisions of the Civil Code.

464. Second, on a more basic level, as Professor Varsi explains, the STA and the Guaranty are independent juridical acts under Peruvian law.[940] A juridical act "is the manifestation of will intended to create, regulate, modify or extinguish legal relationships."[941] To be valid, each juridical act must meet certain requirements: It must have among other things, (i) an actors who manifest their will, a legitimate purpose, and the proper form.[942] Some examples of juridical acts are wills, marriages, and the recognition of paternity. A contract is another example.

465. In Peru, "[a] contract is an agreement between two or more parties whereby they create, regulate, modify or extinguish a legal relationship of an economic nature."[943] Like all juridical acts, each contract has its own actors manifesting their will and legitimate purpose.[944] Contracts, however, differ from some other juridical acts in important ways. Unlike a will or recognition of paternity, for instance, the manifestation of will necessary to create, modify, or extinguish the legal relationship must be joint—the common will of the contracting parties (the actors in contracts):

> "[T]he contract requires wills that in the internal order merge, so that consent is not a simple sum of wills, nor is it a community of wills, but ***a common will*** that implies full coincidence between offer and acceptance."[945] (Emphasis added)

Those requirements make clear that the STA and the Renco Guaranty are distinct contracts.

466. The common will needed to create the STA and the Renco Guaranty differs, because the actors (i.e., contracting parties) of primary contracts and guaranty contracts are different.

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[939] Varsi Expert Report-Contract, ¶¶ 5.30–5.31; **RLA-062**, Peruvian Civil Code, 24 July 1984, Arts. 1529–1601 (regulating sales contracts), Arts. 1868–1905 (regulating surety contracts).

[940] Varsi Expert Report-Contract, ¶ 5.22.

[941] **RLA-062**, Peruvian Civil Code, 24 July 1984, Art. 140; Varsi Expert Report-Contract, ¶ 4.2.

[942] **RLA-062**, Peruvian Civil Code, 24 July 1984, Art. 140; Varsi Expert Report-Contract, ¶¶ 4.3, 4.7.

[943] **RLA-062**, Peruvian Civil Code, 24 July 1984, Art. 1351.

[944] Varsi Expert Report-Contract, ¶ 4.7.

[945] Varsi Expert Report-Contract, ¶ 4.20.

As professor Varsi notes, guaranty contracts are executed between the guarantor and the beneficiary (i.e., the creditor); the primary debtor is not a party to the guaranty contract.[946] Likewise, Luciano Barchi Velaochaga states that "the guaranty contract . . . is the agreement between ***the guarantor*** and ***the creditor*** of the guaranteed relationship. The principal debtor is not a party to this contract" (emphasis added).[947]

467. That is consistent with the STA and the Renco Guaranty. The background section of the STA, by referencing the heading (which identifies the three STA Parties), identifies the entities whose common will is the basis of the STA: "By virtue of the above background, the corporations appearing in the heading enter into this contract."[948] Conversely, the intent of Renco and DRRC is noted in the Renco Guaranty, and is limited to their guaranty obligations: "The consortium composed by the Doe Run Resources Corporation and the Renco Group, Inc., warrants the compliance with the obligations contracted by the Investor, Doe Run Peru S.R. LTDA., therefore this contract is subscribed by [DRRC and Renco]."[949] Indeed, only DRRC, Renco, and Centromín (the beneficiary/creditor) have rights and obligations under the Renco Guaranty.[950] The principal debtor, DRP, is not a party to the Renco Guaranty.

468. The STA and the Renco Guaranty have two different purposes. The purpose of the STA was to transfer Metaloroya to DRP to allow for private investment.[951] The purpose of the Renco Guaranty is to guaranty DRP's obligations that run to Centromín.[952]

469. In short, the STA and the Renco Guaranty are distinct contracts. The following table identifies the STA Parties and the parties to the Renco Guaranty:

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[946] Varsi Expert Report-Contract, ¶ 4.83.

[947] **Exhibit JAP-068**, Luciano Barchi Velaochaga, *Apuntes sobre la fianza en el Código Civil peruano*, Ius Et Veritas, p. 36.

[948] **Exhibit R-001**, STA & Renco Guaranty, p. 8.

[949] **Exhibit R-001**, STA & Renco Guaranty, Additional Clause.

[950] **Exhibit R-001**, STA & Renco Guaranty, Additional Clause.

[951] Varsi Expert Report-Contract, ¶ 5.25.

[952] Varsi Expert Report-Contract, ¶¶ 5.27–5.28.

Table 3: STA and Renco Guaranty Parties	
STA	Renco Guaranty
Centromín	Centromín
The Investor	Renco
The Company	DRRC

470. Peruvian law on this matter is not unique, but instead consistent with the law of other countries. In the United States, for instance, the Court of Appeals for the Seventh Circuit has directly addressed the issue, reversing a ruling that a guarantor was bound by an arbitral clause in a main contract.[953] In that case, *Grunsdstad v. Ritt*, the guaranty was located in the same document as the contract containing the guaranteed obligations.[954] Nevertheless, for the court, that both contracts had been memorialized in one document was not a "dispositive distinction" from an earlier case in which each contract had been memorialized in separate documents.[955] The court explained that the guarantor was not a party to the underlying contract simply because it was a party to the guaranty.[956]

471. To be clear, Respondents do not request that the Tribunal apply any law other than Peruvian law. Instead, Respondents cite to jurisprudence from outside Peru to confirm that Peruvian law's treatment of guaranty contracts as independent from a main contract, even when both are memorialized in the same document, is not *sui generis*.

472. Faced with the clear text of the STA, Claimants resort to Professor Payet for two prophylactic rebuttals. Claimants seem to suggest that who the heading of the STA identifies as the STA Parties is irrelevant.[957] Instead, Professor Payet and Claimants assert that a contracting party is one who **(i)** has consented to the contract and **(ii)** has obtained

[953] **RLA-195**, *Grundstad v. Ritt*, 106 F.3d 201, 203, 205 (7th Cir. 1997).

[954] **RLA-195**, *Grundstad v. Ritt*, 106 F.3d 201, 205 (7th Cir. 1997).

[955] **RLA-195**, *Grundstad v. Ritt*, 106 F.3d 201, 205 (7th Cir. 1997).

[956] **RLA-195**, *Grundstad v. Ritt*, 106 F.3d 201, 205 (7th Cir. 1997).

[957] *See* Contract Memorial, ¶ 121.

rights or obligations under the contract.[958] They then conclude that Claimants meet both elements and thus are parties to the STA.[959] That first rebuttal fails for at least three reasons.

473. First, the rebuttal disregards basic principles of Peruvian contract law. Peruvian law grants parties autonomy to structure their contractual relationship as they see fit. It allows them to "freely determine their contract's content, so long as it does not contravene a mandatory legal norm."[960] The contracting parties' liberty to structure their contractual relationship includes the liberty to determine who they contract with.[961] And "[c]ontracts are binding as to the statements contained therein," because "[i]t is presumed that the express words of the contract correspond to the common intention of the parties."[962]

474. The notion that it is irrelevant who the STA Parties have identified as such brushes aside the text of the STA and the presumption that it represents the common will of the STA Parties. Instead, that the heading of the STA identifies Centromín, the Investor, and the Company as STA Parties represents their common will. That DRRC and Renco are not identified as such is also the common will of the STA Parties.

475. Relying on Professor Payet's own definition of a contracting party also casts aside the remaining principles of Peruvian contract law.[963] Claimants represent Professor Payet's definition as "Peruvian law."[964] But there is no such Peruvian law. In fact, Professor Payet recognizes that "Peruvian law does not define who the parties to a contract are."[965] His definition is based on a "general[ ] recogni[tion]."[966] Yet, only a mandatory provision of law, not a purported general recognition, can override the common will of contracting

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[958] *See* Payet Expert Report, ¶ 117; Contract Memorial, ¶ 121.

[959] *See* Payet Expert Report, ¶ 124–25; Contract Memorial, ¶ 121.

[960] **RLA-062**, Peruvian Civil Code, 24 July 1984, Art. 1354.

[961] *See* Varsi Expert Report-Contract, ¶ 4.55; Payet Expert Report, ¶ 5 ("As recognized by the Peruvian Constitutional Court, this right has two facets . . . self-determination to decide to enter into a contract, ***including with whom to enter into it*** and (ii) self-determination to decide the subject matter of the contract.") (emphasis added).

[962] **RLA-062**, Peruvian Civil Code, Art. 1361.

[963] *See* Contract Memorial, ¶ 121.

[964] *See* Contract Memorial, ¶ 121.

[965] *See* Payet Expert Report, ¶ 21.

[966] *See* Payet Expert Report, ¶ 21.

parties[967]. To accept Claimants' first rebuttal would be to eliminate the contracting parties' ability to decide who to contract with and obviate the STA Parties' common will.

476. Second, Professor Payet's definition of a contracting party (in addition to not being Peruvian law) is incorrect. As Professor Varsi notes, it is insufficient for Renco and DRRC to consent to contract.[968] What is necessary is that all contracting parties provide their joint consent (common will) to contract.[969] That means that Centromín, DRP, and Metaloroya must have consented to contract *with* Renco and DRRC. But as Respondents have detailed—and will continue to explain in the following sections—Centromín, DRP, and Metaloroya did not do so.

477. Third, even if Professor Payet's definition were correct, it would not help Claimants. Claimants did not "provide consent for the formation of the [STA]."[970] In fact, Renco and DRRC ceded their right to execute the STA to DRP.[971] Consequently, Centromín's authorization to execute the STA granted it the power to contract with only DRP.[972] Claimants provided consent only to become parties to the Renco Guaranty.

478. Additionally, Renco and DRRC did not "assume[ ] rights and obligations that are the object of the [STA]."[973] Professor Payet claims otherwise.[974] But there are two problems with his argument. To start, Professor Payet's argument that Claimants obtained obligations under the STA because they guaranteed DRP's obligations is circular. It presumes what it intends to conclude—that the Renco Guaranty and the STA are one contract.

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[967] **RLA-062**, Peruvian Civil Code, Art. 1354.

[968] *See* Varsi Expert Report-Contract, ¶¶ 4.62–4.63, 5.12.

[969] *See* Varsi Expert Report-Contract, ¶¶ 4.62–4.63, 5.12.

[970] *See* Payet Expert Report, ¶ 124.

[971] **Exhibit R-282**, Centromín Agreement No. 54-97, 15 September 1997; *see also* **Exhibit R-001**, STA & Renco Guaranty, p. 7 ("In accordance with the bidding conditions, the aforementioned consortium has assigned its rights to the Investor and this assignment has been authorized by the Cepri-Centromín agreement dated September 11, 1997.")

[972] **Exhibit R-283**, Centromín Agreement No. 77-97, 15 September 1997.

[973] *See* Payet Expert Report, ¶ 125.

[974] *See* Payet Expert Report, ¶¶ 126, 138.

479. Moreover, Claimants have no rights under the STA. Professor Payet contends that Claimants have rights under Clauses 5 and 6 of the STA.[975] But as Respondents demonstrate below, a systematic interpretation of those clauses demonstrates that Claimants fall outside their ambit. Instead, the rights and obligations in the STA run only between Centromín, the Investor, and the Company.[976]

480. Claimants' second rebuttal is that Renco *remained* an STA Party after it was released from the Renco Guaranty.[977] (For factual context, Renco was released from the Renco Guaranty three days after the execution of the STA.[978]) Claimants' response is based on an incorrect premise and a mischaracterization of Respondents' position. Claimants' premise—that Renco was once an STA Party—is incorrect. Further, Respondents' argument is not that Renco ceased to be an STA Party, but that it was never an STA Party and, after its release, was not a party to the Renco Guaranty either.[979]

481. In sum, a literal interpretation of the STA demonstrates that Centromín, the Investor, and the Company—not Claimants—are the STA Parties.

b. A systematic interpretation of the STA confirms that Renco and DRRC are not STA Parties

482. As the literal interpretation of the STA is clear, that should be the end of the interpretive exercise. But the Tribunal could also resort to the canon of systematic interpretation.[980] The canon of systematic interpretation allows resort to other contractual provisions as context to interpret an ambiguous clause.[981] The purpose of doing so is to obtain a reading of the ambiguous clause that is in harmony with the whole of the contract.[982]

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[975] *See* Payet Expert Report, ¶ 138.

[976] *See generally*, **Exhibit R-001**, STA & Renco Guaranty.

[977] Contract Memorial, ¶ 122.

[978] *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.

[979] **Exhibit R-012-39**, Peru's Reply on its Preliminary Objection under Article 10.20.4, *The Renco Group Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, 27 October 2015, ¶ 53.

[980] Varsi Expert Report-Contract, ¶ 4.32

[981] Varsi Expert Report-Contract, ¶¶ 4.34–4.35; **RLA-062**, Peruvian Civil Code, Art. 169.

[982] Varsi Expert Report-Contract, ¶ 4.34.

483. A systematic interpretation in this case entails determining whether reading the heading of the STA as identifying Centromín, the Investor, and the Company as STA Parties is consistent with the rest of the STA. Not only do the STA's remaining provisions support such a reading, they demand it. A systematic interpretation of the STA confirms Respondents' literal interpretation: Claimants are not STA Parties.

(i) General STA clauses demonstrate that Claimants are not STA Parties

484. To start, the STA's background section confirms that the three companies identified in the heading are the STA Parties. It reads: "By virtue of the above background, the corporations appearing in the heading enter into this contract."[983] The heading, in turn, identifies only three STA Parties—Centromín, the Investor, and the Company.[984]

485. Professor Payet conflates the cover page (or the title page) of the public deed (which is not part of the STA) with the heading of the STA (which is part of the STA).[985] The heading is located on pages 4 and 5 of Exhibit R-001.[986] The proper identification of the heading is confirmed by the model contracts in the Bidding Terms. No model contract contains a cover page or title page, but all model contracts contain a heading that (like the STA) identifies three contracting parties: Centromín, the Investor, and the Company.[987] And as with the STA, the background sections of all model contracts confirm that the heading identifies the contracting parties.[988] Below are the relevant excerpts from the model contracts:

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[983] **Exhibit R-001**, STA & Renco Guaranty, p. 8.

[984] **Exhibit R-001**, STA & Renco Guaranty, pp. 4–5.

[985] *See* Payet Expert Report, ¶ 127 ("But, in any case, the reference in the heading of the Contract to the fact that DRR and Renco intervene in it does not take away from them the quality of parties.").

[986] *See* **Exhibit R-001**, STA & Renco Guaranty, pp. 4–5.

[987] *See* **Exhibit R-187**, Bases and Contract Templates (Second Round), Centromín, 26 March 1997 ("**Bidding Terms (Second Round)**"), pp. 29, 43.

[988] *See* **Exhibit R-187**, Bidding Terms (Second Round), pp. 30, 44.

Figure 9: Capital Increase and Subscription of Shares Model Agreement[989]

Please issue in your Registry of Public Deeds, **THE AGREEMENT FOR THE INCREASE OF THE SHARE CAPITAL AND SUBSCRIPTION OF SHARES OF THE COMPANY METALÚRGICA LA OROYA S.A.,** which is entered into by and between, **COMPANY MINERA DEL CENTRO DEL PERÚ S.A. (CENTROMÍN),** with Unique Taxpayer Registration No. xxx, domiciled at Av. Javier Prado Este No. 2155, San Borja, Lima, represented by its General Manager xxx with Electoral Book No. xxx, authorized by Agreement of the Board of Directors of CENTROMÍN dated **xxx,** hereinafter **CENTROMÍN;** and, on the other part **xxx, [ ]** hereinafter **THE INVESTOR.**

Intervenes in this contract the **COMPANY METALÚRGICA LA OROYA S.A. (METALOROYA S.A.),** with Unique Taxpayer Registration No. XXX, domiciled at xxx, represented by its General Manager xxx, with Electoral Book No. xxx, authorized by Board of Directors Agreement dated xxx hereinafter **THE COMPANY.**

By virtue of the background information presented, the companies listed in the heading celebrate this agreement, under the following terms and conditions:

Figure 10: Share Transfer, Capital Increase, and Share Subscription Model Agreement[990]

Please issue in your Registry of Public Deeds, **THE SHARE TRANSFER AGREEMENT, INCREASE IN SHARE CAPITAL AND SUBSCRIPTION OF SHARES OF THE COMPANY METALÚRGICA LA OROYA S.A.,** entered into on the one hand, **EMPRESA MINERA DEL CENTRO DEL PERÚ S.A. (CENTROMÍN),** with Unique Taxpayer Registration No. **xxx,** domiciled at Av. Javier Prado Este No. 2155, San Borja, Lima, represented by its General Manager **xxx** with Electoral Book No. xxx, authorized by Agreement of the Board of Directors of CENTROMÍN dated **xxx,** hereinafter **CENTROMÍN;** and, on the other part **xxx, [.....]** hereinafter **EL INVESTOR.**

Intervenes in this contract the **COMPANY METALÚRGICA LA OROYA S.A. (METALOROYA S.A.),** with Unique Taxpayer Registration No. XXX, domiciled at xxx, represented by its General Manager xxx, with Electoral Book No. xxx, authorized by Board of Directors Agreement dated xxx hereinafter **THE COMPANY.**

By virtue of the above background information, the companies listed in the heading enter into this contract, under the following terms and conditions:

[989] *See* **Exhibit R-187**, Bidding Terms (Second Round), pp. 29–30.

[990] *See* **Exhibit R-187**, Bidding Terms (Second Round), pp. 43–44.

486. Moreover, Clause 13.1 recognizes both that the STA Parties are identified in the heading and that Respondents correctly locate the heading. It provides that "[f]or the purpose of the execution of this contract, the parties establish as their domiciles in Peru those addresses indicated in the heading of this contract."[991] Contrary to the cover page and title page of the public deed, the heading of the STA relays the domicile information and the identity of the STA Parties.[992] Renco and DRRC are not domiciled in Peru, nor are they named as parties in the heading.[993]

487. Claimants' absence from the provisions that establish the STA's object also indicates that they are not STA Parties. Clauses 1 and 2 identify the sales transaction that is the main object of the STA. Centromín transfers 99.9% of the Company's shares to the Investor.[994] As consideration for the transfer, the Investor "commits itself to pay to Centromín the amount of US$ 121,440,608 . . . in cash upon signature of this contract."[995] Clause 3 of the STA outlines the Investor's obligation to make a capital contribution to the Company.[996] References to Claimants are absent from those clauses, indicating that they are not STA Parties.

488. Claimants are also nonexistent in Clause 10, the STA's assignment of rights and obligations clause. Therein, Centromín, the Investor, and the Company consent in advance to the assignment of each STA Party's contractual position."[997] Because only Centromín, the Investor, and the Company have contractual positions, Clause 10 requires only them to provide notice of any assignment of their rights.[998] Clause 10 thus makes clear that Centromín, the Investor, and the Company—not Claimants—are STA Parties.

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[991] **Exhibit R-001**, STA & Renco Guaranty, Clause 13.1.

[992] *See* **Exhibit R-001**, STA & Renco Guaranty, pp. 4–5.

[993] DRRC is referenced only as the owner of DRP.

[994] **Exhibit R-001**, STA & Renco Guaranty, Clause 1.2.

[995] **Exhibit R-001**, STA & Renco Guaranty, Clause 2.

[996] **Exhibit R-001**, STA & Renco Guaranty, Clause 3.2.

[997] **Exhibit R-001**, STA & Renco Guaranty, Clause 10.

[998] **Exhibit R-001**, STA & Renco Guaranty, Clause 10.

489. In short, a systematic interpretation of general STA provisions affirms Respondents' literal interpretation.

(ii) The STA clauses at issue in this case indicate that Claimants are not STA Parties

490. The only substantive rights that Claimants' claim to possess under the STA are found only in Clauses 5 and 6. As Claimants see it, under Clauses 5 and 6 Respondents bound themselves to indemnify and defend Claimants from most third-party claims, including the Missouri Litigations.[999] But a harmonious reading of Clauses 5, 6, and 8.14 demonstrates that Clauses 5 and 6 do no such thing. Instead, Clauses 5 and 6 do not encompass Claimants. Under a systematic interpretation of the STA, that is further evidence that Claimants are not STA Parties.

491. To understand why Claimants misrepresent Clauses 5 and 6, it is important to explain the structure of Clauses 5, 6, and 8.14. Clauses 5 and 6 allocate responsibility for environmental matters between the Company (which, to recall, ultimately became DRP) and Centromín, and establish the consequences of this allocation. Under Clauses 5.1, 5.2, 5.3, and 5.4, the Company assumes responsibility for certain environmental matters.[1000] Clause 5.8 establishes the consequence of that allocation: the Company is to indemnify Centromín against third-party claims for which the Company has assumed responsibility.[1001] Clause 5.9 states that all other responsibility is allocated to Centromín pursuant to Clause 6.[1002]

492. Accordingly, Clause 6 is the analogue to Clause 5, but for Centromín. Clauses 6.1, 6.2, and 6.3 identify the environmental matters for which Centromín assumes responsibility.[1003] More specifically, under Clause 6.2, Centromín assumes responsibility (during the execution period for Metaloroya's PAMA) for third-party claims attributable to the Company and Centromín's activities, except for those for which the Company has assumed

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[999] *See* Contract Memorial, ¶¶ 151–172.

[1000] **Exhibit R-001**, STA & Renco Guaranty, Clauses 5.1–5.3.

[1001] **Exhibit R-001**, STA & Renco Guaranty, Clause 5.8.

[1002] **Exhibit R-001**, STA & Renco Guaranty, Clause 5.9.

[1003] **Exhibit R-001**, STA & Renco Guaranty, Clauses 6.1–6.3

responsibility in Clause 5.3.[1004] Pursuant to Clause 6.3, Centromín assumes responsibility (after the expiration of the legal term of Metaloroya's PAMA) for third-party claims attributable to Centromín's activities, except for those for which the Company has assumed responsibility in Clause 5.4.[1005]

493. The consequences of that allocation of responsibility are detailed in Clauses 6.5 and 8.14.[1006] Under Clause 6.5, Centromín is obligated to indemnify the Company against third-party claims for which Centromín has assumed responsibility.[1007] And Clause 8.14 provides that if Centromín receives notice from the Company or the Investor of a suit (or similar claim) within a reasonable time; that is related to a fact or act that is encompassed by Centromín's responsibilities, representations, and warranties; then Centromín will defend the Company or the Investor.[1008]

494. Ready correctly, Clauses 6 and 8.14 create one chain of interlocking provisions in relation to the allocation of responsibility for third-party claims. The first link, Clauses 6.2 and 6.3, identify the third-party claims for which Centromín "will assume responsibility."[1009] The second link, Clause 6.5, sets the first consequence of that assumption. It requires Centromín to indemnify the Company against third-party claims "for which it has assumed responsibility and obligation."[1010] The third link, Clause 8.14, sets the second consequence of that assumption. It requires Centromín to defend the Company against a suit (or similar claim) that is "related to any act or fact included within the responsibilities . . . [of] Centromín," so long as it receives notice of the suit or claim within a reasonable time.[1011]

[1004] **Exhibit R-001**, STA & Renco Guaranty, Clause 6.2.

[1005] **Exhibit R-001**, STA & Renco Guaranty, Clause 6.3.

[1006] Varsi Expert Report-Contract, ¶¶ 5.67–5.68.

[1007] **Exhibit R-001**, STA & Renco Guaranty, Clause 6.5.

[1008] **Exhibit R-001**, STA & Renco Guaranty, Clause 8.14. In other clauses of the STA, Centromín made representations and warranties to the Company and the Investor. So, Clause 8.14 applies to Company as to the relevant representations and warranties, and it applies to the Investor as well. Clauses 5 and 6 allocate responsibility only between the Company and Centromín. Thus, only Clause 8.14's applicability to the Company's responsibilities is relevant when analyzing the scope of Clauses 5 and 6.

[1009] **Exhibit R-001**, STA & Renco Guaranty, Clauses 6.2–6.3.

[1010] **Exhibit R-001**, STA & Renco Guaranty, Clause 6.5.

[1011] **Exhibit R-001**, STA & Renco Guaranty, Clause 8.14.

495. Pursuant to the canon of systematic interpretation under Peruvian law, those clauses must be read in a manner that provides consistency among them. Under Clauses 6.5 and 8.14, Centromín is obligated to indemnify and defend only the Company for third-party claims encompassed by Clause 6.2 and 6.3. The only interpretation of Clauses 6.2 and 6.3 that is consistent with Clauses 6.5 and 8.14 is one that concludes that the former—like the latter—encompass only the Company.[1012]

496. Below is a graphical representation of the correct interpretation of Clauses 6 and 8.14:

Table 4: Correct Interpretation of Clauses 6 and 8.14		
Clauses 6.2 and 6.3	"During the period approved for the execution of Metaloroya's PAMA, Centromín will assume responsibility for [certain] damages and claims by third parties."[1013] "After the expiration of the legal term of Metaloroya's PAMA, Centromín will assume responsibility for [certain] damages and third party claims."[1014]	Clause 6.2 and 6.3 (Allocation of Responsibility) (The Company) ↓ Clause 6.5 (Indemnity) (The Company) ↓ Clause 8.14 (Notice and Defense) (The Company)
Clause 6.5	"Centromín will protect and hold the Company harmless against third party claims and will indemnify it for any damages, responsibilities or obligations that may arise for which it has assumed responsibility and obligation."[1015]	
Clause 8.14	"Should the Company or the Investor receive any claim or judicial, administrative notice or notice of any kind, related to any act or fact included within the responsibilities, representations and warranties 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 the Company or the Investor from any obligation with regard to the same and Centromín shall be obligated to immediately assume those obligations as soon as it is notified."[1016]	

[1012] *See* Varsi Expert Report-Contract, ¶¶ 5.68, 5.70–5.71.

[1013] **Exhibit R-001**, STA & Renco Guaranty, Clause 6.2.

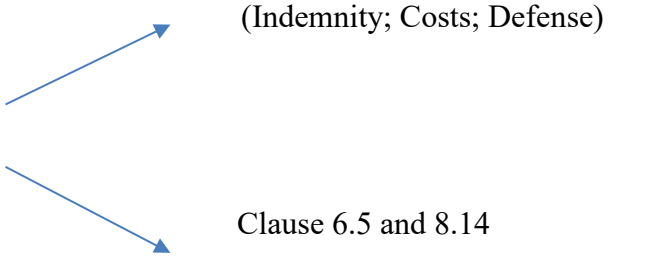
[1014] **Exhibit R-001**, STA & Renco Guaranty, Clause 6.3.

[1015] **Exhibit R-001**, STA & Renco Guaranty, Clause 6.5.

[1016] **Exhibit R-001**, STA & Renco Guaranty, Clause 8.14.

497. Claimants, on the other hand, read Clauses 6 and 8.14 as establishing a fork-in-the-road framework. The first path relies only on Clauses 6.2 and 6.3, which Claimants read as "assumption of liability" clauses.[1017] According to Claimants, under the law of some states of the United States, "assumption of liability" clauses are composed of three obligations—to defend in litigation, to pay litigation costs, and to indemnify for damages.[1018] Because Clauses 6.2 and 6.3 do not state that Centromín's "assumption of liability" covers only the Company, Claimants argue that it "extends to anyone who could be sued by a third-party for damages falling within the scope of the assumption of liability."[1019] The second path relies instead on Clauses 6.5 and 8.14, which respectively provide for indemnity and defense, but only for the Company.[1020] Below is a graphical representation of Claimants' interpretation of Clauses 6 and 8.14:

Table 5: Claimants' Interpretation of Clauses 6 and 8.14



[1017] Contract Memorial, ¶ 161.

[1018] Contract Memorial, ¶¶ 161, 164.

[1019] Contract Memorial, ¶ 166.

[1020] Contract Memorial, ¶¶ 166, 171.

498. Claimants' interpretation fails for numerous reasons. First, Claimants invoke inapplicable law to define imprecise translations. To begin, while Clauses 6.1, 6.2, and 6.3 identify the environmental matters for which the Centromín "assumes responsibility" or "will assume responsibility,"[1021] Claimants' translation of the STA applies the phrase "will assume ***liability***" only to Clauses 6.2 and 6.3 (emphasis added).[1022] Clause 6.1 still reads "assumes ***responsibility***" (emphasis added).[1023] The problem with the translation is not that *responsabilidad* cannot mean legal liability—it can. Instead, the problem is that Claimants cite to United States jurisprudence to conflate the phrase "will assume liability" with their view of the meaning of the legal concept of "assumption of liability" clauses under the laws of New Jersey, New York, California, Louisiana, and Oklahoma.[1024] But purported United States law has no bearing on the STA.

499. The STA is governed by Peruvian law. And as Professor Varsi explains, there is no "assumption of liability" term-of-art under Peruvian law.[1025] Peruvian law does not regulate indemnity and defense clauses.[1026] Thus, if contracting parties agree to indemnity, they include an indemnity provision in their contract and define its scope.[1027] The STA parties did that here in Clause 6.5 (and others). And if contracting parties agree to a defense obligation, they include such a provision in their contract and define its scope.[1028] The STA parties did so here in Clause 8.14. The STA did not define the content of its clauses by reference to United States law. Therefore, rather than subject the STA to the minutiae

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[1021] **Exhibit R-001**, STA & Renco Guaranty, Clauses 6.1, 6.2, 6.3.

[1022] **Exhibit C-001**, STA & Renco Guaranty, Clauses 6.2, 6.3.

[1023] **Exhibit C-001**, STA & Renco Guaranty, Clause 6.1.

[1024] *See* Contract Memorial, ¶¶ 161–65. *See also* **CLA-034**, *Caldwell Trucking PRP v. Rexon Technology Corp*., 421 F.3d 234, 243 (3d Cir. 2005) (applying New Jersey law); **CLA-028**, *Bouton v. Litton Indus., Inc.,* 423 F.2d 643, 650 (3d Cir. 1970) (applying New York law); **CLA-035**, *Lee-Thomas, Inc. v. Hallmark Cards, Inc*., 275 F.3d 702, 706 (8th Cir. 2002) (applying California law); **CLA-036,** *Davis Oil Co. v. TS, Inc.*, 145 F.3d 305, 316 (5th Cir. 1998) (applying Louisiana law**)**; **CLA-027**, *Thrifty Rent-A-Car Sys. v. Toye*, 1994 U.S. App. LEXIS 8034, at *5 (10th Cir. Apr. 19, 1994).

[1025] Varsi Expert Report-Contract, ¶¶ 4.93, 5.67.

[1026] Varsi Expert Report-Contract, ¶ 4.93, 5.67.

[1027] Varsi Expert Report-Contract, ¶ 4.93, 5.67.

[1028] Varsi Expert Report-Contract, ¶¶ 4.93, 4.106.

of Oklahoma law, Respondents interpret the STA under the interpretative canons of the applicable law: Peruvian law.

500. The 1999 modification of the STA confirms that Claimants' reliance on purported United States law is misplaced. The 1999 modification includes an agreement to transfer land from Centromín to DRP.[1029] As part of the land transfer, both Centromín and DRP made representations and warranties. In particular, each represented that it would indemnify the other for claims for which the first was responsible.[1030] Centromín and DRP's indemnity obligations included indemnity for "costs for its own defense," "procedural costs" and "payment of damages to third-parties."[1031] Claimants' view, however, is the following:

> "An 'assumption of liability' is different from, and broader than, and subsumes within it, an obligation to indemnify. A party that agrees to assume a liability takes that liability upon itself and is obligated to cover the losses (including the litigation costs) of anyone who is sued for damages falling within the scope of the liability the party has assumed."[1032]

If Claimants' distinction between an "assumption of liability" clause and a mere indemnity clause were true under Peruvian law, the indemnity clause relating to the land transfer would make no sense—for it would bleed into the "different" and "broader" "assumption of liability" concept. Rather, the 1999 modification demonstrates that Peruvian contracting parties who agree to indemnity or defense obligations include relevant provisions in their contract and specifically define their scope.

501. Second, the STA has multiple provisions that follow the same responsibility-consequence structure of Clauses 6 and 8.14, further confirming Respondents' interpretation. The provisions **(i)** specify the relevant responsibility, representation, or warranty; **(ii)** define the scope of the indemnity and/or defense obligation; and **(iii)** identify the holder, or holders, of the indemnity and/or defense right.

[1029] *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 2 (clauses modifying the STA), Clauses 3–9 (clauses relating to the transfer of land to DRP).

[1030] *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, Clauses 6(e), 7(c).

[1031] *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, Clauses 6(e), 7(c).

[1032] Contract Memorial, ¶ 161.

Table 6: Indemnity and Defense Clauses of the STA	
Clauses 5.3, 5.4, and 5.8	"During the period approved for the execution of Metaloroya's PAMA, the Company will assume responsibility for [certain] damages and claims."[1033] "After the expiration of the legal term of Metaloroya's PAMA, the Company will assume responsibility for [certain] damages and third party claims."[1034] "The Company shall protect and hold Centromín harmless against third party claims and indemnify it for any damage, responsibility or obligation that may come for which it has assumed responsibility and obligation."[1035]
Clause 8.4	"Centromín shall be responsible for any wages or benefits . . . due or accrued before the date of execution of this contract . . . . Centromín will indemnify, defend and hold the Company harmless from the same."[1036]
Clause 8.9	"Centromín assumes responsibility for any matters that may arise from any of [the contracts in annex 8.9] prior to the date of this contract and shall indemnify and hold the Company harmless of the same."[1037]
Clause 8.10	"Annex 8.10 contains a list of [certain licenses]. [Centromín makes certain representations]. Centromín agrees to indemnify, defend and protect from damages the Company and its shareholders, directors, officers, employees, agents and independent contractors from claims, demands, suits, actions, procedures and harm caused by or as a result of any inaccuracy in the aforementioned representation."[1038]

[1033] **Exhibit R-001**, STA & Renco Guaranty, Clause 5.3.

[1034] **Exhibit R-001**, STA & Renco Guaranty, Clause 5.4.

[1035] **Exhibit R-001**, STA & Renco Guaranty, Clause 5.8.

[1036] **Exhibit R-001**, STA & Renco Guaranty, Clause 8.4.

[1037] **Exhibit R-001**, STA & Renco Guaranty, Clause 8.9.

[1038] **Exhibit R-001**, STA & Renco Guaranty, Clause 8.10.

Table 6: Indemnity and Defense Clauses of the STA	
Clause 8.16	"Centromín represents and warrants that, immediately prior to the transfer of the same to the Company, it had the sole right, title and interests on all of the assets referred to in this contract . . . All of such assets . . . are free of all liens, claims, obligations and interests on any third party whatsoever. Centromín shall indemnify, defend and hold the Company harmless from and against any and all demands, claims, actions and proceedings . . ."[1039]
Clauses 8.16 and 8.9	"Numeral 8.16 lists [certain data, intellectual property rights, etc.] that are relevant for the La Oroya Metallurgical complex and all the processes and other intellectual property right that are required for the same. All of them will be transferred to the Company without royalties and are free from liens, obligations and lawsuits or other demands whatever they may be and Centromín shall indemnify and hold the Company harmless from any demands related to the same."[1040]
Clause 8.14	The responsibilities, representations, and warranties provided by Centromín in Clause 8 are also subject to Clause 8.14's defense obligation.[1041]

502. Those parallel structures show that when the STA Parties provided for indemnity or defense, they did so by identifying the nature of responsibility, representation, or warranty and linking it to a detailed indemnity or defense obligation. Moreover, when the STA Parties intended to indemnify or defend anyone other than the Company—e.g., "its shareholders, directors, officers, employees, agents and independent contractors"—they established so expressly.[1042] They did not subsume indemnity obligations into amorphous "assumption of liability" clauses, or extend them to an unknown number of entities. The structure of the STA further contradicts Claimants' interpretation of Clauses 6.2 and 6.3.

503. Third, Claimants' interpretation would render Clauses 6.5 and 8.14 devoid of any utility. According to Claimants, "assumption of liability" clauses encompass indemnity, costs, and

[1039] **Exhibit R-001**, STA & Renco Guaranty, Clause 8.16.

[1040] **Exhibit R-001**, STA & Renco Guaranty, Clause 8.9.

[1041] *See* **Exhibit R-001**, STA & Renco Guaranty, Clause 8.14.

[1042] **Exhibit R-001**, STA & Renco Guaranty, Clause 8.10.

defense obligations.[1043] Claimants read Clauses 6.2 and 6.3 as applying to "Metaloroya or anyone else"[1044] and as not limited to "Metaloroya."[1045] In other words, Clauses 6.2 and 6.3 encompass Metaloroya too. But Clauses 6.5 and 8.14 already encompass the Company (originally, Metaloroya). Under Claimants' reading, the obligations to indemnify (Clause 6.5) and to defend (Clause 8.14) the Company would be superfluous. Indeed, in Claimants' translation, Clause 6.5 requires Centromín to indemnify the Company for claims for which "it has assumed 'liability'" already.[1046]

504. Fourth, Claimants' reading of Clauses 6.2 and 6.3 as applying to "anyone who could be sued" and "Metaloroya or anyone else" is limitless.[1047] If Clauses 6.2 and 6.3 are not circumscribed to the Company, there is no limit to whom they apply. Proving the point, Claimants ask that the Tribunal find Respondents in breach of the STA and Peru Guaranty for not defending and indemnifying "related entities and individuals in the personal injury St. Louis lawsuits."[1048] Claimants identify those nine "phantom-claimants" in paragraph 80 of their Contract Memorial: "DR Acquisition Corp. and Renco Holdings, Inc., and directors and officers Marvin K. Kaiser, Albert Bruce Neil, Jeffery L. Zelms, Theodore P. Fox III, Daniel L. Vornberg, Jerry Pyatt, and Ira L. Rennert."[1049] That reading is perverse.

505. Claimants' attempt to submit the claims of those phantom-claimants confirms how groundless their interpretation of the STA is. There is no contractual basis to differentiate between Claimants and those phantom-claimants, or indeed any other entity or individual. Claimants are just as absent from Clauses 6.2 and 6.3 as everyone else, other than the Company and Centromín. Either Clauses 6.2 and 6.3 operate only between the Company

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[1043] Contract Memorial, ¶¶ 161, 164.

[1044] Contract Memorial, ¶ 63.

[1045] Contract Memorial, ¶ 168 ("Clause 6.2 does not restrict that assumption of liability to third-party claims filed only against DRP/Metaloroya.").

[1046] **Exhibit R-001**, STA & Renco Guaranty, Clause 6.5 ("Centromín will protect and hold the Company harmless against third party claims and will indemnify it for any damages, liabilities or obligations that may arise for which it has assumed liability and obligation.") (internal quotation marks added).

[1047] Contract Memorial, ¶¶ 63, 166, 168.

[1048] Contract Memorial, ¶ 246.

[1049] Contract Memorial, ¶ 80.

and Centromín, or they encompass "anyone who could be sued."[1050] Instead of drawing the boundary at "anyone who could be sued," as Claimants propose, the Tribunal should draw the boundary at the Company, the only entity to whom Clauses 6.2 and 6.3 run. That reading is consistent with the text of Clauses 6.2 and 6.3; it is in harmony with Clauses 6.5 and 8.14; and it rejects the unbelievable notion that Centromín would oblige itself to indemnify and defend innumerable, indeterminate entities and individuals.

506. Fifth, an unbound reading of Clauses 6.2 and 6.3 is also in conflict with Claimants' alleged desire to limit exposure to third-party claims.[1051] To recall, Clauses 5.3 and 5.4 identify the third-party claims for which the Company will be responsible. They share the same "will assume responsibility" language with Clauses 6.2 and 6.3.[1052] Thus, if Clauses 6.2 and 6.3 constitute "assumption of liability" clauses as Claimants understand the concept, then so do Clauses 5.3 and 5.4. Likewise, neither Clause 5.3 nor Clause 5.4 is textually limited to Centromín. Under Claimants' understanding, the Company would be required to indemnify and defend countless legal and natural persons. Neither Metaloroya nor DRP (who became the Company upon absorbing Metaloroya) agreed to indemnify and defend numerous, unidentified entities and individuals.

507. Sixth, reading Clauses 5.3 and 5.4 as "assumption of liability" clauses renders devoid of utility Clause 5.8, under which the Company is required to indemnify Centromín against third-party claims "for which it has assumed liability."[1053] Instead, a reasonable interpretation of Clause 5 is that it too creates one chain of interlocking provisions. The first link, Clauses 5.3 and 5.4, identifies the category of third-party claims for which the Company is responsible.[1054] The second link, Clause 5.8, establishes the consequences of that assumption—i.e., indemnity.[1055] There is no notice requirement because, in the

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[1050] Contract Memorial, ¶ 166.

[1051] *See e.g.*, Contract Memorial, ¶ 189 ("The essence of the bargain that Centromín/Peru and the Renco Consortium struck was that Centromín (now Activos Mineros) and Peru bore the risk for third-party claims except in a few isolated circumstances that do not apply here.").

[1052] **Exhibit R-001**, STA & Renco Guaranty, Clauses 5.3, 5.4.

[1053] **Exhibit R-001**, STA & Renco Guaranty, Clause 5.8.

[1054] **Exhibit R-001**, STA & Renco Guaranty, Clauses 5.3, 5.4.

[1055] **Exhibit R-001**, STA & Renco Guaranty, Clause 5.8.

absence of a provision analogous to Clause 8.14, the Company has no obligation to defend anyone in litigation.

508. Seventh, a limitless reading of Clauses 5 and 6 would conflict with their dispute resolution mechanism. Clauses 6.3 and 5.4(c) provide a mechanism for the resolution of disputes about the allocation of responsibility for third-party claims under Clauses 5 and 6. Under Clause 6.3, "[I]n the case that damages are attributable to Centromín and the Company, the provisions set forth in numeral 5.4.c. shall apply."[1056] Clause 5.4(c), in turn, establishes the parameters of the dispute resolution mechanism. It provides that "[i]f the damages be attributable to Centromín and to the Company, the Company will assume responsibility in proportion to its contribution to the damage."[1057] Further, in the absence of a consensus "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 . . . the matter will be submitted to the decision of an expert."[1058] Centromín and the Company are bound by the expert's decision if the claim is for less than USD 50,000.[1059] If the claim is for that amount or greater, either can submit the dispute to arbitration pursuant to the STA Arbitral Clause.[1060]

509. The dispute resolution mechanism addresses the allocation of responsibility between only the Company and Centromín, any resulting decision binds only them, and only they can submit their dispute to arbitration under the STA Arbitral Clause. That indicates that the allocation of responsibility under Clauses 5 and 6 is likewise circumscribed to Centromín and the Company.

510. In conclusion, a systematic interpretation of the STA confirms the literal interpretation of the STA. The only rights that Claimants invoke under the STA are those from Clauses 5 and 6.[1061] But the foregoing analysis demonstrates that Claimants are not encompassed by

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[1056] **Exhibit R-001**, STA & Renco Guaranty, Clause 6.3.

[1057] **Exhibit R-001**, STA & Renco Guaranty, Clause 5.4(c).

[1058] **Exhibit R-001**, STA & Renco Guaranty, Clause 5.4(c).

[1059] **Exhibit R-001**, STA & Renco Guaranty, Clause 5.4(c).

[1060] **Exhibit R-001**, STA & Renco Guaranty, Clause 5.4(c).

[1061] *See* Contract Memorial, ¶¶ 151–93.

those clauses. Claimants' exclusion, in turn, supports reading the heading of the STA as accurate—only Centromín, the Investor, and the Company are STA Parties.

c. A good faith interpretation of the STA confirms that Claimants are not STA Parties

511. Under Peruvian law, contracts are to be interpreted pursuant to the principle of good faith.[1062] As relevant here, the principle of good faith allows interpreters to consider conduct before, during, and after the execution of a contract when interpreting a contract under the Peruvian canons of interpretation.[1063] In this case, that conduct further confirms that Claimants are not STA Parties.

512. Pre-execution conduct evinces that Claimants and the STA Parties knew that only DRP would execute the STA. For instance, Claimants ceded to DRP the rights they had acquired as winners of the bidding process.[1064] In response, Centromín approved the transfer of rights,[1065] and authorized the execution of the STA "with the company Doe Run del Perú S.R. Ltda."[1066] That limited authorization is further memorialized in the STA.[1067]

513. Moreover, Centromín's pre-execution conduct demonstrates that it would indemnify only Metaloroya under the future STA. In its answer to question 42 of the second round of consultations, Centromín stated that its indemnification obligation would run to the Company (now, DRP):

> "Assuming that the new owners of the METALOROYA comply with the PAMA terms and adopt all measures against contamination in order to comply with national and international rules, but Centromín does not correct the existing contamination (prior to the transfer) and a legal entity (local or foreign) files a

[1062] **RLA-062**, Peruvian Civil Code, 24 July 1984, Arts. 168, 1362.

[1063] Varsi Expert Report-Contract, ¶¶ 4.46, 5.13.

[1064] **Exhibit R-282**, Centromín Agreement No. 54-97, 15 September 1997; *see also* **Exhibit R-001**, STA & Renco Guaranty, p. 7.

[1065] **Exhibit R-282**, Centromín Agreement No. 54-97, 15 September 1997.

[1066] **Exhibit R-283**, Centromín Agreement No. 77-97, 15 September 1997.

[1067] **Exhibit R-001**, STA & Renco Guaranty, p. 70 ("It is unanimously agreed . . . To authorize engineers César Polo Robilliard and Ángel Álvarez Angulo so that either may sign the contract of capital stock increase and stock transfer of Metaloroya S.A., with the company Doe Run Peru S.R. LTDA.")

> claim in a national or international court ... How does Centromín propose to relieve METALOROYA from responsibility?
>
> CENTROMÍN has ordered the organization of and provided the funds to comply with the environmental remediations [sic] for which it is responsible, thereby guaranteeing compliance. In addition ***METALOROYA*** will be held harmless from such remediations [sic] and from third-party claims that are CENTROMÍN's responsibility by signing the contract."[1068] (Emphasis added)

Centromín's answer reinforces Respondents interpretation that Renco and DRRC are not encompassed by Clauses 5 and 6 of the STA and, in turn, that they are not STA Parties.

514. DRP's post-execution conduct confirms that Claimants are not STA Parties. First, DRP's assignment of its contractual position demonstrates that Renco group entities have understood that Claimants are not STA Parties. On 1 June 2001, DRP assigned its contractual position as the Investor to DRCL (Doe Run Cayman Ltd.). In that intra-Renco group instrument, DRP and DRCL recognize that "The [STA] was executed by the Empresa Minera del Centro de Perú S.A. (Centromín), Doe Run Perú as the Investor and Metaloroya as the Company receiving the investment."[1069] DRP and DRCL correctly interpreted the STA then. Renco and DRRC can do so now.

515. Second, the 1999 modification of the STA also confirms that Claimants are not STA Parties. On 21 December 1999, DRP and Centromín executed the first modification to the STA.[1070] As Clause 1.1 of the 1999 modification explains, the STA was executed "by and between Centromín Perú S. A., Metaloroya S.A. and Doe Run Peru S.R.L."[1071]

516. Third, the Peru Guaranty also indicates that Renco and DRRC are not STA Parties. The Peru Guaranty, concluded on 21 November 1997, identifies DRP as "the Investor."[1072] It

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[1068] **Exhibit R-201**, Question and Answers Round 2, PDF p. 36, query 42.

[1069] **Exhibit R-004**, Contract Assignment, Clause 1.3.

[1070] **Exhibit R-003**, Modification of the Contract to Transfer Shares, Increase Company Capital and Subscription of Shares of Metaloroya, 17 December 1999, Clause 2.1.

[1071] **Exhibit R-003**, Modification of the Contract to Transfer Shares, Increase Company Capital and Subscription of Shares of Metaloroya, 17 December 1999, Clause 1.1.

[1072] **Exhibit R-002**, Guaranty Agreement, 21 November 1997 ("**Peru Guaranty**"), p. 1.

further explains that "The Investor and [Centromín] . . . entered, on October 23 1997, into the [STA]."[1073] Through the Peru Guaranty, Peru "acknowledge[d] that pursuant to the bidding conditions of the aforementioned International Public Bidding, ***the members of the winning consortium assigned their rights in favor of the Investor so that it would sign the*** [***STA***]" (emphasis added).[1074]

517. Importantly, Peru's guaranty runs *only* to DRP. Clause 2.1 of the Peru Guaranty provides that "[Peru] hereby guarantees the Investor the representations, assurances, guaranties and obligations assumed by [Centromín] under the [STA]."[1075] Claimants' translated quote, in paragraph 184 of their Contract Memorial, replaces the singular of the defined term "the Investor" with the plural, "the Investors."[1076] That monumental scrivener's error is inexplicable given that Claimants' own translation correctly uses the singular.[1077] Also inexplicable is the notion that DRP would execute a guaranty that runs only to it if, as Claimants contend, they "would not proceed with the purchase unless," (i) "Centromín retained and assumed liability for any and all third-party claims . . . including, of course, claims against [Claimants]", and (ii) "the Peruvian government guaranteed Centromín's declarations, guarantees, and obligations under the [STA]."[1078]

518. As Professor Payet concedes, "in accordance with its terms, the Guarantee Agreement does not extend to DRR or Renco."[1079] He argues, however, that because Renco and DRRC are, in the fictitious contract Claimants have fabricated, encompassed by Clauses 5 and 6 of the STA, the Peru Guaranty should be read instead as encompassing them.[1080] That analysis not only presumes the correctness of his conclusion that Renco and DRRC are STA Parties and encompassed by Clauses 5 and 6, but also it requires a rewrite of the Peru Guaranty. Putting the logical fallacy of conclusions-turned-premises aside, under a good faith

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[1073] **Exhibit R-002**, Peru Guaranty, Art. 1.1.

[1074] **Exhibit R-002**, Peru Guaranty, Art. 2.2.

[1075] **Exhibit R-002**, Peru Guaranty, Art. 2.1.

[1076] *Compare* **Exhibit R-002**, Peru Guaranty, p. 1, Art. 2.1 *with* Contract Memorial, ¶ 184.

[1077] **Exhibit C-106**, Peru Guaranty, Art. 2.1.

[1078] Contract Memorial, ¶ 181 (international quotation marks omitted).

[1079] Payet Expert Report, ¶ 294.

[1080] *See* Payet Expert Report, ¶¶ 294–299.

interpretation of the STA, the limited scope of the Peru Guaranty reinforces the notion that Claimants are not STA Parties.

519. Fifth, as Claimants' statements during the course of the Missouri Litigations show, only an opportunistic reading of the STA can lead to the conclusion that they are STA Parties. In their opposition to a motion to dismiss an appeal before the United States Court of Appeals for the Eighth Circuit, Claimants asserted that "Peru could never have anticipated that its obligations would turn on the adjudication of claims in a foreign forum under another sovereign's tort laws."[1081] Respondents agree, precisely because Claimants are not STA Parties, nor are they owed any indemnity or defense obligations.

520. A good faith reading of the STA leads to only one interpretation—Claimants are not STA Parties.

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521. In sum, under a literal, systematic, and good faith interpretation of the STA, Claimants are not STA Parties. As the heading of the STA is clear under those interpretive canons, there is no need to engage in a functional interpretation. Because the STA Arbitral Clause grants arbitral consent only to disputes "between the parties," the Tribunal lacks jurisdiction over Claimants' STA claims.[1082]

2. Claimants have no rights under the STA (including the right to arbitrate) because they are not STA Parties

522. Because Claimants are not STA Parties, they are not in privity with Centromín. Article 1363 of the Peruvian Civil Code codifies the principle of privity under Peruvian law, pursuant to which "[t]he effects of the contract are limited to its parties."[1083] Because Claimants are not STA Parties, they have no rights under the STA, including the right to arbitrate. Consequently, there is no arbitral consent, and the Tribunal lacks jurisdiction over Claimants' STA claims.

[1081] **Exhibit R-286**, Claimants' Opposition to Motion to Dismiss Appeal, United States Court of Appeals for the Eighth Circuit, 7 January 2019, p. 19.

[1082] **Exhibit R-001**, STA & Renco Guaranty, Clause 12.

[1083] **RLA-062**, Peruvian Civil Code, 24 July 1984, Art. 1363.

523. As Professor Varsi explains, under Peruvian law, "

> "[Under the principle of privity] the contract only binds and grants authority to those who freely entered into it, obliging themselves to fulfill it in accordance with the agreement. *Contrario sensu*, those who did not enter into the contract, and who did not provide their consent, are not bound by its contractual terms or by the effects radiating from the contractual business."[1084]

524. The principle of privity applies to arbitral clauses just as it applies to other contracts. As Professor Born explains, "The principle that the rights and obligations of an arbitration agreement apply only to the agreement's parties is a straightforward application of the doctrine of privity of contract."[1085] Accordingly, arbitral tribunals have dismissed claims for lack of arbitral consent due to a lack of privity. The *Cable Television* tribunal, for instance, held that it lacked jurisdiction over the dispute before it because there was no privity of contract between the claimants and the respondent in that case.[1086]

525. The same is true here, Claimants are not, and never were, STA Parties. In other words, the STA Parties did not consent to contract with Claimants, including with respect to the STA Arbitral Clause. There is no arbitral consent in this case—let alone clear and unambiguous consent—and hence the Tribunal lacks jurisdiction.

526. Claimants propose that they are third-party beneficiaries of the STA.[1087] They are not. Articles 1457 to 1469 of the Civil Code of Peru govern contracts for the benefit of third-parties.[1088] Under Article 1457, "[b]y the contract in favor of a third party, the promisor

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[1084] Varsi Expert Report-Contract, ¶¶ 4.56, 4.64–4.67.

[1085] **RLA-196**, Gary Born, INTERNATIONAL COMMERCIAL ARBITRATION (THIRD EDITION), 2021, § 10.01[A].

[1086] **RLA-197**, *Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltd. v. Federation of St. Kitts and Nevis*, ICSID Case No. ARB/95/2, Award of the Tribunal, 13 January 1997, ¶ 2.27 ("[I]t seems clear that the Government of Nevis, as stated in the Agreement, is the proper party to the Agreement and, in the absence of any assignment, that the Federation has no locus standi or privity of contract with Cable and should not be substituted therefor as claimed by Cable."), ¶ 5.14 ("[T]he Federation is not a proper party to these proceedings, was not a party to the Agreement and there is no privity of contract between the Federation and Cable. Accordingly, there is no agreement between the Federation and Cable for Arbitral Proceedings under ICSID rules and, consequentially, no consent by the Federation to the Arbitration proceedings and no date of consent for the purpose of this hearing.").

[1087] Contract Memorial, ¶ 207.

[1088] **RLA-062**, Peruvian Civil Code, 24 July 1984, Arts. 1457–69.

undertakes with the stipulator to fulfill performance for the benefit of a third person."[1089] In other words, "[t]he contract is said in favor of third parties when a party (stipulator) designates a third party as beneficiary of the performance due by the counterparty (promisor)."[1090]

527. As Professor Varsi explains, for a contract to be for the benefit of a third-party, "[i]t is essential that at least three subjects be evidenced in the contract: the stipulator, the promisor, and the third-party beneficiary."[1091] A third-party beneficiary must be determined or determinable. A determined third-party beneficiary is one that is expressly identified in the contract or the relevant clause.[1092] A determinable third-party beneficiary is one for which the contracting parties have defined criteria for its future identification.[1093] A third-party beneficiary would be determinable, for instance, if contracting parties agree that the performance would be for the benefit of the winner of a tender for an employment position.[1094] A third-party is *not an entity that is absent from the contract and for which there are no objective criteria for its future identification.*[1095] The absence of a determined or determinable third-party does not convert "anyone who could be sued"[1096] into a third-party beneficiary. Rather, it indicates that the contract or contractual provision at issue is not for the benefit of a third-party.[1097]

528. Claimants contend that they are third-party beneficiaries of Clauses 5 and 6.[1098] But they are not expressly identified in Clauses 5 or 6, nor are there any criteria therein providing an objective means of determination. In addition, Claimants' submission of the claims of

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[1089] **RLA-062**, Peruvian Civil Code, 24 July 1984, Art. 1457 (Spanish Original: "*Por el contrato en favor de tercero, el promitente se obliga frente al estipulante a cumplir una prestación en beneficio de tercera persona*.").

[1090] Varsi Expert Report-Contract, ¶ 4.69 (citing **EVR-39**, BIANCA, Massimo, *Derecho Civil 3,* El Contrato. 2007, pp. 588-589).

[1091] Varsi Expert Report-Contract, ¶ 4.70.

[1092] Varsi Expert Report-Contract, ¶ 4.71.

[1093] Varsi Expert Report-Contract, ¶ 4.72.

[1094] Varsi Expert Report-Contract, ¶ 4.72.

[1095] Varsi Expert Report-Contract, ¶ 4.72.

[1096] Contract Memorial, ¶ 166.

[1097] Varsi Expert Report-Contract, ¶ 4.72.

[1098] Contract Memorial, ¶ 207.

nine phantom-claimants indicates that none is a third-party beneficiary. Both Claimants and the remaining Renco Defendants are absent from Clauses 5 and 6, which identify only Centromín and the Company. Under Claimants' reading—that "[c]lauses 6.2 and 6.3 extend[ ] to anyone who could be sued,"[1099]—these clauses are intended to benefit everyone who they do—and do not—identify. *In other words, everyone*. That cannot be correct. Rather, the correct interpretation is that the STA (including Clauses 5 and 6) is not a contract for the benefit of a third-party. It is a contract for the benefit of the STA Parties. And Clauses 5 and 6 in particular are for the benefit of Centromín and the Company (now, DRP).

529. In any event, Respondents have no obligation to arbitrate the extension of Clauses 5 and 6 (or any other clause) to Claimants (or any other non-party to the STA). Even if "anyone who could be sued" was a third-party beneficiary, its remedy would lie before the Peruvian judiciary. The STA Arbitral Clause limits the Tribunal's jurisdiction to disputes "between the parties."[1100] A third-party is, by definition, not a contracting party. Under Peruvian law, contracting parties are free to structure their contractual relationship as they see fit.[1101] And Claimants provide no justification for disregarding the explicit limit to the scope of arbitral consent in the STA.

530. For the foregoing reasons, the Tribunal lacks jurisdiction over Claimants' STA claims.

3. Claimants are not parties to the STA Arbitral Clause

531. Claimants assert that even if they have ceased being STA Parties, they nevertheless remain parties to the STA Arbitral Clause due to **(i)** the doctrine of separability of arbitral clauses, **(ii)** Article 14 of the Peruvian Arbitration Act, and **(iii)** the STA Parties' intentions.[1102] None of Claimants' alternative jurisdictional underpinnings withstands scrutiny.

[1099] Contract Memorial, ¶ 166.

[1100] **Exhibit R-001**, STA & Renco Guaranty, Clause 12.

[1101] **RLA-062**, Peruvian Civil Code, 24 July 1984, Art. 1354 ("The parties can freely determine their contract's content, so long as it does not contravene a mandatory legal norm.").

[1102] Contract Memorial, ¶ 123.

532. As a threshold matter, each argument fails because it is based on the false premise that Claimants were once STA Parties.[1103] Yet Claimants have never been STA Parties. The Tribunal should reject Claimants' alternative arguments at the outset on that basis alone. For the avoidance of doubt, however, each argument also fails of its own accord.

533. To start, Claimants' reliance on the separability doctrine is a red herring. They argue that under the separability doctrine, a contracting party remains a party to an arbitral clause even though it is no longer a party to the underlying contract.[1104] But Claimants cite nothing to indicate that their interpretation is valid under Peruvian law. Unsupported argument from counsel cannot prove the content of Peruvian law.

534. Instead, the separability doctrine under Peruvian law provides that "the non-existence, nullity, nullability, invalidity or ineffectiveness of a contract containing an arbitration agreement does not necessarily imply the non-existence, nullity, nullability, invalidity or ineffectiveness of the latter."[1105] Accordingly, under Peruvian law arbitral tribunals have the power of *kompetenz-kompetenz*.[1106] Respondents' jurisdictional defense, however, is not that the STA is non-existent, void, voidable, invalid, or inoperable—nor that Claimants were once, but are no more, STA Parties. Instead, *Claimants were never parties to the STA*. Claimants' separability doctrine argument should thus be dismissed as a strawman.

535. Claimants' theory on Article 14 of the Peruvian Arbitration Act fares no better. On this point, Claimants contend that if they are "no longer" parties to the STA, they remain parties

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[1103] *See* Contract Memorial, ¶ 124 ("First, Renco and DRR were parties to the STA's arbitration clause, even if they are no longer parties to the STA, due to the separability doctrine."), ¶ 126 ("Second, Renco and DRR are parties to the STA's arbitration clause, even if they are determined to no longer be parties to the STA, pursuant to Article 14 of the Peruvian Arbitration Act."), ¶ 128 ("Renco and DRR are parties to the STA's arbitration clause, even if they are no longer parties to the STA, because that was the intention of the parties to the transaction by which the Renco Consortium purchased the La Oroya Complex from Centromín.").

[1104] Contract Memorial, ¶ 124.

[1105] **CLA-012**, Arbitration Act of the Republic of Peru, Art. 41.2 (Spanish Original: "*La inexistencia, nulidad, anulabilidad, invalidez o ineficacia de un contrato que contenga un convenio arbitral, no implica necesariamente la inexistencia, nulidad, anulabilidad, invalidez o ineficacia de éste.*").

[1106] **CLA-012**, Arbitration Act of the Republic of Peru, Art. 41.2 (English Translation: "Consequently, the arbitral tribunal may decide on the controversy submitted to it, which may even deal with the non-existence, nullity, nullability, invalidity or ineffectiveness of the contract that contains an arbitration agreement.") (Spanish Original: "*En consecuencia, el tribunal arbitral podrá decidir sobre la controversia sometida a su conocimiento, la que podrá versar, incluso, sobre la inexistencia, nulidad, anulabilidad, invalidez o ineficacia del contrato que contiene un convenio arbitral*.").

to the STA Arbitral Clause.[1107] But Article 14 does not address what happens when a party to an underlying contract ceases to be a contracting party.[1108] Instead, Article 14 provides that an arbitral clause may extend to *non-signatories* who, despite not having formally executed the arbitral agreement, are parties to the agreement.[1109] The issue of binding non-signatories to an arbitration contract is common in domestic and international arbitration. Article 14 is meant to address that issue. Claimants conflate **(i)** non-parties with non-signatories and **(ii)** the arbitral agreement with the underlying contract. Claimants' argument is not that they are non-signatories to the STA Arbitral Clause. Instead, it is based on the premise that they have ceased being STA Parties.[1110] That has nothing to do with Article 14.

536. Finally, Claimants' third gambit is divorced from basic contract and arbitration principles. Claimants propose that they "should be considered parties to the STA's arbitration clause," because, according to Claimants, the STA Parties intended to protect them from third-party claims.[1111] But Claimants cannot rewrite the STA with *post hoc* statements about the alleged subjective intent of the STA Parties. Under Peruvian law, "[c]ontracts are binding as to the statements contained therein," as "[i]t is presumed that the express words of the

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[1107] *See* Contract Memorial, ¶ 126.

[1108] **CLA-012**, Arbitration Act of the Republic of Peru, Art. 14 (English Translation: "The arbitration agreement extends to those whose consent to arbitration, in good faith, is determined by their active and decisive participation and in the negotiation, conclusion, execution or termination of the contract that includes the arbitration agreement or to which the agreement is related. It also extends to those intend to derive rights or benefits from the contract, according to its terms.") (Spanish Original: "*El convenio arbitral se extiende a aquellos cuyo consentimiento de someterse a arbitraje, según la buena fe, se determina por su participación activa y de manera determinante en la negociación, celebración, ejecución o terminación del contrato que comprende el convenio arbitral o al que el convenio esté relacionado. Se extiende también a quienes pretendan derivar derechos o beneficios del contrato, según sus términos*.").

[1109] **Exhibit R-300**, Fernando Cantuarias Salaverry and Roque J. Caivano, La Nueva Ley de Arbitraje Peruana: Un nuevo salto a la modernidad, REVISTA PERUANA DE ARBITRAJE NO. 7, 2008, pp. 60–61 (English Translation: "[Article 14], which does not break with the basic principle according to which arbitration is strictly voluntary, implies that, given certain particular factual circumstances, it is possible to consider that someone has expressed his agreement to submit to arbitration, even in absence of an express and formal acceptance.") (Spanish Original: "[*El Articulo 14*], *que no significa romper con el principio básico conforme el cual el arbitraje es estrictamente voluntario, implica que, dadas ciertas circunstancias de hecho particulares, es posible considerar que alguien ha expresado su conformidad a someterse a arbitraje, aun en ausencia de una expresa y formal aceptación*.").

[1110] *See* Contract Memorial, ¶ 126.

[1111] Contract Memorial, ¶¶ 128–129.

contract correspond to the common intention of the parties."[1112] Arbitral consent here is textually limited to disputes between the STA Parties.[1113] That statement represents the common will of the STA Parties. Claimants are not, and were never, STA Parties, and hence they fall outside the STA Arbitral Clause's ambit.

537. Because Claimants are not parties to the STA Arbitral Clause, the Tribunal lacks jurisdiction over this dispute.

C. The Tribunal lacks jurisdiction over Claimants' Peru Guaranty claims

538. Claimants have made Peru a respondent in this proceeding. They contend that—by not stepping in and performing the STA obligations that Centromín failed to perform—Peru breached its obligations under the Peru Guaranty.[1114] Claimants also file claims against Peru under Peruvian law and customary international law—also in reliance on the Peru Guaranty.[1115] But Claimants are not parties to or third-party beneficiaries of the Peru Guaranty. Consequently, the jurisdictional hook for their Peru Guaranty claims is ever-shifting. No matter the argument, however, the Tribunal lacks such jurisdiction over such claims.

539. As an initial matter, however, it is important to note that, during the course of this proceeding, Claimants have whittled down the jurisdictional underpinning of their Peru Guaranty claims. Initially, they asserted that they were parties to the Peru Guaranty.[1116] Claimants then shifted, arguing that they could rely on the Peru Guaranty's arbitral clause as either parties or third-party beneficiaries.[1117] Now, Claimants propose that the Tribunal has jurisdiction over their Peru Guaranty claims because the STA incorporates the Peru

[1112] **RLA-062**, Peruvian Civil Code, 24 July 1984, Art. 1361.

[1113] **Exhibit R-001**, STA & Renco Guaranty, Clause 12.

[1114] Contract Memorial, ¶¶ 187–202.

[1115] Contract Memorial, ¶ 139.

[1116] Claimants' Comments on Notice of Bifurcation, 11 February 2020, p. 3 ("Claimants are parties to [the STA and the Peru Guaranty] and to the arbitration agreements contained and/or referenced therein.").

[1117] Response to Request for Bifurcation, 20 March 2020, ¶¶ 27, 30.

Guaranty.[1118] Claimants' fluctuating theories evince that Peru has not consented to arbitrate Peru Guaranty disputes with Claimants.

540. Claimants cannot prove that they are parties or third-party beneficiaries. As with the STA, the Peru Guaranty's heading identifies the contracting parties:

> "Witnesseth hereby the Guaranty Agreement, granted by the Peruvian State . . . hereinafter referred to as The State, as party of the first part: and Doe Run Peru S. R. LTDA . . . hereinafter referred to as the Investor."[1119]

541. Separately, the relevant obligation is found in Clause 2.1 of the Peru Guaranty, which provides that "[Peru] hereby guarantees the Investor the representations, assurances, guaranties and obligations assumed by [Centromín] under the [STA]."[1120] In short, Clause 2.1 explicitly runs only to DRP, excluding from its scope any third-party. And because under Peruvian law a "guarantor is only liable for what he has expressly undertaken to do,"[1121] guaranties are strictly construed under Peruvian law.[1122] Consequently, only a rewriting of Clause 2.1 can broaden its scope to anyone other than DRP.[1123]

542. Faced with those impasses, Claimants now attempt to import the Peru Guaranty into the STA. They feign reliance on the Peru Guaranty's incorporation by reference of the STA Arbitral Clause.[1124] Yet their true argument is that "[t]he STA itself . . . incorporates the Guaranty."[1125] That most-recent jurisdictional theory is baseless for two reasons.

[1118] Contract Memorial, ¶ 131 ("The STA itself recognizes this fundamental inseparability, and incorporates the Guaranty.").

[1119] **Exhibit R-002**, Peru Guaranty, p. 1.

[1120] **Exhibit R-002**, Peru Guaranty, Clause 2.1

[1121] **RLA-062**, Peruvian Civil Code, 24 July 1984, Art. 1873.

[1122] Varsi Expert Report-Contract, ¶ 6.26.

[1123] Because Claimants have dropped their original arguments on the Tribunal's jurisdiction under the Peru Guaranty, Peru addresses them only to explain why Claimants have chosen to shift to a third jurisdictional theory. Peru reserves the right to object to the tardy resurrection those and any other arguments that Claimants have dropped.

[1124] Contract Memorial, ¶ 131 ("Since the Guaranty's arbitration clause refers back to the STA's arbitration clause, Peru is a party to the latter.").

[1125] *See* Contract Memorial, ¶ 131.

543. First, Peru did not consent to arbitrate any Peru Guaranty claims with Claimants. Claimants invert the operation of the incorporation by reference. The Peru Guaranty's arbitral clause incorporates the STA Arbitral Clause into the Peru Guaranty, not the other way around. It provides that "[a]ny litigation, dispute, controversy, difference or claim that may originate from or is related to this Guaranty Agreement will be resolved by applying the provisions set forth in Clause Twelfth of the [STA]."[1126] Peruvian law recognizes incorporated arbitral clauses.[1127] That is what Peru and DRP did here: They agreed to arbitrate Peru Guaranty disputes based on the parameters of the STA Arbitral Clause. The text of the STA Arbitral Clause—including its limitation to disputes "between the parties"—is thus the text of the Peru Guaranty's arbitral clause. Those contracting parties are only Peru and DRP.[1128]

544. Second—even if the reference operated in reverse—Clause 10 of the STA does not incorporate anything. Clause 10 regulates the assignment of rights and obligations by the STA Parties.[1129] As Peru will explain below, under Article 1439 of the Peruvian Civil Code, third-party guaranties do not survive contractual assignments absent the guarantor's authorization.[1130] In light of Article 1439, Clause 10 identifies Peru's third-party guaranty and provides the requisite authorization for any assignment by Centromín: "[S]aid guaranty shall survive the transfer of any of the rights and obligations of Centromín and any liquidation of Centromín."[1131] There is no incorporation.

545. For the foregoing reasons, the Tribunal lacks jurisdiction over Claimants' Peru Guaranty claims.

[1126] **Exhibit R-002**, Peru Guaranty, Art. 3.

[1127] **CLA-012**, Arbitration Act of the Republic of Peru, Art. 13(6).

[1128] As Respondents will explain below, the Peru Guaranty became void when DRP assigned its contractual position in the STA to DRCL. *See* Section IV.B. If the Peru Guaranty had not become void, however, the current parties would have been Peru and DRCL, such that the Peru Guaranty's arbitral clause would encompass only them. *Id.*

[1129] **Exhibit R-001**, STA & Renco Guaranty, Clause 10.

[1130] **RLA-062**, Peruvian Civil Code, 24 July 1984, Art. 1439 ("Guarantees offered by a third party do not pass to the assignee without the express authorization of the third party.")

[1131] **Exhibit R-001**, STA & Renco Guaranty, Clause 10.

D. The Tribunal lacks jurisdiction over the claims of the phantom-claimants

546. Claimants request that the Tribunal find Respondents in breach of the STA and Peru Guaranty for not defending and indemnifying "the Renco Consortium members and related entities and individuals in the personal injury St. Louis lawsuits."[1132] Claimants bring claims on behalf of the nine other Renco Defendants.[1133] They also bring claims on behalf of DRP, who likewise is not a party to these proceedings. The tribunal has no jurisdiction over the claims of those ten phantom-claimants.

547. As explained above, Claimants have the burden of proving the facts on which the Tribunal's jurisdiction rests.[1134] But Claimants make no attempt to prove that the Renco Defendants are parties to the STA and Peru Guaranty, or that they otherwise fall within the scope of the STA Arbitral Clause or the Peru Guaranty's arbitral clause. Accordingly, Claimants fail to meet their burden of proof to establish that the Tribunal has jurisdiction over the claims of those phantom-claimants.

548. Instead, as explained above, the inclusion of the remaining Renco Defendants in this proceeding evidences the implausibility of Claimants' contractual interpretation. Claimants cannot draw a line separating them from the other Renco Defendants. Each is just as absent from Clauses 5 and 6, and from the Peru Guaranty, as the other. If there were such a line, Claimants presumably would not have submitted the Renco Defendants' claims. Respondents do agree with Claimants' premise that they and the Renco Defendants are in the same category. From that common premise, the only logical conclusion is that both fall outside—rather than inside—the scope of the STA and the Peru Guaranty.

549. Moreover, Claimants also file a claim on behalf of DRP (another phantom-claimant) without attempting to prove how the Tribunal has jurisdiction over its claims.[1135]

[1132] Contract Memorial, ¶ 246.

[1133] Contract Memorial, ¶ 201.

[1134] **RLA-183**, *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB 12/20, Award, 26 April 2017, ¶ 66; **RLA-184**, *Abaclat et al. v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, ¶ 678; **RLA-180**, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, ¶ 2.8.

[1135] Contract Memorial, ¶ 201.

Claimants argue that DRP executed a contract with the Claimants and the other phantom-claimants to indemnify them for the consequences of the Missouri Litigations.[1136] Therefore, in Claimants' view, Respondents are bound to indemnify and defend DRP under Clauses 6.5 and 8.14.[1137] But DRP is not a defendant in the Missouri Litigations, and—more importantly—it is not a party to this arbitration. If DRP would like to bring a claim against Respondents, it must do so itself.

550. And if Claimants seek to use DRP as a vehicle for indirect indemnity and defense claims, they fail to articulate how the tribunal has jurisdiction over such a claim. Claimants' concede, Clauses 6.5 and 8.14 run to the Company (originally, Metaloroya, later, DRP), establishing indemnity and defense obligations for *claims filed against the Company (DRP)*.[1138] DRP is not a party to the Missouri Litigations. Claimants provide no explanation on how, under Peruvian law, an external indemnity agreement can bypass the principle of privity, and rewrite the STA and Peru Guaranty to require Respondents—*without their consent*—to indirectly indemnify and defend anyone with whom DRP signs an indemnity agreement. The Tribunal should dismiss Claimants' manifestly untenable argument at the threshold.

551. Finally, Claimants are not clear whether the phantom-claimants' claims are brought only under contract or also under other theories. Respondents request that Claimants fully explain the legal grounds supporting the phantom-claimants' claims (including their jurisdictional underpinnings) pursuant to Article 20(2)(e) of the UNCITRAL Rules, so that Respondents can fully exercise their due process rights.[1139] Respondents reserve the right to present the appropriate jurisdictional, admissibility, and merits arguments once Claimants do so.

[1136] Contract Memorial, ¶ 201.

[1137] Contract Memorial, ¶ 201.

[1138] Contract Memorial, ¶ 171.

[1139] UNCITRAL Arbitration Rules, Art. 20(2), Art. 20(2)(e) ("The statement of claim shall include the following particulars . . . . (e) The legal grounds or arguments supporting the claim.")

E. The Tribunal lacks jurisdiction over Claimants' Peruvian law claims

552. Claimants also bring claims under the Peruvian law concepts of pre-contractual liability, subrogation, contribution, and unjust enrichment.[1140] Claimants rely on those concepts to seek indemnity from Respondents for the claims filed in the Missouri Lawsuits.[1141] In essence, Claimants' Peruvian law claims are an attempt to salvage their indemnity claim if "Renco and DRR's contract claim fails."[1142]

553. However, the Tribunal also lacks jurisdiction over Claimants' Peruvian law claims for three reasons: **(i)** There is no arbitral consent for Claimants' Peruvian law claims, **(ii)** the pre-contractual liability claim is premises on the inexistence of arbitral consent, and **(iii)** the unjust enrichment claim requires the inexistence of arbitral consent.

1. There is no arbitral consent for Claimants' Peruvian law claims

554. As Respondents have explained above, Claimants are not parties to the STA or the Peru Guaranty, and they are not otherwise encompassed by the STA Arbitral Clause or the Peru Guaranty's arbitral clause. Consequently, the Tribunal also lacks jurisdiction over Claimants' Peruvian law claims.

2. Claimants' pre-contractual liability claim is premised on the inexistence of arbitral consent

555. Claimants bring a claim under the theory of pre-contractual liability.[1143] While Claimants shield the premise of the claim in their Contract Memorial, the argument is grounded on their not being STA Parties or third-party beneficiaries of the STA.[1144] The STA Arbitral Clause is limited to disputes between STA Parties.[1145] Accepting Claimants' pre-

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[1140] Contract Memorial, ¶¶ 210–237.

[1141] Contract Memorial, ¶ 211 ("With respect to pre-contractual liability, under Peruvian law, Renco and DRR are entitled to compensation from Peru and Activos Mineros/Centromín for any damages suffered in connection with the St. Louis Lawsuits), ¶ 213 (arguing that Claimants can rely on subrogation "if the St. Louis Court were to find Renco and DRR liable vis-à-vis the St. Louis Plaintiffs"), ¶ 216 (contending that they seek contribution due to the Missouri Lawsuits), ¶ 235 ("the conditions for an unjust enrichment claim would be met—if the St. Louis Court were to find Renco and/or DRR liable for the claims asserted in that forum").

[1142] Contract Memorial, ¶ 210.

[1143] Contract Memorial, ¶ 211.

[1144] Payet Expert Report, ¶¶ 211, 215.

[1145] **Exhibit R-001**, STA & Renco Guaranty, Clause 12.

contractual liability claim therefore means that there is no arbitral consent. Accordingly, the Tribunal cannot have jurisdiction over Claimants' pre-contractual liability claim.

556. As noted above, Claimants pre-contractual liability claim is unclear, though it seems to be a legitimate expectations claim. As with all non-contract claims, Claimants present their pre-contractual liability claim "in the alternative" to their contractual claims, relevant only "if Renco and DRR's contract claim fails."[1146] From their Contract Memorial, it is unclear how Claimants' STA and Peru Guaranty claims could fail but their pre-contractual liability claim survive. After all, the supposed legitimate expectations would be coextensive with any rights under the STA. The answer lies in Professor Payet's report, on whom Claimants rely to make out their pre-contractual liability claim.[1147]

557. Claimants make no mention of the underpinnings of their claim, but Professor Payet does. In two paragraphs in particular, Professor Payet makes clear that the premise of the claim is that Claimants are not STA Parties or third-party beneficiaries. In paragraph 211 of his expert report, he says the following:

> "***If Renco and DRR were not parties nor third-party beneficiaries to the Contract, in any case, they would be entitled to compensation by Activos Mineros and Peru for the damage caused by the litigation initiated in the United States of America***, since Centromín and Peru created the appearance that Renco and DRR would be protected from the consequences of claims made by third parties for CMLO's environmental liabilities."[1148] (Emphasis added)

558. Claimants textually cite to the final two sentences of paragraph 218 of Professor Payet's expert report.[1149] But they omit the first two sentences:

> "***In case it is found that Renco and DRR are not parties nor third-party beneficiaries entitled to the protections set forth in the Contract, this duty of good faith during negotiations would have been clearly infringed by Peru and Centromín***. During the entire precontractual phase, Centromín, and specially Peru, created

[1146] Contract Memorial, ¶ 210.

[1147] *See* Contract Memorial, ¶ 211.

[1148] Payet Expert Report, ¶ 211.

[1149] Contract Memorial, ¶ 211.

> legitimate trust in Renco and DRR in that they would be protected from third party claims based on [Metaloroya's] environmental liabilities."[1150] (Emphasis added)

559. In short, Claimants' pre-contractual liability claim is founded on their lack of STA Party (and third-party beneficiary) status. While that particular fact would not matter to a Peruvian court (whose jurisdiction is not based on a contract to arbitrate), a finding by the Tribunal that Renco and DRRC are not STA Parties would result in a lack of arbitral consent. Accordingly, the Tribunal cannot have jurisdiction over Claimants' pre-contractual liability claim.

3. Claimants' unjust enrichment claim requires the inexistence of arbitral consent

560. A similar jurisdictional flaw vitiates Claimants' unjust enrichment claim.[1151] The proper forum for an unjust enrichment claim is the Peruvian judiciary, because its viability requires the inexistence of arbitral consent. Accordingly, if Claimants' unjust enrichment claim were viable, the Tribunal would lack jurisdiction over it.

561. The viability of Claimants' unjust enrichment claim depends on the non-existence of the Tribunal's jurisdiction because it is premised on the Tribunal concluding that Claimants are *not* parties to the STA. Unjust enrichment is a last-resort cause of action under Peruvian law. Thus, it requires "the absence of any other remedy," which necessarily includes contractual remedies.[1152] Indeed, Article 1955 of the Peruvian Civil Code provides that "[t]he action [for unjust enrichment] is not appropriate when the person who has suffered the damage can exercise another action to obtain the respective compensation."[1153] Importantly, under Article 1955, an unjust enrichment action depends on the availability—rather than the success or failure—of all other actions.[1154] Indeed, the Supreme Court of

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[1150] Payet Expert Report, ¶ 215.

[1151] Contract Memorial, ¶¶ 234–237.

[1152] Contract Memorial, ¶ 234.

[1153] **RLA-062**, Peruvian Civil Code, 24 July 1984, Art. 1955 (Spanish Original: "*La acción* [*por enriquecimiento sin causa*] *no es procedente cuando la persona que ha sufrido el perjuicio puede ejercitar otra acción para obtener la respectiva indemnización*.").

[1154] Varsi Expert Report-Contract, ¶ 8.44.

Peru has explained that an unjust enrichment action "is not viable when the person who has suffered the injury can bring another action to obtain the respective indemnification."[1155]

562. For that reason, Claimants state that "were this Tribunal to find that Renco and DRR are not parties to the STA . . . the conditions for an unjust enrichment claim would be met," if other conditions are met as well.[1156] In short, Claimants cannot bring an unjust enrichment claim under Peruvian law if they are STA Parties.[1157] That would not matter to a Peruvian court, whose jurisdiction is not based on a contract to arbitrate. But such a finding would divest the Tribunal of jurisdiction because it would result in a lack of arbitral consent.

563. As a result, the Tribunal cannot have jurisdiction over Claimants' unjust enrichment claim.

F. The Tribunal lacks jurisdiction over Claimants' minimum standard of treatment claim

564. Claimants also submit a minimum standard of treatment claim against Peru. They purport to base that claim on the principle of estoppel.[1158] In essence, Claimants' minimum standard of treatment claim seems to be a clone of their pre-contractual liability claim—Peru made pre-contractual promises and broke them. For two reasons, the Tribunal lacks jurisdiction over Claimants' minimum standard of treatment claim.

1. There is no arbitral consent for Claimants' minimum standard of treatment claim

565. As already detailed, Claimants are not parties to the STA or Peru Guaranty, and they are not otherwise encompassed by the STA Arbitral Clause or the Peru Guaranty's arbitral clause. As a result, the Tribunal lacks jurisdiction over Claimants' minimum standard of treatment claims.[1159]

[1155] **Exhibit R-285**, Cassation Decision No. 936-2005, Supreme Court of the Republic of Peru, 26 March 2006, p. 3.

[1156] Contract Memorial, ¶ 235.

[1157] Varsi Expert Report-Contract, ¶ 8.44.

[1158] Contract Memorial, ¶ 238.

[1159] Insofar as Claimants present their minimum standard of treatment claim in the alternative to their contract claims, under Article 20(2)(e) of the UNCITRAL Rules they are required to set out that analysis, so that Respondents can exercise their due process rights.

2. Claimants have no standing to submit their minimum standard of treatment claim

566. Assuming that the STA Arbitral Clause were broad enough to encompass the minimum standard of treatment claim, Claimants nevertheless lack standing to bring the claim. This proceeding is a contract-based, not a treaty-based, arbitration. Peru has not derogated from the rule of customary international law that a foreign national has no recourse against it in an international forum for a violation of international law. Therefore, the standing to bring a claim under international law remains with Claimants' home state—the United States. Because this issue of standing goes to the Tribunal's competence to hear Claimants' minimum standard of treatment claim, the Tribunal lacks jurisdiction.

567. Under customary international law, a foreign national generally cannot bring a claim against a State in an international forum for a violation of international law.[1160] Instead, the home State of the foreign national can invoke the responsibility of the violating State through diplomatic protection.[1161] States can derogate from rules of customary international law by executing treaties.[1162] Such derogation occurs, for instance, when a State offers in a bilateral investment treaty to arbitrate disputes relating to breaches of that treaty.[1163] That has not occurred here.

[1160] *See* **RLA-202**, *Case Concerning The Barcelona Traction, Light and Power Company, Ltd.*, ICJ, Judgment, 5 February 1970, p. 44 ("[A] State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is to resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress.").

[1161] *See* **RLA-203**, Draft Articles on Diplomatic Protection with commentaries, INTERNATIONAL LAW COMMISSION (58TH SESSION), 2006, Art. 1.

[1162] *See* **RLA-096**, *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, 1989 I.C.J. 15 (Judgment, 20 July), p. 42 ("The Chamber has no doubt that the parties to a treaty can therein either agree that the local remedies rule shall not apply to claims based on alleged breaches of that treaty; or confirm that it shall apply. Yet the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so.").

[1163] *See* **RLA-203**, Draft Articles on Diplomatic Protection with commentaries, INTERNATIONAL LAW COMMISSION (58TH SESSION), 2006, Art. 17 ("The present draft Articles do not apply to the extent that they are inconsistent with special rules of international law, such as treaty provisions for the protection of investments."), *id.* at cmt. (2) ("The dispute settlement procedures provided for in BITs and the [ICSID] Convention on the settlement of investment disputes between States offer greater advantages to the foreign investor than the customary international law system of diplomatic protection, as they give the investor direct access to international arbitration.").

568. For instance, the *Dunkwa Continental* tribunal properly dismissed a customary international law claim in a commercial (i.e., contract-based) arbitration for lack of jurisdiction. There, the claimants initiated an arbitration against Ghana for breaches of the contract and customary international law.[1164] Because the claimants in *Dunkwa Continental* were Ghanaian, the tribunal found that their nationality precluded them from bringing their customary international law claim against Ghana.[1165]

569. But even if the claimants had been foreign nationals, the tribunal stated, they were also required to prove "[t]hat they are themselves entitled to invoke the breach of [international law] duties."[1166] They could not do so, as the tribunal explained:

> "[A] more basic reason why [the claimants] lack standing to bring claims for breach of international law . . . is simply that the right to invoke such a claim as may exist under customary international law is held not by the legal person alleged to have suffered the initial wrong at the hands of the host state, but by its home state."[1167]

570. Curiously, Claimants do not bring this minimum standard of treatment claim in the parallel treaty case, where the minimum standard of treatment is an obligation under the Treaty.[1168] Claimants instead try to convert this proceeding into a treaty-based, investor-State arbitration. But this proceeding is a contract-based, commercial arbitration. If Claimants consider that Peru has violated their rights under customary international law, their remedy is to request the United States to engage in diplomatic protection.

* * *

571. In light of the plethora of jurisdictional flaws in Claimants' claims, the Tribunal lacks jurisdiction over this entirety of Claimants' claims.

[1164] **RLA-204**, *Dunkwa Continental*, ¶ 334.

[1165] **RLA-204**, *Dunkwa Continental*, ¶¶ 340–41.

[1166] **RLA-204**, *Dunkwa Continental*, ¶ 339.

[1167] **RLA-204**, *Dunkwa Continental*, ¶ 345.

[1168] **RLA-001**, Treaty, Art. 10.5.2, Annex 10-A.

IV. CLAIMANTS' CLAIMS ARE INADMISSIBLE

572. There is overlap between jurisdictional and admissibility defenses. Broadly, however, "jurisdiction is an attribute of a tribunal, which has jurisdiction in respect of a certain limited category of disputes, whereas admissibility is a characteristic of the dispute actually submitted to the tribunal which, even if the dispute falls within the jurisdiction of a tribunal, may be rejected because it is for some reason . . . inadmissible."[1169] Jan Paulsson identifies the same distinction:

> "If the reason for [a dismissal] would be that the claim could not be brought to the particular forum seized, the issue is ordinarily one of jurisdiction and subject to further recourse.
>
> If the reason would be that the claim should not be heard at all (or at least not yet), the issue is ordinarily one of admissibility and the tribunal's decision is final."[1170]

Respondents agree with Professor Paulsson.

573. The Tribunal's power to dismiss claims on admissibility grounds stems from its inherent power to oversee the proceedings.[1171] The following are some of the reasons why a "claim should not be heard at all (or at least not yet)": claimants lack standing to bring the relevant

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[1169] **RLA-206**, *Mathias Kruck et al. v. Kingdom of Spain*, ICSID Case No. ARB/15/23, Decision on Jurisdiction and Admissibility, 19 April 2021, ¶ 192.

[1170] **RLA-083**, Jan Paulsson, Jurisdiction and Admissibility, GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION, November 2005, 2005, p. 617.

[1171] *See* **RLA-083**, Jan Paulsson, Jurisdiction and Admissibility, GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION, November 2005, 2005, p. 602 (admissibility rulings are issued "in the exercise of [tribunal] jurisdictional authority"); *see also* UNCITRAL Rules, Article 17(1) ("Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.").

claim,[1172] claims are evidently unfounded,[1173] claims are unripe (premature),[1174] and claims are improperly articulated.[1175]

574. Assuming the Tribunal had jurisdiction over this case, all of Claimants' claims would nonetheless be inadmissible.

A. Claimants' STA claims are inadmissible

575. Claimants' claims under the STA are inadmissible because they lack standing to bring such claims. Claimants lack standing because they are not STA Parties, and, even if they were STA parties, they would lack standing because they are not the holders of the rights for which they bring claims under Clause 6.1.

1. Claimants lack standing to raise their STA claims because they are not STA Parties

576. Claimants are not STA Parties. As a consequence of the principle of privity under Peruvian law, Claimants have no rights under the STA.[1176] As Respondents have explained, the lack of privity means that the Tribunal lacks jurisdiction over Claimants' STA claims. In the alternative, however, the lack of privity means that Claimants lack standing to bring their STA claims. The Tribunal should thus dismiss Claimants' STA claims as inadmissible.

577. Tribunals have dismissed contractual claims as inadmissible for lack of standing based on a lack of privity. In *L.E.S.I. - DIPENTA*, for instance, the tribunal dismissed the claim before it, finding instead that the claimant lacked standing because it was not a party to the relevant contract.[1177] The tribunal stated:

[1172] **RLA-207**, *Consortium Groupement L.E.S.I. - DIPENTA v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/8, Award, 10 January 2005, ¶ 37(ii), (iv).

[1173] **CLA-110**, *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No. UN3467, Final Award, 1 July 2004, ¶ 80 (dismissing an expropriation claim that was evidently unfounded).

[1174] *See* **RLA-175**, *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021 ("***Infinito Gold* (Award)**"), ¶ 580.

[1175] **RLA-086**, *ST-AD GmbH v. The Republic of Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013 (Stern, Klein, Thomas) ¶ 295.

[1176] **RLA-062**, Peruvian Civil Code, 24 July 1984, Art. 1363.

[1177] **RLA-207**, *Consortium Groupement L.E.S.I. - DIPENTA v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/8, Award, 10 January 2005, ¶ 37(v).

> "It is evident to the Arbitral Tribunal that it cannot go into the substance of a claim if that claim is submitted to the Tribunal by a legal entity that is not bound by the Contract on which the claim is based. ***This point is so obvious that it does not need special documentation***. The economic links that may exist between the companies do not matter here: thus, a parent company cannot claim payments due under contract to a subsidiary, even if that subsidiary is totally dependent on the parent company, unless there are very particular circumstances in play that have not been alleged in this case. These parties opted for different legal structures, for their own reasons, and they cannot now insist that the other party simply overlook that fact."[1178] (Emphasis added)

578. The *L.E.S.I. - DIPENTA* tribunal dismissed the claim as inadmissible, and the Tribunal should do the same here—if it were to find that it had jurisdiction. Claimants are not STA Parties. Accordingly, they have no standing to challenge any purported breach of the STA.

2. Claimants lack standing to bring claims for breach of Clause 6.1

579. In addition to their Clause 6.2 and 6.3 claims, Claimants also bring a claim for a breach of Clause 6.1 of the STA.[1179] Clause 6.1 establishes Centromín's obligation to remediate the area around the Facility.[1180] That obligation is owed only to the Company. Thus, Claimants lack standing to bring a claim for breach of Clause 6.1.

580. The principle that only one to whom an obligation is owed can claim for its breach is a proposition almost too plain to warrant explanation. It exists in public international law,[1181] and in domestic law.[1182] As relevant here, the principle exists in Peruvian law. As

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[1178] **RLA-207**, *Consortium Groupement L.E.S.I. - DIPENTA v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/8, Award, 10 January 2005, ¶ 37(iv).

[1179] Contract Memorial, ¶ 208.

[1180] **Exhibit R-001**, STA & Renco Guaranty, Clause 6.1.

[1181] Under Articles 42 and 48 of the Articles of Responsibility of States for Internationally Wrongful Acts, for instance, a State can "invoke the responsibility of another State if the obligation breached is owed to" the claiming State, either individually or jointly with other States. *See* **RLA-007**, Articles on the Responsibility of States for Internationally Wrongful Acts (2001), Art. 42 ("A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to: (a) that State individually; or (b) a group of States including that State, or the international community as a whole."), Art. 48 ("Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole.").

[1182] *See e.g.*, **RLA-215**, Frank August Schubert, INTRODUCTION TO LAW AND THE LEGAL SYSTEM (12TH EDITION), 2022, p. 210 ("Our cases have established that the irreducible constitutional minimum of standing consists of three

professor Varsi explains, under Peruvian law, only the holder a right can obtain recovery for a breach of the corresponding obligation.[1183] When the breach is contractual in nature, only the party to whom the breached obligation is owed can recover.[1184] As Peruvian scholar Manuel de La Puente y Lavalle explains, "an obligation . . . is a legal relationship in a person—the debtor—has the duty to execute a certain performance in favor of another person—the creditor—*who has the authority to require it*."[1185] In international arbitrations, the consequence of not being the holder of the right at issue is dismissal of the claim as inadmissible for lack of standing.[1186]

581. As with Clauses 6.2 and 6.3, Claimants are also absent from Clause 6.1. More broadly, Clauses 5 and 6 allocate responsibility between the Company and Centromín.[1187] The obligation under Clause 6.1 is owed—as with the rest of Clause 6—only to the Company. If the STA Parties intended to include Claimants in Clause 6.1, they would have explicitly included them there, or more broadly in Clauses 5 and 6. Claimants are not encompassed by Clause 6.1 and therefore lack standing to bring a claim for breach of that clause.

B. Claimants' Peru Guaranty claims are inadmissible

582. Assuming that the Tribunal were to find that it had jurisdiction over Claimants' Peru Guaranty claims, such claims would nonetheless be inadmissible for multiple reasons.

583. First, Claimants have no standing to bring a claim under the Peru Guaranty because it ceased to exist before Peru purportedly breached its obligations thereunder. Claimants first

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elements. The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision . . . . To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized . . . . For an injury to be particularized, it must affect the plaintiff in a personal and individual way.") (internal quotation marks and citations omitted).

[1183] Varsi Expert Report-Contract, ¶¶ 4.117–4.118.

[1184] Varsi Expert Report-Contract, ¶¶ 4.117–4.118.

[1185] **RLA-213**, Manuel de la Puente y Lavalle, EL CONTRATO EN GENERAL, COMMENTARIOS A LA SECCIÓN PRIMERA DEL LIBRO VII DEL CÓDIGO CIVIL, TOMO II (THIRD EDITION), 2017, p. 18.

[1186] *See* **RLA-083**, Jan Paulsson, Jurisdiction and Admissibility, GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION, November 2005, pp. 614, 616 (explaining that *locus standi* is an issue of admissibility, rather than jurisdiction, if it does not involve the scope of jurisdiction); **RLA-216**, Jurisdictional Challenges, INTERNATIONAL ARBITRATION PRACTICE GUIDELINE: JURISDICTIONAL OBJECTIONS, Chartered Institute of Arbitrators, 2015, p. 3 ("'admissibility' relates to . . . a party's legal right to bring its claim before the arbitrators").

[1187] *See* **Exhibit R-001**, STA & Renco Guaranty, Clauses 5, 6.

contacted Respondents in October of 2010 regarding the Missouri Litigations.[1188] According to Claimants, Peru had an obligation under the Peru Guaranty to indemnify and defend them in the Missouri Litigations.[1189] But breach of a contractual obligation cannot occur if that obligation does not exist. In this case, the Peru Guaranty was rendered null and void in 2001 by operation of Peruvian law.

584. On 1 June 2001, DRP assigned its contractual position to DRCL.[1190] That assignment terminated the Peru Guaranty, in accordance with Article 1439 of the Peruvian Civil Code. Article 1439 provides that "[g]uarantees offered by a third party do not pass to the assignee without the express authorization of the third party."[1191] As Respondents have explained, Clause 10 of the STA contains the requisite authorization in the event of an assignment of rights and obligations by Centromín.[1192] But no such authorization was granted with respect to the transfer of DRP's rights and obligations. Thus, Peru was required to provide its express authorization for the Peru Guaranty to survive a transfer of DRP's rights and obligations.[1193] Peru did not do so. Accordingly, the Peru Guaranty was subsequently rendered null and void as a matter of Peruvian law in 2001, and could no longer be the source of any rights and obligations in 2010.

585. Second, even if the Peru Guaranty were still in force, the only entity who would have standing would be DRCL. Peru's guaranty originally ran only to DRP.[1194] If DRP's assignments of its contractual position in the STA to DRCL did not void the Peru Guaranty, then Peru's guaranty now runs *only* to DRCL. Hence Claimants still would not have standing to bring a claim for breach of the Peru Guaranty.

[1188] **Exhibit R-258**, Letter from King & Spalding to MEM, MEF, and Activos Mineros, 12 October 2010.

[1189] **Exhibit R-258**, Letter from King & Spalding to MEM, MEF, and Activos Mineros, 12 October 2010, pp. 2–3.

[1190] **Exhibit R-004**, Contract Assignment, Clause 1.3 and 1.5.

[1191] **RLA-062**, Peruvian Civil Code, 24 July 1984, Art. 1439.

[1192] **Exhibit R-001**, STA & Renco Guaranty, Clause 10.

[1193] **RLA-062**, Peruvian Civil Code, 24 July 1984, Art. 1439; Varsi Expert Report-Contract, ¶¶ 6.28–6.37.

[1194] **Exhibit R-002**, Peru Guaranty, Art. 2.1.

586. Third, Claimants' Peru Guaranty claims are unripe. Claims are inadmissible if they are premature.[1195] Under the Peruvian law principle of *excussion*, a creditor cannot proceed against a guarantor in a surety contract unless it has first proceeded against the original debtor but has failed to obtain recovery.[1196] As Professor Varsi explains, under Peruvian law, a guaranty has a subsidiary nature, meaning that the guarantor only responds when the debtor is in default.[1197] Article 1868 of the Peruvian Civil Code states that "the guarantor assumes an obligation to the creditor to do what is specified in order to guarantee an obligation assumed by the debtor, ***in case the debtor does not comply***" (emphasis added).[1198] The principle of *excussion*, established in Article 1879, provides, "The guarantor cannot be compelled to pay the creditor ***without the creditor first seeking payment from the debtor***" (emphasis added).[1199] The creditor must first proceed against the original debtor, obtain a favorable judgment, and attempt but fail to enforce the judgment, before seeking payment from the guarantor.[1200] In this case, Claimants have not completed the *excussion* process. Accordingly, their Peru Guaranty claim is unripe.

587. For the foregoing reasons, Claimants' Peru Guaranty claims are inadmissible.

C. Claimants' indemnity, costs, and defense claims are inadmissible

588. The main thrust of Claimants' claims are based on Respondents' purported obligations to indemnify Claimants for damages, pay their litigation costs, and defend them in the

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[1195] **RLA-208**, *The AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16, Award, 1 November 2014 (Tercier, Vaughan Lower, Sachs), ¶ 441 (finding premature and inadmissible a claim based on what "may or may not happen"); **RLA-175**, *Infinito Gold* (Award), ¶ 580 (dismissing an indemnity claim as premature and inadmissible because the damages amount had yet to be determined); **RLA-083**, Jan Paulsson, Jurisdiction and Admissibility, GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION, November 2005, pp. 606, 616; **RLA-217**, *Republic of Sierra Leone v. SL Mining Ltd*., EWHC Case No. CL-2020-000185 (Commercial Court), Approved Judgment, 15 February 2021, ¶ 15(ii) ("mootness and ripeness are matters of admissibility, not jurisdiction") (internal quotation marks omitted); **RLA-216**, Jurisdictional Challenges, INTERNATIONAL ARBITRATION PRACTICE GUIDELINE: JURISDICTIONAL OBJECTIONS, Chartered Institute of Arbitrators, 2015, p. 3 ("'admissibility' relates to the claim and whether it is ripe and capable of being examined judicially").

[1196] Varsi Expert Report-Contract, ¶¶ 6.40–6.44; *see* **RLA-062**, Peruvian Civil Code, 24 July 1984, Art. 1879.

[1197] Varsi Expert Report-Contract, ¶ 6.39..

[1198] **RLA-062**, Peruvian Civil Code, 24 July 1984, Art. 1868.

[1199] **RLA-062**, Peruvian Civil Code, 24 July 1984, Art. 1879.

[1200] Varsi Expert Report-Contract, ¶ 6.45.

Missouri Litigations.[1201] Claimants locate those alleged obligations in Clauses 6.2 and 6.3 of the STA, the Peru Guaranty, pre-contractual liability under Peruvian law, and the minimum standard of treatment under customary international law.[1202]

589. Irrespective of the legal basis of the purported obligations, Claimants' claims are inadmissible because **(i)** Claimants lack standing to bring claims for breaches of these obligations, **(ii)** the indemnity claims are evidently unfounded, and **(iii)** the indemnity claims are unripe, in any event.

1. Claimants lack standing to bring their indemnity, costs, and defense claims

590. Assuming that Claimants were parties to the STA, they would nevertheless lack standing to assert claims for breach of the duties to indemnify, pay for costs, and defend. Claimants are not the holders of any of the rights for which they bring claims. Consequently, they lack standing to claim for breaches of any indemnity, costs, or defense obligations.

591. To recall, Claimants claim for breaches of Clauses 6.2 and 6.3 of the STA (and Peru's corresponding guaranty) on the *theory* that these clauses contain indemnity, costs, and defense obligations.[1203] Claimants cannot file a claim for breach of indemnity, costs, and defense obligations, because no such obligations are owed to them.

592. First, Claimants are not owed indemnity, costs, or defense obligations because, as Respondents explained in Section III.B.1.b(ii), Clauses 6.2 and 6.3 do not contain such duties. Instead, Clause 6.5 of the STA contains Centromín's indemnity obligation for third-party claims on environmental matters. That obligation, however, is owed only to the Company (DRP).[1204] Article 8.14 contains the relevant defense obligation. But that obligation is also owed only to the Company with regard to third-party claims encompassed by Clauses 5 and 6.[1205]

[1201] Contract Memorial, ¶¶ 144–172, 187–207.

[1202] Contract Memorial, ¶¶ 161, 164, 211, 238–45.

[1203] Contract Memorial, ¶¶ 161, 164.

[1204] **Exhibit R-001**, STA & Renco Guaranty, Clause 6.5.

[1205] **Exhibit R-001**, STA & Renco Guaranty, Clause 8.14.

593. There are no "assumption of liability" clauses, as Claimants define them, under Peruvian law.[1206] Peruvian law does not regulate indemnity, costs, or defense obligations, thereby leaving it up to the contracting parties to define their scope. Thus, if the STA Parties wanted to codify indemnity, costs, or defense obligations in Clauses 6.2 and 6.3, they would have done so explicitly. Because Clauses 6.2 and 6.3 do not contain any indemnity, costs, or defense obligations, Claimants lack standing to bring claims based on those rights.

594. Second, even if Clauses 6.2 and 6.3 included indemnity, costs, and defense obligations, Claimants are not encompassed by these clauses.[1207] Baldy claiming that their absence, the absence of the phantom-claimants, and the absence of everyone else from Clauses 6.2 and 6.3 means that the latter encompass "anyone who could be sued" is not good enough. When the STA Parties intended to indemnify or defend anyone other than the Company—e.g., "its shareholders, directors, officers, employees, agents and independent contractors"—they stated so expressly.[1208] If the STA Parties intended to include Claimants in Clauses 6.2 and 6.3, they would have done so explicitly.

595. Centromín left no doubt in its answer to question 42 of the consultations during the bidding process that it would indemnify only the Company for environmental matters:

> "[Question:] Assuming that the new owners of the METALOROYA comply with the PAMA terms and adopt all measures against contamination in order to comply with national and international rules, but Centromín does not correct the existing contamination (prior to the transfer) and a legal entity (local or foreign) files a claim in a national or international court ... How does Centromín propose to relieve METALOROYA from responsibility?
>
> [Answer:] CENTROMÍN has ordered the organization of and provided the funds to comply with the environmental remediations [sic] for which it is responsible, thereby guaranteeing compliance. In addition ***METALOROYA*** will be held harmless from such remediations [sic] and from third-party claims that are CENTROMÍN's responsibility by signing the contract."[1209] (Emphasis added)

[1206] Varsi Expert Report-Contract, ¶ 4.93.

[1207] *See* Section III.B.1.b(ii).

[1208] **Exhibit R-001**, STA & Renco Guaranty, Clause 8.10.

[1209] **Exhibit R-201**, Question and Answers Round 2, PDF p. 36, query 42.

In light of the above, Claimants' presentation of witness statements, from interested parties, without any documentary support, to rewrite the STA such that Clauses 6.2 and 6.3 encompass them, simply will not do.

596. Third, insofar as Claimants rely on pre-contractual liability under Peruvian law or customary international law, such claims are inadmissible for the same reasons.[1210] Claimants do not argue that any representations made by Respondents during contract negotiations were broader than the memorialized obligations under the STA, and there is no reason to conclude that they would have been. If binding representations had been made, they would have been coextensive with the terms of the STA—including as to the subjects of the relevant rights and obligations. Otherwise, Claimants bear the burden of proving exactly why they—sophisticated multinational corporations working (presumably) with counsel—signed a contract that excluded them when they were allegedly promised the opposite in negotiations.

597. Claimants are owed no indemnity, costs, or defense obligations under Clauses 6.2, 6.3, 6.5, or 8.14; Peruvian law; or customary international law. Thus, even if Claimants were STA Parties, they would nevertheless lack standing to assert such claims.

2. Claimants' indemnity claims are evidently unfounded

598. As noted above, Claimants argue that an "'assumption of liability" is "different" and "broader" than an indemnity obligation.[1211] The broader "'assumption of liability," according to Claimants, includes an obligation to cover litigation costs and to defend.[1212] The indemnity obligation, by definition, is limited to damages. Claimants ask the Tribunal to find that Respondents have *already* "breached" their indemnity obligations.[1213] But Claimants have failed to allege that a damages judgment has been entered against them. They cannot because the Missouri Litigations are still in progress. Assuming that Clauses 6.2 and 6.3 contained an indemnity obligation encompassing Claimants, that element must

[1210] Contract Memorial, ¶¶ 211, 238–45.

[1211] Contract Memorial, ¶ 161.

[1212] Contract Memorial, ¶¶ 161, 164.

[1213] Contract Memorial, ¶ 246.

be met under both Peruvian law and the United States law that Claimants hope the Tribunal imposes. Because that elements have not been met—and Claimants make no attempt to argue that they have been—Claimants' indemnity claims are inadmissible.[1214]

599. Where a claim is evidently unfounded, it is dismissed as inadmissible.[1215] The tribunal in *Occidental (I)*, for instance, dismissed an indirect expropriation claim as inadmissible because "it [was] so evident that there [was] no expropriation."[1216] There, it was manifest that one of the elements of an indirect expropriation, substantial deprivation, had not been met.[1217] Thus, the Tribunal stated, even though "[a] claim of expropriation should normally be considered in the context of the merits of a case," it dismissed the claim as a threshold question of admissibility.[1218] The Tribunal here should likewise dismiss Claimants' indemnity claims as evidently unfounded.

600. Under Peruvian law, Claimants could only claim for an indemnity obligation under Clauses 6.2 and 6.3 after they pay damages to the Missouri Plaintiffs. As Professor Varsi explains, Peruvian law does not regulate indemnity clauses, and so the scope of any indemnity obligation is determined by the contracting parties.[1219] For that reason, that Clauses 6.2 and 6.3 do not contain any indication that they include an indemnity obligation (let alone one whose content and scope is defined by the STA Parties) indicates that they are not indemnity clauses.

[1214] Claimants ask for indemnity (*de jure* or *de facto*) under the STA, the Peru Guaranty, Peruvian law, and international law.

[1215] **CLA-110**, *Occidental Exploration & Production Co. v. The Republic of Ecuador*, LCIA Case No. UN3467, Final Award, 1 July 2004, ¶ 80.

[1216] **CLA-110**, *Occidental Exploration & Production Co. v. The Republic of Ecuador*, LCIA Case No. UN3467, Final Award, 1 July 2004, ¶ 80.

[1217] **CLA-110**, *Occidental Exploration & Production Co. v. The Republic of Ecuador*, LCIA Case No. UN3467, Final Award, 1 July 2004, ¶ 89.

[1218] **CLA-110**, *Occidental Exploration & Production Co. v. The Republic of Ecuador*, LCIA Case No. UN3467, Final Award, 1 July 2004, ¶¶ 80, 92. During annulment proceedings at the arbitral seat (London), the High Court correctly held that, as the tribunal's ruling was not on jurisdiction, there was no basis to challenge the award under Article 67 of the English Arbitration Act. *See* **RLA-218**, *Occidental Exploration and Production Company v. Republic of Ecuador*, EWHC Case No. 04/656 (Commercial Court), Approved Judgment, 2 March 2006, ¶¶ 130–37.

[1219] Varsi Expert Report-Contract, ¶¶ 4.100, 7.3.

601. But if they were, because their content and scope is undefined, one would have to resort to general principles on Peruvian law on damages to determine when the indemnity obligations therein could be claimed.[1220] Under Peruvian law, there can be no claim for damages unless the claiming party has suffered a certain injury.[1221] As Professor Varsi concludes, because there has been no damages judgment entered against Claimants in the Missouri Litigations, Claimants have suffered no certain injury for which they can seek damages from Claimants under any indemnity obligations.[1222]

602. Likewise, even if Oklahoma law (or some other United States law) governed (they do not), for Claimants' indemnity claim to be minimally viable, the Missouri Litigations must have ended with a damages judgment against Claimants. Indeed, United States courts routinely reject indemnity claims when the underlying litigation remains pending.[1223] But the Missouri Litigations are still in progress, and nowhere near the issuance of a judgment.[1224] Accordingly, if the Tribunal were to accept Claimants' request to apply purported United States law, Claimants' indemnity claims would remain evidently unfounded.

603. The above analyses applies also to Claimants' pre-contractual liability claims under Peruvian law or customary international law.[1225] Claimants do not argue that any representations made by Respondents during contract negotiations were broader than the memorialized obligations under the STA, and there is no reason to conclude that they

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[1220] Varsi Expert Report-Contract, ¶¶ 4.101, 7.3.

[1221] Varsi Expert Report-Contract, ¶ 7.3.

[1222] Varsi Expert Report-Contract, ¶ 7.4.

[1223] *See, e.g.*, **RLA-200**, *Frontline Processing Corp. v. First State Bank of Eldorado*, 389 F. App'x 748, 754 (9th Cir.2010) ("Defendant's indemnification counterclaims were unripe because they rest[ed] upon contingent future events that might not have occurred as anticipated or at all."); (internal quotation marks omitted); **RLA-201**, *Hartford Fire Ins. Co. v. InterDigital Commc'ns Corp.*, 464 F. Supp. 2d 375, 378 (D. Del. 2006) ("The insurer's duty to defend an insured is a separate and distinct obligation from the insurer's duty to indemnify the insured. The duty to indemnify is a narrower duty, and arises only when the insured is determined to be liable for damages within the coverage of the policy. The duty to indemnify is based on actually liability, while the duty to defend is based upon the allegations of the complaint.").

[1224] *See generally* **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.

[1225] Contract Memorial, ¶¶ 211, 238–45.

would have been. Thus, Claimants' pre-contractual liability and customary international law claims fail for the same reasons.

604. The Tribunal is tasked with determining whether *an obligation has already been* "*breached*."[1226] Respondents cannot be held liable for a non-breach. It is so evidently clear that there has been no breach in this case that the Tribunal should dismiss Claimants' indemnity claims as inadmissible.

3. Claimants' indemnity claims are unripe

605. Because the Missouri Litigations remain in progress, and Claimants have not been found liable (let alone ordered to pay any damages) Claimants' indemnity claims are premature because they are speculative.[1227] As a result—even assuming that Claimants' interpretation of the STA, the Peru Guaranty, Peruvian law, and international law were correct—Claimants' indemnity claims are unripe and inadmissible.

606. Claimants' indemnity claims are unripe because they are speculative.[1228] Seemingly aware of those flaws, Claimants request declarations of breaches of the indemnity obligations.[1229] Claimants, however, conflate the Tribunal's power to issue a declaration with the inadmissibility of their unripe claims. This case, like *Infinito Gold*, involves ripeness of a declaratory award claim due to a pending legal proceeding.

607. *Infinito Gold* addressed claims by the investor in a mining company in Costa Rica.[1230] One of the claims challenged a ruling by a Costa Rican administrative tribunal ordering the mining company to pay USD 6.4 million in damages.[1231] But the quantum analysis of that ruling had been overturned, requiring a new ruling on the quantum of damages, the

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[1226] Contract Memorial, ¶ 246.

[1227] **RLA-208**, *The AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16, Award, 1 November 2013, ¶ 441; **RLA-175**, *Infinito Gold* (Award), ¶ 580.

[1228] **RLA-208**, *The AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16, Award, 1 November 2014, ¶ 441; **RLA-175**, *Infinito Gold* (Award), ¶ 580.

[1229] Contract Memorial, ¶ 246.

[1230] **RLA-175**, *Infinito Gold* (Award), ¶ 68.

[1231] **RLA-175**, *Infinito Gold* (Award), ¶ 577.

proceedings for which were pending.[1232] Accordingly, the claimant requested "a declaration that Costa Rica is liable to indemnify Infinito for any amounts Infinito or [Industrias Infinito] are required to pay as a result of, or in connection with, th[e] late-blooming proceeding."[1233]

608. The Tribunal dismissed the claim as inadmissible:

> "The Tribunal agrees with the Respondent that this claim is premature. The [administrative tribunal] has not issued any decision quantifying the damages to be paid by Industrias Infinito. However, it cannot be said that the claim is manifestly without legal merit, as the Respondent also contends. It is undisputed that the [administrative tribunal's decision] ordered Industrias Infinito to bear part of the costs of restoring the site, and this decision was confirmed by the Administrative Chamber. What remains to be decided is the amount that Industrias Infinito will need to pay. Accordingly, the Tribunal finds that the claim is premature and thus inadmissible at this stage."[1234]

The present case is even more premature because the courts presiding over the Missouri Litigations have not ordered Claimants to pay damages. Indeed, in neither proceeding has liability even been addressed. The Missouri Litigations are in pre-merits phases, and it would be pure conjecture to predict the eventual outcome. If the declaratory award claim in *Infinito Gold* was not ripe, Claimants' indemnity claims have not yet sprouted.

609. Litigation in the United States proceeds in various phases. Broadly, the first phase is the exchange of initial written submissions, during which plaintiffs file their complaint and defendants file an answer, or, a motion to dismiss due to legal or factual deficiencies.[1235] Generally, if the court does not dismiss the complaint, the parties proceed to the second phase—discovery. During the discovery phase, the parties exchange evidence between themselves and seek evidence from third-parties.[1236] Once the discovery phase is over, the

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[1232] **RLA-175**, *Infinito Gold* (Award), ¶¶ 115–18, 577.

[1233] **RLA-175**, *Infinito Gold* (Award), ¶ 394.

[1234] **RLA-175**, *Infinito Gold* (Award), ¶ 580.

[1235] *See* **RLA-209**, Federal Rules of Civil Procedure of the United States of America, 1 December 2020, R. 3–15.

[1236] *See* **RLA-209**, Federal Rules of Civil Procedure of the United States of America, 1 December 2020, R. 26–31, 33–37.

litigation often proceeds to the summary judgment phase, which is another opportunity for the defendants to seek summary dismissal based on legal or factual insufficiency.[1237] Importantly, the written submissions filed by the parties during those phases, and the evidence that accompanies those submissions, are not part of the evidentiary record. In United States litigation, evidence—documentary, testimonial, expert, etc.—is admitted into the record *only* at trial, after the fact-finder (the jury) has been constituted.

610. Only if claims survive summary judgment does the case proceed to trial. During trial, defendants have the opportunity to seek dismissal of the plaintiffs' claims by the court.[1238] Indeed, even after a verdict is reached, defendants can request that the court overturn an adverse verdict.[1239] Only if an adverse verdict survives will defendants be ordered to pay damages. After the determination of damages, defendants can move for *remittitur*—wherein the judge gives a plaintiff who has received an excessively favorable damages award the option of accepting a specified reduction or submitting to a new trial.[1240] And after completion of the first-instance proceeding, defendants have the right to appellate review.[1241]

611. The two Missouri Litigations are still in the pre-trial phases. The Collins Cases are still in the discovery phase, while the Reid Cases are still in the summary judgment phase.[1242] It is impossible at this stage to know whether either case will move past summary judgment and whether Claimants in this arbitral proceeding will be found liable. It is impossible to know whether any finding of liability will relate to claims for which Respondents may be responsible under the STA, the Peru Guaranty, Peruvian law, or international law. Further, it is also impossible to know the quantum of any damages award against Claimants (if any);

[1237] *See* **RLA-209**, Federal Rules of Civil Procedure of the United States of America, 1 December 2020, R. 56.

[1238] *See* **RLA-209**, Federal Rules of Civil Procedure of the United States of America, 1 December 2020, R. 50(a), (b).

[1239] *See* **RLA-209**, Federal Rules of Civil Procedure of the United States of America, 1 December 2020, R. 59, 60.

[1240] **RLA-210**, Corpus Juris Secundum, Federal Civil Procedure, 35B, § 1128, March 2022.

[1241] **RLA-211**, *Gunderson v. Bigg*, 146 F.3d 557, 557 (8th Cir. 1998) (reversing a district court's denial of a motion for remittitur, and decreasing the damages award of USD 355,000 by USD 128,000).

[1242] *See generally* **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, p. 181; **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, p. 182.

whether those damages will be for claims for which Respondents may be responsible; or whether an appellate court will overturn a verdict on liability or damages, in full or in part.

612. Assume that Claimants and the phantom-claimants had been sued for A, B, C, and D. For the Tribunal to find that Respondents breached any indemnity obligation, it would need to know what damages Claimants (rather than the phantom-claimants) had been ordered to pay (if any). That, in turn, requires knowing *for what* Claimants have been held liable. If Respondents are only responsible to indemnify damages of claims A and B, they cannot have breached an indemnity obligation if Claimants are found liable only for claims C and D. The Tribunal cannot know any of that information because no judgments have been issued in the Missouri Litigations.

613. The preceding sequence, moreover, assumes that the litigating parties do not settle. In the United States, roughly 66% of all federal civil suits settle before reaching a verdict.[1243] As a settlement agreement is a contract between the litigating parties, they can decide the quantum of any settlement, and which defendants will pay any settlement amount. Further, it is common for defendants to agree to pay a settlement amount without accepting any liability for the claim. In such a scenario, it would be impossible to determine what portion of a potential settlement amount (if any) would relate to claims for which Respondents may be responsible.

614. Given the status of the Missouri Litigations, the Tribunal cannot determine at this stage if Respondents owe Claimants any indemnity under the STA, the Peru Guaranty, Peruvian law, or international law. As in *Infinito Gold*, the Tribunal should dismiss Claimants' indemnity claims as unripe.

D. Claimants' Peruvian law claims are inadmissible

615. Claimants' Peruvian law claims are inadmissible. First, Claimants' subrogation, contribution, and unjust enrichment claims are unripe, and a procedural maneuver cannot cure that fact. Second, Claimants lack standing to bring their subrogation and contribution claims, because they hold no rights under those theories. Third, all of Claimants' Peruvian

[1243] **RLA-212**, Jay Tidmarsh, *The Future of Oral Argument*, 48 Loy. U. Chi. L.J. 475, 486 n.32, Winter 2016.

law claims are inadequately articulated, precluding Respondents from exercising their due process rights.

1. Claimants' subrogation, contribution, and unjust enrichment claims are unripe

616. Claimants bring claims under the Peruvian law concepts of subrogation, contribution, and unjust enrichment.[1244] Respondents have already explained why the Tribunal lacks jurisdiction over such claims. In the alternative, however, those claims are inadmissible. Under Peruvian law, subrogation, contribution, and unjust enrichment all require the existence of an already-made payment to the Missouri Plaintiffs. But Claimants have made no such payment, nor have they argued otherwise. They are just as speculative as Claimants' indemnity claims, and for the same reasons. Accordingly, Claimants subrogation, contribution, and unjust enrichment claims are unripe.

617. It is clear that Claimants' subrogation, contribution, and unjust enrichment claims require the existence of a payment:

> "Renco and DRR therefore seek a declaration from this Tribunal that, *if the either are found liable for damages arising from the personal injury claims asserted in the St. Louis Lawsuits*, and if Claimants' contract claims in this arbitration fail, *Renco and DRR are entitled to restitution of any amounts that they might pay in satisfaction of the judgment in the St. Louis Lawsuits* pursuant to the doctrines of subrogation, contribution and/or unjust enrichment as provided for under Peruvian law."[1245]

618. A declaratory award is not a procedural maneuver that bypasses the limitation on hypothetical, speculative claims. *That is especially true when a claimant does not seek true declaratory relief, as is the case here.* Claimants do not limit their request to declaratory relief. Instead, they reserve their rights to request compensation in the quantum phase of this proceeding.[1246] Claimants attempt to use the bifurcated nature of this proceeding to bypass their burden to prove the elements of their subrogation, contribution, and unjust enrichment claims in the merits phase. This proceeding involves a full request for compensation, split into merits and quantum phases. Claimants must prove the

[1244] Contract Memorial, ¶¶ 210–237.

[1245] Contract Memorial, ¶ 237.

[1246] Contract Memorial, ¶ 264.

elements of their claims in the proper phase—the merits phase. The Tribunal should not acquiesce to Claimants' tactic.

619. A subrogation claim requires the existence of an already executed payment under Peruvian law.[1247] Claimants concede the point, explaining that their subrogation action "would be met" if they were to be found liable in the Missouri Litigations, because, in that case "Renco and DRR would be third parties covering the debt of Centromín."[1248] In that circumstance, Claimants assert, they "'would have the legitimate right to file a subrogation action and demand Activos Mineros ***the restitution of the payment made***'" (emphasis added).[1249]

620. The same is true for Claimants' contribution claim. Article 1983 of the Peruvian Civil Code, which governs contribution, provides that "[i]f several are responsible for the damage, they will be jointly and severally liable. However, the one who paid the totality of the indemnity can repeat against the others."[1250] As is clear from Article 1983, a contribution action requires a completed payment.[1251] Indeed, Professor Payet admits that under contribution, "the party with joint several liability *that paid the entire compensation* can file for reimbursement for what was paid against the rest of the liable parties" (emphasis added).[1252] Claimants concede the point as well.[1253] An already effected payment is a prerequisite of a contribution claim.

621. Finally, to substantiate an unjust enrichment claim, Respondents must have been enriched and Claimants must have been impoverished.[1254] That means, as Claimants concede, that "the conditions for an unjust enrichment claim would be met—*if* the St. Louis Court were

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[1247] Varsi Expert Report-Contract, ¶¶ 8.31, 8.33, 8.35.

[1248] Contract Memorial, ¶ 213.

[1249] Contract Memorial, ¶ 213.

[1250] **RLA-062**, Peruvian Civil Code, 24 July 1984, Art. 1983 (Spanish Original: "*Si varios son responsables del daño, responderán solidariamente. Empero, aquel que pagó la totalidad de la indemnización puede repetir contra los otros*.")

[1251] Varsi Expert Report-Contract, ¶ 8.39.

[1252] Payet Expert Report, ¶ 238.

[1253] Contract Memorial, ¶ 215.

[1254] Varsi Expert Report-Contract, ¶ 8.43.

to find Renco and/or DRRC liable for the claims asserted in that forum" (emphasis added).[1255] Because there has been no finding of liability, however, Claimants haven't made any payment. But an unjust enrichment claim requires Claimants' impoverishment—i.e., an already executed payment.[1256]

622. In this case, Claimants have not alleged (and cannot allege) that they have made the required payments. Given the pending status of the Missouri Litigations, the Tribunal cannot determine whether Claimants' ever will. Moreover, it is impossible for the Tribunal to know on what basis the Claimants might be found liable in the Missouri Litigations (if they are). Thus, it is impossible to know if any future payment, based on a hypothetical future liability, will relate to actions for which Centromín has assumed responsibility. For the same reasons that Claimants' indemnity claims are unripe, so are their subrogation, contribution, and unjust enrichment claims.

2. Claimants lack standing to bring subrogation and contribution claims

623. The consequence of not being the holder of the right at issue is dismissal of the claim as inadmissible for lack of standing.[1257] Claimants put the cart before the horse with regard to their subrogation and contribution claims. Under both theories, a right to request compensation arises only after all the elements are met—in particular, having effected payment. Claimants have not made any payment, and as a consequence they hold no right under either theory to proceed against Respondents. In short, Claimants lack standing.

624. Article 1222 of the Peruvian Civil Code allows third-parties to make the payments for obligations of debtors.[1258] Pursuant to Articles 1260 and 1261 of the Civil Code, in some

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[1255] Contract Memorial, ¶ 235.

[1256] Varsi Expert Report-Contract, ¶ 8.46.

[1257] *See* **RLA-083**, Jan Paulsson, Jurisdiction and Admissibility, GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION, November 2005, pp. 614, 616 (explaining that *locus standi* is an issue of admissibility, rather than jurisdiction, if it does not involve the scope of jurisdiction); **RLA-216**, Jurisdictional Challenges, INTERNATIONAL ARBITRATION PRACTICE GUIDELINE: JURISDICTIONAL OBJECTIONS, Chartered Institute of Arbitrators, 2015, p. 3 ("'admissibility' relates to . . . a party's legal right to bring its claim before the arbitrators").

[1258] **RLA-062**, Peruvian Civil Code, Art. 1222 (Spanish original: "*Artículo 1222.- Puede hacer el pago cualquier persona, tenga o no interés en el cumplimiento de la obligación, sea con el asentimiento del deudor o sin él, salvo que el pacto o su naturaleza lo impidan. Quien paga sin asentimiento del deudor, sólo puede exigir la restitución de aquello en que le hubiese sido útil el pago*.").

instances the third-party who has made the payment can subrogate itself to the creditor's position.[1259] For subrogation to operate, there must be **(i)** a debt owed by a debtor to a creditor, **(ii)** a payment by a third-party of the debt to the creditor, and **(iii)** compliance with one of the requirements of Articles 1260 and 1261.[1260] The third-party thereby substitutes the old creditor and becomes the new creditor, holding the former's rights, actions, and guarantees.[1261]

625. Claimants argue that *if* in the future they are ordered to pay the Missouri Plaintiffs, they would be paying Respondents' debt.[1262] Assuming Claimants' theory were correct, they would still lack standing to file their current subrogation claim. A party assumes the former creditor's rights, actions and guarantees only after having met all the elements of subrogation.[1263] Until that process is complete and Claimants have effected payment, under Claimants' theory the Missouri Plaintiffs remain Respondents' creditors.[1264] In other words, the Missouri Plaintiffs remain the holders of the rights that Claimants invoke in their subrogation claim. No substitution has taken place. Claimants are not subrogating parties; they are usurpers who lack standing.

626. A similar situation occurs with Claimants' contribution claim. Under Article 1983 of the Peruvian Civil Code, "[i]f several are responsible for the damage, they will be jointly and severally liable. However, the one who paid the totality of the indemnification can repeat against the others."[1265] The adjudicator then determines the appropriate compensation in proportion to each party's fault.[1266] In other words, if Claimants had a right to seek compensation from Respondents under the theory of contribution, that right would arise

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[1259] **RLA-062**, Peruvian Civil Code, Arts. 1260–61.

[1260] Varsi Expert Report-Contract, ¶ 8.33.

[1261] Varsi Expert Report-Contract, ¶ 8.33; **RLA-062**, Peruvian Civil Code, Art. 1262.

[1262] Contract Memorial, ¶ 213.

[1263] Varsi Expert Report-Contract, ¶¶ 8.33, 8.35.

[1264] *See* Varsi Expert Report-Contract, ¶ 8.35.

[1265] **RLA-062**, Peruvian Civil Code, 24 July 1984, Art. 1983 (Spanish Original: "*Si varios son responsables del daño, responderán solidariamente. Empero, aquel que pagó la totalidad de la indemnización puede repetir contra los otros*.").

[1266] **RLA-062**, Peruvian Civil Code, 24 July 1984, Art. 1983.

only after they paid the totality of the indemnification due, and Respondents were responsibility for part of that amount. Claimants cannot "repeat against others" if they are not the "one[s] who paid the totality of the indemnization."[1267] Claimants cannot ask this Tribunal to properly determine the apportionment of compensation between them and Respondents, because, by not having met the necessary requirements, Claimants have no legal right to file this claim. In short, they lack standing.

3. Claimants Peruvian law claims are not adequately articulated

627. If Claimants do not adequately explain the bases of their Peruvian law claims, the Tribunal should dismiss them as inadmissible. Claims are inadmissible when they are not comprehensible.[1268] Under Article 20(2) of the UNCITRAL Rules, Claimants must provide fully-developed claims so that Respondents can fully exercise their due process rights.[1269] The Tribunal has the power to conduct proceedings in a manner that ensures fairness under Article 17(1).[1270] In this case, Claimants have not explained how their Peruvian law claims operate—even under their own theories. Claimants' Peruvian law claims are so amorphous that Respondents are unable to properly defend themselves. Respondents request that the Tribunal dismiss Claimants' Peruvian law claims as incomprehensible.

628. For instance, Claimants "devote" one paragraph (paragraph 211) of their Contract Memorial to their pre-contractual liability claim. The following is essentially the factual basis for that claim: "Peru and Centromín breached their duty to negotiate in good faith by creating the reasonable expectation by the Renco Consortium during the bidding process and the STA negotiations that Centromín would retain and assume liability for third-party

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[1267] **RLA-062**, Peruvian Civil Code, 24 July 1984, Art. 1983 (Spanish Original: "*Si varios son responsables del daño, responderán solidariamente. Empero, aquel que pagó la totalidad de la indemnización puede repetir contra los otros*.").

[1268] *Compare* **RLA-086**, *ST-AD GmbH v. Republic of Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013, ¶ 295 (dismissing claims as inadmissible because "they were not properly articulated and that, as a result, the Tribunal could not really understand what the issues were").

[1269] UNCITRAL Rules, Art. 20(2)(e).

[1270] UNCITRAL Rules, Art. 17(1).

claims, but then refusing to do so."[1271] That is plainly insufficient. At a minimum, Claimants must **(i)** identify facts, **(ii)** identify a legal standard, **(iii)** and explain how those facts could lead to a favorable award. The dearth of factual content and explanation in paragraph 211 prevents any true analysis of the claim. It also precludes Respondents from properly defending themselves against Claimants' vague statement.

629. As another example, all of Claimants Peruvian law claims are framed as "in the alternative" to their contractual claims, relevant only "if Renco and DRR's contract claim fails."[1272] Respondents have been able to identify what "in the alternative" means vis-à-vis Claimants' pre-contractual liability and unjust enrichment claims—both require the inexistence of arbitral consent. Nevertheless, Claimants and Professor Payet do not explain how Claimants' subrogation and contribution claims could succeed if their contractual claims fail. Respondents are therefore unable to determine whether those claims too fail on jurisdictional grounds.

630. Further, no one seems to dispute that, under the Peru Guaranty, Peru guaranteed Centromín's obligations *under the STA*.[1273] On the Peruvian law claims, however, it is unclear on what basis Peru is a proper respondent in this proceeding. For all the Peruvian law claims, Claimants freely treat Centromín and Peru as one and the same without any argument on attribution or otherwise.[1274] Regarding subrogation, for example, Claimants argue that if they were to pay the Missouri Plaintiffs, they would "in effect would be assuming Centromín's liability under Clauses 5 and 6 of the STA (and Peru's liability under the STA)."[1275] That sleight of hand is insufficient. Peru has no liability "under the STA." Peru is, as Claimants know, a guarantor for the entity who, if Claimants' subrogation theory were accepted, would be the debtor.

631. Attempting to hold Peru liable under Peruvian law theories is even more problematic given that such claims require, under Claimants' theory: that their STA claims fail. Peru, for instance, did not guaranty compliance with Centromín's pre-contractual statements. More

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[1271] Contract Memorial, ¶ 211.

[1272] Contract Memorial, ¶ 210.

[1273] **Exhibit R-002**, Peru Guaranty, Clause 2.1

[1274] *See* Contract Memorial, ¶¶ 211–36.

[1275] Contract Memorial, ¶ 213.

generally, if—as with Claimants' unjust enrichment and pre-contractual liability claim—all other Peruvian law claims require that Claimants *not* be STA Parties, then how can such claims be brought against Peru?

632. Respondents have the due process right to proper notice of properly articulated claims. Respondents thus request that the Tribunal dismiss Claimants' Peruvian law claims as improperly submitted.

E. Claimants' minimum standard of treatment claim is inadmissible

633. Based on Claimants' current arguments, Claimants' minimum standard of treatment claim under the theory of estoppel is both evidently unfounded and impenetrable.[1276] Claimants have not met even a minimal burden of proving the content of the minimum standard of treatment, nor have they articulated any actual facts to support their claim. Respondents reiterate that Claimants must provide fully-developed claims so that Respondents can fully exercise their due process rights.[1277] Accordingly, pursuant to the Tribunal's power to ensure the fairness of these proceedings, Respondents request that it dismiss Claimants' minimum standard of treatment claim.[1278]

634. At this phase of the proceeding, Claimants' estoppel claim is evidently unfounded. Claimants present no evidence of *usus* or *opinio juris* that principles of estoppel gives rise to international obligations under the minimum standard of treatment.[1279] *Chagos Marine Protected Area*, cited by Claimants, does not address the minimum standard of treatment under customary international law.[1280]

[1276] **CLA-110**, *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No. UN3467, Final Award, 1 July 2004, ¶ 80 (dismissing an expropriation claim that was evidently unfounded); **RLA-086**, *ST-AD GmbH v. Republic of Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013, ¶ 295 (dismissing claims as inadmissible because "they were not properly articulated and that, as a result, the Tribunal could not really understand what the issues were").

[1277] UNCITRAL Rules, Art. 20(2)(b), (e).

[1278] UNCITRAL Rules, Art. 17(1).

[1279] *See e.g.*, **RLA-144**, *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, ¶ 273; **RLA-205**, Glamis Gold Ltd. v. United States of America, Award, 8 June 2009, ¶¶ 20–21.

[1280] *See generally* **CLA-016**, *Chagos Marine Protected Area (Republic of Mauritius v. United Kingdom)*, Award, 18 March 2015.

635. Claimants' minimum standard of treatment claim is evidently unfounded and impenetrable because they fail to present almost any identifiable facts, let alone tie them to their purported elements of estoppel. Peru rejects the notion that vague references precluding it from exercising its due process rights—and the Tribunal from considering the claim—are sufficient.[1281]

636. For instance, Claimants assert that the first element of their claim is that a State make clear and consistent representations.[1282] Claimants assert that Peru assured that it would assume responsibility for third-party claims and would not leave investors with liability.[1283] But they fail to specifically identify the supposed representations. Claimants summarily reference "the bidding terms, answers to bidder questions, and larger context,"[1284] without identifying the specific Bidding Terms, the specific answers, or any discrete representations from the nebulous "larger context." Claimants also mention in passing unidentified oral representations during supposed STA negotiations.[1285]

637. The only supposed representation that Claimants specifically identify is a governmental resolution splitting the original PAMA.[1286] But the resolution says nothing about the allocation of responsibility for third-party claims; whether Claimants are encompassed by such allocation; or any indemnity, costs, or defense obligations—let alone anything regarding the Peru Guaranty.[1287]

638. According to Claimants, the second element of estoppel is that the subject representations be made by an agent for the State that is authorized to speak for the State on that matter.[1288] Claimants do not identify specific representations, however, and therefore they do not

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[1281] UNCITRAL Rules, Art. 20(2)(b), (e); **RLA-086**, *ST-AD GmbH v. Republic of Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013, ¶ 295 (dismissing claims as inadmissible because "they were not properly articulated and that, as a result, the Tribunal could not really understand what the issues were").

[1282] Contract Memorial, ¶ 239.

[1283] Contract Memorial, ¶ ¶ 242–243.

[1284] Contract Memorial, ¶ 243.

[1285] Contract Memorial, ¶ 240.

[1286] Contract Memorial, ¶ 243.

[1287] *See generally* **Exhibit R-028**, Directorial Resolution No. 334-97-EM/DGM, 16 October 1997.

[1288] Contract Memorial, ¶ 239.

name specific representatives. Claimants are thus unable to explain why nameless representatives might be considered agents of Peru, never mind individuals authorized to speak for Peru on the unidentified representation.

639. Finally, Claimants assert that the last two elements of estoppel are detrimental and legitimate reliance.[1289] According to the case cited by Claimants,

> A State that elects to rely to its detriment upon an expressly non-binding agreement does not, by so doing, achieve a binding commitment by way of estoppel. Such reliance is not legitimate . . . [Estoppel] . . . is instead concerned with the grey area of representations and commitments whose original legal intent may be ambiguous or obscure, but which, in light of the reliance placed upon them, warrant recognition in international law.[1290]

640. Not one sentence in Claimants' section on the minimum standard of treatment explains why Claimants could legitimately rely on supposed representations. It could not have come as a shock to Claimants that DRP would be executing the STA, a legally binding instrument, and the Peru Guaranty, another legally binding instrument. Given that reality, Claimants must have—at minimum—informed Respondents and the Tribunal of the facts that make the legal intent of any pre-contractual representation ambiguous rather than expressly non-binding.

641. For the foregoing reasons, Peru requests the Tribunal to dismiss Claimants' minimum standard of treatment claim as inadmissible.

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642. As Respondents have detailed, the Tribunal lacks jurisdiction over this dispute, and Claimants' claims are, in any event, inadmissible. Indeed, ruling for Claimants on jurisdiction and admissibility would require a complete rewriting of the STA and the Peru Guaranty. Respondents steadfastly reject Claimants' attempt to override the common intent of the STA Parties.

[1289] Contract Memorial, ¶ 239.

[1290] **CLA-016**, *Chagos Marine Protected Area (Republic of Mauritius v. United Kingdom)*, Award, 18 March 2015, p. 249, ¶¶ 445–46.

643. If Claimants' theory—that they have standing to file a claim against Peru under clause 2.1 of the Peru Guaranty though the guaranty obligation therein is specifically owed only to DRP[1291]—were accepted, then the STA's specific identification of the legal entities that have obligations or to which obligations are owed must be erased too. There is no reason to interpret the STA and the Peru Guaranty differently. Thus, under Claimants' own theory, every STA obligation that is owed by the Company or the the Investor would likewise be owed by Claimants. If such a modification of the Peru Guaranty and the STA were applied, Respondents would amend and supplement their Counter-Memorial to counterclaim against Claimants for breaches of their numerous obligations under the STA.

644. Respondents' position necessarily follows from Claimants' position. For instance, if Claimants' view that clauses 6.2 and 6.3 constitute "assumption of liability" clauses were implemented, then, as Respondents explain above, the same interpretation must be given to clauses 5.3 and 5.4.[1292] If Claimants were to erase the specification of legal entities, then they too would have "assumed liability" under clauses 5.3 and 5.4. Further, if those clauses were rewritten to encompass "anyone who could be sued,"[1293] then Claimants would be obligated to defend, pay costs for, and indemnify Peru (who is not an STA Party) against third-party claims. And, to recall, Claimants also propose that a breach of an indemnity obligation under Peruvian law can occur prior to a finding of liability, a quantification of damages, and the payment of damages.[1294]

645. Claimants do not ask for an interpretation of the STA and the Peru Guaranty. Claimants ask for the contracts to be redrafted. It is not possible for Respondents to predict at this point the breadth of any potential redrafting of the STA and the Peru Guaranty. Nevertheless, as a point of departure, if Claimants' cascade of amendments masquerading as "interpretation" were incorporated into the STA, the Peru Guaranty, and Peruvian law, Respondents hereby put Claimants on notice that we would be obliged to bring forward

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[1291] *See* **Exhibit R-002**, Guaranty Contract, 21 November 1997, Art 2.1 ("[*Peru*] *garantiza a EL INVERSIONISTA las declaraciones, seguridades, garantías y obligaciones asumidas por* [*Centromin*] *en el* [*STA*].").

[1292] *See* **Exhibit R-001**, STA and Renco Guaranty, clauses 5.3, 5.4.

[1293] Contract Memorial, ¶ 166.

[1294] Contract Memorial, ¶ 246.

counterclaims against Claimants for, among other things, breaches of their newly formed "assumption of liability" obligations. As Peru explains in its Counter-Memorial in the parallel treaty arbitration, there are currently third-party claims against Peru pending before the Inter-American Court of Human Rights.[1295] Those claims are based, in part, on the fact that DRP failed to comply with its obligations under the Metaloroya PAMA.[1296] Given the abject lack of jurisdiction over Claimants' claims, and their inadmissibility, in this arbitral proceeding, Respondents would expect this scenario to be foreclosed, but stand ready to assert and pursue all legal remedies under any redrafted contractual instruments.

[1295] *See* Treaty Counter-Memorial, Section IV.A.2.b.(ii), n. 1163.

[1296] *See* Treaty Counter-Memorial, Section IV.A.2.b.(ii), n. 1163..

V. MERITS

A. Activos Mineros and Peru have no obligation under the STA and the Peru Guaranty to indemnify, pay costs, or defend Claimants in relation to the Missouri Litigations

646. As explained above, Claimants' claims face insurmountable hurdles on jurisdiction and admissibility. If the Tribunal were to find that it had jurisdiction over Claimants' claims, and that such claims are admissible, then they would still fail on the merits.

647. As the Tribunal considers Claimants' arguments on the merits, it should keep in mind that Claimants bear the burden of affirmatively proving their claims. 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.[1297] The UNCITRAL Arbitration Rules, which govern this proceeding, codify this principle.[1298] Because Claimants are the parties alleging that Respondents have breached their obligations, Claimants bear the burden of proving the existence of such breaches.[1299]

648. With Claimants' burden in mind, even assuming that the Tribunal finds that Claimants' claims can survive the fatal jurisdictional and admissibility hurdles, which they cannot, Claimants' claims lack merit and should be dismissed for the reasons explained below.

[1297] *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**, *Víctor 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").

[1298] UNCITRAL Arbitration Rules, Art. 27 ("Each party shall have the burden of proving the facts relied on to support its claim or defence.").

[1299] *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 malicious misapplication of the law. The burden of proof is on the Claimants to demonstrate such a systemic injustice.").

After a review of the pleadings and supporting documentation, the Tribunal will observe that ruling in favor of Claimants' contractual claims requires redrafting the STA and misapplying Peruvian law.

1. Activos Mineros and Peru did not assume responsibility for all third-party claims relating to environmental contamination pursuant to clauses 5 and 6 of the STA and the Peru Guaranty

649. In Claimants' Contract Memorial, they make the sweeping allegation that Activos Mineros and Peru agreed to assume responsibility for virtually all third-party claims relating to environmental contamination, including for DRP's operation of the Facility during the period of DRP's PAMA.[1300] Claimants' allegation is baffling. To arrive at their conclusion, Claimants interpret the STA, not by interpreting the text of the STA, but instead by citing their subjective beliefs and the unsubstantiated witness statements of their executives. The STA and record squarely contradict Claimants' interpretation.

650. While Activos Mineros did agree to assume responsibility for third-party claims relating to environmental contamination in some situations, Activos Mineros did not assume responsibility for *all* third-party claims relating to environmental contamination. Specifically, Respondents will demonstrate that Claimants misinterpret (i) Clause 5.3 of the STA regarding DRP's (i.e., the Company's) responsibility for third-party claims relating to environmental contamination caused during the period approved for the execution of DRP's PAMA; (ii) Clause 5.4 of the STA regarding DRP's (i.e., the Company's) responsibility for third-party claims relating to environmental contamination caused after the expiration of the term of DRP's PAMA; and (iii) clauses 6.2, 6.3, 6.5, and 8.14 of the STA regarding Activos Mineros' obligations relating to environmental contamination claims.

[1300] *See e.g.*, Contract Memorial, ¶ 154 ("Centromin agreed to assume liability for all third-party damages and claims attributable to DRP's operation of the Complex during the period approved by the MEM for the performance of DRP's PAMA projects (initially 10 years), subject to very narrow exceptions not applicable here"); *id*. ¶ 157 ("Under no circumstances or scenario would Renco, DRR or anyone else be liable for third-party claims arising from operations in the Complex prior to execution of the STA or after the STA was signed;" *id*. ¶ 166 ("Centromin agreed in Clauses 6.2 and 6.3 to "assume liability for any damages and claims by third parties" relating to environmental contamination, in addition to agreeing in Clause 6.5 to "indemnify [the Company] for any damages, liabilities or obligations" arising from such claims"); *id*. ¶ 166 ("Centromin's assumption of liability for third- party damages and claims under Clauses 6.2 and 6.3 extends to anyone who could be sued by a third-party for damages falling within the scope of the assumption of liability").

a. DRP's responsibility under Clause 5.3 of the STA for third-party claims relating to environmental contamination caused during the period approved for the execution of DRP's PAMA

651. Clause 5.3 of the STA establishes the scope of DRP's responsibility for damages and claims by third parties for the "period approved for the execution of Metaloroya's [DRP's] PAMA." During that period, DRP assumed responsibility for:

> "a) those that arise directly due to acts that are not related to Metaloroya's [DRP's] PAMA which are exclusively attributable to [DRP] but only insofar as said acts were the result of [DRP'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.
>
> [and]
>
> b) those that result directly from a default on the Metaloroya's [DRP's] PAMA [sic] obligations on the part of [DRP] . . . ."[1301]

652. The above indicates that the STA distinguishes between two scenarios where DRP assumes responsibility for third-party claims relating to environmental contamination: (i) acts that are not related to DRP's PAMA (*see* Clause 5.3(a)); and (ii) acts relating to DRP's PAMA (*see* Clause 5.3(b)).

653. **The first scenario.** Under the first scenario, there are three phrases that merit close attention: (i) "acts that are not related to Metaloroya's [DRP's] PAMA"; (ii) "exclusively attributable"; and (iii) "less protective of the environment or of public health than those that were pursued by Centromín."

654. With respect to what "acts that are not related to Metaloroya's [DRP's] PAMA" encompasses, as explained by Professor Varsi, under Peruvian law contract interpretation starts by performing a literal interpretation of the clause in accordance with Article 168 of the Peruvian Civil Code. For this determination, it is helpful to determine the significance of "acts that *are related* to Metaloroya's [DRP's] PAMA." As explained above,[1302] DRP's PAMA and its amendments outlined projects and technological improvements that DRP was obligated to completed, including, among other projects: (i) the Sulfuric Acid Plant

[1301] **Exhibit R-001**, STA & Renco Guaranty, Clause 5.3.

[1302] *See supra* **Section II.A**.

Project; (ii) the industrial waste water treatment plant for the smelter and refinery; (iii) the containment dam for the lead muds near the zileret plant; and (iv) wastewater treatment and disposal in La Oroya.

655. Based on a literal interpretation of Clause 5.3(a), acts that "are related to Metaloroya's [DRP's] PAMA" can only include acts that were done in order to perform, implement, or further DRP's PAMA. As a result, "acts that are *not* related to Metaloroya's [DRP's] PAMA" must include the operation of the Facility, such as processing and smelting metals concentrates, which produce toxic emissions.

656. As explained by Professor Varsi, under Article 168, if the language of the clause is clear, then it is sufficient to read the literal text to derive the parties' joint intention.[1303] The analysis of the meaning of this part of clause 5.3(a) can stop here, but, for the sake of completeness and as discussed above, in cases where the literal interpretation is not clear (which is not the case here), Article 169 of the Peruvian Civil Code provides for systematic interpretation. A systematic interpretation entails interpreting a clause of a contract in a manner that provides consistency among the different clauses of the contract.

657. Based on a systematic interpretation of Clause 5.3(a), if one were to follow Claimants' interpretation and exclude the operation of the Facility from the phrase "acts that are not related to Metaloroya's [DRP's] PAMA," then the second half of Clause 5.3(a) would be devoid of meaning. That is, the second half of Clause 5.3(a) states that DRP assumed responsibility for damages and claims by third parties if they arise directly due to acts that are not related to Metaloroya's[DRP's] PAMA which are exclusively attributable to DRP, "but only insofar as said acts were the result of [DRP'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."[1304] If the operation of the Facility is excluded from the phrase "acts that are not related to Metaloroya's[DRP's] PAMA," then there would be no scenario in which one would have to determine whether the use of standards and practices used by DRP were less protective of the environment or of public health than those that were pursued by Centromín.

[1303] Expert Report of Enrique Varsi - Contract, ¶ 4.30.

[1304] **Exhibit R-001**, STA & Renco Guaranty, Clause 5.3(a).

658. As a result, Claimants' argument that under Clause 5.3(a) of the STA, DRP is not responsible for any claims that relate to DRP's operations of the Facility during the term of DRP's PAMA period is simply incorrect. Claimants' reading of Clause 5.3 (a) requires the Tribunal to assume that *everything* that DRP was doing at the Facility after its acquisition related to DRP's PAMA. That cannot be right. First, Claimants provide no support for this assumption; in fact, their own witness draws a distinction between "the PAMA projects and [the] operation of the Complex" in the same paragraph Claimants cite to erase that distinction.[1305] Second, Claimant's reading of Clause 5.3(a) would require the Tribunal to believe that Activos Mineros intended to assume responsibility for environmental contamination that DRP caused from its operation of the Facility, no matter how DRP operated the Facility. This reading does not make sense,[1306] and, as discussed above, is squarely contradicted by the second half of Clause 5.3(a).[1307]

659. With respect to determining what the phrase "exclusively attributable" applies to, Claimants argue that DRP assumes liability only for *claims* that are "exclusively attributable" to DRP. That interpretation is not only nonsensical, but also is incorrect both under a textual interpretation and a systematic interpretation under Peruvian law. The phrase "exclusively attributable" applies to "acts."

660. Based on a literal interpretation of Clause 5.3(a), "exclusively attributable" applies to acts. The relevant part of the clause reads:

> "the Company [(DRP)] will 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 [DRP's] PAMA **which are exclusively attributable to the Company [(DRP).]**" (Emphasis added)

661. A literal interpretation makes this clear, DRP assumes responsibility whenever claims and damages "arise directly due to acts" that are "exclusively attributable" to DRP. To argue

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[1305] Mogrovejo Witness Statement, ¶ 38.

[1306] *See* Alegre Expert Report, ¶ 30(d).

[1307] **Exhibit R-001**, STA & Renco Guaranty, Clause 5.3(a) ("but only insofar as said acts were the result of [DRP's] use of standards and practices that were less protective of the environment or of public health than those that were pursued by Centromin until the date of execution of this Contract").

that "exclusively attributable" modifies the term "claims" instead of the term "acts" would be to argue that "exclusively attributable" is modifying the subject of the *chapeau* of Clause 5.3, rather than modifying the subject of the list in which the phrase "exclusively attributable" is found. That cannot be right.

662. The analysis of what "exclusively applies to" can stop here, because a literal interpretation provides a clear answer. For the sake of completeness, however, Respondents will demonstrate that the same conclusion is reached through a systematic interpretation under Article 169 of the Peruvian Civil Code.

663. Based on a systematic interpretation of Clause 5.3(a), if one were to follow Claimants' interpretation and apply "exclusively attributable" to *claims* instead of *acts*, then the second half of Clause 5.3(a) and Clause 5.4(c) would be devoid of meaning. The second half of Clause 5.3(a) states:

> "Should there be any controversy on the determination of whether the standards or practices used by the Company [(DRP)] 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 [(Activos Mineros)] and the Company [(DRP)] **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).**"

664. Clause 5.4(c) in turn states:

> "**If the damages be attributable to Centromín [(Activos Mineros)] and to the Company [(DRP)], the Company [(DRP)] will assume responsibility in proportion to its contribution** to the damage.
>
> In those cases in which no consensus was reached between Centromín [(Activos Mineros)] and the Company [(DRP)] 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."

665. Clause 5.4(c) makes clear that the parties to the STA (Centromín, the Company, and the Investor) contemplated a scenario where the damages of a claim are attributable to *both* Centromín and the Company (DRP), and agreed that if the damages are attributable to *both* Centromín and DRP, that DRP would assume responsibility "in proportion to its contribution to the damage." This agreement would be devoid of meaning under Claimant's characterization of "exclusively attributable" in Clause 5.3(a), because, according to Claimants, there could be no scenario in which DRP would be responsible for its respective contribution for harm caused to third parties. According to Claimants, DRP is only responsible for *claims* "exclusively attributable" to DRP. In this interpretive world, DRP's contribution to a damages claim for the harm caused attributable to DRP would be impossible, because that would involve a claim that is not exclusively attributable to DRP. Further contradiction of Claimants' argument is found in the remainder of Clause 5.4(c), which makes clear that a determination will be made regarding the "**causes**" of the presumed damage "that is the subject of the claim." A good faith interpretation of the STA cannot withstand the pathological result of Claimants' interpretive argument. The STA must be interpreted consistent with a systematic interpretation, and therefore "exclusively attributable" in Clause 5.3(a) must apply to *acts* and not to *claims*.

666. As a result, Claimants' argument that, under Clause 5.3(a), DRP assumes liability only where *claims* are "exclusively attributable" to DRP fails as a matter of Peruvian contractual interpretation.

667. With respect to the significance of "less protective of the environment or of public health than those that were pursued by Centromín," based on a literal interpretation, this phrase means that DRP is liable if it used standards and practices that resulted in increased possibility of damage to the environment, it would be responsible for damages and claims by third parties. The Parties generally seem to agree on the meaning.[1308]

668. While Claimants would like Clause 5.3(a) to mean that Activos Mineros assumed responsibility "for all third-party damages and claims attributable to DRP's operation of the Complex during the period approved by the MEM for the performance of DRP's

[1308] *See* Contract Memorial, ¶ 88.

PAMA projects (initially 10 years),"[1309] it is evident that their reading is only attainable by rewriting the STA, relying on Claimants' self-serving and unsubstantiated statements of their officials (without any contemporary evidence), and forcing a limitless and unprecedented interpretation of the principle of good faith. Indeed, as detailed above, Professor Varsi explains that Peruvian doctrine draws a distinction between subjective good faith and objective good faith; the good faith that applies to contract interpretation under Article 1362 of the Peruvian Civil Code refers to *objective* good faith.[1310]

669. **The second scenario.** It is uncontested by the Parties that pursuant to Clause 5.3(b) of the STA, DRP assumed responsibility for damages and claims that arise directly from DRP's default of the performance of its PAMA obligations.[1311]

670. Therefore, pursuant to Clauses 5.3(a) and 5.3(b), during the period approved for the execution of DRP's PAMA, DRP assumed responsibility for third-party claims relating to environmental contamination if (i) the claims arise directly due to acts that are not related to DRP's PAMA, which are exclusively attributable to DRP if those acts were the result of DRP'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 the STA; or if (ii) the claims resulted from a default on DRP's PAMA obligations.

b. DRP's responsibility under Clause 5.4 of the STA for third-party claims relating to environmental contamination caused after the expiration of the term of DRP's PAMA

671. Clause 5.4 of the STA establishes the scope of DRP's responsibility for damages and claims by third parties for the period "[a]fter the expiration of the legal term of Metlaoroya's [sic] [DRP's] PAMA." For that period, DRP assumes:

> "responsibility for damages and third party claims in the following manner:
>
> a) those that result directly from acts that are exclusively attributable to its operations after that period.

[1309] Contract Memorial, ¶ 154.

[1310] Expert Report of Enrique Varsi - Contract, ¶ 4.22.

[1311] Contract Memorial, ¶ 156.

> b) those that result directly from a default on the Metaloroya's [sic] [DRP's] PAMA obligations on the part of [DRP] . . . .
>
> c) if the damages be attributable to Centromín and to [DRP], [DRP] will assume responsibility in proportion to its contribution to the damage."[1312]

672. The above indicates that the STA distinguishes between two scenarios where DRP assumes responsibility for third-party claims relating to environmental contamination: (i) those that result directly from acts that are exclusively attributable to its operations after that period (*see* Clause 5.4(a)); and (ii) those that result directly from DRP's default of DRP's PAMA obligations (*see* Clause 5.4(b)). For Clause 5.4(a), Claimants again present the same pathological interpretation regarding the application of "exclusively attributable." Claimants present an equally untenable argument regarding the interpretation of "after that period."

673. With respect to Claimants' argument regarding the application of "exclusively attributable," Respondents invite the Tribunal to revisit the explanation in the previous section, which demonstrates that Claimants' argument regarding the application of "exclusively attributable" under Clause 5.3(a fails as a matter of contractual interpretation. Indeed, the phrase "exclusively attributable" applies to "acts," not "claims."

674. With respect to the meaning of "*after that period*," Claimants argue that under Clause 5.4(a) of the STA, DRP is not responsible for any environmental contamination claims that relate to DRP's operations after the expiry of DRP's PAMA period. Claimants make this argument on the basis of a temporal conceit: According to Claimants, DRP's PAMA did not expire on 13 January 2007; instead, it expired in October 2010. And, according the Claimants, because DRP stopped operating the Facility in June 2009 (four months before DRP's PAMA expired), DRP never operated after DRP's PAMA period.[1313] Claimants' argument under Clause 5.4(a) is misguided.

675. Claimants' argument fails because "the legal term of Metlaoroya's [sic] [DRP's] PAMA" is the PAMA term agreed to under the STA (*i.e.*, October 1997 through January 2007). The PAMA period thus expired on 13 January 2007, and that period is not to be conflated

[1312] **Exhibit R-001**, STA & Renco Guaranty, Clause 5.4.

[1313] Contract Memorial, ¶ 192.

with the additional time DRP was granted, in 2006 and 2009, to complete the Sulfuric Acid Plant Project. Such is clear from the ministerial resolution that granted the first extraordinary extension, which explicitly provided that "[t]he present ministerial resolution does 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 . . . ."[1314] Both Ms. Alegre and Mr. Isasi confirm that DRP's PAMA period expired on 13 January 2007; the extraordinary extensions DRP received could not and did not change this fact.[1315] Thus, Claimants' attempted interpretive argument regarding the term "after the period" is based on a fallacy.

676. Moreover, Claimants misinterpret Clause 5.4 to require that environmental contamination "claims" be solely attributable to DRP's post-PAMA operations. In reality, however, Clause 5.4 merely requires that the "damages" result at least in part from *acts* that are solely attributable to DRP's post-PAMA operations.[1316] Such is clear from the grammatical structure of Clause 5.4(a) ("acts that are solely attributable"), as well as the fact that Clause 5.4(c) expressly envisions a scenario in which DRP is partially responsible for damages that are attributable to both itself and Centromín.

677. Therefore, pursuant to Clause 5.4, in the period after the expiration of the legal term of DRP's PAMA, that is, the period after 13 January 2007, DRP assumed responsibility for third-party claims relating to environmental contamination for (i) those that result directly from acts that are solely attributable to its operations after that period; and (ii) those that result directly from a default on DRP's PAMA obligations on the part of DRP.

[1314] **Exhibit R-287**, Ministerial Resolution No. 257-2006-MEM/DM, 29 May 2006, art. 10 (Spanish original: "*La presente Resolución Ministerial no implica modificación alguna de las obligaciones, ni de los plazos estipulados en los contratos que Doe Run Perú S.R.L. y sus accionistas tienen celebrados con Centromin Peru S.A. y con el Estado Peruano, en particular los referidos a Garantías y Medidas de Promoción a la Inversión, cuyo incumplimiento por parte de la recurrente dentro de los plazos pactados en dichos contratos estará sujeto a las consecuencias jurídicas previstas en tales instrumentos*.").

[1315] *See* Alegre Expert Report, ¶¶ 37-40, 53-55, 67, 92-93, 126; Isasi Witness Statement, ¶ 43 (Spanish original: "*Lo único que la RM-257 prorrogaba era el plazo para concluir el Proyecto Nro. 1, no para todo el PAMA*.")

[1316] **Exhibit R-001**, STA & Renco Guaranty, Clause 5.4.

c. Activos Mineros' obligations under Clause 6 and 8.14 of the STA to assume responsibility for third-party claims and indemnify DRP

678. Activos Mineros, for its part, assumed responsibility for third-party claims attributable to the activities of DRP, Centromín and/or its predecessors, *except* for third-party claims that are DRP's responsibility under Clause 5 (as discussed above). In Claimants' Contract Memorial, much like they did in their discussion of Clauses 5.3 and 5.4 of the STA, they make the sweeping allegation that Activos Mineros and Peru agreed to assume responsibility for virtually *all* third-party claims relating to environmental contamination, including for DRP's operation of the Facility during the period of DRP's PAMA.[1317] As described above, Claimants' arguments are wrong and frivolous.

679. Clause 6.2 of the STA provided,

> "During the period approved for the execution of Metaloroya's [DRP's] PAMA, Centromín [(Activos Mineros)] will assume responsibility for any damages and claims by third parties that are attributable to the activities of the Company [(DRP)], of Centromín [(Activos Mineros)] and/or its predecessors, **except for the damages and third party claims that are the Company's [(DRP)] responsibility in accordance with numeral 5.3**."

680. The scope of Activos Mineros' responsibility towards DRP under Clause 6.2 of the STA therefore depends on the interpretation of Clause 5.3. As a result, it is unnecessary to repeat the details behind Claimants' flawed interpretation of Clause 5.3 (*see supra* previous section). Respondents simply note that to arrive to their conclusion, Claimants interpret the STA *not* by following the principles of contract interpretation under Peruvian law, but by ignoring the language of the STA and by citing their subjective beliefs and unsubstantiated witness statements of their executives.

[1317] *See e.g.*, Contract Memorial, ¶ 151 ("Under the STA, Centromin expressly agreed [. . .] to assume liability for third-party damages and claims attributable to DRP's operation of the Complex after the execution of the STA"); *id.* ¶ 154 ("Centromin agreed to assume liability for all third-party damages and claims attributable to DRP's operation of the Complex during the period approved by the MEM for the performance of DRP's PAMA projects (initially 10 years), subject to very narrow exceptions not applicable here"); *id.* ¶ 157 ("Under no circumstances or scenario would Renco, DRR or anyone else be liable for third-party claims arising from operations in the Complex prior to execution of the STA or after the STA was signed"; *id.* ¶ 166 ("Centromin agreed in Clauses 6.2 and 6.3 to "assume liability for any damages and claims by third parties" relating to environmental contamination, in addition to agreeing in Clause 6.5 to "indemnify [the Company] for any damages, liabilities or obligations" arising from such claims"); *id.* ¶ 166 ("Centromin's assumption of liability for third- party damages and claims under Clauses 6.2 and 6.3 extends to anyone who could be sued by a third-party for damages falling within the scope of the assumption of liability").

681. As explained above, a proper reading of Clause 5.3, which in turn provides the scope of responsibility of Activos Mineros to DRP under Clause 6.2, demonstrates that Activos Mineros ***did not*** assume responsibility for third-party claims relating to environmental contamination in the following scenarios: **In the period approved for the execution of DRP's PAMA,** if (a) the claims arise directly due to acts that are not related to DRP's PAMA which are exclusively attributable to DRP, but only insofar as said acts were the result of DRP'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 the STA; or (b) the claims resulted from a default on DRP's PAMA obligations.

682. As a result, Claimants' suggestion that "[u]nder no circumstances or scenario would [DRP] be [responsible] for third-party claims arising from operations in the Complex [. . .] after the STA was signed[,]" is false.

683. Claimants make a similar mistake with their reading of Clause 6.3. Clause 6.3 of the STA provided:

> "After the expiration of the legal term of Metaloroya's [DRP's] PAMA, Centromín [(Activos Mineros)] will assume responsibility for any damages and third party claims attributable to Centromín's [(Activos Mineros')] and/or its predecessors' activities **except for the damages and third party claims for which the Company [(DRP)] is responsible in accordance with numeral 5.4.**
>
> In the case that damages are attributable to Centromín [(Activos Mineros)] and the Company [(DRP)], the provisions set forth in numeral 5.4.c. shall apply."

684. The scope of Activos Mineros' responsibility towards DRP under Clause 6.3 of the STA therefore depends on the interpretation of Clause 5.4. As a result, it is unnecessary to repeat the details behind Claimants' flawed interpretation of Clause 5.4 (*see* previous section). Respondents simply note that to arrive at their erroneous conclusion, Claimants interpret the STA *not* by following the principles of contract interpretation under Peruvian law, but by ignoring the language of the STA.

685. As explained above, a proper reading of Clause 5.4, which in turn provides the scope of responsibility of Activos Mineros to DRP under clause 6.3, demonstrates that DRP assumed responsibility for third-party claims relating to environmental contamination in the following scenarios: **In the period after the expiration of the legal term of DRP's**

PAMA, for (a) those that result directly from acts that are solely attributable to its operations after that period; or (b) those that result directly from DRP's default of its obligations under DRP's PAMA.

686. As a result, Claimants' suggestion that "[u]nder no circumstances or scenario would [DRP] be [responsible] for third-party claims arising from operations in the Complex [. . .] after the STA was signed[,]" is false.

687. The parties to the STA undertook to hold themselves harmless and indemnify each other with respect to specific third-party claims. Activos Mineros refused, however, to grant DRP a limitless waiver of responsibility.

688. Claimants assert that during alleged negotiations between its representatives and Peru's representatives that led to the signing of the STA, they made clear that they would not purchase the Facility without Centromín retaining responsibility for any third-party claims related to historical environmental contamination in and around the facility, as well as contamination occurring during the term of the PAMA.[1318] Specifically, Claimants state that "[u]nder no circumstances or scenario would Renco, DRR or anyone else be liable for third-party claims arising from operations in the Complex prior to the execution of the STA or after the STA was signed."[1319] The second part of this assertion (*i.e.*, or after the STA was signed) is absurd. There is not a single document that supports this assertion except for the self-interested witness statements Claimants put forward, which, in turn, heavily rely on hearsay.[1320] This is notable considering the sweeping affirmations that they make, and the fact that these events occurred around 25 years ago. Most importantly, this narrative is at odds with the wording of the STA, which DRP freely entered into, and with no reservations except for those established in it.

689. Claimants also point to Centromín's responses to questions 41 and 42 of the rounds of consultations to assert that "investors [in the Facility] would not be required to assume liability for third-party claims that arose from the operation of the Complex before or

[1318] Contract Memorial, ¶ 55.

[1319] Contract Memorial, ¶ 157.

[1320] *See e.g.,* Sadlowski Witness Statement, ¶¶ 8-12.

during the modernization and upgrade."[1321] That is *not* the conclusion that can be drawn from Centromín's responses to questions 41 and 42. Claimants ignore the fact that Question 41 recognizes that any new operator must not operate the Facility with practices that are less protective than Centromín's ("the new operator will be obligated to continue with the same contamination practices for a period of time, as authorized by the terms of the PAMA").[1322] That recognition is part of the question that Centromín replied to. Centromín's response states that it would accept responsibility for existing contamination "provided that Metaloroya [(i.e. DRP)] would fulfill the PAMA's obligations which are their responsibility, otherwise, Metaloroya will be responsible from the date of non-compliance of the obligation, according to the competent authority's opinion."[1323] Similarly, Centromín's response to question 42 was that:

> "CENTROMÍN has ordered the organization and provided the funds to comply with the environmental remedies of which it is responsible, guaranteeing, therefore, their compliance. In addition METALOROYA will be held harmless from such remediations [sic] and from third-party claims that are CENTROMÍN's responsibility by signing the contract."[1324]

690. Questions 41 and 42 thus only confirm that Peru never suggested that Peru would accept unlimited responsibility for third-party claims. Limitations to Centromín's responsibility were always considered and were a part of the bargain with the new owner of the Facility. As Ms. Alegre explains, the limitless waiver of responsibility clauses for which Claimants now militate would have established a perverse incentive for DRP to pollute at will, without any regard to the consequences:

> "I do not agree with this interpretation of clause 5.3, since such an interpretation would imply that DRP had [a] blank check to do what it wished within the scope of this clause and without any limitation in the CMLO during the PAMA period, without assuming any type of responsibility, which is not in accordance with the Law, nor with

[1321] Contract Memorial, ¶ 51.

[1322] **Exhibit R-201**, Question and Answers Round 2, 26 March 1997, query 41 (". . . el nuevo operador estaría obligado a continuar con las mismas prácticas de conaminación [sic] por un período de tiempo, como lo autoriznan [sic] los términos del PAMA.")

[1323] **Exhibit R-201**, Question and Answers Round 2, 26 March 1997, query 41.

[1324] **Exhibit R-201**, Question and Answers Round 2, 26 March 1997, query 42.

> Peruvian contractual practice, since contracts must be negotiated, entered into and executed in good faith and with criteria[.]
>
> The text of Clause 5.3 does not say what the Claimants affirm, and it would be illogical to think that the meaning of it was to allow DRP to pollute as much as it wanted during the PAMA period without any type of responsibility or consequence."[1325]

691. In sum, under clause 6.2, Centromín assumes responsibility (during the execution period for DRP's PAMA) for third-party claims attributable to the Company and Centromín's activities, except for those for which the Company has assumed responsibility in clause 5.3.[1326] Pursuant to clause 6.3, Centromín assumes responsibility (after the expiration of the legal term of DRP's PAMA) for third-party claims attributable to Centromín's activities, except for those for which the Company has assumed responsibility in clause 5.4.[1327]

692. As explained in previous sections on jurisdiction and merits, Clauses 6.2 and 6.3 do not contain any indemnity or defense obligations; the consequences of the allocation of responsibility under Clauses 6.2 and 6.3, rather, are detailed in clauses 6.5 and 8.14. Under clause 6.5, Centromín is obligated to indemnify the DRP against third-party claims *for which Centromín has assumed responsibility*.[1328] And clause 8.14 provides that if Centromín receives notice from the Company or the Investor of a suit (or similar claim) within a reasonable time; that is related to a fact or act that is *encompassed by Centromín's*

[1325] Alegre Expert Report, ¶ 30(d) (Spanish original: "no estoy de acuerdo con esta interpretación de la cláusula 5.3. puesto que tal interpretación implicaría que DRP tenía una habilitación a manera de un cheque en blanco, hacer lo que quisiera dentro del alcance de esta cláusula y sin limitación alguna en el CMLO durante el periodo del PAMA, sin asumir ningún tipo de responsabilidad, lo cual no es acorde a Derecho, ni a la práctica contractual peruana, dado que los contratos deben deben negociarse, celebrarse y ejecutarse de buena fe y con criterios de reciprocidad. El texto de la cláusula 5.3 no dice lo que las demandantes afirman, y sería ilógico pensar que el sentido de la misma era el de permitirle a DRP contaminar hasta donde quisiera durante el período del PAMA sin ningún tipo de responsabilidad o consecuencia.").

[1326] **Exhibit R-001**, STA & Renco Guaranty, clause 6.2.

[1327] **Exhibit R-001**, STA & Renco Guaranty, clause 6.3.

[1328] **Exhibit R-001**, STA & Renco Guaranty, clause 6.5.

responsibilities, representations, and warranties; then Centromín will defend the Company or the Investor.[1329]

693. Ready correctly, clauses 6 and 8.14 create one chain of interlocking provisions in relation to the allocation of responsibility for third-party claims. The first link, clauses 6.2 and 6.3, identify the third-party claims for which Centromín "will assume responsibility."[1330] The second link, clause 6.5, sets the first consequence of that assumption. It requires Centromín to indemnify the Company against third-party claims "for which it has assumed responsibility and obligation."[1331] The third link, clause 8.14, sets the second consequence of that assumption. It requires Centromín to defend the Company against a suit (or similar claim) that is "related to any act or fact included within the responsibilities . . . [of] Centromín," so long as it receives notice of the suit or claim within a reasonable time.[1332]

694. Claimants, however, have not invoked Clauses 6.5 and 8.14, because they cannot. Indeed, as explained in our sections on jurisdiction and admissibility, and as Claimants concede,[1333] Clauses 6.5 and 8.14 run only to the Company (*i.e.*, DRP).

695. As a result, Claimants' ambitious and expansive reading of Activos Minero's assumption of responsibility for environmental contamination and obligation to indemnify DRP is flawed and deserves no attention from this Tribunal.

2. Peru and Activos Mineros have not breached the STA and the Peru Guaranty by failing to indemnify, pay costs, or defend Claimants in relation to the Missouri Litigations

696. Clauses 5, 6, and 8.14 of the STA do not require Respondents to indemnify, pay costs, or defend Claimants in relation to the Missouri Litigations for the following reasons:

[1329] **Exhibit R-001**, STA & Renco Guaranty, clause 8.14. In other clauses of the STA, Centromin made representations and warranties to the Company and the Investor. So, clause 8.14 applies to Company as to the relevant representations and warranties, and it applies to the Investor as well. Clauses 5 and 6 allocate responsibility only between the Company and Centromin. Thus, only clause 8.14's applicability to the Company's responsibilities is relevant when analyzing the scope of clauses 5 and 6.

[1330] **Exhibit R-001**, STA & Renco Guaranty, clauses 6.2–6.3.

[1331] **Exhibit R-001**, STA & Renco Guaranty, clause 6.5.

[1332] **Exhibit R-001**, STA & Renco Guaranty, clause 8.14.

[1333] Contract Memorial, ¶ 171.

697. The Renco defendants in the Missouri Litigations are not parties to the STA or the Peru Guaranty nor does the allocation of responsibility in the STA encompass the cause of action in the Missouri Litigations (**subsection (a)**);

698. Even if the STA's allocation for responsibility did encompass the Missouri Litigations (*quod non*), Activos Mineros is not responsible for the injuries complained of in the Missouri Litigations because:

(a) the allocation of responsibility covering the period prior to the execution of the STA is irrelevant since the Missouri Litigations do not arise from Centromín's historical operations (**subsection b**);

(b) the injuries in the Missouri Litigations caused during the PAMA period are excluded from any responsibility assumed by Activos Mineros' because:

(i) the injuries do not arise from DRP's performance of its PAMA obligations (**subsection c(i)**);

the injuries result from DRP's use of standards and practices that were less protective of the environment and public health than those used by Centromín (and Claimants fail to show otherwise) (**subsection c(ii)**);

(ii) the injuries arise directly from DRP's breach of its PAMA obligations (and Claimants fail to show otherwise) (**subsection d**); and

(c) the injuries in the Missouri Litigations result in part from DRP's activities in the post-PAMA period (and Claimants fail to show otherwise) (**subsection (e)**).

a. The defendants in the Missouri Litigations are not parties to the STA or Peru Guaranty.

Centromín breached no indemnity, costs, or defense obligations to the defendants in the Missouri Litigations

699. Claimants' claim that Respondents should indemnify them for losses, pay litigation costs, and defend them in the Missouri Litigations fails for the obvious reason that none of the Missouri Defendants benefit from any of the relevant provisions of the STA. To start, none of the Missouri Defendants are parties to the STA or Peru Guaranty.[1334] Further, Activos Mineros' indemnity (clause 6.5) and defense (clause 8.14) obligations regarding third-party claims run only to DRP (the Company).[1335] The Missouri Plaintiffs have not sued DRP. Rather, they have sued Renco, DRRC, and the officers of those companies. And even if the Missouri Defendants were encompassed by clauses 6.2 and 6.3, such clauses do not contain any indemnity, costs, or defense obligations.[1336] Finally, assuming that clauses 6.2 and 6.3 contained indemnity obligations, there has been no breach.[1337]

Centromín assumed no responsibility for negligent decision-making in the US

700. Centromín also assumed no responsibility under the STA for claims concerning corporate decisions made in the United States by the Renco Defendants. As explained, Activos Mineros' indemnity (clause 6.5) and defense (clause 8.14) obligations regarding third-party claims run only to DRP (the Company). DRP is a Peruvian company, who owns and operates a smelting facility in Peru. As Claimants argued in the Missouri Litigations, "Peru could never have anticipated that its obligations would turn on the adjudication of claims in a foreign forum under another sovereign's tort laws."[1338]

701. The Missouri Plaintiffs' claims arise from the duty of care owed by parent companies under Missouri law whose subsidiaries contaminate the environment.[1339] This duty of care relates to the parent companies' negligent decision-making, and not to the actual acts that directly damage the environment. Thus, the Missouri Plaintiffs have confirmed that they "are not

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[1334] *See* Sections III.B.1 & 2, III.C. and IV.A1.

[1335] *See* Sections III.B.1.b(ii) and IV.C.1.

[1336] *Id.*

[1337] *See* Section IV.C.2.

[1338] **Exhibit R-286**, Claimants' Opposition to Motion to Dismiss Appeal, United States Court of Appeals for the Eighth Circuit, 7 January 2019, p. 19.

[1339] **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

asking this [US] Court to apply Missouri law extraterritorially." As has been stated repeatedly, the Missouri Plaintiffs "seek to hold the Renco Defendants accountable under Missouri law for actions taken in Missouri, even if the harm from those actions occurred in Peru."[1340]

702. This is confirmed throughout the parties' pleadings in the Missouri Litigations. Claimants' own pleadings in the Missouri Litigations state that "the 'heart' of Plaintiffs' case is that Defendants 'controlled the day-to-day affairs of DRP's business,' that they 'undercapitalized' DRP S.R.L. ('DRP'), and that the 'undercapitalization resulted in plaintiffs' harm.'"[1341] Thus, Claimants themselves affirm that the Missouri Litigations concern claims for harm arising from Renco, Doe Run Resources and their officers' decision to undercapitalize DRP. The suggestion that Centromín assumed responsibility for claims against Claimants concerning their decision to undercapitalize DRP is absurd.[1342]

703. The Missouri Plaintiffs' complaints further confirm that their claims concern the negligent decisions of US corporations and their officers made in the United States and *not* the activities of DRP in Peru:

> "[the Renco Defendants] negligently, carelessly, and/or recklessly made decisions while located in the States of Missouri and/or New York that resulted in the release of heavy metals and other toxic and harmful substances into the air and water and onto the properties on which the plaintiffs have in the past and/or continue to reside, use and visit; the toxic and harmful substances include but are not limited to: lead, arsenic, cadmium, and sulfur dioxide. . . .[1343]

[1340] **Exhibit R-296**, Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Application of Peruvian Law and Summary Judgment under Peruvian Law, or, alternatively, Dismissal under Transational Law Doctrines (Doc. 1230), Document No. 1275, 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. 19.

[1341] **Exhibit R-293**, Memorandum of Law in Support of Defendants The Renco Group, Inc. and Ira L. Rennert's Supplemental Motion for Summary Judgment, Document No. 1242, *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, p. 1.

[1342] On the contrary, in the STA Centromín secured DRP's obligation to commit capital to the Facility, an obligation which it breached. *See* Section II.C.1.

[1343] **Exhibit R-294**, Amended Complaint for Damages – Personal Injury, Document No. 474, *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.

> Defendants Renco, Rennert, Doe Run Resources, by and through their agents, and together and each of them, had the right to control and did control the operations, storage, generation, handling, disposal, and release of toxic and harmful substances that led to the plaintiffs' injuries. Such control occurred, upon information and belief, solely from the States of Missouri and New York in the form of decisions, orders, policies and requirements communicated to Defendants' agents in La Oroya, Peru, as well as from their own direct actions."[1344]

704. Similarly, the Missouri Plaintiffs' Petition for Damages centers on the Renco Defendants' actions made in the United States:

> "The corporate Defendants, while located in the States of Missouri or New York, exert compete control, not merely stock control, but complete domination of finances, policies, and business practices of DRP. The control is so complete that the subsidiary has never had a separate mind, will, or existence of its own. Defendants control environmental expenditures, production practices, use of technology that would limit emissions, and policies including public relations policies and decisions regarding warnings given to the minor plaintiffs. Such control is used by Defendants to make substantial profit while causing injuries to the minor plaintiffs, constituting fraud and injustice that violates the minor plaintiffs' legal rights. This heinous use of control proximately caused the minor plaintiffs' injuries. . . ."[1345]
>
> Defendants Doe Run Resources Corporation, D.R. Acquisition Corp., and Renco, through their decisions made in the States of Missouri or New York and through their agents, also purposefully withheld information or deliberately deceived the minor plaintiffs with regard to the dangers of exposure to the toxic substances

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[1344] **Exhibit R-294**, Amended Complaint for Damages – Personal Injury, Document No. 474, *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, ¶ 80. *See also*, *id.* ("Defendants Doe Run Resources Corporation, D.R. Acquisition Corp., and Renco, through their decisions made in the States of Missouri and/or New York and through their agents, also negligently, carelessly, and recklessly failed and continue to fail to warn minor plaintiffs of release of the toxic metals and gases and other toxic substances into the environment and community . . . .").

[1345] **Exhibit R-292**, Petition for Damages – Personal Injury, Document 18, *Father Chris Collins et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:15-cv-01704-RWS), 12 October 2015, ¶ 29. *See also*, id., ¶ 24 ("During the course of their ownership, operation, use, management, supervision, storage, maintenance, or control of operations of the La Oroya Complex and related properties in La Oroya, Peru, the Defendants, while located in the States of Missouri or New York, made decisions regarding the operations of the complex. Those decisions were negligent, careless or reckless and resulted in the release of metals and other toxic and harmful substances, including lead, arsenic, cadmium, and sulfur dioxide, into the air and water and onto properties on which the minor plaintiffs reside, use or visit, which has resulted in toxic and harmful exposures to the minor plaintiffs.")

> released into the environment by their metallurgical complex and related operations and facilities."[1346]

705. 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."[1347]

706. There can be no serious argument that, through the STA, Centromín undertook the obligation to indemnify and defend for Claimants' negligent and reckless decision-making in Missouri. Claimants' claim that Activos Mineros is responsible for the Missouri Litigations therefore has no valid basis.

b. The allocation of responsibility for the period prior to the execution of the STA is irrelevant

(i) The Missouri Plaintiffs do not seek recovery for injuries caused by Centromín's activities

707. Claimants err when they contend that the Renco Defendants "are now defending claims arising out of exposures to lead that Centromín and Peru should have remediated."[1348] The Missouri Plaintiffs expressly limit their claims to injuries caused by the Facility's operations *after* DRP acquired the Facility. Any obligation regarding the period prior to the execution of the STA therefore has no relevance to the losses claimed in the Missouri Litigations. In any event, even if it were correct that Centromín's operations caused the Missouri Plaintiffs' injuries (*quod non*), Claimants cannot be held liable under Missouri

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[1346] **Exhibit R-292**, Petition for Damages – Personal Injury, Document 18, *Father Chris Collins et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:15-cv-01704-RWS), 12 October 2015, ¶ 37. *See also*, *id.*, ¶ 36 ("Defendants Doe Run Resources Corporation, D.R. Acquisition Corp., and Renco, through their decisions made in the States of Missouri or New York and through their agents, also negligently, carelessly, and recklessly failed and continue to fail to warn the minor plaintiffs of release of the toxic metals and gases and other toxic substances into the environment and community surrounding the La Oroya Complex and related operations and facilities, including the properties on which the minor plaintiffs have in the past or continue to reside, and of the reasonably foreseeable effects of such releases, including the dangers of inhaling or ingesting these toxic metals, gases, and other toxic substances.").

[1347] **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.

[1348] Contract Memorial, ¶ 104.

law for injuries caused by a third party. There will therefore be no loss to indemnify, nor is there a duty to defend to exercise (assuming Claimants were encompassed by the relevant clauses).

The Missouri Plaintiffs expressly limit their claims to injuries caused by the Facility's operations after DRP acquired the Facility

708. The allocation of responsibility covering the pre-PAMA period has no relevance to the Missouri Litigations because the Missouri Plaintiffs expressly limit their claims to injuries caused by the Facility's operations *after* DRP acquired it. This has been confirmed by the Missouri Plaintiffs, whose submissions made clear from the outset that their claims related only to the Facility's operations under Claimants' stewardship:

> **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.[1349] (Emphasis added)

709. During discovery, the Missouri Plaintiffs again confirmed that their claims related only to DRP's operations. The Renco Defendants posed the following interrogatory to the Missouri plaintiffs:

> "Do you contend that your alleged injuries were caused, in whole or in part, by exposure to lead and other metals from the following:
>
> a. work being performed at the La Oroya Complex by The Doe Run Resources Corporation?; and/or

[1349] **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, ¶ 20.

b. work that had already been completed at La Oroya Metallurgical Facility prior to October 23, 1997?"[1350]

710. The Missouri Plaintiffs responded confirming that they did not seek damages for the acts of Centromín and its predecessors:

> "**Plaintiff does not contend that his/her injuries were caused, in whole or in part, by exposure to lead and other metals from work that had already been completed at La Oroya Metallurgical Facility prior to October 23, 1997.** Plaintiff does allege that the activities performed, directed, and/or controlled by the Doe Run Resources Corporation at the La Oroya Complex caused or contributed to Plaintiff's exposure to lead and other metals and resulting injuries."[1351] (Emphasis added)

711. The court hearing the Missouri Litigations has itself confirmed that the Missouri Litigations relate only to DRP's operations of the Facility. Thus, when the Renco Defendants appealed a lower court's decision, the United States Fifth Circuit Court of Appeals Fifth Circuit held that the district court:

> "will decide **only the theories pled in the complaint**. These theories do not rely on the STA, do not turn on whether the claims arise from PAMA, and **do not relate to the practices of the former facility operator**. . . . [T]he trier in this case will consider whether **each defendant sufficiently caused the children's injuries** according to the applicable law."[1352] (Emphasis added)

712. Since the Missouri Plaintiffs and the court itself have confirmed that the Missouri Litigations are limited to harm caused by acts occurring under Claimants' stewardship of the Facility, any responsibility assumed by Centromín with respect to harm caused by acts

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[1350] **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, Annex I, p. 245.

[1351] **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, Annex I, p. 245. *See also*, Plaintiffs' Memorandum of Law in Opposition to Defendants' Motions for Application of Peruvian Law and Summary Judgment, p. 23 ("[I]nquiry into whether the prior owner of the La Oroya smelter (Centromín) may have caused injury to Plaintiffs is not an element of Plaintiffs' claims in this case.").

[1352] **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. 6.

pre-dating that ownership has no relevance to the losses claimed in the Missouri Litigations.

As a matter of Missouri law, Claimants can only be liable for injuries caused by them; Claimants cannot be held liable for injuries caused by Centromín's prior activities

713. Under the law governing the Missouri Plaintiffs' claims, the Renco Defendants cannot be held liable for injuries that stem from Centromín's activities.[1353] The Missouri Plaintiffs have expressly confirmed this limitation of the Renco defendants' liability under Missouri tort law: "As the owners and operators of the La Oroya Complex, Defendants are liable for the activities and the toxic environmental releases from the complex since the date Defendants purchased the complex, October 24, 1997."[1354] Thus, in the Missouri litigations, Claimants can only be liable for injuries that Claimants caused by during their stewardship of the Facility; they cannot be held liable for injuries caused by acts predating their ownership. Centromín's assumption of responsibility for harms arising from such prior acts is therefore not implicated by the Missouri Litigations.

(ii) The Missouri Plaintiffs' claims relate to harms caused by DRP's release of pollution into the air and not historical contamination of the soil

714. Claimants allege that Peru and Activos Mineros are responsible for the losses arising from the Missouri Litigations on the basis that the injuries complained of in those proceedings were caused by historical contamination of the soil in La Oroya.[1355] In particular, Claimants allege that "Centromín/Activos Mineros' conduct created the vast majority (if not all) of the conditions that factually caused the [Missouri Plaintiffs'] alleged injuries."[1356]

[1353] **RLA-178**, *Tharp v. St. Luke's Surgicenter-Lee's Summit, LLC*, 587 S.W.3d 647, 653 (Mo. 2019) (stating that the elements of a negligence claim are "duty, breach of that duty, causation, and damages") (citing Hoover's Dairy, Inc. v. Mid-Am. Dairymen, Inc., 700 S.W.2d 426, 431 (Mo. banc 1985))

[1354] **Exhibit R-292**, Petition for Damages – Personal Injury, Document 18, *Father Chris Collins et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:15-cv-01704-RWS), 13 November 2015, ¶ 19.

[1355] Contract Memorial, ¶ 216.

[1356] Contract Memorial, ¶ 216.

715. This assertion is unfounded. The Missouri Plaintiffs' claims concern injuries caused by DRP's release of contaminants into the air in La Oroya during DRP's ownership of the Facility. This is clear from the Missouri Plaintiffs' written submissions and the testimony of their party-appointed expert.

716. In particular, the Missouri Plaintiffs allege that the Renco Defendants "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. . . "[1357] (emphasis added). According to the Missouri Plaintiffs, the Renco Defendants' actions have:

> [N]egatively and dramatically affected the air quality in La Oroya. **The air quality level is critical** not only because the minor plaintiffs must breathe this polluted air, but also because the particulate matter in the air has been dispersed in a dust form that enters and settles inside the minor plaintiffs' houses and has been deposited on the ground and on surfaces, including furniture, clothing, water, and crops."[1358] (Emphasis added)

717. The focus of the Missouri Plaintiffs' claims is therefore the air emissions causing injury during DRP's ownership of the Facility and not historical contamination.

718. The testimony of the party-appointed expert assessing the Missouri Plaintiffs' injuries further confirms that their claims do not relate to injuries caused by Centromín's historical activity. The Missouri Plaintiffs instructed their expert "to estimate [blood lead levels] for seventeen cohort Plaintiffs at ages 2, 5, and 7 years old and to determine the portion of those [blood lead levels] attributable to emissions from [the Renco] Defendants' Complex between October 1997 and June 2009, as opposed to other sources."[1359] Accordingly, the expert "determined, by year, the fraction of each Plaintiffs' [blood lead level] attributable

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[1357] **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, ¶ 20.

[1358] **Exhibit R-292**, Petition for Damages – Personal Injury, Document 18, *Father Chris Collins et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:15-cv-01704-RWS), 13 November 2015, ¶ 21.

[1359] **Exhibit R-295**, Memorandum of Law in Opposition to Defendants' Motion to Exclude the Expert Opinion of Dr. David Macintosh, Document No. 1269, *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. 2.

to lead emitted from the Complex during Defendants' ownership."[1360] In order to do so, the expert estimated the plaintiffs' blood lead levels based on air emissions alone using a methodology that excluded existing contamination in soil that pre-dated October 1997.[1361] Any injuries caused by historical contamination is therefore expressly excluded from the scope of the Missouri Plaintiffs' claims.[1362]

(iii) Claimants fail to show that the Missouri Plaintiffs' claimed injuries stem from Centromín's activities

719. Even if the Missouri Plaintiffs could hold Claimants liable for Centromín's activities and sought to do so (*quod non*), the evidence confirms that the Missouri Plaintiffs' injuries arise from DRP's operations of the Facility. The Missouri Plaintiffs' primary complaint concerns the emissions of lead and sulfur dioxide, which are both addressed in turn below.[1363]

Injuries allegedly arising from lead emissions

720. The lead causing injuries to the Missouri Plaintiffs was emitted during DRP's ownership of the Facility and not prior to that date. This is confirmed by the expert report of Ms. Deborah Proctor, which explains that lead emitted by DRP's operation of the Facility ("**Contemporaneous Lead Emissions**") would have affected the Missouri Plaintiffs to a

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[1360] **Exhibit R-295**, Memorandum of Law in Opposition to Defendants' Motion to Exclude the Expert Opinion of Dr. David Macintosh, Document No. 1269, *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. 2.

[1361] **Exhibit R-295**, Memorandum of Law in Opposition to Defendants' Motion to Exclude the Expert Opinion of Dr. David Macintosh, Document No. 1269, *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. 2–6.

[1362] In any event, as set out in the Section below, historical soil contamination did not cause the injuries in the Missouri Litigations.

[1363] The Missouri Plaintiffs place particular emphasis on lead and sulfur dioxide emissions. Their complaint asserts that "[l]ead causes multitudinous and serious injuries to the nervous system, which can lead to convulsions, coma and brain death. It causes learning and behavioral disorders, memory loss, nausea, anemia, hearing loss, fatigue, colic, hypertension, and myalgia. 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." See **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, ¶¶ 22–23. Respondents reserve the right to address other emissions to the extent it becomes apparent that they assume more prominence in the Missouri Litigations.

far greater extent than any lead that was emitted by Centromín and its predecessors' operation of the Facility ("**Historical Lead Emissions**").[1364]

721. Ms. Proctor shows that the Missouri Plaintiffs' lead exposure would have been driven primarily by contact with lead contained in outdoor and indoor dust.[1365] Given the sheer volume of lead emitted from the Facility into the air under DRP's ownership, the vast majority of the lead present in that dust would be the result of Contemporaneous Lead Emissions.[1366]

722. The primary exposure pathway for the Missouri Plaintiffs was thus dust contaminated through Contemporaneous Lead Emissions in the air. Ms. Proctor shows that lead in soil would have represented a minor exposure pathway. Ms. Proctor further shows that the lead in the soil that contributed to the Missouri Plaintiffs' injuries would have originated primarily from the Facility's ongoing operations under DRP's ownership and not from Historical Lead Emissions.[1367] This is because Contemporaneous Lead Emissions would have predominated in topsoil and covered the lead stemming from Historical Lead Emissions.[1368] Historical Lead Emissions covered beneath the topsoil was therefore not a scientifically significant exposure pathway for the Missouri Plaintiffs.

723. Ms. Proctor used the data presented by Dr. Schoof to model the percent contribution to total lead intake of the six primary exposure pathways: soil, air, diet, water, indoor dust, and outdoor dust.[1369] Ms. Proctor's modeling confirms soil constituted a minor exposure pathway during the PAMA Period:[1370]

[1364] Proctor Expert Report, Sections 3.1-3.2.

[1365] Proctor Expert Report, Sections 3.1-3.2.

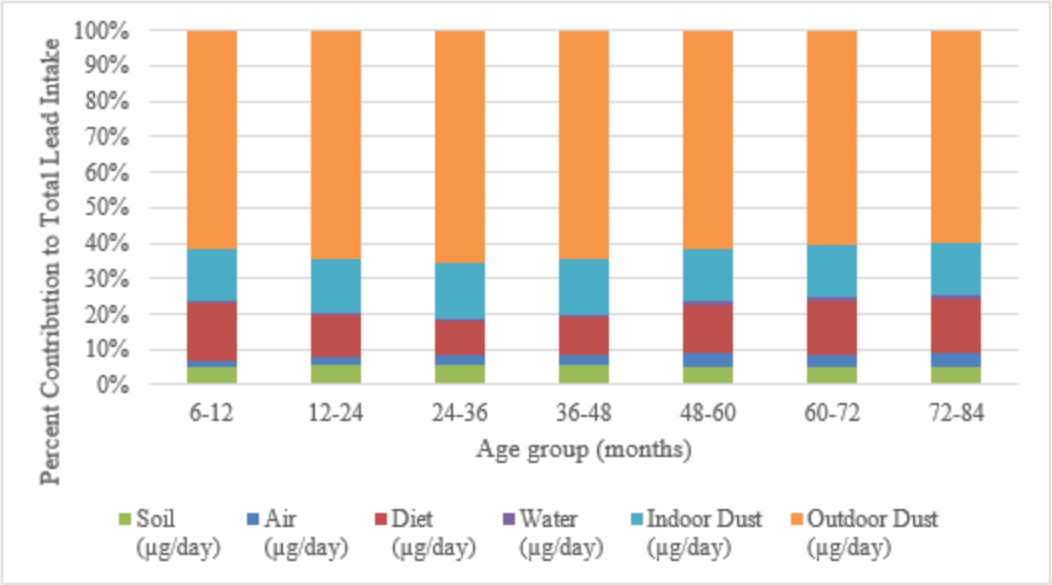
[1366] Proctor Expert Report, Sections 3.1-3.2.

[1367] Proctor Expert Report, pp. 18-21.

[1368] Proctor Expert Report, pp. 27.

[1369] Proctor Expert Report, pp. 22 *et seq.*

[1370] Proctor Expert Report, Figure 8, p. 23.



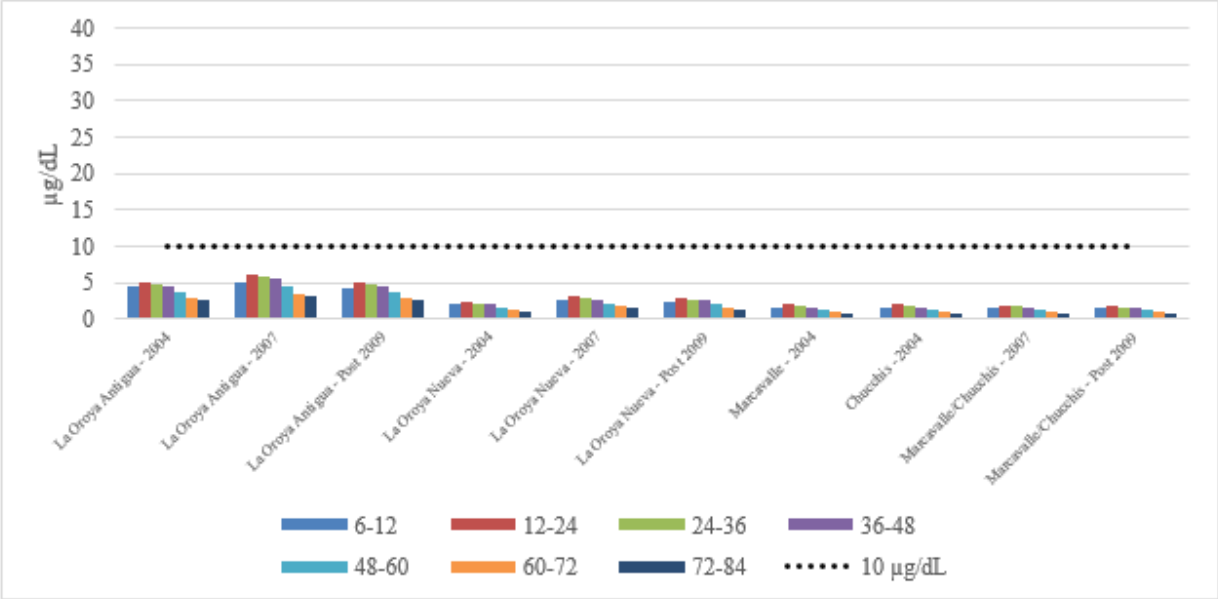
724. Ms. Proctor's conclusions find support in the data on the blood lead levels of children in La Oroya. Multiple studies demonstrate that blood lead levels fell significantly *after* DRP ceased operations of the Facility in 2009.[1371] Historical Lead Emissions predating DRP's ownership would have remained constant during this period and thus could not have caused the fall and rise in blood lead levels occurring in this period. These studies therefore provide further evidence that it is Contemporaneous Lead Emissions that account for virtually all of the Missouri Plaintiffs' injuries.

725. Ms. Proctor also used the data presented by Dr. Schoof to model the blood lead levels of La Oroya residents based on exposure to soil alone.[1372] Ms. Proctor's modeling found that mean blood lead levels for each age group and community based on exposure to soil alone are lower than the US Environmental Protection Agency and CDC target level of 10 µg/dL.[1373]

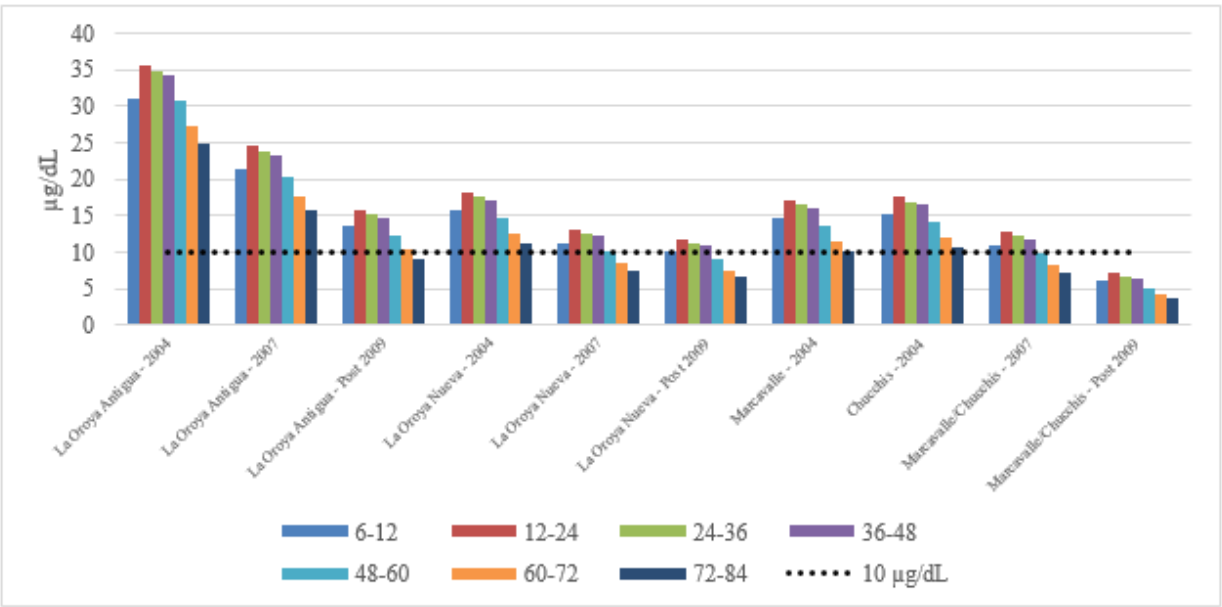
[1371] Schoof Expert Report, Exhibit B.

[1372] Proctor Expert Report, p. 25.

[1373] Proctor Expert Report, p. 25.



726. In contrast, blood lead levels based on exposure to air, indoor dust, and outdoor dust exceeded the CDC target level of 10 µg/dL[1374]:



727. Ms. Proctor's conclusions also find support in the 2005 study conducted by the US CDC, which recommended that DRP

> [r]educe air lead emissions, both stack and fugitive, to levels that protect children from having BLLs ≥10 µg/dL. **Until this is accomplished no other interventions will have a great impact on**

[1374] Proctor Expert Report, ¶ 26.

> **lowering children's BLLs**. . . . **When the principal pathway of lead exposure, air emissions, is controlled, BLLs decrease**. Soil then replaces air as the primary source of lead exposure.[1375] (Emphasis added)

Dr. Schoof "strongly support[ed]" the CDC's recommendation in 2005.[1376]

728. Claimants' unstudied contention that the Missouri Plaintiffs' injuries must have been caused by Historical Lead Emissions on the basis that these emissions comprise the vast majority of lead emitted from the Facility since it began operations in 1922 is therefore wrong. [1377] Claimants and their experts assume that Historical Lead Emissions have remained in place, accumulated over time, and now comprise virtually all of the lead available in the uppermost layers of soil in La Oroya.[1378] Claimants and their experts provide no support for these assumptions, and Ms. Proctor shows these assumptions to be incorrect. [1379] Historical Lead Emissions therefore did not constitute an exposure pathway to the Missouri Plaintiffs. Moreover, although Claimants' experts expressly recognize that "contaminated soils [are] mobilized by wind and water erosion,"[1380] they fail to address whether such climactic factors would prevent lead from accumulating over time.

729. It is telling that even Claimants' own toxicology expert is not willing to support Claimants' assertion that virtually all of the Missouri Plaintiffs' injuries stem from Historical Lead Emissions. Dr. Schoof opines that lead particles in soil "contribute substantially to exposures of La Oroya area residents to lead and other metals,"[1381] but also that factors such as air pollution, water pollution, and particulate emissions that settled as dust contributed and continue to contribute to the Missouri Plaintiffs' injuries.[1382] All of these factors can be attributed to DRP.

[1375] **Exhibit C-138**, 2005 CDC Report, pp. 12-39, 29.

[1376] **Exhibit C-064**, 2005 Integral Study, xxxvi.

[1377] Contract Memorial, ¶ 220 (*citing* Bianchi Expert Report, pp. 76–94; Connor Expert Report, pp. 21–22).

[1378] Contract Memorial, ¶ 220 (*citing* Bianchi Expert Report, pp. 78–94; Connor Expert Report, pp. 21–22).

[1379] Proctor Expert Report, Sections 3.1-3.2.

[1380] Connor Expert Report, p. 24.

[1381] Contract Memorial, fn. 333 (*citing* Schoof Expert Report, p. 2).

[1382] Schoof Expert Report, pp. 17–18.

730. Dr. Schoof finds that Historical Lead Emissions of lead in soil comprise a minor source of lead exposure in La Oroya.[1383] Conversely, she finds that the vast majority of lead exposure stems from indoor and outdoor dust.[1384] This is consistent with Ms. Proctor's testimony which, as noted above, shows that dust contaminated through Contemporaneous Lead Emissions was the primary exposure pathway for the Missouri Plaintiffs.

731. However, Dr. Schoof's testimony in this arbitration is silent on the crucial question of what portion of lead in dust is attributable to Contemporaneous Lead Emissions and what portion of lead in dust is attributable to Historical Lead Emissions. In contrast, Dr. Schoof's previous Health Risk Assessments from 2005 and 2008 —which provide the basis for her expert report—indicate that virtually all of the Missouri Plaintiffs' lead exposure would stem from Contemporaneous Lead Emissions.[1385] The 2005 and 2008 Schoof studies found that outdoor and indoor dust were the first and second largest contributors to elevated blood lead levels, and that soil was a marginal contributor.[1386] The 2005 Integral risk assessment found that 100% of lead in outdoor dust and 80% of lead in indoor dust were due to ongoing emissions.[1387] Additionally, the 2008 Integral study demonstrated that DRP's contemporaneous emissions were disproportionately represented in the uppermost layers of soil. The 2008 study found that mean concentrations of lead and other metals in surface soil (0 to 2 cm) in 2007 were higher than in 2004.[1388] Further, the mean lead concentrations in deeper soils (2 to 10 cm) were lower than mean concentrations in 0 to 2 cm surface soils, indicating that shallow soil (0 to 2 cm) was influenced by higher concentrations in ongoing DRP emissions than from historic operations.[1389]

732. Dr. Schoof's own studies thus directly undermine Claimants' contention that Historical Lead Emissions were an "important contributor" to elevated blood lead levels, and disprove

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[1383] Schoof Expert Report, p. 17.

[1384] Schoof Expert Report, p. 17.

[1385] **Exhibit C-064**, 2005 Integral Study, pp. 60-61; **Exhibit C-062**, 2008 Integral Study, p. 61.

[1386] Proctor Expert Report, pp. 18-19; Schoof Expert Report, p. 17.

[1387] **Exhibit C-064**, 2005 Integral Study, pp. 60-61.

[1388] **Exhibit C-062**, 2008 Integral Study, Tables 3-5, 3-6; Proctor Expert Report, pp. 18-19.

[1389] **Exhibit C-062**, 2008 Integral Study, Tables 3-5, 3-6; Proctor Expert Report, pp. 18-19.

Claimants' broader claim that "Centromín/Activos Mineros' conduct created the vast majority (if not all) of the conditions that factually caused the alleged injuries."[1390]

733. The only evidence Dr. Schoof cites to indicate that Historical Lead Emissions contributed significantly to the Missouri Plaintiffs' injuries are blood lead level studies conducted *after* DRP ceased operations.[1391] Dr. Schoof's report notes that "as recently as 2018 and 2019, about 20% of children have blood lead levels greater than 10 µg/dL. . . . [A]s this sampling was conducted during 2018 and 2019, none of the children sampled who were less than 6 years old could have been exposed to active emissions from the facility when it was operated by DRP, as those operations ceased in 2009."[1392] This conclusion is misguided because it fails to account for (and Dr. Schoof fails to mention) the fact that the Facility subsequently resumed operations in 2012. [1393] Consequently, there was an exposure pathway for emissions from the Facility's operations under DRP's bankruptcy administrator to cause elevated blood lead levels in 2018 and 2019.

734. Moreover, as noted above, even Dr. Schoof's data shows that blood lead levels dramatically dropped in the period after DRP ceased operations in 2009, and then rebounded after the Facility resumed operations in 2012.[1394] This trend confirms that blood lead levels are most affected by Contemporaneous Lead Emissions. Elevated blood lead levels are therefore *not* the result of Historical Lead Emissions.

735. In light of the clear evidence disproving their claim that Historical Lead Emissions caused the Missouri Plaintiffs' injuries, Claimants have resorted to misrepresenting several studies—including studies conducted by their own toxicology expert.

[1390] Contract Memorial, ¶ 216.

[1391] Schoof Expert Report, pp. 17-18

[1392] Schoof Expert Report, p. 24.

[1393] *See* Section II.F.3, above.

[1394] Schoof Expert Report, Exhibit B.

736. First, Claimants cite a 1999 Environmental Health Directorate study finding that blood lead levels in La Oroya were alarmingly high.[1395] This study in fact *undermines* Claimants' assertion that Historical Lead Emissions caused the Missouri Plaintiffs' injuries. This is clear from the study's conclusion that "the amount of lead particles that are emitted by the metallurgical plant, and transported through the air by wind, seems to be the main reason for the high values of blood lead levels in children".[1396] The study therefore indicates that injuries are caused by air emissions and not historical soil contamination. According to the study's findings, "the results of the air quality evaluation with respect to lead were alarming. The highest levels of air contamination were detected during the morning, especially at 11:00 a.m., exceeding by 17.5 times the standard level. It is necessary to consider this as children, when playing, tend to increase their respiratory frequency, taking in larger volumes of air, and, finding themselves in a contaminated environment, increase their blood lead levels"[1397] The 41-page study of children's blood lead levels in La Oroya also contains no mention of Centromín's historical emissions as a potential cause of elevated blood lead levels. The study mentions soil as "another means of lead entering the organism, although in lesser value,"[1398] but, consistent with Ms. Proctor's testimony,[1399] it does not attribute lead in soil to Historical Lead Emissions.

737. Second, Claimants assert that subsequent follow-up studies "confirmed" that Historical Lead Emissions caused elevated blood lead levels in La Oroya.[1400] In reality, the "follow-up studies" cited by Claimants consist of a single study conducted by DRP. The passages cited by Claimants do not mention historical lead deposits and instead state that "exposure pathways evaluated in this risk assessment include incidental ingestion of soil and dust,

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[1395] Contract Memorial, ¶ 106 (citing **Exhibit C-061**, 1999 DIGESA Study; **Exhibit C-019**, Letter from B. Neil (DRP) to M. Chappuis (MEM), PAMA for the Metallurgical Complex of La Oroya 2004-2011 Period, 17 February 2004, Annex VI at 9-10, 14, 19; Buckley Witness Stmt. ¶ 19).

[1396] **Exhibit C-061**, 1999 DIGESA Study, p. 33

[1397] **Exhibit C-061**, 1999 DIGESA Study, p. 33

[1398] **Exhibit C-061**, 1999 DIGESA Study, p. 33

[1399] *See* Proctor Expert Report, Sections 3.1-3.2.

[1400] Contract Memorial, ¶ 106 (*citing* **Exhibit C-059**, 1998-2002 DRP Report at 75-76; **Exhibit C-061**, 1999 DIGESA Study at 21; **Exhibit C-019**, Letter from B. Neil (DRP) to M. Chappuis (MEM), PAMA for the Metallurgical Complex of La Oroya 2004-2011 Period, 17 February 2004, Annex VI, pp. 9–10, 14, 19).

and inhalation of ambient air."[1401] This is again consistent with Ms. Proctor's testimony that Contemporaneous Lead Emissions polluting the air was the primary exposure pathway for the Missouri Plaintiffs.

738. Third, Claimants also cite a study Activos Mineros commissioned from Intrinsik in relation to its soil remediation project.[1402] Ms. Proctor explains that the study does not support Claimants' contention that Centromín's Historical Lead Emissions caused the Missouri Plaintiffs' injuries.[1403] The Intrinsik study predicted blood lead levels using *only* the top layer of soil in La Oroya—which would have contained mostly lead stemming from DRP's recent emissions—and assumed that ongoing emissions had been controlled.[1404] Moreover, Intrinsik used a model that was intentionally conservative and that did not account for circumstances particular to La Oroya. Ms. Proctor notes that in 2005 and 2008, Dr. Schoof did not use the same model as Intrinsik and found that soil was a marginal exposure pathway to lead.[1405]

739. Fourth, Claimants cite a study conducted by the expert panel appointed in connection with the 2006 Extension.[1406] Claimants string together various fragments from eight nonconsecutive pages of the panel's report to create the illusion that the panel concluded that Historical Lead Emissions re-suspended into the air and settled as dust, causing "dangerously high" lead concentrations in dust.[1407] Contrary to Claimants' claims, the

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[1401] **Exhibit C-019**, Letter from B. Neil (DRP) to M. Chappuis (MEM), PAMA for the Metallurgical Complex of La Oroya 2004-2011 Period, 17 February 2004, Annex VI, p. 14.

[1402] Contract Memorial, ¶ 220 (*citing* Bianchi Expert Report, pp. 79–94).

[1403] Proctor Expert Report, Section 3.2.1.

[1404] Proctor Expert Report, Section 3.2.1.

[1405] Proctor Expert Report, Section 3.2.1.

[1406] Contract Memorial, ¶ 221 (*citing* **Exhibit C-090**, Expert Comments on Exceptional Fulfillment Extension Request for the Sulfuric Acid Plant Project of La Oroya Metallurgical Complex PAMA, 10 May 2006, pp. 14, 16–17, 22–24, 25–26).

[1407] Contract Memorial, ¶ 221 ("This was confirmed by a study conducted by a Panel of Experts selected by the Peruvian Government in 2006 to evaluate the contamination. As the Expert Panel explained, in La Oroya 'over 80 years of uncontrolled emissions creat[ed] heavy metal reservoirs throughout the study area.' These reservoirs of lead, the Expert Panel explained, impact the community in a variety of ways, including through direct contact with contaminated soils, the resuspension of contaminated dusts, and 'extremely high dust lead loadings' and 'dangerously high floor dust lead loadings' in La Oroya homes, which cannot be effectively cleaned due to the materials used in their construction. Thus, the Expert Panel found: 'Expanded efforts need to be made immediately to prevent exposure from lead-contaminated soil,' as this is 'a critical [source] for some of the children with very high blood lead.'").

expert panel at no point concluded that Historical Lead Emissions in soil re-suspended in the air as dust. On the contrary, the expert panel found that DRP's own emissions settled as dust and thereafter re-suspended into the air. [1408] The studies cited by Claimants therefore undermine Claimants' case and confirm that Contemporaneous Lead Emissions and not Historical Lead Emissions were the primary exposure pathway for the Missouri Plaintiffs.

Injuries allegedly arising from sulfur dioxide emissions

740. Centromín's operations also could not have been the source of the Missouri Plaintiffs' injuries caused by exposure to sulfur dioxide. Ms. Proctor explains that sulfur dioxide dissipates into the atmosphere within a matter of days.[1409] This means that only contemporaneous sulfur dioxide emissions can harm a person's health. Thus, historical emissions of sulfur dioxide could not have caused the Missouri Plaintiffs' injuries.

c. The PAMA period

(iv) The Missouri Litigations do not relate to DRP's PAMA

741. The Missouri Plaintiffs' claims relate to DRP's "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."[1410] The release of those contaminants relates to the Facility's smelting operations.[1411] DRP's smelting operations were not "related to" to DRP's implementation of its PAMA.[1412] Accordingly, no obligation to assume

[1408] **Exhibit C-090**, Expert Comments on Exceptional Fulfillment Extension Request for the Sulfuric Acid Plant Project of La Oroya Metallurgical Complex PAMA, 10 May 2006, p. 16 ("The community is impacted directly and indirectly. Direct impacts are caused by on-going process emissions and fugitives. . . . Indirect impacts are being caused by the accumulation of dusts over the short and long term in different soil areas (reservoirs) in the community. Short term impacts are being caused by the re-suspension of emissions that deposit to soils and other flat surfaces in the community. Long term impacts are being caused by the re-suspension of previously deposited dusts.").

[1409] Proctor Expert Report, p. 9.

[1410] *See* **Exhibit R-299**, *U.S. District Court, E.D. Missouri, Sister Kate Reid and Megan Heeney (Next Friends) v. Doe Run Resources Corporation et. al.*, Second Amended Petition for Damages – Personal Injury, Dec. 5, 2007, ¶ 20.

[1411] *See generally*, **Exhibit R-189**, Report on Visit to the Herculaneum Site (19–22 October 1996), 25 October 1996.

[1412] See Section V.A.1.a above.

responsibility arises under the STA because the Missouri Plaintiffs' claims do not "arise directly" due to acts that are "related to" the PAMA.[1413]

742. Claimants seek to avoid this by contending that *all* of their business operations were related to the PAMA.[1414] The only support Claimants provide for this is a reference to their own employee's witness statement, which states that DRP "had not expanded operations, created any new metallurgic processes, or created any new business opportunities at the Complex."[1415] This statement does not support Claimants' assertion that Missouri Plaintiffs' claims stem from DRP's PAMA.[1416] There is therefore no evidence to support Claimants' claims on this point.

743. All the evidence thus confirms that the injuries of the Missouri Plaintiffs were caused by DRP's smelting operations and not the implementation of DRP's PAMA.

(v) DRP's standards and practices were "less protective of the environment and public health" than those of Centromín

744. DRP must also establish that the Missouri Plaintiffs' claims do not stem from acts that "were the result of [DRP's] use of standards and practices that were less protective of the environment or of public health than those that were used by Centromín until the date of execution of [the STA]."[1417]

745. The Dobbelaere, and Proctor reports explain that: (1) DRP's operations were less protective of both the environment and public health than those of Centromín in several respects; (2) DRP's less protective operations caused the injuries complained of by the Missouri Plaintiffs; and (3) the protective measures that Claimants cite are irrelevant to the injuries complained of in the Missouri Litigations and in no way offset the harm caused by DRP's less protective practices.

[1413] **Exhibit R-001**, STA & Renco Guaranty, Clause 5.3(a).

[1414] Contract Memorial, ¶ 88, fn. 151.

[1415] Contract Memorial, ¶ 190 (*citing* Mogrovejo Witness Statement, ¶ 38).

[1416] Mogrovejo Witness Statement, ¶ 38. In any case, Claimants' own witness draws a distinction between "the PAMA projects and [the] operation of the Complex" in the same paragraph that Claimants cite to support their argument.

[1417] **Exhibit R-001**, STA & Renco Guaranty, Clause 5.3(a).

DRP's practices were less protective of the environment and public health than those of Centromín

746. DRP's practices were less protective than those of Centromín in several respects.

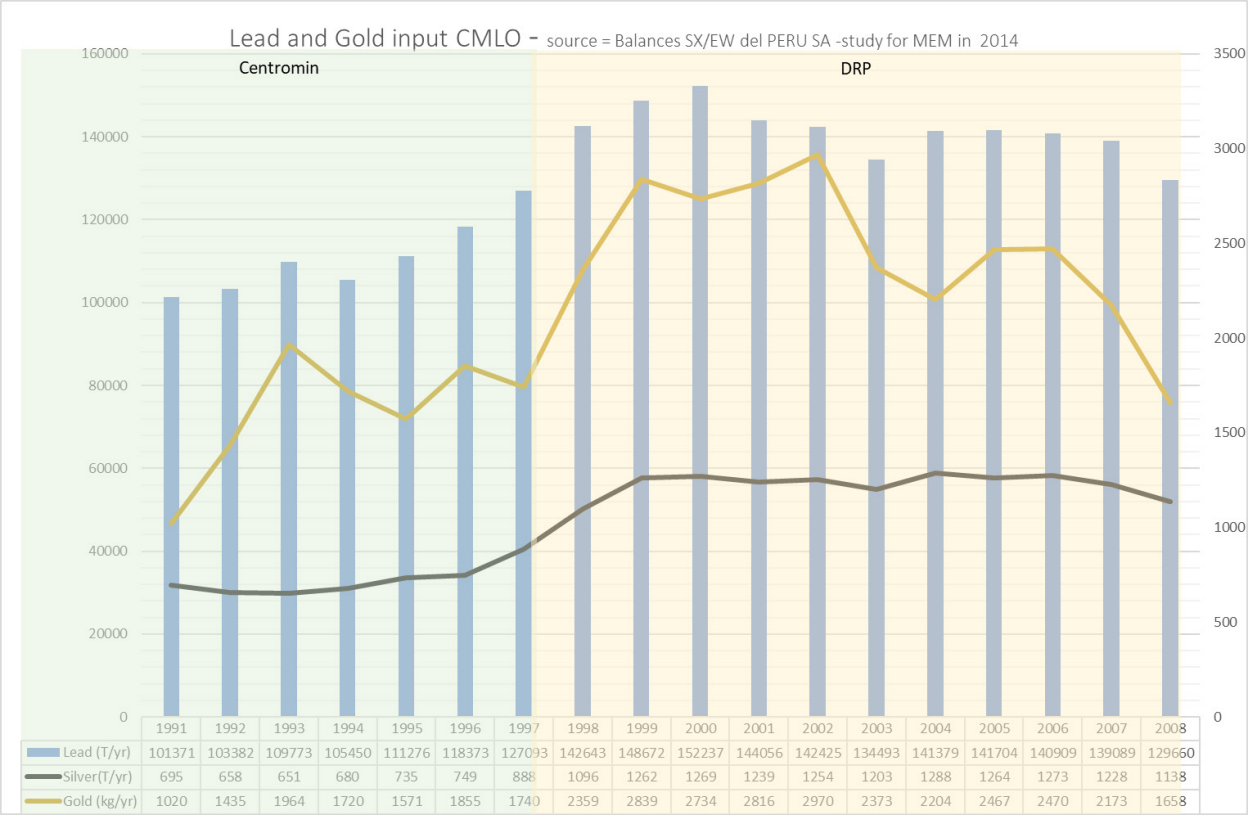
747. First, the Wim Dobbelaere report shows that DRP increased the Facility's production without implementing environmental safeguards. Peru's Environmental Mining Law required DRP to report any increase in operations to the MEM and present an Environmental Impact Study regarding production augmentation.[1418] Additionally, the International Finance Corporation's Environmental, Health and Safety Guidelines required DRP not to increase production until effective pollution prevention measures were in place.[1419] Nevertheless, in breach of these requirements, between 1997 and 2009, DRP (without presenting to the MEM the required Environmental Impact Study) treated more than 30% more lead than Centromin treated between 1990 and 1997.[1420] The below graph shows the extent to which DRP ramped up the Facility's treatment of lead.[1421]

[1418] **Exhibit R-025**, Supreme Decree No. 016-93, Art. 7.3 (The title holders of concessions that are in the production or operation phase and that require an increase in operations must present to the [MEM] an Environmental Impact Study of the corresponding project.") ("Los titulares de concesiones que se encuentren en la etapa de producción u operación y que requieren ampliar sus operaciones deberán presentar al Ministerio de Energía y Minas un Estudio de Impacto Ambiental del correspondiente proyecto.").

[1419] **Exhibit WD-034**, Environmental, Health, and Safety Guidelines Base Metal Smelting and Refining, International Finance Corporation and The World Bank, 30 April 2017.

[1420] Dobbelaere Expert Report, ¶ 208.

[1421] Dobbelaere Expert Report, pp. 87-88.



748. When DRP acquired the Facility, the emissions controls in place were old and ineffective. DRP did not, however, improve the Facility's emissions controls until 2005.[1422] By producing greater quantities of lead without presenting an Environmental Impact Study to the MEM or improving environmental safeguards, DRP's practices were less protective of the environment and public health than those of Centromín.

749. Second, compared to the prior practice under Centromín, DRP fed cheaper, dirtier feedstock into the Facility in order to increase production without incurring a commensurate increase in costs.[1423] The Dobbelaere report explains that DRP fed higher amounts of led into the Facility, which made its way into the environment.[1424] Moreover, DRP began importing significant quantities of "stock" concentrates in 2003 and continued

[1422] Dobbelaere Expert Report, p. 119.

[1423] Dobbelaere Expert Report, ¶¶ 214-217.

[1424] Dobbelaere Expert Report, ¶¶ 227-237.

to do so until 2009.[1425] These stock concentrates contained high levels of impurities.[1426] In particular, the copper stock concentrates contained more than twice the amount of lead than the copper concentrates used by Centromin.[1427] Mr. Dobbelaere explains that the introduction of lead into the copper circuit is particularly harmful and generates high levels of fugitive lead emissions.[1428]

750. Using cheaper and dirtier inputs than those previously used by Centromín was a practice that was less protective of the environment and public health.

751. Third, pyro-metallurgy expert Wim Dobbelaere' testimony confirms that DRP's failure to improve emissions controls while (as noted above) simultaneously ramping up production and using cheaper and dirtier feedstock resulted in increased lead and sulfur dioxide emissions.[1429] The Facility processes metallic concentrates that contain high levels of impurities, including lead and sulfur.[1430] As the Facility processes those concentrates, its various emissions controls capture some of the impurities and release the remainder into the environment.[1431] As noted above, DRP did not, however, improve the Facility's aged emissions controls until 2005.[1432] That meant that the Facility's capacity to process concentrates remained the same as it was under Centromín while DRP fed into the Facility: (a) an increased quantity of concentrates; and (b) a dirtier quality of concentrates.[1433] This

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[1425] Dobbelaere Expert Report, ¶¶216; **Exhibit WD-008**, SXEW Lima Peru Consultant – Location and selection of information related to the Mineral Copper, Lead and Zinc in the Metallurgical Complex of La Oroya, November 2012, pp. 17-20.

[1426] Dobbelaere Expert Report, ¶¶216; **Exhibit WD-008**, SXEW Lima Peru Consultant – Location and selection of information related to the Mineral Copper, Lead and Zinc in the Metallurgical Complex of La Oroya, November 2012, pp. 17-20.

[1427] Dobbelaere Expert Report, ¶¶216; **Exhibit WD-008**, SXEW Lima Peru Consultant – Location and selection of information related to the Mineral Copper, Lead and Zinc in the Metallurgical Complex of La Oroya, November 2012, p. 18.

[1428] Dobbelaere Expert Report, ¶¶218-222.

[1429] Dobbelaere Expert Report, ¶¶227-237. While the Missouri Plaintiffs' initially claimed damages stemming from exposure to arsenic and cadmium, their later public pleadings focused on lead and sulfur dioxide. Respondents reserve their right to further develop defenses relating to any claimed damages that relate to arsenic, cadmium, or any other substance, to the extent that the Missouri Plaintiffs have preserved their claims related to those contaminants.

[1430] Dobbelaere Expert Report, ¶36.

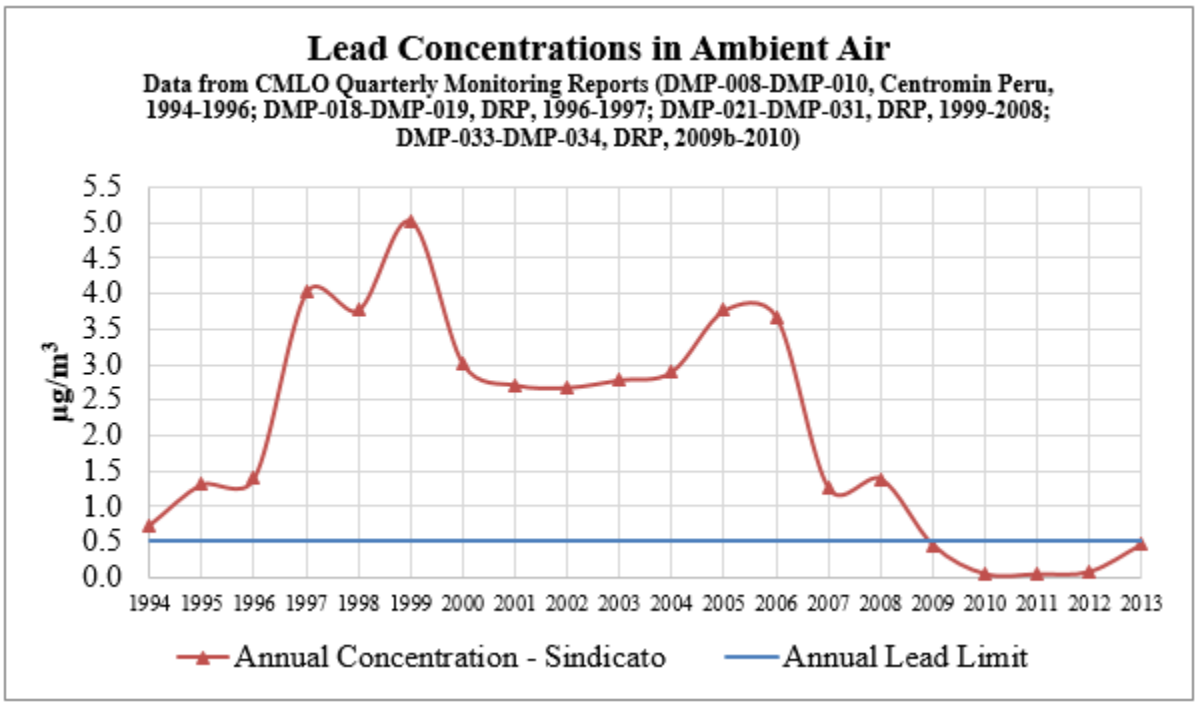
[1431] Dobbelaere Expert Report, ¶39.

[1432] Dobbelaere Expert Report, p. 126.

[1433] Dobbelaere Expert Report, ¶ 213.

practice necessarily caused an increase in emissions.[1434] Moreover, DRP's practices shifted emissions from the main stack to fugitive emissions, which are much more harmful to the environment and public health.[1435] Accordingly, DRP's practices were less protective than the practices under Centromín.[1436]

752. Fourth, DRP's use of less protective standards is further demonstrated by the evidence showing an increase in emissions following DRP's acquisition of the Facility. Ms. Proctor's analysis of the Facility's air monitoring data confirms that emissions of lead and sulfur dioxide increased significantly after DRP acquired the Facility.[1437]

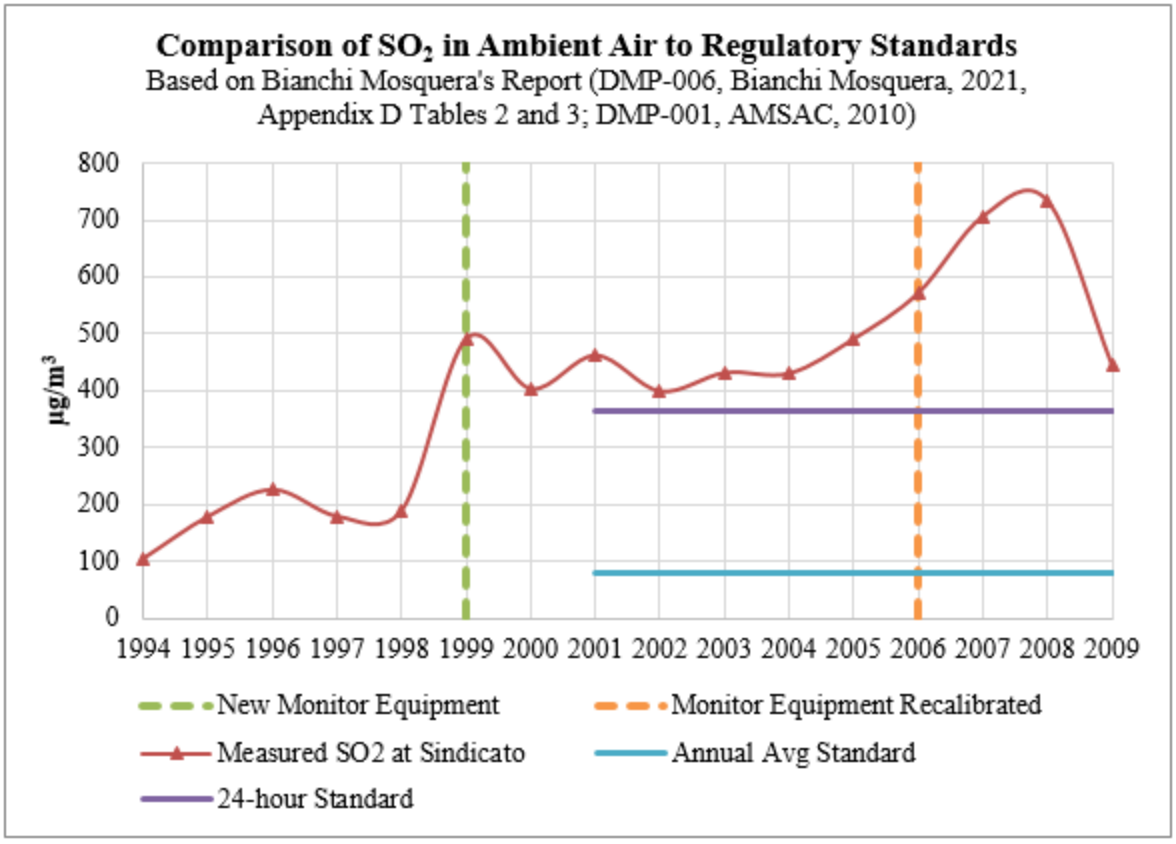


[1434] Dobbelaere Expert Report, ¶¶ 227.

[1435] Dobbelaere Expert Report, ¶¶ 235 ("[B]y dramatically increasing the amount of lead fed into the CLMO before implementing any meaningful process changes and emissions controls, DRP necessarily would have increased the amount of lead and other contaminants emitted into the environment in La Oroya.").

[1436] Dobbelaere Expert Report, ¶ 203.

[1437] Proctor Expert Report, Figures 13, 15.



753. Mr. Bianchi, Claimant's environmental expert, asserts that the air monitoring data for lead is faulty because, in his view, it is inconsistent with measurements of the Facility's main-stack emissions.[1438] Mr. Bianchi omits, however, that main-stack emissions only accounted for a small portion of overall lead emissions (an average of 17% of total emissions under Centromín, and just 6% of total emissions under DRP).[1439] The remainder of the Facility's lead emissions were released through fugitive emissions, which DRP did not directly monitor.[1440] Moreover, DRP's own consultant found that fugitive emissions affect air quality eight times more than main-stack emissions.[1441] It is thus misleading for

[1438] Bianchi Expert Report, pp. 67-68.

[1439] **Exhibit R-150**, Assessment of Lead Loss from the La Oroya Metallurgical Complex and Environmental Contamination (Volume I), January 2013, pp. 29-30.

[1440] **Exhibit R-150**, Assessment of Lead Loss from the La Oroya Metallurgical Complex and Environmental Contamination (Volume I), January 2013, pp. 29-30.

[1441] **Exhibit C-045**, 2004 DRP Extension Request, pp. 5–6.

Mr. Bianchi to suggest that air monitoring data is faulty unless it tracks main-stack emissions perfectly.

754. In any event, the Dobbelaere report explains that a "mass balancing" analysis of the Facility's emissions confirms that DRP released greater amounts of lead into the environment than Centromín.[1442] Mass balancing derives from a fundamental scientific principle: the Law of Conservation of Mass.[1443] According to that principle, mass can neither be created nor destroyed.[1444] Mass balancing applies the Law of Conservation of Mass to calculate a smelter's total emissions by accounting for the quantity and composition of the smelter's inputs (i.e., the concentrates fed into the smelter) and outputs (i.e., the refined materials produced by the smelter and other byproducts captured during the smelting process).[1445] By subtracting the outputs from the inputs, it is possible to determine the quantity of any substances that were "lost" during the production process (either converted into slag, captured by processes, or released into the environment).[1446] A mass balancing approach thus allows one to ascertain both main stack emissions (which are recorded) and fugitive emissions (which are not recorded).[1447]

755. SX-EW, an independent analyst engaged by Right Business (DRP's bankruptcy administrator), conducted a mass balancing analysis of the Facility's total emissions between 1990 and 2009.[1448] SX-EW used data regarding the Facility's operations that has been reported in detail since 1966, as well as data on fugitive emissions from a report that DRP presented to the MEM in 2004.[1449] SX-EW conducted a mass balancing analysis of the Facility's emissions between 1990 and 2009 and found that DRP increased the

[1442] Dobbelaere Expert Report, ¶ 227.

[1443] Dobbelaere Expert Report, ¶ 227.

[1444] Dobbelaere Expert Report, ¶ 227.

[1445] Dobbelaere Expert Report, ¶ 227.

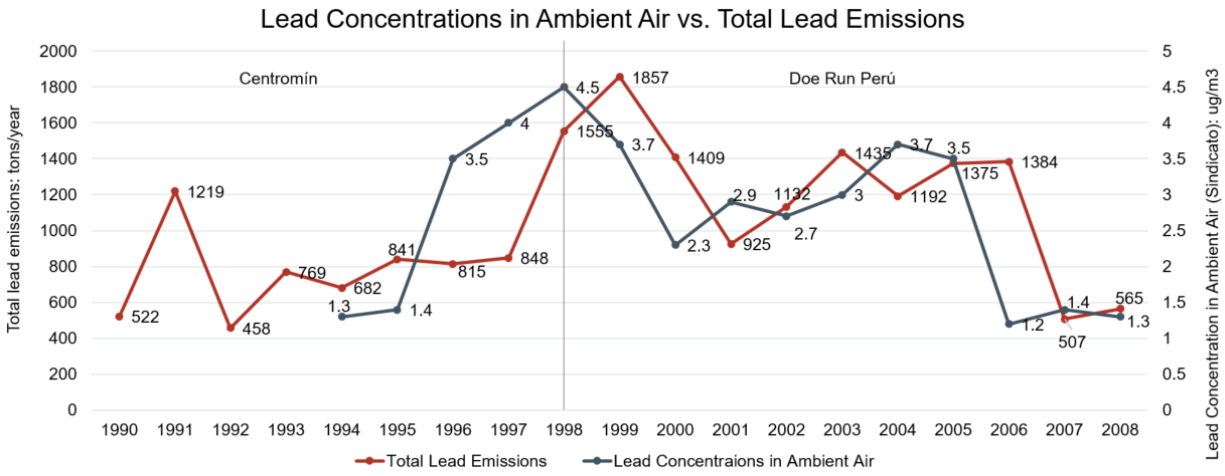
[1446] Dobbelaere Expert Report, ¶ 227.

[1447] Dobbelaere Expert Report, ¶ 227.

[1448] **Exhibit R-150**, Assessment of Lead Loss from the La Oroya Metallurgical Complex and Environmental Contamination (Volume I), January 2013.

[1449] **WD-008**, SXEW Lima Peru Consultant, November 2012; **Exhibit R-150**, Assessment of Lead Loss from the La Oroya Metallurgical Complex and Environmental Contamination (Volume I), January 2013, pp. 26 *et seq.*

Facility's lead emissions by 73% during the PAMA Period.[1450] Mr. Dobbelaere has reviewed SX-EW's analysis and shares its findings:[1451]



756. The evidence therefore overwhelmingly confirms that DRP's practices were less protective of the environment and public health than those of Centromín.

DRP's less protective practices caused the Missouri Plaintiffs' alleged injuries

757. DRP's less protective practices during its ownership of the Facility caused the Missouri Plaintiffs' alleged injuries. As shown above, the Missouri Plaintiffs allege that their injuries were caused by the Renco Defendant's causing DRP to "release" lead and sulfur dioxide "into the air," *i.e.,* the Facility's emissions.[1452] As also shown above, the Facility's contemporaneous emissions under DRP were the dominant source of the Missouri Plaintiffs' lead exposure and the only source of their sulfur dioxide exposure.[1453] The evidence therefore confirms that the injuries of the Missouri Plaintiffs were caused by DRP when operating the Facility with practices that were less protective than those of Centromín.

[1450] Dobbelaere Expert Report, ¶ 233.

[1451] Dobbelaere Expert Report, ¶ 234.

[1452] **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, ¶ 20.

[1453] Proctor Expert Report, Sections 3.1-3.2.

758. Claimants fail to show otherwise. Rather, Claimants rely on generalized assertions about environmental and health conditions in La Oroya but fail to provide any specific information about the Missouri Plaintiffs and their claims. Claimants have not identified where each plaintiff lived, worked, or went to school during the relevant timeframe, what injury each plaintiff claims to have suffered, what toxic substances caused each alleged injury, the evidence on which the plaintiffs rely to support their theory of causation, when and how each plaintiff alleges to have been exposed to any toxic substances, or even the plaintiffs' ages. Without this information, Respondents cannot determine with certainty the source of the Missouri Plaintiffs' injuries. Claimants' failure to provide information about the Missouri Plaintiffs and their claims thus impairs Respondents' right to defend themselves against Claimants' claims.

759. In any case, it is undisputed that, insofar as the Missouri Plaintiffs' injuries stem from DRP's activities, their injuries relate to the Facility's air emissions. Claimants and their experts, however, fail to establish that Centromín employed standards and practices related to air emissions that were less protective of the environment and public health than those of DRP. Rather, Claimants distort the available data and omit damaging information about DRP's operations.

760. First, Claimants present only information about the Facility's main-stack emissions, which increased under DRP's operations for two years, and then decreased below Centromín's main-stack emissions levels starting in 2000.[1454] However, as explained above, main-stack emissions accounted for just 6% of DRP's total lead emissions. In contrast, main-stack emissions accounted for 17% of Centromin's total lead emissions, meaning that DRP's operations shifted emissions from the main stack to fugitive emissions.[1455] Given that fugitive emissions are eight times more harmful than main-stack emissions,[1456] Claimant's reduction in main-stack emissions (which caused a concomitant increase in fugitives) is no indication that Claimant's operations were somehow more protective of the environment

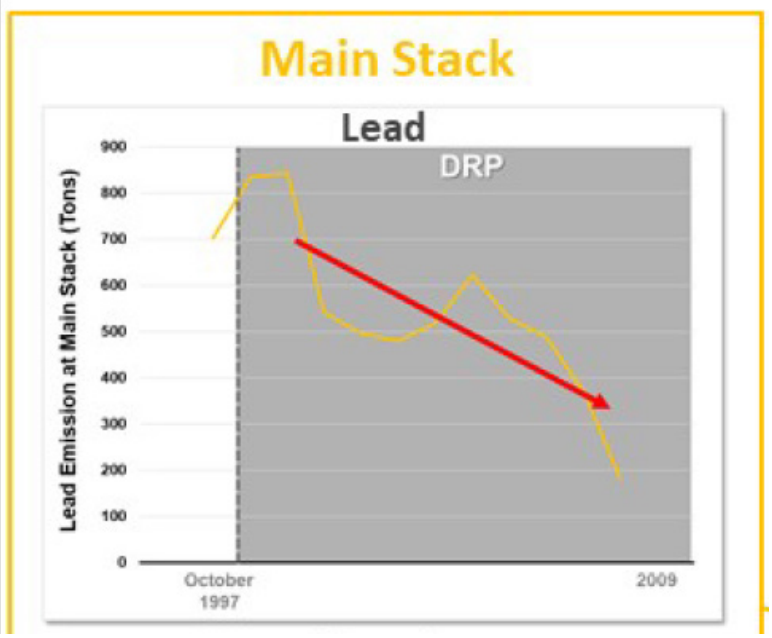
[1454] Contract Memorial, pp. 36, 37, 45.

[1455] Dobbelaere Expert Report, ¶242; **Exhibit R-150**, Assessment of Lead Loss from the La Oroya Metallurgical Complex and Environmental Contamination (Volume I), January 2013, pp. 29-30.

[1456] **Exhibit C-045**, 2004 DRP Extension Request, pp. 5–6.

and public health. Quite the opposite: as demonstrated above, the Facility's *total* lead emissions (i.e., main-stack and fugitive emissions) increased markedly after DRP assumed operations, as confirmed by air monitoring data and a mass balancing analysis.[1457] It is therefore misleading for Claimants to present DRP's reduction in main-stack emissions as if it represented an improvement over Centromin's practices.

761. Second, Claimants present trend lines to illustrate the supposed improvement in main-stack emissions after DRP acquired the Facility.[1458] These trend lines are misleading because they (i) start in October 1997, thus obscuring the fact that Centromín's rate of main-stack emission improvements was greater than that of DRP; and (ii) end in 2009, even though most of DRP's improvements to lead emissions occurred after the PAMA Period ended in January 2007. The following is the trend line graphic regarding main-stack emissions for lead in Claimants' Memorial, which only shows information from October 1997 to January 2007[1459]:

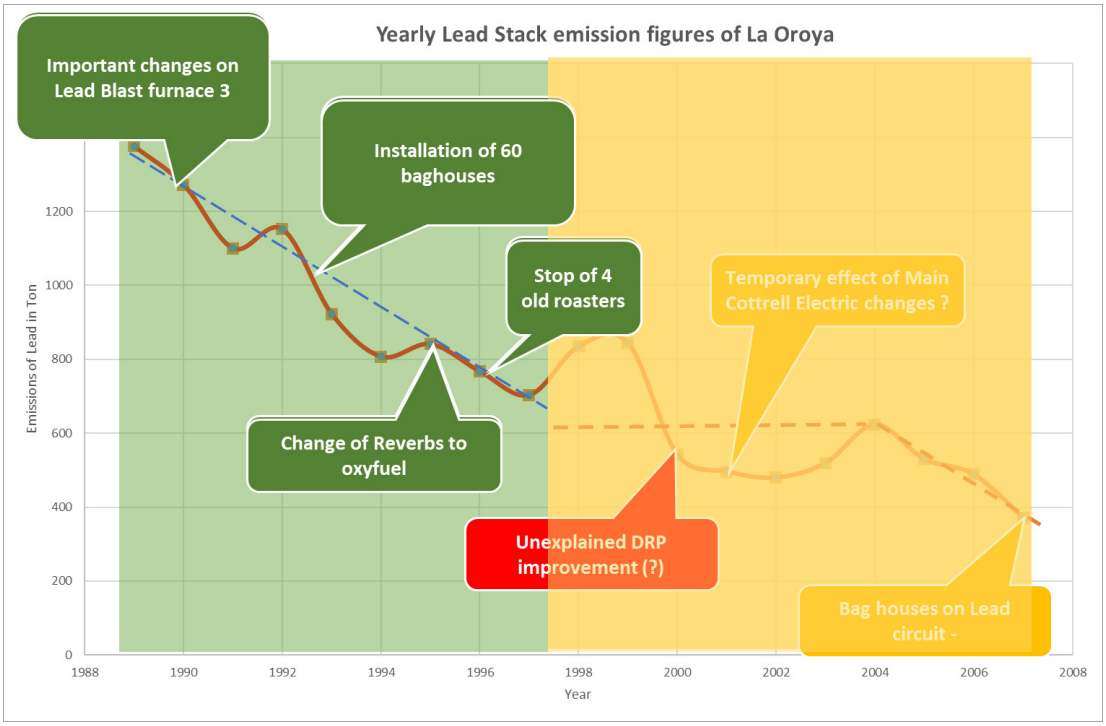


[1457] Dobbelaere Expert Report, ¶227-237; WD-008, SXEW Lima Peru Consultant, November 2012; **Exhibit R-150**, Assessment of Lead Loss from the La Oroya Metallurgical Complex and Environmental Contamination (Volume I), January 2013, pp. 26 *et* seq; Proctor Expert Report, pp. 31-32.

[1458] Contract Memorial, Figure 4, p. 45.

[1459] Contract Memorial, Figure 4, p. 45.

762. The below graph corrects for the partical information in Claimants' graphic and shows that DRP's improvements in main-stack lead emissions were comparatively minor and actually slowed Centromín's trend of reducing main-stack emissions.[1460]



763. Third, Claimants assert that DRP implemented process changes and environmental improvement projects that supposedly reduced the Facility's environmental impact.[1461] Those changes were too little, too late. In Section XI of his report, Mr. Dobbelaere evaluates each of DRP's process changes and environmental improvement projects and demonstrates that they would not have had a meaningful impact on the Facility's emissions during the PAMA Period, especially in light of DRP's decision to ramp up lead production and increase fugitive emissions.[1462]

764. Fourth, Claimants omit that DRP fed substantially greater amounts of lead into the Facility by (i) increasing production and (ii) importing concentrates with greater impurities. As

[1460] Dobbelaere Expert Report, WD Figure 29.

[1461] Contract Memorial, ¶¶ 90-91.

[1462] Dobbelaere Expert Report, Section XI.

discussed above, these practices had dramatic negative consequences on the public health and the environment in La Oroya.

Claimants' submissions regarding DRP's protective practices are irrelevant to the Missouri Plaintiffs' injuries

765. The majority of Claimants' arguments supporting their claim that DRP's practices were not "less protective" than Centromín's practices concern standards and practices that are unrelated to the Facility's air emissions (and therefore not relevant to the Missouri Plaintiffs' alleged injuries). For example, Claimants and their experts assert that DRP reduced the Facility's effluent discharges into two local rivers[1463] and improved the Facility's handling of solid and hazardous waste.[1464] Even assuming that these assertions are true, Claimants fail to establish that under Centromín's operations, liquid effluents and solid waste would have constituted a significant pathway for the Missouri Plaintiffs' exposure to lead and sulfur dioxide. Indeed, Claimants' own expert, Dr. Schoof, opines that the opposite is true.[1465]

766. Claimants likewise recite a litany of environmental and public health projects that DRP undertook during the course of the PAMA period.[1466] Ms. Proctor demonstrates that these improvement projects had a trivial impact and in no way offset DRP's more harmful practices of increasing production and using dirtier inputs.[1467]

767. Researchers from the CDC and St. Louis University shared Ms. Proctor's conclusion, finding that DRP's public health projects would not impact blood lead levels until the company reduced the Facility's emissions.[1468]

[1463] Contract Memorial, ¶¶ 92–94 (*citing* Bianchi Expert Report, pp. 49–54, 72–73).

[1464] Contract Memorial, ¶¶ 95–97 (*citing* Bianchi Expert Report, pp. 54–58, 74).

[1465] *See* Schoof Expert Report, pp. 17–21.

[1466] Contract Memorial, ¶¶ 90, 93, 96, 98–101.

[1467] Proctor Expert Report, Section 3.8.

[1468] **Exhibit C-138**, 2005 CDC Report, pp. 29, 32 ("[p]ublic health education and hygiene efforts alone [were] of little benefit in reducing elevated BLLs"); **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.

768. Moreover, DRP's public health projects may have even *increased* La Oroya residents' exposure to lead.[1469] For example, Ms. Proctor notes that DRP recruited La Oroya's residents as "volunteers" to clean contaminated streets, but failed to provide the volunteers with personal protective equipment.[1470]

769. Claimants therefore provide no relevant evidence that DRP's practices were not less protective than those of Centromín.

d. The Missouri Litigations resulted directly from a breach by DRP of its PAMA obligations

(vi) DRP breached its obligation under the PAMA to complete the sulfuric acid plant project by 13 January 2007

770. Claimants argue that the Missouri Plaintiffs' injuries do not "result directly from a default on Metaloroya's PAMA obligations" because, in their view, DRP never defaulted on those obligations.[1471] Claimants' assertion is incorrect. As explained in **Section II.C.3,** DRP breached its obligation under the PAMA to complete the sulfuric acid plant project by 13 January 2007.

771. Contrary to Claimants' assertions, the extensions beyond the PAMA period to complete the Sulfuric Acid Plant Project do not change the fact that DRP "default[ed] on [DRP's] PAMA obligations" within the meaning of Clause 5.3 of the STA. Experts Dr. Varsi and Dr. Alegre both confirm that the 2006 and 2009 Extensions did not affect DRP's contractual obligation to complete its PAMA projects by 13 January 2007.[1472] The extensions were granted by the MEM and by the Peruvian Congress, neither of which are parties to the STA.[1473] As a matter of Peruvian Constitutional law, administrative and legislatives acts cannot modify contractual obligations—only the parties to a contract may

[1469] Proctor Expert Report, Section 3.8.

[1470] Proctor Expert Report, p. 50.

[1471] Contract Memorial, ¶ 190.

[1472] Varsi Expert Report - Treaty, ¶¶ 6.20-6.23; Alegre Expert Report, ¶¶ 53-55.

[1473] Varsi Expert Report - Treaty, ¶ 6.21.

subsequently modify their obligations.[1474] Claimants' contention that the extensions modified the obligation DRP owed to Centromín and Activos Mineros is therefore wrong as a matter of the Peruvian law governing DRP's contractual obligation under the STA.[1475]

772. Moreover, each extension expressly clarified that it did not constitute an extension of the PAMA or otherwise affect DRP's contractual obligations towards Centromín and Activos Mineros. 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 . . . ."[1476]

773. 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."[1477]

774. The 2009 Extension Regulation likewise clarified that the new framework did not affect DRP's contractual obligations or constitute an extension of the PAMA:

> "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 CENTROMIN 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."[1478]

[1474] **RLA-036**, Political Constitution of Peru, enacted on 29 December 1993, Art. 62; Varsi Expert Report - Treaty, ¶ 6.21.

[1475] Varsi Expert Report - Treaty, ¶¶ 6.20-6.23.

[1476] **Exhibit R-287**, Ministerial Resolution No. 257-2006-MEM/DM, Art. 10.

[1477] **Exhibit R-289**, Report No. 118-2006-MEM-AAM/AA/RC/FV/AL/HS/PR/AV/FO/CC, 25 May 2006, p. 7.

[1478] **Exhibit C-078 (*Renco II*)**, Decree No. 075-2009, Final, Temporary and Supplementary Provisions, Section 6.

775. The extensions thus left undisturbed DRP's contractual obligation to complete the PAMA by 13 January 2007.

776. In any event, even if the extensions did have the effect of altering DRP's contractual obligations under Peruvian law (*quod non*), DRP's breach of its PAMA obligations had already crystalized prior to the granting of the extensions. Dr. Alegre explains that under Peruvian law a company is deemed to have breached a PAMA obligation if it recognizes that it will not comply with that obligation.[1479] Applying this principle of Peruvian law, DRP breached its PAMA obligation by at least 17 February 2004, when it submitted its 2004 Extension Request and notified the MEM that it lacked the financing to complete its PAMA by the original deadline.[1480]

777. It is therefore clear that DRP breached its PAMA obligations by failing to complete its PAMA obligations by the required deadline.

(vii) The Missouri Litigations result directly from DRP's PAMA breach

778. Experts Wim Dobbelaere and Deborah Proctor show that DRP's failure to build the sulfuric acid plants on time in breach of its PAMA obligations caused the Missouri Plaintiffs' injuries.

779. Mr. Dobbelaere explains that the Sulfuric Acid Plant Project required by the PAMA would have resulted in a dramatic reduction of the Facility's sulfur dioxide and lead emissions.[1481] The project was designed to reduce the Facility's sulfur dioxide emissions by approximately 89%.[1482] Moreover, the project would have required DRP to implement cleaning mechanisms to remove all particulate matter—including lead—from the Facility's emissions before running them through the sulfuric acid plants.[1483] According to Mr. Dobbelaere, "all streams treated in a sulfuric acid plant will become free of dust in the

[1479] Alegre Expert Report, ¶¶ 50-51.

[1480] Alegre Expert Report, ¶¶ 50-51; **Exhibit C-019**, Letter from DRP (B. Neil) to MEM (M. Chappuis) *attaching* PAMA for the Metallurgical Complex of La Oroya 2004-2011 Period, 17 February 2004.

[1481] Dobbelaere Expert Report, ¶¶ 287-300. *See also*, Dobbelaere Expert Report, Sections V–VIII.

[1482] Dobbelaere Expert Report, ¶ 66.

[1483] Dobbelaere Expert Report, ¶¶ 51-54.

stack, which brings a drastic reduction of dust and metal emissions. Hence, the installation of sulfuric acid plants will reduce both SO_2 and dust (lead and arsenic and other minor impurities)."[1484] Thus, the timely completion of the Sulfuric Acid Plant Project would have reduced all harmful emissions causing the injuries claimed in the Missouri Litigations.

780. Ms. Proctor's testimony further confirms that DRP's default on its PAMA obligations harmed the Missouri Plaintiffs:

> "DRP's delays in fully implementing the PAMA in a timely manner negatively affected the health of the local community members, especially children and sensitive individuals. To protect public health, measures to address fugitive emissions, as well as PAMA Project 1, should have been conducted earlier and concurrently."[1485]

Ms. Proctor notes that Dr. Schoof's 2005 and 2008 Health Risk Assessments likewise found that by implementing the PAMA, DRP would have markedly reduced La Oroya residents' exposure to sulfur dioxide and lead.[1486]

781. Accordingly, DRP's failure to implement its PAMA caused significant injury to the Missouri Plaintiffs. Claimants, however, have not attempted to show that the Missouri Plaintiffs' alleged injuries do not result from DRP's default on its PAMA obligations—Claimants have not even described the alleged injuries with any particularity.

e. The Missouri Plaintiffs' alleged injuries stem at least in part from DRP's activities after the PAMA period

782. The Missouri Plaintiffs' claims and the expert testimony submitted in this arbitration make clear that at least *some* of the Missouri Plaintiffs' injuries resulted from acts that are solely attributable to DRP's post-PAMA operations. The Missouri Plaintiffs' claims relate to the entire period during which DRP operated the Facility (i.e., between October 1997 and June 2009). The Missouri Plaintiffs' expert has calculated the extent to which DRP's operations contributed to blood lead levels for every year during this period, including in 2007, 2008,

[1484] Dobbelaere Expert Report, ¶ 52.

[1485] Proctor Expert Report, p. 49.

[1486] Proctor Expert Report, Section 3.6.

and 2009.[1487] Given that the PAMA period ended in January 2007, DRP is liable for the Missouri Plaintiffs' injuries that stem from its operations after 13 January 2007.

783. Moreover, the Proctor Report explains that DRP emitted dangerous levels of lead and sulfur dioxide during the post-PAMA period.[1488]

784. Given that Claimants have provided virtually no information about the individual Missouri Plaintiffs and their claimed damages, it is impossible for Respondents to disaggregate the harms DRP caused during the post-PAMA period from the harms it caused during the PAMA period. Claimants bear the burden of carrying out that task, which they have failed to do. Claimants have therefore failed to establish that the Missouri Plaintiffs' claims fall under Activos Mineros' allocation of responsibility.

B. Centromín and Activos Mineros attended to their environmental obligations, although they were delayed by DRP's failure to implement its PAMA

785. Centromín, as the former owner-operator of the Facility, was originally responsible for five PAMA projects related to historical operations, including Project No. 4, which entailed revegetating the area surrounding La Oroya.[1489] Centromín performed its PAMA obligations within the original timelines to the extent it was able. It could not, however, perform Project No. 4 until DRP reduced the Facility's sulfur dioxide emissions. Given that DRP never brought the Facility into compliance with Peruvian sulfur dioxide standards, Centromín was forced to delay implementation of is revegetation project.

786. Claimants now seek to hold Centromín responsible for DRP's delay. In doing so, Claimants attempt to rewrite PAMA Project No. 4 to include the obligation to remove lead and other contaminants from the soil in La Oroya. Claimants' argument directly contradicts the text of the PAMA and subsequent findings of the MEM and independent consultants.

787. In this section, Respondents will demonstrate that (i) Claimants misrepresent the content of Centromín's PAMA obligations (**subsection 1**); (ii) Centromín and Activos Mineros did not unduly defer their revegetation obligations (**subsection 2**); and (iii) Activos Mineros

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[1487] **Exhibit R-295**, Memorandum of Law in Opposition to Defendants' Motion to Exclude the Expert Opinion of Dr. David Macintosh, Document No. 1269, *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. 2.

[1488] Proctor Expert Report, Sections 3.3-3.4.

[1489] **Exhibit R-001**, STA & Renco Guaranty, Clause 6.1.

implemented the revegetation project and designed and implemented a soil remediation project (s**ubsection 3**).

1. Claimants misrepresent the content of Centromín's PAMA obligations

788. According to Claimants, Centromín's "failure to remediate the soil . . . caused, and continues to cause, pervasive environmental contamination in and around La Oroya, which continues to contribute substantially to exposures of La Oroya area residents to lead and other metals."[1490] Claimants base their claim on the false premise that the revegetation project (PAMA Project No. 4) required Centromín to remove lead and other contaminants from the soil (i.e., to "remediate" the soil). The PAMA, however, contains no such requirement, but instead required Centromín to revegetate the areas affected by the Facility's emissions.[1491] Indeed, while the PAMA contains a detailed description of the revegetation project, it makes no mention of the need to remove lead and other contaminants from the soil.[1492] The "Schedule of Investments for the Recuperation of the Affected Area Project"—which Claimants omit from their translation of the PAMA—likewise does not include a line item for "remediating" the soil by removing lead and other contaminants.[1493]

789. In 2004, the MEM required Centromín to undertake a new soil remediation project in La Oroya.[1494] The MEM created this new project precisely because under the PAMA (and later, the Closing Plan), Centromín was obligated only to revegetate the soils—not to remediate them.[1495] According to the MEM, "the PAMA was designed with a large emphasis on revegetation of the effected lands. However, it does not contain any disposition providing for the evaluation and/or mitigation of the health problems that might have arisen as a consequence of the accumulated contaminants in the affected areas caused by historical emissions."[1496]

[1490] Contract Memorial, ¶ 104.

[1491] *See* **Exhibit C-020**, PAMA Report, Project No. 4, PDF pp. 205–213.

[1492] *See* **Exhibit C-020**, PAMA Report, Project No. 4, PDF pp. 205–213.

[1493] *See* **Exhibit C-020**, PAMA Report, Project No. 4, PDF p. 187.

[1494] **Exhibit R-290**, Report No. 144-2004-MEM-DGM-FMI/MA, 24 March 2004, pp. 2–3.

[1495] **Exhibit R-290**, Report No. 144-2004-MEM-DGM-FMI/MA, 24 March 2004, pp. 2-3.

[1496] **Exhibit R-290**, Report No. 144-2004-MEM-DGM-FMI/MA, 24 March 2004, p. 2.

790. Dr. Alegre explains that the remediation obligation imposed in 2004 did not constitute a part of Centromín's PAMA.[1497] Indeed, when the MEM required Centromín to remediate the soil in La Oroya, the MEM had already issued a resolution confirming that Centromín had completed its obligations under the PAMA.[1498] Three independent consultants confirmed this determination.[1499]

791. Claimants also exaggerate the scope of Centromín's revegetation obligations. Claimants assert that under the PAMA, Centromín was required to remediate the soil in an area covering over 14,000 hectares.[1500] The PAMA, however, is clear that Centromín was responsible for revegetating an area of just under 4,000 hectares.[1501] Claimants briefly acknowledge this discrepancy in a footnote and claim that "[l]imiting the impacted area to 4,000 hectares was an error. As there had been no remediation done on the 14,000 hectares, that land continued to have high levels of heavy metal contaminants."[1502] Claimants provide no support for this claim, which contradicts the PAMA's text.[1503]

2. Centromín and Activos Mineros did not unduly defer their revegetation obligations

792. Claimants support their claim that Centromín failed to meet its PAMA obligations with a series of misleading and unsubstantiated statements that unravel upon closer scrutiny.

793. Claimants assert that DRP "tried to convince Centromín to complete its remediation obligations," but Centromín allegedly could not remediate the soil because it lacked the necessary finances to undertake the project.[1504] Claimants do not cite any documentary evidence to support these assertions,[1505] and a contemporaneous assessment from the MEM

[1497] Alegre Expert Report, Section VI.

[1498] Alegre Expert Report, ¶¶ 116-122.

[1499] Alegre Expert Report, ¶¶ 116-122.

[1500] Contract Memorial, ¶ 42.

[1501] **Exhibit C-020**, PAMA Report, PDF p. 205.

[1502] Contract Memorial, ¶ 42, footnote 67.

[1503] **Exhibit C-020**, PAMA Report, PDF p. 205 ("1. Objective. To delimit and rehabilitate the area affected by smoke considering the existing flora, fauna, soils, water, etc. . . . As of January 1996 an affected area of 3,829 Ha was recorded.")

[1504] Contract Memorial, ¶ 108 (*citing* Buckley Witness Statement, ¶¶ 16–17).

[1505] Contract Memorial, ¶ 108 (*citing* Buckley Witness Statement, ¶¶ 16–17).

shows that "Centromín ha[d] the foreseen funds to comply with the La Oroya PAMA."[1506] In reality, Centromín could not fulfil its revegetation obligations until DRP built the sulfuric acid plants, a precondition that never materialized because of DRP's own financial woes.

794. Claimants also assert that DRP sent a letter to Centromín in 1999 noting that Centromín "urgently needed to undertake its rehabilitation obligations."[1507] The letter cited by Claimants, however, does not express any urgency or timeframe in which DRP expected Centromín to complete its PAMA projects.[1508] The letter, which is 16-pages long, addresses Centromín's PAMA in two sentences that merely note that Centromín has several environmental obligations under the STA.[1509]

795. By the year 2000, Centromín had completed the first of its five PAMA projects.[1510] Of the four remaining projects, one project had become DRP's responsibility,[1511] two projects were delayed due to an agreement between Centromín and DRP to allow the latter to use Centromín's slag deposits,[1512] and one project (concerning revegetation of the affected area) would be postponed due to DRP's delays.[1513]

796. Indeed, in 2000, Centromín presented to the MEM a request that the revegetation project follow DRP's completion of the Sulfuric Acid Plant Project.[1514] Claimants assert that Centromín made this request due to pressure from DRP to begin work, coupled with

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[1506] **Exhibit R-277**, Directorial Resolution No. 082-2000-EM-DGAA, 17 April 2000 *attaching* Report No. 21-2000-DGAA/LS, 24 March 2000, p. 5.

[1507] Contract Memorial, ¶ 108 (*citing* Buckley Witness Statement, ¶ 18).

[1508] **Exhibit C-079**, Letter from DRP (K. Buckley) to MEM (J. Merino Tafur), 21 October 1999, pp. 15–16.

[1509] **Exhibit C-079**, Letter from DRP (K. Buckley) to MEM (J. Merino Tafur), 21 October 1999, pp. 15–16.

[1510] **Exhibit R-277**, Directorial Resolution No. 082-2000-EM-DGAA, 17 April 2000 *attaching* Report No. 21-2000-DGAA/LS, 24 March 2000, p. 2.

[1511] **Exhibit R-277**, Directorial Resolution No. 082-2000-EM-DGAA, 17 April 2000 *attaching* Report No. 21-2000-DGAA/LS, 24 March 2000, p. 2.

[1512] **Exhibit R-277**, Directorial Resolution No. 082-2000-EM-DGAA, 17 April 2000 *attaching* Report No. 21-2000-DGAA/LS, 24 March 2000, pp. 2–3.

[1513] **Exhibit R-277**, Directorial Resolution No. 082-2000-EM-DGAA, 17 April 2000 *attaching* Report No. 21-2000-DGAA/LS, 24 March 2000, p. 4.

[1514] **Exhibit R-277**, Directorial Resolution No. 082-2000-EM-DGAA, 17 April 2000 *attaching* Report No. 21-2000-DGAA/LS, 24 March 2000, p. 2.

Centromín's alleged lack of finances.[1515] Claimants again fail to cite any documentary evidence to support this claim. In reality, Centromín sought to reorder the revegetation project because it would have been futile to attempt revegetation before DRP had curbed the Facility's sulfur dioxide emissions.[1516] High sulfur dioxide emissions caused acid rain to fall in La Oroya, which destroyed vegetation and thus would have compromised the effectiveness of any revegetation project.[1517] Such can be gleaned from contemporaneous photos of the area surrounding La Oroya, which—in stark contrast to the land outside the Facility's reach—were devoid of vegetation.

797. The MEM granted Centromín's request and deferred the bulk of the revegetation project until after DRP completed its sulfur plant.[1518] The MEM's experts agreed with Centromín that "[r]evegetating the areas surrounding the La Oroya Metallurgical Complex before

[1515] Claimant's Memorial, ¶ 109.

[1516] **Exhibit R-277**, Directorial Resolution No. 082-2000-EM-DGAA, 17 April 2000 *attaching* Report No. 21-2000-DGAA/LS, 24 March 2000, p. 4.

[1517] Proctor Expert Report, p. 61; **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, pp. 4–5.

[1518] **Exhibit R-277**, Directorial Resolution No. 082-2000-EM-DGAA, 17 April *attaching* Report No. 21-2000-DGAA/LS, 24 March 2000.

controlling SO_2 emissions would be a useless investment."[1519] The MEM thus changed the revegetation start date to 2007, "after SO_2 emissions from the La Oroya smelter have been controlled."[1520] Given DRP's delays in completing the Sulfuric Acid Plant Project, Centromín's revegetation project would fall beyond the 10-year regulatory maximum for PAMA projects. The MEM therefore removed the revegetation project from Centromín's PAMA and transferred it to Centromín's obligations under the Facility's "Closing Plan", which was governed by a different regulatory regime than the PAMA.[1521]

798. Centromín implemented its final PAMA project in 2003, after which the MEM declared Centromín's PAMA to be complete.[1522]

799. Claimants contend that the MEM should not have granted Centromín's extension request because, according to them, lead contamination was the primary problem affecting La Oroya's soil, not sulfur dioxide emissions.[1523] This argument is a red herring and ignores the nature of Centromín's revegetation project. The purpose of the project was to restore flora and fauna to La Oroya by means of strategic revegetation.[1524] Centromín could not begin revegetation until DRP reigned in sulfur dioxide emissions. High sulfur dioxide emissions caused acid rain to fall in La Oroya, which destroyed vegetation and thus compromised the effectiveness of any revegetation projects.[1525]

800. Several experts have agreed with Centromín's justification for postponing the revegetation project. First, as mentioned above, experts from the MEM analyzed the issue and found that it would be "useless" to revegetate La Oroya before controlling the Facility's sulfur

[1519] **Exhibit R-277**, Directorial Resolution No. 082-2000-EM-DGAA, 17 April 2000 *attaching* Report No. 21-2000-DGAA/LS, 24 March 2000, p. 4.

[1520] **Exhibit R-277**, Directorial Resolution No. 082-2000-EM-DGAA, 17 April 2000 *attaching* Report No. 21-2000-DGAA/LS, 24 March 2000, p. 4.

[1521] **Exhibit R-278**, Letter No. 280-2016-AM/GO from Activos Mineros S.A.C. (A. Pérez Muñoz) to MINAM (G.P. Becerra Celis), 13 October 2016, p. 3; Alegre Expert Report, ¶¶ 110-111.

[1522] Alegre Expert Report, ¶¶ 116-122.

[1523] Contract Memorial, ¶ 110.

[1524] **Exhibit C-020**, PAMA Report, Project No. 4, PDF p. 205.

[1525] **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, pp. 4–5.

dioxide emissions.[1526] Toxicologist Deb Proctor agrees that high sulfur dioxide emissions would have compromised Centromín's ability to revegetate the area surrounding the Facility.[1527] Even Mr. Bianchi admits that "[i]t is well-understood that SO_2 impacts vegetation by the formation of sulfuric acid (i.e., acid rain), which has a detrimental effect on crops, grasses, and other plants."[1528] Moreover, the 1996 Knight Piésold report prepared in connection with the Facility's PAMA—cited by Claimants to support their soil remediation claim[1529]—recommended that Centromín implement the revegetation project *only after* the Facility's emissions were under control, i.e., after DRP built the sulfuric acid plant. [1530] Claimants had access to and reviewed this report during the due diligence stage of contract negotiations.[1531]

801. Moreover, even if Centromín's PAMA did include a soil remediation component (*quod non*), Claimants misrepresent the threat of historical lead deposits in soil as compared to ongoing air emissions. Claimants argue that "the MEM's 'decision to postpone the clean-up work meant that for at least seven more years, the local community would continue to be exposed to the high concentrations of lead and other contaminants that had accumulated in the soil over the past 75 years.'"[1532] As Respondents demonstrated above, the evidence cited by Claimants shows that historic lead emissions represented a trivial exposure pathway relative to DRP's ongoing emissions.[1533] Given that DRP failed to address fugitive emissions—the main source of lead contamination—until 2006, it is disingenuous for Claimants to argue that "[w]hen the MEM granted Centromín's extension request in 2000, '[t]he urgency of the lead exposure problem should have become even more obvious to the [Peruvian G]overnment and Centromín, when the Peruvian Ministry of Health

[1526] **Exhibit R-277**, Directorial Resolution No. 082-2000-EM-DGAA, 17 April 2000 *attaching* Report No. 21-2000-DGAA/LS, 24 March 2000, p. 4.

[1527] Proctor Expert Report, p. 61.

[1528] Bianchi Expert Report, p. 79.

[1529] Treaty Memorial, ¶ 105.

[1530] **Exhibit C-014**, Environmental Evaluation of La Oroya Metallurgical Complex, Final Report, Knight Piésold LLC, 18 September 1996, p. 55.

[1531] **Exhibit R-001**, STA & Renco Guaranty, clause 7.

[1532] Contract Memorial, ¶ 111 (*citing* Buckley Witness Statement, ¶ 19).

[1533] Proctor Expert Report, Sections 3.1-3.2.

[("MINSA")] reported the results of a study showing elevated blood-lead levels in the population of La Oroya.'"[1534]

802. Claimants further impugn the MEM's decision to postpone the revegetation project, arguing that the Peruvian Government benefited from that decision because it had guaranteed Centromín's compliance with the PAMA under the Guaranty Agreement.[1535] Claimants seem to argue that *any* modification of Centromín's PAMA—even those that resulted directly from DRP's own delays—would be impermissible under the STA. Claimants fail to cite a single authority to support this argument. In any case, Claimants' argument fails because the STA specified that Centromín and Activos Mineros were obligated to implement "Centromín's PAMA **according to its eventual amendments approved by the relevant authority and the legal requirements in force**" (emphasis added).[1536]

803. Claimants further contend that Centromín's justification for delaying soil remediation did not justify the delay of its obligation to conduct a "Study of the Area Affected by Smoke" from the Facility.[1537] Centromín, however, did not delay this obligation. Between 1996 and 2003, Centromín commissioned four studies in connection with its revegetation obligations: (i) an initial evaluation of the affected areas; (ii) a detailed engineering plan of the revegetation project; (iii) monitoring reports of the revegetation project's pilot programs; and (iv) a hydrological and geotechnical study of the ravines exposed to erosive phenomena.[1538] Claimants do not address these studies or explain why they were insufficient.

3. Activos Mineros implemented the revegetation project and designed and implemented a soil remediation project

804. In any event, Activos Mineros complied with its revegetation obligations and its separate remediation obligations. In October 2006, Respondent Activos Mineros assumed all of

[1534] Contract Memorial, ¶ 111 (*citing* Buckley Witness Statement, ¶ 19).

[1535] Contract Memorial, ¶ 112.

[1536] **Exhibit R-001**, STA & Renco Guaranty, Clause 6.1.

[1537] Contract Memorial, ¶¶ 113–114.

[1538] **Exhibit R-290**, Report No. 144-2004-MEM-DGM-FMI/MA, 24 March 2004, p. 1.

Centromín's environmental obligations and liabilities, including Centromín's obligations to revegetate and remediate the soil around La Oroya.[1539]

805. In accordance with the applicable regulation,[1540] in August 2007, Activos Mineros announced that it would study the extent to which the Facility's emissions had damaged the soil and vegetation in La Oroya. It solicited bids from firms interested in conducting the study; a consortium of environmental consulting and engineering firms led by Ground Water International won the bid process.

806. Between June 2008 and March 2009, Ground Water International examined an area of 280,000 hectares in the region surrounding the Facility (the "**GWI Study**").[1541] The GWI Study had the following four objectives: (i) determine the extent of the area affected by the Facility's emissions; (ii) determine the soil contamination levels that could be attributed to the Facility's emissions; (iii) evaluate the potential risks to humans, flora, and fauna posed by the contaminated soil; and (iv) propose remediation measures aimed at mitigating such risks.[1542]

807. The GWI Study found that metal contaminants were highest in the areas closest to the Facility, as well as in the southeastern areas downwind of the Facility.[1543] Additionally, the study determined that the contaminants were concentrated in the uppermost 10cm of the soil.[1544] The GWI Study's principal recommendations were to (i) prioritize urban areas over rural areas in order to maximize public health benefits; (ii) pave most exposed areas in urban settings and replace soil in parks and other open spaces; (iii) minimize wind and

[1539] **Exhibit R-279**, Supreme Decree No. 058-2006-EM, 3 October 2006.

[1540] **Exhibit R-290**, Report No. 144-2004-MEM-DGM-FMI/MA, 24 March 2004.

[1541] **Exhibit R-278**, Letter No. 280-2016-AM/GO from Activos Mineros S.A.C. (A. Pérez Muñoz) to MINAM (G.P. Becerra Celis), 13 October 2016, p. 4.

[1542] **Exhibit R-278**, Letter No. 280-2016-AM/GO from Activos Mineros S.A.C. (A. Pérez Muñoz) to MINAM (G.P. Becerra Celis), 13 October 2016, pp. 3–4.

[1543] **Exhibit R-278**, Letter No. 280-2016-AM/GO from Activos Mineros S.A.C. (A. Pérez Muñoz) to MINAM (G.P. Becerra Celis), 13 October 2016, p. 4.

[1544] **Exhibit R-278**, Letter No. 280-2016-AM/GO from Activos Mineros S.A.C. (A. Pérez Muñoz) to MINAM (G.P. Becerra Celis), 13 October 2016, p. 4.

rain erosion in rural areas; and (iv) improve agricultural capacity of soils in areas used for farming.[1545]

808. As of December 2021, Activos Mineros has completed 92% of urban remediation projects and 45% of rural remediation projects.[1546] The company has spent approximately USD 25 million on soil remediation and revegetation, nearly four times the amount contemplated in the original PAMA.[1547] Activos Mineros has concluded over thirty projects in urban settings, including removing the uppermost 10cm of all exposed soils, paving over exposed areas, reforesting immediate surroundings, and constructing several works for public use, such as showers, paved sports surfaces, recreation centers, schools, plazas, and paved stairways.[1548] Activos Mineros has also revegetated and remediated the soil in several rural areas.[1549]

809. Claimants baselessly assert that Activos Mineros' revegetation and remediation projects have been inadequate and incomplete but fail to explain how Activos Mineros' alleged failure to complete those projects contributed to the Missouri Plaintiffs' claims.[1550] As explained above, neither Centromín nor Activos Mineros was required to revegetate or remediate the soil until well after DRP ceased operations in 2009. The Missouri Plaintiffs, however, do not claim any damages incurred after that time.[1551] Therefore, any failure by Activos Mineros to adequately revegetate or remediate the soil would not have generated liability for Claimants.

[1545] **Exhibit R-278**, Letter No. 280-2016-AM/GO from Activos Mineros S.A.C. (A. Pérez Muñoz) to MINAM (G.P. Becerra Celis), 13 October 2016, p. 4.

[1546] **Exhibit R-291**, La Oroya: Peruvian State Delivers New Soil Remediation Works, AMSAC, 14 December 2021.

[1547] **Exhibit R-278**, Letter No. 280-2016-AM/GO from Activos Mineros S.A.C. (A. Pérez Muñoz) to MINAM (G.P. Becerra Celis), 13 October 2016, pp. 10-12; **Exhibit R-277**, Directorial Resolution No. 082-2000-EM-DGAA, 17 April 2000 attaching Report No. 21-2000-DGAA/LS, 24 March 2000, p. 4.

[1548] **Exhibit R-278**, Letter No. 280-2016-AM/GO from Activos Mineros S.A.C. (A. Pérez Muñoz) to MINAM (G.P. Becerra Celis), 13 October 2016, pp. 6–10.

[1549] **Exhibit R-278**, Letter No. 280-2016-AM/GO from Activos Mineros S.A.C. (A. Pérez Muñoz) to MINAM (G.P. Becerra Celis), 13 October 2016, p. 11.

[1550] Contract Memorial, ¶ 115.

[1551] **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, ¶ 20 (alleging injuries incurred by DRP's operations "[d]uring the course of [Defendants'] ownership, operation, use, management, supervision, storage, maintenance, and/or control of operations of their metallurgical complex.").

C. Claimants' Peruvian law claims are without merit

810. In an attempt to breathe life into their case, Claimants bring claims under the Peruvian law concepts of (i) pre-contractual liability, (ii) subrogation, (iii) contribution, and (iv) unjust enrichment.[1552] All of Claimants' Peruvian law claims are framed as "in the alternative" to their contract claims, relevant only "if Renco and DRR's contract claim fails."[1553] Each of Claimants' Peruvian law claims fail on the merits.

1. Claimants have failed to meet their burden of proof on the merits of their Peruvian law claims

811. As a threshold matter, in **Section IV.D.3**, Respondents explain that Claimants' Peruvian law claims (on their own and as they relate to Peru) are inadmissible because they are obscure. At minimum, to meet their burden on the merits on their pre-contractual liability claim, Claimants must **(i)** identify facts, **(ii)** identify a legal standard, **(iii)** and explain how those facts could lead to a favorable award. To obtain an award finding Peru liable, in particular, Claimants must explain how its Peruvian law claims are opposable to Peru. For the same reasons, Claimants fail to meet their burden of proof on the merits.

2. Claimants' pre-contractual liability claim is meritless

812. Claimants claim that they are entitled to compensation from Respondents for any damages suffered in connection with the Missouri Litigations, because "Peru and Centromin created the legitimate expectation that the Renco Consortium would be protected from third-party claims."[1554] Claimants' pre-contractual liability claim lacks any merit.

813. Claimants have not met their burden of proving the elements necessary to establish a pre-contractual liability claim. In Peru, doctrine considers that pre-contractual liability is a claim under extra-contractual liability.[1555] Consequently, establishing pre-contractual liability requires proving the standard elements of extra-contractual liability under Peruvian law. As Professor Varsi explains, those are **(i)** the occurrence of an unlawful act,

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[1552] Contract Memorial, ¶¶ 210–237.

[1553] Contract Memorial, ¶ 210.

[1554] Contract Memorial, ¶ 211.

[1555] *See* Expert Report of Enrique Varsi - Contract, ¶ 8.5.

(ii) attribution, **(iii)** a causal nexus, and **(iv)** definite damages.[1556] Claimants do not identify those elements, let alone explain which facts meet which elements.

814. For instance, Claimants allege that Respondents "creat[ed] the reasonable expectation by the Renco Consortium during the bidding process . . . that Centromin would retain and assume liability for third-party claims."[1557] But Claimants cite to no documents from the bidding process relevant to that assertion. On the other hand, Centromin left no doubt in its answer to question 42 of the consultations during the bidding process that it would indemnify only the Company (Metaloroya, and subsequently DRP) for environmental matters:

> "[Question:] Assuming that the new owners of the METALOROYA comply with the PAMA terms and adopt all measures against contamination in order to comply with national and international rules, but Centromin does not correct the existing contamination (prior to the transfer) and a legal entity (local or foreign) files a claim in a national or international court ... How does Centromin propose to relieve METALOROYA from responsibility?
>
> [Answer:] CENTROMIN has ordered the organization of and provided the funds to comply with the environmental remediations [sic] for which it is responsible, thereby guaranteeing compliance. *In addition METALOROYA will be held harmless from such remediations [sic] and from third-party claims that are CENTROMIN's responsibility by signing the contract*."[1558]

As Respondents detailed in **Section IV.D.3**, the dearth of content prevents any true analysis of Claimants' pre-contractual liability claim. It consequently also means that Claimants have failed to meet their burden of proof on the merits.

815. Claimants also have not paid any damages to the Missouri Plaintiffs, as explained in **Section IV.C.2**. Accordingly, Claimants have not met their burden of proof on the merits.

816. Accordingly, Claimants' pre-contractual liability claim fails.

[1556] *See* Expert Report of Enrique Varsi - Contract, ¶ 8.11.

[1557] Contract Memorial, ¶ 211.

[1558] **Exhibit R-201**, Question and Answers Round 2, PDF p. 36, query 42 (emphasis added).

3. Claimants' subrogation claim is meritless

817. Claimants' claim that they are entitled to compensation from Respondents under the theory of subrogation for any damages they would might be ordered to pay in the future to the Missouri Litigations.[1559] Claimants' subrogation claim fails on the merits.

818. Article 1222 of the Peruvian Civil Code allows third-parties to make the payments for obligations of debtors.[1560] Pursuant to articles 1260 and 1261 of the Civil Code, in some instances the third-party who has made the payment can subrogate itself to the creditor's position.[1561] The third-party thereby becomes the new creditor, holding the former's rights, actions, and guarantees.[1562] For subrogation to operate, there must be **(i)** a debt owed by a debtor to a creditor, **(ii)** a payment by a third-party of the debt to the creditor, and **(iii)** compliance with one of the requirements of articles 1260 and 1261.[1563] With these elements in mind, Claimants' subrogation claim fails.

819. First, as explained in **Sections IV.D.1 & 2**, subrogation operates only when a payment has already been made.[1564] But Claimants have not made any payment to the Missouri Plaintiffs. No subrogation has taken place, and thus Claimants cannot proceed against Respondents.

820. Second, Claimants misstate the original debtor-creditor relationship in their hypothetical. Claimants argue that if in the future they are ordered to pay the Missouri Plaintiffs, they would be paying Respondents' debt.[1565] That is not true. There is no debtor-creditor relationship between Respondents and the Missouri Plaintiffs. The Missouri Plaintiffs are not claiming that Respondents owe an obligation to them. The Missouri Plaintiffs sued

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[1559] Contract Memorial, ¶ 212.

[1560] **RLA-062**, Peruvian Civil Code, Art. 1222 (Spanish original: "*Artículo 1222.- Puede hacer el pago cualquier persona, tenga o no interés en el cumplimiento de la obligación, sea con el asentimiento del deudor o sin él, salvo que el pacto o su naturaleza lo impidan. Quien paga sin asentimiento del deudor, sólo puede exigir la restitución de aquello en que le hubiese sido útil el pago*.").

[1561] **RLA-062**, Peruvian Civil Code, arts. 1260–61.

[1562] **RLA-062**, Peruvian Civil Code, art. 1262.

[1563] *See* Expert Report of Enrique Varsi - Contract, ¶¶ 8.31–8.33.

[1564] Expert Report of Enrique Varsi - Contract, ¶ 8.33.

[1565] Contract Memorial, ¶ 213.

Claimants, not Respondents. If Claimants are ordered to pay the Missouri Plaintiffs, then the debtor-creditor relationship that would exist would be between Claimants (debtors) and the Missouri Plaintiffs (creditors).[1566] In Claimants' hypothetical, they would be the original debtor rather than the third-party. If a third-party were to pay Claimants' judgment debt, then that third-party would take the place of the Missouri Plaintiffs and could seek recovery from Claimants.

821. Claimants contend that Respondents' obligation can be found in clause 6 of the STA.[1567] Seemingly unsatisfied with grafting the phantom-claimants onto the STA and the Peru Guaranty, Claimants apparently want to open up both contracts to the Missouri Plaintiffs. It should be clear by now that the relationship found in clause 6 is between Activos Mineros (debtor of an obligation) and the Company (DRP) (creditor of an obligation). The indemnity obligation under clause 6.5 is owed by Activos Mineros to the Company (DRP).[1568] At most—accepting *arguendo* Claimants' theory that they are encompassed by clauses 5 and 6—they would be the creditors of Activos Mineros' obligations in clause 6. But neither Activos Mineros, nor Peru, nor DRP, nor DR Cayman, nor even Renco or DRRC (assuming they were STA Parties, *quod non*), owe obligations to the Missouri Plaintiffs under the STA or the Peru Guaranty.

822. Third, Claimants contend that they would have a legitimate interest, under article 1260(2) of the Peruvian Civil Code, to pay the obligation.[1569] But even under Professor Payet's definition, that presumes that Claimants would be paying someone else's obligation.[1570] As noted above, in Claimants' hypothetical they would be paying their own obligation.

823. For these reasons, Claimants' subrogation claim fails.

[1566] Expert Report of Enrique Varsi - Contract, ¶ 8.35.

[1567] Contract Memorial, ¶ 213.

[1568] *See* **Exhibit R-001**, STA & Renco Guaranty, clause 6.5

[1569] Contract Memorial, ¶ 212.

[1570] *See* Payet Report, ¶ 225 ("a third party with legitimate interest is someone who … not being a debtor, may suffer an impairment in their own right if the debt is not paid") (internal quotation marks omitted).

4. Claimants' contribution claim is meritless

824. A contribution claim under Peruvian law requires **(i)** that multiple parties have been responsible for an injury, and **(ii)** for one of the responsible parties to have paid the compensation due.[1571] Claimants have not articulated any facts explaining either of the elements. Accordingly, they have failed to meet their burden of proof on the merits of their contribution claim.

825. On the first element, Claimants disclaim all responsibility for any injury to the Missouri Plaintiffs. In fact, after their initial paragraph on contribution (paragraph 215), Claimants spend the following 7 pages blaming Respondents for such injuries.[1572] They end their argument on contribution by stating, "[n]ot only is Centromin (and Peru) responsible for *all* of the third-party injuries at issue in the St. Louis Lawsuits because its own conduct caused those alleged injuries, Centromin is responsible for *all* of those alleged third-party injuries because its conduct was much more harmful to the environment and extensive in time than DRP's."[1573] What Claimants do not do, however, is allege that they too are responsible for the injuries of the Missouri Plaintiffs.

826. That dooms their contribution claim at the threshold. The burden is on Claimants to affirmatively prove their claims:

> A Party having the burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency, of proof.[1574]

It is not Peru's burden to prove Claimants' case. If Claimants fail to make an affirmative argument or present evidence proving that they are jointly responsible, the Tribunal cannot rule in their favor.

[1571] Expert Report of Enrique Varsi - Contract, ¶ 8.39.

[1572] Contract Memorial, pp. 102–109.

[1573] Contract Memorial, ¶ 232 (emphasis added).

[1574] **RLA-170**, *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, ¶ 56.

827. Regarding the second element, Claimants have also not paid any compensation to the Missouri Plaintiffs. Article 1983 of the Peruvian Civil Code, which governs contribution, provides that "[i]f several are responsible for the damage, they will be jointly and severally liable. However, the one who paid the totality of the indemnity can repeat against the others."[1575] As is clear from article 1983, a contribution action requires a completed payment. Until Claimants make a payment to the Missouri Plaintiffs, not only do they not have standing, as detailed in **Section IV.D.2**, but they also fail to meet their burden of proof on the merits.

828. Because neither element of a contribution claim is met, Claimants' contribution claim fails.

5. Claimants' unjust enrichment claim is meritless

829. In a last-ditch effort, Claimants allege that they are entitled to compensation under the theory of unjust enrichment. As Respondents have explained, the Tribunal does not have jurisdiction over this claim because it requires the *inexistence* of arbitral consent, and it is inadmissible because it is unripe. Even if Claimants' unjust enrichment claim overcomes those jurisdictional hurdles, it would be meritless.

830. Unjust enrichment is recognized under article 1954 of the Peruvian Civil Code, which states that "whoever enriches himself unduly at the expense of another person is obligated to indemnify him."[1576] Further, the experts agree that the requirements for an unjust enrichment claim are: **(i)** the enrichment of the respondent, **(ii)** impoverishment of the claimant, **(iii)** a causal relationship between enrichment and impoverishment, **(iv)** absence of a fair justification, and **(v)** absence of all other remedies.[1577]

831. Starting with the last element first, Claimants have failed to establish the absence of all other remedies. Claimants present their unjust enrichment claim in the alternative.[1578] That is not the same thing. Unjust enrichment is a cause of action of last resort under Peruvian

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[1575] **RLA-062**, Peruvian Civil Code, 24 July 1984, art. 1983 (Spanish Original: "*Si varios son responsables del daño, responderán solidariamente. Empero, aquel que pagó la totalidad de la indemnización puede repetir contra los otros*.")

[1576] **RLA-062**, Peruvian Civil Code, Art. 1954.

[1577] *See* Expert Report of Enrique Varsi - Contract, ¶ 8.43.

[1578] Contract Memorial, ¶ 236.

law. Article 1955 of the Peruvian Civil Code provides that "[t]he action [for unjust enrichment] is not appropriate when the person who has suffered the damage can exercise another action to obtain the respective compensation."[1579] Under article 1955, an unjust enrichment action depends on the *availability*—rather than the success or failure—of all other actions. The Supreme Court of Peru has explained that an unjust enrichment action "is not viable when the person who has suffered the injury can bring another action to obtain the respective indemnization."[1580] The burden is on Claimants to affirmatively prove their claims.[1581] Claimants must affirmatively prove that no other claim is available to them. Claimants have a choice—concede that they have no other contract, Peruvian law, *and* international law claims, or drop their unjust enrichment claim.

832. On the first element, Claimants have not proven that Respondents have been enriched. Claimants' argument is that Respondents **(i)** "*would be*" unjustly enriched if the Missouri Litigations end with an unfavorable ruling, **(ii)** because Centromin assumed responsibility for those claims under the STA and Peru made pre-contractual representations regarding the same.[1582] To start, such a claim is unripe.

833. Moreover, as unjust enrichment requires the absence of every other remedy, Respondents invite Claimants to explain exactly how the Tribunal can rule against them under the STA, the Peru Guaranty, pre-contractual liability, subrogation, contribution, and customary international law, but still find that Respondents assumed responsibility under the STA or through pre-contractual representations. It is one thing to present an unjust enrichment claim when, for instance, a contract is void and there is no other means of enforcing what would have been the impoverished party's rights. It is another to ask the Tribunal to issue a merits ruling in Claimants' favor on the basis of the same legal obligations that it would have found non-existent.

[1579] **RLA-062**, Peruvian Civil Code, 24 July 1984, art. 1955 (Spanish Original: "*La acción* [*por enriquecimiento sin causa*] *no es procedente cuando la persona que ha sufrido el perjuicio puede ejercitar otra acción para obtener la respectiva indemnización*.")

[1580] **Exhibit R-285**, Cassation Decision No. 936-2005, Supreme Court of the Republic of Peru, 26 March 2006, p. 3.

[1581] **RLA-170**, *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, ¶ 56.

[1582] Contract Memorial, ¶ 236 (emphasis added).

834. On the second element, Claimants concede on this point as well that any impoverishment is a hypothetical future possibility.[1583] They have failed to meet their burden of proof.

835. Finally, given the absence of any enrichment and impoverishment, there can be no causal nexus. Indeed, as Respondents noted above, until the Missouri Litigations are concluded, it is impossible for the Tribunal to know on what basis Claimants might be found liable in the Missouri Litigations, let alone if any future payment, based on a hypothetical future liability, will relate to actions for which Centromin has assumed responsibility.

836. For these reasons, Claimants' claim for unjust enrichment fails.

D. Claimants' minimum standard of treatment claim is meritless

837. As Peru explained in **Section IV.E**, Claimants have failed to make even a basic showing on their minimum standard of treatment claim. For the same reasons, Claimants' minimum standard of treatment claim fails on the merits.

838. Claimants bear the burden of proving the content of customary international law.[1584] Claimants' claim is so deficient that they present no evidence that estoppel gives rise to international obligations under the minimum standard of treatment.

839. Further, Claimants fail to put forth even the bare minimum factual support and explanation that would allow the Tribunal to rule in Claimants' favor. Claimants' allegations are so vague that Peru is unable to properly exercise its due process rights, and the Tribunal is unable to rule for Claimants on the basis of those amorphous allusions.

840. In short, Claimants fail to meet their burden of proof on the merits.

[1583] Contract Memorial, ¶ 236 (stating that if Respondents do not indemnify Claimants, the latter "would suffer a loss").

[1584] *See* **RLA-144**, *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, ¶¶ 247–271; **RLA-205**, Glamis Gold Ltd. v. United States of America, Award, 8 June 2009, ¶¶ 20–21.

VI. PRAYER FOR RELIEF

841. For the foregoing reasons, Respondents respectfully requests that the Tribunal:

a. Dismiss all of Claimants' claims for lack of jurisdiction; or

b. Dismiss all of Claimants' claims for being inadmissible; or

c. Dismiss all of Claimants' claims based on alleged violations of the STA for lack of merit; and

d. Dismiss all of Claimants' claims based on alleged violations of the Peruvian Civil Code for lack of merit; and

e. Dismiss all of Claimants' claims under customary international law for lack of merit.

842. Given the frivolous nature of Claimants' claims Respondents' "serious and substantial"[1585] jurisdictional objections, Respondents further request that the Tribunal order Claimants to pay all of Respondents' costs, including the totality of the arbitral costs that Respondents incurred in connection with this proceeding, as well as the totality of its legal fees and expenses.

[1585] Procedural Order No. 3, PCA Case No. 2019-47, 29 July 2020, ¶ 4.2.

Respectfully submitted,

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