

PCA CASE No. 2019-46

**IN THE MATTER OF AN ARBITRATION
BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH
THE TRADE PROMOTION AGREEMENT BETWEEN THE REPUBLIC OF PERU
AND THE UNITED STATES OF AMERICA**

- and -

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.

CLAIMANTS' REPLY TO LIABILITY AND RESPONSE TO JURISDICTION

Adam P. Schiffer
Andrew S. Hicks
Fatima Aslam
SCHIFFER HICKS JOHNSON, PLLC
TC Energy Tower
700 Louisiana Street, Suite 2650
Houston, Texas 77002
T: (713) 357-5151
E: aschiffer@shjlawfirm.com
ahicks@shjlawfirm.com
faslam@shjlawfirm.com

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INTRODUCTION

1. Seemingly lost in Respondents' Counter-Memorial is the fact that it was the government of Peru, through Centromin, which operated Metaloroya, polluting the nearby town of La Oroya for twenty-five years. Now, after creating one of the worst wastelands on Earth, a veritable "vision from Hell," Respondents seek to deflect from their own conduct, instead pointing an accusatory finger at DRP and inviting the Tribunal to ignore logic and irrefutable facts. But no matter the number of experts they retain or the heft of their filings, Respondents cannot avoid their fundamental contractual and legal obligations.

2. Before addressing the relevant arguments, Claimants first set the record straight with the following opening remarks.

A. To criticize Claimants' standards and practices, Respondents must sweep under the rug DRP's remediation efforts, which cost \$313 million and which yielded vastly improved air quality.

3. Respondents apparently believe the best way to sway the Tribunal to their side is to paint Claimants as bad actors unworthy of a favorable award. To make such a case, Respondents would have the Tribunal ignore that DRP spent \$313 million modernizing the Complex, implementing the very pollution control projects mandated by the Republic of Peru, and, by doing so, dramatically reducing emissions in every category.

4. DRP completed all the PAMA projects, with the sole exception of the last 45 percent of the last of three sulfuric acid plants. The global financial crisis in 2008-2009 affected the entire industry, including DRP's financial ability to complete this project.

B. Respondents' claim that they did better environmentally than DRP is unsupportable in fact and beggars belief.

5. Respondents claim they did better than DRP during the twenty-five years Centromin owned and operated the Complex. Such a boast is unsupportable.

6. When Centromin owned the Complex, it was universally acknowledged that the area in and around the Complex was among the most polluted places on earth.

7. In 1994, Newsweek Magazine reported a vision from Hell at La Oroya:

Richard Kamp figured he had seen the worst wastelands the mining industry was able to create. But that was before the American environmentalist – a specialist on the U.S.-Mexican border area – laid eyes on La Oroya, home to Centromin, Perú's biggest state-owned mining company. Last month, as his car rattled toward the town through hills that once were green, Kamp fell silent. Dusted with a whitish powder, the barren hills looked like bleached skulls. Blackened slag lay in heaps on the roadsides. At La Oroya, Kamp found a dingy cluster of buildings under wheezing smelter smokestacks. Pipes poking out of the Mantaro River's banks sent raw waste cascading into the river below. 'This,' he said, 'is a vision from hell.'

“How Brown Was My Valley,” *Newsweek*, April 18, 1994.¹

8. In 1996, Respondents' environmental consultants, Knight Piesold, reported, *inter alia*, that:

- Airborne emissions of sulfur-dioxide (SO²), metals, and PM-10 particulate matter are high and exceed generally accepted international standards.
- Airborne emissions have impacted the soils surrounding the facility. Metal concentrations, in some areas, exceed those that are generally accepted for agricultural and residential areas. Large areas surrounding the project site have characteristics of soil burn out which may decrease vegetation levels due to the defoliation action of the SO₂ emissions and acid rain.

¹ Exhibit C-103, Corinne Schmidt, “How Brown Was My Valley,” *Newsweek*, April 18, 1994.

- Lead/copper slag and zinc ferrite disposal facilities do not meet existing siting requirements, and ferrite effluent are being discharged to the Mantaro River.
- Centromin’s measurements of air quality were so scientifically flawed as to be unreliable.²

9. Centromin developed the PAMA at issue in this case against this backdrop and with the intent to *improve* the environment and public health over then-existing conditions. But Centromin never undertook *any* of the projects before the sale of the Complex to Claimants.

10. And since a picture is worth a thousand words, here are just a few of the many examples of the photographs taken at the Complex before and after the sale.³



[Counter-Memorial Figures](#) [Facility Map](#) [Timelines](#) [Project Spending](#) [Environmental Data](#)

HUANCHAN SLAG STORAGE FACILITIES

Before



Section of Huanchan slag deposit before stabilization (c. 2001).

After



South portion of plant with stabilized slag deposit in background (c. 2008).

Description: PAMA Project 13 was reassigned to DRP in 2000. This project stabilized the Huanchan Slag deposit through waterproofing, reforestation, drainage, and slope stabilization in 2001-2002. Windblown dust from the slag pile had previously polluted the air and water over an extensive area. New cover and management reduced dust loss.

Benefit: This project helped contain and isolate used slag, thus preventing pollution of the soil and Mantaro River.

KEY FACTS	
Project Type	Solid Waste
Timeframe	2001-2002
Cost	\$1,090,845
PAMA Project	Original 1997 (Project No. 13)
Benefit	Slag Emissions and Leachate Runoff Prevented

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Sources: JAC-35

² Exhibit C-108, Knight Piésold LLC, Environmental Evaluation of La Oroya Metallurgical Complex, September 18, 1996.

³ Supplemental Expert Report of John A. Connor, P.E., P.G., BCEE Concerning DRP Operations and Environmental Conditions at the La Oroya Metallurgical Complex, Junin Peru (“Connor Supp. Report”), Appendix C.

COPPER REFINERY BLEED-OFF TREATMENT PLANT



Unmanaged discharges of acidic solutions from copper refinery (c. 2002).



Copper sulfate cells to treat acidic solutions from copper refinery (c. 2004).

Description: DRP remodeled the Copper Refinery from 2001-2003 to eliminate acidic discharges to the Yauli River. Acidic wastes polluted the river with heavy metals. The treatment system neutralized waste and removed heavy metals prior to discharge.

Benefit: As a result of this project, the process changes and bleed-off treatment plant reduced ferrous acid solution discharge to the Yauli River at a rate of 60,000 L per day.

KEY FACTS

Project Type	Water
Timeframe	2001-2003
Cost	\$3,090,000
PAMA Project	Original 1997 (Project No. 5)
Benefit	Acidic Discharge ↓ 60,000 L/d

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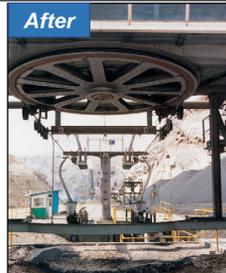
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Sources: JAC-32

SLAG HANDLING SYSTEM



Prior slag transport system, in use 1939-1999.



New cable car system for slag transport (2005).

Description: DRP designed a new slag granulation system and replaced the cable car system to the disposal site across the Mantaro River from 1999-2001. The prior cable car system had routinely spilled slag into the river, causing serious water pollution problems.

Benefit: As a result of this project, accidental slag emissions to the Mantaro River were curtailed.

KEY FACTS

Project Type	Solid Waste
Timeframe	1999-2001
Cost	\$9,707,664
PAMA Project	Original 1997 (Project No. 12)
Benefit	Slag Emissions Prevented

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Sources: JAC-35

DOMESTIC WASTE AND REFUSE DISPOSAL



The unregulated former waste disposal site at Cochabamba (before 2002).



Official Cochabamba landfill, newly installed by DRP (c. 2004).

Description: DRP constructed a landfill and organized a garbage collection system for La Oroya from 2002-2004, as well as cleanup of a former unregulated disposal site. Previously, household waste was unprotected from vermin, fire, scavenging, and windblown dispersion. The new landfill met proper specifications for waste management.

Benefit: This project reduced the amount of trash pollution that would end up in the Mantaro River.

KEY FACTS

Project Type	Solid Waste
Timeframe	2002-2004
Cost	\$2,636,735
PAMA Project	Original 1997 (Project No. 16)
Benefit	Trash Pollution Prevented

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Sources: JAC-35, JAC-32

ENCLOSURE AND BAGHOUSE FOR LEAD BLAST FURNACE



Lead Blast Furnace prior to the addition of the enclosure (c. 2006).



Lead Blast Furnace with dust collectors and enclosure (c. 2008).

Description: DRP designed and constructed full enclosures around the feeding floor of the Lead Blast Furnace and installed a 7-chamber baghouse for the Lead Blast Furnace in 2006-2007. The enclosure prevented dust from escaping the building so that it could be captured by the ventilation system and directed to the fabric filter bags in the baghouse.

Benefit: As a result of this project as well as improvements to the Lead Dross Plant, the baghouses for the ventilation systems of the two buildings captured fugitive particulate emissions at a rate of 0.5 MT per day.

KEY FACTS

Project Type	Air
Timeframe	2006-2007
Cost	\$3,229,756 (enclosure) \$3,252,214 (baghouse)
PAMA Project	2005 Extension
Benefit	Pb Dust Emissions ↓ 0.5 MT/d

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Sources: JAC-35

SMELTING BEDS DUST CONTROL



Concentrate beds before addition of lateral enclosure (2006).



Lateral enclosure of concentrate beds (2006).

Description: DRP designed and constructed lateral enclosures and sprinkler systems around the lead and copper circuit Smelting Beds in 2006. The smelting beds contained ore awaiting processing. Wind can generate dust. The shield blocked the ore from high winds and watering prevented dust emissions.

Benefit: This project prevented fugitive concentrate particulate emissions from the Smelting Beds.

KEY FACTS

Project Type	Air
Timeframe	2006
Cost	\$1,104,534
PAMA Project	2005 Extension
Benefit	Fugitive Concentrate Emissions Prevented

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Sources: JAC-35

11. Respondents' submissions borrow heavily from, and adopt many of the positions of, Plaintiffs in the Missouri Litigation. One of Plaintiffs' experts, Jack Matson, testified that the environment was better *after* the sale to DRP than before:

Q. Was the air quality in La Oroya better in September 1996 or June of 2009?

A. Yes [June of 2009].

Q. Was the condition of the rivers in La Oroya better in September 1996 or June 2009?

A. Yes, they were better. You know, that's not -- that's not the question at hand in terms of the timing of the fugitive lead emissions.

Q. You know that by 19 -- by 2008, Doe Run Peru reduced lead emissions from the main stack by 74 percent; do you agree with that?

A. That sounds about right.

Q. By 2008, Doe Run Peru had reduced arsenic emissions from the main stack by 86 percent; agree?

A. Yeah, that seems to be in the ballpark.

Q. Doe Run Peru reduced concentrations of lead in ambient air by 69 percent by 2007; agree?

A. I mean, I agree with all those. We're really talking about the timing of those and the issues that occurred because they put that at the back end and not the front end.

Q. Doe Run Peru reduced concentrations of arsenic in ambient air by 67 percent by 2007, right?

A. I think that's about right, yeah.

Q. Doe Run Peru virtually eliminated lead discharges in wastewater by 2008; agreed?

A. Yes. But that has little or nothing to do with lead in the neighborhood.⁴

...

Q. You would agree with me that this is definitely not a case in which an American operator went down to South America and polluted, in an uncontrolled manner, a pristine community, correct?

A. Yes.

Q. This is a case, right, where American investors put a considerable amount of money into an awful, rundown, polluting facility and improved it substantially; isn't that right?

A. Well, ultimately, they did...⁵

12. The PAMA set out each of the projects that Centromin and Peru deemed necessary to improve the environment and public health in and around the Complex. Centromin implemented none of them. DRP implemented all of them, except for one of three sulfuric acid plants. It therefore beggars belief that

⁴ Exhibit C-235, Deposition of Jack Matson (Volumes I & II, January 26-27, 2021) at 240:15-19, 240:20-24, 243:23-244:11, 244:15-22.

⁵ Exhibit C-235 at 239:10-21.

Centromin can claim it was more protective of the environment and public health than DRP.

13. But Claimants are not resting their case only on common sense. They will also demonstrate with objective facts that DRP's standards and practices in reducing pollution were a vast improvement over those of Centromin.

C. While the foregoing conversation is interesting, it is not relevant to this case.

14. The foregoing responds to Respondents' attack on Claimants' corporate integrity. Yet, while so much time has been spent on this subject, it is paradoxical that this issue comes into play *only* if the third-party claims "are not related to Metaloroya's PAMA." Since the Missouri Litigation is most definitely related to DRP's execution of its PAMA obligations, the inquiry ends there.

D. Other Subjects this Reply will and will not include.

15. This Reply will not respond to much of Respondents' other, irrelevant arguments, *e.g.*, writings by dead English poets, or mining operations unrelated to Metaloroya. Instead, this Reply will make the following six points:

First, as a matter of law, Respondent Activos Mineros may be held liable to Claimants under the Peruvian Civil Code for the claims asserted by the Missouri Plaintiffs, irrespective of privity of contract, and Claimants have standing under the Peruvian Arbitration Act to bring these claims as part of this arbitration proceeding. Claimants assert statutory grounds for recovery independent of, and without prejudice to, the contractual grounds for entitlement set out by Claimants in their Memorial.

Second, as a matter of fact, Activos Mineros, as successor to Centromin, is liable to Claimants on the Missouri Plaintiffs' claims. The Missouri Plaintiffs claim damages due to exposure to pollutants from the operations during the time of DRP's ownership from 1997 to 2009, which period also corresponds with the time in which DRP was performing its obligations under the PAMA. Subject to an exception that Claimants will show does not apply, Activos Mineros, as the successor to Centromin, retained all liability for such claims.

Third, Claimants did not undercapitalize DRP and thereby impede DRP's completion of its PAMA obligations.

Fourth, decisions by the Peruvian bankruptcy courts after those issued in the bankruptcy of DRP prove decisively that Claimants were denied justice.

Fifth, but for such denial of justice, it is probable that DRP would have successfully reorganized, and Claimants would not have lost their investment in DRP.

Finally, Claimants will make some final remarks about their contract claims.

ARGUMENT AND AUTHORITIES

I. Activos Mineros is liable to Claimants under the Peruvian Civil Code, irrespective of privity of contract.

16. Claimants are entitled to recover under several extra-contractual theories, each raised in their Memorial, *i.e.*, subrogation, restitution, contribution, and unjust enrichment.⁶ While each theory provides Claimants with an independent basis for

⁶ Supplemental Report of José Antonio Payet Puccio ("Payet Supp. Report"), ¶197 (May 1, 2023).

recovery, Claimants focus exclusively on their subrogation theory⁷ in this Reply because its applicability to the instant facts is undeniable.

17. Article 1970 – which in conjunction with a retention of liabilities by Centromin, makes Respondents liable to the Missouri Plaintiffs – forms the basis of Claimants’ claim for subrogation. The rationale connecting Article 1970 with Article 1260 is discussed in detail below and is briefly summarized as follows:

- Article 1970 (according to the Missouri Plaintiffs) creates a duty for a mining-related entity not to cause injuries to third parties from their operations. A breach of this duty subjects the mining entity to legal action for damages.
- Centromin was subject to Article 1970 for the twenty-five years it operated Metaloroya, and it chose to retain the risk on third-party claims for an additional ten years following the sale of the Complex to DRP as evidenced by the terms of the Stock Transfer Agreement.
- The Missouri Plaintiffs alleged damages from the operation of the mining related activities of the Complex during DRP’s ownership.
- Irrespective of the parties the Missouri Plaintiffs chose to sue, their claims are the responsibility of Centromin (now Activos Mineros).
- Therefore, because the Missouri Plaintiffs have filed suit against Claimants on a debt owed by Activos Mineros, Claimants have a “legitimate interest” under Article 1260.
- Consequently, Claimants can recover from Activos Mineros any amounts paid under Article 1260.

A. Article 1260: the right to subrogation

18. Article 1260 of the Peruvian Civil Code provides for subrogation in three circumstances: (i) when the debt is paid by an indivisible debtor or by a joint and several debtor, (ii) when the debt is paid by a third party with a legitimate interest,

⁷ As discussed more fully in their Memorial, Claimants are entitled to subrogation – *i.e.*, to demand reimbursement from a third party, here, Respondents. Claimants’ Peruvian law expert, Jose Payet, explains this doctrine in his Report, noting that “under Peruvian law, whenever a person pays another’s debt with a legitimate interest in payment thereof, he acquires the right to be reimbursed by the original debtor through subrogation.” Payet Supp. Report at ¶95.

and (iii) when the debt is paid by a creditor of the common debtor in favor of another creditor.⁸ (Even Respondents acknowledge in their Counter-Memorial that once a party pays that debt “in compliance with [this] requirement[] of Article 1260,” then it “substitutes [for] the old creditor and becomes the new creditor, holding the former’s rights, actions, and guarantees.”)⁹

19. Article 1260 provides indemnity-like relief; but, unlike a contractual claim for indemnification, Article 1260 does not depend on contractual privity.¹⁰ Article 1260 applies because the obligation belongs to someone other than the paying party. As explained below, the instant obligation allegedly owed to the Missouri Plaintiffs belongs to Respondents, thus giving rise to Claimants’ subrogation rights.

20. As Dr. Payet explains,

56. The Liability Allocation Provisions are provisions that truly allocate liability for third party claims between Centromin and Metaloroya, and not merely establish indemnification obligations among them. To assume a liability or an obligation, present or future, is totally different than to merely agree to indemnify another person if some damage materializes. In an assumption of liability, the person assuming the liability becomes personally responsible to the creditor or potential creditor for the obligation. In an indemnity provision, one party undertakes to compensate another if some event happens. This does not require the transfer of a liability or contingency from the indemnifying party to the party receiving the indemnity, which is the effect of an assumption of liability.¹¹

⁸ Payet Supp. Report at ¶96.

⁹ Respondents’ Counter-Memorial at ¶624.

¹⁰ In their Counter-Memorial, Respondents repeatedly assert that the claim is premature and that Claimants’ Peruvian law expert, Professor José Payet, did not explain in his initial report how subrogation succeeds if Claimants’ contract arguments fail. Dr. Payet’s supplemental report responds to Respondents’ criticism.

¹¹ Payet Supp. Report at ¶56.

21. Respondents incorrectly contend that they cannot be a debtor or liable party, because (i) the Missouri Plaintiffs have sued Claimants, not Respondents, and because (ii) neither the Stock Transfer Agreement nor the Peru Guaranty creates any obligation owing by Respondents to the Missouri Plaintiffs.¹²

22. As to the first point, Respondents' argument is a *non-sequitur*. Whom the Missouri Plaintiffs chose to name as defendants is wholly irrelevant. A third party can be sued for someone else's debt. Indeed, that is the typical case giving rise to rights under Article 1260.

23. With respect to the second point, Respondents owe duties to Claimants both contractually and extra-contractually. Respondents' extra-contractual liability is addressed as follows:

B. *Activos Mineros is the “debtor” or “liable party” for the application of subrogation.*

1. Article 1970: liability for a “risky or dangerous activity.”

24. Article 1260 requires, in the first instance, the existence of someone who is legally liable for the debt, and for this we turn to an Article of the Peruvian Civil Code and a theory of liability advanced by the Missouri Plaintiffs themselves.

25. The Missouri Plaintiffs alleged Article 1970 as a theory of liability against Claimants. Article 1970 imposes tort liability for damages on anyone who engages in a risky or dangerous activity, which harms another.¹³

¹² Respondents' Counter-Memorial filed April 1, 2022, at ¶¶819, 820, and 822.

¹³ Payet Supp. Report at ¶¶120-122.

26. The Missouri Plaintiffs submitted an expert report from Peruvian torts expert, Juan Espinoza in support.¹⁴ According to Dr. Espinosa, “mining activity qualifies as a risky activity,” and thus mining operators are subject to the provisions of Article 1970.¹⁵

27. The trial court dismissed the Missouri Plaintiffs’ strict liability claims for failure to state a claim under New York and Missouri law (which applied to the case) but did not consider them under Peruvian law.¹⁶

28. It is however most definitely worth re-examining the applicability of Article 1970 in an arbitration governed by Peruvian law.

2. *Activos Mineros steps into the shoes of DRP during the PAMA for exactly this type of third-party claim.*

29. Although Centromin was no longer the owner or operator of the Complex during the time in which the Missouri Plaintiffs allege damages, Centromin nonetheless retained responsibility as evidenced by Clause 6 of the Stock Transfer Agreement for what the Missouri Plaintiffs contend are “risky and dangerous” activities.

30. Specifically, Clause 6.2 of the Stock Transfer Agreement documents Centromin’s retention of certain liabilities, notwithstanding the sale to DRP. Clause 6.2 states:

¹⁴ Statement of Juan Alejandro Espinoza Espinoza, C-237.

¹⁵ Exhibit C-237 at 5.41. Claimants do not concede that the operations of the Complex constitute a risky or dangerous activity within the ambit of Article 1970. Moreover, Respondents owned and operated the Complex for approximately 25 years, during which time they emitted a tremendous volume of pollutants. There can be no good faith common sense dispute (much less scientific dispute) whether Respondents caused, or at a minimum, contributed to the damages claimed by the Missouri Plaintiffs.

¹⁶ Memorandum and Order, Exhibit C-238.

6.2 During the period approved for the execution of Metaloroya's PAMA, Centromin will assume liability for any damages and claims by third parties that are attributable to the activities of the Company [DRP f/k/a Metaloroya], of Centromin or its predecessors, except for damages and third party claims that are the Company's responsibility in accordance with numeral 5.3.¹⁷

31. Importantly, Claimants reference the terms of the Stock Transfer Agreement here for the limited evidentiary purpose of establishing that Respondents agreed to retain and assume the liabilities at issue in the Missouri Litigation (irrespective of whether the same arose during Centromin's operations or thereafter during the execution of the PAMA). No privity of contract is required to use the contract in this manner, thus avoiding – for the purposes of this submission – other contractual questions, such as which party bears the burden of proof under Clause 5.3(A) (Claimants submit that Respondents do) and what, if any, ramifications exist for the failure to engage in an expert determination under that Clause.

32. Centromin's ownership of certain third-party claims is permissible under Peruvian corporate law, as companies can decide which assets and liabilities are transferred. Here, the Stock Transfer Agreement is proof of Centromin's intention to assume environmental liabilities for at least ten years after sale. The corporate and contractual structure designed for the privatization of Metaloroya was precisely crafted to isolate the new investors from the environmental risks inherent in the Complex.¹⁸

¹⁷ Exhibit C-105, Contract of Stock Transfer between Empresa Minera del Centro del Perú S.A., Doe Run Peru S.R. Ltda., The Doe Run Resources Corporation, and The Renco Group, Inc., October 23, 1997, Section 6.2.

¹⁸ Payet Supp. Report at ¶62.

33. In short, Activos Mineros is the “operator” of the Complex for the purposes of such third-party claims.

C. Claimants have a “legitimate interest” for the purposes of subrogation.

34. Claimants are a third party with a legitimate interest, as defined in Article 1260. Claimants’ Peruvian law expert, Jose Payet explained in his Report that Claimants likewise meet the “legitimate interest” requirement in connection with the Missouri Plaintiffs’ claims since Claimants may be held liable for damages on claims for which Activos Mineros is liable.¹⁹ Yet any potential liability of Claimants is directly related to alleged damages the Missouri Plaintiffs contend they suffered from emissions from the operation of the Complex during DRP’s ownership.²⁰ These are liabilities Centromin assumed.²¹

D. Claimants are entitled to a declaratory judgment on this cause of action.

35. Respondents’ primary argument for avoiding liability on Claimants’ subrogation claim is that Claimants have not yet made payment to the Missouri Plaintiffs.

36. Peruvian law recognizes a claim for declaratory relief under these circumstances. This basic principle of Peruvian law runs counter to Respondents’

¹⁹ Payet Supp. Report at ¶96.

²⁰ Exhibit R-292, Petition for Damages – Personal Injury, from Case No. 4:15-cv-01704-RWS, *Father Chris Collins as Next Friends of J.Y.C.C., et al., v. Doe Run Resources Corporation, et al.*, in the Circuit Court of the City of St. Louis, Missouri [Doc 18]; see also and Exhibit R-294, Amended Complaint for Damages – Personal Injury, from Case No. 4:11-cv-00044-CDP, *A.O.A., et al. v. Ira L. Rennert, et al.*, in the United States District Court of the Eastern District of Missouri, Eastern Division [Doc. 474].

²¹ Payet Supp. Report at ¶96.

primary argument for avoiding liability for Claimants' subrogation claim (*i.e.*, that Claimants have not yet made payment to the Missouri Plaintiffs). Article III of the Preliminary Title of the Peruvian Code of Civil Procedure establishes that "the specific purpose of the process is to resolve a conflict of interests or eliminate an uncertainty."²²

37. Article 2 of the same Code states that "for the right of action of any subject, in exercise of his right to effective jurisdictional protection and directly or through a legal representative or attorney-in-fact, he may resort to the jurisdictional body requesting the solution of an intersubjective conflict of interests or a legal uncertainty."²³

38. Legal commentator, Ramiro Portocarrero states that a declaratory judgment action is proper when there is legal uncertainty between the parties:

The jurisdictional provision for the declaration of certainty on a certain legal situation must be absolutely indispensable. The judicial intervention for such declaration must be based on a legal uncertainty (as regards rights, situations, advantages, etc.) of such magnitude that its removal through a judgment is essential. The magnitude that will determine the merits of the petition depends on whether the uncertainty can be perceived as objective and present. [...] The requirement that the uncertainty must be current means that it must exist in fact at the time the claim is filed. It is not enough that it be possible, it is necessary that it be factually present. The requirement of objectivity means that it must not be only internally in the plaintiff, but that it must be objectively perceived.²⁴

39. Such is the case here. A central legal uncertainty exists as to which of the parties is responsible for the alleged environmental liabilities generated by the

²² Payet Supp. Report at p. 45, §201.

²³ *Id.*

²⁴ *Id.* at ¶208.

operation of the Complex between 1997-2009. There is no doubt that the uncertainty over this issue is actual, objective and of a longstanding nature. Indeed, the parties have been arguing over this issue for almost a decade. Consequently, Claimants meet the test to maintain a declaratory judgment action as they have submitted to the Tribunal.

40. Nor will a declaration of rights be a waste of the Tribunal's valuable time. A declaration by this Tribunal that Respondents are liable for amounts paid by Claimants on their behalf will likely *not* result in another arbitration. Respondents would have an impetus to engage with Claimants in resolving the Missouri Litigation or in participating with Claimants in a trial and appeal of those cases. But even if another arbitration were necessary, it should be a simple matter of determining whether the amount paid was reasonable.

E. The right to bring this claim in arbitration.

41. Peruvian law recognizes the rights of both parties and non-parties to enforce arbitration agreements.

42. Article 14 of the Peruvian Arbitration Law provides that:

[T]he arbitration agreement extends to include those whose consent to submit to arbitration, in good faith, is determined by their active and determining participation in the negotiation, conclusion, execution or termination of the contract covered by the arbitration agreement or to which the agreement is related. It also extends to include those who intend to derive rights or benefits from the contract, according to its terms.²⁵

²⁵ *Id.* at ¶159.

43. The purpose of the rule is to extend the arbitration agreement to non-parties who can be considered, in good faith, to have consented to the arbitration agreement.

44. Article 14 typically applies in two instances: (i) when, in good faith, a non-party's consent to submit to arbitration can be derived from an active and decisive participation in the negotiation, conclusion, performance or termination of a contract; or (ii) when a party intends to derive rights or benefits from the contract, according to its own terms.²⁶

45. It is indisputable that both Claimants and Respondents were actively involved in the negotiations of the Stock Transfer Agreement and that both intended to derive benefits from the transaction.

46. Claimants played an essential role in the negotiation, as DRP was not created until after the completion of the negotiations of the Stock Transfer Agreement.

47. Respondent Centromin is a Party to the Stock Transfer Agreement. Respondent the Republic of Peru should also be bound through its organ, Centromin and by virtue of its Guaranty.

48. Even if *arguendo* Respondents were not proper Parties with a capital "P," they would be bound as interested non-parties that, among other reasons, benefitted from the aim of the Stock Transfer Agreement and corresponding PAMA. The priority of Peru was to institute regulations that would improve the environment and public health in places traditionally known as "visions from Hell." Peru lacked

²⁶ *Id.* at ¶160.

funding to institute such massive modifications to the mining and metals processing industry on its own. It looked to the private sector by privatizing. Peru hoped that the PAMA regimes would improve the quality of life and ecosystem of the country.²⁷

49. The Republic of Peru, *via* MEM and Centromin, were involved in every facet of the negotiation, performance, and termination of the Stock Transfer Agreement. Centromin negotiated the agreement. MEM regulated the performance of the PAMA and was the so-called creditor that forced the liquidation of DRP in bankruptcy.

50. Given these factors, Article 14 gives Claimants standing to invoke arbitration under the Stock Transfer Agreement, and it correspondingly requires Respondents to respond to the merits of such arbitration.

51. Perhaps ironically, Claimants and Respondents also intended for international arbitration to resolve their disputes. In the Pre-Bid Questions and Answers, Claimants and Respondents corresponded as follows:

QUESTION N° 103 OF THE FIRST ROUND

Article Ten. Arbitration should be International Arbitration

ANSWER

If the bidder being awarded the contract thinks it is convenient, there is no problem.²⁸

Centromin was the entity seeking bids. Claimants, not DRP, were the bidders.

²⁷ Exhibit C-104, 1999 White Paper, PDF p. 9.

²⁸ Payet Supp. Report at ¶163.

52. Not only are Respondents obligated to arbitrate, but they must also arbitrate *both* contractual and non-contractual claims.

53. First and foremost is the language of the arbitration agreement is considered “broad form.”²⁹

TWELFTH CLAUSE Arbitration

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 ... will be submitted to legal arbitration

54. According to Gary Born,

[T]he most common terms cover (a) “all” or “any”; (b) “disputes,” “differences,” “claims,” or “controversies”; (c) “arising out of,” “in connection with,” “under,” or “relating to”; (d) the parties’ “agreement,” “contract,” the “works,” or some broader set of contractual arrangements between the parties.” Similarly, the terms “dispute,” “difference” and “controversy” should all be given expansive interpretations, whether used in statutory or contractual provisions, to cover any circumstance where one party demands something and the other party refuses, fails, or is unable to provide it.³⁰

55. These same criteria are shared in the Redfern and Hunter Guide, which states that

[G]eneral words such as “claims,” “differences,” and “disputes” have been held by the English courts to encompass a wide jurisdiction in the context of the particular agreement in question. [...] Similarly, linking words such as “in connection with,” “in relation to,” “in respect of,” “with regard to,” “under,” and “arising out of” may also be important in any dispute as to the scope of an arbitration agreement.³¹

²⁹ Exhibit C-105.

³⁰ Payet Supp. Report at ¶172.

³¹ *Id.* at ¶173.

56. Peruvian arbitration law likewise interprets the scope of arbitration provisions quite broadly. Article 2.1 of the Arbitration Law provides that “any dispute on matters freely available under the law, as well as those that the law or international treaties or agreements authorize, may be submitted to arbitration.” Article 13.1 of the Arbitration Law highlights that an arbitration agreement may concern a “contractual or other legal relationship.”³²

57. According to Peruvian legal expert, Luciano Barchi,

When the arbitration agreement states that the parties submit to arbitration “Any dispute that may arise between them” or “All disputes that may arise between them,” there is no doubt that the parties decided to submit to arbitration jurisdiction all disputes that may arise between them with respect to the legal relationship that binds them. Only those disputes that are non-arbitrable disputes are excluded. [...] We are of the opinion that if the parties decide, in the arbitration agreement, to submit to arbitration “any dispute or controversy arising out of or in connection with this legal act, ...” they are including non-contractual matters arising out of this legal act.³³

58. Clause 12 therefore fits the bill for such expansive interpretation. It applies to “any claim ... in relation” to the Stock Transfer Agreement.³⁴ Claimants’ statutory claims are all related to the PAMA Assumed Liabilities, as defined in the agreement, and thus are subject to arbitration.

59. Claimants’ position is further consistent with the principles of international arbitration, which recognize that, unless a clear agreement exists otherwise between the parties, the parties are presumed to want all their disputes to be resolved in the

³² *Id.* at ¶169.

³³ *Id.* at ¶174.

³⁴ Exhibit C-105.

same jurisdiction. Indeed, in the seminal case of *Fiona Trust Holding Corp. vs. Privalov*, Lord Hoffmann stated as follows:

In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.³⁵

60. Respondents create a straw man in response to the applicability of Article

14. They state:

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. That has nothing to do with Article 14.³⁶

61. It appears Respondents are reasoning that:

- Signatories to an arbitration agreement must arbitrate their disputes;
- Non-signatories to an arbitration agreement can under certain circumstances be compelled to arbitrate pursuant to an arbitration agreement; but that
- Parties that were once signatories but have since assigned their rights to others somehow *cannot* be bound by the arbitration agreement to which they initially agreed.

This unsubstantiated position makes no sense and contradicts the binary logic that a party either is or is not a signatory to an arbitration agreement.

62. It does not matter whether either of Claimants and Respondents are parties, non-parties, or once parties but now non-parties. That is not the test. Article 14

³⁵ Payet Supp. Report at ¶157.

³⁶ Respondents' Counter-Memorial at ¶535.

binds them to arbitration, without regard to these considerations, if they meet one of the two prongs of Article 14; and, as discussed herein, they do.

F. Conclusion

63. For these reasons, Claimants request that the Tribunal declare that Respondents are liable to Claimants for future payments Claimants may make to settle Claims by the Missouri Plaintiffs or to satisfy a final judgment against them.

II. Respondents retained liability for the claims asserted in the Missouri Litigation.

64. The Missouri Plaintiffs have sued Claimants alleging damages from personal injuries they allegedly sustained from “toxic environmental releases” generated by the Complex during DRP’s ownership. Paragraph 18 of one of the complaints³⁷ states:

18. The minor plaintiffs lived in or around La Oroya, Peru and were exposed to and injured by the harmful and toxic substances released from the Defendants’ metallurgical complex.

65. Liabilities as alleged in the Missouri Litigation are the responsibility of Activos Mineros under Clause 6 of the Stock Transfer Agreement, which provides in relevant part:

6.1 Centromin assumes responsibility in the following environmental matters:

....

During the period approved for the execution of Metaloroya’s PAMA, Centromin will assume liability for any damages and claims by third parties that are attributable to the activities of the Company [DRP], of Centromin and/or its predecessors, except for damages

³⁷ Exhibit R-227.

and third party claims that are the Company's responsibility in accordance with Numeral 5.3....³⁸

66. It is indisputable that the Missouri Plaintiffs' claims fall within this assumption of liability, as the Missouri Plaintiffs themselves allege. Respondents' only potential "out" is contained in Clause 5.3, which provides:

5.3 During the period approved for the execution of Metaloroya's PAMA, the Company will assume liability for damages and claims by third parties attributable to it from the date of the signing of this contract, only in the following cases:

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 Centromin until the date of execution of this Contract.³⁹

67. Respondents attempt to use Clause 5.3 to evade liability under Clause 6.1, contending that the criteria of Clause 5.3 apply (i) because DRP's operation of the Complex was *not* "related to" DRP's implementation of its PAMA and (ii) because DRP's standards and practices were less protective than those of Centromin.⁴⁰ To avoid liability, Respondents must satisfy *both* prongs of Clause 5.3, which they cannot do.

³⁸ Exhibit C-105 at pp. 25-27, Section 6.1.

³⁹ *Id.* at p. 21, Section 5.3.

⁴⁰ Respondents' Counter-Memorial at §II.C.2.

A. **Clause 5.3 does not apply because emissions resulting from DRP's operation of the Complex during the PAMA that are the basis of third-party claims are directly due to acts that related to Metaloroya's PAMA.**

68. The 1993 Environmental Mining Law required PAMAs for all operators of metallurgical facilities over a period of ten years. Under the Law, operators were required to spend at least one percent of their annual revenues on environmental remediation and control programs and to submit annual reports to MEM regarding their operations' emissions. The only way operators could spend one percent of their annual revenues is if they were operating their complexes during the execution of their PAMAs.

69. The Environmental Mining Law also permitted mining and metallurgical operators to enter into administrative stability agreements with MEM. A stability agreement would require the operators to comply only with the air quality standards then in effect for the life of the PAMA.⁴¹ There would of course be no need for such agreements if the operations of the complexes were unrelated to the execution of the PAMAs. The stability agreements recognized that the mining and metallurgical companies would have to operate to generate the revenues to pay for the capital costs of the PAMAs.

70. DRP entered into a Stability Agreement and operated the Complex in accordance with its terms.⁴² The Agreement was essential to DRP because revenues generated from operations paid for the PAMA.

⁴¹ Exhibit R-25, Filing of Appeal, October 31, 2012, and Exhibit R-131, Legislative Decree No. 757 – Approve Framework Law for the Growth of Private Investment, November 13, 1991.

⁴² Exhibit R-199, Environmental Administrative Stability Contract for Centromin, May 1998.

71. For Respondents to argue that operations were unrelated to the PAMA therefore flies in the face of the 1993 Environmental Mining Law, the purpose of the Stability Agreement, and creates a false dichotomy between the two. The PAMA and the operations of the Complex are so intertwined as to be inseparable from each other. MEM's entire scheme was based upon the reality that complexes would operate while improvements were undertaken. Consequently, it makes no sense that operations would not be "related to" the PAMA.

72. Respondents' argument also flies in the face of the Missouri Plaintiffs' articulation of their own claims and their attendant nexus between DRP's operations and the PAMA. Jack Matson, the Missouri Plaintiffs' expert on how and why Defendants breached the standard of care (the critical element of Plaintiffs' common law negligence claim), testified that the Plaintiffs were injured because Defendants followed the sequence of projects dictated by the PAMA. Specifically, Matson testified that the "crux" of his opinion was that DRP should have completed certain fugitive emissions projects earlier than was required by the PAMA and that the PAMA was wrong in prioritizing water treatment projects over fugitive emissions projects.⁴³

73. According to Matson, contrary to the schedule set out in the PAMA, "[DRP] should have more quickly enclosed [1] the sinter plant, [2] the blast furnace, and [3] the dross plant, and [4] paved the roads."⁴⁴ According to Matson, had DRP completed these projects earlier than was required by the PAMA, i.e., "within the

⁴³ Exhibit C-235 at Vol. I, 194:20-25; 195:1-2.

⁴⁴ Exhibit C-235 at Vol. I, 206:11-18.

first 2 and a half years of operating the complex,” DRP would have “gone a long way or possibly even made it” to satisfying “the standard of care.”

74. By basing DRP’s alleged breach of the standard of care (and thus the Missouri Plaintiffs’ negligence claims) on the sequencing of these projects in the PAMA, Dr. Matson confirms that the Missouri Plaintiffs’ claims are related to the PAMA. According to Dr. Matson:

Q. ... The government of Peru gave Doe Run Peru until December 31, 2006, to implement fugitive emission control projects, right?

A. Yes.

Q. And Doe Run Peru met that deadline, correct?

A. Yes.⁴⁵

75. Yet, according to Matson, complying with the timing set out in the PAMA was not sufficient to meet the standard of care because Peru was wrong in its ordering of priorities:

Q. ... Is the government --- is it your view that the government of Peru got it wrong in putting anything other than fugitive lead emission projects as the top priority in the PAMA?

A. Well, **they got it wrong in not having fugitive lead emissions as a top priority**, but they didn’t get it wrong in terms of all the other improvements that needed to be made concurrently....⁴⁶

⁴⁵ Exhibit C-236, Deposition of Jack Matson (July 2, 2021) at 98:4-10.

⁴⁶ Exhibit C-236 at 62:5-16 (emphasis added).

76. There can be no clearer connection between the Missouri Plaintiffs' claims, DRP's operations and the PAMA than the express testimony of the Missouri Plaintiffs' own expert attributing the Missouri Plaintiffs' injuries to the ordering of the projects in the PAMA.

77. Because Respondents cannot establish that DRP's operations were unrelated to the PAMA, the Tribunal need not even consider whether DRP used of standards and practices that were less protective of the environment or of public health than those that were pursued by Centromin. Accordingly, the inquiry about whether the exception contained in Article 5.3 applies should end here.

B. *Clause 5.3 does not apply because DRP operated the Complex using standards and practices that were more protective of the environment than Centromin.*⁴⁷

78. Assuming *arguendo* that this subject is reached by the Tribunal, Claimants respond to the opinions of Respondents' environmental expert, Wim Dobbelaere:⁴⁸

- “DRP significantly increased lead production and the use of dirtier concentrates.⁴⁹ It was very bad practice to do these two things at a facility that

⁴⁷ Claimants submit contemporaneously with their Reply an interactive information tool (the “Presentation”) prepared by John Connor, one of their experts at GSI. The Tribunal can use the Presentation to navigate to any point or subject of interest. Claimants' intention is to present the Tribunal with all the facts and data compiled in an easy-to-access manner. The Presentation operates much like a personal computer: it contains “menu bars” that allow the user to “select” and view topics of interest, with an opportunity to delve deeper into the subject with additional “clicks” of the icons. Unless otherwise noted, the following graphics are all part of the Presentation.

⁴⁸ Expert Report on Pyrometallurgy by Wim Dobbelaere, April 1, 2022.

⁴⁹ Centromin was the one that developed the business plan to substantially boost production using dirtier concentrates:

1.2 PRODUCTION PROGRAMME & STRATEGY

1. La Oroya will be in a position to select a precise blend of concentrates to maximise profitability, given the expansion in mining activity currently underway in Peru and world-wide.
2. The treatment of dirty concentrates is profitable for La Oroya and should continue after privatisation. Small mines dependent upon treatment services from La Oroya are thus unlikely to be unaffected by the transfer.
3. Profitability of La Oroya will be maximised by producing:
 - a blister copper output of 150,000 tpa and 100,000 tpa of refined metal;

did not meet environmental best practice standards. These practices had a negative effect on the circulation of impurities in all of the circuits and caused the Facility to release greater amounts of lead into the environment than under Centromin.” [p. 3 at ¶14]

- “Instead, it appears that, once DRP settled on its low-cost approach of minimal modernization, it operated the CMLO without regard to the accumulating negative effects of its decision. Those effects included an increase in fugitive emissions.” [p. 58 at ¶161]
- “In short, because of DRP’s practices, emissions were higher during the first eight years of DRP’s operations than they were in 1995, the reference year for the PAMA during Centromin’s time of operations. Lead emissions only came back to 1995 PAMA baseline levels in 2005, while sulfur emissions never came back to the 1995 baseline level seen during Centromin’s time.” [pp. 81 – 82 at ¶207]
- “The picture that emerges is that DRP took no action that would have significantly reduced lead emissions and improved air quality for lead until 2007 (and never for SO₂), the actions it began taking then were either minor or only had a major impact after the PAMA period ended in January 2007.” [p. 115, Section XI]

79. These statements are simply contrary to the known and demonstrated facts of the PAMA projects and the attendant improvements in air quality that occurred over the 12-year period of DRP operations.⁵⁰ In the Presentation, the before and after photos alone demonstrate the dramatic improvement in the physical plant. Moreover, in reaching these opinions, Dobbelaere undertakes the wrong analysis altogether.

-
- a lead production of 108,000 tpa;
 - 50,000 tpa of zinc; and
 - 781 tpa of silver.
4. Increased output in copper will be achieved by treating clean concentrates as a custom smelter, in addition to processing dirty concentrates.
 5. A further upgrading of copper production to 200,000 tpa is thought to be possible by injecting concentrates into the base of the standard converters. However, this has not been considered in this plan.

Exhibit R-184, La Oroya Metallurgical Complex Business Plan – 1997 – 2011, June 1996, at p. 7, Section 1.2.

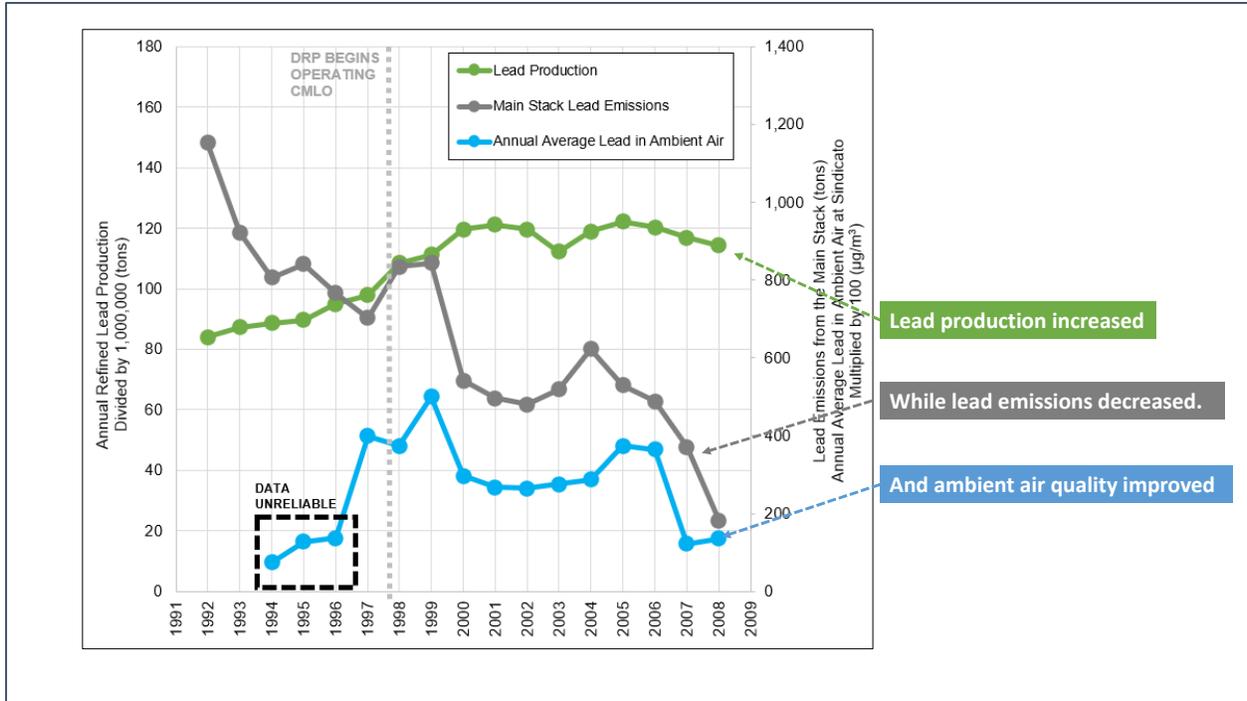
⁵⁰ Claimants also note that Dobbelaere’s decision to use a single year – 1995 – as the “reference year” for his analysis rather than data from the remainder of the decades that Centromin operated the Complex creates an artificial comparison, lacking in any rational basis or common sense.

80. Clause 5.3 does not concern itself with the results of operations, but *rather* whether DRP used “standards and practices that were less protective of the environment or of public health than those that were pursued by Centromin.” As such, Dobbelaere’s analysis completely overlooks the fact that Centromin designed the PAMA and Peru approved it. The notion that Claimants somehow fell short of appropriate “standards and practices” by executing the PAMA that Respondents designed and approved strains credulity.

81. As for the merits of Mr. Dobbelaere’s analysis, it is first important to understand that emissions and air quality go hand-in-glove. If emissions increase, air quality will correspondingly worsen. If emissions decrease, air quality will correspondingly improve.

82. The slide below provides the combined plots of lead production, lead air emissions, and ambient air lead over the period of 1991 – 2009:⁵¹

⁵¹ GSI Environmental Inc.’s Supplemental Expert Report of John A Connor, P.E., P.G., BCEE Concerning DRP Operations and Environmental at the La Oroya Metallurgical Complex, Junin, Peru, April 19, 2023 (“Connor Supp. Report”), at p. 12, Exhibit 3.1, Plot of lead metal production, lead air emissions, and ambient air lead at CMLO.



83. The data⁵² shows that, consistent with the government’s objectives in privatizing the Complex, DRP was able to increase production of lead product over its period of operations, ranging from approximately one hundred thousand metric tons per year in 1997 to over one hundred twenty thousand metric tons per year in

⁵²Insofar as the dotted box, labeled “data unreliable” is concerned, it is well documented that Centromin did not maintain an accurate and reliable monitoring system to track air quality at the closest station to the Complex referred to as Sindicato (labor union headquarters). Knight Piesold, the environmental consultants Centromin retained to assist in the development of its PAMA noted on one of their field trips to the Complex that “[t]he visits identified concerns in the areas of instrumentation siting, instrumentation maintenance, and sample analysis procedures. These concerns are directly related to data quality and usefulness.” John Connor testified in the Missouri Litigation that pre-2000 is unreliable. The Missouri Plaintiffs’ environmental expert, Jack Matson, PhD, agreed:

Q. Okay. So it’s your view that the ambient air monitoring data from the Sindicato station from 1995 through 1999 are too unreliable to use; is that right?

A. Yes, that's my opinion.

Exhibit C-235, at 24:10-14.

So as not to confuse the two, the measurement of air quality is different from the measurement of emissions. Air quality was measured at Sindicato and the data is suspect before 2000; emissions are measured at the main stack of the Complex, and no one questions the validity of this data.

ensuing years. At the same time, the air emissions data *compiled by Activos Mineros itself* shows that main stack lead emissions decreased markedly compared to Centromin's operations, dropping from over eight hundred tons per year in 1997 to under two hundred tons per year by 2008. The lowest lead emission level under Centromin's operations was approximately seven hundred tons per year. In addition, the reliable air monitoring data shows that ambient air lead levels dropped in step with reduced lead emissions.⁵³

84. The improved air quality in the area surrounding the Complex demonstrates that, contrary to Mr. Dobbelaere's assertions, all emissions, both "stack" and "fugitive,"⁵⁴ decreased over the course of DRP's operations. It is impossible for ambient air to improve if lead emissions are increasing. Take the example of a bubble making machine. If a bubble machine runs at a faster rate, emitting more bubbles, there will be more bubbles in the air. When it runs slower, there are fewer bubbles. It is impossible for higher bubble emissions to result in fewer bubbles in the air – as Mr. Dobbelaere's opinion suggests.⁵⁵

85. Projects were undertaken by DRP to reduce both fugitive and stack emissions in the earliest days of their operations. These projects included (i) repair of ventilation ducts (which, like a vacuum cleaner, capture and remove dust particles from the metal processing areas), (ii) new and repaired baghouses (which

⁵³ Connor's Supp. Report at p. 12.

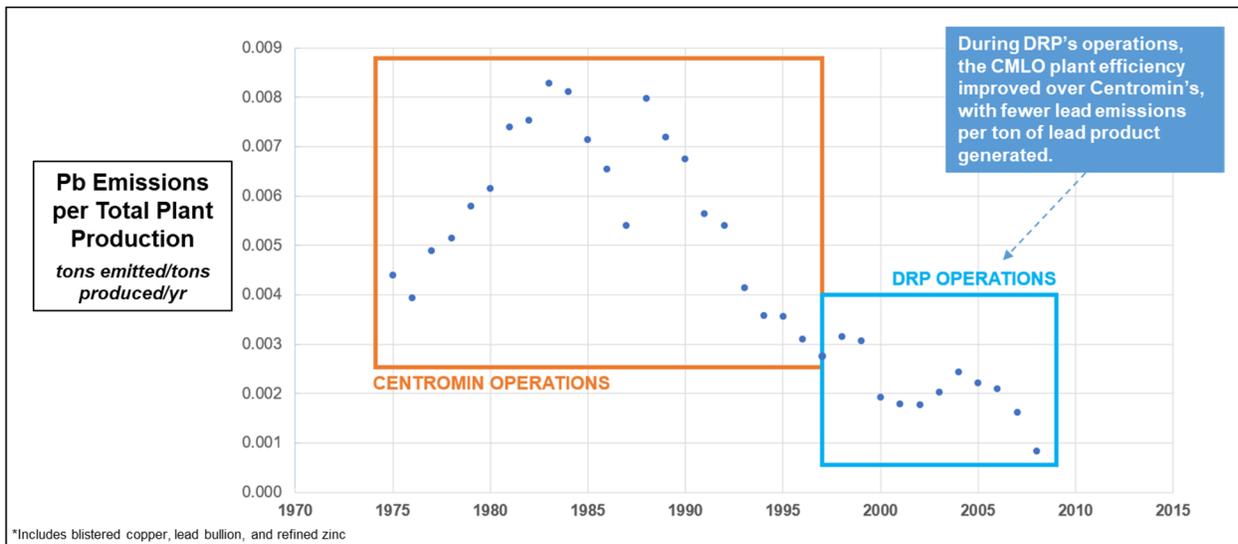
⁵⁴There are two types of emissions of concern. The first type of emission comes from the "main stack" of the smelters. These emissions are objectively monitored and measured. The second type of emission is "fugitive," which are emissions that seep out of ducts and other areas of the plant.

⁵⁵ Connor's Supp. Report at pp. 12-13.

function like a vacuum cleaner bag to filter out dust particles), and (iii) new and repaired electrostatic precipitators (which ionize and capture the finest dust particles). By capturing and removing dust before it exited the main stack, DRP removed both fugitive and stack emissions at the same time. This fact is evidenced by the improved air quality in the area surrounding the plant.⁵⁶

86. The reduction of emissions while increasing metal production also disproves Mr. Dobbelaere’s suggestion that DRP increased production without regard to environmental effects. The above slide shows the results of the parallel efforts to modernize the Complex and increase the efficiency of metal extraction from the lead ore, with less waste in the form of lost lead emissions.⁵⁷

87. The next slide shows lead production efficiency as tons of lead air emissions per ton of lead product: 1975 – 2009:⁵⁸



⁵⁶ *Id.* at p. 13.

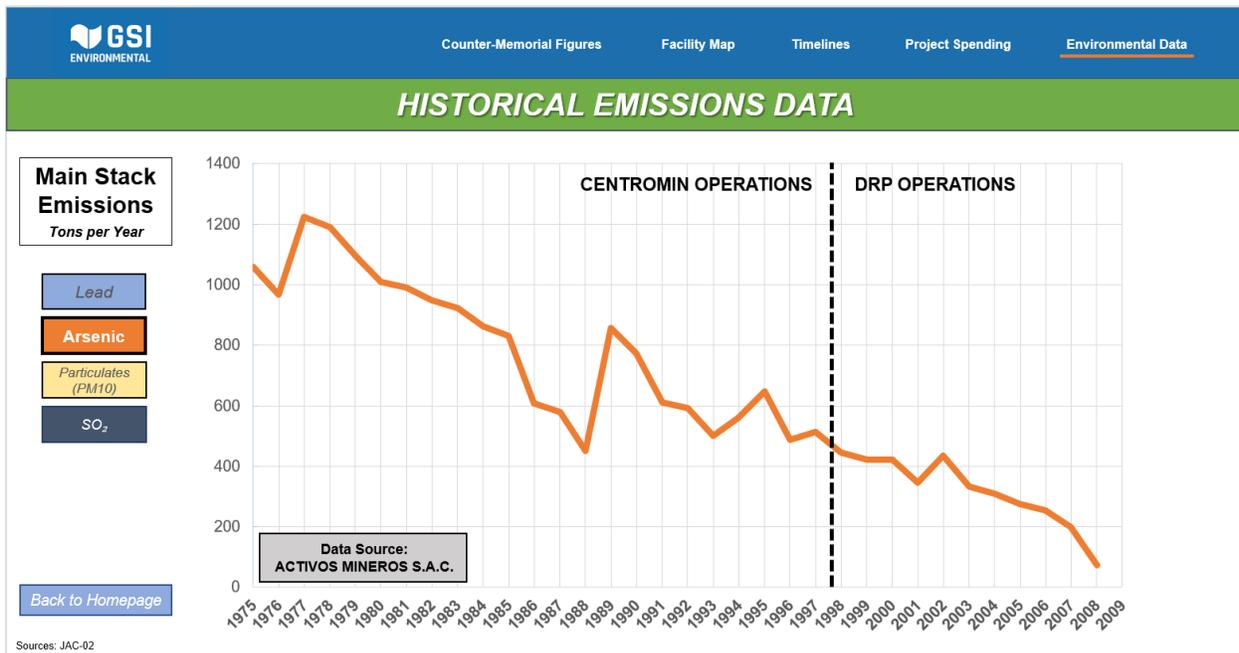
⁵⁷ *Id.*

⁵⁸ *Id.* at p. 13, Exhibit 3.2, Plot of CMLO lead production efficiency a tons of lead air emissions per ton of lead product: 1975 - 2009.

88. DRP reduced the tons of lead emissions per ton of lead produced from approximately 0.006 tons per ton in 1997 to approximately 0.002 tons per ton in 2009. Under Centromin, the plant efficiency was never better than 0.007 tons per ton and ranged as high as 0.023 tons per ton, representing a much higher rate of emissions per ton of lead product. Therefore, it is simply not correct that DRP increased production without regard to plant air emissions, as asserted by Mr. Dobbelaere.⁵⁹

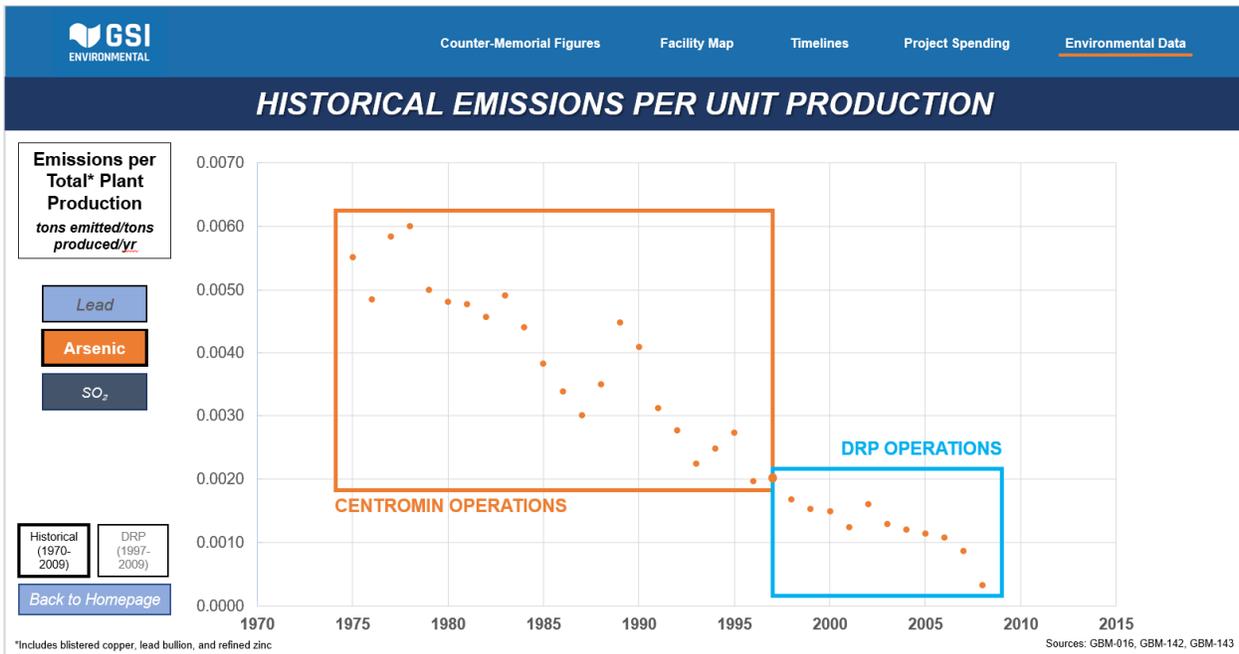
89. The same is true for every other measured pollutant at the Complex.

90. Arsenic:⁶⁰

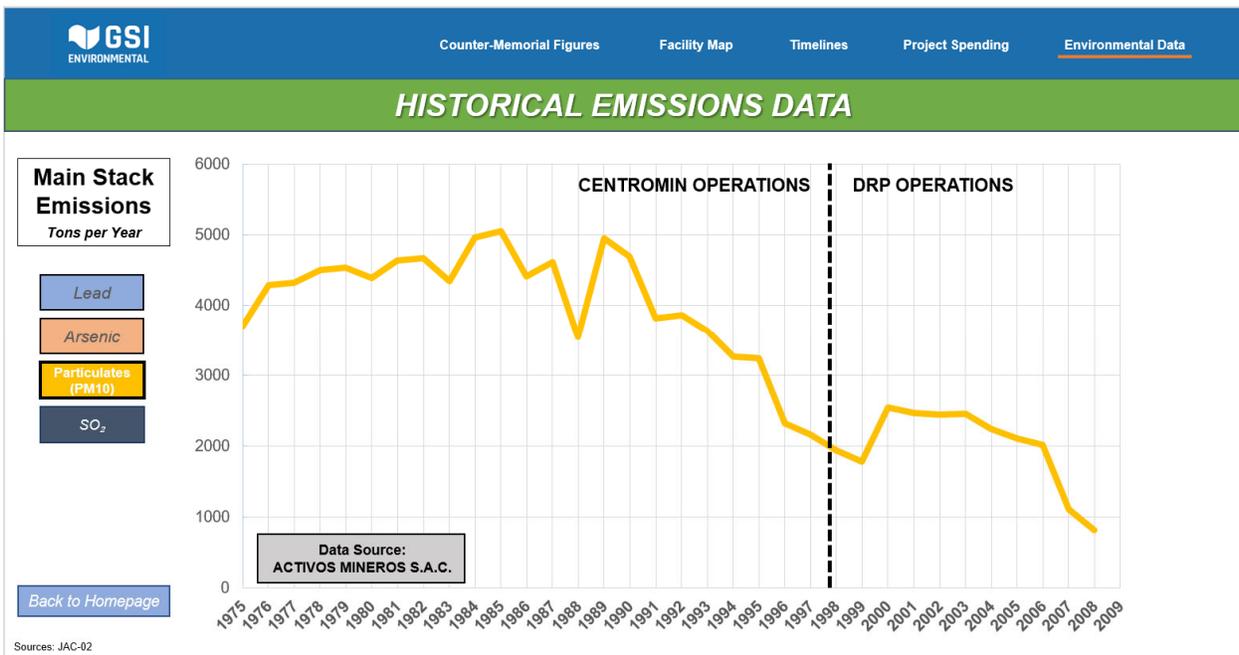


⁵⁹ *Id.* at p. 13.

⁶⁰ *Id.* at Appx. C.

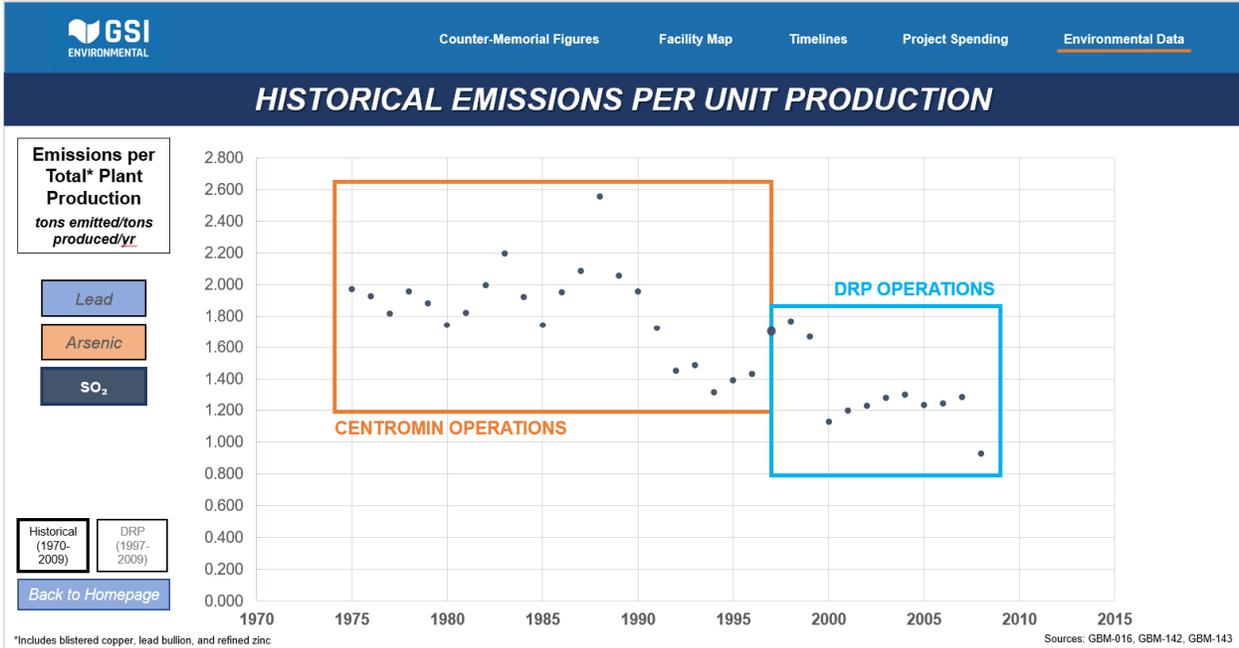
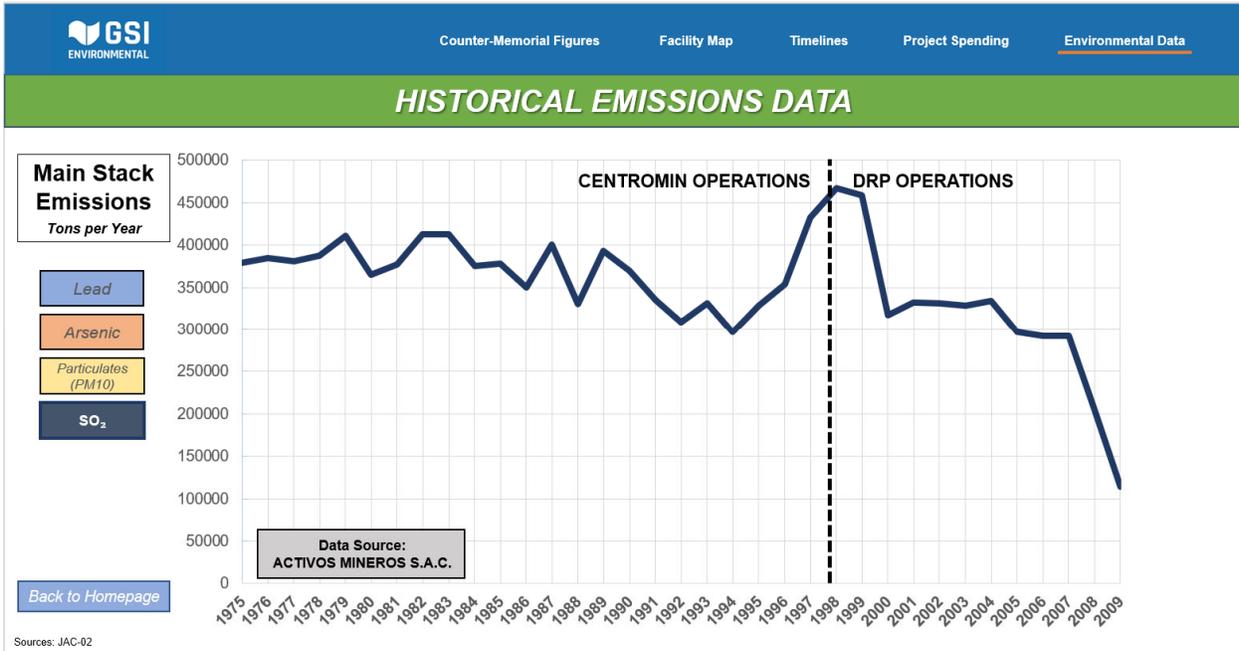


91. Particulate emissions:⁶¹



⁶¹ *Id.* at Appx. C.

92. Sulfur emissions:⁶²



⁶² *Id.* at Appx. C.

93. As is apparent from the preceding slides, for each category of emissions measured, main stack emissions declined during DRP operations improving the air quality, versus Centromin’s operations:⁶³

5.3.1 Industrial emissions were reduced

As a result of the various projects implemented by DRP as of 2009, emissions from the Main Stack of the CMLO were reduced significantly compared to historical CMLO emissions going back to 1975. Using available data (GBM-018: AMSAC, 2010a), I calculated reductions in annual Main Stack emissions between 1975 and 2008, between 1997 and 2008, and between the highest historical emission value during Centromin’s operation of the CMLO and 2008:

Compound	Reduction in Main Stack Emissions 1997 - 2008	Reduction in Main Stack Emissions 1975 - 2008	Reduction in Main Stack Emissions Historical Maximum - 2008
Sulfur Dioxide	-52%	-47%	-52% (1997)
Particulate Matter	-62%	-78%	-84% (1985)
Lead	-74%	-78%	-88% (1984)
Arsenic	-86%	-93%	-94% (1977)

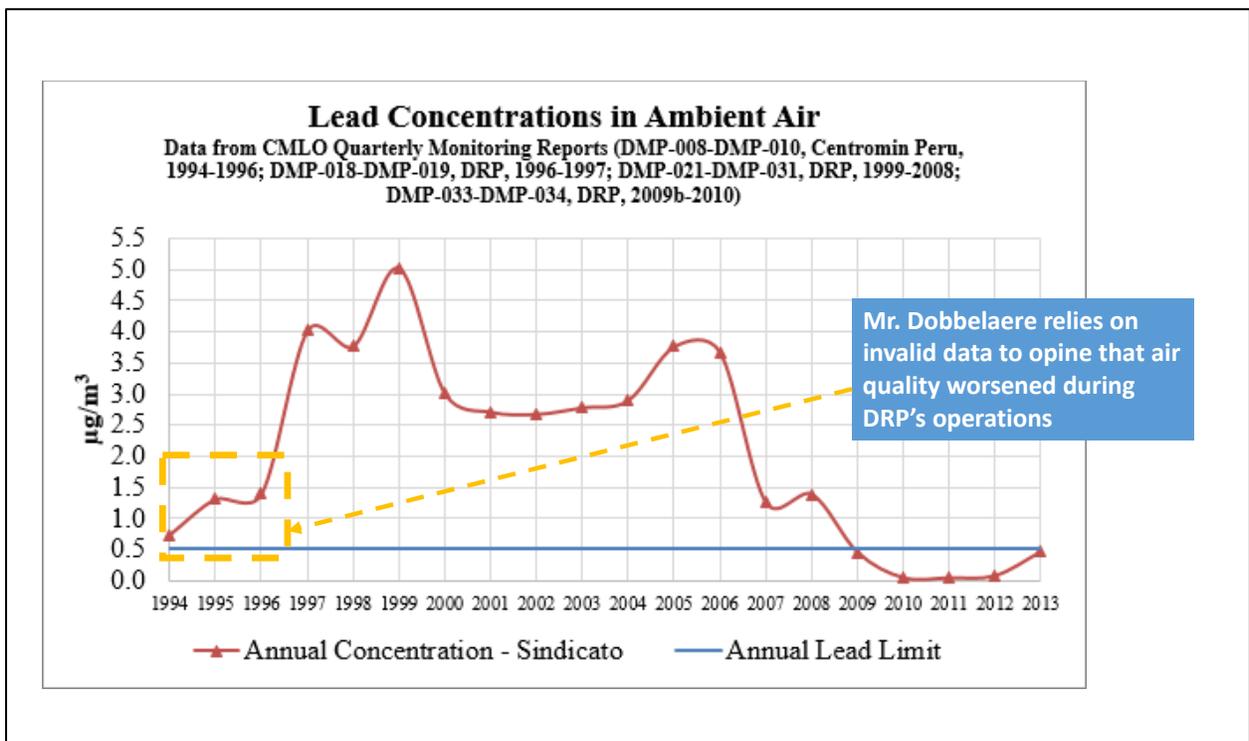
94. Despite the objective evidence, Mr. Dobbelaere opines that lead emissions were higher during DRP’s operations and the air quality worsened significantly compared to the air quality during Centromin’s ownership. It is well established that environmental conditions were dire under Centromin.⁶⁴ For this very reason, the PAMA was developed, and a new investor was solicited to finance these upgrades, which DRP did at the cost of \$313 million. There is no reasonable interpretation of these facts that could support an opinion that Centromin’s operations were superior to those of DRP.

95. The incorrect statements by Mr. Dobbelaere and by Respondents’ toxicologist, Deborah Proctor, appear to be based, in part, upon erroneous “baseline” data on ambient air quality from the period shortly before DRP

⁶³ Expert Opinion of Gino Bianchi Mosquera, D.Env., P.G., Concerning Certain Environmental Issues Associated with the La Oroya Metallurgical Complex, Junin, Peru (February 8, 2021) at p. 61, §5.3.1.

⁶⁴ Exhibit C-2; and Respondents’ Counter-Memorial at ¶¶15-16.

commenced operations. The ambient air lead concentrations reported for the years 1994 through 1996, the first years that routine air monitoring was conducted at the Complex, clearly understated the actual concentrations of lead in the air near the Complex. Figure 6 in Respondents' Counter Memorial includes these same incorrect data, suggesting that air quality was pristine prior to DRP and worsened immediately upon commencement of their operations. Key points regarding the unreliability of the early monitoring data are summarized below:⁶⁵



96. The air monitoring data reported for 1996 suggests that the air at that time was as clean or cleaner than it was at any later time during DRP's operations,

⁶⁵ Connor Supp. Report at p. 19.

despite DRP's installation of major emissions reduction systems costing hundreds of millions of dollars over the period of 1998 to 2007.⁶⁶

97. First-hand observations of air quality conditions in the period of 1994 to 1996 indicate that the air was, in fact, very polluted, as was also famously captured in Newsweek Magazine and as also reported by Knight Piesold.⁶⁷

98. Knight Piesold reported in 1996 that:

Airborne emissions of sulfur-dioxide (SO₂), metals, and PM-10 particulate matter are high and exceed generally accepted international standards. CENTROMIN has plans to evaluate control methods that will modify processing and facility operations in order to comply with future air quality standards. However, remedial actions to bring the facility into compliance with proposed Peruvian standards and generally accepted world standards would involve a significant capital expenditure.⁶⁸

Centromin was unwilling or unable to make that “significant capital expenditure.” DRP did.

99. Also, in the period of 1994 to 1996, lead emission rates from the main stack were in the range of 800 to 900 tons per year, roughly comparable to levels observed in 1998 to 1999, during DRP's operations. However, the reported ambient air lead concentrations in 1994 to 1996 are over five times lower than those reported in 1998 to 1999 – which is a physical impossibility – as illustrated by the bubble machine analogy. In fact, ambient air quality generally correlates with air emission

⁶⁶ Connor Supp. Report at §3.2.4.

⁶⁷ Exhibit C-2; Exhibit C-108.

⁶⁸ Exhibit C-108.

rates, and very low ambient lead concentrations cannot reasonably occur during periods of high emissions.⁶⁹

100. Simply put, the data shows that the 1994 to 1996 ambient air monitoring data is unreliable. Consequently, Mr. Dobbelaere's modeled analysis of "lead losses" from the Complex during DRP's operations using such data as his baseline is equally unreliable.⁷⁰

101. Mr. Dobbelaere's analysis is further compromised because it purports to present a model developed by a separate consulting firm. SX-EW developed a "mass balance" calculation that purports to predict the "indeterminate lead losses" that escaped the Complex as fugitive emissions.⁷¹

102. This so-called calculation purports to demonstrate that the air emissions records issued by Activos Mineros itself are in error and that, despite the emission reduction measures implemented by DRP, total plant emissions somehow increased dramatically during DRP's tenure to levels far greater than Centromin's.⁷²

103. For instance, on the following plot, Mr. Dobbelaere attempts to juxtapose the "total" lead emissions levels calculated by SX-EW against the objectively measured main stack lead emissions, as recorded by Activos Mineros:⁷³

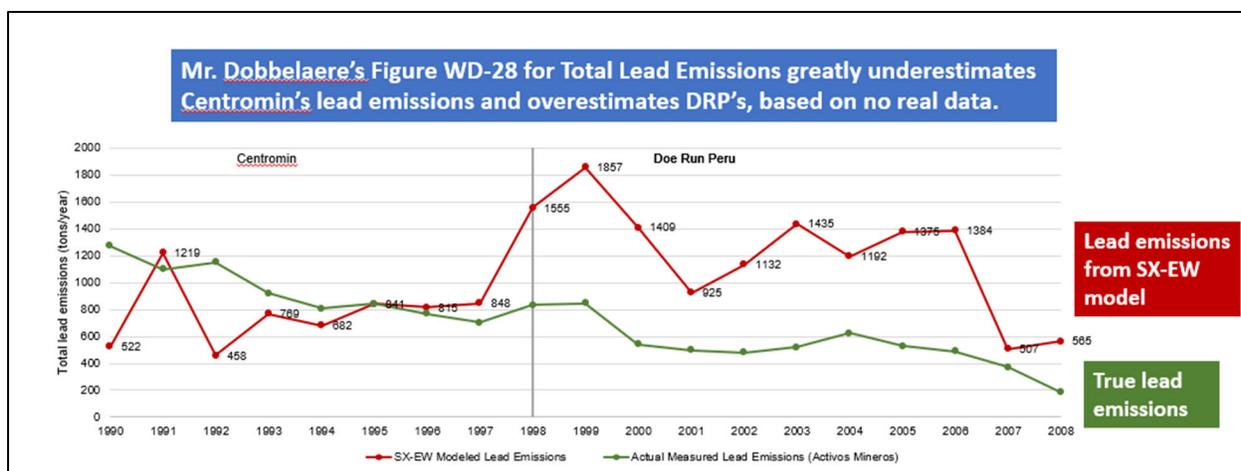
⁶⁹ Connor Supp. Report at p. 20.

⁷⁰ *Id.* at § 3.2.4, pp. 14-15.

⁷¹ *Id.* at p. 14.

⁷² *Id.* at p. 14.

⁷³ *Id.* at p. 14, Exhibit 3.3.



The SX-EW model indicates that Centromin's total lead emissions prior to 1997 were two-to-three times less than those under DRP.⁷⁴

104. The flaws in this analysis are readily apparent.

105. First, the total combined stack and fugitive emissions under Centromin cannot be less than the measured stack emissions alone, as suggested by the SX-EW model for the years 1990-95.⁷⁵

106. Second, as noted previously, during the time that the SX-EW model states that lead emissions were rising dramatically, actual air monitoring data shows that ambient lead levels were dropping. Lead emissions cannot possibly be increasing while ambient air lead is decreasing.⁷⁶

107. Third, both stack and fugitive emissions from the Complex dropped in unison as DRP implemented air emissions control projects to capture stray dust and

⁷⁴ *Id.* at p. 14.

⁷⁵ *Id.* at p. 15.

⁷⁶ *Id.* at p. 15.

direct it to the baghouses and electrostatic precipitators, where it was removed prior to exiting the main stack.⁷⁷

108. Finally, review of the various projects completed by DRP under the PAMA and in addition to the PAMA (as documented in the Presentation) shows that there is no action that was undertaken by DRP that could have reasonably increased fugitive emissions to such an extraordinary degree to have caused total emissions to increase while stack emissions were decreasing.⁷⁸

109. The SX-EW model results are simply contrary to known facts. Furthermore, their calculations are not presented in a manner that would facilitate independent review. Their analysis and Mr. Dobbelaere's related opinions cannot be considered reliable.⁷⁹

C. Respondents' argument that DRP failed to meet Peru's environmental standards is not the test for the PAMA Assumed Liabilities.

110. Respondents argue that Claimants did not meet the requisite environmental standards for levels of pollution. The Complex DRP inherited was so far out of alignment with Peru's environmental regulations when DRP took over operations that it took years for DRP to approach such limits. The relevant question here, however, is not whether DRP complied with Peru's environmental laws but only whether DRP's standards and practices were less protective than those of Centromin. There can be no real dispute that DRP's standards and practices were

⁷⁷ *Id.* at p. 15.

⁷⁸ *Id.* at p. 15.

⁷⁹ *Id.* at p. 15.

more protective than those of Centromin. Centromin did not implement *any* of the PAMA projects during its ownership; thus, it stands to reason that Centromin could *not* have utilized better, more protective standards and practices during its tenure.

111. But again, while it is “standards and practices” and not “results” that matter, the data concerning emissions and environmental conditions still proves Claimants’ position. For the reasons set out above, the objective, reliable evidence shows that toxic emissions steadily decreased under DRP’s ownership.

D. Toxicology: Fundamental Truth

112. Respondents’ toxicologist, Dr. Proctor, counters Claimants’ toxicologist, arguing that public health worsened under DRP.

113. It is a fundamental truth in toxicology, however, that there is a relationship between a toxic reaction (response) and the amount of poison received (the dose).⁸⁰ The lower the dose, the less the toxic reaction and *vice-versa*. Since there is a direct correlation between dose and response, the impact on public health can be determined simply by examining the dose, which in this case can be and has been objectively determined from the comprehensive record of emissions.

114. The objective, credible and Activos Mineros certified data indisputably shows a decrease in emissions. Less emissions mean a corresponding improvement in public health. Given this simple cause and effect, undersigned counsel sees no

⁸⁰ Connor Supp. Report at p. 21.

point in delving into the toxicology experts' reports and has eschewed submitting a rebuttal report from Dr. Rosalind Schoof.⁸¹

115. For these reasons and those set out in Claimants' Memorial, Activos Mineros is responsible for third party claims asserted against Claimants in the Missouri Litigation.

III. Claimants did not undercapitalize DRP and thereby impede DRP's completion of the PAMA.

116. Respondents' economics expert, Isabel Santos Kunsman, has submitted a report blaming Claimants for DRP's failure to complete the PAMA: had Claimants not caused DRP to lend \$125 million to its parents and/or not paid inter-company costs, it could have completed the PAMA, notwithstanding the collapse of the metal markets, financial markets, and general global economic crisis in 2008. According to Ms. Kunsman, DRP was "immediately undercapitalized" on "Day 1," was "handicapped," "never recovered" and was unable to make progress in meeting its PAMA obligations.⁸² These are remarkable conclusions, considering DRP spent \$313 million out of its own cash flow towards the completion of the PAMA projects.

117. Claimants submit a report from forensic accountant, Bryan Callahan of Forvis, that refutes Ms. Kunsman's conclusions.⁸³

⁸¹ Parenthetically, John Connor addresses the conclusions of Respondents' experts, Proctor, and Alegre, as part of his rebuttal. *See* Connor Supp. Report, generally.

⁸² First Expert Report of Isabel Santos Kunsman, MBA (April 1, 2022) ("Kunsman Report") at ¶137.

⁸³ Expert Report of H. Bryan Callahan CPA, April 21, 2023 ("Callahan Report").

A. The case for common sense.

118. Putting aside both sides' economics experts for a moment, common sense tips the scales in Claimants' favor.

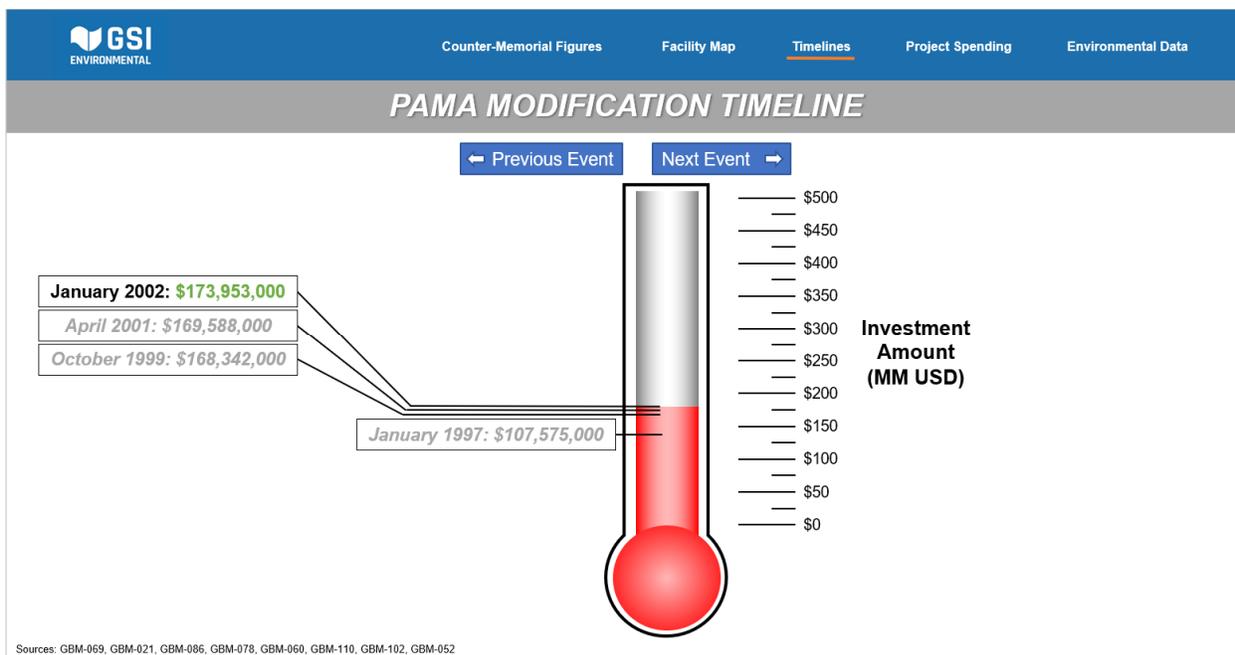
119. When DRP was forced into bankruptcy in the aftermath of the metal markets collapse in 2007-2008, it had spent \$313 million.⁸⁴ All the mathematical and analytical exercises submitted by Ms. Kunsman cannot obfuscate the reality: DRP was able to meet all its commitments before the global recession of 2008. And despite Ms. Kunsman's conclusory opinion that DRP experienced a "liquidity crisis" beginning "on Day 1,"⁸⁵ she did not identify a single PAMA project that DRP did not complete due to this alleged undercapitalization.

120. Underscoring the point, DRP met its commitments notwithstanding that the PAMA cost was an ever-moving target, trending only radically upward.⁸⁶

⁸⁴ Callahan Report at ¶26.

⁸⁵ Callahan Report at ¶3 and ¶28; Kunsman Report at ¶152.

⁸⁶ Connor Supp. Report, Exhibit 2.2, Appx. C.



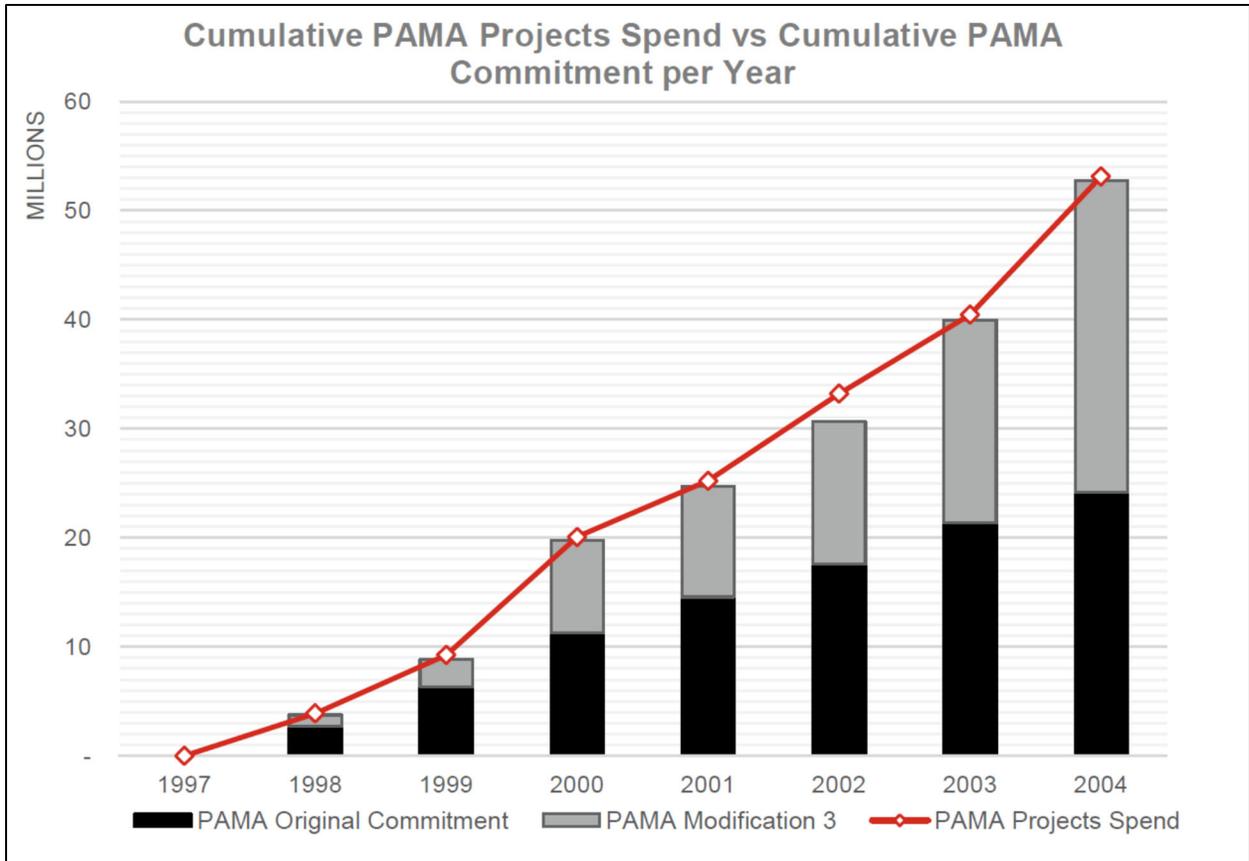
121. As illustrated in the chart above:

- The original PAMA forecasted a planned cost of \$107.5 million;
- October 1999 Amendment increased the anticipated cost to \$168.3 million;
- April 2001 Amendment further increased the cost to \$169.5 million;
- January 2002 Amendment pushed the planned cost to \$173.9 million; and
- 2006 Amendment more than doubled the cost to \$463 million.

122. Despite these ever-growing costs, DRP persevered in funding the projects. The following graph prepared by Claimants’ financial expert, Callahan, confirms that contrary to Ms. Kunsman’s conclusion that “DRP failed to allocate sufficient capital to fulfill its PAMA Projects”⁸⁷ DRP was not limited in its ability to fund the PAMA projects:⁸⁸

⁸⁷ Kunsman Report at ¶153.

⁸⁸ Callahan Report at ¶30.



123. And DRP’s spending was reflected in its progress. The first timeline covers PAMA projects nos. 1-3, comparing the Planned and Extended Timelines against Actual Construction.⁸⁹

⁸⁹ Connor Supp. Report, § 2.2, Appx. C.

PLANNED AND ACTUAL PAMA PROJECT EXECUTION TIMELINES

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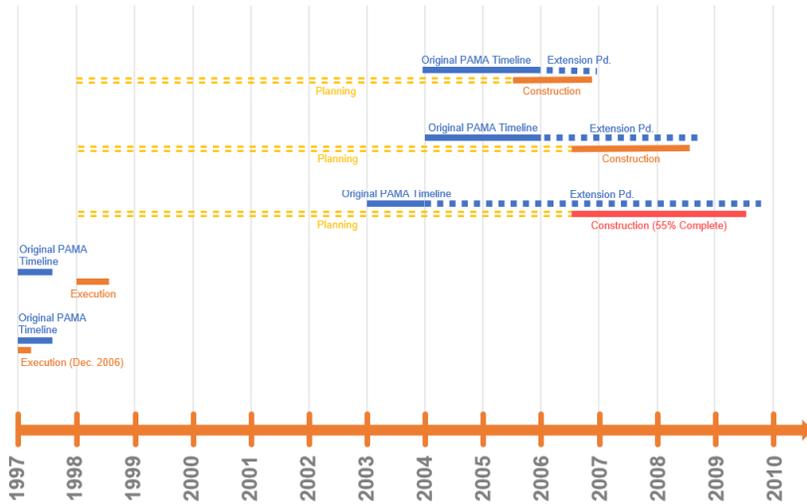
No. 1: Zinc Sulfuric Acid Plant

No. 1: Lead Sulfuric Acid Plant

No. 1: Copper Sulfuric Acid Plant

No. 2: Changes to Coking Plant

No. 3: Oxygen Gas Use in Anodic Waste Plant



[Next](#)

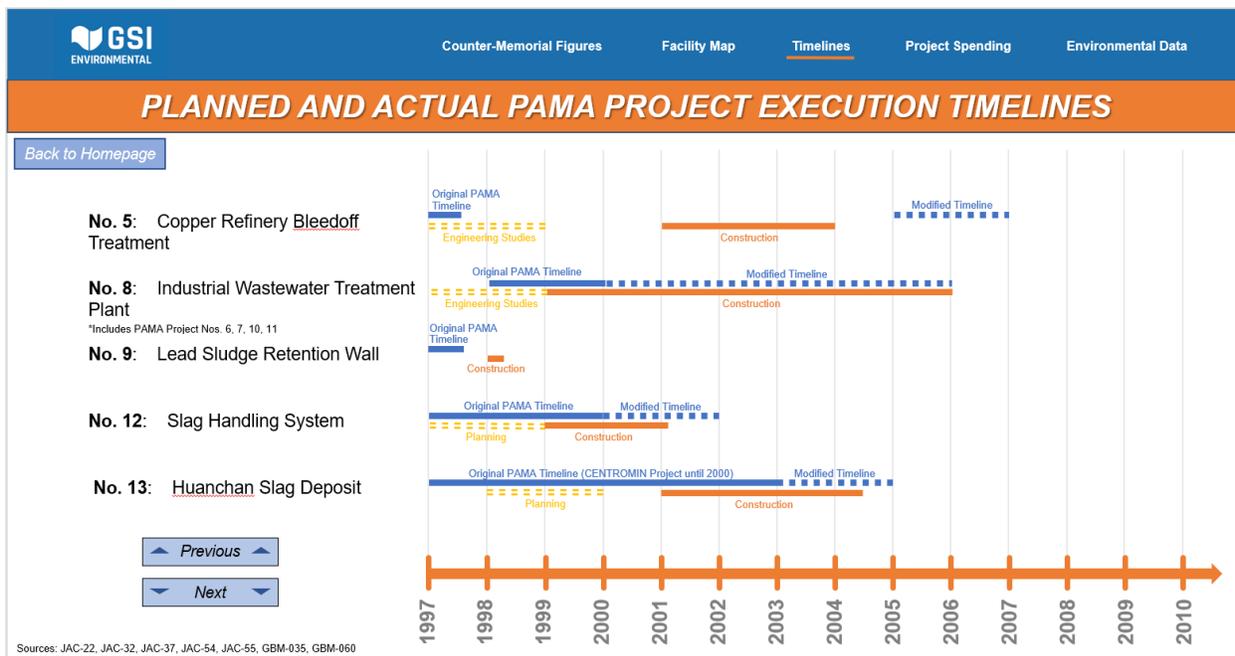
Sources: JAC-22, JAC-32, JAC-37, JAC-54, JAC-55, GBM-035, GBM-060

The zinc and lead sulfuric acid plants finished on schedule, as did the changes to the coking plant and oxygen gas used in the anodic waste plant. As discussed below, while the copper sulfuric acid plant project was 55 percent complete at the expiration of the PAMA, it also required much more than the mere installation of the plant itself; it required extensive reworking of the copper smelting processing system. None of this additional work (or significant, attendant cost) was contemplated at the time of the original PAMA.⁹⁰

124. The next timeline covers projects 5, 8, 9 and 12-13:⁹¹

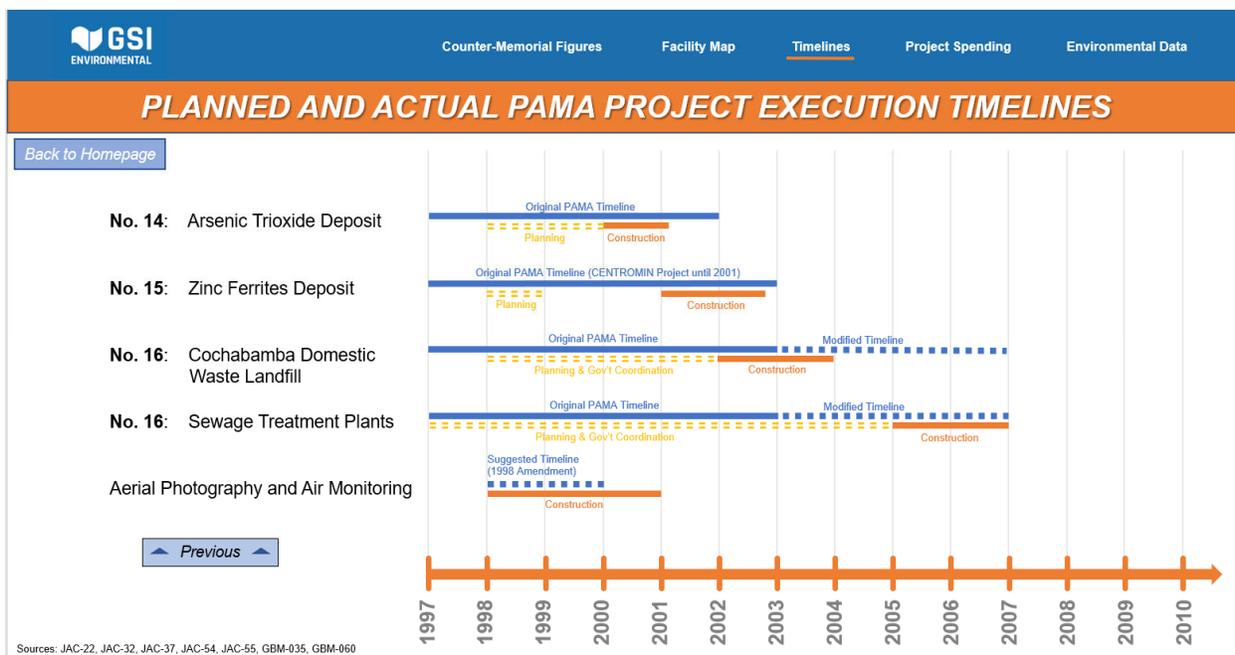
⁹⁰ Memorial at ¶145.

⁹¹ Connor Supp. Report at § 2.2, Appx. C.



Of these, the industrial wastewater treatment was a consolidation of PAMA projects 6-8 and 10-11. It was a major undertaking spanning eight years.

125. The next timeline covers projects 14-16:⁹²



⁹² *Id.*

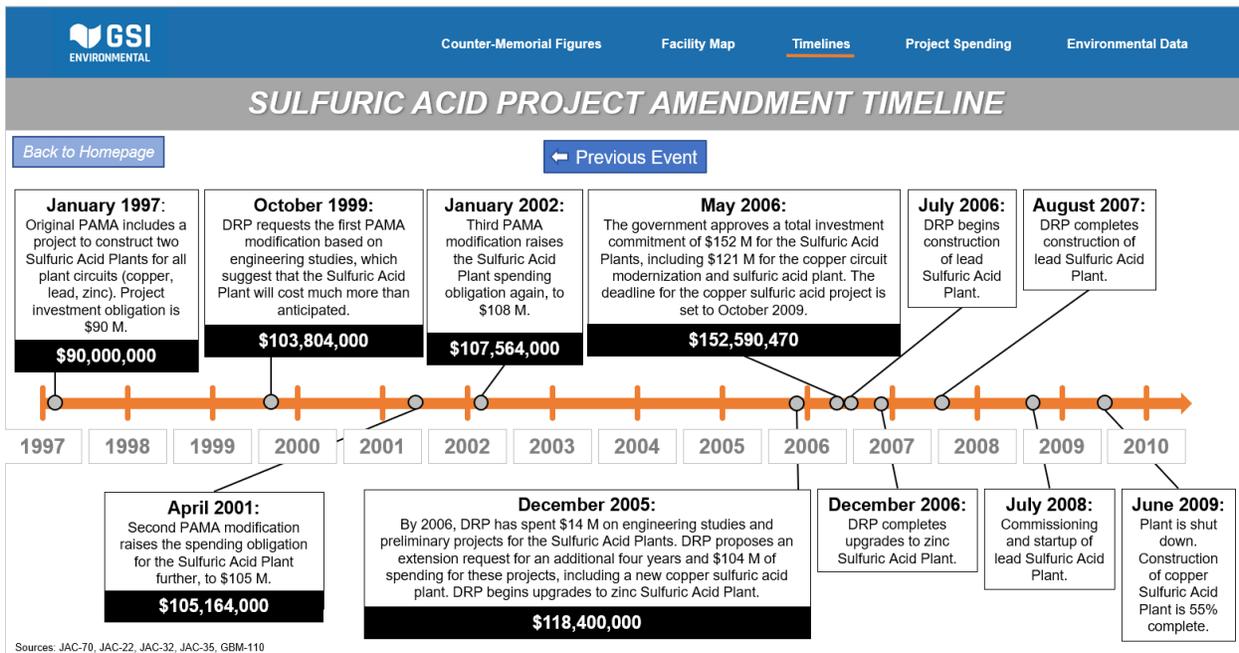
126. As mentioned above, it is true that DRP had not completed the Copper Circuit sulfuric acid plant – the last of the three plants DRP installed – as of January 2007, the time of the original PAMA’s expiration. However, DRP obtained an extension of the PAMA deadline in 2006, and by the fall of 2008, DRP had made substantial progress on the Copper Circuit sulfuric acid plant project, which required DRP both to redesign and overhaul its copper smelting process and to construct another new sulfuric acid plant. The redesign was necessary because the proposal developed by Centromin and approved by MEM in the PAMA was unworkable. In fact, it was only through the substantial and costly engineering work undertaken by DRP and its engineering team that it was discovered that the sulfuric acid plants initially specified under the PAMA were impracticable for capturing and recovering SO₂ emissions.⁹³ Rather, to achieve adequate reductions, major modifications were required and, in fact, independent acid plants for each of the three metal circuits would be necessary—*i.e.*, three sulfuric acid plants, not the two originally specified. In effect, the inadequate engineering work undertaken by Centromin required DRP to restart from scratch.

127. DRP had completed the detailed engineering work for the redesign of its copper smelting operations. DRP had issued more than 90 percent of the purchase orders for the work on this project, including for a new state-of-the-art furnace. DRP had contracts for all preliminary and structural work and had issued RFPs for the final installation of the remaining mechanical and electrical equipment. Moreover, DRP was making substantial progress on the actual construction of the

⁹³ *Id.* at Appx. C (Slide 178 and sources, JAC-70, JAC-22, JAC-32, JAC-35, GMB-110).

reconfigured copper smelting facility, having completed more than 25 percent of the total construction work, including about 55 percent of the site work and almost 40 percent of the structural work.⁹⁴

128. The following timeline confirms (i) the increasing budgets for the sulfuric acid plants; (ii) the evolution of the acid plant designs from two-to-one-to-three separate acid plants; and (iii) that DRP did not sit on its hands but was actively studying, designing, redesigning, and constructing the plants throughout the life of the PAMA.⁹⁵



129. In short, despite Respondents’ efforts to portray Claimants as perpetually delaying the portion of the PAMA related to the sulfuric acid plants, the objective evidence illustrates that Claimants began work almost immediately and continued those efforts, at great expense, effectively until shut down in 2009. None of these

⁹⁴ Claimants’ Memorial at p. ¶90.

⁹⁵ Connor Supp. Report at p. 5, § 2.2, Appx. C.

things could have occurred when and as they did if Claimants had looted the assets of DRP, as Respondents more than suggest.

B. Callahan's Conclusions

130. Mr. Callahan's analysis reaches the same conclusions utilizing metrics commonly applied in business valuations.

131. The acquisition of Metaloroya was in part financed through a \$225 million credit agreement with Bankers Trust Company. DR Cayman, DRM, and DRP were the grantors of the credit agreement. The funds of the loan were used to make a capital contribution to Metaloroya. According to the Third Clause of the Stock Transfer Agreement, DRP was under no obligation to maintain the capital contribution of \$126.4 million in cash.⁹⁶

132. Metaloroya lent \$125 million to DRM, on October 23, 1997. The date on which DRP merged with DRM. Upon completion of the merger, DRRC successfully transferred its debt obligation to DRP. Ms. Kunsman concludes that this transfer of the debt "...immediately undercapitalized DRP to fund its PAMA Commitments."⁹⁷

133. The notion that this debt somehow impaired DRP's liquidity lacks any rational basis, as DRP never made any payments of principal or interest on this debt.⁹⁸ Further, as Ms. Kunsman's own current ratio analysis shows, DRP's current

⁹⁶ Callahan Report at ¶30.

⁹⁷ *Id.* at ¶29.

⁹⁸ DRP never made any payments of principal or interest on the debt as DRP was not obligated to do so until the sulfuric acid plants portion of the PAMA was satisfied. Since the projects were not completed in their entirety, DRP never made any payments on the note. Callahan Report at ¶30.

assets were sufficient to cover current liabilities during the six years following the acquisition and Stock Transfer Agreement.⁹⁹

Figure 17. DRP's Current Ratio ¹²⁷

Financial Ratios ^[A]	----- Early Years -----						----- Latter Years ----->							
	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
Doe Run Peru	2.4x	2.7x	1.7x	1.2x	1.7x	0.9x	0.4x	0.5x	0.8x	0.9x	1.0x	0.8x	2.4x	2.1x
Minsur	4.3x	2.0x	3.2x	5.0x	6.5x	14.6x	3.9x	10.0x	11.1x	7.5x	3.7x	1.4x	2.3x	3.1x
Nexa Resources Perú	NA	1.1x	2.1x	0.7x	2.0x	0.8x	1.6x	1.5x	1.6x	1.3x	0.7x	1.5x	1.8x	1.5x
Sociedad Minera El Brocal	1.0x	0.7x	0.6x	0.4x	0.7x	0.4x	0.9x	1.6x	2.7x	4.7x	10.4x	7.8x	3.0x	3.1x

¹ Figure 17. DRP's Current Ratio was extracted from the Kunsman Report. I have highlighted the weakest current ratio of each year in red.

134. Nor does Ms. Kunsman provide support for her conclusions that “as of 31 October 1998, the Metaloroya Loan remained unpaid, continuing to deprive DRP of US \$125 million in capital it needed to fulfill the PAMA Commitment.” Payments made by DRP to fund the PAMA projects contradict this statement entirely.¹⁰⁰

135. Ms. Kunsman implies that “inter-company agreements” were a sham designed to drain DRP of its assets.¹⁰¹ Ms. Kunsman overlooks that such agreements are routine between parent and subsidiary companies, and that they provide access to services for the subsidiary that otherwise the subsidiary would have to contract separately and at greater cost.¹⁰²

136. Ms. Kunsman performed no analysis of the related party transactions. Had she, she would have seen that DRP benefitted from these inter-company

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at ¶32.

¹⁰² *Id.* at ¶36.

agreements, including the receipt of a host of services and significant access to international markets for DRP’s product sales. DRP’s international sales increased from 55 percent to 85 percent the year after the inter-company agreements were put into place, effectively allowing DRP to ramp-up its sales.¹⁰³

137. Even assuming for the sake of argument that the inter-company agreements served no *quid pro quo* value to DRP, the related party transactions had little-to-no impact on DRP’s liquidity position during the years the related party transactions were incurred. The intercompany agreements did not “[represent] a significant liquidity drain,” as Ms. Kunsman asserts in her report, but rather amounted to a de minimis percentage of DRP’s total expenditures. The following table illustrates the point, comparing Related Party Payments as a percentage of Total Expenses:¹⁰⁴

	1998	1999	2000	2001	2002	2003	2004
Total Expenses	\$ 413,889	\$ 439,748	\$ 476,632	\$414,156	\$425,736	\$453,447	\$563,487
Related Party Payments	20,300	23,984	26,446	9,322	9,077	9,550	7,868
% of Total Expenses	4.90%	5.45%	5.55%	2.25%	2.13%	2.11%	1.40%

138. While analyzing the payments over the years 1998 to 2006, Ms. Kunsman makes a point to discuss the cumulative total of \$106.5 million. However, the related party expenses drop in 2001 and continue to decrease until 2004. Between the years 2005 through 2007 (the years immediately preceding the global financial crisis), DRP has no related party expenses.¹⁰⁵ But more to the point, even during the “Early Years” (which Ms. Kunsman defines as 1999 through 2002), when

¹⁰³ *Id.* at ¶35.

¹⁰⁴ Callahan Report at ¶ 38.

¹⁰⁵ *Id.* at ¶37.

monies spent on related party agreements, financing fees, interest, and long-term debt were highest, DRP still had sufficient cash to meet the PAMA Commitment.¹⁰⁶ The “burden” cited by Ms. Kunsman simply finds no support in the objective data.¹⁰⁷

139. Moreover, as covered extensively in the Memorial, Claimants were willing to provide a bail-out of DRP during the global recession had MEM been willing to permit DRP a reasonable time to spend the remaining cost completing the PAMA. MEM refused.¹⁰⁸

140. In sum, Respondents’ attempted character assassination of Claimants and DRP does not pass muster. It is a diversion from the relevant issues.

IV. Claimants were denied justice.

141. MEM became the largest creditor in DRP’s bankruptcy when it asserted a credit for \$163 million. MEM claimed entitlement to this credit under the Supreme Decree No. 016-93. The amount was “estimated” by MEM as that necessary to complete the PAMA.¹⁰⁹

142. DRP challenged the legality of the asserted credit. What followed was an initial decision by INDECOPI in favor of DRP followed by years of appeals to numerous higher courts between 2010 and 2014, all of which are detailed in the Memorial. The upshot is that the appeals courts found that INDECOPI had

¹⁰⁶ *Id.* at ¶43.

¹⁰⁷ *Id.*

¹⁰⁸ *See, e.g.*, Claimants’ Memorial at ¶¶107, 142 and 223; C-111.

¹⁰⁹ Expert Report of Daniel Schmerler (January 5, 2021) (“Schmerler Expert Report”) at ¶219.

jurisdiction to determine that DRP breached its PAMA obligations, entitling MEM to compensation, and to fix an amount of compensation at \$163 million.¹¹⁰

143. The decision by the Peruvian administrative courts that DRP owed MEM compensation under the Supreme Decree No. 016-93 and that INDECOPI could determine the quantum of damages had no precedents.¹¹¹

144. INDECOPI is a public entity of an administrative nature, within which there are two resolute instances in bankruptcy matters (the Commission as the first instance and the Court as the superior administrative instance) whose authority derives from the Peruvian Administrative Code (which in Peru is the General Administrative Procedure Law).¹¹²

145. That the courts knowingly exceeded the scope of their jurisdiction to uphold MEM's credit for political reasons is made clear given two later bankruptcies. *Compañía Minera Quiruvilca S.A.* ("Quiruvilca")¹¹³ and *Compañía Minera Aurifera Santa Rosa S.A.* ("Aurifera")¹¹⁴ were mining companies subject to bankruptcy proceedings, just like DRP. As part of their obligations under the Supreme Decree No. 016-93 and corresponding PAMA, they were required to issue guaranties in the amount of approximately \$17 million and \$6 million, respectively,

¹¹⁰ Rebuttal Report of Daniel Schmerler (May 1, 2023) ("Schmerler Rebuttal Report") at ¶3.

¹¹¹ *Id.* at ¶27.

¹¹² *Id.* at ¶15.

¹¹³ *Id.* at ¶76.

¹¹⁴ *Id.*

to ensure compliance with their Mine Closure Plans. Both filed for bankruptcy in 2018 without having provided the required guaranties.

146. MEM claimed a credit in each of the bankruptcy proceedings for the amount of the unfunded guaranties. INDECOPI denied MEM's claim for a credit in both instances.¹¹⁵

147. In two separate but very similar opinions, the Court of Defense of Competition and Intellectual Property confirmed INDECOPI's decision, holding that neither the Supreme Decree No. 016-93 nor the PAMA entitled MEM to recover as damages the amount of the guaranties because it was unknown whether the guaranteed sums resembled the actual cost to close the mines and that, in any event, that the administrative courts lacked the authority to determine this issue.¹¹⁶

148. Simply put, the administrative courts refused to recognize MEM's claim on liquidated amounts on unfunded guaranties in these cases. But the courts recognized MEM's credit against DRP based on a contested claim "estimated" by MEM.

149. Such treatment of DRP constitutes a denial of justice under ICSID precedent.

150. In *Dan Cake S.A. v. Hungary*, ICSID Case No. ARB/12/9,¹¹⁷ a Portuguese company Dan Cake acquired a majority of shares in a Hungarian company, later

¹¹⁵ *Id.* at ¶3.

¹¹⁶ Schmerler Expert Report at §IV.3.3.C.

¹¹⁷ CLA-142, *Dan Cake S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability, 24 August 2015.

renamed Danesita, whose business consists in supplying biscuits and cookies in Eastern Europe, Southern Europe, and Scandinavian countries.

151. In 2006, Danesita’s creditors filed bankruptcy proceedings against the company for unpaid debts. With the help of Dan Cake, Danesita was in the process of concluding agreements with its creditors to avoid liquidation. Danesita asked the Metropolitan Court of Budapest to convene a “composition hearing,” at which Danesita hoped its creditors would vote in favor of restructuring rather than liquidation.¹¹⁸

152. The Metropolitan Court denied the request and instead ordered Danesita, among other things, to place into an escrow account an amount sufficient to satisfy all creditor claims – present and future. When Danesita failed to satisfy this and other conditions, the court liquidated the company without ever having conducted the composition hearing.¹¹⁹

153. The arbitral tribunal determined:

It is impossible at this stage, for the Tribunal to determine whether a composition agreement would have been reached if a composition hearing had been convened. However, one thing is certain: whatever the chance of a successful composition hearing, it was destroyed by the Bankruptcy Court’s decision to refuse to convene a hearing within 60 days, as required by law. It also results from the above analysis of the decision that it was rendered in flagrant violation of the Bankruptcy Act and that it purported to condition the mandatory convening of a hearing upon several requirements, all of which were unnecessary; two of which were in direct violation of Dan Cake’s creditor rights; and at least one of which was impossible to satisfy within a reasonable time. ... [It is] the Tribunal’s considered view a

¹¹⁸ *Id.* at ¶2.

¹¹⁹ *Id.*

manifest sign that the Court simply did not *want*, for whatever reason, to do what was mandatory.¹²⁰

154. Because the Hungarian Bankruptcy Court ignored its obligations to the detriment of Danesita, the Tribunal found a breach of the Bilateral Investment Treaty requiring fair and equitable treatment, in the form of a denial of justice.¹²¹

155. The facts of *Dan Cake* are similar to the case at bar. The Peruvian administrative appellate courts should have acknowledged their constitutional limitations that they had no jurisdiction to determine any amount of so-called credit that MEM could assert in the bankruptcy of DRP. For whatever reason, they did not want to do what was mandatory.¹²²

156. The result was that MEM controlled the bankruptcy proceedings, and as discussed below, rejected all Plans of Reorganization, insisted on conditions that made DRP's ability to reorganize impossible, and spearheaded the push to liquidation.

157. In sum, the Peruvian administrative courts and MEM (both belonging to the Peruvian state, of which INDECOPI and MEM are part) worked arm-in-arm to deny Claimants justice. The strong-arm tactics continue to this day. Indeed, INDECOPI recently rejected Doe Run Cayman's challenge and objection to the sale of the assets.

¹²⁰*Id.* at ¶142.

¹²¹ *Id.* at ¶161.

¹²²*Id.* at ¶142.

V. Claimants lost their investment because of this denial of justice.

158. With respect to causation, international tribunals have held that a claimant must establish a “sufficient link between the wrongful act and the damages in question” that is not too remote or inconsequential. *See Biwater v. Tanzania*, ICSID Case No. ARB/05/22.¹²³

159. As with this case, *Dan Cake* was a bifurcated arbitration – jurisdiction and liability in the first proceeding, and quantum in the second. In its decision on liability, the Tribunal was faced with the question of whether Danesita would have been able to reach agreement with its creditors but for the Bankruptcy Court’s improper intervention. The Tribunal there ruled:

Having concluded that, by virtue of the conduct of the Metropolitan Court of Budapest, Hungary breached its obligations under the Treaty, there is then a question as to the consequences of this breach. In particular, there remains an issue as to the extent (if at all) that the breach caused any loss to the Claimant, which in turn will depend *inter alia* upon whether the Court’s decision was the operative factor that prevented the conclusion of a settlement with all creditors; and whether, had a composition hearing been convened, a composition agreement would have been concluded. Further assuming the establishment of a causal link, there remains the issue as to the quantification of any damages. All of these matters are reserved for subsequent determination.¹²⁴

160. Whereas the Tribunal in *Dan Cake* considered causation part of the second proceeding, it is not clear to Claimants whether that holds true for this case. Out of an abundance of caution, Claimants present their case for causation, while reserving

¹²³ CLA-143, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/022, Award, 24 July 2008, ¶785.

¹²⁴ CLA-143, ¶161. A Final Award incorporating findings on causation and damages, if any, has not been published on Westlaw.

their right to supplement their evidence in response to Respondents' Rejoinder in the second proceeding.¹²⁵

161. On March 29, 2012, Glencore – one of DRP's largest creditors – and DRP agreed on a Plan of Reorganization, pursuant to which DRP would have access to credit facilities totaling \$200 million. DRP would use the lines of credit to help in completing its PAMA obligations, repaying outstanding debts to its suppliers, and in providing working capital to restart the Complex. The Plan was subject to approval by a majority of the creditor's committee and to MEM's agreement to a 30-month extension to complete the sulfuric acid plant. DRP revised the Plan on April 11, 2012, and again on May 14, 2012, to meet MEM's objections, without success. MEM's press for liquidation remained unchanged throughout.¹²⁶

162. MEM will undoubtedly argue that it was all the creditors, not just MEM, which drove liquidation. However, the only objections lodged to the Plan were those by MEM.¹²⁷

163. In its letter to Renco, dated July 13, 2012, MEM wrote in part:

To date, DRP's creditors have not received a proposal for a reasonable Restructuring Plan that takes into account the central observations that the Ministry as creditor has transmitted to them from the beginning. As we indicated to you, both in meetings and in written media, in the version of the Restructuring Plan of May 14, 2012, its representatives still did not absolve the central issues, and rather they maintain unviable positions of the latest Restructuring Plans. This prevented a solution by not accepting DRP critical aspects, such as the plant operating in compliance with current environmental standards, which prevents a La Oroya Metallurgical

¹²⁵ CLA-142.

¹²⁶ Claimants' Memorial at ¶143.

¹²⁷ See Meeting Minutes of Creditors, Exhibits C-197 to C-198, C-231, R-107 to R-113, R-115 to R-118, R-120, R-122 to R-124, R-126 to R-127, R-146, R-234.

Complex operation compatible with the interest of workers and the community. The creditors and the Ministry still hope that these points can be resolved.¹²⁸

164. No support can be found in any of the minutes from the meetings of the creditors committee for MEM's statement that creditors (other than MEM) insisted that DRP comply with current environmental standards.¹²⁹

165. The circumstantial evidence supports the conclusion that MEM, as the largest creditor and as the supervisory authority over all the creditors, used its position to insist on measures that were arbitrary and unfair.¹³⁰

166. For context, it is important to start with the 2009 Extension, which has already been covered in detail in the Memorial. A quick synopsis is that the 2009 Extension evolved from MEM's initial denial of DRP's request for an extension; to Congress' override of MEM by granting DRP's request for a 30-month extension to April 2012; to MEM's imposition of a condition that would make DRP put into a trust all of its revenues from operations, which condition made the extension meaningless because no one would finance DRP under such a condition; to DRP's cessation of operations even before the extension was even granted; to MEM's about-face in removing its conditions, but only when DRP had no time to obtain financing to complete the sulfuric acid plant for the copper line.¹³¹

¹²⁸ Exhibit R-116.

¹²⁹ See Meeting Minutes of Creditors, Exhibits C-197 to C-198, C-231, R-107 to R-113, R-115 to R-118, R-120, R-122 to R-124, R-126 to R-127, R-146, R-234.

¹³⁰ *Id.*

¹³¹ Claimants' Memorial at ¶¶196-198.

167. Even with all this rigmarole, the original PAMA, as amended, permitted DRP to operate while performing the PAMA and operate within a lenient sulfur emission standard of 365 $\mu\text{g}/\text{m}^3$ SO₂ for the life of the PAMA.¹³²

168. But as of March 2012, MEM decided to change the rules completely. It insisted that the PAMA be completed before the start-up of operations and that the Complex upon start-up immediately meet 2012 environmental standards (80 $\mu\text{g}/\text{m}^3$ SO₂). MEM made these demands knowing that without operations, DRP could not generate the revenues necessary to make its payments under the Plan of Reorganization and that it would also take more time and work to upgrade the Complex – yet again – to meet the more stringent 2012 environmental standards.¹³³

169. Later events reveal that MEM's reasons for rejecting DRP's Plan of Reorganization were disingenuous. After DRP was liquidated, in November 2014, 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. The IGAC granted DRP's successor in liquidation, The Right Business, 14 years to bring Metaloroya into compliance with new emissions standards.¹³⁴

170. Moreover, MEM has implemented regulatory changes to make compliance easier for the creditors operating the Complex. These include a change to the way

¹³² Claimants' Memorial at ¶151.

¹³³ Claimants' Memorial at ¶144.

¹³⁴ Expert Opinion of Gino Bianchi Mosquera, D.Env., P.G. Concerning Certain Environmental Issues Associated with the La Oroya Metallurgical Complex, Junin, Peru (February 8, 2021), §4.3, pp. 30-31.

in which ambient SO₂ concentrations are calculated for high altitude operations — a change that DRP itself requested and MEM rejected prior to its takeover of the Complex.¹³⁵

171. Moreover, despite MEM's insistence that DRP meet the 80 µg/m³ for SO₂ standard immediately upon restarting the Complex, in 2017, the government relaxed the environmental standards a new operator would have to comply with and adopted a 250 µg/m³ standard.¹³⁶

172. Moreover, if the Tribunal is curious about what became of the last of the sulfuric acid plants that was 55 percent completed before the shut-down of the Complex over the past ten years, the answer is nothing. The materials remain at that location today, and the current operators have not undertaken the completion of this project.¹³⁷

173. Had MEM's \$163 million so-called credit been disallowed, MEM would not have been the majority creditor with the majority vote in the creditor's committee.¹³⁸

174. Had MEM not insisted on conditions it knew were unreasonable in granting a 30-month extension (one which had previously been given but not used), the Plan of Reorganization would otherwise have received no objections.¹³⁹

¹³⁵ Claimants' Memorial at ¶149.

¹³⁶ Claimants' Memorial at ¶151.

¹³⁷ Connor Supp. Report at p. 10, §3.1.

¹³⁸ Claimants' Memorial at ¶139 and ¶291.

¹³⁹ Claimants' Memorial at ¶237.

175. Had the Plan of Reorganization been put to vote, rational business creditors would have voted in favor of the Plan of Reorganization, which would have paid DRP's debts to them.¹⁴⁰

176. Had the Plan been approved, DRP would have had the financial wherewithal to complete its PAMA obligations without stress on the company and would have generated revenues of \$611,307,929 in 2009 alone.¹⁴¹

177. Had the creditors voted in favor of reorganization, Claimants would not have lost their investment.¹⁴²

178. The only difference between the facts of this case and those of *Dan Cake* are that in *Dan Cake*, the bankruptcy court alone both denied justice and may have caused damages (to have been determined in the next proceeding), while in this case, the Peruvian administrative courts denied justice, and MEM used the denial of justice to cause damages.

VI. Claimants' Contract Claims.

179. The crux of the disagreement between the Peruvian contract experts concerns whether the Stock Transfer Agreement constitutes of two separate contracts, rather than one, integrated agreement. If the Stock Transfer Agreement is a single, integrated agreement, then Claimants and Respondents are parties to its provisions and can enforce their contractual rights.¹⁴³

¹⁴⁰ Claimants' Memorial at ¶291.

¹⁴¹ Callahan Report at ¶¶75-76 ("had the extension been granted, DRP would have been able to complete the remaining PAMA projects by this deadline...").

¹⁴² Claimants' Memorial at §II(I).

¹⁴³ Payet Supp. Report generally.

180. Dr. Payet opines that the Respondents' position that the Stock Transfer Agreement consists of two legal acts is artificial, arbitrary, and ignorant of the nature of corporate transactions.¹⁴⁴

181. There is one single agreement (i.e., the Stock Transfer Agreement). It is a complex contract that regulates several obligations, binding several companies and creating several legal relationships:¹⁴⁵

- A relationship between Centromin and DRP regarding the transfer of shares and the payment of the purchase price.
- A relationship between Metaloroya and DRP for the issuance and subscription of new shares.
- A relation between Centromin, DRP and Metaloroya regarding future investments.
- A relationship between Centromin and Metaloroya regarding environmental management obligations (PAMA).
- A relationship between Centromin, Metaloroya, DRP, Renco and DRR regarding confidentiality obligations.
- A relationship between Centromin and DRP, Renco and RR regarding non-competition.
- A relationship between Renco and DRR to guarantee the obligations of DRP.
- A relationship between Centromin and every other party regarding its assumption of responsibility for past environmental liabilities, as well as those liabilities to be generated during the performance of Metaloroya's PAMA.

182. These legal relationships are part of one legal program with a shared concrete cause: the segregation, capitalization and sale and future operation of the

¹⁴⁴ Payet Supp. Report at ¶130.

¹⁴⁵ *Id.* at ¶¶137-139, ¶149.

Complex.¹⁴⁶ They are all linked through a functional relationship, as all are part of the scheme designed by the parties to turn the sale into a reality.

183. Respondents' position totally ignores that, under Peruvian law and civil law in general, things are what they are and not what they are said to be. The principle of the irrelevance of the *nomen iuris* implies that the parties cannot, using denominations, affect the legal reality. The Respondents and their contracts expert, Mr. Varsi, ignore the aforementioned principle, instead arguing that DRR and Renco are not parties, since the heading of the notarial recorded instrument names them as intervening parties and the heading of the private draft instrument does not incorporate them.¹⁴⁷

184. As Dr. Payet opines, this argument is plainly incorrect. A contracting party is one that has expressed its will in a contract to receive obligations and/or rights. It is irrelevant whether, in the contract, they are referred to as parties or by any other denomination. Renco and DRR meet these two requirements. Metaloroya was also not referred to as "party" and no one could reasonably deny its condition as such.¹⁴⁸

185. There is no doubt that Renco and DRR expressed their will and gave their consent to the Stock Transfer Agreement. Renco and DRR participated in the execution of the Contract by expressly consenting to it. Mr. Jeffrey L. Zelms appeared before the Notary, on behalf of DRR, and Mr. Marvin N. Koenig appeared on behalf of Renco. In both cases, the details of the corresponding powers

¹⁴⁶ *Id.* at ¶140.

¹⁴⁷ *Id.* at ¶143.

¹⁴⁸ *Id.* at ¶144.

of attorney appear in the notarial recorded instrument. Both representatives were instructed of the contents of the contract by the Notary and they duly signed the Stock Transfer Agreement.¹⁴⁹

186. Claimants' contract interpretation arguments should prevail, requiring Respondents to indemnify Claimants for any liability on the Missouri Plaintiffs' claims.¹⁵⁰

187. And, in the event Respondents continue to insist that Claimants arbitration must be dismissed for the alleged failure to comply with an expert determination, Claimants hereby incorporate by reference their prior submissions to the Tribunal on the subject.¹⁵¹

CONCLUSION

188. For the reasons set forth herein and in Claimants' Memorial, Claimants request an award, inter alia, granting it the following relief:

189. A declaration that Respondents violated the fair and equitable treatment standard under Article 10.5 of the Treaty, because of (i) Respondents' unwarranted delay in granting, and subsequent undermining of, DRP's extension of time to finish its final PAMA project; and (ii) Respondents mistreatment of Claimants in connection with DRP's restructuring plans.

190. A declaration that Respondents have violated Article 10.7 of the Treaty by unlawfully expropriating Claimants' investments.

¹⁴⁹ C-105 (Stock Transfer Agreement); Payet Supp. Report at ¶145.

¹⁵⁰ Payet Supp. Report at ¶7(i).

¹⁵¹ See generally Claimant's Memorial.

191. A declaration that Respondents have violated Article 10.5 of the Treaty due to their failure to invalidate MEM's patently improper US\$ 163 million credit against DRP, which constitutes a denial of justice.

192. A declaration that Peru and Centromin/Activos Mineros breached the Stock Transfer Agreement and/or the Guaranty Agreement by failing to assume liability for third-party claims and damages for which they are responsible and by refusing to defend Resolution Directorial No. 334-97-EM/DGM, Oct. 16, 1997 and indemnify the Renco Consortium members and related entities and individuals in the personal injury St. Louis Lawsuits.

193. A declaration that Peru and Centromin/Activos Mineros breached the Stock Transfer Agreement and/or the Guaranty Agreement by failing to remediate the soil in and around La Oroya.

194. In the alternative, a declaration that, if Claimants are found liable and are ordered to pay damages in the St. Louis Lawsuits, Claimants are entitled to recover from Respondents all the amounts that Claimants may, or may be forced to, pay as damages in satisfaction of any judgment in the St. Louis Lawsuits, under the Peruvian legal theories of subrogation, contribution, and/or unjust enrichment.

195. A declaration that Peru has violated international law by failing to honor its representations to the Renco Consortium that Centromin would retain and assume liability for third-party claims and entitle Claimants to compensation.

196. Awarding Claimants all costs of this proceeding, including Claimants' attorneys' fees, expert fees, and expenses.

197. Pursuant to Section 2 of Procedural Order No. 4 dated September 17, 2020, Claimant expressly reserves its right until the damages phase of this proceeding to seek an award of compensation for any and all damages it has suffered and will suffer resulting from Respondents' breaches of contract, any and all damages under Peruvian law and customary international law and an award of pre-and-post award interest until the date of Peru's final satisfaction of the award, compounded quarterly, and any other form of recoverable damages or relief to be developed and quantified in the course of the damages phase.

Dated: May 1, 2023.



Adam H. Schiffer
Andrew S. Hicks
Fatima Aslam
SCHIFFER HICKS JOHNSON, PLLC
TC Energy Tower
700 Louisiana Street, Suite 2650
Houston, Texas 77002
T: (713) 357-5151
E: aschiffer@shjlawfirm.com
ahicks@shjlawfirm.com
faslam@shjlawfirm.com