UNDER THE UNCITRAL ARBITRATION RULES (2013)

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

v.

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

PCA Case No. 2019-47

Respondents' Rejoinder

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1 September 2023

ALLEN & OVERY

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Glossary

Term	English	Spanish
Activos Mineros	Activos Mineros S.A.	Activos Mineros S.A.
Bankruptcy Law	Law No. 27809, the General Law of the Bankruptcy System of Peru	La Ley N° 27809, Ley General del Sistema Concursal
Board of Creditors	Board of recognized creditors of Doe Run Peru S.R.Ltda.	Junta de acreedores reconocidos de Doe Run Peru S.R.L.
CEPRI	Special Committee for the Promotion of Private Investment	Comité Especial para la Promoción de la Inversión Privada
Centromín	Empresa Minera del Centro del Perú S.A.	Empresa Minera del Centro del Perú S.A.
Claimants (Demandadas)	Renco Group, Inc. and Doe Run Resources, Corp.	Renco Group, Inc. y Doe Run Resources, Corp.
Collins Cases	The subset of Missouri Litigations captioned *J.Y.C.C., et al., v. Doe Run Resources, Corp.*, et al., Case No. 4:15-CV-1704-RWS	El subconjunto de *Missouri Litigations* titulados *J.Y.C.C., et al., v. Doe Run Resources, Corp.*, et al., Case No. 4:15-CV-1704-RWS
Counter-Memorial	Respondents' Counter-Memorial, dated 1 April 2022 ("**Contract Counter-Memorial**")	Memorial de Contestación de las Demandadas, de fecha 1 de abril de 2022 ("**Memorial de Contestación del Contrato**")
DRCL	Doe Run Cayman LTD	Doe Run Cayman LTD
DRP	Doe Run Peru S.R. LTDA	Doe Run Perú S.R.L.
DRRC	Doe Run Resources Corporation	Doe Run Resources Corporation
Facility	The refinery complex and copper smelter in La Oroya, Peru	El complejo de refinería y horno de fundición de cobre en La Oroga, Perú
General Arbitration Law	Law No. 26572 of 5 January 1996	Ley No. 26572 de 5 de enero de 1996
INDECOPI	National Institute for the Defense of Free Competition and the Protection of Intellectual Property	Instituto Nacional de Defensa de la Competencia y la Protección de la Propiedad Intelectual

Term	English	Spanish
INDECOPI Chamber No. 1	INDECOPI Chamber No. 1 for the Defense of Competition	Sala de Defensa de la Competencia No. 1
LPAG	General Administrative Procedure Law of Peru	Ley del Procedimiento Administrativo General del Perú
MEM	Ministry of Energy and Mines	Ministerio de Energía y Minas
Memorial (Contract)	Claimants' Memorial, dated 25 January 2021 ("**Contracto Memorial**")	Memorial de las Demandantes, de fecha 25 de enero de 2021 ("**Memorial del Contrato**")
Metaloroya	Empresa Metalúrgica La Oroya Sociedad Anónima	Empresa Metalúrgica La Oroya Sociedad Anónima
Missouri Litigations	Lawsuits beginning in 2007 in the U.S. state of Missouri by a group of minors from La Oroya against Renco and DRRC, and entities and individuals affiliated with them	Litigios iniciados en el 2007 en el estado de Missouri de EEUU por un grupo de menores de edad de La Oroya en contra de Renco y DRRC, y entidades e individuos afiliados a ellas
Missouri Plaintiffs	The plaintiffs in the Missouri Litigations	Las demandantes en los *Missouri Litigations*
PAMA	Environmental Adjustment and Management Program	Programa de Adecuación y Manejo Ambiental
PAMA Period	The period of time between 23 October 1997 and 13 January 2007	El periodo de tiempo de 23 de octubre de 1997 a 13 de enero de 2007
PCA (CPA)	Permanent Court of Arbitration	Corte Permanente de Arbitraje
Peru, in Spanish, el Perú	The Republic of Peru	La República del Perú
Peru Guaranty	A guaranty contract, separate from the STA, executed by Peru and DRP	Un contrato fianza, independiente del STA, celebrado entre el Perú y DRP
PO1	Procedural Order No. 1 in The Renco Group, Inc. v. The Republic of Peru, PCA Case No. 2019-46	Orden Procesal No. 1 en The Renco Group, Inc. c. La República del Perú, Caso PCA No. 2019-46
Post-PAMA Period	The period after the expeiration of the term of Metaloroya's PAMA	El period despues del vencimiento del PAMA de Metaloroya

Term	English	Spanish
Reid Cases	The subset of Missouri Litigations captioned *A.O.A. et al v. Doe Run Resources Corporation et al.*, Case No. 4:11-cv-00044	El subconjunto de *Missouri Litigations* titulado *A.O.A. et al v. Doe Run Resources Corporation et al.*, Case No. 4:11-cv-00044
Renco	The Renco Group Inc.	The Renco Group Inc.
Renco Defendants	The defendants in the Missouri Litigations	Las demandadas en los *Missouri Litigations*
Renco Guaranty	A guaranty contract, separate from the STA, executed by Renco, DRRC, and Centromím	Un contrato fianza, independente del STA, celebrado entre Renco, DRRC y Centormín
***Renco II* (or Treaty Case)**	*The Renco Group, Inc. v. Republic of Peru*, PCA Case No. 2019-46 (the instant proceedings)	*The Renco Group, Inc. c. la Republica del Perú*, Caso CPA N° 2019-46 (el proceso instantáneo)
***Renco III* (or Contract Case)**	*The Renco Group, Inc. and Doe Run Resources Corp. v. Republic of Peru and Activos Mineros S.A.C.*, PCA Case No. 2019-47	*The Renco Group, Inc. y Doe Run Resources Corp. c. la Republica del Perú y Activos Mineros S.A.C.*, Caso CPA N° 2019-47
Reply	Claimants' Reply to Liability and Response to Jurisdiction, dated 1 May 2023 ("**Reply**")	Respuesta de los Demandantes a la Responsabilidad y Respuesta a la Jurisdicción, de fecha 1 de mayo de 2023 ("**Respuesta**")
Respondents (Demandadas)	Republic of Peru and Activos Mineros S.A.	República del Perú y Activos Mineros S.A.
STA	Stock Transfer Agreement between "Centromin," "the Investor," and "the Company," executed on 23 October 1997	Contrato de Transferencia de Acciones "Centromin," "el Inversionista," y "la Empresa," firmado el 23 de octubre de 1997
STA Arbitral Clause	Clause 12 of the STA	La cláusula 12 del STA
STA Parties, and, individually, **STA Party**	The contracting parties to the STA: the "Company", the "Investor", and "Centromín"	Las partes contratantes del STA, la "Empresa", el "Inversionista", y "Centormín"
Sulfuric Acid Plant Project	Project No. 1, Sulfuric Acid Plants	Proyecto No. 1, Planta de Ácido Sulfúrico

Term	English	Spanish
Supreme Court	Supreme Court of Justice of Peru	Corte Suprema de Justicia de la República del Perú
Treaty	Trade Promotion Agreement between the Republic of Peru and the United States of America, dated 12 April 2006, entered into force on 1 February 2009	Acuerdo de Promoción Comercial entre la República del Perú y los Estados Unidos de América, de fecha 12 de abril de 2006, vigente a partir del 1 de febrero de 2009
UNCITRAL Rules (Reglamento CNUDMI)	Arbitration Rules of the United Nations Commission on International Trade Law (as revised in 2010, with new article 1, paragraph 4, as adopted in 2013)	Reglamento de Arbitraje de la Comisión de las Naciones Unidas para el Derecho Mercantil Internacional (revisado en 2010, con el nuevo artículo 1, párrafo 4, aprobado en 2013)

I. INTRODUCTION

1. In their Memorial, Renco Group Inc. ("**Renco**") and Doe Run Resources, Corp. ("**DRRC**") (jointly, "**Claimants**") asked the Tribunal to redraft the contract and the law. In their Reply, in response to the Republic of Peru ("**Peru**") (together with Activos Mineros, "**Respondents**"), Claimants change strategy. Claimants now close their eyes to the flaws in their claims that Respondents demonstrate in the Counter-Memorial. Worse, they filed a threadbare, incomplete Reply, wherein they seemingly ask the Tribunal to simply close its eyes as well.

2. Claimants ask the Tribunal to ignore the following:

- the text of the contract executed between their subsidiary Doe Run Peru, S.L. ("**DRP**"); Empresa Metalúrgica La Oroya Sociedad Anónima ("**Metaloroya**"); and Activos Mineros S.A.C's ("**Activos Mineros**") predecessor, Empresa Minera del Centro del Perú S.A. ("**Centromín**");
- the multiple jurisdictional flaws in Claimants' claims identified by Respondents;
- the multiple temporal defects in their claims, by asking the Tribunal to improperly apply Peruvian law retroactively and by raising unripe claims;
- basic principles of Peruvian law, by presenting evidently unfounded claims;
- common sense and precise, scientific data, both of which demonstrate that DRP increased emissions after acquiring the Facility and breached its contractual and legal obligations;
- Claimants' own dropped claims, which they have abandoned or failed to articulate (once again); and
- Claimants' true purpose in bringing this arbitration.

3. Of course, the Tribunal is not blind. It cannot ignore the above. Nor can the Tribunal ignore the truth now clearly manifest. Claimants have abandoned their burden of proof in their anemic Reply and have shown these arbitrations to be what they truly are: wholly without merit.

A. Background

4. Respondents will not repeat their detailed factual narrative in this Rejoinder and provide instead the following summary. In 1922, a refinery complex and copper smelter were founded in La Oroya, Peru, by the U.S. Cerro de Pasco Corporation, which also built a lead smelter in 1928, and a zinc refinery in 1952 ("**Facility**").[1] In 1974, Peru nationalized the Facility and created Centromín to operate it.[2]

5. In the mid-1990s, Peru decided to privatize operational units of Centromín to attract the investment and expertise necessary to turn around the Facility's environmental performance.[3] To that end, it created Metaloroya to serve as an investment vehicle to own and operate the Facility.[4] And in 1997, Peru's Special Committee for the Promotion of Private Investment for Centromín ("**CEPRI**"),[5] conducted an international tender for private investors to bid for Metaloroya.[6]

6. Claimants bid in the international tender and won. They established DRP, a Peruvian subsidiary, to sign the sales contract for Metaloroya, and to own and operate the Facility.[7] Accordingly, Claimants ceded the rights they had obtained as winners of the auction in favor of DRP.[8] Centromín, in turn, approved the execution of the sales contract with DRP.[9]

7. On 23 October 1997, Centromín, DRP, and Metaloroya executed the Contract of Stock Transfer for 99.93% shares of Metaloroya ("**STA**").[10] The heading of the STA identified

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[1] **Exhibit C-020**, Environmental Impact Program, La Oroya Metallurgical Complex, Centromín, 12 December 1996 ("**PAMA 1996 Report**"), PDF p. 25; *see also* **Exhibit C-012**, White Paper - Fractional Privatization of Centromín, 1999 ("**1999 White Paper**").
[2] **Exhibit C-020 (Contact)**, PAMA 1996 Report, PDF p. 26.
[3] **Exhibit C-104**, 1999 White Paper, p. 38.
[4] **Exhibit R-183**, Supreme Resolution No. 016-96-PCM; *see also* **Exhibit C-012**, 1999 White Paper, p. 38.
[5] **Exhibit C-122**, Supreme Resolution No. 102-92 PCM, 21 February 1992, Art. 1.
[6] **Exhibit R-187**, Bases and Model Contracts (Second Round), Centromín, 26 March 1997 ("**Bidding Terms (Second Round)**"); *See also* **Exhibit C-012**, 1999 White Paper, p. 72.
[7] **Exhibit R-001**, Public Deed containing Contract of Stock Transfer, Capital Stock Increase and Stock Subscription of Empresa Metalurgica La Oroya S.A. and Renco Guaranty, 23 October 1997 ("**STA & Renco Guaranty**").
[8] **Exhibit R-282**, Centromín Agreement No. 54-97, 15 September 1997; *see also* **Exhibit R-001**, STA & Renco Guaranty, p. 7 ("In accordance with the bidding conditions, the aforementioned consortium has assigned its rights to the Investor and this assignment has been authorized by the Cepri-Centromín agreement dated September 11, 1997.").
[9] **Exhibit R-283**, Centromín Agreement No. 77-97, 15 September 1997.
[10] **Exhibit R-001**, STA & Renco Guaranty.

and defined the contracting parties as Metaloroya (the "Company"), DRP (the "Investor"), and Centromín ("Centromín") ("**STA Parties**," individually "**STA Party**").[11]

8. Renco and DRRC intervened in the public deed that contains the STA, as guarantors for DRP. Specifically, under an "Additional Clause" at the end of the public deed, Renco and DRRC agreed to "warrant the compliance with the obligations contracted by the Investor, Doe Run Peru" ("**Renco Guaranty**").[12] Likewise, Peru and DRP entered into a separate guaranty agreement pursuant to which Peru guaranteed the representations, securities, guaranties, and obligations undertaken by Centromín in the STA ("**Peru Guaranty**").[13]

9. In 1997, Metaloroya merged with DRP, and DRP thus assumed all of Metaloroya's rights and obligations as the Company under the STA.[14] In 2001, DRP assigned its contractual position as the Investor to Doe Run Cayman Ltd. ("**DRCL**").[15] In 2007, Centromín assigned its contractual position to Activos Mineros.[16] Consequently, Activos Mineros, DRCL, and DRP are the STA Parties today. They are defined in the STA respectively as Centromín, the Investor, and the Company.

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

11. The STA's purchase rights and obligations involve the duties of the STA Parties relative to the acquisition and capitalization of Metaloroya (DRP).[17] The STA's environmental responsibility rights and obligations allocate responsibility for (i) the execution of environmental remediation projects and (ii) for third-party claims relating to the Facility. That distribution was split between Centromín and Metaloroya.

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[11] **Exhibit R-001**, STA & Renco Guaranty, p. 5.
[12] **Exhibit R-001**, STA & Renco Guaranty, Additional Clause.
[13] **Exhibit R-002**, Guaranty Agreement, 21 November 1997 ("**Peru Guaranty**"), clause 2.1 ("[T]he **State** guarantees the **Investor** [(DRP)] the declarations, securities, guarantees and obligations assumed by the Transferor [(Centromín)] in the [STA].")
[14] *See* **Exhibit R-003**, Modification of the Contract to Transfer Shares, Increase Company Capital and Subscription of Shares of Metaloroya S.A., 17 December 1999, clause 7, p. 21.
[15] **Exhibit R-004**, Assignment of Contractual Position between Due Run Peru S.R.L and DRCL, 1 June 2001 ("**Contract Assignment**"), Cl. 1.3.
[16] **Exhibit R-284**, Assignment of Centromin's Contractual Position to Activos Mineros, 19 March 2007.
[17] **Exhibit R-001**, STA & Renco Guaranty, Clauses 1-4.

12. The STA Parties' environmental and investment obligations were mostly outlined in an Environmental Remediation and Management Program (or "**PAMA**" for its Spanish initials "*Programa de Adecuación y Manejo Ambiental*").[18] The PAMA provided for 16 projects in total to be divided between Centromín and DRP. The first project was particularly important, as it would remediate Sulfur Dioxide ("**SO_2**") and particulate emissions (including lead)—critical sources of contamination. To achieve the remediation of those emissions, the PAMA required DRP to carry out the important and costly project of constructing sulfuric acid plants (the "**Sulfuric Acid Plant Project**").[19] This project required DRP to capture the Facility's emissions, clean them of particulate matter (including lead), and convert the remaining SO_2 into sulfuric acid, which could be sold to market.[20] Completing the Sulfuric Acid Plant Project required DRP to modernize the Facility's three circuits, which necessitated substantial investment on top of the PAMA projects.[21] The Regulation for Environmental Protection in the Mining-Metallurgical Activity (the "**Environmental Mining Law**")[22] set a strict, *ten-year deadline* to complete the PAMA and bring the Facility into compliance with applicable environmental standards.

13. A few days before the contract was executed, Peru's Ministry of Energy and Mines (the "**MEM**") issued Directorial Resolution No. 334-97-EM/DGM, which modified the PAMA to separate the respective obligations that Metaloroya and Centromín were required to fulfill.[23] Clause 5.1 of the STA contains Metaloroya's obligation to fulfill its PAMA obligations.[24] Clause 6.1 of the STA contains Centromín's obligation to fulfill its PAMA obligations.[25]

14. With regard to third-party claims, Clauses 5 and 6 expressly allocate responsibility between Centromín and the Company (as noted above, first Metaloroya, then DRP). Clauses 5.3,

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[18] **Exhibit C-020 (Contract)**, PAMA.
[19] **Exhibit C-020 (Contract)**, PAMA, Section 5.4.1.
[20] **Exhibit C-020 (Contract)**, PAMA, Section 5.4.1.
[21] **Exhibit C-020 (Contract)**, PAMA, Section 5.4.1.
[22] *See* **Exhibit R-025**, Supreme Decree No. 016-93-EM concerning Regulations for Environmental Protection in Mining and Metallurgy, 28 April 1993 ("**Supreme Decree No. 016-93**").
[23] **Exhibit R-028**, Directorial Resolution No. 334-97/EM/DGM, 16 October 1997. This document notes (p. 1) the "period of environmental adaptation of ten (10) years (1997-2006) of the Program of Adaptation and Environmental Management of La Oroya Metallurgical Complex of Centromín"; **Exhibit R-163**, Letter from AIDA, *et al.* to U.S. Department of State (H. Clinton) and U.S. Department of the Treasury (T. Geithner), 31 March 2011, PDF pp. 2–3.
[24] **Exhibit R-001**, STA & Renco Guaranty, Clause 5.1.
[25] **Exhibit R-001**, STA & Renco Guaranty, Clause 6.1.

5.4, 6.2, and 6.3, identify which of Centromín and the Company would be responsible for particular third-party claims relating to the Facility.[26]

15. Three other clauses establish the consequences of that allocation of responsibility. Under Clause 5.8, the Company agreed to indemnify Centromín against third-party claims for which the Company is responsible.[27] Under Clause 6.5, Centromín agreed to indemnify the Company against third-party claims for which Centromín is deemed to be responsible under Clauses 6.2 and 6.3.[28] Finally, Clause 8.14 provides that if Centromín receives notice from the Company of a suit (or similar claim) within a reasonable time that is related to a fact or act for which Centromín is responsible, then Centromín will defend the Company in litigation.[29]

16. Despite making specific promises and undertakings to comply with environmental obligations under the PAMA and the STA within the legally mandated ten-year timeframe, DRP made a series of requests to the MEM to modify the project and capital expenditure schedule, consistently delaying work on the PAMA projects most critical to addressing the environmental and public health crisis in La Oroya, which was reaching catastrophic proportions under DRP's tenure.

17. In their Reply, Claimants' habitually employed gambit is to paint La Oroya as a hellscape, and ask the Tribunal how it would be possible for DRP to sink below the depths of hell? This is how: While ignoring and delaying its environmental obligations, DRP made the devastating decision to ramp up production at the Facility, pushing the system capacity beyond its limits, while simultaneously employing dirtier and cheaper concentrates in the production process. As a result, the Facility's emissions surged. Notwithstanding this, DRP repeatedly postponed (and indeed never completed) the only PAMA project that could significantly reduce emissions – the Sulfuric Acid Plant Project.

18. Mismanagement, overproduction and use of dirtier concentrates, and the failure to complete the one PAMA project that could have meaningfully addressed the Facility's dangerous emissions led to personal injury lawsuits against DRP's parent companies and

[26] **Exhibit R-001**, STA & Renco Guaranty, Clauses 5.3, 5.4, 6.2, 6.3.
[27] **Exhibit R-001**, STA & Renco Guaranty, Clause 5.8.
[28] **Exhibit R-001**, STA & Renco Guaranty, Clause 6.5.
[29] **Exhibit R-001**, STA & Renco Guaranty, Clause 8.14.

affiliates in Missouri in 2007 ("**Missouri Litigations**" and "**Renco Defendants**"). The plaintiffs in the Missouri Litigations ("**Missouri Plaintiffs**") are thousands of Peruvian nationals who allege they were injured by the actions of DRP's parent companies (including Renco and DRRC) and affiliates, in the United States.[30]

19. Those actions, the Missouri Plaintiffs claim, run the gamut from negligence, to recklessness, to fraud, to conspiracy.[31] Among other things, the Missouri Plaintiffs accuse the Renco Defendants of,

- "negligently, carelessly, and/or recklessly ma[king] decisions while located in the States of Missouri and/or New York that resulted in the release of heavy metals and other toxic and harmful substances into the air and water and onto the properties on which the plaintiffs have in the past and/or continue to reside, use and visit; the toxic and harmful substances include but are not limited to: lead, arsenic, cadmium, and sulfur dioxide;"[32]

- "in conspiracy with each other, through their decisions made in the States of Missouri and/or New York and through their agents, [ ] negligently, carelessly, and recklessly fail[ing] and continu[ing] to fail to warn plaintiffs of release of the toxic metals and gases and other toxic substances into the environment and community surrounding the La Oroya Complex and related operations,"[33] and

- "[promulgating and enacting policies that] prevented DRP from making capital and other expenditures necessary for the improvements to operations, and/or these policies left DRP and the La Oroya Complex underfunded, undercapitalized, and without the means or resources to take necessary steps to make improvements, perform maintenance, meet credit and debt obligations, and/or these policies detrimentally delayed necessary improvements, maintenance, and modernization efforts that directly impacted critical environmental issues such as toxic emissions, remediation, and other such actions pertaining to the health and safety of the Plaintiffs."[34]

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[30] *See generally* **Exhibit R-294**, Amended Complaint for Damages – Personal Injury, Document No. 474, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 21 February 2017; **Exhibit R-307**, Complaint, *Father Chris Collins et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:15-cv-01704-RWS), 13 November 2015.

[31] *Id.*

[32] **Exhibit R-294**, Amended Complaint for Damages – Personal Injury, Document No. 474, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 21 February 2017, ¶ 71.

[33] **Exhibit R-294**, Amended Complaint for Damages – Personal Injury, Document No. 474, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 21 February 2017, ¶ 103.

[34] **Exhibit R-294**, Amended Complaint for Damages – Personal Injury, Document No. 474, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 21 February 2017, ¶ 242.

Because the Missouri Litigations are based on United States companies' conduct in the United States, none of the STA Parties (including DRP) are Renco Defendants.

20. Renco and DRRC seek to use this arbitral proceeding to escape the consequences of their actions. They want Respondents to reimburse Claimants for the damages they are forced to pay (if any) as a result of an adverse judgment in the Missouri Litigations. And so, Claimants throw every possible claim at Respondents, hoping that one or more will stick. Even though the Missouri Plaintiffs are suing Claimants for Claimants' own conduct, and despite the fact that Renco and DRRC are not STA Parties—and thus are not encompassed by the allocation of responsibility clauses or the indemnity provisions of the STA—Claimants seek indemnification under the STA. They also want Peru (also not an STA Party) to pay under the Peru Guaranty, even though Peru's obligation runs only toward DRP.[35]

21. If Claimants' contractual claims fail, they have back-up claims that seek *de facto* indemnity. Claimants lodged a series of scattershot Peruvian law claims in their Memorial: pre-contractual liability, subrogation, contribution, and unjust enrichment. In their Reply, they have seemingly dropped their pre-contractual liability claim, and in a one sentence reference a "restitution" claim, but then they forget about it as suddenly as it came up.[36]

22. Plan C, if Plans A and B do not work, is a minimum standard of treatment claim under customary international law. Or at least it was in the Memorial, as Claimants appear to have fully forgotten about it in their Reply and ignored Respondents' objections and defenses to the same.

23. All of the claims fail, for numerous reasons. Yet Claimants' goal was never to win. Instead, as Respondents explain below, the purpose of this arbitration is to have this Tribunal issue a partial award on claims that Claimants can use to exert pressure on Peru, or, in the worst case, use as a liability insurance policy. With that partial award, they will seek to continue doing what they have done since the beginning of this arbitration, pressure Peru into participating in the Missouri Litigations to prejudice the Missouri Plaintiffs. And if Peru continues to refuse to harm its own citizens (and, to be clear, it will steadfastly refuse), or

[35] Reply, ¶ 47.
[36] Reply, ¶ 16.

if an intervention were to fail, Respondents would be on the hook for the totality of the damages awarded in the Missouri Litigations, whether Claimants are found liable or other Renco Defendants who are not parties to this arbitration (the "phantom-claimants") are found liable.

24. Claimants can only achieve that goal, however, if the Tribunal ignores the severe jurisdictional and merits deficiencies of their claim. Respondents are certain it will not.

B. The Tribunal lacks jurisdiction over Claimants' claims

25. In their Counter-Memorial, Respondents submitted numerous objections to the Tribunal's jurisdiction. Claimants ignore all but some of objections. Seemingly, they want the Tribunal to forget that those objections have not been responded to. Claimants instead want the Tribunal to allow them to submit their arguments on Respondents' objections in Claimants' Rejoinder on Jurisdiction (even though they could have done so in their Reply), thereby preventing Respondents from ever responding. That would be a fundamental breach of Respondents' due process rights and a serious departure from procedural fairness.

26. The Tribunal should protect Respondents' due process rights, and, in any event, rule for Respondents on the substance of their objections:

- The Tribunal lacks jurisdiction over Claimants STA claims:
  - Claimants are not STA Parties, so the text of Clause 12 of the STA ("**STA Arbitral Clause**" and the principle of privity under Peruvian law preclude them from bringing any claim in arbitration against Activos Mineros, and
  - DRP did not engage in the expert determination process required by the STA, so no consent has been perfected.
- The Tribunal lacks jurisdiction over Claimants' Peru Guaranty claims for the reasons expressed in the Counter-Memorial, as Claimants have ignored the objection.
- The Tribunal lacks jurisdiction over the claims of the phantom-claimants for the reasons expressed in the Counter-Memorial, as Claimants have ignored the objection.
- The Tribunal lacks jurisdiction over Claimants' Peruvian law claims:

- In this case, the STA Arbitral Clause cannot be extended to cover non-signatories, and, if it could be, it would not encompass Claimants or Peru.

- Claimants present for the first time in their Reply a revised theory for their Peruvian law claims, but the revised theory makes their Peruvian law claims fall outside the scope of the STA Arbitral Clause.

- Claimants' subrogation claim, under the revised theory, entails the inexistence of arbitral consent.

- Claimants' precontractual liability claim (were it alive) is premised on the inexistence of arbitral consent for the reasons expressed in the Counter-Memorial, as Claimants have ignored the objection.

- Claimants' unjust enrichment claim is premised on the inexistence of arbitral consent for the reasons expressed in the Counter-Memorial, as Claimants have ignored the objection.

- The Tribunal lacks jurisdiction over Claimants' minimum standard of treatment claim for the reasons expressed in the Counter-Memorial, as (again) Claimants have ignored the objection.

27. In short, Claimants cannot escape the numerous flaws in their claims, which divest the Tribunal from any jurisdiction.

C. Claimants' claims fail at the threshold of merits and on a full merits analysis

28. At the threshold of merits (admissibility), all of Claimants' claims fail. Here too, Claimants fail to respond to many of Respondents defenses. On the substance, even before a full analysis of whether the elements of a particular claim have been met, Claimants' claims fail because:

- Claimants' claims under the STA are inadmissible because they are not STA Parties.

- Claimants lack standing to bring their claims for breach of Clause 6.1 for the reasons expressed in the Counter-Memorial, as Claimants have ignored the objection.

- Claimants' Peru Guaranty claims fail at the threshold for the reasons expressed in the Counter-Memorial, as Claimants have ignored the objection.

- Claimants' indemnity, costs, and defense claims fail at the threshold for the reasons expressed in the Counter-Memorial, as Claimants have ignored the objection.

- Claimants' Peruvian law claims fail at the threshold for the reasons expressed in the Counter-Memorial. In addition to the arguments Claimants have refused to respond to,

  - Claimants' revised theory makes their Peruvian law claims evidently unfounded,

  - Claimants' subrogation claim, under their revised theory, is time-barred,

  - Claimants' unripe claims cannot be presented in this proceeding, because Claimants do not seek true declaratory relief and, if they did, their claims would be remain inadmissible,

  - Claimants lack standing to bring their subrogation and contribution claims for the reasons expressed in the Counter-Memorial, as Claimants have ignored the objection, and

  - Claimants' Peruvian law claims remain inadequately articulated.

- Claimants' minimum standard of treatment claim fails at the threshold for the reasons expressed in the Counter-Memorial, as Claimants have ignored the objection.

29. Even if Claimants were to offer a full merits analysis, they would do no better than what they have done to date. To start, none of the Missouri Plaintiffs' claims is Activos Mineros' responsibility under the STA because *all* are based on the Renco Defendants' conduct (not that of DRP) in the United States (not in Peru). Those claims are not encompassed by Clauses 5 and 6 of the STA, and thus responsibility for them is not allocated to Centromín.

30. Even if the Tribunal considered that the Missouri Plaintiffs' claims were for actions attributable to DRP, Claimants' STA claims fail because the STA allocates to DRP responsibility for the Missouri Plaintiffs' claims. Under Clauses 5.3 and 5.4, DRP is responsible for third-party claims arising from DRP's operations during the PAMA Period where the claims arise from (i) acts unrelated to the PAMA that stem from DRP's use of standards and practices that were less protective than those of Centromín; or (ii) DRP's noncompliance with its PAMA obligations. The Missouri Plaintiffs' claims fall within both categories, each of which independently engages DRP's responsibility.

31. First, the Missouri Plaintiffs' claims stem from DRP's decision to increase production and use dirtier concentrates, which was unrelated to the PAMA and stemmed from DRP's less-protective standards and practices for controlling emissions. Claimants do not dispute—nor could they—that DRP ramped up production beyond the Facility's capacity and used dirtier concentrates. At the same time, DRP did not complete any meaningful emissions reduction products until months before the PAMA deadline and never completed the Sulfuric Acid Plant. It is a logical consequence that the Facility's emissions increased under DRP's stewardship. The objective data confirms this commonsense conclusion.

32. Second, the Missouri Plaintiffs' claims arise from DRP's noncompliance with the PAMA. DRP failed to implement the only PAMA project aimed at the meaningful reduction of emissions. It also pursued policies that increased emissions and brought the Facility further away from the PAMA's stated objective: to reduce emissions. The STA allocates responsibility to DRP for all claims and damages arising from such noncompliance, including the Missouri Plaintiffs' claims.

33. As to Claimants' Peruvian law claims, they all fail because Claimants fail to meet their burden of proof. Each individual Peruvian law claim in any event collapses under its own weight. Claimants have seemingly dropped their pre-contractual liability claim, and they have refused to respond at all on contribution and unjust enrichment. They ignore those claims and want the Tribunal to forget Respondents' defenses to the claims. Claimants reference "restitution" once in their Reply, and then they refuse to articulate the claim.[37]

34. On subrogation, the only articulated claim, not one of its three elements is met. First, Activos Mineros owes no debt to the Missouri Plaintiffs. Second, they have no legitimate interest (as required by Peruvian law) in paying the supposed debt.[38] Instead, if Claimants pay damages because of an adverse judgment in the Missouri Litigations, they would be paying their own debt arising out of their own liability. Third, they have not actually effected any payment. Claimants' subrogation claim is completely unviable.

[37] Reply, ¶ 16.
[38] Reply, ¶¶ 16-63.

35. Finally, Claimants ignore their minimum standard of treatment claim. They provide no response to Respondents' defense to the claim. They seemingly think their severely lacking exposition in their Memorial is sufficient to establish the claim. It is not.

D. The evidence overwhelmingly supports Respondents' positions

36. Unlike Claimants, Respondents have supported their arguments with substantial and forceful evidence, even though Respondents *do not* bear the burden of disproving Claimants' claims. The present Rejoinder is supported by six expert reports, exhibits R-303 to R-313 and legal authorities RL-226 to RL-269.

37. The six reports are from the following experts:

- Enrique Varsi, a Peruvian civil and contract law expert, who provides his second expert report that responds to comments made by Claimants and their expert, Dr. Payet, and addresses Peruvian law and contract interpretation, in particular on Claimants' Peruvian law claims and the interpretation of the STA, the Renco Guaranty, and the Peru Guaranty ("**Varsi Second Report**").

- Wim Dobbelaere, a pyrometallurgy expert, who provides a second expert report that responds to comments made by Claimants and their environmental expert, Mr. Connor, and addresses DRP's failure to implement the modernization and PAMA projects necessary to meet its environmental obligations, as well as the company's standards and practices when operating the Facility ("**Dobbelaere Second Report**").

- Deborah Proctor, a toxicology expert, who responds to comments made by Claimants to her first expert report and addresses the effects of DRP's operations on public health ("**Proctor Second Report**").

- Ada Carmen Alegre Chang, a Peruvian lawyer, who provides a second expert report explaining the regulatory framework governing mining operations in Peru at the time DRP acquired the Facility and opines on Claimants' environmental obligations under the PAMA and Peruvian law ("**Alegre Second Report**").

- Oswaldo Hundskopf, a Peruvian bankruptcy and corporate law expert, who provides an expert report that responds to comments made by Claimants and Dr. Payet and explains that the claims in the Missouri Litigations are not contingent liabilities that should have been included in Centromin's restructuring documents in 1997 ("**Hundskopf Second Report**").

- Isabel Kunsman, a financing and accounting expert from AlixPartners, who provides a second expert report that responds to comments made by

Claimants and Bryan Callahan to her first expert report and explains how DRP was undercapitalized to complete its obligations under the PAMA and how DRP's own financial decisions resulted in its failure to complete the PAMA and its obligations under the STA ("**Kunsman Second Report**").

38. For all of the above reasons, the Tribunal should reject all of Claimants' claims. But there is something much more fundamental under attack in this case—the legitimacy of the international commercial arbitration system.

E. The Tribunal should protect the international commercial arbitration system from Claimants' poor conduct

39. Claimants have shown a consistent pattern of bad practice and distortion throughout this proceeding. From their failure to comply with the waiver requirement in their initial Notice of Arbitration, their futile and misleading communications with Respondents, their baseless and exaggerated claims for compensation, their selective and incomplete presentation of facts and evidence, their poor behavior during the document production phase—where they (i) claimed that a federal court order barred them from disclosing critical documents that they eventually disclosed, nine months later, at Respondents' insistence[39]; and (ii) sought to extract information to help them avoid responsibility in the Missouri Litigations in exchange for providing documents that they were legally obligated to provide—, to finally, a Reply that is at best, a clumsy attempt at gamesmanship, but at bottom does not acknowledge the existence of most of Respondents' arguments and evidence, ignores the basic principles of treaty interpretation, international law, burden of proof, and frankly candor. At some point it is time to say enough.

40. Claimants have wasted over a decade of Respondents' time and have caused them significant prejudice and harm. Despite this arbitration being brought as a pressure tactic, because of their commitment to their contractual obligations and Peruvian and international law, Respondents have dedicated time, taxpayer money, and effort to address all of Claimant's allegations —no matter how meritless— and have expended enormous resources doing so. This has been met with disrespect.

[39] *See* Respondents' Letter to the Tribunal, 3 June 2022.

41. Respondents respectfully ask the Tribunal to reject Claimants' claims in their entirety, and to award Respondents full costs and attorneys' fees for this misuse of what should be a legitimate, international arbitration proceeding.

II. PRELIMINARY MATTERS NECESSARY TO GUIDE THE TRIBUNAL AS IT EVALUATES THE DISPUTE

42. The following section highlights for the Tribunal some of the key topics that merit its attention.

A. Claimants have not contested material facts

43. Claimants completely fail to address at least two sets of material facts in their Reply. Claimants do not, because they can not, contest facts concerning DRP's Environmental Remediation and Management Program (or "PAMA" for its Spanish initials "*Programa de Adecuación y Manejo Ambiental*") and DRP's financial mismanagement and have therefore conceded them.

44. Respondents limit their Rejoinder to these two sets of facts, notwithstanding that the Claimants' failure to dispute key facts is pervasive throughout their Reply. Respondents reserve the right to point out these additional omissions and concessions in their oral argument and in response to any questions from the Tribunal should the need arise.

1. The Complex's PAMA and its implementation

45. In their telling of the PAMA and its implementation, Claimants make several misrepresentations.

46. First, Claimants suggest that the PAMA period lasted until 2009.[40] This is incorrect. The PAMA period ran, as legally mandated, from 23 October 1997 to 13 January 2007.[41] The 2006 and 2009 Extensions gave DRP more time to complete Project 1, but they did not affect DRP's contractual obligation to complete its PAMA projects by 13 January 2007 nor did they extend the PAMA period as a whole.[42] Thus, contrary to Claimants' assertions, the extensions beyond the PAMA period to complete Project 1 do not change the fact that the PAMA period officially ended on 13 January 2007. In response, Claimants say nothing in their Reply. These facts — which Claimants concede by their silence — mean that after 13 January 2007 the Company assumed responsibility for third-party claims

[40] *See*, *e.g.*, Reply, ¶ 129.

[41] Contract Counter-Memorial, §§ II.B.2, V.B.2.d.vi.

[42] *See* Contract Counter-Memorial, ¶ 771, *citing* Varsi First Expert Report-Treaty, ¶¶ 6.20–6.23; Alegre First Expert Report, ¶¶ 53–55; **RLA-036**, Political Constitution of Peru, enacted on 29 December 1993, article 62.

if they (i) "default[ed] on [DRP's] PAMA obligations" within the meaning of Clause 5.3 of the STA, and (b) stem from its operations.

47. Second, Claimants boast about investing millions of dollars in modernizing the Complex[43] and that they *only* failed to comply with Project 1 of the PAMA, the Sulfuric Acid Plant.[44] Project 1 was, however, the most environmentally significant and costly PAMA project.[45] As Respondents have demonstrated —and Claimants do not deny— Project 1 would have dramatically reduced the Facility's sulfur dioxide and lead emissions by approximately 89%.[46] Because Claimants deliberately chose not to implement Project 1, and in fact took no meaningful actions to abate emissions until 2006,[47] their decision to increase production and use dirtier materials in the first years of operating the Facility was not only disastrous for the already critical situation in La Oroya but also: (i) constitutes a practice "less protective of the environment or of public health" within the meaning of Clause 5.3 of the STA; and (ii) a breach of the PAMA. In response, Claimants say nothing in their Reply. These facts — which Claimants concede by their silence — also support Respondents' position in the Contract Case regarding the occurrence of the scenario contemplated under Clause 5.3 of the STA.

48. Third, Claimants attempt to attribute the delay in implementing Project 1 to the PAMA's original design, and its designer, Peru.[48] This is wrong. Respondents' experts have demonstrated that the PAMA's design for Project 1 was both feasible and consistent with contemporaneous state of the art. Further, DRP's own conduct demonstrates that Claimants' arguments are a fabrication. Apart from Claimants own decisions to maximize production while flouting the intent and purpose of the PAMA, there was no reason to delay.[49] In response, Claimants say nothing in their Reply. These facts – which Claimants

[43] Reply, ¶ 4.

[44] Reply, ¶ 12.

[45] Contract Counter-Memorial, § II.C.3.a.

[46] *See* Contract Counter-Memorial, § II.C.3.a.; Dobbelaere First Expert Report, ¶ 66; Dobbelaere Second Expert Report, ¶ 94.

[47] Contract Counter-Memorial, ¶ 127; Dobbelaere First Expert Report, §§ VI, X.; and Dobbelaere Second Expert Report, ¶¶ 87 and 91.

[48] Reply, ¶ 126.

[49] Dobbelaere First/Second Expert Report, § VIII; Proctor First Expert Report, Sections 3.4 & 3.5.

concede by their silence – support Peru's position on these issues in the Treaty Case regarding the fact that DRP could have completed Project 1 on time.

49. After operating the Facility for seven years without making any significant progress on Project 1, DRP requested an extension from Peru to implement Project 1.[50] This is despite the fact that it had requested a substantial modification of its design in 1998.[51] In its extension request, it questioned *for the first time* the achievability of Project 1, and proposed to return to the original PAMA design —the same one it now holds responsible for its delay— reversing its 1998 decision.[52] Claimants' position is untenable; they are solely to blame for this delay and for the environmental consequences that it caused in La Oroya. As explained in the Counter-Memorial[53] and further in this Rejoinder,[54] it was the depletion of DRP's capital that seriously compromised and delayed its ability to complete the PAMA. Again, in response Claimants say nothing in their Reply. These facts – which Claimants concede by their silence – support Respondents' position in the Contract Case that DRP breached its PAMA, and support Peru's in the Treaty case that DRP caused its own delay and was not entitled to an extension.

2. Claimants compromised DRP's ability to meet its obligations

50. In their Counter-Memorial, Respondents presented evidence that Claimants imposed severe financial obligations and constraints on DRP and the resulting statements from key executives and employees within DRP, Renco and its affiliates. These employees and executives protested Renco's transactions by raising concern that Renco's financial management was putting DRP in an untenable and dire position. In their Reply, Claimants did not deny that these financial transactions or statements were made. In fact, Claimants completely ignored all the evidence Respondents presented on this matter. Yet another series of concessions. For the Treaty Case, these facts demonstrate that Renco is the

[50] Contract Counter-Memorial, ¶ 218; A. Bruce Neil First Witness Statement, 17 December 2020, ¶ 25.

[51] **Exhibit R-155**, Report to the MEM on the PAMA and Request for Approval of Modifications in the Program, DRP, December 1998, p. 2.

[52] Contract Counter-Memorial, ¶ 217; **Exhibit C-050 (Treaty)**, Letter from DRP (J. C. Mogrovejo) to Ministry of Energy & Mines (J. Bonelli) *attaching* Request for an Exceptional Extension of Deadline to Complete the Sulfuric Acid Plants Projects, 15 December 2005; Dobbelaere Expert Report, ¶¶ 162–163.

[53] Contract Counter-Memorial, § II.C.1.

[54] Contract Rejoinder, § II.A.2.

architect of DRP's financial downfall, which in turn precluded DRP's completion of its PAMA obligations. For the Contract Case, these facts demonstrate that Claimants failed to allocate the appropriate amount of resources to comply with DRP's environmental obligations, which in turn resulted in DRP violating its PAMA obligations.

a. Claimants failed to address evidence presented in Respondents' Counter-Memorial showing that Renco's financial mismanagement of DRP caused DRP's failure

(i) Claimants' financial management of DRP

51. While the Tribunal can find a detailed explanation of key and undisputed facts regarding Claimant's financial mismanagement of DRP in Section II.C.1.a of Respondents' Counter-Memorial, for the Tribunal's convenience below, Respondents provide a summary of the key and now undisputed facts relating to Claimants' financial mismanagement of DRP. All of the following facts are undisputed:

- On the same day the Facility was purchased, DRP provided a USD 125 million interest-free loan to DRM (the USD 125 million was taken from the Acquisition Loan, meaning the USD 225 million loan from Bankers Trust Company and other Lenders that Renco used to finance the acquisition of the Complex). The STA explicitly provided that these funds would be allocated to DRP's fulfillment of the PAMA project.[55]

- In March 1998, DRP became a guarantor of DRRC's (Renco's subsidiary) high-yield (*i.e.*, junk) bond debt. This required DRP to pledge the entirety of its assets and prohibited it both from incurring other indebtedness, unless subordinate to the guarantee, and from entering any revolving credit facility greater than USD 60 million.[56]

- DRRC loaned the bond proceeds to DRM – the "Back-to-Back Loan." DRM then used the loaned bond proceeds to pay off the Acquisition Loan and other acquisition related debt. DRM thus became indebted to DRRC for USD 125 million, plus over USD 14 million a year in interest.[57] While DRP did not make any payments of principal or interest in the relevant time period, such debt stressed DRP's liquidity

[55] Contract Counter-Memorial, ¶ 153; *see* **Exhibit R-095**, Acquisition Loan, p. 45, clause 2.5(f); *see* **Exhibit R-094**, DRRC SEC Form S-4, PDF p. 31.

[56] Contract Counter-Memorial, ¶ 158(b); *see* **Exhibit R-069**, Indenture between DRRC and State Street Bank and Trust Company, 12 March 1998, p. 1, 15–16, 55–56; *see also* **Exhibit R-068**, DRP Intercompany Note: Summary of Facts, undated, p. 6.

[57] Contract Counter-Memorial, ¶ 158(c); *see* **Exhibit R-070**, Special Term Deposit Contract, 12 March 1998. The bond proceeds were used to secure the USD 125 million Back-to-Back Loan from Banco de Credito Overseas Limited to Doe Run Mining; *see* **Exhibit R-071**, Contract for a Loan in Foreign Currency, 12 March 1998.

and made it more difficult for DRP to obtain financing, as Ms. Kunsman points out.[58]

- In 2001, DRP and DRM merged, leading to significant financial repercussions. First, the debt from the USD 125 million loan from DRP to DRM was simply "eliminated"[59] and DRP never recovered their initial loan.[60] Second, DRP became the debtor on the Back-to-Back Loan, saddling DRP with the outstanding debt from its own acquisition,[61] which became USD 139.1 million after interest.[62]

- During this period, DRP also paid many separate intercompany fee arrangements to Renco and its U.S. affiliates. For example, from October 1997 to March 1998 DRP entered into five such agreements, paying over USD 70 million to upstream Renco affiliate entities over the next three years.[63] Within this arrangement, DRP paid tens of millions of dollars to DRM–even though DRM was a company with no offices or employees, and offered no services.[64] These agreements were often signed by one executive on behalf of both counterparties.[65]

52. What Claimants do contest, is as baffling as it is incomplete and false. In their Reply, Claimants allege for the first time that there was a correlation between DRP's international sales and the related party transactions, as the related party transactions allegedly gave DRP "a host of services and significant access to international markets for DRP's product sales."[66] However, as Ms. Kunsman points out in her second expert report, Claimants and

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[58] *See* Kunsman Second Expert Report, ¶ 58 ("Mr. Callahan misses the point that existing debt, whether you are paying it or not, affects a company's liquidity because it prevents the company from raising additional debt. In this case the intercompany debt stressed DRP's liquidity since the intercompany debt was not incurred to fund DRP's capital investments required to comply with the PAMA Requirements but instead to fund Renco's acquisition of the Facility").

[59] Contract Counter-Memorial, ¶ 158(d); *see* **Exhibit R-068**, DRP Intercompany Note: Summary of Facts, undated, p. 7.

[60] Contract Counter-Memorial, ¶ 159(a).

[61] Contract Counter-Memorial, ¶ 158(d); *see* **Exhibit R-068**, DRP Intercompany Note: Summary of Facts, undated, p. 7.

[62] Contract Counter-Memorial, ¶ 158(e); *see* **Exhibit R-073**, Letter from Doe Run Company (J. Zelms) to Banco de Credito Overseas Ltd., 12 September 2002; *see* **Exhibit R-072**, Subordinated Promissory Note, 12 September 2002; *see also* **Exhibit R-068**, DRP Intercompany Note: Summary of Facts, undated, p. 9.

[63] Contract Counter-Memorial, ¶ 163; *see, e.g.*, **Exhibit R-074**, DRP Financial Statements, as of 31 October 2000 and 1999, pp. 16–18 (addressing "Related party transactions").

[64] Contract Counter-Memorial, ¶ 165; *see* **Exhibit R-076**, Kenneth Richard Buckley Deposition (excerpts), Document No. 764-5, A.O.A. et al. v. Doe Run Resources Corp., et al. (E.D. Mo. Case No. 4:11-cv-00044-CDP), 9 June 2017, p. 34:6–16; *see also*, *id.*, pp. 33:16–34:5; *see* **Exhibit R-077**, Marvin Kaiser Deposition (excerpts), Document No. 764-3, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 28 June 2017, p. 60:1–3.

[65] Contract Counter-Memorial ¶ 164; *see* **Exhibit R-075**, Technical, Managerial and Professional Services Agreement between Doe Run Mining S.R. Ltda. and DRP, 9 March 1998, p. 6.

[66] Claimants' Reply, ¶ 136.

Mr. Callahan simply assume that the related party transactions had a direct impact on DRP sales without any basis.[67] Correlation is not the same as causation.[68] DRP's sales were affected by a host of factors, such as market conditions.[69]

53. Claimants provide no evidence to substantiate this proposition, and DRP's alleged dependence on the intercompany fee arrangements is belied by the fact that when proposing restructuring plans, DRP was willing to stop the related party transaction until Project 1 was complete.[70]

(ii) DRP executives, auditors, and banks repeatedly raised concerns about DRP's financial management and subsequent viability

54. In the Counter-Memorial,[71] Respondents provided ample evidence that key employees and affiliates repeatedly responded to Renco's financial transactions by raising concerns. In their Reply, Claimants neither deny nor address the transactions. They are simply silent.

55. In the wake of this silence, Respondents here again speak the now uncontested facts:

- In August 1998, DRP treasurer Eric Peitz warned that DRP "could not satisfy the obligations that were imposed upon" it and would need to decide which obligations "we can't do or aren't going to do in order to be -- in order to be viable as a going concern."[72] Peitz later confirmed during testimony in the Missouri Litigations that the undercapitalization of DRP contributed to its ultimate bankruptcy, calling it, "reasonably foreseeable" that bankruptcy would result from, "start(ing) out undercapitalized."[73]

- DRP president Kenneth Buckley stated in a 2000 memo written to the President/CEO of DRRC that "[t]he time for business as usual is over. Doe Run's situation is deteriorating, Renco is not coming to the rescue" and "Doe Run's business model–100% debt financing–is flawed … and we are unaware of any

[67] *See* Kunsman Second Expert Report, ¶¶ 68-70.

[68] *See* Kunsman Second Expert Report, ¶ 69.

[69] *See* Kunsman Second Expert Report, ¶ 69.

[70] *See* **Exhibit IK-002**, Restructuring Plan, p. 7 (The "Project" is understood to mean Sulfuric Acid Plant and Copper Circuit Modification).

[71] *See* Contract Counter-Memorial, § II.C.1.c.

[72] Contract Counter-Memorial, ¶ 170; *see* **Exhibit R-067**, Eric Peitz Deposition (excerpts), Document No. 764-6, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 27 July 2017, pp. 78:5–79:20.

[73] Contract Counter-Memorial, ¶ 154; *see* **Exhibit R-067**, Eric Peitz Deposition (excerpts), Document No. 764-6, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 27 July 2017, pp. 73:20–75:2; *see also id.*, p. 75:17–19.

company, in any industry, that has managed a similar feat… The system isn't working … business is not good, and … Doe Run's future is very much in doubt."[74]

- Several banks involved with DRP also shared this concern. In June 2000, for example, Credit Lyonnais wrote to the Vice President of Finance for DRRC. In reference to their intracompany financial transactions, they stated, "DRP cash flow generation can not sustain the continuation of this money transfer."[75]

- By 2001, DRP's auditors stated that DRP, "faces liquidity issues that raise substantial doubt about its ability to continue as going concern."[76] They reiterated these same concerns again in 2003.[77]

- In August 2005, DRP Treasurer Mr. Peitz noted: "I sounded the alarm in writing in August 1998 and it did nothing but discredit me with management…. Aside from the fact that the Company's capital was drained, its current earning power is not strong enough to cover its costs. I say again, drastic measures need to be taken."[78] Pietz characterized DRP as "in volatile waters" because "[t]he sponsors have only invested $2 million in DRP and DRP has sent some $125 million to the US."[79]

- In fall 2005, Pierre Larroque, an outside financial strategist hired by Claimant, noted the impact the debt was having on DRM. He stated that existing liens and negative pledges on DRP's assets "now needs to be resolved as a priority" as "[n]o bank will proceed with arranging financing for Doe Run Peru until it is assured that adequate collateral will be available."[80]

- In December 2005, Renco demanded DRP wire it an additional USD 1 million, plus USD 333,000 every month following. DRP objected: "The budget was not planned in that way … we are trying to build enough cash to comply with the MEM requirement[.] Increasing your liquidity is obviously reducing our liquidity, and is

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[74] Contract Counter-Memorial, ¶ 158; *see* **Exhibit R-085**, Memorandum from DRP (J. Zelms), 4 September 2000, p. 4.

[75] Contract Counter-Memorial, ¶ 159; *see* **Exhibit R-083**, Email from Credit Lyonnais (A. Corvalan) to M. Kaiser, 30 June 2000; *see also* **Exhibit R-084**, Email from Credit Lyonnais (A. Corvalan) to DRP (Eric Peitz), 4 July 2000.

[76] Contract Counter-Memorial, ¶ 160; *see* **Exhibit R-086**, DRP Combined Financial Statements, as of 31 October 2001 and 2000, p. 2 (KPMG Independent Aud itor's Report, 5 December 2001).

[77] Contract Counter-Memorial, ¶ 160; *see* **Exhibit R-087**, DRP Financial Statements, as of 31 October 2003 and 2002, p. 2 (KPMG Independent Auditor's Report, 4 February 2004).

[78] Contract Counter-Memorial, ¶ 161; *see* **Exhibit R-089**, Email chain between DRRC to DRP, 30 August and 28 December 2005, pp. 4–5.

[79] Contract Counter-Memorial, ¶ 161; *see* **Exhibit R-089**, Email chain between DRRC to DRP, 30 August and 28 December 2005, pp. 4.

[80] Contract Counter-Memorial, ¶ 162; *see* **Exhibit R-090**, Email from DRRC (J. Zelms) to Renco Group (I. Rennert), *attaching* the Pierre Larroque Report on Peru Financing Status, 19 October 2005, pp. 2, 4.

putting in danger the objective to extend the PAMA."[81] DRRC replied with one-line: "[P]lease have the [USD] 333[,000] sent the first working day of Jan."[82]

- In the subsequent years proceeding bankruptcy, DRP continued to raise concerns. For example, in March 2006 Mr. Peitz said, "Please note that the cash flow is not sufficient to support PAMA … We run out of money in 2007."[83] Later that month, Peitz warned that "[t]he company has to stop spending money like it grows on trees."[84]

56. In their Reply brief, Claimants deny none of the above. They do not suggest these statements by their own employees and affiliates are incorrect, and for that matter, how could they? Claimaints' silence is once again a dispositive concession.

b. In their Reply, Claimants ignore the material evidence discussed above and focus on alleged facts that are irrelevant

57. In their Reply brief, while neither denying nor addressing the occurrence of the aforementioned financial transactions, Claimants argue against the conclusions necessarily drawn from these undisputed facts. Namely, Claimants attempt to argue that the financial transations did not result in DRP being immediately undercapitalized and burdened financially.

58. Claimants claim that DRP spent USD 313 million to meet its PAMA investment obligations and that, because of this, it is impossible that they experienced a liquidity crisis or were financially burdened. In other words, Claimants argue that because DRP allegedly spent a large sum of money, DRP could not have been financially burdened or unstable.

59. Notwithstanding the issue of whether these alleged expenditures occurred, Claimants somehow miss the point, placing in full relief the logical fallacy propping up their argument. Establishing that some funds – even a considerable amount of funds – were invested in the PAMA project over a ten-year period does not prove the absence of

[81] Contract Counter-Memorial, ¶ 164; *see* **Exhibit R-089**, Email chain between DRRC to DRP, 30 August and 28 December 2005, p. 1.

[82] Contract Counter-Memorial, ¶ 165; *see* **Exhibit R-089**, Email chain between DRRC to DRP, 30 August and 28 December 2005, p. 1.

[83] Contract Counter-Memorial, ¶ 166; *see* **Exhibit R-092**, Email from DRP (E. Peitz) to DRRC (B. Neil), 13 March 2006, p. 1.

[84] Contract Counter-Memorial, ¶ 166; *see* **Exhibit R-093**, Email from DRP (E. Peitz) to DRRC (B. Neil), 30 March 2006, p. 1.

Claimants' financial mismanagement of DRP, or DRP's resulting precarious position. DRP's own executives stand as a repeated testament to the serious strain Claimants placed on DRP's financial position. Even if the alleged expenditures were made, Renco stretched DRP to its breaking point with liens, stripping, debts, and a lack of liquidity. Renco managed DRP's financials in this manner, knowing that DRP was obligated to complete its PAMA obligations. Claimants' argument is simply: large expenditures are not made by financially unstable entities. Respondents disagree.

60. In their Reply, in one of the few points in opposition it makes, Claimants also deny that DRP paid tens of millions of dollars in interest on debt originating from their own acquisition.[85] Claimants do not provide any support for this position. Claimants rely on the "Callahan Report" to support this point, which states, "DRP never made any payment of principal or interest on the debt as DRP was not obligated to make payments … until the Sulfuric Acid portion of the PAMA was satisfied."[86] Callahan's report supports this claim by citing to the "Third Revised and Amended Subordinated Promissory Note", which only lays out the terms of the loan agreement.[87] Notably, Callahan's report does not contain any relevant financial records that might prove his point.

61. Notably, none of the above-mentioned information is new to Claimants, as Respondents provided a detailed account of Claimants' mismanagement of DRP in **Section II.C.1** of their Counter-Memorial, Claimants just decided not to respond.

B. Claimants bear the burden of proof to establish jurisdiction and prove their claims

62. Claimants bear the burden of proving the facts required to establish the jurisdiction of the arbitral tribunal over the dispute. Claimants also bears the burden of proving the facts necessary to its claims.

[85] *See* Contract Counter-Memorial, ¶ 159(c); *see* Reply, ¶ 132.

[86] Callahan First Expert Report, ¶ 30.

[87] Callahan First Expert Report, ¶ 30; *see* **Exhibit R-303**, Third Revised and Amended Subordinated Promissory Note, 16 March 2007.

1. Claimants bear the burden of proving the existence of jurisdiction

63. International tribunals have consistently applied the basic burden-of-proof rule that the party who makes an assertion must prove it.[88] This principle is established in Article 27(1) of the UNCITRAL Rules, which govern this proceeding.[89] Claimants, as the party asserting that the Tribunal possesses jurisdiction, must therefore prove the facts necessary to establish such jurisdiction.[90] As the tribunal in Pacific Rim explained, it is impermissible for the Tribunal to find its jurisdiction on any of the Claimant's claims on the basis of an assumed fact.[91] Instead, as the AAPL tribunal noted, a claimant "must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency, of proof."[92]

64. The jurisdiction of international arbitral tribunals is founded on consent. For that reason, when a jurisdictional question involves the existence (or not) of arbitral consent, a claimant bears the burden of proving clear and unequivocal (rather than probable) consent. As the AMTO tribunal recognized, "Consent to arbitrate, as the foundation of the jurisdiction of an arbitral tribunal, should be unequivocal."[93] Said another way, "consent should be expressed in a manner that leaves no doubts."[94] And because a tribunal's jurisdiction is coextensive with the scope arbitral consent,[95] the clear and unequivocal threshold applies both to the existence and scope of arbitral consent. As the Fireman's Fund tribunal

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[88] *See* **RLA-180**, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, ¶ 2.11; **RLA-181**, *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Award, 7 July 2004, ¶ 58; **RLA-182**, *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, ¶ 64.

[89] UNCITRAL Rules, article 27(1).

[90] *See* **RLA-183**, *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB 12/20, Award, 26 April 2017, ¶ 66; **RLA-184**, *Abaclat et al. v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, ¶ 678.

[91] *See* **RLA-180**, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, ¶ 2.8.

[92] **RLA-170**, *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, ¶ 56.

[93] **RLA-182**, *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, ¶ 46.

[94] **RLA-185**, *Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3, Award, 2 August 2011, ¶ 113.

[95] **RLA-186**, Nigel Blackaby et al., Redfern and Hunter on International Arbitration (6th Edition), 17 September 2015, § 2.63; *see* **RLA-187**, *Achmea B.V. v. The Slovak Republic*, PCA Case No. 2013-12, Award on Jurisdiction and Admissibility, 20 May 2014, ¶ 117.

explained, "a foreign investor is [not] entitled to the benefit of the doubt with respect to the existence and scope of an arbitration agreement."[96]

65. Claimants cannot ignore this burden as they present their arguments.

2. Claimants bears the burden of proving every aspect of each claim they presents

66. A claimant bears the burden of proving every aspect of each claim it presents, both in commercial and investment arbitration.

67. In commercial arbitration, claimants have the sole burden of proving every aspect of their claim for damages in accordance with the general *actori incumbit probatio* principle of international law (each party bears the burden of providing the facts necessary to its claims or defenses).[97] The tribunal in *International Consultants v. Reynolds* accordingly decided that the burden of proof laid on the party contending the claim, and that the tribunal would reject the allegations if the evidence proved unconvincing.[98] A few institutional arbitration rules codify this issue,[99] and the rules applicable to this case, UNCITRAL Rules, are representative: "[e]ach party shall have the burden of proving the facts relied on to support its claim or defense."[100]

68. Investment arbitration follows the same principle. In 1994, the *Biloune v. Ghana* tribunal determined that "each party has the burden of proving the facts upon which it relies for its claim or defence."[101] Since then, the *Apotex v. USA* tribunal determined that it is for the claimant to "prove its positive test" and for the respondent to "prove its positive defence,

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[96] **RLA-188**, *Fireman's Fund Insurance Company v. United Mexican States*, ICSID Case No. ARB(AF)/02/1, Decision on the Preliminary Question, 17 July 2003, ¶ 64; *see also* **RLA-189**, *National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7, Award, 3 April 2014, ¶ 117; *see* **RLA-190**, *Menzies Middle East & Africa S.A. and Aviation Handling Services International Ltd. v. Republic of Senegal*, ICSID Case No. ARB/15/21, Award, 5 August, 2016, ¶ 130.

[97] **RLA-231**, General Assembly, United Nations, Report of the UNCITRAL on the Work of Its Ninth Session, U.N. Doc. A/31/17 (Supplement No. 17), Annex II (Report of the Committee of the Whole II relating to the UNCITRAL Arbitration Rules, pp. 183–184 (¶116).

[98] **RLA-227**, *International Consultants Inc. v. Reynolds Construction Company Ltd.*, ICC Case No. 15612/FM/JEM/MLK, Award, 24 June 2010, ¶¶ 180–81.

[99] *See, e.g.*, **RLA-232**, 2002 ICDR Rules, article 21(1); **RLA-233**, 2018 HKIAC Rules, article 22(1); **RLA-234**, 2015 CIETAC Rules, article 41(1); *see also* **RLA-235**, 2012 SCAI Rules, article 24(1).

[100] 2021 UNCITRAL Rules, article 27(1).

[101] **CLA-055 (Treaty)**, *Antoine Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre*, UNCITRAL, Award on Jurisdiction and Liability, 27 October 1989, p. 207.

if it has a case to meet."[102] Likewise, the tribunal in *Rompetrol Group v. Romania* applied "the widely accepted international principle that a party in litigation bears the burden of proving the facts relied on to support its claim or defence," and determined that "[a] claimant before an international tribunal must establish the facts on which it bases its case or else it will lose the arbitration."[103] In fact, according to the *Rompetrol* tribunal, the respondent did not bear a "burden of (dis)proof."[104] The respondent's burden of proof would only be triggered if it chose to "put forward fresh allegations of its own in order to counter or undermine the claimant's case."[105] That burden on respondents to put forward fresh allegations of their own in order to counter or undermine Claimants' case, however, is only triggered if a claimant actually proves all the elements necessary to establish its case in the first place. This principle was confirmed in *Chevron v. Ecuador*, which applied UNCITRAL Article 24(1) and highlighted that "whilst the evidential burden may shift from one side to the other depending on the evidence, it remains always for the Claimants to prove their positive case."[106]

C. Interpretation of the clauses of the STA that are relevant to the dispute in accordance with Peruvian law

69. The Tribunal must decide three points to determine whther it has jurisdiction: first, the proper method of contract interpretation in accordance with Peruvian law; second, the apportionment of responsibility set forth in clauses 5, 6, and 8.14 of the STA; and third, DRP's responsibility, if any, for third-party claims pursuant to clauses 5.3 and 5.4 of the STA.

70. The proper interpretation of these STA clauses in accordance with Peruvian law is fundamental for the Tribunal to properly decide the matter. In order for Claimants to adequately plead their case, they must perform a proper interpretation of these relevant clauses, which they categorically have failed to do. Claimants have ignored or distorted the

[102] **RLA-226**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, ¶ 8.9.

[103] **RLA-230**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, ¶ 179.

[104] **RLA-230**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, ¶ 179.

[105] **RLA-230**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, ¶ 179.

[106] **CLA-039 (Treaty)**, *Chevron Corporation and Texaco Petroleum Corporation v. Republic of Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II, 30 August 2018, ¶¶ 4.4, 8.3.

meaning and purpose of these clauses, and have advanced unfounded and contradictory arguments that are contrary to the text and parties' common intention. Claimants' interpretation of these clauses is not only inconsistent with Peruvian law, but also with the factual and legal background of the STA, the parties' conduct and correspondence, and the evidence on record.

1. Contract interpretation in accordance with Peruvian law

71. As Respondents explained in their Counter-Memorial, the STA and the Peru Guaranty are governed by Peruvian law and,[107] accordingly, they are to be interpreted under principles of Peruvian law that govern contract interpretation. Respondents further noted in their Counter-Memorial that Claimants mischaracterized the Peruvian law of interpretation – in numerous instances omitting important principles regarding proper contract interpretation. In their Reply, Claimants do not contest the Peruvian law that Respondents presented in their Counter-Memorial. Nevertheless, because Claimants continue to fail to properly interpret the STA under Peruvian law, choosing not only to fail to contest but rather fully ignore the law, Respondents provide a summary of proper contract interpretation under Peruvian law for the Tribunal's convenience.

72. The Peruvian Civil Code contemplates several methods of interpreting contracts. Article 168 requires a literal interpretation contracts.[108] Article 169 provides for the systematic interpretation of contracts.[109] And Article 170 establishes the functional interpretation of contracts.[110] Two overarching Articles help guide the interpretative exercise. Article 1361 establishes the presumption that the text of a contract represents the common will of the contracting parties.[111] Article 1362 mandates that contracts "be negotiated, executed and performed according to the rules of good faith and according to the common intention of the parties."[112] Below Respondents will explain each principle in turn.

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[107] *See* **Exhibit R-001**, STA & Renco Guaranty, clause 11.

[108] **RLA-062**, Peruvian Civil Code, 24 July 1984, article 168; Varsi First Expert Report-Contract, ¶¶ 4.28–4.30.

[109] **RLA-062**, Peruvian Civil Code, 24 July 1984, article 169; Varsi First Expert Report-Contract, ¶¶ 4.33–4.34.

[110] **RLA-062**, Peruvian Civil Code, 24 July 1984, article 170; Varsi First Expert Report-Contract, ¶¶ 4.39–4.48.

[111] **RLA-062**, Peruvian Civil Code, 24 July 1984, article 1361.

[112] **RLA-062**, Peruvian Civil Code, 24 July 1984, article 1362.

73. Article 168 of the Peruvian Civil Code provides the *starting point* for contractual interpretation: "A legal act shall be interpreted in accordance with what has been stated in them in accordance with the principle of good faith."[113] Contractual interpretation under Peruvian law does not seek to discover some hidden will.[114] Where the common will of the parties is clear from the text, no other methods of interpretation are necessary.[115]

74. In cases where the literal interpretation is not clear, Article 169 of the Peruvian Civil Code provides for systematic interpretation.[116] The meaning of an apparently clear clause can also be confirmed through systematic interpretation. Systematic interpretation is a contextual cannon, providing that a contractual provision should be interpreted in a manner that provides consistency among the different clauses of the contract.[117]

75. If after performing literal and systematic interpretations, the common will of the parties is not clear, then Article 170 of the Peruvian Civil Code provides for a functional (i.e., teleological) approach. Under this functional interpretation, contract provisions that are subject to more than one interpretation are construed in a manner that accords with the contract's nature and object.[118]

76. Professor Varsi explains that Articles 1361 and 1362 of the Peruvian Civil Code must also be taken into consideration in addition to the aforementioned interpretative principles.[119] Article 1361 states that "[i]t shall be presumed that the statement contained in the contract corresponds to the common intention of the parties and the party who denies such coincidence shall prove this."[120] Notably, a party seeking to dispel the presumption *cannot* rely on subjective feelings or thoughts about the will of the contracting parties.[121]

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[113] **RLA-062**, Peruvian Civil Code, 24 July 1984, article 168.

[114] *See* Varsi First Expert Report-Contract, ¶ 4.26.

[115] Varsi First Expert Report-Contract, ¶¶ 4.33–4.36; **Exhibit JAP-020**, Lohmann, Guillermo, *"La Interpretación del Negocio Jurídico y del Contrato"*, Tratado de la Interpretación del Contrato en América Latina, Tomo III, p. 1679.

[116] Varsi First Expert Report-Contract, ¶¶ 4.33–4.36.

[117] *See* Varsi First Expert Report-Contract, ¶¶ 4.314.

[118] **RLA-062**, Peruvian Civil Code, 24 July 1984, article 170; Varsi First Expert Report-Contract, ¶¶ 4.36–4.38.

[119] Varsi First Expert Report-Contract, ¶ 4.39

[120] **RLA-062**, Peruvian Civil Code, 24 July 1984, article 1361.

[121] Varsi First Expert Report-Contract, ¶ 4.42.

77. Article 1362 states that contracts "must be negotiated, executed and performed according to the rules of good faith and according to the common intention of the parties."[122] As explained by Professor Varsi, Article 1362 refers to *objective* good faith, meaning that it "requires the parties to behave in accordance with a legal standard, such as the action of a correct and reasonable person, that is, a person who behaves with ordinary diligence."[123] It is an objective, reasonable person standard. Further, "good faith" cannot be used to change the content of a contract.[124]

78. Finally, under Peruvian law parties are free to agree on how a contract should be interpreted.[125] The parties can determine, for example, which documents form part of the agreement and how they should be read. Thus, in the event that there is an inconsistency between the provisions of the different documents that are part of the contract, the parties may prefer that one prevail over the other in those situations.[126]

79. The Tribunal must apply the aforementioned rules and principles when interpreting the STA and the Peru Guaranty.[127]

2. Interpretation of Clauses 5, 6, and 8.14 of the STA and how responsibility is allocated between the Company and Centromín

80. Using the above-referenced provisions of the Peruvian Civil Code, Respondents explain below how to interpret Clauses 5, 6, and 8.14 of the STA. Clauses 5 and 6 allocate responsibility for environmental matters between the Company (which, to recall, ultimately became DRP) and Centromín, and establish the consequences of this allocation.

81. Clause 5 is made up of one chain of interlocking provisions in relation to the allocation of responsibility for third-party claims. Under Clauses 5.1, 5.2, 5.3, 5.4, and 5.5 the Company

[122] **RLA-062**, Peruvian Civil Code, 24 July 1984, article 1362.

[123] Varsi First Expert Report-Contract, ¶ 4.22

[124] Varsi First Expert Report-Contract, ¶ 4.47.

[125] Varsi First Expert Report-Contract, ¶ 4.50.

[126] Varsi First Expert Report-Contract, ¶ 4.50.

[127] Under Peruvian law, if after performing literal and systematic interpretations, the common will of the parties is not clear, then Article 170 of the Peruvian Civil Code provides for a functional (i.e., teleological) approach. Peru does not provide an explanation of the functional approach because, for purposes of interpreting the STA, only the literal and systematic approaches are relevant.

assumes responsibility for certain environmental matters.[128] Clause 5.8 establishes the consequence of that allocation: the Company is to indemnify Centromín against third-party claims for which the Company has assumed responsibility.[129]

82. The following is a graphical representation of the correct interpretation of Clause 5:

Table 1: Correct Interpretation of Clause 5		
Clauses 5.1 and 5.2	In relevant part, Clause 5.1 states that the Company must "Compl[y] with the obligations contained in METALOROYA'S PAMA, and its eventual amendments approved pursuant to the legal provisions, which have been or may be issued by the relevant authority, with regard to the effluents, emissions and waste generated by [. . .] [t]he smelting and refining facilities of the COMPANY."[130] Clause 5.2 states as follows: "The future closing and dismantling at the end of the operational life of: A) The smelting and refining facilities of the COMPANY. B) Any new deposit of slag, zinc ferrite or arsenic trioxide and others that the COMPANY may establish. C) The existing zinc ferrite deposits should the COMPANY not return the same to CENTROMIN within three (3) years from the date of the signing of this contract or should not pay the amount that was stipulated in numeral 5.6."[131]	Clauses 5.1, 5.2, 5.3, 5.4, 5.5 (Allocation of Responsibility) ↓ Clause 5.8 (Indemnity)
Clause 5.5	"The Company will not have nor will it assume any responsibility for damages or for [certain] third party claims attributable to Centromin"[132]	
Clause 5.3	"During the period approved for the execution of Metaloroya's PAMA, the Company will assume responsibility for [some] damages and claims by third parties"[133]	

[128] **Exhibit R-001**, STA & Renco Guaranty, clauses 5.1–5.3.
[129] **Exhibit R-001**, STA & Renco Guaranty, clause 5.8.
[130] **Exhibit R-001**, STA & Renco Guaranty, clause 5.1.
[131] **Exhibit R-001**, STA & Renco Guaranty, clause 5.2.
[132] **Exhibit R-001**, STA & Renco Guaranty, clause 5.5.
[133] **Exhibit R-001**, STA & Renco Guaranty, clause 5.3.

Table 1: Correct Interpretation of Clause 5		
Clause 5.4	"After the expiration of the legal term of Metaloroya's PAMA, the Company will assume responsibility for [some] damages and third party claims"[134]	
Clause 5.8	"The Company shall protect and hold Centromin harmless against third party claims and indemnify it for any damage, responsibility or obligation that may come for which it has assumed responsibility and obligation."[135]	

83. Clause 5.9 states that all other responsibility is allocated to Centromín pursuant to Clause 6.[136] Accordingly, Clause 6 is the analogue to Clause 5, but for Centromín. Clauses 6.1, 6.2, and 6.3 identify the environmental matters for which Centromín assumes responsibility.[137] More specifically, under Clause 6.2, Centromín assumes responsibility (during the execution period for Metaloroya's PAMA) for third-party claims attributable to the Company and Centromín's activities, except for those for which the Company has assumed responsibility in Clause 5.3.[138] Pursuant to Clause 6.3, Centromín assumes responsibility (after the expiration of the legal term of Metaloroya's PAMA) for third-party claims attributable to Centromín's activities, except for those for which the Company has assumed responsibility in Clause 5.4.[139]

84. The consequences of that allocation of responsibility are detailed in Clauses 6.5 and 8.14.[140] Under Clause 6.5, Centromín is obligated to indemnify the Company against third-party claims for which Centromín has assumed responsibility.[141] And Clause 8.14 provides that if Centromín receives notice from the Company or the Investor of a suit (or similar claim) within a reasonable time; that is related to a fact or act that is encompassed by

[134] **Exhibit R-001**, STA & Renco Guaranty, clause 5.4.
[135] **Exhibit R-001**, STA & Renco Guaranty, clause 5.8.
[136] **Exhibit R-001**, STA & Renco Guaranty, clause 5.9.
[137] **Exhibit R-001**, STA & Renco Guaranty, clauses 6.1–6.3.
[138] **Exhibit R-001**, STA & Renco Guaranty, clause 6.2.
[139] **Exhibit R-001**, STA & Renco Guaranty, clause 6.3.
[140] Varsi First Expert Report-Contract, ¶¶ 5.67–5.68.
[141] **Exhibit R-001**, STA & Renco Guaranty, clause 6.5.

Centromín's responsibilities, representations, and warranties; then Centromín will defend the Company or the Investor.[142]

85. Read correctly, Clauses 6 and 8.14 create one chain of interlocking provisions in relation to the allocation of responsibility for third-party claims. The first link, Clauses 6.2 and 6.3, identify the third-party claims for which Centromín "will assume responsibility."[143] The second link, Clause 6.5, sets the first consequence of that assumption. It requires Centromín to indemnify the Company against third-party claims "for which it has assumed responsibility and obligation."[144] The third link, Clause 8.14, sets the second consequence of that assumption. It requires Centromín to defend the Company against a suit (or similar claim) that is "related to any act or fact included within the responsibilities . . . [of] Centromín," so long as it receives notice of the suit or claim within a reasonable time.[145]

86. Pursuant to Peruvian law, those clauses must be read in a manner that provides consistency among them. Under Clauses 6.5 and 8.14, Centromín is obligated to indemnify and defend only the Company for third-party claims encompassed by Clause 6.2 and 6.3. The only interpretation of Clauses 6.2 and 6.3 that is consistent with Clauses 6.5 and 8.14 is one that concludes that the former—like the latter—encompasses only the Company.[146]

87. Below is a graphical representation of the correct interpretation of Clauses 6 and 8.14:

[142] **Exhibit R-001**, STA & Renco Guaranty, clause 8.14. In other clauses of the STA, Centromín made representations and warranties to the Company and the Investor. So, clause 8.14 applies to Company as to the relevant representations and warranties, and it applies to the Investor as well. Clauses 5 and 6 allocate responsibility only between the Company and Centromín. Thus, only clause 8.14's applicability to the Company's responsibilities is relevant when analyzing the scope of clauses 5 and 6.

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

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

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

[146] *See* Varsi First Expert Report-Contract, ¶¶ 5.68, 5.70–5.71.

Table 2: Correct Interpretation of Clauses 6 and 8.14		
Clause 6.1	"Centromin assumes responsibility in the following environmental matters: [including] Compliance with the obligations contained in Centromin's PAMA."[147]	Clauses 6.1, 6.2,6.3 (Allocation of Responsibility) (The Company) ↓ Clause 6.5 (Indemnity) (The Company) ↓ Clause 8.14 (Notice and Defense) (The Company)
Clauses 6.2 and 6.3	"During the period approved for the execution of Metaloroya's PAMA, Centromín will assume responsibility for [certain] damages and claims by third parties."[148] "After the expiration of the legal term of Metaloroya's PAMA, Centromín will assume responsibility for [certain] damages and third party claims."[149]	
Clause 6.5	"Centromín will protect and hold the Company harmless against third party claims and will indemnify it for any damages, responsibilities or obligations that may arise for which it has assumed responsibility and obligation."[150]	
Clause 8.14	"Should the Company or the Investor receive any claim or judicial, administrative notice or notice of any kind, related to any act or fact included within the responsibilities, representations and warranties offered by Centromín, they pledge to report it to Centromín within a reasonable term which will allow Centromín to exercise its right to a defense, releasing the Company or the Investor from any obligation with regard to the same and Centromín shall be obligated to immediately assume those obligations as soon as it is notified."[151]	

3. The Company assumed responsibility for various third-party claims and damages pursuant to Clause 5 of the STA

88. When determining which party assumed responsibility for third-party claims, one must look at both Clause 5 and Clause 6, as they interact which eachother. Notably, in order to properly interpret Clause 6.2, which outlines when responsibility falls on Centromín for the period approved for the execution of Metaloroya's PAMA, one must interpret Clause 5.3 to determine first whether the responsibility instead falls on the Company. One element

[147] **Exhibit R-001**, STA & Renco Guaranty, clause 6.1.
[148] **Exhibit R-001**, STA & Renco Guaranty, clause 6.2.
[149] **Exhibit R-001**, STA & Renco Guaranty, clause 6.3.
[150] **Exhibit R-001**, STA & Renco Guaranty, clause 6.5.
[151] **Exhibit R-001**, STA & Renco Guaranty, clause 8.14.

to presenting a claim under Clause 6.2 is to prove that the exception in Clause 5.3 is not triggered. Likewise, in order to properly interpret Clause 6.3, which outlines when responsibility falls on Centromín for the period after the expiration of the term of Metaloroya's PAMA, one must interpret Clause 5.4 to determine first whether the responsibility instead falls on the Company. One element to presenting a claim under Clause 6.3 is to prove that the exception in Clause 5.4 is not triggered.

89. The following table summarizes the allocation of responsibility for third-party claims under the STA by time-period:

Table 3: Allocation of Responsibility for Third-Party Claims		
Time Period	Centromin's Responsibility	The Company's Responsibility
Prior to the execution of the STA		**Clause 5.5**: "The Company will not have nor will it assume any responsibility for damages or for third party claims attributable to Centromin, insofar as the same were the result of Centromin's operations or those of its predecessors up to the execution of this contract."
During the period approved for the execution of Metaloroya's PAMA	**Clause 6.2**: "Centromin will assume responsibility for any damages and claims by third parties that **[i]** are attributable to the activities of the Company, of Centromin and/or its predecessors, except for **[ii]** the damages and third party claims that are the company's responsibility in accordance with numeral 5.3."	**Clause 5.3**: "The Company will assume responsibility for damages and claims by third parties . . . only in the following cases: **A)** Those that arise directly due to acts **[i]** that are not related to Metaloroya's PAMA **[ii]** which are exclusively attributable to the Company [and] **[iii]** [that] 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. [. . . .] **B)** Those that result directly from a default on **[i]** the Metaloroya's PAMA obligations on the part of the Company or **[ii]** of the obligations established by means of this contract in numerals 5.1 and 5.2."
After the expiration of the legal term of Metalaoroya's PAMA	**Clause 6.3**: "Centromin will assume responsibility for any damages and third party claims **[i]** attributable to Centromin's and/or its predecessors' activities except for **[ii]** the damages and third party claims for which the Company is responsible in accordance with numeral 5.4."	**Clause 5.4:** "The Company will assume responsibility for damages and third party claims in the following manner: **A)** Those that result directly from acts that are exclusively attributable to its operations after that period **B)** Those that result directly from a default on **[i]** the Metaloroya's PAMA obligations on the part of the Company or **[ii]** of the obligations established by means of this contract in numerals 5.1 and 5.2.

90. Below Respondents will explain how each of the scenarios is interpreted pursuant to Peruvian law.

a. The Company's responsibility for third-party claims and damages for the period approved for the execution of Metaloroya's PAMA Pursuant to Clause 5.3(a) of the STA

91. During the period approved for the execution of Metaloroya's PAMA ("**PAMA Period**"), Centromín made the following commitment:

> **Clause 6.2**: "Centromin will assume responsibility for any damages and claims by third parties that
>
> [i] are attributable to the activities of the Company, of Centromin and/or its predecessors, except for
>
> [ii] the damages and third party claims that are the company's responsibility in accordance with numeral 5.3."[152]

92. As is clear from a literal interpretation of the text, Clause 6.2 has two elements. The first element is that the party invoking Clause 6.2 must prove that the damages and claims by third parties are attributable to the activities of the Company, of Centromin and/or its predecessors. The second element is that the claims must not be encompassed by Clause 5.3. Therefore, in order to properly interpret Clause 6.2, one must interpret Clause 5.3 to determine whether the responsibility does not fall on the Company. Respondents will now explain the Company's responsibility under Clause 5.3(a).

93. Clause 5.3(a) of the STA establishes the first scenario of the scope of the Company's (i.e., DRP's) responsibility for damages and claims by third parties for the "period approved for the execution of Metaloroya's PAMA." During that period, DRP assumed responsibility if the third party claims and damages "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

[152] **Exhibit R-001**, STA & Renco Guaranty, clause 6.2.

protective of the environment or of public health than those that were pursued by Centromín until the date of execution of this Contract."[153]

94. There are three phrases that merit close attention: (i) "acts that are not related to Metaloroya's PAMA"; (ii) "exclusively attributable"; and (iii) "standards and practices that were less protective of the environment or of public health than those that were pursued by Centromín."

(i) The meaning of "acts that are not related to Metaloroya's PAMA"

95. With respect to what "acts that are not related to Metaloroya's PAMA" encompasses, in accordance with Article 168 of the Peruvian Civil Code we must start by performing a literal interpretation of the clause. For this determination, it is helpful to determine the significance of "acts that *are related* to Metaloroya's PAMA." As explained in Respondents' Counter-Memorial,[154] Metaloroya's (i.e., DRP's) PAMA and its amendments outlined projects and technological improvements that DRP was obligated to complete, including, among other projects: (i) the Sulfuric Acid Plant Project; (ii) the industrial waste water treatment plant for the smelter and refinery; (iii) the containment dam for the lead muds near the zileret plant; and (iv) wastewater treatment and disposal in La Oroya.

96. Based on a literal interpretation of Clause 5.3(a), acts that "are related to Metaloroya's PAMA" can only include acts that were done in order to perform, implement, or further DRP's PAMA. As a result, "acts that are *not* related to Metaloroya's [DRP's] PAMA" must include many operations of the Facility, such as processing and smelting metals concentrates, which produce toxic emissions. Most relevantly, they would also include DRP's decisions to increase production and use dirtier concentrates. Claimants have not identified a single provision of the PAMA that bears relation to those decisions.

97. The analysis of the meaning of this part of clause 5.3(a) can stop here, but, for the sake of completeness, in cases where the literal interpretation is not clear (which is not the case here), Article 169 of the Peruvian Civil Code provides for systematic interpretation. Based

[153] **Exhibit R-001**, STA & Renco Guaranty, clause 5.3(a).

[154] *See* Contract Counter-Memorial, **Section II.A**.

on a systematic interpretation of Clause 5.3(a), if one were to incorrectly exclude all operations of the Facility from the phrase "acts that are not related to Metaloroya's PAMA," as Claimant argue should be the case, then the second half of Clause 5.3(a) would be devoid of meaning. That is, the second half of Clause 5.3(a) states that DRP assumed responsibility for damages and claims by third parties if they arise directly due to acts that are not related to Metaloroya's PAMA which are exclusively attributable to DRP, "but only insofar as said acts were the result of [DRP's] use of standards and practices that were less protective of the environment or of public health than those that were pursued by Centromín until the date of execution of this Contract."[155] If all operations of the Facility are excluded from the phrase "acts that are not related to Metaloroya's[DRP's] PAMA," then there would be no scenario in which one would have to determine whether the use of standards and practices used by DRP were less protective of the environment or of public health than those that were pursued by Centromín. Further, as Ms. Alegre notes in her expert reports, it would be illogical to assume that Centromín granted the Company a "blank check" to contaminate as much as it wanted to through its operations.[156] The argument is untenable and would be contrary to Peruvian law.[157] In addition, as Ms. Alegre explains in her first report, pursuant to Supreme Decree No. 016-93-EM, "[t]he PAMA is an environmental instrument that contains the actions and investments necessary to incorporate, to the mining-metallurgical operations, the technological advances and/or alternative measures that aim to reduce or eliminate emissions and/or spills to be able to comply with the maximum levels approved allowables."[158] In her second report, Ms. Alegre further confirms that it is untenable to hold that operations are always related to the PAMA:

> "I consider that the higher emissions resulting from the increase in production in the CMLO operations and the use of dirtier materials do not constitute acts directly related to the PAMA, because the PAMA was not designed under the premise that such an increase in

[155] **Exhibit R-001**, STA & Renco Guaranty, clause 5.3(a).

[156] *See* Alegre Second Expert Report, § II.B; Alegre First Expert Report, ¶ 30(d).

[157] *See* Alegre Second Expert Report, ¶ 40; Alegre First Expert Report, ¶ 30(d).

[158] Alegre First Report, ¶ 16; **Exhibit AA-003**, Supreme Decree No. 016-93-EM, article 9.

> production would exist and, therefore, it also did not foresee management measures to handle those higher emissions."[159]

98. As a result, there must be scenarios where DRP is responsible for claims that relate to DRP's operations of the Facility during the term of DRP's PAMA period, based both on a plain reading and a systematic interpretation. Claimants' reading of excluding all operations from clause Clause 5.3 (a) would require the Tribunal to assume that *everything* that DRP was doing at the Facility after its acquisition *is related* to DRP's PAMA. That cannot be right. Claimant's reading of Clause 5.3(a) would require the Tribunal to believe that Activos Mineros intended to assume responsibility for environmental contamination that DRP caused from its operation of the Facility, no matter how DRP operated the Facility.

99. In their Reply, Claimants argue that operations are somehow always related to the PAMA.[160] Claimants argue that "[t]he PAMA and the operations of the Complex [were so] intertwined as to be inseparable from each other"[161] because: (i) the 1993 Enviromental Mining Law required operators "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;"[162] and (ii) the Environmental Mining Law "permitted mining and metallurgical operators to enter into administrative stability agreements with MEM [and that a] stability agreement would require the operators to comply only with the air quality standards then in effect for the life of the PAMA."[163] Respondents are unsure what Claimants expect the Tribunal to draw from these points. To be sure, just because operations were meant to continue during the PAMA period does not mean that operations are always related to the PAMA, and Claimants provide no support for such a far reaching a statement.

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[159] Alegre Second Expert Report, ¶ 15 (Spanish original: "Considero además que las mayores emisiones derivadas del incremento de producción en las operaciones del CMLO y el uso de concentrados más sucios no constituyen actos directamente relacionados con el PAMA, debido a que el PAMA no fue diseñado bajo la premisa de que existiría ese incremento de producción y, por lo tanto, tampoco previó medidas de manejo para gestionar las mayores emisiones resultantes de esos actos").

[160] *See* Reply, ¶¶ 68–71.

[161] *See* Reply, ¶ 71.

[162] *See* Reply, ¶ 68.

[163] *See* Reply, ¶ 69.

100. Claimants then attempt to support their flawed interpretation by referencing "the Missouri Plaintiffs' articulation of their own claims and their attendant nexus between DRP's operations and the PAMA."[164]

101. Notably missing from Claimants' arguments in their Memorial and Reply is any type of analysis in accordance with Peruvian law *of the text of the STA*. Indeed, not only do Claimants not address the text of the STA, but they also did not respond at all to the interpretation of this text that Respondents set forth in their Counter-Memorial and summarized above. Claimants likewise fail to engage with the PAMA and do not identify which part of it relates to DRP's increase in production and use of dirtier concentrates.

102. Although Claimants now try to refute the plain and systematic reading of the text of the STA that demonstrates that the PAMA is unrelated to DRP's increase in production and use of dirtier concentrates, and instead argue that the PAMA relates to *all* of the Facility's operations, it is notable that in their Statement of Claim they asserted just the opposite: describing DRP's responsibility for third-party damages and claims, Claimants noted that under Clause 5.3(a) of the STA, DRP would be responsible if the damages and claims are attributable to the "operation of the Complex" and "business operations of DRP 'not related' to its PAMA."[165]

(ii) The meaning of "exclusively attributable"

103. With respect to determining what the phrase "exclusively attributable" applies to, in their Memorial, Claimants argued that DRP assumes liability only for *claims* that are "exclusively attributable" to DRP. Respondents set out in their Counter-Memorial why in accordance with a textual and systematic interpretation under Peruvian law the phrase "exclusively attributable" applies to "acts." In their Reply, Claimants have not addressed the issue. As such, Respondents provide a summary for the benefit of the Tribunal of why "exclusively attributable" applies to "acts."

104. DRP assumes responsibility whenever claims and damages "arise directly due to acts" that are "exclusively attributable" to DRP. To argue that "exclusively attributable" modifies

[164] *See* Reply, ¶¶ 72–74.

[165] *See* Contract Memorial, ¶¶ 158(1), 158(2).

the term "claims" instead of the term "acts" would be to argue that "exclusively attributable" is modifying the subject of the *chapeau* of Clause 5.3, rather than modifying the subject of the list in which the phrase "exclusively attributable" is found. That cannot be right. This literal interpretation is clear.

105. Based on a systematic interpretation of Clause 5.3(a) (which is not necessary if a literal interpretation is clear), if one were to apply "exclusively attributable" to *claims* instead of *acts*, then the second half of Clause 5.3(a) and Clause 5.4(c) would be devoid of meaning. Clause 5.4(c) makes clear that the parties to the contemplated a scenario where the damages of a claim are attributable to *both* Centromín and the Company (DRP), and agreed that if the damages are attributable to *both* Centromín and DRP, that DRP would assume responsibility "in proportion to its contribution to the damage." This agreement would be devoid of meaning under Claimant's characterization of "exclusively attributable" in Clause 5.3(a), because, according to Claimants, there could be no scenario in which DRP would be responsible for its respective contribution for harm caused to third parties. According to Claimants, DRP is only responsible for *claims* "exclusively attributable" to DRP. In this interpretive world, DRP's contribution to a damages claim for the harm caused and attributable to DRP would be impossible, because that would involve a claim that is not exclusively attributable to DRP. A good faith interpretation of the STA cannot withstand the pathological result of Claimants' argument.

106. As a result, "exclusively attributable" must apply to "acts."

(iii) The meaning of "standards and practices that were less protective of the environment or of public health than those that were pursued by Centromín"

107. With respect to the meaning of "standards and practices that were less protective of the environment or of public health than those that were pursued by Centromín," based on a literal interpretation, this phrase means that DRP is liable if it used standards and practices that resulted in increased possibility of damage to the environment through pollution, it would be responsible for damages and claims by third parties. The Parties generally seem to agree on the meaning of this phrase.[166]

[166] *See* Contract Memorial, ¶ 88.

108. For example, in their Reply Claimants note that "reducing pollution" would be a better "standards and practices."[167] This understanding is further evidenced by Claimants' arguments expressed in paragraphs 80-94 of their Reply, where Claimants are clear that emissions that worsen "air quality" would be the result of a lesser standard and practice.[168] As such, it is clear that the Parties would agree that operations that increase pollution would therefore be a lesser "standard and practice."

109. Where there seems to be some confusion on Claimants part is reflected in paragraph 80 of their Reply, where they state the following:

> "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."[169]

110. There are several issues with Claimants' argument. First, the question of whether or not DRP executed its PAMA is being debated by the Parties, so including a debated issue as a premise to what should be an objective interpretation of the text of an agreement is incorrect. Second, even assuming DRP executed and completed its PAMA perfectly, which it did not, from an interpretative standpoint, nowhere in the text of the STA or the PAMA does it say that if the Company executes the PAMA to perfection they are immune from any responsibility regarding third Party claims no matter what else they do. Third, Claimants ask the Tribunal to ignore the fact that two things can be true at the same time: (1) it can be true that DRP executed the PAMA perfectly (*quod non*), and (2) it can be true that DRP nonetheless implemented other standards and practices that were less protective of the environment or of public health than those that were pursued by Centromin, such as by implementing less-protective standards for controlling emissions. Nowhere does the STA say that for purposes of interpreting "standards and practices" one looks at them as a whole. Using the simple example of a physician treating a patient with a headache, if the

[167] *See* Reply, ¶ 13.

[168] *See, e.g.*, Reply, ¶ 80.

[169] Reply, ¶ 80.

physician instructs the patient to take ibuprophen, drink water, and rest (in line with the generally accepted standard that a physician would follow), but at the same time hands the patient rat poison and instructs the patient to drink the water, then the physician still would have used lesser than accepted standards and practices.

111. While Claimants would like Clause 5.3(a) to mean that Activos Mineros assumed responsibility "for all third-party damages and claims attributable to DRP's operation of the Complex during the period approved by the MEM for the performance of DRP's PAMA projects (initially 10 years),"[170] it is evident that their reading is only possible by rewriting the STA.

b. The Company's responsibility for third-party claims for the period approved for the execution of Metaloroya's PAMA Pursuant to Clause 5.3(b) of the STA

112. In determining whether one can satisfy the second element of Clause 6.2, one must also determine first whether the responsibility falls on the Company under Clause 5.3(b).

113. Clause 5.3(b) of the STA establishes two additional scenarios where the Company assumes responsibility for third-party claims for the period approved for the execution of DRP's PAMA. The first is if they result directly from a default on DRP's PAMA, the second is if they result directly from a default of the obligations established by means of the STA in numerals 5.1 and 5.2. Both are described below in turn.

(i) The Company is responsible for third-party claims for the period approved for the execution of DRP's PAMA if they result directly from a default on DRP's PAMA

114. With respect to the first scenario under Clause 5.3(b) of the STA, DRP assumed responsibility for damages and claims that arise directly from DRP's default of DRP's PAMA.[171] As explained in Respondents' Counter-Memorial, the obligations of the PAMA required (i) 16 projects in total to be divided between Centromín and DRP; (ii) implementation of a modernization process of the facility for which it also detailed a series of technological improvements; and (iii) DRP would also have to invest in securing the

[170] Contract Memorial, ¶ 154.
[171] Contract Memorial, ¶ 156.

continuation of operations, and improving the various processes that the Facility undertook.[172] In addition, as Ms. Alegre explains in her first report, pursuant to Supreme Decree No. 016-93-EM,

> "The PAMA is an environmental instrument that contains the actions and investments necessary to incorporate, to the mining-metallurgical operations, the advances technologies and/or alternative measures **whose purpose is to reduce or eliminate emissions** and/or discharges in order to comply with the maximum levels approved allowables."[173] (Emphasis added)

115. It appears uncontested based on the Parties' submissions that DRP's violation of any of the above-referenced PAMA obligations would constitute a "default."

> (ii) The Company is responsible for third-party claims for the period approved for the execution of DRP's PAMA if they result directly from a default of the obligations established by means of the STA in numerals 5.1 and 5.2

116. With respect to the second scenario under Clause 5.3(b) of the STA, which states that the Company is responsible for third-party claims for the period approved for the execution of DRP's PAMA if they result directly from a default of the obligations established by means of the STA in numerals 5.1 and 5.2, in order to interpret when DRP would be responsible, it is necessary to look at Clauses 5.1 and 5.2 of the STA. In this case, the only relevant Clause is 5.1, thus Respondents will limit their analysis to Clause 5.1.

117. In relevant part, Clause 5.1 states that the Company must:

> "Compl[y] with the obligations contained in METALOROYA'S PAMA, and its eventual amendments approved pursuant to the legal provisions, which have been or may be issued by the relevant authority, with regard to the effluents, emissions and waste generated by [. . .] [t]he smelting and refining facilities of the COMPANY."[174]

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[172] **Exhibit C-090**, PAMA 1996 Report, PDF p. 185, table 5.1.2; *see also*, *id.*, PDF p. 186; *see* Contract Counter-Memorial ¶¶ 85–87.

[173] Alegre First Expert Report, ¶ 16; **Exhibit AA-003**, Supreme Decree No. 016-93-EM, article 9.

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

118. With regard to emissions obligations contained in Metaloroya's PAMA, the PAMA's primary goal is clear: reduce emissions of harmful substances into the environment. Specifically, the PAMA states as follows:

> "the purpose of this plan is to reduce the concentration of contaminants resulting from metallurgical operations and discharges to the environment to comply with the maximum permissible limits legally established by the Ministry of Energy and Mines."[175]

119. Both Parties' experts agree. Ms. Alegre, Respondents' environmental law expert, and Mr. Connor, Claimants' environmental expert, both agree that the PAMA's objective was to mitigate and prevent environmental harms by modernizing the Facility and reducing emissions.[176]

120. As such, with respect to the second scenario under Clause 5.3(b) of the STA, the Company is responsible for third-party claims for the period approved for the execution of DRP's PAMA if they result directly from a default of the obligations established by means of the STA in numerals 5.1, which would include a default of the PAMA's primary goal of reducing emissions of harmful substances into the environment.

c. The Company's responsibility for third-party claims for the period after the expiration of the term of Metaloroya's PAMA pursuant to Clause 5.4(a) of the STA

121. During the period after the expiration of the term of Metaloroya's PAMA ("**Post-PAMA Period**"), Centromín made the following commitment:

> **Clause 6.3**: "Centromin will assume responsibility for any damages and third party claims
>
> [i] attributable to Centromin's and/or its predecessors' activities except for
>
> [ii] the damages and third party claims for which the Company is responsible in accordance with numeral 5.4."

[175] **Exhibit C-020 (Contract)**, PAMA 1996 Report, Section 5.1, p. 149.

[176] *See e.g.*, Alegre Second Expert Report, ¶ 42; Connor First Expert Report, ¶ 9.

122. Clause 6.3 also has two elements. The first element is that the party invoking Clause 6.3 must prove that the damages and third-party claims are attributable to Centromin's and/or its predecessors' activities. The second element is that the claims must not be encompassed by Clause 5.4. Therefore, in order to properly interpret Clause 6.3, one must interpret Clause 5.4 to determine whether the responsibility does not fall on the Company.

123. Clause 5.4(a) of the STA establishes the first scenario of the scope of the Company's (i.e., DRP's) responsibility for damages and claims by third parties for the "period after the expiration of the term of Metaloroya's PAMA." Clause 5.4(a) of the STA establishes the scope of DRP's responsibility for damages and claims by third parties for the period "[a]fter the expiration of the legal term of Metlaoroya's [sic] [DRP's] PAMA," and notes that DRP assumes responsibility for damages and third party claims when they "result directly from acts that are exclusively attributable to its operations after that period."[177]

124. With respect to "exclusively attributable," Respondents invite the Tribunal to revisit the explanation in the section above providing for the Peruvian law interpretation of Cluase 5.3(a) of the STA, which demonstrates that the phrase "exclusively attributable" applies to "acts," not "claims."

125. With respect to the meaning of "*after that period*," the PAMA period expired on 13 January 2007, meaning that anything that occurred after 13 January 2007 would fall under the temporal period qualified as "after that period." It is important to note that "the legal term of Metlaoroya's [sic] [DRP's] PAMA" is the PAMA term agreed to under the STA (*i.e.*, October 1997 through January 2007). The PAMA period thus expired on 13 January 2007, and that period is not to be conflated with the additional time DRP was granted, in 2006 and 2009, to complete the Sulfuric Acid Plant Project. Such is clear from the ministerial resolution that granted the first extraordinary extension, which explicitly provided that "[t]he present ministerial resolution does not imply any modification of the obligations or the timelines stipulated in the contracts that DRP and its shareholders have signed with

[177] **Exhibit R-001**, STA & Renco Guaranty, clause 5.4(a).

Centromín and the Peruvian State . . . ."[178] Both Ms. Alegre and Mr. Isasi confirm that DRP's PAMA period expired on 13 January 2007; the extraordinary extensions DRP received could not and did not change this fact.[179]

d. The Company's responsibility for third-party claims for the period after the expiration of the term of Metaloroya's PAMA pursuant to Clause 5.4(b) of the STA

126. In determining whether one can satisfy the second element of Clause 6.3, one must also determine first whether the responsibility falls on the Company under Clause 5.4(b).

127. Clause 5.4(b) of the STA establishes two additional scenarios where the Company assumes responsibility for third-party claims for the period after the expiration of the term of DRP's PAMA. The first is if they result directly from a default on DRP's PAMA, the second is if they result directly from a default of the obligations established by means of the STA in numerals 5.1 and 5.2. Respondents invite the Tribunal to revisit the interpretive excercises under Peruvian law referenced in the previous sections, which apply fully to the interpretation of Clause 5.4(b) of the STA.

III. THE TRIBUNAL LACKS JURISDICTION OVER CLAIMANTS' CLAIMS

128. Claimants have submitted four types of claims: Claims under the STA, claims under the Peru Guaranty, claims under Peruvian law, and claims under customary international law. In their Counter-Memorial, Respondents put forth numerous comprehensive, supported, and substantial objections to the Tribunal's jurisdiction.

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[178] **Exhibit R-287**, Ministerial Resolution No. 257-2006-MEM/DM, 29 May 2006, article 10 (Spanish original: "*La presente Resolución Ministerial no implica modificación alguna de las obligaciones, ni de los plazos estipulados en los contratos que Doe Run Perú S.R.L. y sus accionistas tienen celebrados con Centromin Peru S.A. y con el Estado Peruano, en particular los referidos a Garantías y Medidas de Promoción a la Inversión, cuyo incumplimiento por parte de la recurrente dentro de los plazos pactados en dichos contratos estará sujeto a las consecuencias jurídicas previstas en tales instrumentos*.").

[179] *See* Alegre First Expert Report, ¶¶ 37–40, 53-55, 67, 92–93, 126; Alegre Second Expert Report, ¶ 59; Isasi Witness Statement, ¶ 43 (Spanish original: "*Lo único que la RM-257 prorrogaba era el plazo para concluir el Proyecto Nro. 1, no para todo el PAMA*.")

129. Throughout these proceedings, Respondents have repeatedly identified Claimants' inappropriate conduct.[180] In the latest manifestation, Claimants respond to less than a handful of Respondents' jurisdictional objections in their Reply. And some responses—*e.g.*, on the identity of the STA Parties—are mere assertions without support or analysis.

130. Respondents *will not* further develop the objections to which Claimants have refused to respond. Instead, in this section,

- where Claimants have not responded, Respondents will refer the Tribunal back to the relevant section of the Counter-Memorial with a short summary of the objection there presented;
- where Claimants present summary assertions instead of argument, Respondents will reply while referring the Tribunal back to the relevant section of the Counter-Memorial for the full objection; and
- where Claimants have actually responded to an objection on jurisdiction, Respondents will demonstrate why the response fails.

131. In the end, Claimants' inappropriate behavior cannot mask the fact that the Tribunal lacks jurisdiction over Claimants' (i) STA claims (Section III.A), (ii) Peru Guaranty claims (Section III.B), (iii) claims of the phantom-claimants (Section III.C), (iv) Peruvian law claims (Section III.D), and (v) minimum standard of treatment claim (Section III.E).

A. The Tribunal lacks jurisdiction over Claimants' STA claims

132. In their Memorial, Claimants submitted claims for breaches of supposed indemnity, defense, and attorneys-fees obligations under the STA.[181] In the Counter-Memorial, Respondents objected to the jurisdiction of the Tribunal over the STA claims because (i) Claimants are not STA Parties, and (ii) Claimants are also not parties to STA Arbitral Clause. Thereafter, Claimants themselves objected to the Tribunal's jurisdiction.[182]

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[180] *See e.g.*, *See* Respondents' Request for Bifurcation, 21 February 2020, ¶ 19; Respondents' Letter to the Tribunal, 21 August 2020; Respondents' Letter to the Tribunal, 30 June 2022, p. 1; Respondents' Letter to the Tribunal, 11 July 2022, pp. 2–4; Respondents' Letter to the Tribunal, 2 August 2022; Respondents' Letter to the Tribunal, 9 September 2022, Respondents' Letter to the Tribunal, 28 September 2022; Respondents' Letter to the Tribunal, 18 October 2022; Respondents' Letter to the Tribunal, 4 November 2022.

[181] *See generally* Contract Counter-Memorial.

[182] *See* Claimants' Letter to the Tribunal, 10 October 2022; Respondents' Letter to the Tribunal, 18 October 2022; Claimants' Letter to the Tribunal 27 October 2022; Respondents' Letter to the Tribunal, 4 November 2022.

Claimants now refuse to respond to Respondents' second objection and respond to the first objection in summary fashion.

133. That notwisthstanding, the simple argument maintained by the Respondents remains steadfast: the Tribunal lacks jurisdiction over Claimants' STA claims because (i) they are not STA Parties, (ii) they are not parties to the STA Arbitral Clause, and (iii) DRP has not engaged in the required expert determination process under the STA.

1. Claimants are not STA Parties

a. Claimants provide no true response to Respondents' comprehensive STA analysis

134. As identified by its heading, the STA has three contracting parties, Centromín, the Company, and the Investor:

> "The [STA] . . . entered into on the one part by Empresa Minera Del Centro Del Peru S.A. (Centromín Peru S.A.) . . . hereinafter Centromín; and on the other part Doe Run Peru S.R. LTDA . . . hereinafter the Investor . . . . Intervenes in this contract the company Metalurgica La Oroya, S.A. (Metaloroya S.A.) . . . hereinafter the Company."[183] (Bold in original)

135. Respondents' literal, systematic, and good faith analysis of the STA under Peruvian-law in Section III.B.1 of the Counter-Memorial, demonstrates that only Centromín, the Investor, and the Company are STA Parties; Claimants are not STA Parties.

Table 4: STA Parties			
STA Parties			
	At Execution	After Absorption of Metaloroya[184]	After Assignments[185]
"Centromín"	Centromín	Centromín	Activos Mineros
"the Investor"	DRP	DRP	DRCL
"the Company"	Metaloroya	DRP	DRP

[183] **Exhibit R-001**, STA & Renco Guaranty, pp. 4–5.
[184] See **Exhibit R-003**, Modification of the Contract to Transfer Shares, Increase Company Capital and Subscription of Shares of Metaloroya S.A., 17 December 1999, p. 7.
[185] *See* **Exhibit R-004**, Contract Assignment, clause 1.3; **Exhibit R-284**, Assignment of Centromin's Contractual Position to Activos Mineros, 19 March 2007.

Not STA Parties
Renco, DRRC, Peru

136. That reality deprives this Tribunal of jurisdiction in two ways. First, because the text of the STA Arbitral Clause is limited to disputes "that may arise *between the parties*," Claimants fall outside the scope of arbitral consent (emphasis added).[186] Second, given the principle of privity under Peruvian law, Claimants have no rights under the STA, including the right to arbitrate (irrespective of the text of the STA Arbitral Clause).[187]

137. In five, paragraphs at the end of their Reply, Claimants summarily allege that they are STA Parties.[188] That allegation is not supported by any contractual interpretation. How do we know? Because Claimants do not even attempt it. As Claimants have not actually responded to Respondents' contractual analysis, for efficiency Respondents will not reproduce their analysis here.[189] Instead, Respondents will rebut Claimants' naked five-paragraph allegation.

138. ***Invective**:* In paragraph 180 of their Reply, Claimants state, "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."[190] They do not explain why that is so; neither does Dr. Payet.

139. To recap, Claimants argue that the STA and the Renco Guaranty are one contract.[191] Respondents, on the other hand, demonstrate that the STA and the Renco Guaranty are two, autonomous contracts, and that Claimants are contracting parties only of the latter.

140. Respondents' Counter-Memorial and Professor Varsi's expert report explained that under Peruvian law, one document can contain multiple contracts.[192] Then, Respondents and Professor Varsi detailed why, in this case, the STA and the Renco Guaranty are two,

[186] *See* Contract Counter-Memorial, § III.B.1.
[187] *See* Contract Counter-Memorial, § III.B.2.
[188] *See* Reply, ¶¶ 180–86.
[189] *See* Contract Counter-Memorial, § III.B.1.
[190] *See* Reply, ¶ 180.
[191] *See* Reply, ¶ 179.
[192] *See* Contract Counter-Memorial, ¶ 462; Varsi First Expert Report-Contract, ¶¶ 4.10–4.11, 5.22.

distinct contracts and identify the parties to each contract.[193] In sum, (i) Peruvian law considers the STA and the Renco Guaranty different contracts, each governed by its own set of laws, and, (ii) on a more basic level, the STA and Renco Guaranty are independent juridical acts.[194]

141. In his second report, Professor Payet concedes that under Peruvian law one document can contain numerous contracts.[195] Claimants disagree with Respondents' and Professor Varsi's conclusion that the STA and the Renco Guaranty are separate contracts in this case, but they resort to invective.[196] What neither they nor Professor Payet do is rebut Respondents' and Professor Varsi's analysis.

142. ***Supposed relationships in a presumed contract***: In paragraph 181 of their Reply, Claimants essentially copy and paste a list from Professor Payet's report of the *supposed* legal relationships that make up a *presumed*, single contract.[197] As relevant here, the list claims that Clauses 5 and 6 contain "[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"[198] (emphasis added). Claimants' supposed legal relationship (because they presume that they are contracting parties) and presumed contract, however, are unsupported.

143. First, the legal relationship is *supposed*, not argued, let alone established. As the Tribunal will recall, who is encompassed by Clauses 5 and 6 has been one of the central disputes in this case. Respondents analyzed those clauses extensively under Peruvian law in their Counter-Memorial to demonstrate, among other things, that they encompass only the Company and Centromín.[199] They do not include the Investor (also an STA Party) or Claimants (even if they were STA Parties). Claimants offer no rebuttal of Respondents' contractual interpretation. Left with silence, the Tribunal has only one conclusion—no rebuttal was possible.

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[193] *See* Contract Counter-Memorial, ¶¶ 463–471; Varsi First Expert Report–Contract, ¶¶ 4.10–4.11, 5.22.
[194] *See* Contract Counter-Memorial, ¶¶ 463–471; Varsi First Expert Report–Contract, ¶¶ 4.10–4.11, 5.22.
[195] *See* Payet Second Expert Report, ¶ 131.
[196] *See* Reply, ¶ 180.
[197] *See* Reply, ¶ 181; *see also* Payet Second Expert Report, ¶ 137.
[198] *See* Reply, ¶ 181; *see also* Payet Second Expert Report, ¶ 137.
[199] *See* Contract Counter-Memorial, ¶¶ 490–510.

144. Further, Claimants' claim directly contradicts their prior position that Clauses 5 and 6 encompass everyone—not just contracting parties. In their Memorial, Claimants filed claims on behalf of "phantom-claimants."[200] Claimants based these claims on the argument that "Centromin's assumption of liability for third-party damages and claims under Clauses 6.2 and 6.3 extends *to anyone who could be sued* by a third-party for damages falling within the scope of the assumption of liability" (emphasis added).[201] Likewise, Professor Payet clearly opined the following:

> "The assumption of liability focuses on the liability towards *third parties* and, with respect to them, Centromin declares that it "assumes it"; that is, it is Centromin's own liability. Therefore, if the damages or claims of third parties are related to activities attributable to Centromin, regardless of the entity sued for such damages or claims, in light of clauses 6.2 and 6.3 of the Contract, the liability lies with Centromin (and Activos Mineros).
>
> [. . . .]
>
> *Whether against third parties or against the parties themselves*, the general rule of the Contract is that the environmental liabilities generated in the operation of the CMLO and, in particular, in the claims of third parties, must be fully assumed by Centromin. This, *in addition to responding to the logic of the operation, is clearly and repeatedly expressed in the Contract*."[202] (emphasis added).

Respondents then explained that such an interpretation is frankly "unbelievable."[203] The ground now shifts again. In Claimants' revised view, their own former "clearly and repeatedly expressed" legal relationship is seemingly incorrect. Claimants have now put forth two contradictory interpretations of Clauses 5 and 6. Both are wrong, as Respondents explain above in Section II.C.

145. Second, the *presumed* single contract argument is not evidence or supported by law— it is a bald presumption about what Professor Payet intends to conclude, namely, that the Renco Guaranty and the STA are one contract.[204] But Claimants are not named in Clauses 5 and

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[200] *See* Contract Memorial, ¶¶ 80, 246.
[201] Contract Memorial, ¶ 166.
[202] Payet First Expert Report, ¶¶ 151, 156.
[203] Contract Counter-Memorial, ¶ 505.
[204] *See* Contract Counter-Memorial, ¶ 478 ("Professor Payet's argument that Claimants obtained obligations under the TA because they guaranteed DRP's obligations is circular. It presumes what it intends to conclude—that the Renco Guaranty and the STA are one contract.").

6 at all. Dr. Payet argues that Clauses 5 and 6 contain "[a] relationship between Centromin *and every other party*" of the STA. Dr. Payet's conclusion that Claimants are encompassed by Clauses 5 and 6 simply presumes that there is one contract to which they are parties. Yet as noted above, Claimants and Professor Payet do not explain why their premise is true or supported by the text.

146. To be sure, one contract can regulate different rights and obligations for more than two parties. Respondents do not deny this. It is also true that *multiple* contracts, memorialized in one or more documents, can regulate different rights and obligations for more than two parties, with differing parties to each contract. Claimants do not deny this. The question is, in this case are there one or two contracts?

147. The answer to the question cannot be that there is one contract because the various rights and obligations are memorialized in one document because, as Professor Payet admits, two contracts can be memorialized in the same document.[205] And yet nowhere do Claimants and Professor Payet explain, with citation to, and support by, Peruvian law, why Respondents and Professor Varsi's detailed analysis and conclusion are incorrect.

148. Respondents searched the Reply to find some rebuttal. The only fragment of an argument is found in paragraph 182, where Claimants state that "[the listed] legal relationships are part of one legal program with a shared concrete cause: the segregation, capitalization and sale and future operation of the Complex. 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."[206]

149. That paragraph is just a copy-and-paste of paragraph 139 of Professor Payet's second report, which cites to nothing to support the notion that because certain legal relationships are part of the same program to achieve one goal, they *must* be established in a single contract.[207] Instead, Claimants and Professor Payet merely assume that because one contract *can* regulate multiple rights and obligations of more than two parties, this *must* be the case here. That is not evidence.

[205] *See* Payet Second Expert Report, ¶ 132.
[206] *See* Reply, ¶ 182.
[207] *See* Payet Second Expert Report, ¶ 131.

150. Claimants peddle in mere assumption (without support) because, as Professor Varsi notes, there is no basis under Peruvian law to argue that being part of the same program or sharing the same cause means that different legal relationships must be established in a single contract.[208] Claimants' assumption is not only void of legal support but is also disproven by examples from this matter. For instance, the Peru Guaranty is part of the privatization program in furtherance of the goal of selling the Company. But no one would argue that it is the same contract as the STA or has the same parties. Similarly, in an earlier section of his second report, Professor Payet argues that the corporate restructuring instruments and the STA share one goal and form part of the same transaction.[209] Nevertheless, he does not claim that they are one contract. Instead, to him they are separate juridical acts.[210]

151. In short, there is no basis in the STA or under Peruvian law to support Claimants and Dr. Payet's presumptions.

152. ***More copy and paste***: The remaining paragraphs are (barely) exercises in re-wording by Claimants and Professor Payet of statements from Claimants' Memorial and/or Professor Payet's first report. Regurgitated arguments or not, there still is no response to any of Respondents' contractual interpretation.

- In paragraph 183, Claimants contend that "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."[211] That is essentially a copy-and-paste of paragraph 23 of Professor Payet's first report.[212]

- In paragraph 184, Claimants write, "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."[213] Another virtual copy-and-paste, this time of paragraph 121 of Claimants' Memorial and paragraph 117 of Professor Payet's first report.[214]

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[208] *See* Varsi Second Expert Report, ¶ 3.40.
[209] *See* Payet Second Expert Report, ¶¶ 29–32.
[210] *See* Payet Second Expert Report, ¶¶ 29–32.
[211] Reply, ¶ 182.
[212] *See* Payet First Expert Report, ¶ 23.
[213] Reply, ¶ 183.
[214] *See* Contract Memorial, ¶ 21; Payet First Expert Report, ¶ 117.

- Finally, paragraph 185 is a paraphrase of text from paragraph 121 of Claimants' Memorial, which is a block quote of paragraphs 124 and 125 of Professor Payet's first report.[215]

153. Claimants' argument is, in sum, that they are STA Parties because who the STA identifies as parties is irrelevant, and they instead meet Professor Payet's personal unsupported definition of a contracting party. Respondents identified this argument in their Counter-Memorial and have already explained why it fails. [216]

154. Respondents invite the Tribunal to review Section III.B.1 of the Counter-Memorial. Therein, the Tribunal will find Respondents' literal, systematic, and good faith interpretation of the STA under principles of Peruvian law. The result of that comprehensive analysis is the conclusion that Claimants are not STA Parties.

b. The Tribunal should draw adverse inferences from Claimants' failure to produce requested documents without any explanation

155. As Respondents explained in their Counter-Memorial, under Peruvian law, contracts are to be interpreted pursuant to the principle of good faith.[217] As relevant here, the principle of good faith allows interpreters to consider conduct before, during, and after the execution of a contract when interpreting a contract under the Peruvian canons of interpretation.[218] Accordingly, in the Counter-Memorial, Respondents included documentary evidence that demonstrated that both sides of the dispute considered that Claimants are not STA Parties.

156. Thereafter, during document production, Respondents requested various documents that are relevant and material to the issue of the identity of the STA Parties.[219] The Tribunal granted most requests.[220] Unfortunately, Claimants did not produce responsive documents to *any* of the granted requests. They also provided no explanation for their failure to produce responsive documents in compliance with Procedural Order No. 8. The Tribunal should therefore draw inferences adverse to Claimants.

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[215] *See* Contract Memorial, ¶ 21; Payet First Expert Report, ¶¶ 124–25.
[216] *See* Contract Counter-Memorial, ¶¶ 472–78.
[217] **RLA-062**, Peruvian Civil Code, 24 July 1984, articles 168, 1362.
[218] Varsi First Expert Report-Contract, ¶¶ 4.46, 5.13.
[219] *See* Procedural Order No. 8, 25 August 2022, Annex B, Reqs. 27–33.
[220] *See* Procedural Order No. 8, 25 August 2022, Annex B, Reqs. 27–33.

157. International arbitration tribunals—including this Tribunal—have the power to draw adverse inferences where parties have failed to produce documents that they have been ordered to produce without explanation. Under Article 5.5 of Procedural Order No. 1, "[s]hould a Party fail to produce documents as ordered by the Tribunal, the Tribunal may draw the inferences it deems appropriate in relation to the documents not produced."[221] Likewise, the Rule 9.6 of the IBA Rules on the Taking of Evidence in International Arbitration—which supplement Procedural Order No. 1[222]—states: "If a Party. . . fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party."[223]

158. There is no standardized test for determining when a Tribunal should draw adverse inferences. But two circumstances in which it is undisputable that tribunals draw adverse inferences are when the party that fails to produce (i) provides unconvincing reasons, or worse, (ii) does not provide any reason at all.[224]

159. In this case, Claimants failed to produce numerous documents. To this day, Claimants have failed to provide any reason for their failure to comply with the Tribunal's orders. For jurisdiction purposes, the Tribunal should draw adverse inferences from the following unjustified failures to produce.

160. *Request No. 27:* This request sought, "Documents created by Renco and DRRC from March 1997 to the execution of the STA (23 October 1997) that explain, summarize, detail, address, discuss, analyze, the identity of the parties to the STA."[225] Claimants objected to Request No. 27—*but not* on the basis that the documents are not in Claimants' possession.

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[221] *See* Procedural Order No. 1, Contract Case, article 5.5.

[222] *See* Procedural Order No. 1, Contract Case, article 6.1 ("In addition to the relevant provisions of the UNCITRAL Rules and the provisions on document production above, the Tribunal may use the IBA Rules on the Taking of Evidence in International Arbitration 2010 as an additional guideline when considering matters of evidence.").

[223] *See* **RLA-228**, *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, ¶ 265 ("While the Tribunal does not believe that the Claimant sought to conceal evidence, the inference that inexorably emerges from this dearth of evidence is that the Claimant can provide no evidence of services, because no services, or at least no legitimate services at the time of the establishment of the Claimant's investment, were in fact performed."); **RLA-229**, *OPIC Karimum Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/14, Award, 28 May 2013, ¶ 145.

[224] *See* **RLA-117**, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶ 178.

[225] Procedural Order No. 8, 25 August 2022, Annex B, Req. 27.

The Tribunal ordered the production of the documents. Claimants failed to provide responsive documents or any explanation for their non-production. In these circumstances, the Tribunal should draw the inference that the content of the documents that Claimants failed to produce would be adverse to their interests on the identity of the STA Parties.

161. *Request No. 28*: This request sought, "Documents from the negotiations of the STA between Renco, DRRC, and/or DRP and Centromin and/or Peru that explain, detail, address, argue, discuss, or analyze, or accept (i) that Renco and DRRC would or should be encompassed by Clauses 5 and 6 of the STA, and (ii) that Renco and DRRC would or should be parties to the STA."[226] Respondents based their request on Claimants' argument that (i) "they sought and obtained assurances from Activos Mineros and Peru that they would be protected from third-party claims (pursuant to Clauses 5 and 6 of the STA)," and (ii) "in Renco and DRRC's view, [because] they have rights under Clauses 5 and 6, they contend that they are parties to the STA."[227]

162. Claimants also objected to Request No. 38—*but not* on the basis that the documents are not in their possession. The Tribunal ordered production. Claimants failed to provide responsive documents or any explanation for their non-production. In these circumstances, the Tribunal should draw the inference either (i) that Claimants never sought such assurances because it was clear that they would not be included in Clauses 5 and 6, (ii) that Respondents never provided any assurances that Claimants would be protected from third-party claims under Clauses 5 and 6, or (iii) that the content of any documents provided by Respondents that Claimants failed to produce would be adverse to Claimants' interests on the issues of their inclusion in Clauses 5 and 6 and the identity of the STA Parties.

163. *Request No. 30:* This request sought "Documents containing the consent of Renco and DRRC to the assignment of the contractual position of Centromin to Activos Mineros."[228] Respondents submitted this request because "[o]n 19 March 2007, Centromin assigned its contractual position in the STA to Activos Mineros."[229] Under Peruvian law, contracting

[226] Procedural Order No. 8, 25 August 2022, Annex B, Req. 28.
[227] Procedural Order No. 8, 25 August 2022, Annex B, Req. 28.
[228] Procedural Order No. 8, 25 August 2022, Annex B, Req. 30.
[229] Procedural Order No. 8, 25 August 2022, Annex B, Req. 30.

parties must consent to the assignment of the contractual position of a counter-party.[230] Accordingly, if Claimants were STA parties, their consent would have been necessary for Centromin's assignment to be legally effective.[231]

164. However, the assignment clearly states that only the consent of the Investor and the Company had been obtained for the assignment Centromin's contractual position: "In accordance with the provisions of clause ten of the Share Transfer Contract, Doe Run Perú (The Company) and Doe Run Cayman Limited (The Investor) have granted their consent in advance for Centromin to be able to assign its contractual position when it deems it appropriate."[232] The assignment thereby *confirms* Respondents' interpretation that the only STA Parties are Centromin, the Company, and the Investor, as it proves that Claimants' consent was not required or obtained because they are not STA Parties. Indeed, as Professor Varsi explains, *if Renco and DRRC had been STA Parties, and thus required to provide consent, the assignment would have been legally ineffective*.[233]

165. Claimants also objected to the Request No. 30—but *not* on the basis that the documents are not in Claimants' possession. The Tribunal ordered production. Claimants failed to provide responsive documents or any explanation for their non-production. Consequently, the Tribunal should draw the inference that Claimants never provided their consent to the assignment of Centromin's contractual position because they are not STA Parties.

166. *Request No. 31*: Similarly, this request sought "Documents containing the consent of Renco and DRRC to the assignment of the contractual position of DRP to DRCL."[234] The reasoning for this request is the same as the reasoning for Request No. 30. On 1 June 2001, DRP assigned its contractual position as the Investor to DRCL. Centromin had already provided its consent to both of its counter-parties' assignment of their contractual position in Clause 10 of the STA.[235] In DRP's assignment, DRP and DRCL recognize that "The [STA] was executed by the Empresa Minera del Centro de Perú S.A. (Centromín), Doe

[230] *See* Varsi Second Expert Report, ¶¶ 3.5–3.6; **RLA-062**, Peruvian Civil Code, article 1435.
[231] *See* Procedural Order No. 8, 25 August 2022, Annex B, Req. 30.
[232] **Exhibit R-284**, Assignment of Centromín's Contractual Position to Activos Mineros, 19 March 2007, clause 3.3.
[233] *See* Varsi Second Expert Report, ¶¶ 3.7–3.8.
[234] *See* Procedural Order No. 8, 25 August 2022, Annex B, Req. 31.
[235] *See* **Exhibit R-001**, STA, clause 10.

Run Perú as the Investor and Metaloroya as the Company receiving the investment."[236] On the other hand, there is no evidence of Claimants' consent, *proving again that they are not STA Parties—otherwise, the lack of consent would result in the ineffectiveness of the assignment*.[237]

167. Claimants also objected to the Request No. 31—*but not* on the basis that the documents are not in Claimants' possession. The Tribunal ordered the production of the documents. Claimants failed to produce any responsive documents or any explanation for their non-production. In these circumstances, the Tribunal should draw the inference that Claimants never provided their consent to the assignment of DRP's contractual position because they are not STA Parties.

168. *Request No. 32:* This request sought the "Document dated on or around 8 September 1997, in which Renco and DRRC ceded their rights as winners of the bid to DRP."[238] The justification for this request is that, even though Claimants were declared winners of the bidding process for Metaloroya, on or around 8 September 1997, they ceded their rights as winners of the bid to DRP.[239] The breadth of the cession of rights would therefore be evidence of the identity of the STA Parties.

169. Claimants objected to Request No. 32—but *not* on the basis that the document is not in Claimants' possession. The Tribunal ordered production. Claimants failed to produce any responsive document or any explanation for their non-production. In these circumstances, the Tribunal should draw the inference that Claimants' cession of rights included the right to execute and be a contracting party of the STA.

170. The aforementioned requests are a mere sample of the document requests for which Claimants did not produce responsive documents and did not provide justification. The Tribunal should draw adverse inferences from that non-production.

[236] **Exhibit R-004**, Contract Assignment, clause 1.3.
[237] *See* Varsi Second Expert Report, ¶ 3.8; **RLA-062**, Peruvian Civil Code, article 1435.
[238] Procedural Order No. 8, 25 August 2022, Annex B, Req. 32.
[239] *See* Procedural Order No. 8, 25 August 2022, Annex B, Req. 32.

2. Claimants are not parties to the STA Arbitral Clause

171. Claimants provide no response.[240]

3. DRP did not engage in the expert determination process

172. As to Claimants' failure to comply with the expert determination process under the STA, Claimants incorporate into their Reply their correspondence on the matter.[241] Likewise, Respondents incorporate the arguments from their letters of 18 October 2022 and 4 November 2022.[242]

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173. Because Claimants are not parties to the STA or the STA Arbitral Clause, the Tribunal lacks jurisdiction over Claimants' STA claims.

B. The Tribunal lacks jurisdiction over Claimants' Peru Guaranty claims

174. Claimants provide no response.[243]

C. The Tribunal lacks jurisdiction over the claims of the phantom-claimants

175. Claimants provide no response.[244]

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[240] In their Memorial, Claimants argued that, assuming they ceased being STA Parties, they remain parties to the STA Arbitral Clause under the doctrine of separability, the intention of the STA Parties, and article 14 of the Peruvian Arbitration Act. *See* Contract Memorial, ¶ 123. Respondents invite the Tribunal to review Section III.B.3 of the Counter-Memorial, wherein they explain why each argument fails. The only jurisdictional base that Claimants retain for their STA claims is found in Section VI of their Reply, and it is *only* the assertion that Claimants are parties to the STA, which Respondents address above in Section III.A.1. Claimants' article 14 argument is limited to their Peruvian law claims, and thus will be addressed below.

[241] *See* Reply, ¶ 187.

[242] *See* Respondents' Letter to the Tribunal, 18 October 2022; Respondents' Letter to the Tribunal, 4 November 2022.

[243] In their Memorial, Claimants argued that the Tribunal has jurisdiction over their Peru Guaranty claims because the STA incorporates the Peru Guaranty. *See* Contract Memorial, ¶ 131. In Section III.C of the Counter-Memorial, Respondents explained why that contention failed. In their Reply, Claimants merely state that "the Republic of Peru should also be bound . . . by virtue of its Guaranty." Reply, ¶ 47. That superficial statement is no response, let alone an argument. The only other supposed jurisdictional hooks over Peru are limited to Claimants' Peruvian law claims (not their Peruvian Guaranty claims), and thus will be addressed below.

[244] In their Memorial, Claimants requested that the Tribunal find Respondents liable for not defending and indemnifying "the Renco Consortium members and related entities and individuals in the personal injury St. Louis lawsuits" and DRP, even though none is a claimant in this proceeding. Contract Memorial, ¶ 201; *see id.*, ¶ 246. Respondents invite the Tribunal to review Section III.D of their Counter-Memorial, which expresses the numerous reasons why the Tribunal lacks jurisdiction over the phantom-claimants' claims.

D. The Tribunal lacks jurisdiction over Claimants' Peruvian law claims

176. In their Memorial, Claimants submitted four Peruvian law claims: pre-contractual liability, subrogation, contribution, and unjust enrichment. Respondents then presented three jurisdictional objections: (i) that there was no arbitral consent for such claims, (ii) that Claimants' pre-contractual liability claim is premised on the inexistence of arbitral consent, and (iii) that Claimants' unjust enrichment claim requires the inexistence of arbitral consent.[245] In the following sections, Respondents reaffirm those three objections.

1. There is no arbitral consent for Claimants' Peruvian law claims[246]

177. Respondents explained in their Counter-Memorial that there is no arbitral consent for Claimants' Peruvian law claims because Claimants neither parties to the STA nor the Peru Guaranty, and they are not otherwise encompassed by the STA Arbitral Clause or the Peru Guaranty's arbitral clause.[247] Respondents also requested dismissal of Claimants' Peruvian law claims because these were so amorphous that Respondents were unable to properly defend themselves.[248]

178. In their Reply, Claimants articulate only their subrogation claim, now based on a new theoretical underpinning.[249] Respondents will explain Claimants' revised theory below in Section III.D.1.b. For current purposes, however, Claimants argue that "irrespective of privity,"[250] they have the "right to bring this claim in arbitration" under Article 14 of the Peruvian Arbitration Act.[251] That is incorrect.

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[245] *See* Contract Counter-Memorial, § III.E.
[246] Claimants only articulate their subrogation claim in their Reply. Accordingly, Respondents will not respond to the other Peruvian law claims, which Claimants have refused to articulate. Insofar as their revised theory applies to the remaining Peruvian law claims, however, these claims fail for the same reasons detailed herein.
[247] *See* Contract Counter-Memorial, § III.E.1.
[248] *See* Contract Counter-Memorial, § IV.D.3; *see also* **RLA-086**, *ST-AD GmbH v. Republic of Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013, ¶ 295 (dismissing claims as inadmissible because "they were not properly articulated and that, as a result, the Tribunal could not really understand what the issues were"); UNCITRAL Rules, article 17(1) & 20(2)(e).
[249] *See* Reply, § I; *id.,* 16 ("Claimants focus exclusively on their subrogation theory in this Reply because its applicability to the instant facts is undeniable").
[250] Reply, ¶ 15; *see also id.*, § I, ¶ 31.
[251] Reply, § I.E.

179. Claimants cannot rely on Article 14 to extend the STA Arbitral Clause to encompass them. Further, even if they could, under their revised theory, the subrogation claim would not be "in relation to [the STA]" as required by the STA Arbitral Clause.

a. Claimants cannot cure their exclusion from the STA Arbitral Clause via Article 14 of the Peruvian Arbitration Act

180. Article 14 of the Legislative Decree No. 1071 (respectively, "**Article 14**" and "**Peruvian Arbitration Act**") codifies the bases on which a non-signatory can be encompassed by an arbitration agreement:

> "The arbitration agreement extends to those whose consent to submit to arbitration, according to good faith, is determined by their active and decisive participation in the negotiation, conclusion, execution or termination of the contract that includes the arbitration agreement or to which the agreement is related. It also extends to those who seek to derive rights or benefits from the contract, according to its terms."[252]

181. Article 14 is novel in that it codifies the bases on which an arbitration agreement can be extended to non-signatories, but in substance it does not break new ground, as it merely codifies pre-existing international arbitration practice.[253] As Peruvian scholars, Cecilia O'Neill de la Fuente and José Luis Repetto Deville, note: "The [Peruvian Arbitration Act] was designed with the purpose of emulating international arbitral practice, which has allowed for decades non-signatories of the arbitration agreement to participate in legal proceedings.[254] More specifically, Article 14 establishes two paths for extension: The first sentence recognizes the concept of implicit consent of non-signatories, while the second sentence recognizes non-signatory beneficiaries.[255]

182. Given that the substance of Article 14 is not new, the principles that underlie it will be familiar to the Tribunal. To start, Article 14 *does not* extend arbitration agreements to non-

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[252] **CLA-012 (Contract)**, Legislative Decree No. 1071, 1 September 2008, article 14 ("***Peruvian Arbitration Act***").
[253] Professor Payet agrees on this point. *See* Payet Second Expert Report, ¶ 156.
[254] **RLA-265**, Cecilia O'Neil de la Fuente and José Luis Repetto Deville, Principal Characteristics of the Peruvian Arbitration Act, ILSA Journal of International & Comparative Law (Volume 23, Issue 3), 2017, p. 526 (Spanish Original: "*La ley peruana [de arbitraje] se llevó a cabo con el propósito de emular la práctica de arbitraje internacional, la cual ha permitido hace décadas que personas no signatarias del convenido arbitral participen en el procedimiento legal*.").
[255] *See* Varsi Second Expert Report, ¶, 3.83.

parties.[256] Instead, it recognizes that in some cases, consent is implicit, through conduct rather than signature[257]. Additionally, Article 14 *does not* alter the consensual nature of arbitration.[258] While not explicit in the text of the second sentence of Article 14, both paths require arbitral consent.[259] That consent must be proven, not assumed. The consent of signatories is also required to extend agreements to non-signatories.[260] Indeed, the commentary cited by Professor Payet explains that "[a] third party cannot enter into [an arbitration agreement] without the consent of those who are already in it."[261]

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[256] *See* Varsi Second Expert Report, ¶ 3.81; *see also* **Exhibit JAP-097**, Carlos Alfredo Soto Coaguila y Alfredo Bullard González, *Comentarios a la Ley Peruana de Arbitraje (Tomo I)*, 2011, p. 209 (English Translation: "[I]t is not the intention of article 14 to authorize bringing a third party to arbitration. This is something that is not possible due to its contractual nature. The assumption is that someone is part of the agreement, even though they do not sign it. Whoever is brought to arbitration and to whom the effects the award are extended is not really a third party, but a non-signatory party.") (Spanish Original: *"[N]o es intención del artículo 14° autorizar a traer a un tercero al arbitraje. Ello es algo que no es posible por la naturaleza contractual del mismo. El supuesto es que alguien es parte del convenio, a pesar que no firma el mismo. A quien se trae al arbitraje y se hace extensivo los efectos del laudo no es propiamente un tercero, sino una parte no signataria*.")

[257] *See* Varsi Second Expert Report, ¶¶ 3.81, 3.93; **Exhibit JAP-097**, Carlos Alfredo Soto Coaguila y Alfredo Bullard González, *Comentarios a la Ley Peruana de Arbitraje (Tomo I)*, 2011, p. 210 (English Translation: "[The Peruvian Arbitration Act] [i]s authorizing, through the use of good faith, the inferring of consent by means of conduct or omissions . . . . Along these lines, article 14 must be understood as a regulation that describes different ways of forming consent.") (Spanish Original: "*[La Ley de Arbitraje] [e]stá autorizando, con el uso de la buena fe, que por medios de conductas u omisiones, pueda inferirse un consentimiento . . . . En esa línea el artículo 14° debe ser entendido como una regulación que describe formas distintas de formar un consentimiento*.").

[258] *See* **RLA-269**, Natale Amprimo Plá, *The Extension of the Effects of Arbitral Agreements to Non-Signatories: Reflections on the Treatment that the New Peruvian Arbitration Act Gives to Said Figure*, 3:5 Official Review of the Judicial Power, 2009, 213–15.

[259] *See* Varsi Second Expert Report, ¶¶ 3.78-3.84; *see also* **Exhibit JAP-097**, Carlos Alfredo Soto Coaguila and Alfredo Bullard González, *Commentary to the Peruvian Arbitration Act (Volume I)*, 2011, p. 209 (English Translation: "The norm, in its first part, is based on two central concepts: (1) inferring consent, and (2) principle of good faith. If it is not possible to infer consent, the first part of the article is not applicable and the person cannot be incorporated into arbitration. And the inference of consent must be acheived under the logic of good faith. The second part adds a concept, which is to claim to derive a benefit from a contract. In reality, consent is also derived from this fact, since whoever wishes to access the benefit must be presumed to be willing to abide by the limits and obligations that this benefit implies, including having to go to arbitration.") (Spanish Original: *"[L]a norma, en su primera parte, se basa en dos conceptos centrales: (1) derivar el consentimiento, y (2) principio de buena fe. Si no es posible derivar un consentimiento la primera parte del artículo no es aplicable y no se puede incorporar a la persona al arbitraje. Y para interpretar el consentimiento se debe hacer bajo la lógica de la buena fe. La segunda parte añade un concepto, que es pretender derivar un beneficio de un contrato. En realidad de ese hecho también se deriva un consentimiento, pues quien desea acceder al beneficio debe presumirse que está dispuesto a sujetarse a los límites y obligaciones que ese beneficio significa, incluido el tener que acudir a un arbitraje.*"); *id.* at p. 210.

[260] *See* **RLA-269**, Natale Amprimo Plá, *The Extension of the Effects of Arbitral Agreements to Non-Signatories: Reflections on the Treatment that the New Peruvian Arbitration Act Gives to Said Figure*, 3:5 Official Review of the Judicial Power, 2009, 215.

[261] **Exhibit JAP-097**, Carlos Alfredo Soto Coaguila and Alfredo Bullard González, *Commentary to the Peruvian Arbitration Act (Volume I)*, 2011, p. 205 (Spanish Original: "*[u]n tercero no puede meterse a [un convenio arbitral] sin el consentimiento de quienes ya están en ella*").

183. Claimants contend that if they are not STA Parties, the Tribunal should extend the STA Arbitral Clause to encompass them via Article 14 of the Peruvian Arbitration Act.[262] And—for the first time in their Reply—Claimants also try to bind Peru to the STA Arbitral Clause through Article 14. Their supporting arguments fail because (i) Article 14 is inapplicable in this case, and (ii) even if Article 14 were applicable, there is no evidence of consent for the extension of the STA Arbitral Clause.

(i) Article 14 is inapplicable in this case

184. Article 14 is inapplicable in this case because it cannot be applied retroactively to create a legal relationship or situation not already in existence (including the existence of a legally binding arbitration agreement).

185. Article 14 cannot be applied retroactively to re-interpret the STA Arbitral Clause, which came into force in 1997. Article 14 is part of the Peruvian Arbitration Act, which came into force in 2008. Yet, under Article 103 of the Peruvian Constitution, "[t]he law, from its entry into force, applies to the consequences of existing legal relationships and situations and has no force or retroactive effect."[263] The Peruvian Civil Code restates the same rule.[264] As Peruvian scholar, Walter Gutierrez, notes, the consequence of the principle of non-retroactivity is that laws cannot be applied to acts that predate their entry-into-force:

> "Non-retroactivity is actually a general principle by which a time limit is placed on the application of the new law. Thus, in principle, the law considers it unfair to apply a new law to acts that were carried out at the time when said law did not exist, and therefore could not be known, much less complied with."[265]

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[262] *See* Reply, ¶¶ 41–51.

[263] *See* **RLA-036**, Political Constitution of the Republic of Perú, enacted on 29 December 1993, article 103 (Spanish Original: "*La ley, desde su entrada en vigencia, se aplica a las consecuencias de las relaciones y situaciones jurídicas existentes y no tiene fuerza ni efectos retroactivos.*"); Varsi Second Expert Report, ¶ 3.59.

[264] *See* Varsi Second Expert Report, ¶ 3.60; **RLA-062**, Peruvian Civil Code, Preliminary Title, article III (English Translation: "The law applies to the consequences of existing legal relationships and situations. It has no retroactive force or effect, except for the exceptions provided for in the Political Constitution of Peru.") (Spanish Original: "*La ley se aplica a las consecuencias de las relaciones y situaciones jurídicas existentes. No tiene fuerza ni efectos retroactivos, salvo las excepciones previstas en la Constitución Política del Perú*").

[265] **EVR-95,** Walter Gutierrez, *The Temporal Application of the Law*, Annotated Civil Code, Legal Gazette, 2020, p. 22 (Spanish Original: "*La irretroactividad es en realidad un principio general por el que se pone límite temporal a la aplicación de la nueva ley. Así, en principio, el Derecho considera injusto aplicar una ley nueva a actos que fueron realizados en el momento en que dicha ley no existía, y que por consiguiente no podía ser conocida y mucho menos acatada*.").

Instead, as Professor Varsi explains, laws can only be applied to existing legal relationships or situations. They cannot retroactively create legal relationships or situations where none existed prior to the law's entry-into-force.[266] The effect of the rule of non-retroactivity is that it is not possible to apply Article 14 retroactively to create a legal relationship or situation.[267] Accordingly, whatever legal relationship or situation existed in 1997 vis-à-vis the STA Arbitral Clause remained after 2008. And as a result, to determine which legal relationship or situation existed in 1997, we must apply the arbitration law in force at the time, Law No. 26572 of 5 January 1996 ("**General Arbitration Law**").

186. In 1997, given the General Arbitration Law, the STA Arbitral Clause could not have been extended to Claimants because this law did not allow for the extension of arbitration agreements to non-signatories. Article 10 of the General Arbitration Law required that all arbitration agreements be in writing under penalty of nullity.[268] No provision of the General Arbitration Law permitted the establishment of an arbitration agreement in circumstances like those relied on by Claimants. And Claimants have not put forth affirmative evidence that Peruvian law recognized such circumstances as giving rise to an arbitration agreement. Accordingly, considering the necessary premise that Claimants are not parties to the STA, under the law in 1997, they could thus not have been encompassed by the STA Arbitral Clause as non-signatory parties. And given the principle of non-retroactivity, Article 14 cannot retroactively convert Claimants into non-signatory parties.

187. The same result is reached from the perspective of Claimants' and the STA Parties' intent at the time of execution of the STA. As noted above, Article 14 allows for the extension of the arbitration agreements to non-signatories based on the consent of signatories and non-signatories. But in 1997, Article 14 did not then exist, the General Arbitration Law did not encompass the circumstances relied on by Claimants, and there is no evidence they were otherwise recognized by Peruvian law. Thus, no one could have had the intention or expectation that the STA Arbitral Clause would encompass non-signatories in such

[266] *See* Varsi Second Expert Report, ¶¶ 3.64–3.66.
[267] *See* Varsi Second Expert Report, ¶¶ 3.74–3.77.
[268] *See* Varsi Second Expert Report, ¶¶ 3.68–3.69; **RLA-258**, Law No. 26572 of 5 January 1996 of the Republic of Peru, article 10 ("**General Arbitration Law**").

circumstances. Neither Claimants' nor the STA Parties could have consented to the extension of the STA Arbitral Clause.

188. Finally, any factual arbitral consent would have been null under Peruvian law. The General Arbitration Law requires arbitration agreements to be written under the penalty of nullity, and other provisions of Peruvian law require contracts to comply with legal requirements as to form, also under the penalty of nullity.[269] Without any evidence that Peruvian law in 1997 recognized the extension of arbitral clauses in the circumstances relied on by Claimants, the only permissible conclusion is that even if Claimants and the STA Parties had implicitly consented to arbitrate, the "arbitration agreement" would have been null under Peruvian law.[270]

189. Article 14 is inapplicable in this case. As a result, the STA Arbitral Clause cannot extend to encompass Claimants.

(ii) Even if Article 14 were applicable, there is no evidence of consent to extend the STA Arbitral Clause to non-signatories

190. If the Tribunal were to find that Article 14 were applicable (*quod non*), Claimants' attempt to extend the STA Arbitral Clause would nevertheless fail: (i) there is no evidence that Claimants consented through negotiation; (ii) there is no evidence that Peru consented through participation in negotiation, execution, or termination; and (iii) Peru has not intended to derive benefits from the STA.

191. To start, Claimants rely on the first prong of Article 14 to place themselves within the ambit of the STA Arbitral Clause, but they fail to meet their burden of proving their consent. Under the first prong, the "arbitration agreement extends to those whose consent to submit to arbitration, according to good faith, is determined by their active and decisive participation in the negotiation . . . of the contract."[271] Claimants' only argument is that they negotiated the STA.[272] But participation in negotiations *per se* is insufficient. Rather, as Professor Varsi and Peruvian scholars explain, active and determinative participation in

[269] *See* Varsi Second Expert Report, ¶¶ 3.69–3.72; *see also* **RLA-258**, **General Arbitration Law**, article 10; **RLA-062**, Peruvian Civil Code, articles 240, 219.
[270] *See* Varsi Second Expert Report, ¶ 3.74.
[271] **CLA-012 (Contract)**, Peruvian Arbitration Act, article 14.
[272] *See* Reply, ¶ 46.

negotiations *must* demonstrate consent under a good faith analysis.[273] "If it is not possible to infer consent, the first part of article [14] is not applicable and the person cannot be incorporated into the arbitration."[274]

192. Here, all the evidence, considered in good faith, points to the fact that Claimants' participation in the negotiations is *not* evidence of consent. As an initial matter, Claimants knew that DRP would be the sole Renco-group party to the STA. Claimants ceded to DRP the rights they had acquired as winners of the bidding process.[275] In response, Centromín approved the transfer of rights,[276] and authorized the execution of the STA "with the company Doe Run del Perú S.R. Ltda."[277] That limited authorization is further memorialized in the STA.[278]

193. Claimants also argue that they created DRP only because Peruvian law required a Peruvian entity to be party to the STA.[279] Yet that merely proves that Claimants did not consent through negotiation. To find otherwise, the Tribunal would have to accept that Claimants consented to violate Peruvian law.

194. Claimants claim that they were the essential (and logically, sole) participants in the negotiations, "as DRP was not created until after the completion of the negotiations of the [STA]."[280] But their own witness, Kenneth Buckley, contradicts them. Mr. Buckley was DRP's President and General Manager beginning in September of 1997.[281] He states that "[o]ver the course of the next two months, I went to Peru several more times as part of a

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[273] *See* Varsi Second Expert Report, ¶¶ 3.92–3.93; **Exhibit JAP-097**, Carlos Alfredo Soto Coaguila y Alfredo Bullard González, Comentarios a la Ley Peruana de Arbitraje (Tomo I), January 2011, p. 210.
[274] **Exhibit JAP-097**, Carlos Alfredo Soto Coaguila y Alfredo Bullard González, Comentarios a la Ley Peruana de Arbitraje (Tomo I), January 2011, p. 209 (Spanish Original: "*Si no es posible derivar un consentimiento la primera parte del artículo [14] no es aplicable y no se puede incorporar a la persona al arbitraje*.").
[275] **Exhibit R-282**, Centromín Agreement No. 54-97, 15 September 1997; *see* **Exhibit R-001**, STA & Renco Guaranty, p. 7.
[276] **Exhibit R-282**, Centromín Agreement No. 54-97, 15 September 1997.
[277] **Exhibit R-283**, Centromín Agreement No. 77-97, 15 September 1997.
[278] **Exhibit R-001**, STA & Renco Guaranty, p. 70 ("It is unanimously agreed . . . To authorize engineers César Polo Robilliard and Ángel Álvarez Angulo so that either may sign the contract of capital stock increase and stock transfer of Metaloroya S.A., with the company Doe Run Peru S.R. LTDA.")
[279] *See* Notice of Arbitration, 23 October 2023, ¶ 10 ("[I]n 1997, a consortium of U.S. investors, including Renco, bid for and won the right to purchase the Complex and thereafter, as required under Peruvian law, transferred it to their wholly-owned Peruvian affiliate, DRP."); Contract Memorial, ¶ 5 ("Peru required that the Renco Consortium create a local Peruvian entity as the acquisition vehicle, which it did in the form of Doe Run Peru S.R. Ltda.").
[280] Reply, ¶ 45.
[281] *See* Witness Statement of Kenneth Buckley, 18 November 2020, ¶¶ 3, 8.

team of representatives of DRP and the Renco Consortium performing due diligence and negotiating the terms of the acquisition agreement."[282] In other words, even taking Claimants' own witness at his word, DRP was an active participant in the negotiations.

195. Finally, Claimants' statements in the Missouri Litigations are further evidence that they did not consent to the Arbitral Clause through negotiation. Throughout their memorandum on summary judgment in the cases styled as *A.O.A. et al v. Doe Run Resources Corporation et al.*, Case No. 4:11-cv-00044 ("**Reid Cases**"),[283] the Renco Defendants (including Claimants) lay out in great detail arguments in support of DRP's independence from Claimants.[284] If Claimants' conduct during negotiations were evidence of consent, and if the creation of DRP were a mere formality, there is no reason for them to have completely disconnected (as they suggest in the Missouri Litigations) from the operation of La Oroya.

196. What occurred during the STA negotiations is that Claimants participated in STA negotiations simply because that is common business practice. As the tribunal in *VRG Linhas Aéreas* S.A. stated:

> "It is very common in business practice for the managers of a parent [entity] to participate in the negotiations and, nominally, in the execution of an agreement adopted by its subsidiary. It is not possible to infer from said participation the parent [entity's] tacit intent to obligate itself jointly along with the subsidiary. Moreover, it is possible to have the opposite understanding, if, despite having participated in the negotiations, it did not sign the Agreement: the tacit intent which can be inferred from this conduct is that it did not wish to obligate itself."[285]

197. Under Article 14, something more than mere participation in negotiations is necessary to extend an arbitration agreement to a non-signatory. A good faith interpretation of the circumstances must evince consent. Here, all the evidence points to the conclusion that Claimants' participation in the negotiations for the STA does not prove their consent.

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[282] *Id.* at ¶ 8.
[283] The Missouri Litigations have been consolidated under two different cases, styled as the Reid Cases, and *J.Y.C.C., et al., v. Doe Run Resources, Corp.*, et al., Case No. 4:15-CV-1704-RWS (the "**Collins Cases**").
[284] *See* **Exhibit R-253**, Defendants' Memorandum Supporting Motion for Summary Judgment, Document No. 1231, *A.O.A. et al. v. Doe Run Resources Corp., et al.*, E.D. Mo. Case No. 4:11-cv-00044-CDP, 15 November 2021, pp. 9–11, 19–23, 31.
[285] **RLA-246**, *VRG Linhas Aéreas S.A. V. Varig Logística S.A., et al.*, ICC Case No. 15372, Partial Award, 7 April 2009, ¶ 86.

198. Second, Activos Mineros (the contracting counterparty) did not consent to arbitrate against Claimants. As noted, Article 14 requires the consent of all contracting parties. Claimants present no evidence, nor do they argue, that Activos Mineros consented to Claimants forming part of the STA Arbitral Clause. They have thus failed to meet their burden of proof on consent.

199. In any event, all the evidence, considered in good faith, points in the other direction. Like their contention here, Claimants state in the Missouri Litigations that "Peru has the sovereign right to establish environmental standards for facilities within its borders. Peru exercised that right by insisting that only a Peruvian entity subject to Peruvian law would be allowed to take over operation of the facility at La Oroya."[286] But that just proves that Activos Mineros did not consent to Claimants' inclusion in the STA Arbitral Clause. To find otherwise, the Tribunal would have to accept that Activos Mineros consented in violation of Peruvian law.

200. Throughout the life of the contract, Activos Mineros' conduct has never suggested that it consented to make Claimants non-signatory parties. Rather, its actions demonstrate the opposite. For instance, when Claimants' original counsel first wrote to Activos Mineros to request indemnity for the Missouri Litigations, Activos Mineros resolutely rejected any contention that Claimants were parties (signatory or non-signatory):

> "Please be advised that:
>
> 1. The Stock Transfer Agreement executed on October 23, 1997 involved only and exclusively Metaloroya S.A. (later absorbed by DRP) and Centromin Perú S.A. We must point out that the contractual clauses that exclusively referred to Metaloroya (today DRP) and not the companies and persons that you state that you represent, without indicating which right or obligation these would have in regards to the STA except for DRP.
>
> 2. Therefore,
>
> (2.1) We have not received any notice from DRP, which is our counterpart in the Stock Transfer Agreement, accrediting you as their representatives, lawyers, or valid mediator to talk about rights, responsibilities or obligations that arise from the Stock Transfer

[286] **Exhibit R-253**, Defendants' Memorandum Supporting Motion for Summary Judgment, Document No. 1231, *A.O.A. et al. v. Doe Run Resources Corp., et al.*, E.D. Mo. Case No. 4:11-cv-00044-CDP, 15 November 2021, p. 34.

> Agreement. We consider said formality as necessary to legitimize any involvement of your company in this case."[287]

201. DRP then wrote to Activos Mineros, confirming that Claimants' original counsel also represented its interests.[288] Activos Mineros's response again made clear that it did not consider Claimants parties:

> "[W]e see that Doe Run Peru S.R.LTDA is not a party to the process originating the lawsuits. Given the fact that the Agreement refers solely to Metaloroya (now Doe Run Peru S.R.LTDA), and not to the companies that are the defendants, we request you to clarify the grounds on which you claim that the indemnity clause applies to such companies."[289]

202. After further exchange of correspondence, Activos Mineros's final response again confirms that it did not consent to grant Claimants access to the STA Arbitral Clause as non-signatory parties: "if Doe Run Peru disagrees with our position, there are specific provisions in the Contract that set out how to discuss and resolve the dispute."[290]

203. In sum, Claimants utterly have failed to meet their burden of proving their and Activos Mineros's consent. Instead, the evidence points to a lack of consent by both.[291]

204. Third, the Tribunal should reject Claimants' attempt to use Article 14 to bind Peru to the STA Arbitral Clause.[292] As a threshold matter, the argument is new. In Claimants' Memorial, they only relied on Article 14 to claim that the Tribunal has jurisdiction over Claimants, not Peru.[293] They relied on other jurisdictional arguments with regard to Peru.[294]

205. Article 20 of the UNCITRAL Arbitration Rules states that "[t]he statement of claim shall include the following particulars: . . . (b) A statement of the facts supporting the claim . .

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[287] **Exhibit R-259**, Letter from Activos Mineros (V. Carlos Estrella) to King & Spalding, 5 November 2010, p. 2.
[288] *See* **Exhibit R-260**, Letter from DRP (J. C. Huyhua) to Activos Mineros (V. Carlos Estrella), 11 November 2010.
[289] **Exhibit R-261**, Letter from Activos Mineros (V. Carlos Estrella) to DRP (J. C. Huyhua), 26 November 2010, p. 3.
[290] *See* **Exhibit R-263**, Letter from Activos Mineros (V. Carlos Estrella) to King & Spalding, 21 January 2011, p. 2.
[291] Claimants do not articulate an argument on the extension of the STA Arbitral Clause over them via the second avenue of article 14. If they had, for the same reasons set out in Professor Varsi's report, it would fail. *See* Varsi Second Expert Report, Section III.1.D.ii. and ¶¶ 3.101--3.116
[292] *See* Reply, ¶¶ 47–49.
[293] *See* Contract Memorial, ¶ 126.
[294] *See* Contract Memorial, ¶¶ 130–31. As noted above, Claimants fail to respond to Respondents' objections to Claimants' arguments.

. . (e) The legal grounds or arguments supporting the claim."[295] Claimants have the burden of affirmatively proving the existence of jurisdiction. They thus must put forth their jurisdictional argument in their statement of claim (or memorial). The statement of defense (or counter-memorial) is limited to "reply[ing] to the particulars (b) to (e) of the statement of claim."[296] Thus the counter-memorial is limited to responding to Claimants' statement of defense.

206. Article 24 allows for further written pleadings, as is the case here, and the rules applicable to the Memorial and the Counter-Memorial apply *mutatis mutandis* to those pleadings. Indeed, Article 6.3 of Procedural Order No. 1 confirms that pleadings after the statement of claim are only responsive:

> "In the subsequent written submissions, such evidence shall only be submitted in support of the factual or legal arguments advanced in rebuttal to the other side's prior written submission or in relation to new evidence arising from document production or new facts that have arisen."[297] (Emphasis added)

207. As noted above, Respondents rebutted Claimants' theory on the foundation of the Tribunal's jurisdiction over Peru. Claimants have not responded to Respondents' objections. Instead, they devised a brand new, independent jurisdictional basis. Asserting a wholly new argument requires justification. Claimants provide none. They do not even claim that new evidence or new facts have arisen that justify the delay in presenting an affirmative jurisdictional argument, nor do they do provide any reason they were impeded from presenting their argument in their Contract Memorial. Claimants' new extemporaneous argument is inappropriate.

208. While inappropriate and prejudicial, Claimants' new arguments fail nonetheless fail. To start, relying on Article 14's first prong, Claimants attempt to extend the STA Arbitral Clause to Peru because Centromin negotiated the STA, by contending that Centromin is a State organ.[298] Yet Claimants provide no support for the proposition that Centromin is a State organ. In fact, Centromin is not a State organ.[299] Next, Claimants argue that Peru

[295] UNCITRAL Arbitration Rules, article 20.2.
[296] UNCITRAL Arbitration Rules, article 21.2.
[297] *See* Procedural Order No. 1, 3 February 2020, article 6.3.
[298] *See* Reply, ¶¶ 47, 49.
[299] *See* Varsi Second Expert Report, ¶ 3.123.

was involved in the performance of the STA because the MEM oversaw compliance with the PAMA.[300] Yet all PAMAs were government regulations, approved by the MEM, and Peruvian law required the MEM to oversee PAMA compliance.[301] A State acting as a State is not evidence of consent. Finally, Claimants argue that the MEM engaged in the termination of the STA as the creditor who drove DRP into liquidation.[302] To start, that is false: 97% of the Board of Creditors, which included DRCL, voted to put DRP into liquidation.[303]

209. Claimants also rely on Article 14's second prong to contend that Peru benefitted from the STA because allowing the private sector to operate La Oroya could result in improved environmental conditions.[304] Article 14's second prong allows the extension of arbitration agreements "to those who seek to derive rights or benefits from the contract, according to its terms."[305] As Professor Varsi explains, this avenue encompasses figures such as third-party beneficiaries, subrogation, succession, assignment, and novation.[306] These figures allow non-signatories to derive benefits from a contract "according to its terms."[307] For instance, with regard to third-party beneficiaries, under Article 1457 of the Peruvian Civil Code, "[b]y the contract in favor of a third party, the promisor undertakes with the stipulator to fulfill performance for the benefit of a third person."[308] Accordingly, under Article 14, third-party beneficiaries can be encompassed by an arbitral clause in the relevant contract.[309] In the case of subrogation, when a third-party pays a creditor who has an arbitral agreement with the debtor, the third-party becomes the creditor, and obtains all

[300] *See* Reply, ¶ 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.").
[301] **Exhibit R-025**, Supreme Decree No. 016-93, articles 4, 48.
[302] *See* Reply, ¶ 49.
[303] **Exhibit C-231 (Treaty)**, DRP Creditors' Meeting Minutes, 9 and 12 April 2012.
[304] *See* Reply, ¶ 48.
[305] **CLA-012 (Contract)**, Peruvian Arbitration Act, article 14.
[306] *See* Varsi Second Expert Report, ¶¶ 3.102–3.103; **Exhibit JAP-097**, Carlos Alfredo Soto Coaguila and Alfredo Bullard González, *Comments to the Peruvian Arbitration Law (Book I)*, January 2011, p. 229.
[307] *See* Varsi Second Expert Report, ¶ 3.101.
[308] **RLA-062**, Peruvian Civil Code, article 1457 (Spanish Original: "*Por el contrato en favor de tercero, el promitente se obliga frente al estipulante a cumplir una prestación en beneficio de tercera persona*.").
[309] As noted in Respondents' Counter-Memorial, however, a third-party beneficiary must be determined or determinable. A determined third-party beneficiary is one that is expressly identified in the contract or the relevant clause. A determinable third-party beneficiary is one for which the contracting parties have defined criteria for its future identification. *See* Contract Counter-Memorial, ¶ 527.

its rights and actions.[310] In these instances, the non-signatories can obtain rights and benefits established in the contract.[311] Nothing of the sort has occurred with Peru.

210. Claimants' reasoning would make every State that diffusely benefited from a concession contract, *i.e.*, all of them, or every company that benefitted from a contract signed by a sister company, a non-signatory party that could access the arbitration agreement. That is an absurd reading of Article 14. It would turn the notion of privity, already under scrutiny by States, completely on its head.

211. As noted, Article 14 codifies international arbitration practice. Respondents know of no theory under Peruvian or international arbitral law or practice by which such a passive, indirect, and generalized impact would convert an entity into a non-signatory party with access to the arbitration agreement. Claimants' novel "diffuse benefits theory" is facetious at best, and deeply problematic at worst. Instead, in line with international arbitration practice, the second avenue of Article 14 means something much more reasonable.

212. In any event, while not explicit in the text of the second sentence of Article 14, the second prong also requires proving arbitral consent.[312] And, as with each of their arguments under Article 14's first prong, Claimants make no argument on why an indirect, diffuse impact such as improved environmental conditions would be evidence of Peru's consent.

213. For the foregoing reasons, Claimants cannot rely on Article 14 to bind themselves or Peru to the STA Arbitral Clause.

b. Under Claimants' new theory for their Peruvian law claims, such claims are not "related to" the STA.

214. The STA Arbitral Clause encompasses, "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."[313] Claimants' subrogation claim is a legal claim rather than a contractual claim. Therefore, Claimants argue that—even under their revised theory—their subrogation claim is "related to" the allocation of

[310] *See* Varsi Second Expert Report, ¶¶ 3.148–3.149.
[311] *See* Varsi Second Expert Report, ¶ 3.149.
[312] *See* Varsi Second Expert Report, ¶¶ 3.84, 3.117–3.121; *see also* **Exhibit JAP-097**, Carlos Alfredo Soto Coaguila y Alfredo Bullard González, *Comentarios a la Ley Peruana de Arbitraje (Tomo I)*, 2011, pp. 209–10.
[313] **Exhibit R-001**, STA & Renco Guaranty, clause 12.

responsibility for certain third-party claims to Centromin in Clause 6.2.[314] Accordingly, in Claimants' view, the subrogation claim is "in relation to this contract [i.e., the STA]." What Claimants actually seek is for permission to file a subrogation claim to bypass their exclusion from all indemnity rights under the STA. The Tribunal should reject Claimants' gambit.

215. To understand why, it is imperative to understand Claimants' new theory for subrogation. For subrogation to operate, there must be (i) a debt owed by a debtor to a creditor, (ii) a payment by a third-party of the debt to the creditor, and (iii) compliance with one of the requirements of Articles 1260 and 1261.[315] Once payment is made, the third-party becomes the new creditor and can see payment from the original debtor.

216. In their Memorial, Claimants argued that Respondents had breached an obligation from Clause 6 of the STA to the Missouri Plaintiffs.[316] Respondents made clear in their Counter-Memorial, however, that there was no such obligation running to the Missouri Plaintiffs because they are not STA Parties, nor are they encompassed by Clauses 5 and 6.[317] As Respondents explained, "Claimants misstate the original debtor-creditor relationship in their hypothetical . . . There is no debtor-creditor relationship between Respondents and the Missouri Plaintiffs."[318]

217. In response, Claimants now propose a new original debtor-creditor relationship, arguing that Respondents are strictly liable to the Missouri Plaintiffs under Article 1970 of the Peruvian Civil Code.[319] Centromin retained that responsibility, according to Claimants, pursuant to Clause 6.2.[320] Clause 6.2 of the STA reads as follows:

> "During the period approved for the execution of Metaloroya's PAMA, Centromin will assume responsibility for [i] any damages and claims by third parties that are attributable to the activities of the Company, of Centromin and/or its predecessors, [ii] except for

[314] *See* Reply, ¶¶ 58, 31.
[315] Varsi First Expert Report-Contract, ¶ 8.33.
[316] *See* Contract Memorial, ¶ 213 ("Clauses 5 and 6 of the STA make clear that Centromin assumed liability for the harm for which Renco is being sued in the St. Louis Lawsuits. Therefore, if the St. Louis Court were to find Renco and DRR liable vis-à-vis the St. Louis Plaintiffs, Renco in effect would be assuming Centromin's liability under Clauses 5 and 6 of the STA (and Peru's liability under the STA").
[317] Contract Counter-Memorial, ¶¶ 820–21.
[318] Contract Counter-Memorial, ¶ 820.
[319] *See* Reply, ¶¶ 24–28.
[320] *See* Reply, ¶¶ 20–31.

> the damages and third party claims that are the Company's responsibility in accordance with numeral 5.3."[321]

Under Clause 6.2, Centromin assumes responsibility for damages and third party claims that are "are attributable to the activities of the Company, of Centromin and/or its predecessors," except if they are the Company's responsibility under Clause 5.3.[322] Claimants say that Clause 6.2 "establish[es] that Respondents agreed to retain and assume the liabilities at issue in the Missouri Litigation" which (apparently) include strict liability.[323] Claimants' theory seems to be that the claims in the Missouri Litigations are "attributable to the activities of the Company."[324] Thus, Claimants' conclude, the subrogation claim is "related to" the allocation of responsibility for certain third-party claims to Centromin in Clause 6.2.[325]

218. Arbitration is a creature of contract. By default, parties to a contractual relationship are subject to the jurisdiction of the relevant domestic court to resolve their contractual disputes. But where contracting parties have consented to resolve their contractual disputes via arbitration, an arbitral tribunal is given jurisdiction to the exclusion of the otherwise competent domestic court to adjudicate the dispute. Accordingly, consent is the foundational bedrock of a tribunal's jurisdiction, and a tribunal's jurisdiction is limited by the scope of arbitral consent. With these principles in mind, we can understand why Claimants' subrogation claim is not "related to" the STA.

219. First, as a threshold matter, Claimants fail to meet their burden of proving jurisdiction for claims arising from injuries resulting from acts that are solely attributable to DRP's post-PAMA operations. As Respondents will explain below, *some* of the Missouri Plaintiffs' injuries resulted from acts that are solely attributable to DRP's post-PAMA operations. As Table 3 above shows, Clause 6.3 regulates Centromin's responsibility for claims arising in the Post-PAMA Period.[326] Claimants make no argument as to how such injuries are

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[321] **Exhibit R-001**, STA & Renco Guaranty, clause 6.2.
[322] **Exhibit R-001**, STA & Renco Guaranty, clause 6.2.
[323] Reply, ¶¶ 30, 29, 32.
[324] Reply ¶ 31. *See* Second Payet Expert Report, ¶ 55 ("it is clear that the Liability Allocation Provisions allocate to Centromin liabilities for potential claims or *damages originating directly from actions of Metaloroya* taken after the closing of the transaction") (emphasis added).
[325] *See* Reply, ¶ 58 ("Claimants' statutory claims are all related to the PAMA Assumed Liabilities, as defined in the agreement, and thus are subject to arbitration."), ¶ 31.
[326] *See* **Exhibit R-001**, STA & Renco Guaranty, clause 6.3.

"related to" the Contract because they assume—contrary to fact—that all the injuries arise during the PAMA Period. In paragraphs 31 and 58 of their Reply, they therefore only rely on Clause 6.2 (which regulates Centromin's responsibility during the PAMA Period) as their "related to" jurisdictional hook.[327] Without any argument or analysis on how the Post-PAMA Period claims relate to the STA, Claimants have failed to meet their burden of proof.

220. Second, Claimants' argument is based on the idea that they should be able to bypass the STA's carefully structured allocation of responsibility framework in order to achieve the same result: Indemnity. Claimants base their subrogation claim on the premise that the STA Arbitral Clause has been extended under Article 14.[328] It is thus based on the premise that they are non-signatory parties to the STA Arbitral Clause but not STA Parties.[329] That means that, given the principle of privity, Claimants are not encompassed by Clauses 5 and 6, which allocate responsibility for third-party claims.[330] Independently, they are also textually excluded from Clauses 5 and 6, including their indemnity provisions.[331] Finally, Claimants are textually excluded from the STA Parties' chose method of determining the allocation of responsibility in a given case—the expert determination process.[332]

221. Third, Claimants' argument is constructed around the notion that, under Clause 6.2, Centromin retained responsibility for the claims filed in the Missouri Litigations. That notion is incorrect. Claimants have the burden of proof on jurisdiction, and thus they must establish the existence of jurisdiction. The Tribunal cannot accept Claimants' legal interpretation *pro tem*. Claimants provide no analysis in their jurisdictional section on how their subrogation claim is encompassed by Clause 6.2. Read after read of paragraphs 31 and 58 of their Reply confirms that Claimants merely state, without any support, that it does.

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[327] *See* Reply, ¶¶ 31, 58.
[328] *See* Reply, ¶¶ 41–62.
[329] Indeed, Claimants explicitly argue that their argument on subrogation is "irrespective of privity" and "independent of . . . the contractual" claims. Reply, ¶¶ 15, 24–27.
[330] **RLA-062**, Peruvian Civil Code, article 1363 ("The effects of the contract are limited to its parties.").
[331] *See* **Exhibit R-001**, STA & Renco Guaranty, clauses 5, 6; *id.*, clauses 5.8, 6.5.
[332] *See* **Exhibit R-001**, STA & Renco Guaranty, clause 5.4.

222. Yet, as Table 3 above demonstrates, Centromin assumed responsibility under Clause 6.2 only for those claims that are (i) "are attributable to the activities of the Company, of Centromin and/or its predecessors" but (ii) not if "the damages and third party claims that are the Company's responsibility in accordance with numeral 5.3."[333] And as explained in Section IV below, the claims filed by the Missouri Plaintiffs do not meet any of those elements. Accordingly, the Missouri claims fall outside the ambit of Clause 6.2, meaning that Claimants' subrogation claim is not "related to" the STA.

223. Claimants contend that the language of the STA Arbitral Clause should be interpreted broadly.[334] Respondents believe that the STA Arbitral Clause should not be interpreted narrowly or broadly, but with fidelity under the Peruvian literal, systematic, and good faith canons of interpretation.

224. Summing up the above, to find that it has jurisdiction over Claimants' subrogation claim, the Tribunal would have to find that the claim is "in relation to" the STA in the following circumstances:

- Claimants are not STA Parties (but only parties to the STA Arbitral Clause);
- Claimants thus are not encompassed by the clauses that allocate responsibility for third-party claims;
- Claimants are textually excluded from the clauses that establish indemnity rights;
- Claimants are textually excluded from the expert determination process; and
- the base of responsibility that Claimants argue makes Centromin responsible for the Missouri Plaintiffs' injuries (i.e., strict liability) is a non-contractual claim; and
- that base of responsibility is not encompassed or regulated by Clause 6.2, under a true reading of the clause and application of the clause to the Missouri Plaintiffs' claims.

225. As is clear from Section II.C above, the STA Parties painstakingly devised an elaborate framework to regulate indemnity. Everyone (Claimants, Respondents, and the Tribunal)

[333] **Exhibit R-001**, STA & Renco Guaranty, clause 6.2.
[334] *See* Reply, ¶¶ 54–55.

knows that Claimants' subrogation claim is an attempt to obtain *de facto* indemnity in case their contractual indemnity claims fail. However, if Claimants are not STA Parties—and if, given the principle of privity, they are not encompassed by Clauses 5 and 6—there is simply no good faith basis to conclude that the STA Parties intended the STA Arbitral Clause to permit Claimants to bypass their lack of indemnity rights under the STA by filing a subrogation claim in arbitration.

226. That is why, under the circumstances, it is not possible for the Tribunal to find that Claimants' subrogation claim is "in relation to" the STA.

2. Claimants' subrogation claim entails the inexistence of arbitral consent

227. In Claimants' revised subrogation claim, they propose an original debtor-creditor relationship based on the notion that Respondents are strictly liable to the Missouri Plaintiffs under Article 1970 of the Peruvian Civil Code.[335] And, through Clause 6.2 of the STA, Claimants say, Centromin "retain[ed] and assum[ed] the liabilities at issue in the Missouri litigations."[336] In other words, a creditor-debtor relationship exists, and the debt is Centromin's responsibility. Under Peruvian law, subrogation operates by transferring the rights and limitations of a former creditor to the new creditor after payment. Here, the Missouri Plaintiffs have no right to arbitrate against Respondents. Thus, if Claimants' revised subrogation claim were viable (quod non), its operation would divest the Tribunal of jurisdiction.

228. For subrogation to operate under Peruvian law, there must be (i) a debt owed by a debtor to a creditor, (ii) a payment by a third-party of the debt to the creditor, and (iii) compliance with one of the requirements of the Peruvian Civil Code.[337] Upon fulfilling those elements, under Article 1262 of the Peruvian Civil Code, subrogation operates by substituting subjects: The third-party becomes the new creditor, holding the former's rights, actions,

[335] Reply, ¶¶ 15, 24–27.
[336] Reply, ¶ 31.
[337] *See* **RLA-062**, Peruvian Civil Code, articles 1260, 1261; Varsi First Expert Report–Contract, ¶¶ 8.31–8.33; Varsi Second Expert Report, ¶ 5.102.

and guarantees.[338] Arbitration can be viewed as a "right" or one of the "actions" referred to in Article 1262.[339]

229. Under Peruvian law, however, a subrogation cannot prejudice the legal position of the debtor with respect to the new creditor, *i.e.*, the debtor has all defenses available to it that it had against the original creditor.[340] For that reason, as Peruvian scholar Luciano Barchi Velaochaga explains, transferred to the new creditor are all rights, actions, and guarantees of the original creditor, but also *the latter's limitations*:

> "Subrogation does not mean the extinction of the original debt, but the subjective modification of the obligational relationship, with the replacement of the original creditor by a third party and without affecting the objective aspect of the relationship, which remains unchanged and maintains its characteristics; the replacement occurs for all the rights and actions that correspond to the specific obligational relationship, *but with these are also transferred the limitations*, repose periods, and prescription periods."[341] (Emphasis added)

230. As Professor Varsi explains, the proscription is also independently established by the *nemo plus iuris ad alium tranferre potest, quam ipse haberet* principle, meaning that no one can transfer a greater right than that which he possesses.[342] As a consequence, if the original creditor did not have the power to arbitrate against the debtor, neither does the new creditor. Otherwise, the new creditor would be obtaining a right or action that the original creditor did not have, thereby bypassing a limit that the original creditor was subject to and prejudicing the legal position of the debtor.[343] In other words, it would be the creation of a new right or action rather than the transfer of an existing one.

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[338] **RLA-062**, Peruvian Civil Code, article 1262.
[339] *See* Varsi Second Expert Report, ¶¶ 3.151.
[340] **Exhibit JAP-092**, Luciano Barchi Velaochaga, *Payment of the third and recovery mechanisms of patrimonial loss suffered by the payment of the outside obligation in the Peruvian Civil Code*, 152 IUS ET VERITAS 47, 159 (2013).
[341] *Id.* (*citing* Amico, Francesco, *Il Pagamento con surrogazione. en: Le Obbligazioni, Diritto Sostanziale e Processuale*, Volume ii. Milán: Giufrrè, 2008, p. 978) (Spanish Original*: "La subrogación no importa la extinción de la deuda original, sino la modificación subjetiva de la relación obligatoria, con la sustitución del acreedor originario por un tercero y sin incidencia en el aspecto objetivo de la relación, que queda inalterado y mantiene sus características; el sub-ingreso se da en todos los derechos y las acciones que corresponden a aquella determinada relación obligatoria,* pero con estos se transfieren también las limitaciones*, la caducidad y la prescripción*."); *see* Varsi Second Expert Report, ¶ 3.152.
[342] *See* Varsi Second Expert Report, ¶ 3.153.
[343] *See* Varsi Second Expert Report, ¶¶ 3.150–3.152.

231. Here, the original creditors (under Claimants' theory) are the Missouri Plaintiffs, which have no power to arbitrate against Respondents: They are not STA Parties nor are they parties to the STA Arbitration Clause. Claimants do not argue otherwise. Yet Claimants—who have the burden of proof on jurisdiction—propose no argument on how the Respondents have consented to arbitrate with the Missouri Plaintiffs (and vice versa). That is because there is none: The Missouri Plaintiffs do not have the right to arbitrate nor is it an action available to them. No right to arbitrate can thus be transferred to Claimants under Peruvian law, nor can the action be transferred.[344]

232. Accordingly, if Claimants had successfully subrogated, the Tribunal would lack jurisdiction over Claimants' subrogation claim.

3. Claimants' pre-contractual liability claim (were it alive) is premised on the inexistence of arbitral consent

233. Claimants provide no response.[345]

4. Claimants' unjust enrichment claim is premised on the inexistence of arbitral consent

234. Claimants provide no response.[346]

E. The Tribunal lacks jurisdiction over Claimants' minimum standard of treatment claim

235. Claimants provide no response.[347]

* * *

236. Claimants have failed to meet their burden of affirmatively establishing the existence of the Tribunal's jurisdiction over their claims, and yet they have not responded to numerous

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[344] *See* Varsi Second Expert Report, ¶ 3.154.

[345] In their Memorial, Claimants raised a claim for pre-contractual liability under Peruvian law. *See* Contract Memorial, ¶ 211. Respondents invite the Tribunal to review Section III.E.2 of their Counter-Memorial, where they explained that the Tribunal lacked jurisdiction over the claim because its viability is premised on the inexistence of arbitral consent.

[346] Claimants claim for unjust enrichment under Peruvian law. *See* Contract Memorial, ¶¶ 234–37. Respondents direct the Tribunal to Section III.E.3 of their Counter-Memorial, which explains that the viability of the claim requires the inexistence of arbitral consent.

[347] As the Tribunal will recall, Claimants originally submitted a minimum standard of treatment claim against Peru in this commercial arbitration. *See* Contract Memorial, ¶¶ 238–245. Peru detailed in Section III.F of the Counter-Memorial (i) that there is no arbitral consent for Claimants' minimum standard of treatment claim, and (ii) that Claimants have no standing to bring this claim.

of Respondents' objections. Accordingly, the Tribunal should dismiss the Contract Case in full for lack of jurisdiction.

237. Separately, due process principles require that the Tribunal preclude Claimants from raising arguments regarding jurisdiction in subsequent written submissions or at the hearing that could have been raised in their Reply.

238. Due process is a foundational principle of international arbitration.[348] Under both English law and the UNCITRAL Arbitration Rules, the Tribunal must conduct this arbitration in a manner that safeguards Respondents' due process rights—in particular the right to present its case and defend itself. Articles 33(1)(a) and (2) of the English Arbitration Act mandate that

> "[t]he Tribunal shall act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
>
> . . . .
>
> The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it."[349]

Article 17(1) of the UNCITRAL Arbitration Rules provides similar protections to Respondents.[350] Due process is also required by Article V(1)(b) of the New York Convention.

239. The procedural orders and the UNCITRAL Arbitration Rules governing this case contain specific rules to preserve each party's right to present its case and to defend itself. To ensure that proper notice of arguments and evidence is given to the opposing party (which allows the opposing party to properly prepare a response), Procedural Order No. 1 ("**PO1**") requires that

> "[t]he Parties [ ] submit with their written submissions all evidence and authorities on which they intend to rely in support of the factual and legal arguments advanced therein, including witness statements,

[348] **RLA-243**, Gary B. Born, International Commercial Arbitration (Third Edition), Chapter 15, 1 August 2021, § 15.04[B][3].
[349] **CLA-013 (Contract)**, English Arbitration Act, articles 33(1)(a) & (2).
[350] UNCITRAL Rules, article 17(1).

> expert reports, exhibits, legal authorities and all other evidence and authorities in whatever form."[351]

PO1 therefore explicitly *required* Claimants to submit *all evidence* on which they based their arguments in their Reply.

240. To ensure that the arbitration proceeds on clearly defined issues, without any party having to respond to distracting, irrelevant points, PO1 also requires that in "subsequent written submissions, such evidence shall only be submitted in support of the factual or legal arguments advanced *in rebuttal* to the other side's prior written submission"[352] (emphasis added). Thus, the parties (as relevant here, Respondents) could respond only to the prior written submission (as relevant here, Claimants' Reply) in their submission (here, this Rejoinder).

241. And to prevent argument by surprise, which would eviscerate the opposing party's right to notice and ability to properly present any response, PO1 prohibits the parties from (i) presenting evidence in subsequent written submissions that could have been presented earlier,[353] and (ii) presenting new evidence after the last written submission.[354]

242. Claimants' tactics seriously prejudice Respondents' due process rights. Claimants were required to present their arguments and supporting evidence responding to Respondent's objections in their Reply, thus providing notice to Respondents. Respondents were then provided the opportunity in this submission with rebutting Claimants' responses. Claimants have eviscerated that framework by refusing to respond to almost all of Respondents' objections on jurisdiction, and Claimants still have one pleading left. Should Claimants be permitted to submit responses in their Rejoinder on Jurisdiction that they have refused to present in their Reply, Claimants will have been granted improper advantage by being permitted (i) to refuse to respond in the proper pleading (their second pleading), to which Respondents can reply, and instead (ii) to respond only in the final pleading, to which Respondents cannot reply. Allowing Claimants to remain silent in their

[351] Procedural Order No. 1, clause 6.2; *see* UNCITRAL Arbitration Rule, articles 20(4), 21(2).
[352] *See* Procedural Order No. 1, clause 6.3; *see* UNCITRAL Arbitration Rule, articles 21(2) ("The statement of defence shall reply to the particulars (b) to (e) of the statement of claim"). Article 21(2) applies *mutatis mutandis* to further written submissions under article 24.
[353] *See* Procedural Order No. 1, clause 6.2.
[354] *See* Procedural Order No. 1, clause 6.4.

Reply only to assert arguments in Rejoinder on Jurisdiction would constitute a drastic departure from the principles of due process and equal treatment of the parties, and eviscerate Respondents' right to a reasonable opportunity to present their case.[355]

243. Accordingly, Respondents request that the Tribunal preserve their due process rights by precluding Claimants from submitting responses to objections on jurisdiction that they could have submitted in their Reply. These objections on jurisdiction are identified above and, for ease of reference, in Annex B to Respondents' cover letter submitted with this Rejoinder.

[355] *See* UNCITRAL Rules, article 17(1) ("Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.").

IV. CLAIMANTS' CLAIMS ARE WITHOUT MERIT

244. Were the Tribunal to find that it has jurisdiction over some or all of Claimants' claims (*quod non*), they would nevertheless fail on the merits. As a preliminary matter, all claims fail at the threshold. And in any event, all claims also fail on a full liability analysis.

245. As with Respondents' objections to jurisdiction, Claimants respond to only a minority of Respondents' merits arguments. Claimants do not have another opportunity to respond in writing on the merits. But, here too, unless Respondents consider that doing so would be helpful to the Tribunal, they *will not further develop* arguments to non-responses by Claimants.

246. Below, Respondents will explain why Claimants': (i) claims fail at the threshold (Section IV.A); (ii) STA claims fail on a full liability analysis (Section IV.B); (iii) Centromín and Activos Mineros attended to their environmental obligations (Section IV.C); (iv) Peruvian law claims fail on a full liability analysis (Section IV.D); and (v) minimum standard of treatment claim fails on a full liability analysis (Section IV.E).

A. Claimants' claims fail at the threshold

247. Section IV of Respondents' Counter-Memorial sets out the many reasons why the Tribunal should dismiss Claimants' claims at the threshold. As the Tribunal will see from a review of Claimants' Reply, Claimants respond only to one of those arguments—that their claims are unripe.[356] As a result, Respondents will generally continue only to address actual responses, merely noting where Claimants have failed to respond.

248. Respondents have subsumed their admissibility arguments into the merits section. Dr. Payet claims in his expert report that, under Peruvian law, Respondents' arguments on admissibility are, as a matter of procedure, merits issues.[357] Respondents disagree with Dr. Payet's assumption that Peruvian procedural law governs the procedural aspects of this arbitration. Yet, for two reasons, Respondents agree that here admissibility should be dealt with as a merits issue. First, under English law, the *lex arbitri* of the Contract Case,

[356] *See* Reply, § I.D.
[357] *See* Payet Second Expert Report, ¶¶ 178 ("The Respondents have raised a number of additional issues, which, they allege, would related to the admissibility of the claim. Under Peruvian law, these do not relate to the admissibility of a claim."), 182, 184, 186, 188.

admissibility rulings are considered rulings on the merits.[358] Second, several international tribunals have considered admissibility arguments in cases under the UNCITRAL Arbitration Rules as merits issues.[359] Accordingly, Respondents consider that their admissibility arguments, while substantively unchanged, are threshold merits issues in this particular case.

249. As Respondents will develop in the following sections: Claimants lack standing to raise their STA claims because they are not STA Parties (Section IV.A.1); Claimants lack standing to bring their claims for breach of Clause 6.1 (Section IV.A.2); Claimants' Peru Guaranty claims fail at the threshold (Section IV.A.3); Claimants' indemnity, costs, and defense claims fail at the threshold (Section IV.A.4); Claimants' Peruvian law claims fail at the threshold (Section IV.A.5); and Claimants' minimum standard of treatment claim fails at the threshold (Section IV.A.6).

1. Claimants lack standing to raise their STA claims because they are not STA Parties

250. Claimants provide no response.[360]

2. Claimants lack standing to bring their claims for breach of Clause 6.1

251. Claimants provide no response.[361]

3. Claimants' Peru Guaranty claims fail at the threshold

252. Claimants provide no response.[362]

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[358] *See* **RLA-218**, *Occidental Exploration and Production Company v. Republic of Ecuador*, EWHC Case No. 04/656 (Commercial Court), Approved Judgment, 2 March 2006, ¶¶ 130–137.

[359] *See e.g.*, **RLA-268**, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (II)*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility (Veeder, Grigera Naón, Lowe), 27 February 2012, ¶ 4.91.

[360] As Respondents explained in Section IV.A.1 of their Counter-Memorial, Claimants have no standing to bring their STA claims because they are not STA Parties. Assuming that Claimants seek to use their jurisdictional arguments from Section VI of the Reply also as admissibility arguments, Respondents have explained above and in their Counter-Memorial why Claimants are not STA Parties.

[361] As Respondents explained in Section IV.A.2 of their Counter-Memorial, Claimants have no standing to bring their claims under clause 6.1 of the STA because Centromin's obligations therein run only to the Company.

[362] In Section IV.B of their Counter-Memorial, Respondents objected to the admissibility of Claimants' Peru Guaranty claims because: (i) the Peru Guaranty had ceased to exist before any purported breach; (ii) even if the Peru Guaranty were still in force, only DRCL would have standing to bring a claim; and (iii), in any event, the Peru Guaranty claims are unripe.

4. Claimants' indemnity, costs, and defense claims fail at the threshold

253. Claimants provide no response to any of Respondents' three arguments.[363]

5. Claimants Peruvian law claims fail at the threshold

254. In the Counter-Memorial, Respondents explained that Claimants' Peruvian law claims are inadmissible for three reasons: (i) Claimants' subrogation, contribution, and unjust enrichment claims are unripe; (ii) Claimants lack standing to bring subrogation and contribution claims; and (iii) Claimants' Peruvian law claims were not adequately articulated.[364] Claimants respond only to Respondents' ripeness argument. As detailed above, Claimants revise the theory underpinning their Peruvian law claims (and articulate only their subrogation claim). They provide no response to the remaining arguments.

255. Claimants' Peruvian law claims still fail at the threshold of merits, however, because (i) their revised theory renders the claims inadmissible, and (ii) despite Claimants' reliance on supposed declaratory relief, their claims remain unripe.

a. Claimants' revised theory for their Peruvian law claims makes them inadmissible

256. As Respondents have explained above, to counter Respondents' request to dismiss Claimants' Peruvian law claims as inadequately articulated, Claimants have articulated their subrogation claim under a new, revised theoretical foundation.

257. According to Claimants, Respondents are strictly liable to the Missouri Plaintiffs under Article 1970 of the Peruvian Civil Code.[365] As they read Clause 6.2 of the STA, Centromin "retain[ed] and assum[ed] the liabilities at issue in the Missouri litigations."[366] Thus, according to Claimants, Centromin is the debtor of the Missouri Plaintiffs, who claim injuries resulting from DRP's pollution of La Oroya community during DRP's operation of the Facility.[367] Accordingly, under Claimants' theory, if Claimants are held liable in the

[363] In Sections IV.C and IV.D of their Counter-Memorial, Respondents objected to the admissibility of Claimants' indemnity, costs, and defense claims under the STA, pre-contractual liability under Peruvian law, and customary international law because: (i) Claimants lack standing, as they have no such rights; (ii) the indemnity claims are evidently unfounded; and (iii) the indemnity claims are unripe.
[364] *See* Contract Counter-Memorial, § IV.D.
[365] *See* Reply, ¶¶ 17, 24.
[366] Reply, ¶ 31.
[367] *See* Reply, ¶ 24.

Missouri Litigations, they would be paying Centromin's debt, and thus could subrogate and substitute the Missouri Plaintiffs.[368]

258. Claimants err in their newly formulated theory because it makes their subrogation claim (i) evidently unfounded and (ii) time-barred.

(i) Claimants' revised theory for their Peruvian law claims is evidently unfounded[369]

259. Claims that are evidently unfounded are dismissed at the threshold.[370] Claimants' subrogation claim, under their new theory, is an attempt to fuse two claims into one. That is impermissible under Peruvian law. It is so far afield from what is permissible under Peruvian law that it is evidently unfounded. The Tribunal should thus reject the subrogation claim at the threshold.

260. A strict liability claim and a subrogation claim are independent, distinct claims. Under Article 1970 of the Peruvian Civil Code, strict liability is an independent claim. Establishing a claim of strict liability requires proving the following elements: (i) an injury (ii) caused by (iii) a dangerous or risky activity or a good that is dangerous or risky.[371] Subrogation is also a standalone claim under Peruvian law.[372] For subrogation to operate, there must be (i) a debt owed by a debtor to a creditor, (ii) a payment by a third-party of the debt to the creditor, and (iii) compliance with one of the requirements of Articles 1260 and 1261.[373]

261. Under Claimants' theory, the elements of strict liability are essentially converted into the first element of subrogation—an existing debt. Indeed, Claimants specifically argue that Centromin is the debtor to the Missouri Plaintiffs because of strict liability under Article 1970.[374] Claimants seem to merge both claims to bypass two obstacles to

[368] *See* Reply, ¶ 34.
[369] Claimants only articulate their subrogation claim in their Reply. Accordingly, Respondents will not respond to the other Peruvian law claims, which Claimants have refused to articulate. Insofar as Claimants consider that their revised theory applies to the remaining Peruvian law claims, however, these would also fail as impermissible attempts to fuse two claims.
[370] *See* Contract Counter-Memorial, ¶ 599; **CLA-110**, *Occidental Exploration & Production Co. v. The Republic of Ecuador*, LCIA Case No. UN3467, Final Award, 1 July 2004, ¶ 89.
[371] *See* Varsi Second Expert Report, ¶ 5.32; **RLA-062**, Peruvian Civil Code, article 1970.
[372] *See* Varsi Second Expert Report, ¶ 5.102; **RLA-062**, Peruvian Civil Code, article 1261.
[373] Varsi First Expert Report-Contract, ¶ 8.33.
[374] *See* Reply, ¶¶ 24–28.

presenting each claim independently under Peruvian law. But, as Professor Varsi notes, that operation is patently impermissible under Peruvian law.[375]

262. Claimants' new theory is barred by the principle of pre-justiciability. Under Peruvian law, the pre-justiciability principle precludes an adjudicator from issuing a ruling on a claim when a required, prior determination of one of its bases is lacking:

> "Pre-justiciability exists in all those cases in which for the jurisdictional decision of a claim, the judge requires that some aspect that constitutes one of the bases on which it is based be previously determined."[376]

As is the case under Claimants' new theory, the base whose prior determination may be required can be a claim (such as strict liability):

> "There is pre-justiciability when, between the object of two proceedings, there is a relationship of logical subordination, so that between them there is a link and connection such that the decision on the claim raised in one proceeding is likely to influence the decision of the claim raised in the other, because it constitutes one of the premises on which the resolution of one of the claims must be based."[377]

263. Here, the resolution of the subrogation claim requires the prior resolution of the strict liability claim.[378] Without a resolution on strict liability, there can be no creditor-debtor relationship, without which there is no debt for a third party to pay off.

264. Moreover, as Professor Varsi notes, under Peruvian law, only an injured party can successfully establish a claim for strict liability.[379] If that plaintiff can successfully establish a strict liability claim, it becomes a creditor, and the author of the injury becomes the debtor. Then, a third-party can file a subrogation claim after paying the original creditor. That means that, assuming Centromin had retained responsibility for the claims at issue in the Missouri Litigations (*quod non*), it is the Missouri Plaintiffs (the parties

[375] *See* Varsi Second Expert Report, ¶¶ 5.19, 5.23.
[376] **RLA-266**, Giovanni Prior, *The Suspension of Proceedings due to Pre-Justiciability in Peruvian Civil Procedure*, 40 Ius Et Veritas (2010) pp. 278–85; *see* Varsi Second Expert Report, ¶ 5.26.
[377] **RLA-266**, Giovanni Prior, *The Suspension of Proceedings due to Pre-Justiciability in Peruvian Civil Procedure*, 40 Ius Et Veritas (2010) pp. 278–85.
[378] *See* Varsi Second Expert Report, ¶ 5.27.
[379] *See* Varsi Second Expert Report, ¶ 5.46.

injured by the supposed dangerous or risky activity) who could file a strict liability claim. But they have not filed any claim against Respondents.

265. Claimants' subrogation claim is pre-justiciable, and Claimants cannot file an independent strict liability claim. Claimants' attempt to bypass these obstacles by merging two claims is so clearly inappropriate under Peruvian law that it makes the subrogation claim evidently unfounded.[380]

(ii) Claimants' subrogation claim is time-barred for claims that could have been filed in the Missouri Litigations by 10 November 2014

266. Claimants' revised subrogation claim is time-barred for claims that could have been filed in the Missouri Litigations by 10 November 2014.

267. Under Peruvian law, a subrogation claim has no independent prescription period.[381] That is because, as noted above, the new creditor obtains the old creditor's rights, actions, and guarantees, "but with these are also transferred the limitations, repose periods, and prescription periods."[382] As a result, a subrogation claim is subject to the prescription period of the underlying action.

268. In this case, the relevant prescription date for the subrogation claim is 10 November 2014. Under Claimants' revised theory, the underlying claim is strict liability under Article 1970 of the Peruvian Civil Code. Article 2001(4) of the Peruvian Civil Code establishes a 2-year prescription period for non-contractual claims, including strict liability.[383] The period starts running from the date on which the claim can be filed.[384]

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[380] As the Tribunal will see, this objection is similar to Respondents' objection based on Claimants' lack of standing. *See* Contract Counter-Memorial, § IV.D.2. Indeed, Claimants' claims suffer from so many flaws that numerous similar objections can be raised against them. The difference between these two objections is that one is based on Claimants' attempt to merge two independent claims while the other is founded on the lack of an effected subrogation. In any event, both objections result in the same conclusion: Even accepting that Centromin is liable to the Missouri Plaintiffs, it is these persons (not Claimants) who have any right of action against Centromin.

[381] *See* Varsi Second Expert Report, ¶¶ 4.57.

[382] **Exhibit JAP-092**, Luciano Barchi Velaochaga, *Payment of the third and recovery mechanisms of patrimonial loss suffered by the payment of the outside obligation in the Peruvian Civil Code*, 152 IUS ET VERITAS 47, 159 (2013); *see* Varsi Second Expert Report, ¶ 4.58.

[383] *See* Varsi Second Expert Report, ¶¶ 4.55; **RLA-062**, Peruvian Civil Code, article 2001(4).

[384] *See* Varsi Second Expert Report, ¶¶ 4.56; **RLA-062**, Peruvian Civil Code, article 1993.

269. Prior to the filing of Claimants' Notice of Arbitration on 23 October 2018, Claimants and Respondents executed an agreement on 10 November 2016, which would govern the consultation period in which they engaged. Because the consultation period would delay the filing of the Notice of Arbitration, Claimants and Respondents agreed to set 10 November 2016 as the deadline for any prescription period defense.[385] Accordingly, the subrogation claim is time-barred for any claim in the Missouri Litigations that was or could have been (but was not) filed by 10 November 2014.

270. As Respondents will detail below, the Tribunal cannot issue the faux declaratory relief requested by Claimants, which is conditional on an uncertain, future finding of liability against Claimants in the Missouri Litigations. But if the Tribunal were to issue such relief on the subrogation claim, it must exclude from its partial award any claim in the Missouri Litigations that was or could have been (but was not) filed by 10 November 2014.

271. There are over 3,700 Missouri Plaintiffs in the Missouri Litigations, and no one knows at present which claims in which of the Missouri Litigations might result in a finding of liability, or against whom liability will be found. It is thus impossible to currently determine whether damages in this proceeding (if any) will diminish because of the time-bar.

272. Claimants presented their revised theory on subrogation for the first time in their Reply. There was no reason precluding Claimants from presenting it in their Memorial, and they should have, because their Rejoinder on Jurisdiction is limited to responding to Respondents' jurisdictional objections. Claimants have no other opportunity to present evidence and arguments explaining why any of their claims are not time-barred and have thus failed to meet their burden of proof.[386] Respondents therefore request that the Tribunal rule that Claimants have failed to meet their burden of proof on the timeliness of their

[385] *See* **Exhibit R-009**, Consultation Agreement, 10 November 2016, ¶ 4.

[386] *See* Procedural Order No. 1, clauses 6.2, 6.3, 6.4 ("Apart from the written submissions set forth in the procedural calendar, the Tribunal shall not consider any evidence that has not been introduced as part of the written submissions of the Parties, unless the Tribunal grants leave on the basis of a reasoned request justifying why such documents were not submitted earlier together with the Parties' written submissions or showing other exceptional circumstances."), 6.5 ("After the filing of its last written submission before the hearing, a Party may not present new evidence. However, if the Tribunal determines that exceptional circumstances exist, it may admit new evidence or allow a witness or expert to submit an additional witness statement or expert report before the hearing."); UNCITRAL Arbitration Rule, article 20(4).

claim. In the alternative, Respondents request that any partial award on the subrogation claim in favor of Claimants exclude all claims in the Missouri Litigations that were or could have been filed by 10 November 2014 as time-barred, and allow Respondents to identify such claims in the quantum phase of the Contract Case (if any).

b. Despite Claimants' request for faux declaratory relief, their subrogation, contribution, and unjust enrichment claims remain unripe[387]

273. Claimants' request for relief on their Peruvian law claims is conditioned on an uncertain, future finding of liability in the Missouri Litigations:

> "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."[388]

274. As Respondents explained in their Counter-Memorial, Claimants' subrogation, contribution, and unjust enrichment claims are unripe.[389]

275. In their Reply, Claimants seek cover for their Peruvian law claims behind the shield of declaratory relief. In Claimants' view, because they are requesting only declaratory relief, the Tribunal should issue an award based on uncertain, future events. That is incorrect: (i) Claimants do not seek true declaratory relief; and (ii) even if they were, their claims would remain unripe.

(i) Claimants seek leverage against Peru, not declaratory relief

276. As a threshold matter, Claimants are not actually seeking declaratory relief. If Claimants were seeking declaratory relief, there would be no bifurcated quantum phase.[390] Simply, the premise that Claimants are seeking declaratory relief is false. Instead, Claimants use

[387] Claimants only articulate their subrogation claim in their Reply. Accordingly, Respondents will not respond to the other Peruvian law claims, which Claimants have refused to articulate. Insofar as Claimants seek a declaratory award for their other Peruvian law claims, however, these fail for the same reasons expressed herein.
[388] Reply, ¶ 194.
[389] *See* Contract Counter-Memorial, § IV.D.1.
[390] Claimants concede that when they argue that the issuance of declaratory relief "will likely not result in another arbitration." Reply, ¶ 40. But another arbitration will be unnecessary solely because Claimants seek damages in this proceeding, not for any other reason.

bifurcation as a procedural ploy to present unripe claims and extend the arbitration to use it as leverage against Peru.[391]

277. Under English law (*lex arbitri*), "[a] declaratory judgment is a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs."[392] Declaratory judgments sit in contrast with "executory judgment[s], [in which] the courts determine the respective rights of the parties *and then* order the defendant to act in a certain way, for example by an order to pay damages."[393] "A declaratory judgment, on the other hand, pronounces upon a legal relationship but does not contain any order which can be enforced against the defendant."[394]

278. The same is true in Peru. Under Peruvian law, as Professor Varsi notes, a declaratory judgment is that in which the court issues a declaration on the existence or scope of a legal situation or relationship.[395] A condemnatory judgment (*condena*), on the other hand, also contains a declaration on rights, but, in addition, it includes an order to perform a certain act, such as the payment of damages.[396] Declaratory relief under Peruvian law also does not contain an enforceable order, it is merely declaratory.

279. Claimants do not seek declaratory relief, because they specifically seek an award ordering Respondents to pay damages. When Claimants submitted their Notice of Arbitration, it was clear in their *petitum* that they sought an award of damages:

> "Claimants Renco and Doe Run Resources request a final award against Activos Mineros and Peru granting the following relief:
>
> . . . .
>
> c. An award for all damages caused to Renco and Doe Run Resources as a result of Activos Mineros's and Peru's breaches of the Stock Transfer Agreement and the Guaranty Agreement;

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[391] *See* Reply, ¶¶ 35–40. Insofar as Claimants seek cover for their STA, Peru Guaranty, and minimum standard of treatment claims also behind the shield of false declaratory relief, that attempt fails for the same reasons. In addition, as noted above, such claims are based on the premise that Respondents *have already committed a breach*, a claim which is evidently unfounded.
[392] **RLA-267**, Lord Woolf and Jeremy Woolf, *The Declaratory Judgment*, 2011, p. 1.
[393] *Id.*
[394] *Id.*
[395] *See* Varsi Second Expert Report, ¶ 4.31.
[396] *See* Varsi Second Expert Report, ¶ 4.23.

> d. An award of moral damages to compensate Renco and Doe Run Resources for the non-pecuniary harm that Renco and Doe Run Resources have suffered due to Activos Mineros's violations of the Stock Transfer Agreement;"[397]

Nothing of substance has changed since then.

280. Procedurally, Claimants sought a bifurcation of the merits and quantum phases of both the Treaty Case and the Contract Case. To be clear, the justification for bifurcation was financial efficiency, not a change in the nature of the relief sought:

> "Claimants also propose that the present phase of the two Cases focus on jurisdiction and liability issues only, and that quantum issues be addressed in a separate phase, in the event that the Claimants prevail on jurisdiction and liability . . . there is no reason to force Claimants to incur the substantial costs associated with the quantum phase before the Tribunal determines liability—especially during a period of substantial economic uncertainty created by the coronavirus pandemic. Although respondents normally do not object to delaying a potential quantum award against them, Respondents are doing so here."[398]

Had Claimants wanted to change the nature of their request, they would have merely dropped their request for damages rather than shift it in time.

281. The Tribunal granted Claimants' request, also understanding that they had not changed the nature of their requested relief:

> "The Claimants request that the present phase of both the Treaty Case and this case address issues of jurisdiction and liability only, and that quantum issues be bifurcated to a separate phase, in the event that the Claimants prevail on jurisdiction and liability."[399]

282. Claimants have since reserved—*not waived*—their right to seek compensation until the quantum phase of the proceeding:

> "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

[397] Claimants' Notice of Arbitration and Statement of Claim, 23 October 2018, ¶ 40.
[398] Claimants' Letter to the Tribunal, 20 August 2020, p. 2.
[399] Procedural Order No. 4, ¶ 2.7.

> 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."[400]

In sum, Claimants will be asking for compensation if Respondents are found liable, and no amount of sophistry—e.g., seeking "declarations" on liability or "reserv[ing] [their] right . . . to seek an award of compensation"—can hide that truth.

283. The only difference between the bifurcated Contract Case and a non-bifurcated, or unified, proceeding is that here the Tribunal will not rule on liability and quantum simultaneously. As is clear from the English and Peruvian law definitions, every award will involve *some* declaration on rights from the Tribunal. In a unified proceeding in which compensation is sought, the final award will contain a declaration on jurisdiction, liability, and then, if appropriate, a compensation order. Bifurcation between liability and quantum does not convert a partial award on liability into a declaratory award. If Respondents are found liable, the partial award (including its declaration, ruling, finding, etc., on liability) will be incorporated *into the final award, which will contain an enforceable order for payment of damages* (assuming Claimants prove the necessary requirements).[401]

284. The procedural difference between a unified and bifurcated arbitration cannot change the nature of Claimants' requested relief or their claims. As Respondents have explained, Claimants' Peruvian law claims require an already-made payment for a favorable ruling on *liability*.[402] That means that Claimants must meet their burden of proving each of the elements of their claims *now*, in the current phase of the Contract Case. Yet, because there has been no adverse ruling in the Missouri Litigations (let alone any resulting payment of damages), Claimants have bifurcated the Contract Case to attempt to dislodge the payment element from liability and shift it into quantum. In short, Claimants have intertwined liability with quantum to submit unripe claims. Why?

285. Claimants have been trying to draw Peru into the Missouri Litigations. Claimants now finally concede the point: According to them, a finding of liability against Peru and

[400] Reply, ¶ 197.
[401] Reply, ¶ 197.
[402] *See* Contract Counter-Memorial, §§ IV.C.2 & D.1.

Activos Mineros would provide the Respondents with the "impetus to engage with Claimants in resolving the Missouri Litigation or in participating with Claimants in a trial and appeal of those cases."[403] In short, Claimants are using this proceeding as leverage to pressure Peru into assisting them against the interests of the Missouri Plaintiffs (Peruvian nationals) and as litigation insurance if they fail.

286. Respondents have continuously expressed their frustration at Claimants' procedural gamesmanship. Beginning with the filing of Respondents' request for bifurcation, Respondents have informed the Tribunal that Claimants are "play[ing] one set of proceedings off of another, to advance their own interests."[404] Since then, Claimants have repeatedly attempted to obstruct and delay the proceedings—most recently by objecting to the Tribunal's jurisdiction and seeking the suspension of the Contract Case until *they* complied with Respondents' 13-year-old request to undertake the expert determination process, a condition to arbitral consent.[405] The strategy would be bizarre if not for the reasoning behind it.

287. In the subset of Missouri Litigations referred to as the Collins Cases, the court has set 29 July 2025 as the date for the close of discovery and 2 September 2025 as the deadline for summary judgment motions.[406] In other words, Claimants intend to prolong the Contract Case (i) at least until late 2025 (if the court were to grant summary judgment in favor of the Renco Defendants and dismiss the claims), and (ii) until an unknown future date (if the case were to proceed to trial). All through unripe claims and to exert pressure on Peru to intervene in Missouri and prejudice Peruvian nationals. Pressure that will only increase if the Tribunal issues Claimants' requested, faux declaratory relief. Claimants would treat such a partial award as an insurance policy fully covering their liability in the Missouri Litigations.

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[403] Reply, ¶ 40.
[404] Respondents' Request for Bifurcation, 21 February 2020, ¶ 19; *see* Respondents' Letter to the Tribunal, 30 June 2022, p. 1; Respondents' Letter to the Tribunal, 11 July 2022, pp. 2–4; Respondents' Letter to the Tribunal, 2 August 2022; Respondents' Letter to the Tribunal, 9 September 2022, Respondents' Letter to the Tribunal, 28 September 2022.
[405] *See* Respondents' Letter to the Tribunal, 18 October 2022; Respondents' Letter to the Tribunal, 4 November 2022.
[406] *See* **Exhibit R-226**, Docket, *Father Chris Collins et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:15-cv-01704-RWS), as of 1 September 2022, Docket Entry # 740.

288. The situation would be worse if Claimants were to settle with the Missouri Plaintiffs. Parties settle to mitigate risk. Defendant-parties will offer to pay an amount lower than the full amount claimed to eliminate the risk of having to pay the full amount claimed. Plaintiff-parties will offer to accept an amount lower than the full amount to eliminate the risk that their claims will fail. An award ordering Respondents to pay future settlement payments would destroy that incentive scheme, and instead further serve as litigation insurance for Claimants. If Respondents are forced to pay a settlement amount, Claimants would be incentivized to settle the Missouri Plaintiffs' claims for the *full amount*. Given that they would collect from Respondents every cent paid, Claimants would not care about the quantum of the settlement. Indeed, Claimants could structure the settlement so that *they* pay the complete settlement amount to release all Renco Defendants, and so Respondents would be forced to pay the claims lodged against the phantom-claimants. In short, the Tribunal would be giving Claimants the key to the Peruvian fisc and a blank check for withdrawal.

289. Claimants do not request declaratory relief. They seek a tool to extort Respondents for their participation in the Missouri Litigation and an insurance policy that no Party bargained or paid for. The Tribunal should not be so used and should not grant Claimants' requested "relief."

(ii) Even if Claimants sought true declaratory relief, their claims would remain unripe

290. Even if Claimants were requesting true declaratory relief, their subrogation claim would be unripe. Claimants argue that because they are seeking declaratory relief, their subrogation claim is not premature.[407] Claimants' argument fails because they fail to meet their burden of proving the merits of their claim and because under either English law (the applicable law) or Peruvian law (the inapplicable law) the claim is speculative.

291. ***At the outset, Claimants fail to meet their burden of proof on the merits of their claim***. Respondents put forth two arguments for why Claimants' subrogation claim is unripe:

[407] *See* Reply, ¶¶ 35–40.

(i) because Claimants had not made any payments to the Missouri Plaintiffs;[408] and (ii) because it is speculative.[409] Claimants' rebuttal in their Reply is limited solely to Respondents' first argument.[410] By refusing to engage with Respondents' argument on the hypothetical and speculative nature of the subrogation claim, Claimants have put forth nothing at all on this point. They have thus failed to meet their burden of proof on the merits of their claim.

292. ***In any event, Claimants' subrogation claim is unripe under English law***. Claimants assume, without analysis, that Peruvian law governs the Tribunal's remedial powers. They are mistaken. The power to grant declaratory relief is governed by the content of the arbitral clause, the applicable procedural rules, and/or the *lex arbitri*.[411] Where the arbitral clause and the relevant arbitral rules are silent, the national arbitration legislation of the seat regulates a tribunal's remedial powers.[412] Article 48 of the English Arbitration Act is thus the well from which this Tribunal's power to issue declaratory awards springs.[413] The

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[408] *See* Contract Counter-Memorial, ¶ 616 ("Under Peruvian law, subrogation, contribution, and unjust enrichment all require the existence of an already-made payment to the Missouri Plaintiffs. But Claimants have made no such payment, nor have they argued otherwise.").

[409] *See* Contract Counter-Memorial, ¶¶ 616 (arguing that Claimants' subrogation, contribution, and unjust enrichment claims "are just as speculative as Claimants' indemnity claims, and for the same reasons."); 622 ("In this case, Claimants have not alleged (and cannot allege) that they have made the required payments. Given the pending status of the Missouri Litigations, the Tribunal cannot determine whether Claimants' ever will. Moreover, it is impossible for the Tribunal to know on what basis the Claimants might be found liable in the Missouri Litigations (if they are). Thus, it is impossible to know if any future payment, based on a hypothetical future liability, will relate to actions for which Centromin has assumed responsibility. For the same reasons that Claimants' indemnity claims are unripe, so are their subrogation, contribution, and unjust enrichment claims.").

[410] *See* Reply, ¶ 36 ("Peruvian law recognizes a claim for declaratory relief under these circumstances. This basic principle of Peruvian law runs counter to Respondents' argument for avoiding liability for Claimants' subrogation claim (*i.e.*, that Claimants have not yet made payment to the Missouri Plaintiffs.").

[411] *See* **RLA-259**, Patrick Dunand and Maria Kostytska, Declaratory Relief in International Arbitration, Journal of International Arbitration, 2012, pp. 4-5.

[412] *See id.*; **RLA-261**, Nigel Blackaby et al., Redfern and Hunter on International Arbitration (Seventh Edition), Chapter 3, Applicable Laws, 2 November 2022, ¶ 3.51; **RLA-263**, Born, Gary, *International Commercial Arbitration* (3d ed., 2021), § 23.07 (explaining how the arbitral agreement in the first instance and then national arbitration legislation regulate a tribunal's power with regard to relief).

[413] *See* **CLA-013 (Contract)**, English Arbitration Act, 1996, article 48(3); *id.* at 2(1) ("The provisions of this Part apply where the seat of the arbitration is in England and Wales or Northern Ireland."). Indeed, multiple scholars have specifically identified the English Arbitration Act, the national arbitration legislation governing this arbitration, as a *lex arbitri* that affirmatively grants tribunals seated in England the power to issue declaratory relief. *See* **RLA-259**, Patrick Dunand and Maria Kostytska, Declaratory Relief in International Arbitration, Journal of International Arbitration, 2012, pp. 4-5 ("although generally arbitration laws (*lex arbitri*) do not regulate the remedies available to the tribunal and, consequently, do not expressly provide for the tribunal's power to grant declaratory relief, one exception is the [English] Arbitration Act"); **RLA-262**, Nigel Blackaby et al., Redfern and Hunter on International Arbitration (Seventh Edition), Chapter 9, Award, 2 November 2022, ¶ 9.59 (referencing the English Arbitration Act: "An arbitral tribunal may be asked to make an award that is simply declaratory of the rights of the parties. Modern arbitration legislation often makes express provision for the granting of declaratory relief").

limits of that power are accordingly governed by English-law principles.[414] Applying those principles to this case, Claimants' claims are unripe.

293. As set out in *CIP Property (AIPT) Limited v. Transport For London et al.*, under English law, determining whether to issue declaratory relief requires considering the following factors: "(1) is the claim premature, (2) would the declaration sought serve a useful purpose, and (3) are the issues sufficiently clearly defined to be properly justiciable?"[415]

294. The plaintiff in *CIP Property*, who owned two buildings, sued three defendants alleging that their future development of nearby land would infringe on its property's right to light.[416] The plaintiff sought declaratory and injunctive relief.[417] The court rejected both requests for relief on the grounds that the claims were premature. The analysis rejecting the declaratory relief request as to the third defendant is relevant for our purposes.

295. The court found that the claim was premature and would serve no useful purpose because there was no immediate threat of an infringement of any right to light, as none of the defendants was close to developing the land.[418] Indeed, numerous future conditions had to be satisfied before the third development owned the land with rights to develop it.[419] The conditions could not be satisfied until 2017, five years after the date of the judgment, if they ever were.[420] Then the defendant would have to obtain development permits and satisfy their conditions.[421] Importantly, the court held that the third defendant's position—that the plaintiff had no right to light and that a future development would not infringe on any right to light—did not constitute an immediate threat of infringement:

> "[T]he third defendant does not accept that [the plaintiff] is entitled to the rights to light it claims in relation to [the buildings]. Nor does it accept that its proposed oversite development would infringe such of them as may be established. But such disagreement does not of itself constitute or indicate an immediate threat to infringe those

[414] To be clear, whether the subrogation claim itself is viable *substantively* is analyzed under Peruvian law. But whether the Tribunal can issue the requested declaratory relief to begin with is governed by English law.
[415] **RLA-260**, *CIP Property (AIPT) Ltd. v. Transport for London et al.*, England and Wales High Court Case No. [2012] EWHC 259 (Ch), Judgment, 25 January 2012 ("**CIP Property**"), ¶ 26.
[416] *Id.*, ¶¶ 1–4, 8–9, 12.
[417] *Id.*
[418] *See id.*, ¶¶ 30, 32, 37, 38, 40.
[419] *See id.*, ¶ 32.
[420] *See id.*, ¶ 32.
[421] *See id.*, ¶ 33.

> rights. The disagreement between the parties' experts and the failure of the third defendant to give any such undertaking as [the plaintiff] has demanded cannot of themselves constitute a threat of actual infringement either."[422]

296. Additionally, the court found that the issues could not be clearly defined, stating "I have considerable doubt as to the possibility of any meaningful definition of the relevant issues, given that the development does not have the benefit of any planning permission and may change substantially in the next five years anyway."[423] Accordingly, the court rejected the plaintiff's declaratory relief request against the third defendant.

297. As in *CIP Property*, Claimants' subrogation claim is unripe based on the applicable factors under English law. First, the claim is temporally premature. Claimants have not effected any payment because there has been no finding of liability nor has a damages judgment been issued. As noted above, the earliest date in which one of the cases could conclude would be late 2025—and that is only if the court in the Collins Cases grants summary judgment *in favor of the Renco Defendants*. In the other subset of Missouri Plaintiffs cases—the Reid Cases—the proceeding is still in discovery. If the cases proceed to trial, there is no telling when the trial will take place, or when a jury would issue a verdict, let alone when the appellate court will issue its ruling on any the eventual appeals. An immediate infringement of any right here is likely at least as distant as the infringement in *CIP Property.* And, as can be seen from the explanation a few paragraphs below, the number of conditions that must be met to arrive at any payment here is more sizeable than the number of conditions necessary to arrive at an infringement in *CIP Property*.

298. Second, issuing a declaratory partial award on liability will serve no useful purpose. It would not grant Claimants their requested *de facto* indemnity in the guise of subrogation, as damages would be determined in the quantum phase of the arbitration, and this phase cannot occur prior to the resolution of the Missouri Litigations. To be clear, that means after the appeals, and after the courts subsequently issue final judgment on damages (assuming those judgments are not subject to further appeals). That is years away.

[422] *See id*., ¶ 35.
[423] *See id*., ¶ 40.

299. In fact, issuing a declaratory partial award now can only cause harm. As noted above, issuing such an award will only (i) provide Claimants leverage to attempt to force Peru to prejudice the interests of Peruvian citizens, and (ii) provide Claimants with a litigation insurance policy, allowing them to force Respondents to pay any and all damages that result from the Missouri Litigations or a settlement. On the first point, Peru once again confirms that, irrespective of the pressure that Claimants exert, it will not take any step to prejudice Peruvian nationals. On the second point, Respondents again express that it is inappropriate to give Claimants the key to the Peruvian fisc.

300. Third, none of the relevant issues is capable of being clearly defined such that the subrogation claim is justiciable. There are just too many future, conditional, and hypothetical, variables to account for. To recall, the Missouri Litigations remain in pre-trial phases and far from concluded. Litigation in the United States proceeds in various phases. The first phase is the exchange of initial written submissions, during which plaintiffs file their complaint and defendants file an answer, or, a motion to dismiss due to legal or factual deficiencies.[424] Generally, if the court does not dismiss the complaint, the parties proceed to the discovery phase, where the parties exchange evidence between themselves and seek evidence from third-parties.[425] Thereafter, the litigation often proceeds to the summary judgment phase, which is another opportunity for the defendants to seek summary dismissal based on legal or factual insufficiency.[426] The written submissions filed by the parties during those phases, and the evidence that accompanies those submissions, are not part of the evidentiary record. In United States litigation, evidence is admitted into the record *only* at trial, after the fact-finder (the jury) has been constituted. After the jury reaches a verdict (assuming it is adverse), the Renco Defendants can ask the first-instance court to overturn it.[427] Only if the adverse verdict survives will the Renco Defendants be ordered to pay damages. After the determination of damages, they can move for remittitur—wherein the judge may give the Missouri Plaintiffs the

[424] *See* **RLA-209**, Federal Rules of Civil Procedure of the United States of America, 1 December 2020, R. 3–15.
[425] *See* **RLA-209**, Federal Rules of Civil Procedure of the United States of America, 1 December 2020, R. 26–31, 33–37.
[426] *See* **RLA-209**, Federal Rules of Civil Procedure of the United States of America, 1 December 2020, R. 56.
[427] *See* **RLA-209**, Federal Rules of Civil Procedure of the United States of America, 1 December 2020, R. 59, 60.

option of accepting a reduction in damages or submitting to a new trial.[428] And after completion of the first instance proceeding, the Renco Defendants will be able to appeal.[429]

301. As noted above, the Collins Cases are still in discovery, which will last until 29 July 2025. The Reid Cases are in summary judgment, but the court's ruling on *one of two* summary judgment motions by the Renco Defendants is on appeal.[430] At the present time, it is impossible to know, *inter alia*:

- if any claims will survive summary judgment and proceed to trial;
- what evidence will be submitted into the records at trial (if there are any);
- what arguments will be made at trial (if there are any);
- who will the juries find liable (if anyone);
- on what claims will the juries find liability (if any);
- on what evidence and arguments will an adverse verdict (if any) be based;
- whether an award of damages (if any) will be for claims for which Respondents may be responsible; or
- whether an appellate court will overturn a verdict on liability or damages, in full or in part.

302. Claimants' new subrogation theory starts with strict liability, runs through the STA, and ends in a subrogation claim. For subrogation to work, there must be a debt owed to a creditor. Claimants argue that Respondents are strictly liable to the Missouri Plaintiffs under Peruvian law, and that, under their reading of the STA, through Clause 6.2 of the STA, Centromin "retain[ed] and assum[ed] the liabilities at issue in the Missouri litigations."[431] In other words, a creditor-debtor relationship exists, and the debt is Centromin's responsibility. Under Clause 6.2, Centromin assumes responsibility only for damages and third party claims that are "are attributable to the activities of the Company,

[428] **RLA-210**, Corpus Juris Secundum, Federal Civil Procedure, 35B, § 1128, March 2022.
[429] **RLA-211**, *Loyal Gunderson v. Steven W. Bigg*, 146 F.3d 557 (8th Circuit), 3 June 1998, p. 557 (reversing a district court's denial of a motion for remittitur and decreasing the damages award of USD 355,000 by USD 128,000).
[430] **Exhibit R-225**, Docket, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), as of 1 September 2022, Docket Entry # 1331.
[431] Reply, ¶ 31.

of Centromin and/or its predecessors."[432] Thus, Claimants' theory seems to be that a finding of liability in the Missouri Litigations would be for injury attributable to activities of the Company (initially Metaloroya, subsequently DRP).[433] According to Claimants, if they pay the debt, they would subrogate and become new creditors.

303. As explained below in Section IV.B, however, the claims from the Missouri Litigations are not "are attributable to the activities of the Company."[434] Instead, they are claims that bypass DRP and derivatively impose liability on the Renco Defendants (Claimants and their affiliates) (through veil piercing and agency theories), or directly impose liability on the Renco Defendants for their conduct in the United States. In other words, the facts and legal theories pled in the Missouri Litigations are such that, necessarily, no finding of liability against the Renco Defendants would be for activities "attributable" to "the Company."

304. Yet, even if the Tribunal were unsure about whether every single one of the 14 still-live claims in the Missouri Litigations falls outside the ambit of Clause 6.2, the Tribunal cannot know at present for which one of the claims (if any) Claimants will be found liable. Accordingly, any doubt by the Tribunal would merely demonstrate that the relevant issues are speculative and unable to be defined.

305. Moreover, a clear definition of the relevant issues cannot be obtained given 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."[435] As Respondents have explained, the parties to a settlement can decide the quantum to pay and who will pay, without any acceptance of liability.[436] The settlement would not allow a determination of the basis of liability or the identification of which one of the Renco Defendants (Claimants or the phantom-claimants) would have been found liable (and on what basis) had the matter gone to trial. Simply, there would be no way to adjudicate

[432] *See* **Exhibit R-001**, STA & Renco Guaranty, clause 6.2.
[433] Reply, ¶ 31. *See* Second Payet Report, ¶ 55 ("it is clear that the Liability Allocation Provisions allocate to Centromin liabilities for potential claims or *damages originating directly from actions of Metaloroya* taken after the closing of the transaction") (emphasis added).
[434] *See* **Exhibit R-001**, STA & Renco Guaranty, clause 6.2.
[435] Reply, ¶ 63.
[436] *See* Contract Counter-Memorial, ¶ 613.

whether the money paid under the settlement would be for a matter that is Centromin's responsibility under Clause 6 of the STA.

306. On the other hand, as Respondents feared and warned, ruling on such imprecise and foggy issues would violate Respondents' due process rights.[437] There are 14 still-live counts in the Missouri Litigations. For each count, there are numerous potential defenses in this proceeding. But Respondents cannot raise them effectively because they do not know, among other things, what evidence will be submitted into the records at trial (if there are any), what arguments will be made at trial (if there are any), for what claims Claimants will be found liable (if any), and so on. The permutations of potential outcomes are so numerous that Respondents are unable to adequately defend themselves from Claimants' arbitral claims with any semblance of efficiency.

307. Due process is the *sine qua non* of a fair and legitimate adjudicatory system. Under both English law and the UNCITRAL Arbitration Rules, the Tribunal must conduct this arbitration in a manner that safeguards Respondents' due process rights—in particular the right to present their case and defend themselves. Articles 33(1)(a) and (2) of the English Arbitration Act mandate that

> "[t]he Tribunal shall act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
>
> . . . .
>
> The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it."[438]

Article 17(1) of the UNCITRAL Arbitration Rules provides similar protections to Respondents.[439] Due process is also required by Article V(1)(b) of the New York Convention.

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[437] *See* Respondents' Letter to the Tribunal, 21 August 2020 ("Bifurcating quantum could prejudice Respondents' ability to present defenses, including, for example, with respect to the purported causal relation between an alleged breach and harm . . . The time has come for Claimants to stop delaying and present their cases, merits and damages.").
[438] **CLA-013 (Contract)**, English Arbitration Act, articles 33(1)(a) & (2).
[439] UNCITRAL Rules, article 17(1).

308. As the following small sample of potential defenses demonstrates, the sheer quantity of potential scenarios prevents any meaningful definition of the issues and thereby makes it impossible for Respondents to identify and respond to every possibility.[440] To start, one of the elements necessary to pierce the corporate veil under Missouri law is that the party controlling the subsidiary use its control to perpetuate a fraud, wrong, a violation of a duty, or an unjust act in breach of the plaintiff's rights.[441] If Claimants are found liable under a veil-piercing theory, the jury must have found that they had committed a fraud, wrong, a violation of a duty, or an unjust act in breach of the plaintiff's rights. In that scenario, Respondents would direct Professor Varsi to research the unclean hands doctrine under Peruvian law, and likely present a defense based on it.

309. If Claimants settle with the Missouri Plaintiffs, given the likely characteristics of a settlement, Respondents would likely present numerous defenses, *inter alia*:

- a burden of proof argument (as Claimants would be unable to prove that a settlement in which no liability is admitted and in which no liable party is identified is encompassed by Claimants' claims or excludes the phantom-claimants);
- various jurisdictional and merits defenses on the basis that Respondents should not be forced to pay any amount that represents payment of the phantom-claimants' liability, *de facto* or *de jure*; and
- a *res inter alios acta* defense under Peruvian law.

310. Irrespective of the claim for which Claimants are found liable (if any), Respondents could develop a defense that Claimants must rely solely on the evidence admitted into the record in the trials of the Missouri Litigations to meet their burden of proof here. Yet no evidence has been admitted in either of the Missouri Litigations, so Respondents have no way of judging whether that defense would be viable, and thus whether to present it.

311. If Claimants are found liable by a jury—after a trial, after evidence is admitted, and after arguments are made—Respondents could then conduct a legal analysis of the basis of

[440] Nor will Respondents be able to re-argue the merits of this case in a future quantum phase. By then, the current jurisdiction and liability phase will be complete.
[441] **Exhibit R-018**, Memorandum and Order, Document No. 949, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 16 October 2018, p. 21.

liability, and manageably determine what defenses to raise. But those issues cannot be clearly defined and managed in any efficient manner.

312. For the foregoing reasons, even if Claimants had submitted a request for true declaratory relief, their claims would remain unripe under English law.[442]

313. ***Finally, even if Peruvian law applied, Claimants' claims would still be unripe***. Even if Peruvian law applied, Claimants' claims would still be unripe: They do not relate to a pre-existing legal relationship, and they are speculative.

314. First, Claimants' claims do not relate to a pre-existing legal relationship. As Professor Varsi explains, under Peruvian law, declaratory relief resolves uncertainty regarding a pre-existing legal relationship.[443]

315. The Peruvian Constitutional Tribunal agrees:

> "It is well known that in the classic classification of judgments, they are usually identified based on the content of their operative part, that is, *if they declare a right or a legal situation prior to the judgment (declarative judgments)*, if they constitute a right or a position legal in relation to an object or situation (constitutive sentences) and if they compulsively order the performance of certain acts established in the process after verifying the transgression of the legal order (condemnatory sentences)."[444] (Emphasis added)

316. Peruvian scholars agree:

> "Declarative [Judgments]; aimed at eliminating a state of uncertainty through a pronouncement that rules on the existence, scope or modality of a legal relationship. *In other words, it only recognizes a pre-existing legal situation*.[445] (Emphasis added)

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[442] The same analysis applies to Claimants' indemnity claim, *mutatis mutandis*.

[443] *See* Varsi Second Expert Report, ¶ 4.18.

[444] **Exhibit EVR–144**, Judgment, Case No. 4119-2005-PA/TC, Constitutional Tribunal, 29 August 2015, ¶ 21 (Spanish Original: "Sabido es que en la clásica clasificación de las sentencias, éstas suelen identificarse en función del contenido de su parte dispositiva, *esto es, si declaran un derecho o una situación jurídica preexistente a la sentencia (sentencias declarativas),* si constituyen un derecho o una posición jurídica con relación a un objeto o situación (sentencias constitutivas) y si ordenan compulsivamente la realización de determinados actos establecidos en el proceso tras verificarse la transgresión del orden legal (sentencias de condena).").

[445] **Exhibit EVR–107**, Enrique Palacios Pareja, *Reflections on Preventative Protection*, *31 Ius et Veritas*, p. 232 (Spanish Original: "[Sentencias] Declarativas; tendientes a eliminar un estado de incertidumbre mediante un pronunciamiento que resuelva acerca de la existencia, alcance o modalidad de una relación jurídica. En otras palabras, solo reconoce una situación jurídica preexistente").

> [Me]mere declaratory protection occurs when the judge issues a judgment that *is limited to verifying a pre-existing legal situation*."[446] (Emphasis added)

317. And even Professor Payet agrees:

> Ramiro Portocarrero argues that "considering that procedural protection makes sense only in the face of crisis of substantive law, it is reasonable to say that whoever proposes a cognition process may seek three things: the issuance of an order, the modification of a legal state or *the declaration of a pre-existing one*."[447] (Emphasis added).
>
> Juan Monroy Palacios argues that "merely declaratory protection occurs when the judge issues a judgment that *is limited to verifying a pre-existing legal situation*."[448] (Emphasis added).
>
> Peruvian law recognizes the need for legal subjects to resort to a jurisdictional body—among them, arbitration— to resolve legal uncertainties regarding pre-existing situations through declaratory judgments.[449]

318. A legal relationship is the relationship that arises under law between legal subjects.[450] Here, the relevant legal relationship would be a new creditor-debtor relationship between Claimants and Respondents.

319. The requirement of a pre-existing legal relationship does not mean that all relevant facts must have already occurred. Indeed, one of the benefits of declaratory relief is that—by removing uncertainty over the existence or scope of a legal relationship—it can inform the parties to that legal relationship of the likely consequences of their next steps. Accordingly, under Peruvian law declaratory relief can be issued if a breach of an obligation has not yet occurred.[451] In that way, the declaratory relief issued can potentially prevent the breach from occurring in the first place.

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[446] **Exhibit JAP-105**, Juan Monroy, *Criteria for the Identification of Different Forms of Protection under Civil Procedure*, Peruana de Derecho Procesal No. 5, 2002, p. 228 (Spanish Original: "La tutela meramente declarativa se produce cuando d juzgador emite una sentencia que se limita a verificar una situación jurídica preexistente.").
[447] Second Payet Expert Report, ¶ 191 (*citing* **Exhibit JAP-104**, Ramiro Portocarrero, *An Approximation of Declaratory Relief in Peruvian Civil Procedure*, 5 Journal of Peruvian Procedural Law, 2002).
[448] Second Payet Expert Report, ¶ 192 (*citing* **Exhibit JAP-105**, Juan Monroy, *Criteria for the Identification of Different Forms of Protection under Civil Procedure* 5 Journal of Peruvian Procedural Law, 2002).
[449] Second Payet Expert Report, ¶ 193.
[450] *See* Varsi Second Expert Report, ¶¶ 4.27, 3.63.
[451] *See* Varsi Second Expert Report, ¶ 4.30.

320. The key distinction is that, while the illicit act may be a potential future occurrence, the legal relationship must already exist.[452] In this case, for there to be a pre-existing legal relationship on the theory of subrogation, the following would need to true:

- that Activos Mineros has been held liable for the Missouri Plaintiff's injuries;
- that Respondents' debt to the Missouri Plaintiffs has been determined;
- that Claimants have paid Respondents' debt; and
- that Activos Mineros has retained responsibility for the claims filed in the Missouri Litigations under the STA.[453]

If those circumstances existed, then there would be a pre-existing legal relationship based on the theory of subrogation. That is not where we are.

321. Here, there is no possibility that a legal relationship exists. To start, Activos Mineros has not been held liable for the Missouri Plaintiffs' injuries, and, as explained above, Claimants' attempt to have this Tribunal conduct that adjudication is barred by the principle of pre-justiciability and by their lack of standing. Moreover, the second two circumstances are necessary for the creation of a legal relationship to exist based on the theory of subrogation—in the same way that there must be consent for the existence of a contract.

322. The last circumstance is in dispute and gives rise to precisely the type of uncertainty that declaratory relief is useful in clarifying. Had the first three circumstances been in existence, the existence or scope of a legal relationship based on subrogation would have been uncertain because the parties disagree on whether Activos Mineros retained responsibility for the claims filed in the Missouri Litigations under the STA.[454] Declaratory relief would clarify that dispute: whether a legal relationship exists, and, if so, its scope. Additionally, Respondents may not have already refused to pay Claimants for the latter's payment to the Missouri Plaintiffs. In that case, declaratory relief would put Respondents on notice of the consequences of refusing to pay.

[452] The "existence" may be disputed by the parties. The declaration would then clarify whether the legal relationship exists.
[453] *See* Varsi Second Expert Report, ¶¶ 4.31–4.32.
[454] *See* Reply, ¶ 31.

323. But based on the facts of this case, a legal relationship cannot presently exist. What Claimants request is for the Tribunal to issue declaratory relief to clarify the future existence and scope of a potential legal relationship. Under Peruvian law, that makes Claimants' subrogation claim unripe.

324. Second, even if as a legal matter the Tribunal were allowed to determine the future existence and scope of potential future legal relationship, it cannot do so based on the facts of this case.

325. Under Peruvian law, declaratory relief does not negate the prohibition against issuing advisory opinions, and the requirement that judgments must serve some utility.[455]

326. Here, for the same reasons that prevent the relevant issues from being clearly defined under Peruvian law, the Tribunal cannot determine the future existence and scope of potential future legal relationship. Claimants are asking the Tribunal to essentially issue an advisory opinion in the abstract, precisely because the future is so uncertain. There is simply too much speculation involved, and too many "what-ifs." The impossibility of determining whether a future legal situation could arise, or its scope, makes any declaratory relief lack utility.[456]

327. For the foregoing reasons, even if Claimants' faux declaratory relief claim were real, their claims would remain unripe.

c. Claimants lack standing to bring their subrogation and contribution claims

328. Claimants provide no response.[457]

d. Claimants' Peruvian law claims remain inadequately articulated

329. Respondents requested in their Counter-Memorial that the Tribunal dismiss Claimants' Peruvian law claims as incomprehensible, given Respondents' due process right to proper

[455] *See* Varsi Second Expert Report, ¶ 4.48.
[456] *See* Varsi Second Expert Report, ¶¶ 4.47–4.53.
[457] In Section IV.D.2 of their Counter-Memorial, Respondents explained that Claimants lacked standing to bring their subrogation and contribution claims as they had not effected any payment.

notice of properly articulated claims.[458] Claimants renew the request (except as to their subrogation claim against only Activos Mineros).

330. As noted above, the only Peruvian law claim that Claimants articulate in their Reply is their subrogation claim. Claimants do not articulate their other Peruvian law claims, which thus should be dismissed.

331. Further, Peru should be released as Respondent. As Respondents have explained, for all the Peruvian law claims, Claimants freely treat Centromin and Peru as a monolith, without any argument on attribution or otherwise.[459] But Peru guaranteed Centromin's obligations *under the STA*.[460] Claimants have refused to explain how Peru can be held liable for their Peruvian law claims, especially now that Claimants file such claims "irrespective of privity" and "independent of . . . the contractual" claims, and that Centromin's supposed liability emanates from strict liability under Peruvian law.[461] Thus, all Peruvian law claims against Peru should be dismissed.

332. For these reasons and those set out in the Counter-Memorial, the Tribunal should dismiss Claimants' Peruvian law claims as inadequately articulated (except for their subrogation claim against only Activos Mineros).

6. Claimants' minimum standard of treatment claim fails at the threshold

333. Claimants provide no response.[462]

B. Claimants' STA and Peru Guaranty claims fail on a full liability basis

334. Respondents are not responsible for indemnifying Claimants for the Missouri Plaintiffs' claims. Those claims arise from Claimants' corporate decision-making and therefore fall outside the STA's allocation of responsibility between the parties. To the extent the Tribunal determines otherwise, DRP is responsible for the Missouri Plaintiffs' claims,

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[458] *See* Contract Counter-Memorial, § IV.D.3; *see also* **RLA-086**, *ST-AD GmbH v. Republic of Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013, ¶ 295 (dismissing claims as inadmissible because "they were not properly articulated and that, as a result, the Tribunal could not really understand what the issues were"); *see* UNCITRAL Rules, article 17(1) & 20(2)(e).
[459] *See* Contract Memorial, ¶¶ 211–36.
[460] **Exhibit R-002**, Peru Guaranty, clause 2.1
[461] Reply, ¶¶ 15, 24–27.
[462] In the Counter-Memorial, Respondents object to the admissibility of Claimants' minimum standard of treatment claim because: (i) it was evidently unfounded; and (ii) it was inadequately articulated. *See* Contract Counter-Memorial, § IV.E.

which relate to DRP's reckless operations that increased emissions and violated the PAMA.[463] While Claimants and their experts skew the picture with cherry-picked data, the issue is simple: DRP dramatically increased the amount of lead and sulfur processed in the Facility without implementing commensurate emissions controls until 2007, and it never completed the only PAMA project aimed at air emissions. These decisions ran afoul of the purpose and intent of the PAMA and necessarily exposed the Missouri Plaintiffs to increased emissions, a conclusion that finds support in all reliable data.

335. In Section IV.B.1, Respondents explain that Claimants have failed to address—and therefore concede—two key defenses to Claimants' contract claims. In Section IV.B.2, Respondents demonstrate that the Missouri Plaintiffs' injuries stem from DRP's operations. In Section IV.B.3, Respondents establish that DRP is responsible for the Missouri Plaintiffs' injuries incurred during the PAMA Period because they stem from (i) DRP's use of standards and practices that were less protective than those of Centromín and (ii) DRP's noncompliance with its PAMA obligations. Finally, Respondents show in Section IV.B.4 that DRP is responsible for injuries the Missouri Plaintiffs suffered after the PAMA Period, between 2007 and 2009.

1. The Missouri Plaintiffs' claims stem from Claimants' acts, not DRP's, and therefore are not subject to the STA's allocation of responsibility

336. Respondents demonstrated in the Counter-Memorial that the claims in the Missouri Litigations stem from Claimants' corporate decision-making, not actions that are attributable to DRP.[464] Those claims are therefore not subject to the provisions of the STA that allocate responsibility between the parties.[465]

[463] For the avoidance of doubt, Respondents maintain that Claimants have failed to particularize their claims. Rather, they rely on generalized assertions about environmental and health conditions in La Oroya but fail to provide any specific information about the Missouri Plaintiffs and their claims. Without this information, Respondents cannot determine with certainty the source of the Missouri Plaintiffs' injuries. Claimants' failure to provide information about the Missouri Plaintiffs and their claims thus impairs Respondents' right to defend themselves against Claimants' claims. While Respondents raised this issue in their Counter-Memorial, Claimants failed to address it in their Reply and therefore have missed their last opportunity to do so.
[464] Contract Counter-Memorial, ¶¶ 700-706.
[465] *Id.*

337. Claimants did not address this issue. Instead, they continue to assume that if they are found liable in the Missouri Litigations, Centromín would be responsible under the STA.[466] As established below, the claims in the Missouri Litigations arise from the PAMA period and the post-PAMA period. Accordingly, the clauses relevant to allocation of responsibility are Clauses 6.2 and 5.3 (for the PAMA period) and 6.3 and 5.4 (for the post-PAMA period).

338. In essence, Claimants incorrectly assume that a finding of liability on any claim in the Missouri Litigation necessarily engages Centromín's responsibility under Clause 6.2.[467] They say nothing about Clause 6.3. What Claimants ignore, however, is that the Missouri Plaintiffs' claims target "the Renco Defendants' decisions concerning DRP's operations."[468] As a result, even if Claimants were found liable in the Missouri Litigations, they would not be Centromín's responsibility under the STA.

339. Clause 6.2 of the STA reads as follows:

> "[d]uring the period approved for the execution of Metaloroya's PAMA, Centromín will assume responsibility for [i] any damages and claims by third parties that are attributable to the activities of the Company, of Centromín and/or its predecessors, [ii] except for the damages and third party claims that are the Company's responsibility in accordance with numeral 5.3."[469]

Under Clause 6.2, Centromín assumes responsibility for damages and third party claims that are "are attributable to the activities of the Company, of Centromín and/or its predecessors."[470] As best Respondents can understand, Claimants' theory seems to be that during the period of the execution of the PAMA, Metaloroya (owned by DRP) and later DRP are "the Company," who operated the Facility, and thus the claims in the Missouri Litigations are by default attributable to activities of the Company or Centromín.[471] Yet, *none* of the Missouri Plaintiffs' injuries or claims are "attributable to the activities of the

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[466] *See* Reply, ¶ 192, ("A declaration that Peru and Centromin/Activos Mineros *breached* the [STA] and/or the Guaranty Agreement").
[467] *See* Reply, ¶ 31 ("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)").
[468] *See* Contract Counter-Memorial, ¶ 307.
[469] **Exhibit R-001**, STA & Renco Guaranty, Clause 6.2.
[470] *See* **Exhibit R-001**, STA & Renco Guaranty, Clause 6.2.
[471] Reply, ¶ 31; *see* Second Payet Report, ¶ 55 ("it is clear that the Liability Allocation Provisions allocate to Centromin liabilities for potential claims or *damages originating directly from actions of Metaloroya* taken after the closing of the transaction") (emphasis added).

Company [or] Centromín," meaning that even if Claimants are found liable in Missouri, Centromín would not be a responsible.

340. As a threshold matter, Claimants fail to meet the burden of proof on the merits of their claims. To start, they do not propose any argument about how the post-PAMA Period injuries lead to claims that are Centromín's responsibility under the STA. As to the PAMA Period claims, given that Claimants seek a blanket finding of liability, it is their burden to affirmatively explain how *each and every one* of the live claims in the Missouri Litigations would be Centromín's responsibility under clause 6.2. Claimants have not done either, and thus they have failed to meet their burden of proof.

341. In any event, none of the Missouri Plaintiffs' injuries or claims are "attributable to the activities of the Company." First—as a matter of fact—the claims filed by the Missouri Plaintiffs are for activities attributable to the Renco Defendants, in the United States, not DRP. To be precise, they allege *inter alia* that

- "the Defendants negligently, carelessly, and/or recklessly made decisions while located in the States of Missouri and/or New York that resulted in the release of heavy metals and other toxic and harmful substances into the air and water and onto the properties on which the plaintiffs have in the past and/or continue to reside, use and visit; the toxic and harmful substances include but are not limited to: lead, arsenic, cadmium, and sulfur dioxide;"[472]

- "These Defendants and their agents, together and each of them, and/or in conspiracy with each other, through their decisions made in the States of Missouri and/or New York and through their agents, also negligently, carelessly, and recklessly failed and continue to fail to warn plaintiffs of release of the toxic metals and gases and other toxic substances into the environment and community surrounding the La Oroya Complex and related operations and."[473]

- "The[ ] policies promulgated and enacted by Defendants Rennert and Renco and their agents prevented DRP from making capital and other expenditures necessary for the improvements to operations, and/or these policies left DRP and the La Oroya Complex underfunded, undercapitalized, and without the means or resources to take necessary steps to make

[472] **Exhibit R-294**, Amended Complaint for Damages – Personal Injury, Document No. 474, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 21 February 2017, ¶ 71.
[473] **Exhibit R-294**, Amended Complaint for Damages – Personal Injury, Document No. 474, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 21 February 2017, ¶ 103.

> improvements, perform maintenance, meet credit and debt obligations, and/or these policies detrimentally delayed necessary improvements, maintenance, and modernization efforts that directly impacted critical environmental issues such as toxic emissions, remediation, and other such actions pertaining to the health and safety of the Plaintiffs."[474]

Respondents invite the Tribunal to review the complaints filed in both the Collins Cases and the Reid Cases, where the Tribunal will see that the Missouri Plaintiffs' claims are targeted at activities attributable to the Renco Defendants in the United States.[475] Indeed, the Court in the Reid Cases, in conducting a choice-of-law analysis, held that if a conflict existed between Peruvian and Missouri law, Missouri law would govern because *inter alia* the conduct giving rise to the injuries in Peru occurred in Missouri:

> "There is no doubt that the injuries occurred in Peru, but that does not mean that defendants are correct in arguing that the conduct giving rise to injury occurred in Peru . . . Missouri has an interest in applying its tort law because – as the state where defendants are incorporated and the misconduct occurred – Missouri has a greater ability to control corporate behavior by deterrence or punishment than Peru, the place where the injury occurred."[476]

342. Second, as a legal matter, the Missouri Plaintiffs' claims *cannot be* for activities attributable to Centromín or the Company. Respondents explained in their Counter-Memorial that under Missouri law, Claimants cannot be held liable for activities attributable to Centromín, a company that Claimants never owned or operated.[477]

343. The Missouri Plaintiffs' claims cannot be for activities attributable to the Company for two reasons. The first reason is that United States federal courts are courts of limited jurisdiction. They can only adjudicate cases where they have subject-matter jurisdiction and personal jurisdiction over the defendant(s).[478] There are two types of personal

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[474] **Exhibit R-294**, Amended Complaint for Damages – Personal Injury, Document No. 474, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 21 February 2017, ¶ 242.
[475] *See generally* **Exhibit R-294**, Amended Complaint for Damages – Personal Injury, Document No. 474, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 21 February 2017; **Exhibit R-307**, Complaint, *Father Chris Collins et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:15-cv-01704-RWS), 13 November 2015.
[476] **Exhibit R-018**, Memorandum and Order, Document No. 949, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 16 October 2018, pp. 50–51.
[477] *See* Counter-Memorial, ¶ 701.
[478] **RLA-247**, *Ruhrgas AG v. Marathon Oil Co.,* Supreme Court of the United States, 526 U.S. 574, 17 May 1999, p. 1569.

jurisdiction. "General, or 'all-purpose,' jurisdiction exists over a corporation when the forum state is its place of incorporation or the location of its principal place of business."[479] "Specific, or 'conduct-linked,' jurisdiction involves suits "arising out of or related to the defendant's contacts with the forum . . . The defendant's activities within the forum state must give rise to, or relate to, the cause of action."[480] The result is that United States courts will generally dismiss claims for lack of personal jurisdiction where plaintiffs have sued *foreign* companies for *foreign* conduct that resulted in foreign injuries because there will be no personal jurisdiction over the foreign-company defendants.[481]

344. In this case, if the Missouri Plaintiffs had sued DRP in Missouri federal court, the case would have been dismissed for lack of personal jurisdiction. There is no all-purpose personal jurisdiction because DRP is not at home in Missouri. And there is no conduct-linked personal jurisdiction because DRP has no activities in Missouri. Indeed, the Missouri court in the Reid Cases has already dismissed claims against various Renco Defendants because it lacked personal jurisdiction over them.[482] Hence, correctly, the Missouri Plaintiffs have sued *domestic* companies for *domestic* conduct.

345. The second reason is that—as a result of the above—the claims filed by the Missouri Plaintiffs attribute legal liability to the Renco Defendants, not DRP. The following table lists the claims that remain live in the Collins Cases and Reid Cases:

[479] **Exhibit R-018**, Memorandum and Order, Document No. 949, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 16 October 2018, p. 6.
[480] **Exhibit R-018**, Memorandum and Order, Document No. 949, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 16 October 2018, pp. 6–7.
[481] *See e.g.*, **RLA-248**, *Daimler AG v. Barbara Bauman*, United States Supreme Court Case No. 11-965, 571 U.S. 117, 14 January 2014; **RLA-249**, *Goodyear Dunlop Tires Operations, S.A. v. Edgar D. Brown*, United States Supreme Court Case No. 10-76, 564 U.S. 915, 27 June 2011, p. 2851.
[482] **Exhibit R-018**, Memorandum and Order, Document No. 949, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 16 October 2018, pp. 8–11.

Table 5: Live Claims in the Missouri Litigations[483]

Collins Cases	Reid Cases
Count I: Negligence/Corporate Veil Piercing Count II: Civil Conspiracy Count III: Strict Liability Count IV: Negligence/Corporate Veil Piercing* Count V: Civil Conspiracy* Count VI: Strict Liability* Count VII: Contribution	Count I: Negligence/Corporate Veil Piercing Count II: Negligence/Corporate Veil Piercing* Count VIII: Direct Liability Count IX: Direct Liability Count X: Negligent Performance Count XI: Negligent Performance Count XII: Direct Participation Liability

346. In the Reid Cases, the court has ruled that Counts I, II, X, and XI are based on two alternative theories of derivative liability: veil piercing and agency liability.[484] If Claimants are found liable under the theory of corporate veil piercing, the Missouri Plaintiffs' injuries and claims will not be "attributable to the activities of the Company." Under Missouri law, "to state a valid claim for veil piercing . . . one must show three elements: (1) control – meaning domination of finances, policy, and business practice so that the corporate entity had no will or existence of its own; and (2) such control perpetuated fraud or a wrong, a violation of a statutory or other positive duty, or an unjust act in breach of plaintiffs' rights; and (3) the control and subsequent breach of duty proximately caused the injury."[485] When the corporate veil is pierced, "Missouri courts will disregard the corporate entity and impose liability *directly* on shareholders."[486] (emphasis added).

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[483] *See generally* **Exhibit R-294**, Amended Complaint for Damages – Personal Injury, Document No. 474, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 21 February 2017; **Exhibit R-307**, Complaint, *Father Chris Collins et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:15-cv-01704-RWS), 13 November 2015. Counts marked with an asterisk are claims filed against Renco Defendants other than Claimants. For the Reid Cases, the court dismissed Counts III, IV, V, VI, and VII for failure to state a claim.

[484] **Exhibit R-018**, Memorandum and Order, Document No. 949, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 16 October 2018, fn. 6.

[485] **Exhibit R-018**, Memorandum and Order, Document No. 949, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 16 October 2018, p. 21.

[486] **RLA-250,** § 31.23. Shareholder liability, 1A Mo. Prac., Methods of Prac.: Transact. Guide § 31.23 (4th ed.); *see* **RLA-251**, *Blanks v. Fluor Corp*., Missouri Court of Appeals, Eastern District, Division Four Case No. ED 97810, (con't)

347. Similarly, liability under the agency theory cannot be for injuries or claims "attributable to the activities of the Company." To establish agency liability under Missouri law, a plaintiff must prove: "1) that an agent holds a power to alter legal relations between the principal and a third party; 2) that an agent is a fiduciary with respect to matters within the scope of the agency; [and] 3) that a principal has the right to control the conduct of the agent with respect to matters entrusted to the agent."[487] Agency liability operates differently from corporate veil piercing. "When legal liability is predicated on principles of agency, courts do not ignore or set aside the existence and entity of the subsidiary."[488] "Rather the separate corporate identity of the subsidiary is affirmed, and the two corporations remain distinct entities. The opposite is true when courts pierce the corporate veil."[489] Nevertheless, "[b]ecause the fundamentals of agency law include the concept that the agent is a substitute for the principal, it is, accordingly, a consequence of the agency relationship that whatever an agent does in the lawful prosecution of the transaction entrusted to him *is the act of the principal*"[490] (emphasis added).

348. Finally, no liability under Counts VIII, IX, and XII can be for injuries and claims "attributable to the activities of the Company." The Missouri court has ruled that those counts do not involve DRP or Metaloroya at all; they are theories of direct liability.[491] Direct liability "rests on the parent's or owner's own conduct."[492] For purposes of the Reid Cases, as of now, the court has found that "[t]he allegations in Counts VIII, IX, and XII are sufficient to allege that those defendants were not wearing their 'subsidiary hats' when

450 S.W.3d 308, 16 September 2014, p. 311 ("'Piercing the corporate veil' is an equitable doctrine used by the courts to look past the corporate form and impose liability upon owners of the corporation—be they individuals or other corporations—when the owners create or use the corporate form to accomplish a fraud, injustice, or some unlawful purpose.").

[487] **RLA-251**, *Blanks v. Fluor Corp.*, Missouri Court of Appeals, Eastern District, Division Four Case No. ED 97810, 450 S.W.3d 308, 16 September 2014, pp. 382–383.

[488] **RLA-251**, *Blanks v. Fluor Corp.*, Missouri Court of Appeals, Eastern District, Division Four Case No. ED 97810, 450 S.W.3d 308, 16 September 2014, pp. 379–380.

[489] *Id.*

[490] **RLA-251**, *Blanks v. Fluor Corp.*, Missouri Court of Appeals, Eastern District, Division Four Case No. ED 97810, 450 S.W.3d 308, 16 September 2014, p. 378.

[491] **Exhibit R-018**, Memorandum and Order, Document No. 949, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 16 October 2018, fn. 6.

[492] **Exhibit R-018**, Memorandum and Order, Document No. 949, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 16 October 2018, p. 43.

they operated the La Oroya Complex," but instead were operating as, among other Renco Defendants, Renco and DRR.[493]

349. The claims in the Collins Cases would not be "attributable to the activities of the Company," for the same reasons as the derivative claims in the Reid Cases. The court in the Collins Cases has not ruled on whether the claims before it are based on derivative or direct liability. Yet a review of the complaint makes clear that the Missouri Plaintiffs in that case are seeking to hold the Renco Defendants liable through corporate veil piercing and agency theories of liability; and a factual review confirms that the claims are for *domestic acts* of *domestic companies*.[494]

350. Given the above, there is no circumstance in which a finding of liability against Claimants in the Missouri Litigations would be Centromín's responsibility under Clause 6.2 of the STA. In any event, as noted above, even if the Tribunal were unsure about whether every single claim in the Missouri Litigations would fall outside the ambit of Clause 6.2, the Tribunal cannot know at the present time for which one of the claims (if any) Claimants will be found liable. Accordingly, any such doubt by the Tribunal would merely demonstrate that Claimants' claims are unripe.

351. For the foregoing reasons, no possible finding of liability against Claimants in the Missouri Litigation would be Centromín's responsibility under the STA. Nonetheless, should the Tribunal determine otherwise, Respondents establish in the following sections that Centromín still did not assume responsibility for the Missouri Plaintiffs' claims.

2. Claimants fail to show that the Missouri Plaintiffs' injuries stem from Centromín's operations

352. Claimants argue that Centromín's operations caused virtually all the Missouri Plaintiffs' injuries.[495] Yet, Claimants have failed to provide the necessary information about the Missouri Plaintiffs, their claims, or claimed damages in order to prove their claims. Claimants' submissions are based on insufficient and generalized assertions about environmental and health conditions in La Oroya and fail to provide any serious response

[493] *Id.*
[494] *See generally* **Exhibit R-307**, Complaint, *Father Chris Collins et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:15-cv-01704-RWS), 13 November 2015.
[495] Contract Memorial, ¶ 216.

to Respondents' evidence that the Missouri Plaintiffs damages and claims are attributable to DRP's operations from October 1997 to June 2009, which necessarily had a direct and much greater impact on the Missouri Plaintiffs than any residual lead from Centromín's operations could have had during that same time period.

353. Respondent's toxicology expert Dr. Proctor, has demonstrated, *inter alia*, that: (a) indoor and outdoor dust was the main source of lead exposure at La Oroya;[496] (b) the primary exposure pathway for the Missouri Plaintiffs was dust contaminated through Contemporaneous Lead Emissions, which predominated any Historical Lead Emissions;[497] and (c) the health risk assessments (HRAs) prepared by Claimant's expert, Dr. Schoof, in 2004, 2005, and 2008 provide "irrefutable documentation" of the excessive exposure to toxic substances, increased cancer risk and noncancer hazards, and highly elevated blood lead levels (BLLs), all caused primarily by Contemporaneous Lead Emissions.[498] Further, Respondents' pyrometallurgy expert, Mr. Dobbelaere, showed the predominant role DRP played in the Missouri Plaintiffs' injuries by increasing its lead production and using dirtier materials.[499]

354. The Claimants did not respond to the Proctor Expert Report in their Reply, nor did Dr. Schoof present a second expert report to rebut Ms. Proctor's evidence. This is unsurprising given that Dr. Schoof never supported Claimants' assertion that Historical Lead Emissions caused virtually all the Missouri Plaintiffs' injuries.[500] In fact, Dr. Schoof found that Historical Lead Emissions of lead in soil were a minor source of lead exposure in La Oroya.[501]

355. Claimants chose, instead, to have Mr. John Connor — who is not a toxicologist — submit a supplemental report to rebut Ms. Proctor's conclusions. His responses reveal his poor understanding of the matter.

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[496] Proctor Expert Report, §§3.1–3.2 (with which Claimants' toxicologic expert agrees, *see* Schoof First Expert Report, p. 17).
[497] Proctor Expert Report, Sections 3.1–3.2.
[498] Proctor Expert Report, Sections 3.1–3.2.
[499] Dobbelaere First/Second Expert Report, §§ IX.A–C.
[500] *See also* Contract Counter-Memorial, ¶ 729.
[501] Schoof First Expert Report, p. 17. *See also* Counter-Memorial, ¶ 730.

356. First, Mr. Connor entirely dismisses Dr. Proctor's analysis regarding the primary exposure pathways to lead and sulfur dioxide in La Oroya during DRP's operations because, according to him, it is not relevant "to the key issues at hand."[502] Yet Claimants claim that "Centromín/Activos Mineros' conduct created the vast majority (if not all) of the conditions that factually caused the alleged injuries"[503] The matter is thus clearly relevant; nevertheless, Claimants' expert Mr. Connor, fails to support Claimants' argument.

357. Secondly, Mr. Connor mischaracterizes Ms. Proctor's position as concluding that "only" Contemporaneous Lead Emissions contributed to poor health.[504] This is untrue. Mr. Connor either misrepresents or lacks understanding of Ms. Proctor's modelling. Ms. Proctor's position is that "the vast majority of lead exposures were related to contemporaneous emissions from the CMLO, and until the emissions were reduced, other exposures were insignificant by comparison"[505] As explained by Ms. Proctor, this conclusion is consistent "with that of experts reviewing environmental conditions in La Oroya at the time … which similarly conclude that soil is only a potentially significant source of lead exposure after lead emissions are controlled, which never happened while DRP operated the CMLO."[506] Mr. Connor is thus alone in his opinion that historical soil contamination was a significant source of lead exposure while DRP operated the CMLO.[507]

358. Thirdly, Mr. Connor states that "historical accumulation of lead in soils and dust in the La Oroya community clearly contributed significantly to child BLL [Blood Lead Levels]".[508] Again, this claim is false and incompatible with Dr. Schoof's contemporaneous evidence. First, Mr. Connor misleadingly offers opinions that inappropriately combine exposures to soil and dust, revealing his poor understanding of the integral blood lead models prepared by Dr. Schoof.[509] Soil and dust are materially different sources of exposure and thus need separate evaluation. While soil concentrations are not expected to change much over time, dust concentrations rapidly reflect changes depending on the amount of dust particles in

[502] Connor Second Expert Report, p. 16.
[503] Contract Memorial, ¶ 216.
[504] Connor Second Expert Report, p. 22.
[505] Proctor Second Expert report, p. 14.
[506] Proctor Second Expert report, p. 14.
[507] Proctor Second Expert report, p. 14.
[508] Connor Second Expert Report, p. 22.
[509] Proctor Second Expert report, p. 12.

the air.[510] Secondly, as explained by Ms. Proctor, the integral blood lead models prepared by Dr. Schoof predict that any contribution from soil was dwarfed by the contribution from outdoor dust, and the lead exposure from dust was the most important source of exposure.[511] Further, Dr. Schoof's risk assessments, which quantified doses from each source individually, found that dust exposures were due to current smelter operations: "…metals in air, outdoor dust, indoor dust and food **are assumed to be principally due to current smelter**."[512]

3. The STA allocates responsibility to DRP for the Missouri Plaintiffs' damages and claims that arise from DRP's operations during the PAMA Period, between October 1997 and January 2007

359. Even if Tribunal decides that Claimants' claims survive the jurisdictional and threshold issues they face—which they should not—the Missouri Plaintiffs' claims and injuries relate to the Facility's emissions after DRP acquired it in October 1997. The parties expressly allocated responsibility for those claims and injuries in Clauses 5.3, 5.4, 6.2 and 6.3 of the STA, which cover the PAMA Period (October 1997 to January 2007) and the Post-PAMA Period, respectively. For the PAMA Period, the STA allocates responsibility to DRP for claims arising from (i) its acts that are unrelated to the PAMA and result from its use of standards and practices that are less protective than those of Centromín; or (ii) its noncompliance with its PAMA obligations. The Missouri Plaintiffs' claims satisfy both of those conditions, each of which independently gives rise to Claimants' responsibility under the STA.

a. The Missouri Plaintiffs' claims and injuries arise from DRP's overproduction and use of dirtier concentrates, which arise from DRP's less protective emissions standards and practices

360. In their Counter-Memorial, Respondents established that the Missouri Plaintiffs' injuries arose from DRP's reckless operation of the Facility, including its use of standards and practices that were less protective than those of Centromín. In short, Respondents demonstrated that:[513]

[510] Proctor Second Expert report, p. 12.
[511] Proctor First Expert Report, § 3.2, pp. 31-35.
[512] Exhibit C-064, 2005 Integral Study, p xx (emphasis added).
[513] Contract Counter-Memorial, ¶¶ 744-769.

- DRP markedly increased the amount of lead and sulfur processed in the Facility.
- Compared to the prior practice under Centromín, DRP fed cheaper, dirtier feedstock into the Facility.
- DRP did not implement significant emissions controls until late-2006.

361. These three actions, taken together, necessarily increased emissions and exacerbated the public health crisis in La Oroya.[514]

362. In response, Claimants misrepresent the relevant facts to suit their case. They selectively cite data from certain years that, in isolation, appear to support their case, while overstating the scope and environmental impact of DRP's improvement projects. For example, Claimants repeatedly emphasize that DRP completed all of its PAMA Projects except for Project No. 1, but they neglect to mention that Project No. 1 was the only project aimed at achieving a substantial reduction in lead and SO_2 emissions.[515] At the same time, Claimants cast at Respondents' defenses unsupported criticisms that fall apart upon the slightest examination.

363. The remainder of this section will rebut each of Claimants' arguments regarding DRP's standards and practices. Respondents will show that:

- DRP increased production and used dirtier metal concentrates;
- DRP did not implement sufficient emissions controls during the PAMA Period to offset the increased lead and sulfur it processed in the Facility;
- The best available data confirms that DRP increased emissions;
- Claimants misrepresent the air quality data;
- Claimants' case rests entirely on the main-stack data, which is of limited value because DRP shifted emissions from the main stack to fugitive outlets;
- Claimants' additional arguments fail to prove that DRP used more protective standards and practices than Centromín; and

[514] Contract Counter-Memorial, ¶¶ 744-769.
[515] Alegre Second Expert Report, ¶¶ 11, 17, 23-24; **Exhibit C-020 (Contract)**, PAMA 1996 Report, Section 5.4.1, p. 165.

- The Missouri Plaintiffs' injuries arise directly from DRP's high lead and SO_2 emissions.

(i) DRP increased production and used dirtier metal concentrates

364. Respondents explained in the Counter-Memorial how DRP's operational decisions increased the amount of lead and other toxic elements processed and emitted by the Facility. First, DRP dramatically increased the lead production by ramping up the output of the lead circuit beyond its installed capacity. According to the data reported by Centromín and DRP, Centromín produced 98,546 tons of lead in 1995, while DRP had exceeded that amount by 34% in 2000, reaching 132,608 tons.[516] The lead circuit's installed capacity, however, was only 105,000 tons, which was determined by the capacity of its gas cleaning systems.[517] By overloading the lead circuit, DRP jeopardized the effectiveness of the gas cleaning systems, which were designed to capture and filter the lead gases generated by the smelting process run at or below capacity.[518] As Mr. Dobbelaere explains,

> "If a 'full system' becomes overloaded, the overall amount of emissions (and particularly fugitive emissions) will increase exponentially, rather than linearly. Much like a dam with cracks, once it faces a flood, exponential overflow will ensue."[519]

365. Second, DRP used metal concentrates that were significantly higher in toxic elements than those used by Centromín. This decision was particularly consequential in the copper circuit, where DRP increased the amount of lead in concentrates by over 60% within two years of operating the Facility.[520]

366. Respondents further established in their Counter-Memorial that Claimants' practices at the Facility resulted in higher levels of SO_2 and lead in the air, which harmed the Missouri

[516] Dobbelaere First Expert Report, ¶¶ 209–211.
[517] Dobbelaere First Expert Report, ¶ 209.
[518] Dobbelaere First Expert Report, ¶ 209.
[519] Dobbelaere Second Expert Report, ¶ 188.
[520] Dobbelaere Second Expert Report, ¶ 187. *See also*, **Exhibit WD-008**, Annex 22a (lead in concentrates, smelting aids, and transfers in the copper circuit under Centromín); **Exhibit WD-008**, Annex 18a (recycled lead in copper circuit under Centromín); **Exhibit WD-008**, Annex 16a (miscellaneous lead inputs in the copper circuit under Centromín); **Exhibit WD-008**, Annex 23a (lead in concentrates, smelting aids, and transfers in the copper circuit under DRP); **Exhibit WD-008**, Annex 19a (recycled lead in copper circuit under DRP); **Exhibit WD-008**, Annex 17a (miscellaneous lead inputs in the copper circuit under DRP).

Plaintiffs. Two facts compel this conclusion: (1) the Facility had inadequate emission controls when Claimants acquired it; and (2) Claimants increased the amount of lead and sulfur processed in the Facility's circuits. Claimants do not dispute these facts.

367. *Inadequate Emission Controls.* The Facility lacked any SO_2 abatement system aside from a small sulfuric acid plant in the zinc circuit (the smallest of the three), which meant that the Facility released nearly all of it SO^2 emissions straight into the environment. The Facility's primary abatement system for particulates was a low-efficiency filter for dust removal from the main stack.[521] This filter, called the Main Cottrell, captured only 96.6% of the dust, allowing 3.4% of the lead in the main-stack gasses to escape into the environment.[522]

368. The Facility also released massive amounts of "fugitive" emissions of lead and SO_2 (among other toxic substances), which were unfiltered and leaked at ground level from various components of the Facility. The Facility generated fugitive emissions from, among other sites, (i) a sinter plant with no walls where emissions freely discharged to the atmosphere; (ii) blast furnaces spewing hot gasses containing SO_2, lead, and arsenic; and (iii) a copper converter section with nothing more than a canopy roof discharging a continuous cloud of lead and SO_2 into the air.[523] According to DRP's own estimate, these emissions had eight times the impact on air quality as the main-stack emissions.[524] DRP knew about these deficiencies when it bought the Facility.[525]

369. *Increased Processing of Lead and Sulfur.* The amount of lead and sulfur processed in each of the Facility's circuits determined the level of emissions. More lead and sulfur processing

[521] **Exhibit C-020 (Contract)**, PAMA, Section 4.1.1, p. 85.
[522] **Exhibit C-020 (Contract)**, PAMA, Section 4.1.1, p. 85. By comparison, a modern electrostatic precipitator would have had an efficiency that was orders of magnitude higher. Dobbelaere First Expert Report, note 175.
[523] For a complete accounting of the sources of the Facility's fugitive emissions, *see* Dobbelaere Second Report, Annex A.
[524] **Exhibit C-045 (Treaty)**, 2004 DRP Extension Request, p. 5.
[525] **Exhibit R-166**, Jack V. Matson Supplemental Expert Report, Document No. 1225-5, A.O.A. et al. v. Doe Run Resources Corp., et al. (E.D. Mo. Case No. 4:11-cv-00044-CDP), May 2021, p. 7 (warning that "fugitive emissions may continue to contribute significantly to the non-compliance status" for lead, and noting that "fugitive emissions from the lead furnaces and the dross treatment plant would be expected. . . . Capturing fugitive emissions from the sinter plant/blast furnace and better controls in the lead circuit should ensure future, consistent compliance with the lead standard."); Exhibit C-108 (Treaty), Knight Piésold Report, p. 34; Exhibit R-198, Estudio de Evaluación Integral de Impacto Ambiental del Area Afectada Por Los Humos en la Fundición de La Oroya, Servicios Ecológicos S.A., 1 November 1996, pp. 33–34.

meant more lead and SO_2 emissions, especially if the circuits exceeded their capacity, as the lead circuit did.[526] Despite this, DRP immediately increased the lead processed in the copper circuit by over 60%, the lead treated in the lead circuit by over 30%, and the sulfur treated in the Facility by over 10%.[527]

370. DRP's decision to increase lead processed in the copper circuit was particularly harmful. That circuit had an outsized role in lead emissions because it was designed to remove lead and other impurities from the copper.[528] Because emissions controls were so poor, a staggering 33.4% of the lead in the copper circuit's process gas was released into the environment.[529]

371. Absent substantial improvements to the Facility's emission controls, these practices would have necessarily exposed the Missouri Plaintiffs to increased levels of lead and SO_2. That is precisely what happened: DRP did not implement emissions controls for years, so lead and SO_2 emissions spiked, and DRP did not abate them during the PAMA Period, and only partially thereafter.[530]

(ii) DRP did not implement sufficient emissions controls during the PAMA Period to offset the increase in lead and sulfur that it processed in the Facility.

372. Claimants wrongly claim that "projects were undertaken by DRP to reduce both fugitive and stack emissions in the earliest days of their operations," such that DRP could produce more lead without increasing emissions.[531] Mr. Dobbelaere shows that DRP made no real progress on emissions projects until 20 December 2006 and thus could not have offset its higher lead and SO_2 emissions during the PAMA Period.[532]

373. In his first report, Mr. Dobbelaere examined several of DRP's projects cited by Dr. Partelpoeg, Claimants' pyrometallurgy expert, and found that none reduced emissions significantly until the end of 2006.[533] This testimony formed the crux of Respondents'

[526] Dobbelaere Second Expert Report, ¶ 188.
[527] Dobbelaere Second Expert Report, ¶¶ 35, 187.
[528] Dobbelaere First Expert Report, ¶ 220; Dobbelaere Second Expert Report, ¶¶ 112-113, 149-156, 189.
[529] Dobbelaere First Expert Report, ¶ 220.
[530] Dobbelaere Second Expert Report, Section 4.
[531] Reply, ¶ 85.
[532] Dobbelaere Second Expert Report, Section 4.
[533] Dobbelaere First Expert Report, Section XI.

merits defense: DRP ramped up production and used dirtier concentrates without making any meaningful improvements to the Facility to address the increased levels of pollution DRP was itself generating. Despite this, Claimants did not instruct Dr. Partelpoeg to respond to Mr. Dobbelaere's analysis of the insufficiency of DRP's alleged improvements to the Facility's pyrometallurgical processes. Rather, Claimants' environmental expert, Mr. Connor, presents a slideshow discussing mostly the same projects that Dr. Partelpoeg and Mr. Dobbelaere already addressed. Mr. Connor ignores the prior discussion and asserts that, in his estimation, DRP's projects would have abated fugitive and main-stack emissions.[534]

374. Mr. Connor's discussion of those projects is unreliable, as he lacks the relevant expertise in pyrometallurgy. Pyrometallurgy is the field of metallurgy that involves high-temperature processes for extracting and refining metals, such as smelting, roasting, and converting. As Mr. Dobbelaere explains, these processes are the main sources of emissions at the Facility, and any significant abatement would require substantial modifications and optimizations of the pyrometallurgical equipment and operations.[535] Mr. Connor does not possess the qualifications or experience in pyrometallurgy necessary to evaluate whether DRP's projects meaningfully reduced emissions from smelting processes that are, according to Claimants, "among the most complex in the world."[536]

375. Mr. Connor's discussion of DRP's projects is also incomplete. He fails to respond to Mr. Dobbelaere's detailed assessment of those projects, which includes the fact that the most meaningful improvements were made at the end of 2006 or later. Instead, he simply presents an "interactive information tool" that lists several projects with brief descriptions, often without any supporting citations.[537] His testimony therefore does not offer a comprehensive or credible alternative to Mr. Dobbelaere's analysis.

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[534] Connor Supp. Report, pp. 12-13.
[535] Dobbelaere Second Expert Report, ¶ 183.
[536] Contract Memorial, ¶ 20 ("Because smelters process concentrates to create a pure ore by burning-off and/or separating out unwanted impurities, it is very difficult to control emissions of such substances. This is true of any smelter, but the La Oroya Complex faces particular challenges in this regard because the integrated smelting processes are **among the most complex in the world**. Indeed, the La Oroya Complex is **one of only four smelting facilities worldwide** capable of recovering numerous metals and by-products from complex, poly-metallic concentrates with high levels of impurities.") (emphasis added).
[537] Connor Supp. Report, Appendix C, slide 83 et seq.

376. In any event, Mr. Dobbelaere has evaluated each of the projects cited by Mr. Connor and explains why they could not have offset DRP's increase in lead and sulfur processing during the PAMA Period.[538] First, DRP did not implement any significant emissions controls until late 2006, just before the PAMA Period expired.[539] There is therefore no reasonable argument that DRP could have improved lead and SO_2 emissions before that time.[540] Second, the emissions projects that DRP implemented between 2006 and 2008 were insufficient, just barely compensating for DRP's earlier decision to increase the amount of lead and other toxic elements treated in the Facility.[541] In other words, they brought emissions back to pre-1997 levels, far above Peruvian and international standards.[542] This is unsurprising, given that DRP failed to implement *any* projects to curb emissions from the pyrometallurgical processes of the copper circuit and the sinter plant, which were the two most polluting components of the Facility.[543]

377. Claimants in their Reply cite only three projects listed in Mr. Connor's report: (i) repair of ventilation ducts; (ii) new and repaired baghouses; and (iii) new and repaired electrostatic precipitators.[544] Claimants assert that these "[p]rojects were undertaken by DRP to reduce both fugitive and stack emissions in the earliest days of their operations," but this is untrue.[545]

378. First, DRP's repairs of ventilation ducts and baghouses were routine maintenance practices that any smelter operator—including Centromín—must undertake.[546] A smelter's hot, acidic process gasses will corrode ducts and baghouses, and thus routine maintenance is a standard practice.[547] Claimants provide no evidence that DRP's maintenance practices improved on those of Centromín. In fact, the contemporaneous evidence suggests the

[538] Dobbelaere Second Expert Report, Section 4.
[539] Dobbelaere Second Expert Report, ¶¶ 107, 183-186, 193. *See also*, **WD-031** Partelpoeg Review of PAMA Projects, 10 May 2006, Figure 7-2, p. 30.
[540] Dobbelaere Second Expert Report, ¶ 193 ("A massive increase in lead treatment coupled with minimal emissions abatement projects means that emissions necessarily increased as long as DRP continued this practice. It is not hyperbole to say that any claim to the contrary is preposterous.").
[541] Dobbelaere Second Expert Report, ¶¶ 185-186
[542] Dobbelaere Second Expert Report, ¶ 185.
[543] Dobbelaere Second Expert Report, ¶ 185.
[544] Reply, ¶ 85 (*citing* Connor Second Report, p. 13).
[545] Reply, ¶ 85 (*citing* Connor Second Report, p. 13).
[546] Dobbelaere Second Expert Report, ¶¶ 47-49, 160-161.
[547] Dobbelaere Second Expert Report, ¶¶ 47-49, 160-161.

opposite is true. DRP's due diligence auditors found that Centromín's maintenance practices were adequate.[548] In contrast, consultants found in 2005 that DRP had poorly maintained the most important baghouses,[549] and Dr. Partelpoeg found in 2006 that DRP had failed to adequately repair worn-down ducts.[550]

379. Second, DRP delayed until the end of 2006 to install new baghouses, which means they would not have affected emissions during the PAMA Period.[551] In addition to their refusal to acknowledge the delayed emissions impact of those baghouses, Claimants and Mr. Connor overstate and misrepresent what impact the baghouse projects could have had. For example, Mr. Connor describes the installation of a single new baghouse as two separate projects, impermissibly double counting that baghouse's effect on emissions.[552] In his discussion of another project, Mr. Connor claims that a baghouse for the arsenic kitchen would have captured an additional 2,335 tons of arsenic per year.[553] This claim is a gross overstatement. As Mr. Dobbelaere explains, that baghouse would have captured an additional 2,335 tons of *total dust* per year, which translates to just 57 tons of arsenic.[554] Mr. Connor's distortions further undercut his already questionable credibility.

380. Third, Claimants assert that DRP improved the Central Cottrell (the Facility's main electrostatic precipitator) in 2000, but the evidence shows that the opposite is true. The document Claimants cite demonstrates that DRP had *reduced* the efficiency of the Central Cottrell to 96.2%,[555] down from 96.6% in 1995.[556] Even if DRP had improved the Cottrell (which it did not), any improvement would have been minor and far from adequate to compensate for DRP's decision to significantly increase production while using dirtier

[548] Dobbelaere Second Expert Report, ¶¶ 47-49, 160-161; **Exhibit WD-040**, 17–29 August 1997 La Oroya Visit Trip Report: Maintenance, Operations, and Capital Budget Review, A.D. Zunkel Consultants, Inc., 12 September 1997, p. 3, Executive Summary ("The operations are reasonably well run and the equipment and facilities adequately maintained.").
[549] Dobbelaere Second Expert Report, ¶¶ 47-49, 160-161; **Exhibit WD-041**, BHA Group, Inc. Study, 11–15 July 2005, Section 1, p.3
[550] **Exhibit WD-031**, Partelpoeg Review of PAMA Projects, 10 May 2006, p.27 ("The data do not suggest that the air ingress problems noted by BHA in 2001 were resolved.").
[551] Dobbelaere Second Expert Report, ¶¶ 75-77, 164, 169.
[552] Dobbelaere Second Expert Report, ¶¶ 162-169.
[553] Connor Supp. Report, Appendix C, Slide 104.
[554] Dobbelaere Second Expert Report, ¶ 81.
[555] **Exhibit JAC-032**, Section 5.2, p. 69.
[556] **Exhibit C-020** (Contract), PAMA, Section 4.1.1, p. 85.

concentrates.[557] At most, improving the Cottrell would have caused a modest reduction in lead emissions from the main stack, but it would have had no impact on SO_2 emissions from the main stack or fugitive emissions of lead or SO_2.[558] The Cottrell's function is limited: to filter particulate matter from process streams exiting the main stack, and thus, any improvements to the Cottrell's efficiency, however significant, can only have a restricted impact on emissions mitigation.

381. Contemporaneous records of DRP's improvements confirm that the company did not start implementing fugitive emissions projects until the end of the PAMA Period. DRP did not report any significant spending on these projects in its regular progress reports to the MEM, which included spending audits for both PAMA and non-PAMA projects.[559] DRP likewise did not mention having undertaken any fugitive emissions projects in its 2004 Extension Request, which included a list of PAMA and non-PAMA projects that DRP had completed to date.[560] In that request, the DRP proposed new projects to address fugitive emissions but did not indicate that it had completed those projects.[561] DRP freely admitted that it had not even measured fugitive emissions at that point, let alone abated them.[562] In its December 2005 Extension Request, DRP also listed the projects that it had executed to date (both PAMA and non-PAMA), which included a single fugitive emissions project with negligible impact.[563] In that 2005 Extension Request, DRP provided estimates of SO_2 and lead fugitives to the MEM revealing that the company had made zero progress in mitigating SO_2 emissions and almost no progress on lead fugitives as of December 2005.[564]

[557] Dobbelaere Second Expert Report, ¶¶ 41, 45-46.
[558] Dobbelaere Second Expert Report, ¶¶ 40-41, 45-46.
[559] **Exhibit R-306**, Investment Obligations - Doe Run La Oroya.
[560] *See* **Exhibit C-045 (Treaty)**, 2004 DRP Extension Request, Section 3.4 of the proposed modified PAMA.
[561] **Exhibit C-045 (Treaty)**, 2004 DRP Extension Request, table 5/1.b, p. 51.
[562] Alegre Second Expert Report, ¶ 40 (citing **Exhibit AA-038**, Carta de Bruce Neil (DRP) a la Dirección General de Minería (MEM) de 17 de febrero del 2004, p. PDF 4).
[563] **Exhibit WD-018**, December 2005 DRP Extension Request, p. 8; Dobbelaere Second Expert Report, ¶¶ 145-156.
[564] **Exhibit WD-018**, December 2005 Request, pp 71, 75.

Tabla 5.1/4

REDUCCION DE DIOXIDO DE AZUFRE POR EMISIONES FUGITIVAS

SO_2 TM/DIA	2002	2005	2007	2009	2011
EMISIONES FUGITIVAS:					
Aberturas de los techos de los edificios					
Tostadores de cobre	34,560	34,560	34,560	34,560	8,813
Pasillo de convertidores de cobre	43,200	43,200	43,200	43,200	11,016
Horno reverbero	8,640	8,640	8,640	8,640	2,160
Sub total	**86,400**	**86,400**	**86,400**	**86,400**	**21,989**
Emisiones fugitivas de los edificios					
Tostadores de cobre	3,110	3,110	3,110	3,110	0,793
Pasillo de convertidores de cobre	4,666	4,666	4,666	4,666	1,190
Horno reverbero	0,864	0,864	0,864	0,864	0,220
Sub total	**8,640**	**8,640**	**8,640**	**8,640**	**2,203**
TOTAL EMISIONES FUGITIVAS	**95,040**	**95,040**	**95,040**	**95,040**	**24,192**

Tabla 5.1/1

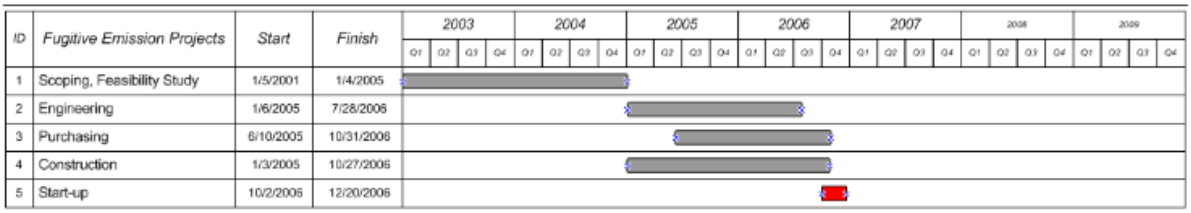
REDUCCION DE PLOMO POR EMISIONES FUGITIVAS

PLOMO, TM/DIA	2002	2005	2007	2009	2011
EMISIONES FUGITIVAS:					
Scrubber de la planta de sinterizaciòn	0,318	0,318	0,011	0,011	0,011
Sub total	**0,318**	**0,318**	**0,011**	**0,011**	**0,011**
Aberturas de los techos de los edificios					
Tostadores de cobre	0,164	0,164	0,164	0,164	0,042
Pasillo de convertidores de cobre	0,110	0,110	0,110	0,110	0,028
Hornos de plomo	0,164	0,110	0,002	0,002	0,002
Planta de espumaje	0,110	0,110	0,002	0,002	0,002
Sub total	**0,548**	**0,493**	**0,278**	**0,278**	**0,074**
Emisiones fugitivas de los edificios					
Planta de sinterizaciòn	0,082	0,082	0,082	0,021	0,021
Sub total	**0,082**	**0,082**	**0,082**	**0,021**	**0,021**
TOTAL EMISIONES FUGITIVAS	**0,948**	**0,893**	**0,372**	**0,310**	**0,106**

382. A contemporaneous report by Claimants' pyrometallurgy expert, Dr. Partelpoeg, demonstrates that DRP did not complete any fugitive emissions projects until 20 December 2006, mere days before the PAMA Period lapsed on 13 January 2007.[565]

[565] **Exhibit WD-031**, Partelpoeg Review of PAMA Projects, 10 May 2006, Figure 7-2, p. 30.

Figure 7-2 Fugitive Emission Reduction Program



ID	Fugitive Emission Projects	Start	Finish
1	Scoping, Feasibility Study	1/5/2001	1/4/2005
2	Engineering	1/6/2005	7/28/2006
3	Purchasing	6/10/2005	10/31/2006
4	Construction	1/3/2005	10/27/2006
5	Start-up	10/2/2006	12/20/2006

383. In sum, both Mr. Dobbelaere's analysis and the contemporaneous evidence belie Claimant's assertion that "[b]y capturing and removing dust before it exited the main stack, DRP removed both fugitive and stack emissions at the same time."[566] Rather, they show that DRP's projects could not have offset its decisions to increase lead production and use dirtier concentrates.

(iii) The best available data confirms that DRP increased emissions.

384. Respondents explained in the Counter-Memorial that the Facility's production data confirms that DRP increased emissions.[567] Centromín and DRP produced this data during their respective periods of ownership, and it is the only dataset whose quality is undisputed.

385. The production data does not merely record the amount of lead, copper, zinc, and other metals that the Facility produced for sale. Rather, it tracks every material that entered each of the circuits (the input), and what happened to it during the processing steps and afterwards (the output).[568] Accordingly, the data reveals the fate of every ton of lead and sulfur that the Facility processed, recording whether it:

a. became slag or other waste;

b. was recycled or transferred into one of the three circuits;

c. was captured by an electrostatic precipitator;

d. escaped through the main stack; or

[566] Reply, ¶ 86.
[567] Contract Counter-Memorial, ¶¶ 754–756.
[568] Dobbelaere Second Expert Report, ¶¶ 194-196.

e. became sellable product.[569]

386. The production data is key to determining the Facility's fugitive emissions for any given year. Fugitive emissions are, by definition, unmeasured. However, one can ascertain a smelter's unmeasured emissions of a substance by subtracting the measured output from the input.[570] The difference represents the smelter's unmeasured or "indeterminate" losses of that substance.[571] This exercise is called "mass balancing," which derives from a fundamental scientific principle: the Law of Conservation of Mass.[572] According to that principle, mass can neither be created nor destroyed.[573] Put more plainly, what goes in must come out.

387. The PAMA itself used this same mass balancing analysis to calculate the Facility's emissions in 1995[574]:

[569] Dobbelaere Second Expert Report, ¶¶ 194-196.
[570] Dobbelaere First Expert Report, ¶ 227; Dobbelaere Second Expert Report, ¶ 197.
[571] Dobbelaere First Expert Report, ¶ 227; Dobbelaere Second Expert Report, ¶ 197.
[572] Dobbelaere First Expert Report, ¶ 227; Dobbelaere Second Expert Report, ¶ 197.
[573] Dobbelaere First Expert Report, ¶ 227; Dobbelaere Second Expert Report, ¶ 197.
[574] **Exhibit C-020 (Contract)**, PAMA 1996 Report, Section 5.4.1, p. 166.

2.3 Sulfur Balance

The sulfur balance at La Oroya Metallurgic Complex for 1995 was as follows:

Inflow	ton of S	%
Copper concentrates	78 080,1	41,08
Lead concentrates	43 282,5	22,77
Zinc concentrates	51 011,7	26,84
Copper smelters	9 441,4	4,97
Lead smelters	6 934,0	3,65
Others (*)	1 320,0	0,69
Total input	**190 069,7**	**100,00**

Outflow (fixed)	ton of S	% (related to inflow)
Sulfuric Acid	13 681,7	7,20
Copper slag	4 239,3	2,23
Lead slag	1 427,6	0,755
Zn/Ag Concentrates	652,0	0,34
Liquid effluents	551,1	0,20
Zinc Ferrites	786,5	0,41
Main stack dusts	300,2	0,16
Others (**)	224,7	0,12
Total output (fixed)	**21 863,2**	**11,50**

Lost through the chimney and fugitive emissions (related to input)	**168 206,6**	**88,50**

388. The production data proves that DRP dramatically increased fugitive emissions of both lead and sulfur. SX-EW, an independent analyst engaged by DRP's bankruptcy administrator, conducted a mass balancing analysis of the Facility's total emissions between 1990 and 2009 by evaluating the input and output of lead and sulfur for each year.[575] SX-EW used the Facility's production data, as well as data on fugitive emissions from a report that DRP presented to the MEM in 2004.[576] Respondents explained in their Counter-Memorial that the SX-EW calculations showed that DRP sharply increased the Facility's lead emissions during the PAMA Period.[577]

389. Claimants and Mr. Connor attempt a series of unfounded criticisms against the mass balancing analysis. Each of them fails.

[575] *See* **Exhibit R-150**, Assessment of Lead Loss from the La Oroya Metallurgical Complex and Environmental Contamination (Volume I), January 2013.
[576] **Exhibit WD-008**, SXEW Lima Peru Consultant, November 2012; **Exhibit R-150**, Assessment of Lead Loss from the La Oroya Metallurgical Complex and Environmental Contamination (Volume I), January 2013, pp. 26 *et seq*.
[577] Contract Counter-Memorial, ¶¶ 754–756.

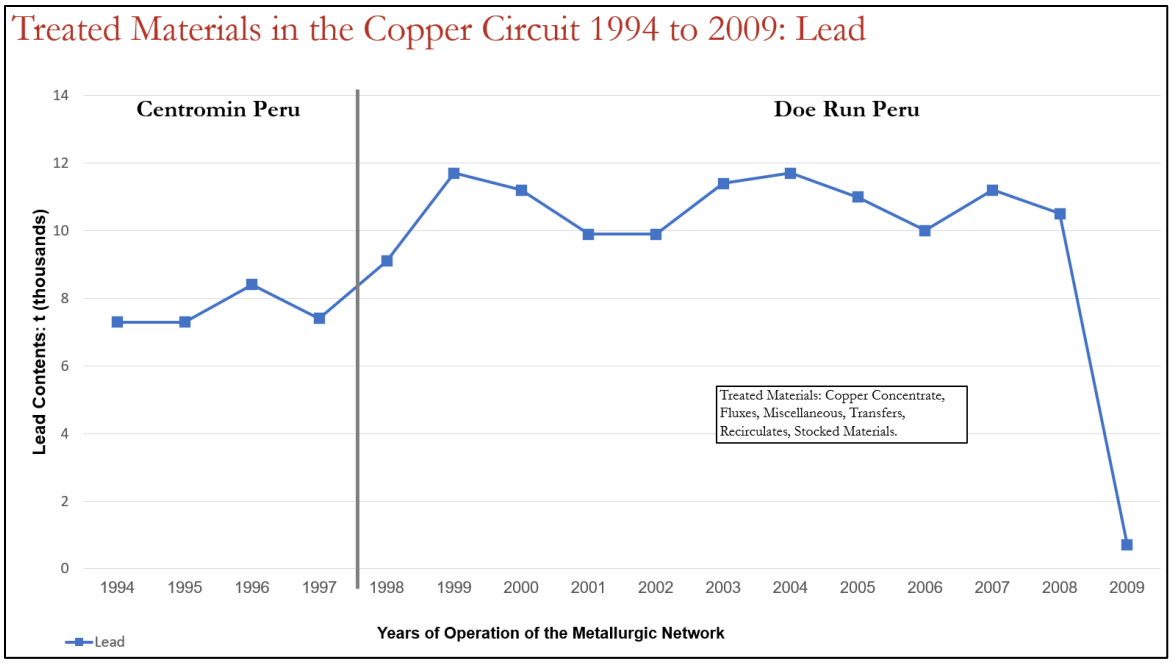
390. First, Claimants allege that SX-EW's "calculations are not presented in a manner that would facilitate independent review. Their analysis and Mr. Dobbelaere's related opinions cannot be considered reliable."[578] This is untrue. SX-EW based its calculations on the production data included in the annexes to Exhibits WD-008, WD-030, and R-150, all of which Respondents introduced into the record with their Counter-Memorial.[579] Therefore, contrary to Claimants' assertion, SX-EW's analysis is available for independent review. Mr. Dobbelaere has reviewed the data and shares SX-EW's findings.[580] In contrast, neither Claimants nor Mr. Connor have even attempted to engage with the underlying production data.

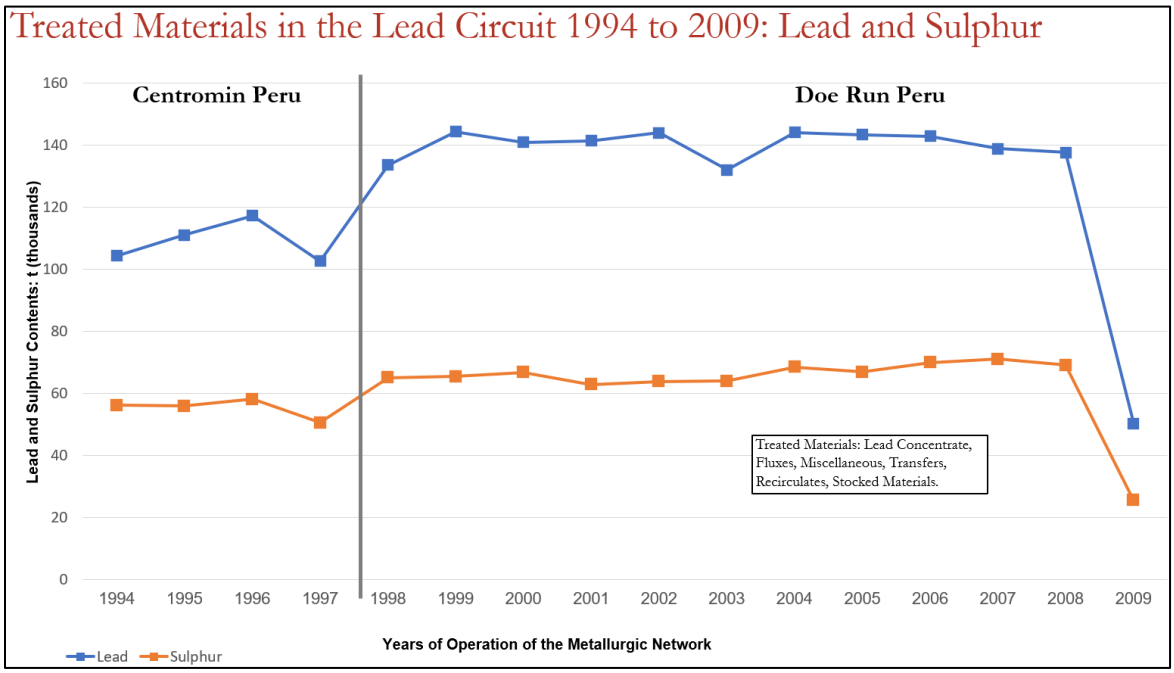
391. While Claimants portray mass balancing as a complicated model, in truth, it entails simple arithmetic that anyone can do.[581] As explained above, one need only subtract the sum of the outputs from the sum of the inputs. Even a cursory review of the underlying data shows that lead emissions spiked during the PAMA Period. The raw data shows that in 1995, Centromín processed 110,950 tons[582] of lead in the lead circuit and 7,301 tons[583] of lead in the copper circuit. By 1999, DRP had increased those figures to 144,636 tons[584] and 11,722 tons, [585] respectively. This represents a 30.4% and 60.6% increase in lead processed in the lead and copper circuits, respectively. It is manifest that this decision would have increased fugitive emissions, which the indeterminate lead loss data confirms: Centromín recorded 1,872 tons[586] of indeterminate lead losses in 1995, while DRP recorded 5,261

[578] Reply, ¶ 109.
[579] *See* Contract Counter-Memorial, Index of Exhibits; Dobbelaere First Expert Report, Index of Exhibits.
[580] Dobbelaere First Expert Report, ¶ 234; Dobbelaere Second Expert Report, Section 5.
[581] Dobbelaere Second Expert Report, ¶ 214 ("This is a simple calculation that is easy to replicate, as I have just done. It involves basic arithmetic and does not include any complex mathematics or formulae.).
[582] **Exhibit WD-008**, Annex 22b (lead in concentrates, smelting aids, and transfers in the lead circuit under Centromín); **Exhibit WD-008**, Annex 18b (recycled lead in lead circuit under Centromín); **Exhibit WD-008**, Annex 16b (miscellaneous lead inputs in the lead circuit under Centromín).
[583] **Exhibit WD-008**, Annex 22a (lead in concentrates, smelting aids, and transfers in the copper circuit under Centromín); **Exhibit WD-008**, Annex 18a (recycled lead in copper circuit under Centromín); **Exhibit WD-008**, Annex 16a (miscellaneous lead inputs in the copper circuit under Centromín).
[584] **Exhibit WD-008**, Annex 23b (lead in concentrates, smelting aids, and transfers in the lead circuit under DRP); **Exhibit WD-008**, Annex 19b (recycled lead in lead circuit under DRP); **Exhibit WD-008**, Annex 17b (miscellaneous lead inputs in the lead circuit under DRP).
[585] **Exhibit WD-008**, Annex 23a (lead in concentrates, smelting aids, and transfers in the copper circuit under DRP); **Exhibit WD-008**, Annex 19a (recycled lead in copper circuit under DRP); **Exhibit WD-008**, Annex 17a (miscellaneous lead inputs in the copper circuit under DRP).
[586] **Exhibit WD-030**, SX/EW Mass Balances, 1990–2009 – Anexo 5B and WD-008, SXEW Lima Peru Consultant, November 2012, Annex 20d.

tons[587] in 1999—a 181% increase. The same dataset shows that DRP maintained these elevated numbers throughout the PAMA Period, as seen in Figures 1 and 2 below.

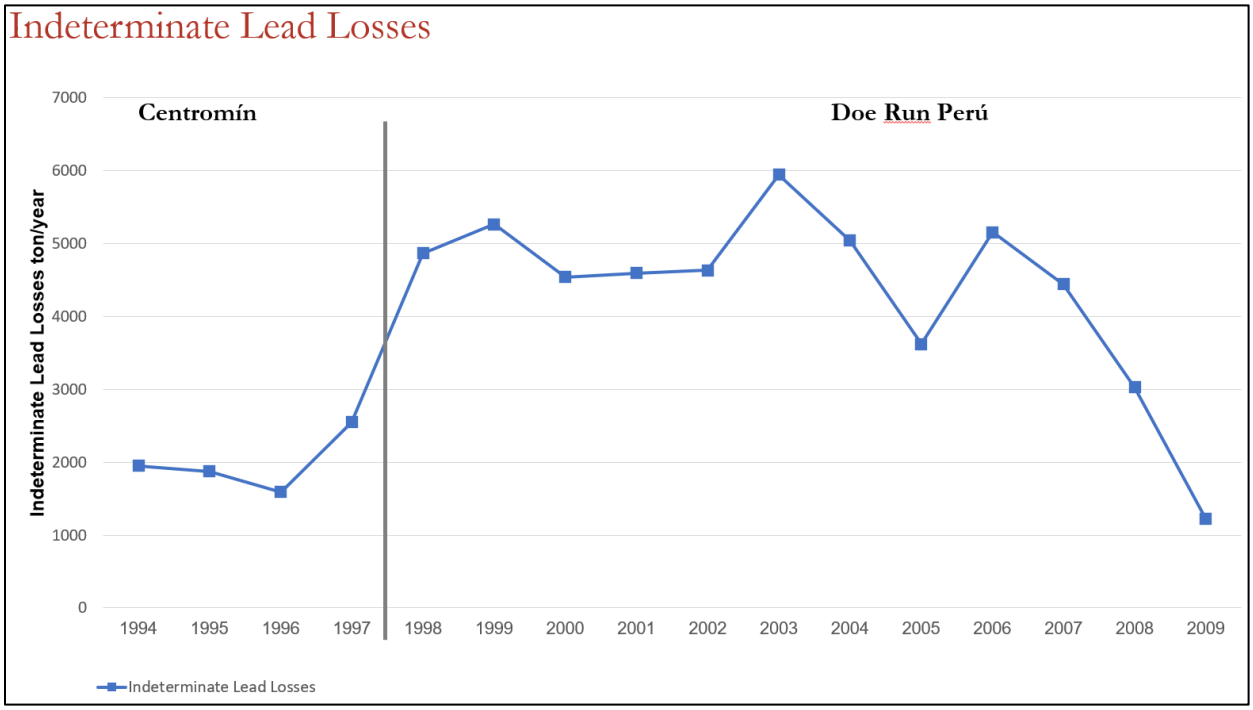
Figure 1: Materials Processed in the Lead and Copper Circuits between 1990 and 2009[588]





[587] **Exhibit WD-030**, SX/EW Mass Balances, 1990–2009 – Anexo 5B and WD-008, SXEW Lima Peru Consultant, November 2012, Annex 20d.
[588] **Exhibit WD-008**, Annexes 16a, 16b, 17a, 17b, 18a, 18b, 19a, 19b, 22a, 22b, 23a, 23b.

Figure 2: Indeterminate Lead Losses between 1990 and 2009[589]



392. Claimant's second criticism of the mass balancing analysis is that Mr. Dobbelaere bases that analysis on air monitoring data, which Claimants allege was unreliable before the year 2000.[590] Leaving aside the fact that Claimants exaggerate the issues with the air monitoring data (as Respondents address below), Mr. Dobbelaere's calculation of indeterminate lead losses is not based on air monitoring data.[591] It is based on a simple mass balancing exercise using the Facility's production data, which was recorded in large part by DRP and whose validity Claimants do not dispute.[592]

393. Third, Claimants wrongly assert that the mass balancing analysis contradicts "objectively measured" main-stack data that was "recorded" and "compiled by Activos Mineros itself."[593] Claimants do not explain how the mass balancing analysis allegedly contradicts the main-stack data. Presumably, Claimants refer to the fact that the main-stack data

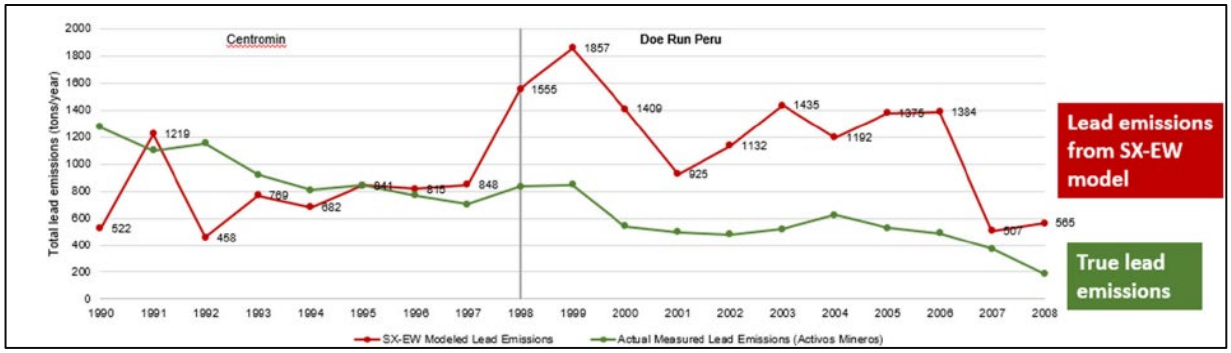
[589] **Exhibit WD-030**, Annex 20d.
[590] Reply, ¶ 100.
[591] Dobbelaere Second Expert Report, ¶¶ 199-214.
[592] Dobbelaere Second Expert Report, ¶¶ 199-214.
[593] Reply, ¶¶ 83, 103 (*citing* Connor Second Report, p. 14).

suggests that emissions from the main stack dropped below Centromín levels starting in 2000,[594] while the mass balancing analysis shows that total emissions under DRP never dropped below total emissions under Centromín. But these two propositions are not in tension. As Respondents explained in their Counter-Memorial, main-stack emissions represent a fraction of total emissions, particularly at a Facility that suffered from significant fugitive emissions—a fact that DRP freely admitted between 2004 and 2006, when it requested several extensions and new projects to address the grave problem of fugitives.[595] If Claimants mean to suggest that a reduction in main-stack emissions would have accompanied a reduction in fugitive emissions, that would also be untrue. Achieving each goal entails different projects, as DRP itself argued before the MEM.[596] It is therefore perfectly consistent that main-stack emissions could drop while total emissions remained high.

394. Claimants also fail to explain their assertion that the main-stack data was "recorded" and "compiled by Activos Mineros itself," nor do they cite any evidence to support it.[597] Insofar as Claimants mean to imply that Activos Mineros produced this data, that would be incorrect. The data was measured and reported by Centromín before October 1997 and DRP thereafter, just like the Facility's production data.[598]

395. Fourth, Claimants take issue with Figure WD-28 included in Mr. Dobbelaere's first report. According to them, "on the following plot . . . Mr. Dobbeleare attempts to juxtapose the 'total' lead emissions levels calculated by SX-EW against the objectively measured main stack emissions"[599]:

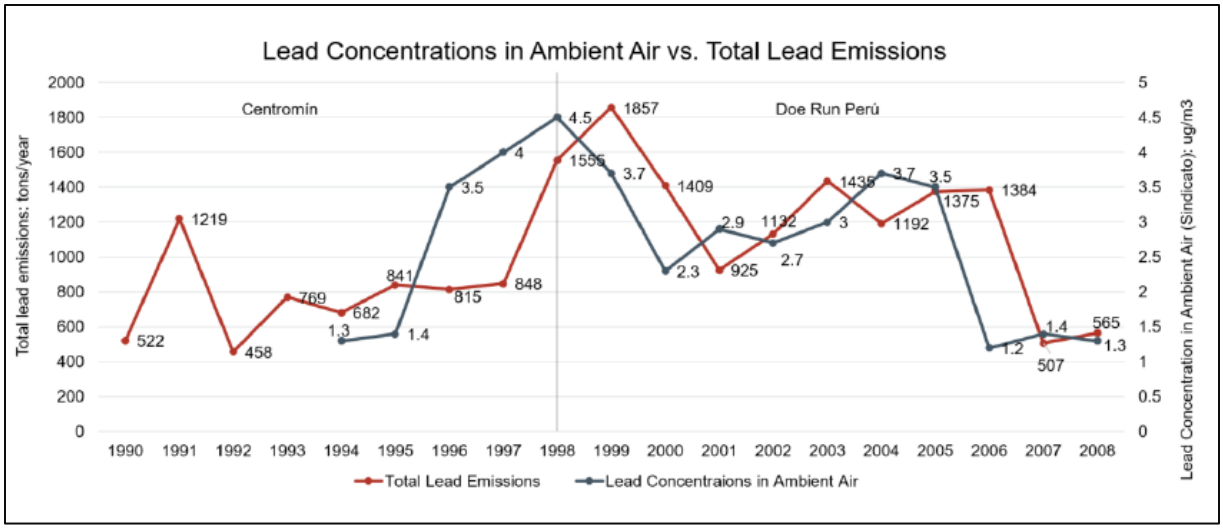
[594] For the avoidance of doubt, Respondents dispute the reliability of the data showing a drop in main-stack emissions between 1999 and 2000, as discussed below.
[595] Contract Counter-Memorial, ¶ 760.
[596] **Exhibit C-045 (Treaty)**, 2004 DRP Extension Request, sections 7 & 8.
[597] Reply, ¶¶ 83, 103 (*citing* Connor Second Report, p. 14).
[598] *See, e.g.*, **Exhibit DMP-018**, Gas Emissions and Air Quality Monitoring Report, December 1996; **Exhibit R-304**, Gas Emissions and Air Quality Monitoring Report, December 1998.
[599] Reply, ¶ 103.



396. Mr. Dobbelaere did not produce the above figure; Mr. Connor did.[600] It is Mr. Connor who juxtaposes total lead emissions against main-stack emissions, deceptively labeling main-stack emissions as "true lead emissions," even though they account for a fraction of total emissions and have one-eighth of the effect on air quality as fugitive emissions.[601]

397. Mr. Dobbelaere's Figure WD-28, reproduced below, compares total lead emissions to lead concentrations in ambient air, based on SX-EW's calculations.[602] SX-EW sought to calculate total lead emissions for each year by adding together fugitive and main-stack lead losses. It could not, however, simply add the absolute values of both types of emissions, given that main-stack emissions affected air quality eight times less than fugitive emissions.[603] SX-EW therefore equated the two types of emissions by dividing main-stack emissions by a factor of eight.[604] It then added the scaled main-stack emissions figure to the fugitive emissions figure to calculate the Facility's "total equivalent lead emissions."[605] DRP undertook this same scaling exercise when it submitted its 2004 extension request, dividing the annual stack emissions amount by eight in order to equate them to the annual fugitive emissions amount.[606]

[600] Connor Supp. Report, p. 14.
[601] Connor Supp. Report, p. 14.
[602] Dobbelaere First Expert Report, p. 93.
[603] Dobbelaere Second Expert Report, ¶¶ 217-218; **Exhibit GBM-051**, McVehil-Monnett Associates, Inc. 2000, Air Quality and Meteorology at the Doe Run Company's La Oroya Smelter.
[604] Dobbelaere First Expert Report, ¶¶ 232–233; Dobbelaere Second Expert Report, ¶¶ 217-218; **Exhibit WD-030**, SXEW Mass Balances, pp. 30–31; **Exhibit GBM-051**, McVehil-Monnett Associates, Inc. 2000, Air Quality and Meteorology at the Doe Run Company's La Oroya Smelter.
[605] Dobbelaere Second Expert Report, ¶¶ 217-218; **Exhibit WD-030**, SXEW Mass Balances, pp. 30–31
[606] **Exhibit C-045 (Treaty)**, 2004 DRP Extension Request, p. 5 ("Fugitive Emissions: 374 t/a. Chimney Emissions: 656 t/a --> 656/8= 82 t/a of equivalent F.E.s. Total equivalent Fugitive Emissions: 374 + 82 = 456 t/a.").



398. Claimants allege three flaws in SX-EW's calculations of total lead emissions.[607] First, Claimants assert that the total combined stack and fugitive emissions under Centromín cannot be less than the measured stack emissions alone, as suggested by the SXEW model for the years 1990-95."[608] As explained above, and as explained in detail in both Mr. Dobbelaere's report[609] and the SX-EW report,[610] the calculation of "total" lead emissions reflects: (i) fugitive emissions; and (i) one-eighth of main-stack emissions, to account for the fact that main-stack emissions have a lower impact on air quality. "Total" could be understood as "scaled" or "equivalent," as SX-EW explained.[611] It is therefore unsurprising that for certain years, total "equivalent" emissions would be lower than absolute main-stack emissions.[612]

399. Even if Claimants take issue with the scaling factor for main-stack emissions, the raw, unscaled production data demonstrates that indeterminate lead losses (and therefore, fugitives) sharply increased during DRP's PAMA Period operations (1997-2007), as Figure 2 above shows.[613] Claimants' decision to focus on SX-EW's scaled model is a

[607] Reply, ¶¶ 104–108.
[608] Reply, ¶ 105 (*citing* Connor Second Report, p. 15).
[609] Dobbelaere Second Expert Report, ¶¶ 217-218.
[610] **Exhibit WD-030**, SXEW Mass Balances, pp. 22, 30-31.
[611] Dobbelaere Second Expert Report, ¶¶ 217-221; SXEW Mass Balances, pp. 22, 30-31.
[612] Dobbelaere Second Expert Report, ¶¶ 217-221.
[613] Dobbelaere Second Expert Report, ¶¶ 213-215; **Exhibit WD-030**, SX/EW Mass Balances, 1990–2009 – Anexo 31; **Exhibit R-150** SXEW Evaluación de Pérdidas de Plomo del CMLO y la Contaminación Ambiental – Enero 2013, pp.15-16.

distraction from their inability to refute the implications of the raw, unscaled data on indeterminate lead losses.[614]

400. Next, Claimants argue that "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."[615] It is disingenuous for Claimants to rely on air monitoring data here where they impugn the quality of that same data throughout their Reply.[616] As Respondents show below, the air monitoring data is even *less* reliable for the DRP period than it is for the Centromín period. Claimants' argument based on that data therefore fails.

401. Finally, Claimants allege that the SX-EW findings cannot be right because "both stack and fugitive emissions from the Complex dropped in unison as DRP implemented air emissions control projects to capture stray dust and direct it to the baghouses and electrostatic precipitators, where it was removed prior to exiting the main stack."[617] Respondents have already explained why the production data is consistent with the data on main-stack emissions, as well as why DRP's projects were minimal during the PAMA Period. As for fugitive emissions, Claimants' reasoning is circular. They essentially argue that DRP's own production data, which shows that fugitive emissions increased, cannot be right because "fugitive emissions dropped," providing no alternative data to show that fugitives in fact decreased.

(iv) Claimants misrepresent the air quality data

402. Respondents demonstrated in the Counter-Memorial that measurements of air quality in La Oroya confirm that DRP increased emissions.[618] Claimants responded with two arguments that are both misleading and contradictory. Claimants assert, with no evidence, that the

[614] Dobbelaere Second Expert Report, ¶¶ 215, 227 ("Now that I have addressed Mr. Connor's concerns over the SX-EW analysis of 'equivalent lead emissions,' I feel compelled to state that the entire discussion of that analysis is a distraction. I repeat that the 'equivalent lead emissions' analysis is separate and apart from the simple arithmetic which shows that DRP increased production, used dirtier concentrates, and increased indeterminate lead losses. Those three data points tell the entire story. There is no need to model 'equivalent lead emissions,' which was an extra step that SX-EW took for its own purposes unrelated to this arbitration. But for the purposes of showing that DRP increased lead emissions relative to Centromín, the raw production data suffices.").
[615] Reply, ¶ 106 (*citing* Connor Second Expert Report, p. 15).
[616] Claimants' argument is also untrue. Figure 10 in the SX-EW report, reproduced in Mr. Dobbelaere's report, shows that SX-EW's calculations of total equivalent emissions track ambient measurements of lead very well. Dobbelaere Second Expert Report, ¶ 225.
[617] Reply, ¶ 107 (*citing* Connor Second Expert Report, p. 15).
[618] Contract Counter-Memorial, ¶ 752.

data is so unreliable as to be unusable from 1994 to 1999, the year that DRP replaced the air monitors.[619] At the same time, Claimants—wanting to have their cake and eat it too—point to air quality data from both before and after 1999 as evidence that lead emissions were lower under DRP than under Centromín.[620] Not only do Claimants fail to provide support for each of these two arguments, but even if accepted as true, they would contradict each other.

403. First, Claimants overstate the issues with the air quality data for the years 1994-1999. Claimants cannot cite a single piece of contemporaneous evidence documenting that the air monitors were defective beyond use during this period, as they claim.[621] They cite just two contemporaneous evaluations of the air monitors, neither of which supports their claim. Claimants first cite a 1996 report by Knight Piesold, the environmental consultants Centromín retained to assist in the development of its PAMA.[622] Claimants cite a passage from the report on air monitoring that "identified concerns in the areas of instrumentation siting, instrumentation maintenance, and sample analysis procedures. These concerns are directly related to data quality and usefulness."[623] Claimants omit the very next sentence of that report, which states that "[g]enerally, the data are adequate for estimating relative areas and times of high or low pollutant impacts, and they provide an indication of overall air quality, but they may not be adequate for assessing compliance with any specific air standard or determining a precise maximum impact level."[624] Claimants also omit that according to the consultants, the lead monitors were manufactured by a reputable brand.[625] Thus, while the consultants found that the air monitoring data was not perfectly precise, it was adequate for assessing overall air quality and general trends.[626]

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[619] *See* Reply, ¶¶ 95–99.
[620] *See* Reply, ¶¶ 83–85.
[621] Proctor Second Expert Report, pp. 26-27.
[622] Reply, fn. 52 (*citing* **Exhibit C-108**, Knight Piesold Report, Appendix A, p. 2).
[623] Reply, fn. 52 (*citing* **Exhibit C-108**, Knight Piesold Report, Appendix A, p. 2).
[624] **Exhibit C-108**, Knight Piesold Report, Appendix A, p. 2.
[625] **Exhibit C-108**, Knight Piesold Report, Appendix A, p. 3 ("All but one of the SO_2 analyzers and all PM and PM-10 analyzers are manufactured by Kimonto, which is a brand recommended in the monitoring protocol document.").
[626] Proctor Second Expert Report, pp. 26-27 ("It is my opinion that the author's words should be interpreted as written, and the data should be considered adequate to assess overall air quality and times of high and low pollutant impacts. Overall, the data support that concentrations of lead in air at the Sindicato monitor were higher after DRP started operating the CMLO than prior to October 1997 when Centromin operated the CMLO.").

404. Next, Claimants assert that their expert, Mr. Connor, has testified that Centromín's air quality data is unreliable.[627] Mr. Connor appears to base his opinion on a misunderstanding of the facts. He cites a 1999 report commissioned by DRP which found that the air quality data was unusable.[628] That report, however, analyzed the new air quality monitors that DRP had installed in the spring of 1999, which replaced the monitors that Centromín used.[629] According to DRP's own consultants, "it is very likely that none of the particulate data is valid and it would appear that some of the SO_2 data is suspect as well."[630] Accordingly, the only two contemporaneous evaluations of the air monitoring data show that DRP's data from 1999 onwards is far less reliable than Centromín's.

405. In addition, Claimants assert that the data "clearly understated the actual concentrations of lead in the air" for the years 1994-1996 and contradicts Knight Piesold's findings that air quality exceeded the applicable standards in 1996. [631] According to Claimants, the data suggests "that air quality was pristine prior to DRP and worsened immediately upon commencement of their operations."[632] The data, however, does not suggest that the air was "pristine" between 1994 and 1996, with average lead in air for those years measuring .6 $\mu g/m^3$, 1.3 $\mu g/m^3$, and 1.37 $\mu g/m^3$, respectively, well exceeding the then-applicable Peruvian standard of .5 $\mu g/m^3$[633] and the current U.S. standard of .15 $\mu g/m^3$.[634] Thus, contrary to Claimants' assertion, the air monitoring data is consistent with Knight Piesold's findings—indeed, the Knight Piesold consultants used the air monitoring data to reach their conclusion.[635]

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[627] Reply, fn. 52. Claimants also assert that the Missouri Plaintiffs' environmental expert, Jack Matson, agreed with Claimants on this point during a deposition: "Q. 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." Reply, fn. 52 (*citing* **Exhibit C-235 (Treaty)**, p. 24:10–14). This alleged quote does not exist in the document that Claimants cite or anywhere else in the record, and Respondents reserve their rights accordingly. Moreover, the unsupported opinion of an expert in another case whom the Tribunal cannot examine has no probative value.
[628] Connor Second Expert Report, p. 20.
[629] *Compare* **Exhibit R-304**, 1998 Q4 Air Monitoring report, p. 25 *with* **Exhibit R-305**, 1999 Q1 Air Monitoring Report, pp. 33-35 (revealing that DRP installed new monitors). *See also* **Exhibit GBM-058**, Miller, A., Visit to La Oroya, 19 August 1999, p. 2 ("new PM10 monitors had been installed where there had previously been hi-vol monitors).
[630] **Exhibit GBM-058**, Miller, A., Visit to La Oroya, 19 August 1999, p. 2; Proctor Second Expert Report, p. 27.
[631] Reply, ¶ 95.
[632] Reply, ¶ 95.
[633] Proctor Second Expert Report, pp. 26, 30; **Exhibit AA-003**, Supreme Decree No. 016-93-EM, Annex 3.
[634] **Exhibit R-310**, U.S. Environmental Protection Agency, National Ambient Air Quality Standards (NAAQS) for Lead (Pb), 11 March 2016.
[635] **Exhibit C-108**, Knight Piesold Report, pp. 30-33.

406. Next, Claimants claim that "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 despite DRP's installation of major emissions reduction," which Claimants argue is inconceivable.[636] Claimants are wrong on both counts. The average annual lead concentration for 1996 (1.37 µg/m^3)[637] was higher than for the years 2007 and 2008 (1.19 µg/m^3 and 1.36 µg/m^3, respectively).[638]

407. More to the point, Mr. Dobbelaere explains that lead emissions would have remained far worse under DRP until the company completed its fugitive emissions projects in 2007.[639] But those projects were not enough, and barely compensated for DRP's increase in production, use of dirtier concentrates, and poor modernization design.[640] For example, DRP chose to operate the lead circuit with its old sinter plant, even though its own consultants had warned in 1998 that the sinter plant—a major source of fugitive emissions—was beyond repair.[641] It also did not implement any projects to abate fugitive emissions from the pyrometallurgical operations of the copper circuit, which was by far the Facility's largest source of lead emissions.[642] It is thus not surprising that DRP barely improved ambient air quality over Centromín, given the massive increase in lead production and lead processed in the copper circuit. As a result, lead concentrations in air far exceeded the Peruvian standard of .5 µg/m^3, even after DRP implemented the projects that Claimants tout.[643]

408. Claimants are also wrong to argue that the air quality data from 1994 to 1996 conflicts with main-stack emissions rates. According to Claimants, it is a "physical impossibility" that air quality could deteriorate so markedly after DRP acquired the Facility while main-stack emissions remained relatively stable.[644] Neither Claimants nor their experts cite any actual air quality modeling to support this assertion. In any case, Mr. Dobbelaere explains that the main-stack emission data is unreliable for the years 1997-1999, as discussed in the next

[636] Reply, ¶ 98.
[637] **Exhibit DMP-018**, 1996 Q4 Air Monitoring report, p. 26.
[638] **Exhibit R-311**, 2007 Q4 Air Monitoring report, p. 17; **Exhibit R-312**, 2008 Q4 Air Monitoring report, p. 48.
[639] Dobbelaere Second Expert Report, ¶¶ 193, 226.
[640] Dobbelaere Second Expert Report, ¶¶ 185-186.
[641] Dobbelaere Second Expert Report, ¶¶ 185-186.
[642] Dobbelaere Second Expert Report, ¶¶ 185-186.
[643] Proctor Second Expert Report, p. 23.
[644] Reply, ¶ 99.

section.[645] Moreover, the primary effect of DRP's decision to run the Facility beyond capacity was an increase fugitive emissions, which had an eight-fold effect on air quality relative to main-stack emissions.[646] Therefore, even if the main-stack data were reliable for those years, it would not contradict the air quality data.

409. Finally, it is worth noting that DRP presented the pre-2000 air monitoring data to the government on several occasions and never questioned its reliability. For example, DRP cited that data in both its 2004 and 2009 extension requests.[647] Neither DRP nor Claimants criticized that data until it undermined their position in this arbitration.

410. In any case, if questions remain regarding air quality data, the Tribunal need not waste time ascertaining its reliability. The production data, the PAMA data, and the Fluor Daniel data independently establish that DRP increased fugitive emissions, as discussed above.

411. Despite claiming that air quality data "is suspect before 2000,"[648] Claimants assert that the "improved air quality in the area surrounding the Complex demonstrates that, contrary to Mr. Dobbelaere's assertions, all emissions, both 'stack' and 'fugitive,' decreased over the course of DRP's operations."[649] Claimants' argument fails for several reasons.

412. First, if the Tribunal were to disregard the air monitoring data from the Centromín period, then that data would be useless for the purposes of comparing the environmental performance of the two operators.[650] Therefore, under Claimants' own argument, the air monitoring data cannot support their contract claim.

413. Second, when it suits their case, Claimants conveniently forget that they and their experts have impugned the data for certain years. Claimants include a graph that purports to show stack emissions and ambient lead decreasing in tandem between 1999 and 2000, in which

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[645] Dobbelaere Second Expert Report, ¶¶ 230-242.
[646] Dobbelaere Second Expert Report, ¶¶ 188-189; **Exhibit GBM-051**, McVehil-Monnett Associates, Inc. 2000, Air Quality and Meteorology at the Doe Run Company's La Oroya Smelter.
[647] **Exhibit C-045 (Treaty)**, 2004 DRP Extension Request, pp. 3-4; **Exhibit C-055 (Treaty)**, 2009 DRP Extension Request, p. 82.
[648] Reply, fn. 52.
[649] Reply, ¶¶ 83–85 (*citing* Connor Second Report, pp. 12–13).
[650] Proctor Second Expert Report, p. 30 ("Mr. Connor's opinion is that all the air quality data prior to 1999 are unreliable (DMP-098, Connor, 2023, pp. 14, 16-17), and, thus, he has no quantitative measure to show that conditions were better or worse under Centromin compared to the extremely poor conditions documented during DRP's operation of the CMLO.").

they highlight the years 1994 to 1996 with the annotation "DATA UNRELIABLE."[651] The graph does not mention that Claimants and their experts also question the data for the years 1997-1999,[652] data that is necessary to support the claim that emissions dropped between 1999 and 2000. Moreover, as discussed above, DRP's own consultants found that the air monitors that DRP installed in 1999 were unreliable.[653] Claimants have not introduced any evidence that DRP ever resolved the issue.

414. Third, even if the air quality data showed that DRP did improve its performance between 1999 and 2000, this would not demonstrate that DRP improved emissions relative to Centromín. At most, it would indicate an improvement over DRP's abysmal performance in 1998 and 1999. This improvement is not relevant for the purposes of assessing DRP's responsibility for the Missouri Plaintiffs' claims.

(v) Claimants' case rests entirely on the main-stack data, which is of limited value because DRP shifted emissions from the main stack to fugitive outlets

Claimants' arguments regarding main-stack emissions are misleading

415. Claimants rely on main-stack data to argue that DRP improved its emissions and air quality during the PAMA Period. This argument is misleading and inaccurate for two reasons. First, it ignores the effect of fugitive emissions, which DRP increased and which have a far greater impact on air quality than main-stack emissions. Second, it exaggerates the extent of DRP's improvements to main-stack emissions during the PAMA Period. Respondents raised both issues in the Counter-Memorial, which Claimants have ignored.

416. Instead, Claimants continue to mislead by implying that main-stack emissions tell the whole story.[654] Claimants and Mr. Connor present main-stack emissions as "true emissions" and introduce graphs that label them as simply "lead emissions,"[655] as if fugitive emissions were irrelevant. Claimants then put forth a syllogism that relies on a slight-of-hand. First, they correctly observe that air quality cannot deteriorate as emissions

[651] Reply, p. 31.
[652] *See* Reply, ¶¶ 95–99.
[653] **Exhibit GBM-058**, Miller, A., Visit to La Oroya, 19 August 1999, p. 2.
[654] *See, e.g.*, Reply, ¶ 81 ("[I]t 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."); Proctor Second Expert Report, pp. 17-18.
[655] Reply, pp. 31, 33, 36, 36; Connor Second Report, Exhibits 3.1, 3.2, 3.3, 3.4.

decrease. Second, they present evidence meant to show that DRP improved "lead air emissions," evidence that, in truth, includes only main-stack emissions.[656] Claimants then falsely claim that contrary to Mr. Dobbelaere's conclusions, the "objective evidence" proves that air quality could not have deteriorated during the PAMA Period because DRP improved lead emissions.[657]

417. This argument fails to acknowledge that a modest improvement in main-stack emissions cannot offset a sharp increase in fugitive emissions.[658] Fugitive emissions are far more polluting than main-sack emissions because they are unfiltered, "deposit closer to the emission source, and result in far greater dust exposure than stack emissions, which are buoyant, are emitted at higher altitude, and disperse in the atmosphere before depositing over a much larger area."[659] DRP's own consultant found that main-stack emissions accounted for only 13% of total lead in ambient air.[660] For these reasons, Ms. Proctor explains that "it is terribly misleading for Claimants and Mr. Connor to use main-stack emissions as a validating metric for lead concentrations in ambient air or dose among the population."[661] Claimants' reliance on main-stack data is nothing but a red herring.

418. Claimants' attempt to downplay the effect of fugitive emissions contradicts DRP's own representations to the MEM. In its 2004 Extension Request, DRP itself stated that fugitive emissions affected air quality eight times as much as main-stack emissions, relying on a study conducted by DRP's consultants.[662] In that same document, a senior DRP officer stated that "low-level emissions of fugitives have a dramatic effect on air leads while stacks are of second order generally."[663] He noted that Doe Run was able to meet ambient lead standards in its Missouri plant by targeting fugitives over main-stack emissions: "The trick was reducing the right emissions inventory rather than only the total emissions inventory.

[656] Reply, ¶¶ 81–84.
[657] Reply, ¶ 94.
[658] Dobbelaere Second Expert Report, ¶¶ 228-229.
[659] Proctor Second Expert Report, pp. 18-21.
[660] **Exhibit DMP-098**, McVehil-Monnett Associates, 2005, p. CLM-0000268.
[661] Proctor Second Expert Report, p. 20.
[662] **Exhibit C-045 (Treaty)**, 2004 DRP Extension Request, pp. 5–6.
[663] **Exhibit C-045 (Treaty)**, 2004 DRP Extension Request, Annex III, p. 4.

The reduction in fugitives was about 82% while the reduction in the stack was only about 14%."[664]

419. It is therefore, at best, disingenuous for Claimants to argue that by reducing main-stack emissions, DRP necessarily reduced fugitives. Reductions in main-stack emissions do not typically entail reductions in fugitive emissions, and vice versa. Reducing different types of emissions involves different modifications and improvements to the various components of a smelter.[665] This is in fact reflected in DRP's proposed PAMA modifications, which include separate projects for reducing main-stack and fugitive emissions.[666]

420. Additionally, Claimants misrepresent the magnitude of DRP's improvements to main-stack emissions during the PAMA Period. They note a 74% decrease in main-stack lead emissions between 1997 with 2008 but omit that most of that decrease occurred in 2007 and 2008, after the PAMA Period had ended.[667] The drop in main-stack lead emissions between 1997 and 2006 is a much more modest 30%.[668] Claimants likewise report a 52% reduction in main-stack SO_2 emissions after the PAMA Period, [669] while the improvement during the PAMA Period was 37%.[670]

<u>The main-stack data is of limited value because DRP shifted emissions from the main-stack to fugitive outlets</u>

421. A close look at the main-stack data reveals that either (i) DRP shifted emissions from the main stack to fugitive outlets, or (ii) the main-stack data is flawed.[671] Because Claimants failed to produce evidence that would have elucidated the issue, the Tribunal should make an adverse inference that DRP shifted emissions from the main stack to fugitives.

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[664] **Exhibit C-045 (Treaty)**, 2004 DRP Extension Request, Annex III, p. 4.
[665] Dobbelaere Second Expert Report, ¶ 229.
[666] **Exhibit C-045 (Treaty)**, 2004 DRP Extension Request, sections 7 & 8; **Exhibit C-055 (Treaty)**, 2009 DRP Extension Request, sections 2.3.1 & 2.3.2; **Exhibit R-154**, 2005 DRP Request for Exceptional Extension of Compliance for Sulfuric Acid Plant Project, sections 5.1 & 5.2.
[667] Reply, ¶ 83 (*citing* Connor Second Report, p. 12) ("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.").
[668] Bianchi First Expert Report, Appendix D, Table 3.
[669] Reply, ¶ 93.
[670] Bianchi First Expert Report, Exhibit 5.33.
[671] Dobbelaere Second Expert Report, ¶¶ 230-242.

422. DRP recorded a colossal reduction in SO_2 emissions between 1999 and 2000, even though the amount of sulfur fed into the Facility remained stable.[672] This is impossible. As Mr. Dobbelaere explains, the only way to abate SO_2 emissions is by installing a sulfuric acid plant, which DRP did not do.[673] Yet between 1999 and 2000, DRP recorded a reduction in SO_2 of 140,000 tons.[674] To put this number in perspective, the planned sulfuric acid plants for the lead and zinc circuits were designed to abate a combined 104,852 tons of SO_2.[675] It is clear that this recorded reduction is an error.

423. Mr. Dobbelaere has reviewed the main-stack data in search of an explanation for the impossible reduction in SO_2 emissions.[676] DRP did not measure main-stack emissions directly. Rather, it measured other variables that, used in a formula, could yield calculations of main-stack emissions for a given substance.[677] Two of those measurements were key to calculating main-stack emissions of SO_2: (i) the measured concentration of SO_2 in process gas exiting the main stack; and (ii) the measured flow rate (the rate at which total process gas exits the main stack).[678]

424. Mr. Dobbelaere has identified only three possibilities to explain the reduction in SO_2 emissions in the year 2000. First, it is possible that DRP miscalculated the measured concentration of SO_2 in the process gas exiting the main stack.[679] This possibility, if true, would call into question all calculations of main-stack SO_2 emissions.[680]

425. Second, it is possible that the measured flow rate is incorrect. [681] The main-stack data shows a sudden drop in flow rate between the years 1999 and 2000.[682] Flow measurements are directly proportional to reported emissions, such that when the flow rate decreases, so

[672] Dobbelaere Second Expert Report, ¶ 234.
[673] Dobbelaere Second Expert Report, ¶ 235.
[674] Dobbelaere Second Expert Report, ¶ 235.
[675] Dobbelaere Second Expert Report, ¶ 235.
[676] Dobbelaere Second Expert Report, ¶ 236.
[677] Dobbelaere Second Expert Report, ¶ 232.
[678] Dobbelaere Second Expert Report, ¶ 232. DRP used this same formula for all other substances, using the concentration of the substance being measured.
[679] Dobbelaere Second Expert Report, ¶ 236.
[680] Dobbelaere Second Expert Report, ¶ 236.
[681] Dobbelaere Second Expert Report, ¶¶ 237-239.
[682] Dobbelaere Second Expert Report, ¶ 237.

will the reported emissions.[683] Thus, any false reduction in flow rate will cause a false reduction in reported emissions.

426. If DRP incorrectly measured the flow rate, that would render all main-stack emission data unreliable.[684] This is because the flow rate is key to determining the main-stack emissions of all reported substances, including lead.[685] If the flow rate measurements were wrong, then the main-stack measurements were wrong, too.[686]

427. The third possible explanation for the reduction in SO_2 is that DRP shifted emissions from the main stack to fugitive outlets.[687] If the measured reduction in flow rate is genuine, that would mean that the Facility sent a lower volume of process gas to the main stack.[688] But the Facility would not have produced a lower volume of gas between 1999 and 2000, given that the Facility's processes did not change.[689] This means that if DRP sent less gas to the main stack, it must have released more gas as unrecorded fugitives.[690] If this were the case, then DRP's "improvements" to main-stack lead and SO_2 emissions would have *worsened* the environmental crisis because, unlike main-stack emissions, fugitive emissions are unfiltered and escape at ground level. This maneuver also would have spared DRP from criticism associated with higher stack emissions, which were the only emissions that DRP recorded and reported to the MEM.

428. Of the three scenarios, it is most likely that DRP shifted emissions from the main stack to fugitive sources.[691] This is because both flow rate and process gas temperature—two factors that are independently measured—fell in tandem in the year 2000.[692] DRP could have taken several actions to shift emissions that would have reduced both flow rate and temperature. For example, it could have punctured a duct on the high-pressure side of an

[683] Dobbelaere Second Expert Report, ¶ 238.
[684] Dobbelaere Second Expert Report, ¶ 239.
[685] Dobbelaere Second Expert Report, ¶ 239. DRP used the following formula to calculate main-stack emissions of a given substance: MT/year = (flow rate)*(seconds/hour)*(hours/day)*(day/year)*(measured concentration of substance)/1.000.000.000.
[686] Dobbelaere Second Expert Report, ¶ 239.
[687] Dobbelaere Second Expert Report, ¶¶ 240-241.
[688] Dobbelaere Second Expert Report, ¶ 241.
[689] Dobbelaere Second Expert Report, ¶ 240.
[690] Dobbelaere Second Expert Report, ¶ 240.
[691] Dobbelaere Second Expert Report, ¶ 241.
[692] Dobbelaere Second Expert Report, ¶ 241.

extraction fan, which would have expelled hot process gas into the atmosphere.[693] It also could have lowered the efficiency of the Complex's extraction fans, which would have caused them to draw less hot process gas into the ducts leading to the main stack.[694] Those gasses would have instead leaked into the surrounding air.[695]

429. Claimants have failed to produce the requested documentation that would resolve this material question.[696] In order to determine which of the above three scenarios reflects the truth, Respondents requested the following two categories of documents from Claimants: (i) "records of stack flow rates, such as process flow diagrams, of all the streams to the main stack and any changes thereto, [as well as] concentrations of impurities and sulfur dioxide in process gasses"; and (ii) "engineering documents and process flow diagrams, related to any changes in the Facility's processes and/or mechanisms that explain the drop in emissions starting in 2000."[697] Claimants failed to produce such documents, even though the Tribunal ordered them to do so.[698]

430. One of the above three scenarios must be true, and any would be devastating to Claimants' case, which relies exclusively on DRP's alleged reductions in main-stack emissions. As explained above, the most likely scenario is that DRP shifted emissions from the main stack to fugitive outlets. Respondents, however, cannot prove which scenario is correct, given Claimants' refusal to disclose documents that would expose the truth. Respondents therefore request the Tribunal to make an adverse inference that DRP shifted emissions from the main stack to fugitive outlets. An adverse inference is proper here, given Claimants' refusal to disclose key documents that would have revealed the truth of this material issue.[699]

[693] Dobbelaere Second Expert Report, ¶ 241.
[694] Dobbelaere Second Expert Report, ¶ 241.
[695] Dobbelaere Second Expert Report, ¶ 241.
[696] Dobbelaere Second Expert Report, ¶ 242.
[697] Procedural Order Number 7, 25 August 2022, Respondents' Requests 46-47.
[698] Procedural Order Number 7, 25 August 2022, Respondents' Requests 46-47.
[699] *See* Section II.A.1.b, above.

(vi) Claimants' additional arguments fail to prove that DRP used more protective standards and practices than Centromín

431. Claimants submit five additional arguments purporting to show that DRP used more protective standards and practices than Centromín. Each of those arguments fails.

Claimants' argument based on DRP's PAMA projects.

432. Claimants falsely argue that DRP necessarily used more protective standards and practices than Centromín because it implemented the PAMA.[700] What is true: DRP never implemented the PAMA, either during the PAMA Period or after. While DRP did carry out ***some*** PAMA projects—none of which addressed the main sources of lead and SO_2 exposure for the local population—it is a falsehood to suggest that DRP actually completed its PAMA obligations.[701] It did not. DRP admitted this fact when it sought to modify the PAMA and delay the Sulfuric Acid Plant Project, which was the critical project for reducing lead and SO_2 emissions.[702]

433. As Ms. Proctor explains, DRP's actions were

> "like firefighters responding to a house on fire but spending their time putting out grass fires in the front and back yards while the house fire continues to burn. Although resources are applied to putting out fires, they are not the most important fires, and the damage to the house worsens. To make matters worse, DRP increased production and used dirtier concentrates, which is analogous to fighting an already burning fire with gasoline. DRP focused on the less urgent problems from a health perspective and made the consequential problem (fugitive emissions) worse before trying to make it better."[703]

434. Respondents noted in the Counter-Memorial that, in addition to being incomplete, DRP's work on the Sulfuric Acid Plant Project was delayed.[704] Mr. Connor responded that "the speed at which these projects were completed is entirely beside the point."[705] Ms. Proctor

[700] Reply, ¶¶ 12, 110.
[701] Alegre Second Expert Report, section 3.
[702] Alegre First Expert Report, ¶¶ 50-51.
[703] Proctor Second Expert Report, p. 28.
[704] Contract Counter Memorial, Section II.C.3.
[705] Connor Supp. Report, p. 10.

> "disagree[s]. As shown above, completion of the project was critical to improving conditions for the local population. Every year that the project was pushed back, the people of La Oroya—in particular, children born during this period, who are most vulnerable to the effects of lead exposure—continued to suffer shocking levels of exposure."[706]

435. Furthermore, the mere fact that DRP completed some PAMA projects does not prove that DRP's standards and practices were better than Centromín's in all respects. In essence, Claimants argue that because *some* of DRP's standards and practices were better than those of Centromín, *all* of DRP's standards and practices were better. The flaw in Claimants' argument is readily apparent: one can improve in some areas while regressing in others. In this case, DRP worsened the fugitive emissions problem while making some improvements that were either irrelevant or insufficient to address DRP's material increase in detrimental air contaminants.

436. Claimants' argument also contradicts the logic of the contract and the PAMA regime.[707] It would allow DRP to escape responsibility for any harm it caused as long as it completed some PAMA projects.[708] This would lead to absurd results. For example, under Claimants' argument, DRP could have exponentially multiplied fugitive lead emissions, killing and injuring countless individuals, but it would not be accountable if it cleaned up the slag waste yard located far from town. If the STA parties had intended to give DRP such broad immunity, they would have said so.

Claimants' argument based on the state of the Facility under Centromín.

437. Claimants open their Reply Brief with their central motif, arguing that the Facility's operations were so bad under Centromín that it would have been impossible for DRP to have made them worse. To add color to their claim, Claimants cite a Newsweek article describing the state of the Facility and La Oroya in 1994, as well as a report finding that emissions were high and exceeded international standards.[709] While those sources

[706] Proctor Second Expert Report, p. 33.
[707] Alegre Second Expert Report, ¶¶ 29-43.
[708] Alegre Second Expert Report, ¶¶ 29-43.
[709] Reply, ¶¶ 7–8 (*citing* **Exhibit C-103 (Treaty)**, Corinne Schmidt, "How Brown Was My Valley," Newsweek, April 18, 1994; **Exhibit C-108 (Treaty)**, Knight Piésold LLC, Environmental Evaluation of La Oroya Metallurgical Complex, 18 September 1996).

certainly paint a dire picture, Claimants argue—and the Tribunal should simply take their word for it—that because La Oroya was heavily polluted when DRP acquired the Facility, the company could not have exacerbated the issue. This argument a thinly disguised logical fallacy, and to accept Claimants' argument, one would have to reject the fact that bad situations can get worse.

438. An *El Mundo* news report, "Visit to a mining hell: La Oroya, where children are born with lead in their blood," describes conditions in La Oroya in August 2007, after DRP was supposed to have resolved the environmental crisis.[710] The description suggests that conditions indeed became worse under DRP's operations[711]:

> "The bad wind, as they call it, brought a cloud with yellowish fringes that was unrolled like a carpet, from the top of the mountain to the bed of the Mantaro River. The masks we used protected us from the ash but not from the breath with a taste of gunpowder that stuck to our palate, clothes, and hair. Only after two days did we feel the taste of the food again . . . .
>
> 'Since the foundry was taken over by the American company DOE RUN in 1997, emissions of gases and heavy metals have increased to gigantic proportions,' says the neurologist at the Essaud hospital, who has been treating patients for 25 years . . . ."

439. Ms. Proctor notes that "unlike the *Newsweek* article, the *elmundo.es* article provides timeline perspective when quoting a doctor serving at a local hospital for 25 years, who stated that conditions were far worse (by "gigantic proportions") under the control of the CMLO by DRP than in earlier years by Centromin."[712]

Claimants' argument based on before-and-after photos.

440. Claimants produce several misleading "before-and-after photos" as evidence that DRP did not worsen lead and SO_2 emissions.[713] While Claimants declare that "a picture is worth a thousand words,"[714] the pictures they present are of little probative value.

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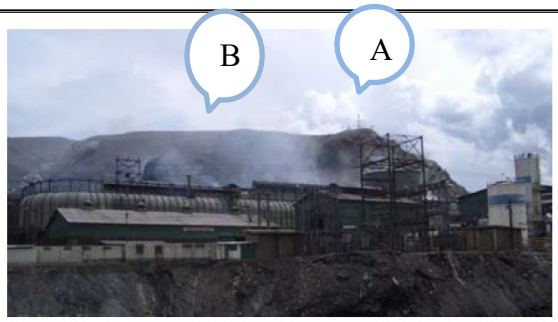
[710] **Exhibit DMP-116**, Wurgaft, Visit to a mining hell: La Oroya, where children are born with lead in their blood, El Mundo, 16 August 2007.
[711] **Exhibit DMP-116**, Wurgaft, Visit to a mining hell: La Oroya, where children are born with lead in their blood, El Mundo, 16 August 2007.
[712] Proctor Second Expert Report, pp. 30-31.
[713] Reply, pp. 3–6.
[714] Reply, ¶ 10.

441. First, the photos are immaterial to the Missouri Plaintiffs' claims. Claimants argue that "the before and after photos alone demonstrate the dramatic improvement in the physical plant,"[715] but the Missouri Plaintiffs did not live in the plant. They lived in the town of La Oroya, where air quality worsened under DRP's operations.

442. Second, Mr. Connor's annotations to the photos confirm that they are immaterial. For each photo, he notes the purported benefit of the project represented. Of the six projects shown, none affected SO_2 emissions, and only one supposedly affected lead emissions.[716] That project, however, was completed in 2007, after the PAMA Period had expired.[717]

443. Third, Claimants' photos do not show the primary sources of fugitive emissions: the copper roasters and the sinter plant. In contrast, a picture taken in by Claimants' pyrometallurgy expert, Dr. Partelpoeg, shows high levels of fugitive emissions coming from the copper roasters (A) and the sinter plant (B) in 2006, at the end of the PAMA Period[718]:

4		A view of fugitive emissions on April 10, 2006.

444. Another photo taken in 2006 also shows high levels of fugitive emissions from the copper converters[719]:

[715] Reply, ¶ 79.
[716] Reply, p. 5 ("Enclosure and Baghouse for Lead Blast Furnace").
[717] Reply, p. 5 ("Enclosure and Baghouse for Lead Blast Furnace").
[718] **Exhibit WD-031**, Partelpoeg Review of PAMA Projects, 10 May 2006, p. 7.
[719] **Exhibit R-313**, Oxfam America, The Peruvian paradox: surging mineral production, lagging tax revenues, 2 August 2018.

The Doe Run lead smelter in La Oraya, Peru, pictured in 2006. Photo: David Stubbs/Oxfam America

445. Contemporaneous accounts confirm that fugitive emissions remained sky-high throughout the PAMA Period. Hundreds of witness accounts reveal that the air in La Oroya was virtually unbreathable when the Facility was under DRP's control,[720] as corroborated by the CDC.[721] Claimants have not produced any accounts of such intolerable pollution levels before DRP acquired the Facility.

446. Finally, a photo from 2008 demonstrates that fugitive emissions remained higher than main-stack emissions even after DRP implemented the abatement projects that Claimants now tout.[722]

[720] **Exhibit DMP-047**, Huyhua, DRP Business in the Central Highlands of Peru (La Oroya), Future Potential in the National and World Context, and Business Potential in the 21st Century, 28 November 2007, slide 78 (showing that at least 115 people were being treated for high levels of SO_2 exposure; Proctor Second Expert Report, p. 10; Proctor First Expert Report, p. 42.

[721] **Exhibit DMP-011**, Scott Clark, Eric Partelpoeg, and James Young, Expert Comments on Exceptional Fulfillment Extension Request for the Sulfuric Acid Plant Project of La Oroya Metallurgical Complex PAMA, 10 May 2006; Proctor Second Expert Report, p. 31.

[722] **Exhibit DMP-099,** "More than a Decade's Wait for Justice in La Oroya, Peru," Earth Justice, La Oroya, 2008; Proctor Second Expert Report, Figure 4.

447. Claimants' photos are thus pointless and misleading.

Claimants' argument based on the testimony of the Missouri Plaintiffs' expert.

448. Claimants assert that the Missouri Plaintiffs' expert, Jack Matson, "testified that the environment was better *after* the sale to DRP than before."[723] This argument is misleading and irrelevant for two reasons.

449. First, Claimants cite a deposition in which the expert agreed that DRP improved certain aspects of the environment in La Oroya.[724] Claimants, however, omit that Mr. Matson's statements compared Centromín's performance to DRP's performance *after* the PAMA Period, when DRP had implemented its fugitive emissions projects.[725] These statements are therefore irrelevant to DRP's standards and practices during the PAMA Period.

450. Second, Claimants' use the Matson deposition to mislead the Tribunal. For example, Claimants' attorney asked Mr. Matson whether "the air quality in La Oroya [was] better in September 1996 or June of 2009."[726] Claimants highlight in their Reply that Mr. Matson responded that the air quality was better in June 2009. Claimants must be confused; DRP ceased operations on 3 June 2009.[727] If the Facility did not operate that month, air quality

[723] Reply, ¶ 11.
[724] Reply, ¶ 11 (*citing* **Exhibit C-235 (Treaty)**, Deposition of Jack Matson (Volumes I & II, January 26–27, 2021), pp. 240:15–19, 240:20–24, 243:23–244:11, 244:15–22).
[725] **Exhibit C-235 (Treaty)**, Deposition of Jack Matson (Volumes I & II, January 26–27, 2021), pp. 240:15–19, 240:20–24, 243:23–244:11, 244:15–22.
[726] **Exhibit C-235 (Treaty)**, Deposition of Jack Matson (Volumes I & II, January 26-27, 2021), p. 240:15–19.
[727] Neil Witness Statement, ¶ 42.

necessarily would have improved. Claimants' focus on this line of questioning is deceptive and a waste of the arbitral process.

Claimants' argument based on a 1996 business plan.

451. Claimants argue that DRP's practices were not less protective of the environment because, according to them, "Centromín was the one that developed a business plan to substantially boost production using dirtier concentrates."[728] This argument is baseless for two reasons.

452. First, Claimants cite in support of this assertion a 1996 business plan proposed by mining consultants with no environmental expertise.[729] The plan was not commissioned by Centromín, but by COPRI (the Commission for the Promotion of Private Investment) and it was meant only to "be used as a starting point and basis for negotiation of the investment commitment needed to achieve the financial results predicted."[730]

453. Second, Claimants mischaracterize the report, which does not state that DRP should "boost production using dirtier concentrates," as they allege. Rather, it states that "[t]he treatment of dirty concentrates is profitable for La Oroya and should continue after privatization."[731] This statement reflects that the Facility's copper circuit is unique because it can process copper concentrates with high amounts of impurities, including lead.[732] But there is a limit to how much lead the copper circuit can process.[733] DRP surpassed that limit by introducing up to 60% more lead in the copper circuit, which dramatically increased fugitive lead emissions from the copper converters.[734] The 1996 business plan did not propose such an irresponsible action.

454. Third, Claimants omit a key fact: a central element of Centromín's plan was to modernize the Facility and implement emissions controls that could better handle dirty concentrates.[735] DRP ignored this plan. It fed dirtier concentrates into the Facility and

[728] Reply, fn. 49.
[729] **Exhibit R-184**, Metaloroya Business Plan (1997–2011), La Oroya Metallugical Complex, June 1996.
[730] **Exhibit R-184**, Metaloroya Business Plan (1997–2011), La Oroya Metallugical Complex, June 1996, p. 18.
[731] **Exhibit R-184**, Metaloroya Business Plan (1997–2011), La Oroya Metallugical Complex, June 1996, p. 7.
[732] Dobbelaere Second Expert Report, ¶¶ 13, 15.
[733] Dobbelaere Second Expert Report, ¶ 189.
[734] Dobbelaere Second Expert Report, ¶ 189.
[735] *See* Dobbelaere First Expert Report, ¶¶ 85, 120 ("Centromin plan: in 1996, SNC devised a way for "clean" concentrates to be dried, with their clean gases going through the main stack, while "dirty" concentrates would be treated in a new roaster, with the gases going to the acid plant to be cleaned before going through the main stack."); **Exhibit R-184**, Metaloroya Business Plan (1997–2011), La Oroya Metallugical Complex, June 1996, pp. 22–23.

increased production before modernizing the Facility or implementing any substantial emissions controls. This decision increased emissions and exacerbated the public health crisis in La Oroya.

(vii) The Missouri Plaintiffs' claims and injuries arise directly from DRP's high lead and SO_2 emissions

455. DRP is responsible for injuries that "arise directly" from its acts that are the result of inferior standards and practices.[736] Claimants cannot escape the fact that the Missouri Plaintiffs' claims and injuries arise directly from DRP's high levels of lead and SO_2 emissions, which in turn result from the inferior standards and practices set forth above. Claimants concede that the dose of lead and SO_2 determines the impact on public health.[737] And the dose increased significantly under DRP's operations, as the production data, the data produced by DRP's own consultants, and the air monitoring data each independently show. Ms. Proctor's expert report confirms this causal link between DRP's emissions and the public health crisis in La Oroya.

456. Claimants declined to respond to Ms. Proctor's report. According to them, Ms. Proctor's conclusions strain common sense because the "objective, credible and Activos Mineros certified data indisputably shows a decrease in emissions," and "[l]ess emissions mean a corresponding improvement in public health."[738]

457. Claimants' attempt to discredit Ms. Proctor's conclusion is baseless.[739] They ignore the relevant and reliable data and rely instead on the main-stack data, which is flawed and incomplete. Claimants' reliance on main-stack data to claim a decrease in emissions and a corresponding improvement in public health is misleading. As explained above, the main-stack data is not conclusive, as it does not reflect the actual emissions from the Facility, and it is not credible, as it is based on unreliable measurements. Claimants also dismiss the air monitoring data, which is more representative of the Missouri Plaintiffs' exposure, and which shows that the levels of lead and SO_2 increased under DRP's operations.

[736] **Exhibit R-001**, STA & Renco Guaranty, Clause 5.3(a)
[737] Reply, ¶ 113.
[738] Reply, ¶ 114.
[739] Reply, ¶¶ 112–114.

458. There is one set of data whose reliability is undisputed for the entire period from 1995-2007: the production data. This data set was compiled by experts and approved by Centromín and DRP's senior management,[740] and it shows that DRP increased emissions of lead and SO_2. Ms. Proctor has relied on this conclusion to evaluate the impact of DRP's actions on the Missouri Plaintiffs' health.

459. Ms. Proctor has likewise relied on Mr. Dobbelaere's meticulous analysis of the projects that DRP completed during the PAMA Period, none of which substantially affected emissions. According to her,

> "[i]t is not a health-protective practice, or an improvement, to increase lead production and use dirtier copper concentrates when the fugitive emissions from the lead furnace and copper roasters are uncontrolled and the equipment is in such poor condition (Figure 6, left panel). Thus, it is easy to see why, for 9 years while DRP operated the CMLO (1997–2006), the fugitive lead emissions increased due to increased production and equipment that is clearly in need of repair based on Mr. Connor's picture. These fugitive emissions contaminated the air, contaminated the environment, and poisoned the community."[741]

460. By refusing to engage with Ms. Proctor's analysis, Claimants concede the point: The Missouri Plaintiffs' claims and injuries arise directly from DRP's actions.

b. The Missouri Plaintiffs' injuries arise directly from DRP's noncompliance with its PAMA obligations

461. Clause 5.3(b) of the STA allocates responsibility to DRP for damages and claims of third parties arising from DRP's noncompliance with its PAMA obligations. DRP failed to comply with its PAMA obligations in two ways: (i) it failed to complete the Sulfuric Acid Plant Project; and (ii) it increased production and used dirtier concentrates.

<u>DRP's failure to complete the Sulfuric Acid Plant Project</u>

462. In the Counter-Memorial, Respondents demonstrated that DRP did not comply with its obligation under the PAMA to complete the Sulfuric Acid Plant Project by 13 January

[740] Dobbelaere Second Expert Report, ¶¶ 200, 212-213, 215.
[741] Proctor Second Expert Report, p. 24.

2007.[742] Respondents' Peruvian law expert showed that the extensions beyond the PAMA period to complete the project do not exculpate DRP's "noncompliance with [its] PAMA obligations" within the meaning of Clause 5.3 of the STA.[743] Experts Wim Dobbelaere and Deborah Proctor, for their part, showed that the Missouri Plaintiffs' injuries arose from DRP's failure to build the sulfuric acid plants.[744] Accordingly, Clause 5.3(b) allocates to DRP responsibility for the Missouri Plaintiffs' claims.

463. Claimants did not respond to Respondents' demonstration that DRP's failure to complete the Sulfuric Acid Plant Project was not in compliance with the PAMA, and that thus responsibility for the Missouri Plaintiffs' damages and claims must be allocated to DRP. Mr. Connor, for his part, agrees with Respondents' experts that the Sulfuric Acid Plant Project was the critical PAMA project aimed at reducing lead and SO_2 emissions. According to Mr. Connor,

> "sulfuric acid plants entail two principal components to reduce air emissions: first, metal particulates, including lead, arsenic, etc., must be thoroughly removed and, second, the filtered gas is conditioned to extract and recover sulfuric acid. Removal of particulates, including lead, is a prerequisite for acid treatment and recovery. Consequently, in this regard, the acid plants addressed both aspects of the air pollution problems identified in the pre-PAMA studies—excessive emissions of both particulates and SO2."[745]

It is therefore undisputed that compliance with the Sulfuric Acid Plant Project would have curtailed the problem of excessive emissions in La Oroya.

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[742] Contract Counter-Memorial, § IV.A.2.d. *See also,* Alegre Second Expert Report, ¶ 39; **Exhibit AA-040**, Informe Nº118-2006-MEM-AAM, p. 79 (DRP's "non-compliance with Project No. 1 occurred 'due to its lack of foresight and compliance with the milestones that the company should have already met' in 2005 when it requested the extension. On the date of making the request 'it [wa]s materially impossible for said company to comply with this obligation within the term established for the execution of the PAMA.'"(Original in Spanish: "*El incumplimiento del Proyecto N°1 se produjo 'por la falta de previsión y cumplimiento de los avances que la empresa ya debiera haber realizado' al año 2005 cuando solicitó la prórroga y que a la fecha de resolver lo solicitado 'resulta materialmente imposible que dicha empresa pueda cumplir con esta obligación dentro del plazo establecido para la ejecución del PAMA*"."[742]

[743] Alegre First Expert Report, ¶¶ 50-51, 53-55. *See also*, Alegre Second Expert Report, ¶¶ 57-63.

[744] Dobbelaere First Expert Report, ¶¶ 51-54, 66-67, 287-300; Proctor First Expert Report, p. 49.

[745] Connor Supp. Report, p. 11.

464. Conversely, DRP's noncompliance with that project caused excessive emissions in La Oroya. DRP is thus responsible for damages attributable to those emissions under Clause 5.3(b) of the STA.

DRP's decision to increase production and use dirtier concentrates.

465. DRP deliberately pushed production beyond the levels envisaged in the PAMA, as its own internal documents prove.[746]

> ***2.2.2 Production Goals***
>
> The following table shows the comparison of production goals for the four major departments of the complex. For year 10 the PAMA and Knox Plan production is shown for comparison. The MP is higher than both and should therefore generate additional revenue from the margins on the increased production.
>
> **PRODUCTION BASIS TABLE**
>
> **1000 MTPY**

Year	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007		
										PMP	KNOX	PAMA
*Cu	66,5	77,5	82,5	87,5	87,5	87,5	87,5	87,5	87,5	87,5	80,7	70
Pb	110	119	125	125	125	125	125	125	125	125	114,7	100
Zn	70	75	80	80	80	80	80	80	80	80	71,9	70
Ag	1	1,2	1,5	1,5	1,5	1,6	1,7	1,8	1,9	2	0,9	0

> *Copper production includes 7,500 tpy blister copper.

466. DRP's overproduction and use of dirtier concentrates caused the Facility's emissions to skyrocket, moving the Facility's environmental performance away from the PAMA's primary goal and undermining the emissions targets set in PAMA Project No. 1.

467. The PAMA's primary goal was to reduce emissions of harmful substances into the environment. This goal is clear from the text of the PAMA itself, which states that "the purpose of this plan is to reduce the concentration of contaminants resulting from metallurgical operations and discharges to the environment to comply with the maximum permissible limits legally established by the Ministry of Energy and Mines."[747] It is also confirmed by both parties' experts. Ms. Alegre, Respondents' environmental law expert, and Mr. Connor, Claimants' environmental expert, both agree that the PAMA's objective

[746] **Exhibit WD-015**, 10 Year Master Plan Report, Fluor Daniel, September 1998, Section 2.2.2, p. 7.
[747] **Exhibit C-020**, PAMA 1996 Report, Section 5.1, p. 149.

was to mitigate and prevent environmental harms by modernizing the Facility and reducing emissions.[748]

468. DRP acted contrary to the PAMA's primary goal during the PAMA Period. Instead of reducing emissions of harmful substances into the environment, DRP increased them by ramping up production and using dirtier concentrates without implementing sufficient improvements to offset the increased emissions. DRP also repeatedly fell short of its environmental investment obligations, unlawfully prolonging the Missouri Plaintiffs' exposure to the increased emissions. These actions establish DRP's noncompliance with the PAMA itself.[749] As Ms. Alegre explains,

> "to act in accordance with the law and the PAMA, DRP had to comply with: (i) the legal obligations that were in force at the date of approval of the PAMA; (ii) the obligations derived from the PAMA; and (iii) the objectives of the legal norms and the PAMA. DRP did not comply with Project No. 1 of the PAMA and operated the CMLO for more than ten years, discharging significant volumes of pollutants into the air, failing to meet its objectives of improving air quality and breaching its legal obligation to adopt measures to prevent damage to the environment and, therefore, to people's health."[750]

469. DRP's overproduction and use of dirtier concentrates also thwarted DRP's compliance with PAMA Project No. 1, which was the main project aimed at reducing the Facility's emissions. Project No. 1 stated that its purpose was "to reduce the concentration of contaminants resulting from metallurgical operations and discharges to the environment to comply with the maximum permissible limits legally established by the Ministry of Energy and Mines."[751] It set specific targets for reducing the Facility's emissions, including an 89% reduction in stack and fugitive emissions.[752] DRP did just the opposite and drastically increased fugitive emissions, as discussed above, making it impossible to reach the

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[748] Alegre Second Report ¶ 42; First Expert Report of John Connor, ¶ 9.
[749] Alegre Second Expert Report, ¶ 20.
[750] Alegre Second Expert Report, ¶ 20 (in Spanish: "…*para conducirse conforme a la ley y al PAMA, DRP debía cumplir con: (i) las obligaciones legales que estuvieran vigentes a la fecha de aprobación del PAMA; (ii) las obligaciones derivadas del PAMA; y (iii) los objetivos de las normas legales y del PAMA. DRP no cumplió con el Proyecto N°1 del PAMA y operó el CMLO durante más de diez años vertiendo al ambiente importantes volúmenes de contaminantes al aire, incumpliendo sus objetivos de mejora de la calidad del aire e incumpliendo su obligación legal de adoptar medidas para evitar la afectación ambiental y, por ende, a la salud de las personas*.")
[751] **Exhibit C-020 (Contract)**, PAMA 1996 Report, Section 5.4.1, p. 165.
[752] **Exhibit C-020 (Contract)**, PAMA 1996 Report, Section 5.4.1, pp. 177–178.

emissions targets. The Missouri Plaintiffs have asserted damages and claims that result directly from these actions.

470. The text of the STA confirms that responsibility must be allocated to DRP for damages and claims by third parties that arise from DRP's noncompliance with the PAMA's emission reduction goals. Clause 5.3(b) provides, in relevant part, that DRP will assume responsibility for damages and claims by third parties attributable to DRP's noncompliance with its obligations contained in the PAMA and in Clause 5.1. Under Clause 5.1, DRP must "compl[y] with the obligations contained in METALOROYA'S PAMA, and its eventual amendments approved pursuant to the legal provisions, which have been or may be issued by the relevant authority, ***concerning the effluents, emissions and waste generated by [. . .] [t]he smelting and refining facilities of the COMPANY***" (emphasis added). DRP, however, did not comply with the obligations in its PAMA concerning the emissions generated by the Facility. Therefore, under Clause 5.3, DRP must assume responsibility for all damages and claims by third parties that are attributable to its noncompliance, including those of the Missouri Plaintiffs.

4. The STA allocates responsibility to DRP for the damages and claims of the Missouri Plaintiffs that are a result of DRP's operations after the PAMA Period, between 2007 and 2009

471. In the Counter-Memorial, Respondents showed that the Missouri Plaintiffs' claims and the expert testimony submitted in this arbitration make clear that at least some of the Missouri Plaintiffs' damages and claims resulted from DRP's operations between January 2007 (when the PAMA Period lapsed) and June 2009 (when DRP ceased operations).[753] Given that Claimants' pleadings provide virtually no information about the individual Missouri Plaintiffs and their claimed damages, it is impossible to disaggregate the harms DRP caused during the post-PAMA period from the harms it caused during the PAMA Period. Claimants bear the burden of carrying out that task, which they have now failed to do twice. Respondents therefore reiterate that Claimants have failed to establish their claim that Respondents are responsible for the Missouri Plaintiffs' claims.

[753] Contract Counter-Memorial, § IV.A.2.e.

C. Centromín and Activos Mineros attended to their environmental obligations, although they were delayed by DRP's failure to implement its PAMA.

472. Claimants allege in their Prayer for Relief that Centromín and Activos Mineros breached the STA and the Peru Guaranty by failing to remediate the soil in and around La Oroya.[754] Claimants do not put forth any substantive argument on this claim, instead leaving that task to Dr. Bianchi. Dr. Bianchi, for his part, misrepresents the content and import of Centromin's obligations under the PAMA and overlooks how DRP contributed to the delay in their implementation.

473. Under PAMA Project No. 4, Centromín committed to revegetating the areas affected by the Facility's emissions in La Oroya.[755] It, however, had no obligation to remediate the soil, i.e., no obligation to remove lead and other contaminants from the soil. Neither the PAMA nor the "Schedule of Investments for the Recuperation of the Affected Area Project" included any remediation obligation for Centromín.[756] This is the second time Claimants raise this baseless argument,[757] and they cannot point to any document where such commitment is included.

474. Mr. Bianchi contends that the MEM identified Centromín's PAMA obligation to remediate the soil in the 2003 Terms of Reference —an annex to a report prepared by the MEM — because in that document the MEM states in passing that the "Centromin PAMA includes the remediation of the areas impacted by dust and gas emissions from the smelter attributable to Centromín's activities."[758] This is inconsequential. As explained by Ms. Alegre, nowhere in the document does the text of the PAMA state the need to remove lead and other substances from the soil (i.e., the need to remediate).[759] The MEM made this clear in March 2004 when, as it evaluated Centromin's PAMA completion, it stated that: "[t]he modification of the PAMA approved by the authority [in 2001] does not hold

[754] Contract Reply Memorial, ¶ 193.
[755] *See* **Exhibit C-020 (Contract)**, PAMA Report, Project No. 4, PDF pp. 205–213.
[756] *See* **Exhibit C-020 (Contract)**, PAMA Report, Project No. 4, PDF pp. 187, 205–213.
[757] Contract Memorial, ¶ 104.
[758] Bianchi Second Expert Report, § 2.1, at 3.
[759] *See* Alegre First Report, Section VI and Alegre Second Report, Section VI. *See* also, Contract Counter-Memorial, § 788.

[Centromin] liable for soil remediation, since it only mentions a revegetation program . . .."[760] This should be the end of the discussion.

475. As Respondents have explained, in 2004 the MEM required Centromín to undertake a separate soil remediation project in La Oroya precisely because Centromín was not obligated to remediate the soil under its PAMA.[761] As Ms. Alegre explains, this remediation obligation was separate from and did not constitute a part of Centromín's PAMA.[762] Indeed, when the MEM required Centromín to remediate the soil in La Oroya, the MEM had already issued a resolution confirming that Centromín had completed its obligations under the PAMA,[763] and, by 2021, Activos Mineros had completed 92% of urban remediation projects and 45% of rural remediation projects.[764]

476. Further, as explained by Respondents' experts,[765] and as contemporaneously confirmed by the MEM,[766] it was reasonable for Centromin to delay the implementation of the revegetation project until after DRP could better control the Facility's unbridled emissions. Thus, any delay in Centromin's compliance with its PAMA was due to DRP's persistent delay in implementing its own.

477. Respondents thus have complied with their obligations as required and have not breached either the STA or the Peru Guaranty.

D. Claimants' Peruvian law claims fail on a full liability analysis

478. Were the Tribunal to find that it has jurisdiction over Claimants' Peruvian law claims and that these claims do not fail at the threshold (*quod non*), they would nevertheless fail on a full liability analysis.

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[760] **Exhibit R-290**, Report No. 144-2004-MEM-DGM-FMI/MA, 24 March 2004, p. 2.
[761] *See* Contract Counter-Memorial, ¶ 789 citing **Exhibit R-290**, Report No. 144-2004-MEM-DGM-FMI/MA, 24 March 2004, pp. 2–3.
[762] *See* Contract Counter-Memorial, ¶ 790 citing Alegre First Report, §VI.
[763] *See* Contract Counter-Memorial, ¶ 790 citing Alegre First Report, § VI.
[764] *See* Contract Counter-Memorial, ¶¶ 804-809.
[765] *See* Alegre First Report, Section VI, Alegre Second Report Section VI and Proctor Second Report, Section 3.10. *See* also, Contract Counter-Memorial, ¶¶ 792-803.
[766] **Exhibit R-290**, Report No. 144-2004-MEM-DGM-FMI/MA, 24 March 2004, p. 2 ("…that would be carried out once DRP concludes with the implementation of the PAMA in 2007...").

1. Claimants have failed to meet their burden of proof on the merits of their Peruvian law claims as a whole

479. As explained above, it is axiomatic that Claimants have the burden of proof not only on jurisdiction but also on the merits. In short, Claimants fail to meet their burden of proof on the merits of all Peruvian law claims.

480. To start, Claimants fail to meet their burden of proof on their pre-contractual liability, unjust enrichment, and contribution claims. Claimants provide no response to Respondents' arguments regarding the former's failure to meet their burden of proof on those claims. They also refuse to articulate the claims in their Reply. Accordingly, Claimants fail to meet their burden of proof on these claims for the same reasons explained in Section V.C.1 of the Counter-Memorial.

481. Next, Claimants fail to meet their burden of proof on a summarily mentioned "restitution" claim. The word "restitution" appears in Claimants' Reply.[767] Claimants did not present that claim in their Memorial, and it is thus extemporaneous.[768] In any event, despite the reference, Claimants do not articulate the claim. They have thus abjectly failed to meet their burden of proof on any restitution claim.

482. Finally, Claimants fail to meet their burden of proof on all their Peruvian law claims because their strict-liability theory fails at the threshold for three reasons. First, Claimants' strict liability foundation is based on the false premise that the Missouri Plaintiffs filed a claim under Article 1970 of the Peruvian Civil Code. In their Reply, Claimants state that "[t]he Missouri Plaintiffs alleged Article 1970 as a theory of liability against Claimants."[769] They informed Dr. Payet of this as well:

> "He sido informado que los Demandantes en los Litigios De Missouri basan su reclamo en el artículo 1970 del Código Civil peruano. No he analizado el fondo de los Litigios de Missouri, pero, asumiendo dicha base, como será explicado, el titular del riesgo es

[767] *See* Reply, ¶ 16.
[768] Claimants provide no explanation for why they could not raise this claim in their Memorial, where they are supposed to present their legal argument and the evidence on which they base their claims. *See* Procedural Order No. 1, clause 6.2; *see* UNCITRAL Arbitration Rule, article 20(4). Subsequent pleadings are supposed to be limited to responding to the prior pleading, not raising new claims. *See* Procedural Order No. 1, clause 6.3; *see* UNCITRAL Arbitration Rule, articles 21(2) ("The statement of defence shall reply to the particulars (b) to (e) of the statement of claim"). Article 21(2) applies *mutatis mutandis* to further written submissions under article 24.
[769] *See* Reply, ¶ 25.

> el llamado a compensar los daños de ahí generados."[770] (The cited sentences are absent from the English translation of Dr. Payet's expert report.)

So, Dr. Payet admits that his strict liability theory is based on the premise that the Missouri Plaintiffs based their claim on Article 1970.

483. The premise is false. Only some of the Missouri Plaintiff's claims are for strict liability, and none has been filed under Peruvian law.[771] In fact, despite *the Renco Defendants'* attempts to argue otherwise, the Missouri courts have rejected the application of Peruvian law.[772] With the collapse of the foundation for Dr. Payet's theory, so collapses the edifice.

484. Second—even accepting the applicability of the revised theory—Claimants *affirmatively refuse* to argue that the elements of strict liability have been established. To recall, establishing a claim of strict liability requires proving the following elements: (i) an injury (ii) caused by (iii) a dangerous or risky activity or a good that is dangerous or risky.[773] They neither affirmatively argue, nor present evidence of, any element. The best Claimants can muster is "[i]t is . . . most definitely worth reexamining the applicability of Article 1970."[774] For Claimants' second written submission on merits and jurisdiction, that assertion is offensively insufficient.

485. Claimants articulate their strict liability theory in paragraphs 24 to 28 of their Reply, but there is nothing on injury or causation. It seems that Claimants are relying on the Missouri Plaintiffs' allegations and evidence. But,

- allegations and evidence in another proceeding are not evidence in this proceeding;
- the Missouri Plaintiffs' allegations and evidence are not those of Claimants;

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[770] Payet Second Expert Report, ¶ 68.
[771] *See generally* **Exhibit R-294**, Amended Complaint for Damages – Personal Injury, Document No. 474, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 21 February 2017; **Exhibit R-307**, Complaint, *Father Chris Collins et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:15-cv-01704-RWS), 13 November 2015.
[772] **Exhibit R-308**, Order on Motion to Dismiss, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 16 October 2018, pp. 17–27; **Exhibit R-309**, Order on Motion to Dismiss, *Father Chris Collins et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:15-cv-01704-RWS), 2 November 2019, pp. 11–14.
[773] *See* Varsi Second Expert Report, ¶ 5.32; **RLA-062**, Peruvian Civil Code, article 1970.
[774] *See* Reply, ¶ 28.

- the Missouri Plaintiffs do not bear Claimants' responsibility of meeting their burden of proof before the Tribunal; and

- the Missouri Plaintiffs are not (i) claiming for strict liability under Article 1970 (ii) against Activos Mineros, so what they must prove and against whom they must prove it is completely different than what is required by Claimants.

In essence, Claimants are proposing that the Tribunal apply some fantastical sort of *res judicata* on the first two elements of strict liability, without a judgment, without *eaedem personae*, without *eadem res*, etc.

486. On the last element, Claimants *affirmatively argue against its existence*. In footnote 15 of their Reply, Claimants "*do not concede* that the operations of the Complex constitute a risky or dangerous activity within the ambit of Article 1970".[775] Claimants' refusal to "concede" is, in truth, a refusal to affirmatively argue the final element of strict liability.

487. In sum, Claimants refuse to even attempt to establish the existence of strict liability.

488. Accordingly, all of Claimants' Peruvian law claims fail because Claimants have failed to meet their burden of proof.

2. Each individual Peruvian law claim is meritless

489. Each individual Peruvian law claim is itself meritless.

a. Claimants' pre-contractual liability claim is meritless

490. Assuming that the Tribunal considers that Claimants' pre-contractual liability claim remains live (and it should not[776]), Claimants provide no response.[777]

b. Claimants' subrogation claim is meritless

491. For subrogation to operate under Peruvian law, there must be (i) a debt owed by a debtor to a creditor, (ii) a payment by a third-party of the debt to the creditor, and (iii), in this case, a legitimate interest to pay another's debt.[778] The first element, the original debtor-creditor

[775] *See* Reply, fn. 15 (emphasis added).
[776] Pre-contractual liability is not referenced anywhere in the Reply/Rejoinder.
[777] Respondents invite the Tribunal to review § V.C.2 of the Contract Counter-Memorial, which explains that Claimants' pre-contractual liability claim is meritless because Claimants: (i) do not identify its elements or explain which facts meet which elements; and (ii) have not paid any damages.
[778] *See* **RLA-062**, Peruvian Civil Code, articles 1260, 1261(2); Varsi First Expert Report–Contract, ¶¶ 8.31–8.33.

relationship, is composed by (under Claimants' revised theory) the elements of strict liability under Peruvian law: (i) an injury (ii) caused by (iii) a dangerous or risky activity or a good that is dangerous or risky.[779] If the Tribunal were to conduct a full liability analysis of Claimants' subrogation claim, it should find Respondents not liable.

492. The first element is not met. There has been no injury caused by Activos Mineros conducting a dangerous or risky activity. Causation is not met, because, as explained above, the Missouri Plaintiffs' claims arise from injuries caused after the sale of the Complex. As Professor Varsi explains, under Article 1970, the strictly responsible party is the party who *factually* causes the injury.[780] In this case, that would be Metaloroya or DRP, or, if the Missouri Plaintiffs succeed on their direct liability claims, it would be some or all the Renco Defendants. It could not be, however, Activos Mineros.

493. Moreover, given Claimants' failure to affirmatively argue the existence of injury and the existence of a dangerous or risky activity or a good that is dangerous or risky, Respondents will not respond, as Claimants may use any response to prejudice the Missouri Plaintiffs.

494. The second element is not met. Claimants have not paid any debt.

495. The third element is not met, as Claimants do not have a legitimate interest in paying the debt. Claimants argue that they have a legitimate interest under Article 1260(2) of the Peruvian Civil Code to pay what they allege is Respondents' debt.[781] As Professor Varsi explains, payment because of a legitimate interest under Article 1260(2) means the payment of another's debt, when there is no obligation to effect payment, to protect the payer's interests.[782]

496. Here, Claimants would not be a third-party to a debtor-creditor relationship if they paid damages because, if the Missouri courts order them to pay, it would be based on a finding that *Claimants—not some other entity—are liable.* To be crystal clear, in a United States court, you cannot be held liable if you are not liable under the law. That is the point of court. No citation is needed. Here, if Claimants are found liable in the Missouri

[779] *See* Varsi Second Expert Report, ¶¶ 5.32, 5.23; **RLA-062**, Peruvian Civil Code, article 1970.
[780] *See* Varsi Second Expert Report, ¶¶ 5.34–5.41.
[781] *See* Reply, ¶¶ 19–20.
[782] *See* Varsi Second Expert Report, ¶ 5.108.

Litigations, it is because they breached a legally binding obligation, and they would be held liable for (and only for) a breach of that legally binding obligation.

497. If Claimants' argument is that payment would be for Respondents' debt because Activos Mineros retained responsibility for that debt under the STA, that would be incorrect. For the reasons explained above, Activos Mineros did not retain responsibility for the PAMA Period claims in the Missouri Litigations under Clause 6.2 of the STA. In short, the claims in the Missouri Litigations are not due to the Company's activities, and if they were, they would be the Company's responsibility under Clause 5.3. The same is true for the Post-PAMA Period claims, as explained above, Activos Mineros did not retain responsibility for the Post-PAMA Period claims under Clause 6.3.[783]

498. Further evidence that Claimants have no legitimate interest under Peruvian law is that, if they eventually pay damages to the Missouri Plaintiffs, it will be pursuant to a court order. As Professor Varsi explains, under Peruvian law subrogation occurs when a third-party *chooses* to pay without any obligation to do so, to protect its interests.[784] Here, any payment of damages would not be the result of a choice, but rather a legal obligation arising from a court order. No payment of damages could therefore be the result of a legitimate interest.

499. For the foregoing reasons, Claimants' subrogation claim fails under a full liability analysis.

c. Claimants' contribution claim is meritless

500. Claimants provide no response.[785]

d. Claimants' unjust enrichment claim is meritless

501. Claimants provide no response.[786]

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[783] To recall, Claimants do not even argue that responsibility for the Post-PAMA Period claims were retained by Activos Mineros under clause 6.3 for purposes of the subrogation claim. As Table 3 above shows, clause 6.3 regulates Centromin's responsibility for claims arising after the legal period of the PAMA. Claimants make no argument as to how such injuries are "related to" the Contract because they assume—contrary to fact—that all the injuries arise during the PAMA period.

[784] *See* Varsi Second Expert Report, ¶ 5.113.

[785] In § V.C.4 of the Contract Counter-Memorial, Respondents explain that Claimants' contribution claim is meritless because Claimants: (i) do not identify its elements or explain which facts meet which elements; (ii) expressly disclaim any responsibility for any injury to the Missouri Plaintiffs; and (iii) have not paid any damages.

[786] In § V.C.5 of the Contract Counter-Memorial, Respondents explain that Claimants' unjust enrichment claim is meritless because Claimants have not established the elements of the claim.

E. Claimants' minimum standard of treatment claim fails on a full liability analysis

502. Claimants provide no response.[787]

[787] As Respondents detail in § V.D of the Contract Counter-Memorial, Claimants' minimum standard of treatment claim is so deficient that it is meritless.

V. PRAYER FOR RELIEF

503. For the foregoing reasons, Respondents respectfully requests that the Tribunal:

a. Dismiss all of Claimants' claims for lack of jurisdiction; or

b. Dismiss all of Claimants' claims based on alleged violations of the STA for lack of merit; and

c. Dismiss all of Claimants' claims based on alleged violations of the Peruvian Civil Code for lack of merit; and

d. Dismiss all of Claimants' claims under customary international law for lack of merit.

504. Additionally, Respondents request an order as soon as practical from the Tribunal that precludes Claimants from raising new arguments regarding jurisdiction in their subsequent written submission or the hearing that could have been raised in their Reply.

505. With regard to Claimants' subrogation claim, Respondents request that the Tribunal rule that Claimants have failed to meet their burden of proof on the timeliness of the claim, or, in the alternative, that all claims in the Missouri Litigations that were or could have been filed by 10 November 2014 are time-barred, and allow Respondents to identify the claims subject to the time-bar in the quantum phase of the Contract Case (if any).

506. Given the frivolous nature of Claimants' claims and Respondents' "serious and substantial"[788] jurisdictional objections, Respondents further request that the Tribunal order Claimants to pay all of Respondents' costs, including the totality of the arbitral costs that Respondents incurred in connection with this proceeding, as well as the totality of its legal fees and expenses.

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

Respectfully submitted,

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