

PCA CASE No. 2019-46

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

- and -

THE UNCITRAL ARBITRATION RULES 2013

THE RENCO GROUP, INC.
CLAIMANT,

v.

THE REPUBLIC OF PERU
RESPONDENT.

- and -

PCA CASE No. 2019-47

IN THE MATTER OF AN ARBITRATION
BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH THE STOCK
TRANSFER AGREEMENT BETWEEN
EMPRESA MINERA DEL CENTRO DEL PERU S.A. AND DOE RUN PERU S.R. LTDA.,
DOE RUN RESOURCES, AND RENCO, DATED 23 OCTOBER 1997, AND
THE GUARANTY AGREEMENT BETWEEN PERU AND DOE RUN PERU S.R. LTDA,
DATED 21 NOVEMBER 1997

- and -

THE UNCITRAL ARBITRATION RULES 2013

THE RENCO GROUP, INC. AND THE DOE RUN RESOURCES, CORP.,
CLAIMANTS,

v.

THE REPUBLIC OF PERU AND ACTIVOS MINEROS S.A.C.,
RESPONDENTS.

CLAIMANTS' REJOINDER ON JURISDICTION

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The Renco Group, Inc., the claimant in the Treaty case (“Renco”), and The Renco Group, Inc., and The Doe Run Resources Corp., the claimants in the Contract case (“Renco” and “DRRC,” and altogether, “Claimants”), file this Rejoinder on Jurisdiction and would show the Tribunal as follows:

INTRODUCTION

1. Respondents attack the lack of heft of Claimants’ submissions as a lack of substance. Respondents attack Claimants’ decision not to repeat arguments previously made as concessions. Claimants are confident, however, that the Tribunal will judge Claimants’ positions on the merits, not on page count. Claimants have met their jurisdictional requirements, and this case should be decided on the merits.
2. A roadmap of the jurisdictionally based issues, and short statements of Claimants’ positions, are as follows:

Treaty Arbitration	No	Issue	Position
	1.	Whether Renco has made a <i>prima facie</i> case for violation of fair and equitable treatment (“FET”)?	Renco has established such a <i>prima facie</i> case. Peru violated its FET obligations on two occasions – one in connection with Peru’s 2009 Extension, and a second in connection with DRP’s Plan of Reorganization.
	2.	Whether Renco has made a <i>prima facie</i> case for substantial denial of justice?	Peru does not contest the Tribunal’s jurisdiction to determine the merits of this claim.
	3.	Whether Renco has made a <i>prima facie</i> case for the procedural denial of justice?	Renco is no longer pursuing its procedural denial of justice claim, opting instead to focus on its substantive denial of justice claim.
	4.	Whether Renco has made a <i>prima facie</i> case for direct expropriation?	Renco agrees that, under these facts, direct expropriation did not occur, and thus Renco is no longer pursuing this claim.
	5.	Whether Renco has made a <i>prima facie</i> case for indirect expropriation?	Renco has established such a <i>prima facie</i> case. Peru’s requirements in connection with the 2009 Extension and DRP’s Plan of Reorganization amounted to indirect expropriation.

Contract Arbitration	1.	Whether Renco and DRRC have standing as a direct party of the STA to assert breach of contract claims against Activos Mineros?	Renco and DRRC are parties to the STA and therefore have standing to maintain its breach of contract claims against Activos Mineros.
	2.	Whether Renco and DRRC claims should be dismissed for failure to engage in an expert determination before filing the arbitration?	Activos Mineros has waived this objection.
	3.	Whether Renco and DRRC have standing to assert breach of contract claims against Peru under the Guaranty?	Renco and DRRC are no longer pursuing this claim; their claims for breach of contract against Activos Mineros, a named Party to the STA, are sufficient.
	4.	Alternatively, whether Renco and DRRC have standing as indirect parties of the STA to enforce the arbitration agreement of the STA?	Renco and DRRC meet the test to be considered “indirect parties” to the arbitration agreement of the STA and can enforce the arbitration agreement contained in the STA against Activos Mineros.
	5.	Whether Renco and DRRC have standing to maintain a claim for subrogation under the Peruvian Civil Code against Activos Mineros in this arbitration proceeding?	Renco and DRRC meet the test to recover under the theory of subrogation and their claims are ripe for declaratory relief.
	6.	Whether Renco and DRRC have standing to maintain claims for pre-contractual liability?	Renco and DRRC are no longer pursuing this claim.
	7.	Whether Renco and DRRC have standing to maintain claims for unjust enrichment.	Renco and DRRC have standing to assert unjust enrichment.
	8.	Whether Renco and DRRC have standing to maintain claims for contribution?	Renco and DRRC have standing to seek contribution from Activos Mineros.
Miscellaneous	1.	Whether certain negative inferences should be drawn based on Renco and DRRC’s document production?	Claimants have fully complied with their obligation to produce documents and have not withheld any responsive documents from production.

THE TRIBUNAL HAS JURISDICTION OVER RENCO’S TREATY CLAIMS

3. Renco presses the following claims under the Treaty: (i) violation of fair and equitable treatment (“FET”), (ii) the substantive denial of justice, and (iii) indirect expropriation. All these causes of action are based on events occurring after the Treaty came into effect in February 2009. Peru does not contest, and thus has conceded, the Tribunal’s jurisdiction

over Renco's substantive denial of justice claim.¹ Therefore, Renco will focus its Rejoinder on the Tribunal's jurisdiction over the FET and indirect expropriation claims.

A. Stricken Pursuant to Procedural Order

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20. Stricken Pursuant to Procedural Order.
21. Stricken Pursuant to Procedural Order.
22. Stricken Pursuant to Procedural Order.

¹ Renco reserves its substantive response to arguments made by Peru in its Rejoinder for presentation at the final hearing.

23. Stricken Pursuant to Procedural Order.
24. Stricken Pursuant to Procedural Order.
25. Stricken Pursuant to Procedural Order.
26. Stricken Pursuant to Procedural Order.
27. Stricken Pursuant to Procedural Order.

B. *Indirect Expropriation Claim*

28. Under Article 10.7 of the Treaty, no Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization.² Indirect expropriation is widely understood as interference with an investment that “deprives [the investor] of the possibility to utilize the investment in a meaningful way.”³ The key factor that typically distinguishes a direct expropriation from an indirect expropriation is the extent to which an investor maintains ownership or control over its investment: if the investment has been taken completely, the taking is usually viewed as a direct expropriation; if the investment has not been taken but the state effectively neutralizes the benefit of the investment to the investor, an indirect expropriation likely has occurred.⁴
29. By this standard, the measures taken by the Peruvian authorities in respect of DRP had the effect of depriving Renco of the use and benefit of its investment and constituted measures having similar effect to expropriation.⁵ As explained above, Peru continued imposing

² See Claimant’s Memorial at ¶¶251-253.

³ *Id.*

⁴ CLA-068, *CMS Gas Transmission Company v. the Argentine Republic* (ICSID Case No ARB/01/8) (Award) (12 May 2005), at ¶188.

⁵CLA-071, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2 (The tribunal concluded that the conjunction and progression of acts performed by different governmental organs, starting from actions surrounding a denial of a permit, continuing with announcements that Venezuela would "take back" Las Crisinas, and ending with a repudiation of the MOC, had the effect of substantially depriving Crystallex of

unreasonable requirements on DRP post-February 2009. When DRP agreed to one set of unreasonable demands, Peru upped the ante, demanding more. Eventually, Peru insisted that DRP (i) spend whatever it would take (at that point the estimate was \$163 million) to complete the copper circuit reconfiguration and the sulfuric acid plant,⁶ (ii) without operating the smelters to generate any revenue in the meantime,⁷ (iii) with no grace if DRP did not complete the project in a very tight 20-month window,⁸ and (iv) make all undefined, additional upgrades to comply with environmental standards then-in effect that were so impossible to meet that Peru relaxed them significantly in 2017.⁹ With Peru unwilling to budge on any of its positions, DRP could not pay for the remaining PAMA work or its creditors, forcing the liquidation of DRP. Peru therefore engineered an indirect expropriation by destroying the value of Renco's investment.

THE TRIBUNAL HAS JURISDICTION OVER CLAIMANTS' CONTRACT CLAIM¹⁰

30. There are two ways under Peruvian law to be bound to a contract. The first, and most obvious, is when a party is a signatory to a contract.¹¹ The second is when a non-signatory is involved in the formation of the contract that contains an arbitration agreement, and the non-signatory seeks benefits from performance of the contract.¹² Under such

the economic use and enjoyment of its investment, and ultimately rendered it entirely useless, the tribunal finding and concluding that the cumulative and incremental effect of those measures was, "equivalent to [...] expropriation" under the treaty.)

⁶ See Claimants' Memorial at ¶100, Sadlowski Witness Stmt. at ¶33.

⁷ See Claimants' Memorial at ¶108.

⁸ See Claimants' Memorial at ¶¶115-117, Sadlowski Witness Stmt. at ¶47.

⁹ See Claimants' Memorial at ¶145.

¹⁰ Claimants assert contractual claims against Activos Mineros, successor-in-interest to Activos Mineros, which was a party to the STA.

¹¹ Payet Supp. Report at 34, ¶156.

¹² Payet Supp. Report at 34, ¶¶156-157.

circumstances, the Peruvian Arbitration Act Art. 14 binds the non-signatory to the arbitration agreement contained in the contract.¹³

31. International law carries this concept further, binding a non-signatory to all the rights and duties of the contract using the same test.¹⁴

A. *Renco and DRRC are explicit Parties to the STA.*

32. The question of whether Renco and DRRC are parties to the STA is a threshold matter of jurisdiction.¹⁵ There is no dispute that Renco and DRRC executed the document that contains the STA and the arbitration agreement. The question is whether their status as parties is limited to a single clause in the document or whether it extends to the whole of the document. The claimants' expert, Dr. José Payet, is a mergers and acquisitions expert. He states that this was a typical mergers and acquisitions transaction, in which the STA memorialized more than just the sale of stock in Metaloroya; it also documented the allocation of environmental liabilities after the sale in relation to Activos Mineros's spin-off of the La Oroya complex through a corporate reorganization. Since both transactions – the sale and the spin-off – are complementary and dependent on the other, the transactions should be viewed as “integrated.”¹⁶ As Dr. Payet explains:

The Metaloroya Reorganization Documents and the Contract are what are called in Civil law "*contractos conexos*" or "*contratos coligados*", linked or connected contracts, which operate jointly, as a whole, to effect a certain economic, business or legal transaction. These contracts, despite being autonomous in their existence, have a linked functionality that makes it necessary to consider them as a whole.

¹³ Third Expert Report by José Antonio Payet Puccio, November 7, 2023 (“Payet Third Report”) at 3, ¶¶iv-v.

¹⁴ See CLA-148, ICC Case No. 11160, Final Award, 1 November 2023 (The tribunal stated that the active participation of a party “in the negotiation, preparation and execution of the Contract, and in some respects in the performance under it, determines that the intention of the parties can be reasonably inferred as to the extension of said Contract”).

¹⁵ Claimants are pursuing contract and Civil Code claims only against Activos Mineros.

¹⁶ Payet Third Report at 11, ¶33.

Linked contracts “are different and autonomous transactions, linked, however, by a so-called functional nexus; it is only the practical purpose that the parties wish to achieve that binds the related transactions together.”¹⁷

33. Peru’s contracts expert, Dr. Varsi, claims the STA consists of two separate contracts: the STA and the alleged guaranty agreement contained in the Additional Clause of the executed document.¹⁸ Yet in no place does the STA make such a distinction. There is only one private document (“minuta”) and one public deed (“escritura pública”).¹⁹ Both these documents are signed by all parties, including Renco and DRRC.²⁰ Throughout the whole STA there are several references to “this contract,” *i.e.*, just one contract.²¹
34. Nor does Dr. Varsi address in either of his two reports the legal concepts of mergers and acquisitions under Peruvian law.²² The reason is simple: he has no experience with mergers and acquisitions and is therefore unable to apply standard concepts in mergers and acquisitions law to the facts of this case.
35. In addition, Dr. Varsi has also not explained why the arbitration agreement contained in the document would only be limited to the STA and would not extend to the Additional Clause.²³

B. Alternatively, Renco and DRRC are Implicit Parties to the STA’s Arbitration Clause.

36. Jurisdiction is not determined solely on whether Claimants were signatories to the STA. Even if Renco and DRRC were considered not to be explicit parties to the STA’s arbitration

¹⁷ Payet Supp. Report at 8, ¶¶29-30.

¹⁸ Peru’s Rejoinder, ¶140, Varsi First Expert Report-Contract, ¶¶4.10-4.11, 5.22.

¹⁹ Payet Third Report at 6-7.

²⁰ Payet Supp. Report at and 34, ¶144.

²¹ C-105, Stock Transfer Agreement; Payet Third Report at 9, ¶33 and 16, ¶36.

²² Payet Third Report at 15, ¶39.

²³ Payet Third Report at §V(a).

agreement, the Tribunal should examine whether Renco and DRRC, as so-called non-signatories, were implicitly parties to the STA's arbitration agreement.

37. In this regard, Peru amended its Arbitration Code to mirror international law on the joinder of non-signatories to arbitration agreements. Article 14 of the Code provides that a non-signatory can be bound to arbitrate (i) when the non-signatory actively and decisively participated in the negotiation, execution, performance, or termination of the contract applying principles of good faith; and (ii) when the non-signatory claims a benefit under the contract.²⁴²⁵
38. Although Article 14 adopts the above principles of international law to determine if a non-signatory is bound to an arbitration agreement contained in a contract, tribunals applying

²⁴ Payet Third Report at 23, ¶71.

²⁵ Activos Mineros attempts to set up a false dichotomy between Renco and DRRC's position in the U.S. litigation and this case. Activos Mineros claims that Renco and DRRC want to distance themselves from DRP in the U.S. litigation but associate themselves with DRP in this case. Not true. The test under Article 14 on whether a non-signatory can be bound to an arbitration clause is fundamentally different from the factors under Missouri law to "pierce the corporate veil." That Renco and DRRC negotiated the STA; offered to contribute capital to DRP as part of a request for an extension of the PAMA; and communicated directly with the MEM during DRP's bankruptcy proceedings are facts relevant to the Article 14 inquiry, but these facts are consistent with the legitimate role of a parent company and investor and have no adverse implications in the U.S. litigation. In short, neither position is incompatible with the other. To pierce the corporate veil under Missouri law, a claimant must prove three elements:

- (1) control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own;
- (2) such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or dishonest and unjust act in contravention of plaintiff's legal rights; and
- (3) the aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Ingham v. Johnson & Johnson, 608 S.W.3d 663, 697 (Mo.App. E.D. 2020) (CLA-149). A mere identity of shareholders, directors, or officers between two corporations is insufficient to find an identity of interests between the two entities for purposes of piercing the corporate veil. *Blanks v. Fluor Corp.*, 450 S.W.3d 308, 376 (Mo.App. E.D. 2014), citing *Mitchell v. K.C. Stadium Concessions, Inc.*, 865 S.W.2d 779, 784 (Mo.App. W.D. 1993) (CLA-150). Likewise, "merely showing that one has absolute control of a corporation does not of itself justify piercing the corporate veil." *Id.*, citing *Fairbanks v. Chambers*, 665 S.W.2d 33, 37-39 (Mo.App. W.D. 1984) (CLA-151). One seeking to pierce the corporate veil must show both complete control and improper purpose. *Id.* "Even though corporations are related, and one has complete control over the other, there can be no piercing of the corporate veil without a showing of impropriety in the establishment or use of the corporate form sought to be disregarded." *Id.*

international law use the same test to determine if non-signatories are bound to all the terms and conditions of a contract. For instance, in *Doosan Heavy Indus. & Constr. Co. v. Damietta Int'l Port Co. and Kuwait Gulf Link Ports Int'l*, ICC Case No. 21880/ZF/AYZ,²⁶ the Tribunal extended its jurisdiction to determine all rights and duties under a contract to a non-signatory, Respondent 2, for the following reasons:

- Respondent 2 was the originator of the project; it created the contracting entity specifically for the project at issue.
- Respondent 2 was the beneficiary of the concession and was a party to the agreement until assigned to Respondent 1.
- Respondent 2's employees were closely involved in the negotiation process.
- There was an overlap in personnel, with individuals involved in the project acting for both Respondents.
- Several discussions in relation to the contract's performance took place between Claimant and Respondent 2 without Respondent 1 being present.
- Respondent 2 took certain strategic decisions alongside Respondent 1.

39. Renco and DRRC meet the Article 14 test. Renco and DRRC actively and decisively participated in the negotiation of the STA. During negotiations, Kenneth Buckley acted in his capacity as the Vice President of DRRC, since DRP did not then exist.²⁷ Dennis Sadlowski, General Counsel of Renco, was the other lead negotiator and lawyer for the deal.²⁸

40. DRRC performed certain functions and offered the following assistance in aid of DRP's performance of the STA:

- DRRC performed services for DRP pursuant to inter-company agreements.

²⁶ CLA-147, *Doosan Heavy Industries & Construction Co., LTD. v. Damietta International Port Company S.A.E. and Kuwait Gulf Link Ports International*, ICC Case No. 21880/ZF/AYZ, Final Award, 15 January 2018.

²⁷ CWS-2, Buckley Witness Stmt. at ¶8.

²⁸ CWS-3, Sadlowski Witness Stmt. at ¶5.

- In connection with DRP’s efforts to obtain an extension of the PAMA from the MEM in 2009, DRRC offered to “inject US\$31 million in new capital to the company in order to reduce past due obligations with mining providers.”²⁹
- In a 2009 draft Memorandum of Understanding, DRRC proposed to increase the capital stock of DRP by contributing \$156 million and pledge collateral in support of DRP’s completion of the PAMA, among other things.³⁰
- During the bankruptcy proceedings, Renco and the MEM had several direct communications,³¹ and Renco offered to inject \$65 million into DRP as part of the restructuring plan.³²

41. It goes without saying that Renco and DRRC expected to receive indirect benefits from the STA, indirectly, through the success of their investment, and directly from Centromin’s promise to indemnify/assume liability for third party claims. Renco and DRRC would not have purchased La Oroya otherwise.³³

42. For all these reasons, the Tribunal should find that Renco and DRRC were implicitly parties to STA arbitration agreement under Article 14.

C. Any objections to an expert determination as a condition precedent to arbitration have been waived.

43. Activos Mineros objects to jurisdiction for the failure by Renco and DRRC to obtain an expert determination. The timeline relevant to this issue is as follows:

- In August 2016, Renco and DRRC sent Activos Mineros and Peru a letter inviting them to engage in the expert process and proposing a candidate to act as the neutral expert. Neither Activos Mineros nor Peru responded.³⁴
- On October 23, 2018, Renco and DRRC alleged in their Notice of Arbitration that Activos Mineros and Peru had waived the requirement of an expert determination as a condition precedent to arbitration.³⁵

²⁹ Exhibit C-55 at 90.

³⁰ Exhibit C-111, Draft Memorandum of Understanding between Peru, DRP, DRCL, and Doe Run Cayman Holding LLC, 27 March 2009.

³¹ Exhibits C-100, C-115, C-195, C-197, and C-198.

³² Exhibits C-195 and C-114.

³³ CWS-2, Buckley Witness Stmt. at ¶ 12.

³⁴ Exhibit C-242, King & Spalding LLP Letter dated August 12, 2016.

³⁵ Claimants’ Notice of Arbitration, §V.

- On January 14, 2019, in its Response to the Notice, Peru and Activos Mineros alleged that the case was unripe because the parties had not participated in the expert procedure described in Clause 5.4 of the Contract.³⁶
- On February 21, 2020, Peru and Activos Mineros requested, and subsequently obtained, a Bifurcation of Preliminary Objections. The absence of an expert determination was not one of the Preliminary Objections raised by them.³⁷
- Renco and DRRC made no mention of this issue as part of its Statement of Claim filed on February 8, 2021.³⁸
- Peru and Activos Mineros made no mention of this issue as part of its Counter-Memorial filed on April 1, 2022.³⁹
- On October 10, 2022, Renco and DRRC requested time to be built into the arbitration schedule to allow for an expert determination.⁴⁰
- On October 18, 2022, Peru and Activos Mineros responded, objecting to Renco and DRRC's request, and seeking to have Renco and DRRC's case dismissed with prejudice for failing to have obtained an expert determination before filing arbitration.⁴¹
- On October 27, 2022, Renco and DRRC withdrew their request and asserted that in any event it was Peru and Activos Mineros' burden to have obtained an expert determination, since Article 5.4 was a defense by Peru and Activos Mineros to indemnity obligations owed in Article 6.2.⁴²
- On November 16, 2022, the Tribunal issued Procedural Order No. 8, in which it stated in relevant part that:

Having considered the views expressed by the Parties in their respective communications and taking note that the Claimant's withdrawal of their request to include an independent expert determination and allocation phase in the Procedural Calendar, the Tribunal hereby dismisses the Respondent's request for summary dismissal of the Contract Case and for the bifurcation of the proceedings. The Tribunal considers that the Respondent has not established a sufficient procedural or factual basis for summary dismissal of the Contract Case at this stage. Nor does the Tribunal consider the circumstances to have changed to such a degree that warrants the reconsideration of its decision not to bifurcate the

³⁶ Response (to Arbitration) of the Republic of Peru and Activos Mineros at §III(A).

³⁷ *See generally*, Respondents' Request for Bifurcation of Preliminary Issues.

³⁸ *See generally*, Claimants' Statement of Claim.

³⁹ *See generally*, Respondents' Counter-Memorial.

⁴⁰ Exhibit C-240, Schiffer Hicks Johnson PLLC Letter dated October 10, 2022.

⁴¹ Exhibit C-239, Allen & Overy LLP Letter dated October 18, 2022.

⁴² Exhibit C-240.

proceedings as set forth in Procedural Order No. 3 in the Contract Case.⁴³

- On September 1, 2023, Peru and Activos Mineros re-urged its objection to jurisdiction on the basis of an alleged failure by Renco and DRRC to obtain an expert determination.

44. Putting aside which party had the burden to obtain an expert determination, the foregoing timeline shows that neither side saw a necessity for a non-binding expert determination before proceeding to binding arbitration. Had Activos Mineros, it would have included this issue as one of its Preliminary Objections. It did not. Renco and DRRC raised the subject in October only because they harbored suspicions that Activos Mineros would wait until the final hearing to raise this objection, and Renco and DRRC did not want a case of this importance to be decided on a technical defect that could have been easily cured. Renco and DRRC's suspicions have proved accurate.
45. Ironically, Activos Mineros is so concerned about a surprise attack by Renco and DRRC that it has exhaustively researched Renco and DRRC's above-stated objection for it.⁴⁴ As Activos Mineros states, new objections or arguments that should have been raised earlier in the proceeding should be deemed waived, rather than risk a party's due process rights.⁴⁵ Renco and DRRC could not agree more: the time for making this objection was at the outset of this arbitration when any procedural deficiencies could have been easily cured by abating the arbitration to allow for a determination. Accordingly, Activos Mineros has waived this objection.

⁴³ Procedural Order No. 8.

⁴⁴ Respondent's Rejoinder at 242, ¶¶67-68

⁴⁵ *Id.*

D. In a similar vein, Respondents' document objections are contrived.

46. Respondents claim that Claimants have purposefully withheld documents ordered to be produced. Respondents identified six requests that Claimants allegedly withheld: Request Nos. 27, 28, 30, 31, 32, and 38.
47. Respondents should double-check their facts. Claimants produced documents responsive to Request Nos. 27 and 38.⁴⁶
48. Respondents are correct that Claimants did not produce any documents responsive to Request Nos. 28 and 30-32. Claimants collected over seven million documents including electronically stored information and scanned paper documents. They diligently searched for documents responsive to these requests but found none. Claimants submit declarations of Stephen Krchma of DRRC and Matt Davis of Schiffer Hicks Johnson PLLC in support.⁴⁷
49. Respondents' position that Claimants should have given a written response stating that "no responsive documents exist" is unprecedented, at least in this firm's experience. The IBA Rules do not require it, nor is it common practice. If a party does not produce documents in response to a request, to which no objections were sustained, it means it could not find responsive documents after a reasonable search and inquiry. That is all the rules require, and supplementation is allowed for the very reason that sometimes parties later discover a responsive document that was missed the first time. This is exactly how Respondents handled their production to Claimants, producing only 189 documents (compared to the 1,000 documents produced by Claimants).⁴⁸ Respondents did not produce documents in response to four different requests and provided no explanation for their non-production.⁴⁹

⁴⁶ Declaration of Matt Davis and Declaration of Stephen Krchma.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

50. In sum, Claimants submit that Respondents' willingness to mischaracterize a document production just to gain a perceived strategic advantage is indeed quite revealing – not in the way Respondents intend.

**THE TRIBUNAL HAS JURISDICTION OVER RENCO AND DRRC'S
PERUVIAN CIVIL CODE CLAIMS**

51. Renco and DRRC have shown that Centromin assumed DRP's Article 1970 strict liability duty for the PAMA period; and that therefore recovery of damages against Renco and DRRC by the Missouri Plaintiffs for injuries arising out of the operation of the smelters during the PAMA period are debts rightfully owed by Activos Mineros. As such, Renco and DRRC have standing to bring an action against Activos Mineros under Article 1260 (subrogation).
52. Activos Mineros challenges Renco and DRRC's subrogation claim on many grounds, hoping one will stick. It is not clear that any of Activos Mineros' objections are "jurisdictional;" however, in an abundance of caution, Renco and DRRC address each of these challenges in turn.
53. Activos Mineros argues that because Renco and DRRC step into the shoes of the Missouri Plaintiffs and because the Missouri Plaintiffs do not have arbitration agreements with Activos Mineros, Renco and DRRC also do not have the right to arbitrate.
54. Activos Mineros mixes apples and oranges. The "debt" Activos Mineros owes Renco and DRRC derives from Article 1970. It gives Renco and DRRC the *substantive* right to pursue a claim against Activos Mineros under Article 1260 (subrogation). Neither article of the Civil Code, however, dictates *procedurally* how such claim must be brought. And while the Missouri Plaintiffs do not have arbitration agreements with Activos Mineros, Renco

and DRRC do. Therefore, the proper procedural vehicle to resolve this dispute is arbitration before this Tribunal.

55. Stricken Pursuant to Procedural Order.

56. Stricken Pursuant to Procedural Order.

57. Stricken Pursuant to Procedural Order.

58. Stricken Pursuant to Procedural Order.

59. Stricken Pursuant to Procedural Order.

60. Stricken Pursuant to Procedural Order.

61. Stricken Pursuant to Procedural Order.

62. Stricken Pursuant to Procedural Order.

63. Stricken Pursuant to Procedural Order.

64. Stricken Pursuant to Procedural Order.

65. Stricken Pursuant to Procedural Order.

66. Activos Mineros claims that the commercial arbitration is unripe because the Missouri Litigation has yet to be decided. That there has been no final judgment in the Missouri Litigation is irrelevant. Centromin agreed to assume the liabilities that are the subject of the claims being pursued against the Renco and DRRC, and the question of whether it must assume responsibility for those claims is certainly ripe. Renco and DRRC have repeatedly demanded that Activos Mineros assume the defense of these claims; Activos Mineros has repeatedly refused to do so. Activos Mineros's refusal to meet its obligations means that Renco and DRRC have been saddled with defending the claims for years, incurring, every single day, the substantial cost of doing so. Indeed, a determination of which party bears the legal responsibility for damages for environmental liabilities pursuant to Sections 5 and

6 of the STA is at the core of contract claim, the subrogation claim, the contribution claim, and unjust enrichment.⁵⁰

67. Because Renco and DRRC argue that the proper construction of those sections makes Activos Mineros responsible, while Activos Mineros denies any liability for over a decade, is a legal situation to be defined – *i.e.*, which party holds that liability.⁵¹
68. A declaration will have an impact on the behavior of the parties.⁵² Currently, Renco and DRRC have incurred and are continuing to incur substantial expenses in the Missouri Litigation that should be reimbursed and assumed by Activos Mineros.⁵³ Therefore, Renco and DRRC are suffering prejudices that will be cured with a declaration.⁵⁴
69. Moreover, this Tribunal can determine the responsibility of Activos Mineros without interfering with the competence and jurisdiction of any other organ, and without a risk of contradiction with a different ruling.⁵⁵
70. Activos Mineros next tries to sell the notion that Article 14 (the “2008 Arbitration Act”), which became effective on September 1, 2008, is being applied retroactively.⁵⁶ It is not. The Second Transitory Disposition of Legislative Decree N° 1071 states that “[u]nless otherwise agreed, in the cases in which a party had received the request for arbitration to a controversy before the entry into force of this legislative decree, the arbitration proceeding will be ruled by Law N° 26572, General Arbitration Act” [the old arbitration act].⁵⁷⁵⁸ The *contrario sensu* interpretation is that if a party receives the request for arbitration after the

⁵⁰ Payet Third Report at 26-29, ¶¶81-96.

⁵¹ *Id.* at ¶107.

⁵² *Id.* at 114.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at ¶120.

⁵⁶ *Id.* at ¶55.

⁵⁷ CLA-144.

⁵⁸ Payet Third Report at ¶57.

entry into force of the 2008 Arbitration Act, the arbitration proceedings will be ruled by the 2008 Arbitration Act and not by the superseded General Arbitration Act.⁵⁹ Or as Marcial Rubio, a leading scholar on general theory of law in Peru, explains: “unless otherwise agreed, the law that will be applied to the arbitral proceeding is the one in force at the moment of receipt by a party of the request for arbitration for a controversy: if at that moment the Law N° 26572 was in force, that would be the applicable one. If, by contrast, when the mentioned request was receipt was already in force the Legislative Decree N° 1071, then it will be applicable.”⁶⁰

71. This arbitration was initiated on December 29, 2010, over two years after the effective date of Article 14, and thus falls within its ambit.

72. Citing no authority, Activos Mineros argues that Renco and DRRC are impermissibly fusing two different causes of action – strict liability and subrogation – and that the Missouri Plaintiffs’ claims cannot be for activities of DRP because DRP is not a party to the U.S. litigation.⁶¹ These arguments make no sense. On the contrary:

- DRP was subject to Article 1970 (strict liability) in the operation of the smelters for alleged damage to the local population caused by pollutants.⁶²
- Centromin agreed to indemnify and retain liability for such third-party claims during the PAMA.⁶³
- The Missouri Plaintiffs could have chosen to sue DRP under Article 1970 in Peru, but they chose instead to sue Renco and DRRC in the United States under Missouri law theories of derivative liability, *i.e.*, theories that would impose liability on Renco and DRRC for the alleged torts of DRP.⁶⁴

⁵⁹ *Id.* at ¶¶57-59.

⁶⁰ *Id.* at ¶58.

⁶¹ Respondent’s Rejoinder at ¶¶259-265.

⁶² Claimants’ Reply Brief at ¶¶17, 26.

⁶³ *Id.* at ¶17, ¶¶30-32.

⁶⁴ *Id.* at ¶17.

- Thus, holding Renco and DRRC liable for the acts of DRP, for which acts Activos Mineros assumed liability, enables Renco and DRRC to recover against Activos Mineros for such liability under Article 1260.⁶⁵

73. Activos Mineros baldly claims that a declaratory judgment would embolden Renco and DRRC to “settle the Missouri Plaintiffs’ claims for the full amount.”⁶⁶ A declaratory judgment would likely achieve the opposite. Activos Mineros would be heavily incentivized to cooperate with Renco and DRRC in defending and/or resolving the Missouri Litigation, since it has agreed to assume/indemnify Renco and DRRC for the full amount of such liability. Further, that circumstance should never come to pass were this Tribunal to order Activos Mineros to meet its obligations, including those under Section 8.14, which requires Peru to step in and assume the defense of claims for which it has assumed liability. Peru can and should determine its own fate by defending the claims as it promised to do.⁶⁷

74. Stricken Pursuant to Procedural Order.

75. Stricken Pursuant to Procedural Order.

76. Stricken Pursuant to Procedural Order.

77. Stricken Pursuant to Procedural Order.

CONCLUSION

For the reasons set forth in Claimants’ submissions and evidence, Claimants are entitled to proceed to the merits on its Treaty, Contract, and Peruvian Civil Code claims.

⁶⁵ *Id.* at ¶17.

⁶⁶ Respondent’s Rejoinder at 96, ¶288.

⁶⁷ C-105 at §8.14.

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