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' POST-HEARING BRIEF

Date: June 21, 2024

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In this consolidated arbitration, Claimants The Renco Group, Inc. ("Renco") and The Doe Run Resources Corporation ("DRRC") seek to hold Peru accountable for directing the liquidation of Doe Run Peru ("DRP") in violation of its treaty with the United States, and to hold Activos Mineros accountable for refusing its contractual obligation to assume responsibility for the Missouri Litigations.

Respondents have not merely denied responsibility. Throughout, they have sought to cast blame on Claimants for Respondents' own conduct. They repeatedly accused Claimants of "poisoning" the environment, after they had ignored for decades any semblance of good stewardship. They chose not to examine witnesses with personal knowledge of their own neglect, choosing instead to retain experts who could recast the facts against Claimants. They closed their eyes to DRP's hundreds of millions of dollars of improvements—far more than they had originally represented was needed—to argue not only that DRP had not done enough but also to find fault in hindsight with DRP's financial management.

The lengths to which Respondents have gone to deflect blame and avoid responsibility should not have been necessary had they simply honored their treaty and contract obligations. It is time for them to answer for what they have done.

I. CLAIMANTS' CONTRACT CASE[1]

Before we begin, a word about the burden of proof. As set forth in Article 27 of the UNCITRAL Arbitration Rules, "[e]ach party shall have the burden of proving the facts relied on to support his claim or defence." Claimants accept the burden to prove facts supporting their claims, but Respondents equally bear the burden of proving their defenses. As we will explain, this principle matters most in the allocation of responsibility for environmental claims under the Stock Transfer Agreement. Claimants must show that Activos Mineros assumed responsibility for the claims of the Plaintiffs in the Missouri Litigations, but Activos Mineros has the burden of proving that any exceptions apply.

A. The Stock Transfer Agreement

1. How the STA Came into Being.

In the mid-1990s, Peru instituted a completely new environmental regime for its mining and smelting operations. A 1993 Supreme Decree required that operators prepare and submit an environmental compliance and management program (called PAMA, for its initials in Spanish). R-025. Centromin was at that time the

[1] To assist the Tribunal and address its questions topically, Claimants will first discuss the contract case against Activos Mineros, followed by the treaty case against Peru. We will answer the Tribunal's specific questions in the context of a broader picture of the two cases and in light of the presentation of evidence at the hearing. For ease of reference, footnotes denote the specific Tribunal questions. An appendix at the end of the brief provides a table of the questions and where in the brief the answer may be found.

owner/operator of the smelter at La Oroya; it developed a PAMA for the facility, scheduling a list of projects to meet the new environmental standards.

At the same time, Peru decided to privatize its mining and smelting assets. Peru invited foreign investors to bid for these assets in the hope of enticing them to modernize the facilities and complete the PAMA projects. Under the rules set out for the bidding process, any foreign bidder would be required to create a Peruvian entity to own and operate the facility, but the foreign bidder would remain responsible for the contractual obligations of the Peruvian entity to Peru. R-167 at 10.

Hence, when the consortium of Renco and DRRC won the bid to acquire Metaloroya and then set up Doe Run Peru (DRP) to own Metaloroya, Peru insisted not only that they guarantee DRP's obligations under the STA, but that they sign the contract, too. R-200 at PDF p. 31 ("The awardee . . . must subscribe the Contract"). Peru insisted that the successful bidders be jointly and severally liable with the Peruvian subsidiary. R-187 at 10 ("A subsidiary of the awarded company . . . may sign THE CONTRACT, to the extent the awarded company owns at least 67% of the shares of the subsidiary and assumes **jointly and severally** with the subsidiary the obligations arising from said CONTRACT") (emphasis added).

Representatives of Renco and DRRC, along with the other parties (Centromin and DRP), were present at the execution of the STA, and, in the presence of the

notary, they ratified it and signed it.[2] R-001 at 71-72 (recording signatories to STA, including Jeffrey L. Zelms, representing DRRC, and Marvin M. Koenig, representing Renco). The additional clause, containing the guaranty of obligations by Renco and DRRC, is one of many separate "causes" (as that term is used in Peruvian law) in the contract; yet, the STA is one contract, not two or three or more. Renco and DRRC are parties to the STA.

2. The Assignments Are Effective.

Respondents make much of the fact that neither Renco nor DRRC signed the assignments of the STA's rights and obligations. *See* R-004 (assignment of DRP's interest as "Investor" to Doe Run Cayman Ltd.) and R-284 (assignment of Centromin's interest to Activos Mineros). They argue that Peruvian law requires all parties to a contract to consent to an assignment. This argument apparently prompted the Tribunal's Question No. 8.[3]

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[2] The Tribunal's Question 3.a addresses the execution of the STA: *"Clause 3.6 states that on the date of the signing of the STA, a "special general meeting of shareholders of the Company" would take place "for the purpose of adopting the necessary agreements for the execution of this contract". Did such a meeting take place? If so, who participated in the meeting, and what was discussed?"* Such a meeting did take place, as evidenced by the minutes of the Extraordinary General Shareholders Meeting for Doe Run Mining S.R. Ltda. Dated October 16, 1997, attached as **Exhibit 1**. The participants in the meeting are listed in the minutes. They discussed the financial arrangements required to effect the acquisition of Metaloroya, and they authorized certain representatives of Renco and DRRC and its subsidiaries to sign and enter the necessary contracts.

[3] Question 8 reads in full: *"Having regard to the STA's provisions concerning the assignment of interests, and Dr. Payet's acknowledgment that on his interpretation of the Additional Clause there might be an "imperfection" given the fact that not all of the parties represented at the execution of the STA and the Additional Clause subsequently consented to the two assignments of contractual rights: if Dr. Payet is correct, does it follow that the assignments*

Peruvian law permits consent to an assignment to be made before, simultaneously, or *after* the assignment agreement. Civil Code Art. 1435. The consent can be given in any form. As Dr. Payet has explained, an expression of will, under Peruvian law, can be express or implied.[4] Even if some parties to the STA did not execute the assignments, the subsequent conduct of the non-signing parties evidences their consent to them. Respondents' Counter-Memorial, for example, states as fact that Activos Mineros, Doe Run Cayman Limited, and Doe Run Peru are now parties to the STA "after assignments."[5] Likewise, the self-evident fact that Claimants brought claims in this arbitration against Activos Mineros demonstrates that Renco and DRRC accepted Activos Mineros as successor in interest to Centromin. In short, the assignments were effective because all parties treated them as such.[6]

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were ineffective under Peruvian law? If they were ineffective, what would be the impact of such ineffectiveness on the present Contract Case proceedings?"

[4] First Payet Report at ¶ 118, referencing Article 141 of the Peruvian Civil Code: "The expression of will can be express or implied. It is express when it is done orally or in writing, through any direct, manual, mechanical, electronic or other similar means. It is tacit when the will is inferred doubtlessly from a reiterated attitude or conduct in the history of life that reveals its existence…."

[5] Respondents' Counter-Memorial at ¶ 12.

[6] Question 3.c asks: *"The Tribunal has noted the description of DRP's ownership in the assignment agreement of 1 June 2001 (R-4). Who owned DRP at the time the STA was signed, and at all relevant points in time?"* The entities that owned DRP are set out as follows: **October 23, 1997 – December 30, 1997**: DRP was wholly owned by Doe Run Mining S.R., Ltda. (DRM); **December 31, 1997 – May 31, 2001**: DRM owned over 99% of DRP (less than 1% owned by DRP employees); **June 1, 2001 – Present**: Doe Run Cayman Ltd. owned over 99% of DRP (less than 1% owned by DRP employees).

3. Renco and DRRC Have Rights under Articles 5 and 6 of the STA.

Activos Mineros owes indemnity to Claimants not because of Clause 8.14, but, rather, because Activos Mineros assumed liability for damages and claims by third parties attributable to DRP in Clauses 5 and 6.[7] As explained by Dr. Payet, under Peruvian law, Renco and DRRC are creditors of Activos Mineros and can therefore request compliance from Activos Mineros of its obligation to assume those liabilities, even if the STA itself does not provide for indemnity.[8]

Respondents exaggerate Claimants' position regarding Activos Mineros' obligations. Claimants do not suggest that those obligations are unlimited or run to any party in the world. Activos Mineros assumed only liabilities attributable to DRP, and it would be required to answer only to third parties whose liabilities were derived from DRP. As discussed below regarding the Missouri Litigations, Renco's and

[7] This section responds to the Tribunal's Question 3.b: "*It appears to be common ground between the Parties that Clause 8.14 bears upon the matters in dispute in the Contract Case. The Tribunal has noted the existence of Clause 8.10, which deals with certain representations and warranties of Centromín and the Company which provides that 'Centromín agrees to indemnify, defend and protect from damages the Company and its shareholders, directors, officers, employees, agents and independent contractors from claims, demands, suits, actions, procedures and harm caused by or as a result of any inaccuracy in the aforementioned representation' (Tribunal's emphasis). From the Tribunal's reading of the STA, this is the only indemnification, defence, and protection obligation that explicitly extends the scope of the beneficiaries to the shareholders, etc. of the Company. What effect, if any, does this Clause have for the interpretation of Clauses 5 and 6 and the balance of Clause 8 of the STA?*"

[8] First Payet Report, ¶¶ 162-64, citing Article 1219 of the Peruvian Civil Code.

DRRC's potential exposure in those litigations is derivative of DRP's conduct; hence, Activos Mineros owes a duty to Renco and DRRC. It is as simple as that.

The separate indemnity provisions in Clause 8 of the STA do not change this analysis. We understand the Tribunal's question to suggest that if the parties failed to include "shareholders" and others in Clause 8.14 (as they had in 8.10) then the defense and assumption obligations of 8.14 do not run to DRP's shareholders. This suggestion is beside the point, as Claimants do not rely on Clause 8 indemnities as the basis of their claims.

B. The Missouri Litigations

1. Missouri Litigations' Status[9]

The Tribunal has asked a series of questions related to the environmental claims brought in the United States against Renco and DRRC for personal injuries allegedly caused by air emissions from DRP's operation of the La Oroya smelter in Peru ("Missouri Litigations"). The Missouri Litigations presently consist of two consolidated cases collectively involving the individual claims of some 3,000 individual plaintiffs (the "Plaintiffs" or the "La Oroya Plaintiffs") pending in the U.S. District Court for the Eastern District of Missouri. These cases are as follows:

- *A.O.A., et al. v. Doe Run Resources Corporation, et al.*, Case No. 4:11-cv-00044-CDP (the "Reid" case); and

[9] The Tribunal's Question 1.a asks: *"What is the current status of the Missouri Litigations and the expected date of any forthcoming judgment(s)?"*

- *J.Y.C.C., et al. v. The Doe Run Resources Corporation, et al.*, Case No. 4:15-cv-01704-RWS (E.D. Mo.) (the "Collins" case).

Proceedings in the district court in *Reid* are stayed while the U.S. Court of Appeals for the Eighth Circuit considers an interlocutory appeal on what the district court described as two controlling questions of law dispositive of the case.[10] The issues have been fully briefed in the Eighth Circuit, which held oral argument on January 9, 2024. There is no timetable for the Eighth Circuit to issue a decision, but it is expected that a ruling will be made in the next several months. Further appellate proceedings, including requests for rehearing or for certiorari to the U.S. Supreme Court, could follow.

Should Renco and DRRC prevail in the appeal, it would end the *Reid* litigation (thus bringing the U.S. litigation to an end) and likely have preclusive effect on the *Collins* case, too. If the appellate court instead remands the case to the district court, several additional potentially dispositive motions filed by Renco and DRRC remain pending. On remand following appeal, the district court would need to resolve those motions and, if necessary, set a new schedule. Given these circumstances, it is not

[10] These issues are as follows: "First, whether under transnational doctrines, including the doctrine of prospective adjudicatory comity, it is appropriate to adjudicate in this forum a foreign citizen's claims that tortious conduct allegedly committed in the United States by a United States citizen caused them to sustain personal injury wholly within the borders of a foreign sovereign…. Second, whether the [U.S.-Peru Trade Promotion Agreement] renders the claims nonjusticiable in this forum given that the claims are intertwined with Peru's environmental laws and/or legal duties under Peru's laws relating to the environment or environmental conditions affecting human health." *Reid*, ECF No. 1322, attached as **Exhibit 2**, at 75-76.

possible to reasonably estimate—particularly given the pending appeal—when the first of the individual Plaintiff cases might go to trial.

The second case, *Collins*, has a scheduling order setting pre-trial deadlines through May 2026. The *Collins* case, however, is not set for trial, which will be set by further order of the court after completion of briefing on dispositive and other pre-trial motions.

2. Causes of Action Remaining in the Missouri Litigations[11]

The remaining claims in the two Missouri Litigation cases—*Reid* and *Collins*—are listed in the tables below:

Reid (claims applicable to Claimants)[12]

Claim[13]	**Complaint Cite**	**Status**
Count 1: Negligence	p. 29	Active
Count 3: Civil Conspiracy	p. 39	Dismissed[14]
Count 5: Absolute or Strict Liability	p. 45	Dismissed
Count 7: Contribution Based on Tortious Conduct of Entities Acting in Concert	p. 49	Dismissed

[11] Question 1.b from the Tribunal states: *"Could the Parties please list the precise causes of actions asserted by the plaintiffs that remain pending for trial in the Missouri Litigations (with appropriate references to the Complaint(s) and other court filings or decisions)? If any causes of actions originally pleaded have been abandoned or ruled inadmissible by the Courts, please identify them."*

[12] While the origins of the *Reid* case date back to 2007, Plaintiffs filed their latest Amended Complaint as to all then-named plaintiffs on the *Reid* docket on February 21, 2017. *Reid*, ECF No. 474 ("*Reid* Compl."), attached as **Exhibit 3**. Claimants would note that counsel for Plaintiffs subsequently filed separate complaints in separate cases with additional named plaintiffs; those cases have now been consolidated with the *Reid* case.

[13] Claims in both cases applicable to both Claimants unless otherwise noted.

[14] All dismissed counts in *Reid* were dismissed in the October 16, 2018 Order. ECF No. 949, attached as **Exhibit 4**, at 15.

Count 8: Direct Liability for Breach of Assumed Duties Pertaining to Foreseeable Harms (DRRC only)	p. 52	Active
Count 9: Direct Liability for Breach of Assumed Duties Pertaining to Foreseeable Harms (Renco only)	p. 56	Active
Count 10: Negligent Performance of a Contract or Undertaking (DRRC only)	p. 59	Dismissed as to breach of contract
Count 11: Negligent Performance of a Contract or Undertaking (Renco only)	p. 67	Dismissed as to breach of contract
Count 12: Direct Participation Liability (Renco only)	p. 70	Active

Collins (claims applicable to Claimants)[15]

Claim	**Complaint Cite**	**Status**
Count 1: Negligence	p. 12	Active
Count 2: Civil Conspiracy	p. 15	Expect dismissal[16]
Count 3: Absolute or Strict Liability	p. 18	Expect dismissal
Count 7: Contribution Based on Tortious Conduct of Entities Acting in Concert	p. 28	Expect dismissal

[15] Plaintiffs filed their first Complaint in *Collins* on October 12, 2015. ECF No. 1, Exs. 1&2 ("*Collins* Compl."), attached as **Exhibit 5**.

[16] The *Collins* court has relied on the *Reid* court's holdings for guidance and precedent. *See Collins*, ECF No. 296, attached as **Exhibit 6**, at 2 ("Because these same issues were decided in Judge Perry's case [*Reid*], I will adopt her reasoning and conclusions of law."). If, as we expect, the *Collins* court follows the *Reid* rulings, the sole remaining claim in *Collins* would be Count 1 for negligence.

3. DRRC and Renco Cannot be Liable for any Claims that Would Not "Pass Through" to DRP[17]

All claims against Renco and DRRC in the Missouri Litigations seek to hold them liable for the actions of DRP and its operation of the La Oroya smelter. No claims are independent of DRP's conduct. By way of example, consider the following "allegations common to all counts" from the *Reid* complaint:

- "At relevant times, DRP was an agent of the Defendants. Defendants consented, expressly or impliedly, to DRP acting on their behalf, and Doe Run Peru was subject to Defendants' exclusive control. Defendants Renco, Rennert, Doe Run Resources, by and through their agents, and together and each of them, had the right to control and did control the operations, storage, generation, handling, disposal, and release of toxic and harmful substances that led to the plaintiffs' injuries." *Reid* Compl. (**Ex. 3**) ¶ 80.
- "Through defendants' control of DRP and/or La Oroya Complex, whether through indirect ownership or otherwise, DRP is and has been an agent of the corporate defendants, and the corporate defendants are liable for any actions and omissions attributable to DRP and/or the La Oroya Complex." *Id.* [18]

Plaintiffs' veil piercing and agency theories by their very nature seek to hold DRP's parent companies liable for the actions of DRP. And the premise of the direct liability claims is the assertion that Defendants themselves operated DRP. *Reid*

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[17] The Tribunal's Question 1.c asks: *"Is it possible under Missouri law that the defendants in the Missouri Litigations could be found liable for breach of one or more legal duties that do not pass through to DRP (and thus might not touch upon the allocation of responsibilities set forth in Sections 5 and 6 of the STA)?"*

[18] *See also Collins* Compl. (**Ex. 5**) ¶¶ 16-31, *e.g.*, ¶ 19 ("As the owners and operators of the La Oroya Complex, Defendants are liable for the activities and the toxic environmental releases from the complex since the date Defendants purchased the complex, October 24, 1997"); ¶ 24 ("the Defendants, while located in the States of Missouri or New York, made decisions regarding the operations of the complex").

Compl. (**Ex. 3**) ¶ 68 (alleging "Defendant Doe Run Resources has managed and operated the La Oroya Complex by and through and/or under Defendant Renco and Rennert's direct control."). As a result, any finding of liability against Renco and DRRC would necessarily be "attributable to the activities" of DRP, for which Activos Mineros assumed responsibility. R-001 at Art. 6.2.

4. Potential Judgment as to DRP's Liability and Conduct[19]

DRP is not a named party in the Missouri Litigations. Accordingly, no ruling or judgment issued in those cases could establish "liability" as to DRP, either alone (as contemplated in subpart (i) of the Tribunal's question) or jointly with Claimants (as asked in subpart (iii)). Instead, any potential judgment imposing liability in the Missouri Litigations will be limited to the named Defendants only (as raised in subpart (ii)).

The Plaintiffs did not sue DRP for obvious reasons. DRP has been liquidated. Even if it had survived, DRP, as a Peruvian company, likely would not have had sufficient contacts with Missouri to be subject to suit there in any event. Renco and DRRC, on the other hand, are U.S. entities with assets in the U.S., making them more attractive targets for enterprising plaintiffs' lawyers.

[19] Question 1.d from the Tribunal states: "*Put a slightly different way, could any potential judgment in the Missouri Litigations pronounce itself (i) upon DRP's liability or conduct; (ii) exclusively upon the liability or conduct of Renco, and/or DRRC and/or any of the other named defendants; or (iii) upon Renco, and/or DRRC and/or any of the other named defendants and DRP*?"

But Renco and DRRC did not operate the La Oroya facilities. They did not emit any substances into the environment in La Oroya. They took no independent action alleged to cause injury to the Plaintiffs. The Plaintiffs' lawyers were therefore compelled to allege theories under U.S. law that would make Renco and DRRC vicariously liable for DRP's conduct (by virtue of their corporate structure). By doing so, the claims fall squarely into the type for which Centromin assumed liability under Article 6.2, as is explained further below in Section C.

5. Allegations Involving Substances Other than Lead[20]

The Tribunal is justified in wondering if the Plaintiffs in the Missouri Litigations complain about materials other than lead. As we explain, a wide gulf separates the Plaintiffs' *allegation*s in the Missouri Litigations, on the one hand, and their single-minded focus in discovery on lead as the real source of their claims, on the other.

The first case in the Missouri Litigations was filed in the Circuit Court of the City of St. Louis, Missouri in 2007, now more than a decade and a half ago. From that first pleading, Plaintiffs alleged exposure to the emission of "toxic and harmful substances, including but not limited to lead, arsenic, cadmium, and sulfur dioxide, into the air and water" from the La Oroya smelter. *A.A.Z.A., et al. v. Doe Run*

[20] The Tribunal's Question 1.e asks: *"Do the Missouri Litigations concern claims for the effects on human health arising from lead contamination exclusively, or do they also concern SO2 and other contaminants?"*

Resources Corporation, et al., Case No. 4:07-cv-01874-CDP, ECF No. 1-1 (Petition for Damages — Personal Injury, Exhibit "A" to Notice of Removal), attached as **Exhibit 7**, ¶ 20. Since 2007, Plaintiffs' counsel have continued to pay lip service to allegations of contaminants other than lead, repeating them in the latest operative complaints as well as in other more recent filings.[21]

Yet, despite having over 15 years to do so, and even after extensive fact and expert discovery, Plaintiffs in these cases have not submitted the requisite evidence establishing any non-lead-based harms or injuries. For that reason, Defendants in *Reid* (which procedurally is further along than the more recently filed *Collins* case[22]) moved in February 2021 to dismiss all non-lead-based causes of action. The district court has not yet ruled on that motion—or a long list of other potentially dispositive motions—but instead awaits a ruling from the Eighth Circuit, as discussed above, on whether the Missouri Litigations should proceed in the United States at all. *Reid*, ECF No. 1322 (**Ex. 2**) at 4 ("The many other motions filed by the parties remain pending.").

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[21] By way of example, the amended complaint in *Reid* filed by Plaintiffs in February 2017 alleges that the La Oroya smelter emitted "toxic and harmful substances into the air and water" and that these substances "include but are not limited to: lead, arsenic, cadmium, and sulfur dioxide[.]" *Reid* Compl. (**Ex. 3**) ¶ 71. Similar language is contained in the Complaint in *Collins*. *See Collins* Compl. (**Ex. 5**) ¶ 23 (alleging emissions of "lead, arsenic, cadmium, and sulfur dioxide").

[22] As *Collins* has not yet proceeded to the summary judgment phase, the case has not yet ruled out harms from substances other than lead. Regardless, at this point, there is no evidence of any sort in either case substantiating actual harm from any substance emitted from the smelter other than lead.

In the Missouri Litigations, Renco and DRRC have extensively briefed the absence of evidence supporting non-lead-based claims.[23] Under well-established Missouri law, a plaintiff who claims harm from exposure to a toxic substance bears the burden of proving that the conduct of the defendant was a substantial cause of the injury. *Elam v. Alcolac, Inc.*, 765 S.W.2d 42, 178 (Mo. Ct. App. 1988). To establish that the defendant caused the injury, a plaintiff must have, among other things, an "expert opinion that the disease found in [the] plaintiff is consistent with exposure to the harmful substance." *Id.* Further, the "diagnosis of disease in the plaintiff consistent with exposure to the toxicants is a subject of medicine, especially occupational and environmental medicine." *Id.* at 185.

While Defendants dispute that their actions caused harm from *any* substance, including lead, Plaintiffs have offered no expert testimony that their alleged exposure to any non-lead contaminant caused any actual injury. In fact, all three of Plaintiffs' specific-causation experts entirely disclaimed any opinions with respect to sulfur dioxide, arsenic, cadmium, or any non-lead substance. *Reid* MSJ (**Ex. 9**) at 92-95. Likewise, Plaintiffs presented no medical testimony from any of their treating physicians that would support allegations of harm resulting from substances

[23] *See, e.g.*, *Reid*, ECF No. 1232, Motion for Summary Judgment Under Missouri Law, attached as **Exhibit 8**; *Reid*, ECF No. 1233, Memorandum in Support re: Motion for Summary Judgment Under Missouri Law ("MSJ"), attached as **Exhibit 9**; & *Reid*, ECF No. 1301, Reply to in Support of Defendants' Motion for Summary Judgment Under Missouri Law ("MSJ Reply"), attached as **Exhibit 10**.

other than lead from the smelter. *Reid* MSJ Reply (**Ex. 10**) at 50. One of Plaintiffs' experts even observed that Plaintiffs have not "had the necessary clinical workup to determine" injuries from exposure to substances other than lead. *Id.* at 48.

In response to Defendants' motions, the Plaintiffs could muster only the testimony of a different expert who discussed *potential* future risks related to these other substances but could not opine that any individual Plaintiff actually suffers from such health effects. *Id.* at 49-50. This testimony is wholly insufficient to establish a prima facie case of injury from those other substances. If either of the Missouri cases ever reaches a trial, the sole issue, at least in the current state of the record, will be lead.

6. Potential for Conflict Between an Arbitration Ruling and the Missouri Litigations[24]

The legal standards that govern resolution of the pending arbitration claims are very different from those that control Plaintiffs' claims in the Missouri Litigations. At the same time, there is some factual overlap relevant to both the arbitration claims and the Missouri Litigations. It is difficult to speculate whether and how the resolution of these different legal standards might create conflict when applied to often contested facts. Given these circumstances, Claimants cannot rule

[24] Question 1.f from the Tribunal asks: "*To what extent (if any) could the award in either of the present Cases and the ruling in the Missouri Litigations contradict each other? If such a potential conflict exists, would this warrant waiting to issue the award in either Case until after the Missouri Litigations have concluded?*"

out the possibility that a decision of the Tribunal could conflict with a decision in the Missouri Litigations (whether by a court or a jury).

In this proceeding, the parties and the Tribunal have invested substantial time and resources, culminating in a two-week evidentiary hearing. We urge the Tribunal to issue its award without waiting for any ruling from Missouri.

C. The STA's Allocation of Responsibility

Peru's first attempt to privatize its mining and smelting industry attracted no bidders. Investors shied away from La Oroya because of the facilities' environmental problems and the potential liabilities from them. To ameliorate investors' concerns in the second round, Peru promised to protect any buyer from third-party environmental claims in all but very limited and prescribed circumstances, even for matters arising from the buyer's own operations. Buyers would assume responsibility only in the event of a finding by MEM of PAMA non-compliance:

QUESTION No. 41

Taking into account that CENTROMIN will assume responsibility for the existing contamination at La Oroya's Smelter, and the new operator willbe obligated later on to continue with the same contamination practices for a period of time, as authorized by PAMA's terms, and that the old (pre-transfer) contamination and the new (post-transfer) contamination...

Would CENTROMINaccept responsibility for all the contaminated land, water and air until the end of the period covered by the PAMA or how can it determine which part corresponds to whom?

ANSWER

Affirmative, provided that METALOROYA would fulfill the PAMA's obligations which are their responsibility, otherwise, METALOROYA will be responsible from the date of non-compliance of the obligation, according to the competent authority's opinion (Clauses 3.3. (5.3) and 4.2 (6.2) of the Models of the Contract).

R-201 at 20.

Given these circumstances surrounding the making of the STA, the allocation of responsibility between Centromin and DRP for environmental matters that arise during the PAMA period must begin with Centromin's express assumption of responsibility. Claimants rely on Article 6.2 of the STA:

> During the period approved for the execution of Metaloroya's PAMA, ***Centromin will assume liability*** for any damages and claims by third parties that are attributable to the activities of the Company, of Centromin and/or its predecessors, ***except*** for the damages and third party claims that are the Company's responsibility in accordance with numeral 5.3.

R-001 at 27 (emphasis added).

Claimants must prove only that the claims of the Plaintiffs in the Missouri Litigations arose during the PAMA period. Plaintiffs expressly assert that.[25] Activos Mineros therefore assumed those liabilities unless it can prove that one of the two narrow exceptions in Article 5.3 applies. Pursuant to Article 27 of the UNCITRAL rules, the exceptions set out in Article 5.3 are defenses for which Activos Mineros properly bears the burden of proof.

We start with a discussion of the exception in Article 5.3(B).

1. Article 5.3(B) Does Not Apply.

To meet this exception, Respondents must establish that the third-party environmental claims "result directly from a default on the Metaloroya's PAMA obligations on the part of [DRP]…." R-001, Article 5.3(B).

a. *Only MEM Can Find a Default*

Only the "competent authority" in Peru could determine whether a smelter had complied with its PAMA obligations. Peruvian law declares that "[t]he competent authority in environmental issues with the mining and metallurgical sector is the Ministry of Energy and Mines [MEM]….". R-025 at 4. Bidders were assured by Peru that their assumption of responsibility would be triggered only

[25] See, for example, the Amended Complaint in *Reid*, which alleges that "Defendant Renco is liable for the activities and the toxic environmental releases from the La Oroya metallurgical complex since the date Defendants' purchased the complex, October 24, 1997." *Reid* Compl. (**Ex. 3**) ¶ 77.

"from the date of non-compliance of the obligation, *according to the competent authority's opinion*." R-201 at 20 (Question 41) (emphasis added).

The 1993 Supreme Decree set out the procedure for MEM to audit a smelter's operations and to determine default with the PAMA. R-25. MEM exercised its right to audit DRP's operations on many occasions, each time confirming that DRP was in compliance with its PAMA obligations. By way of example:

- "With regard to the amounts committed to and programmed in their PAMA for the year 2002, an investment of 134% has been carried out with regard to what was programmed." C-110 at 1.

- "The mining owner has been implementing environmental mitigation measures in addition to PAMA's commitments; it has been promoting a culture of hygiene and health in La Oroya and the communities of its surroundings." R-160 at 4 (2003).

- DRP "has been complying with the environmental commitments established in the [PAMA]." R-194 at 7 (2005).

At the end of the original PAMA period, MEM hired an outside auditor to review DRP's performance and once again found no basis for any default on its PAMA obligations:

> September 2007: The ENVIRONMENTAL AUDIT OF THE PAMA was carried out, not extended through the supervising company D&E Desarrollo y Ecología S.A.C., to verify the implementation of the eight PAMA projects. At the same time, a financial audit was carried out to verify the PAMA's executed investments, under the responsibility of the international consultancy Deloitte, the results indicate that DRP has complied with its investments.

R-214 at 3.

The absence of any finding of default by MEM is conclusive on the issue. Article 5.3(B) of the STA does not apply because the MEM never found DRP to be in default of its PAMA obligations. No after-the-fact, made-for-arbitration opinion, even one from a recognized Peruvian environmental law expert like Ada Alegre, could create a finding of default that MEM never made.

b. *Respondents Changed Their Position*

During the hearing, Respondents changed their position on what constituted a default of the PAMA. While they had always contended in this arbitration that the failure to finish the sulfuric acid plants sooner was a breach, they did an about-face on whether increased production and use of "dirtier concentrates" constituted a breach of the PAMA. Compare two statements from Respondents, starting with this one from paragraph 96 of their Rejoinder:

> 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.

The second statement comes from slide 36 of Respondent's closing argument at the hearing:

> DRP breached the PAMA by increasing production and using dirtier concentrates, without implementing any emission mitigation measures until December 2006.

These statements cannot be reconciled. Conduct cannot both be unrelated to the PAMA and at the same time a breach of the PAMA. We assume Respondents' latest position to be the one they intend to persist in asserting, and we will first discuss their claims of increased production and dirtier concentrates in this section.

c. *Increased Production*

Respondents assert (at least, now) that increasing production of metals, primarily lead, constitutes a default of the PAMA. The Tribunal asked about this issue in its questions.[26]

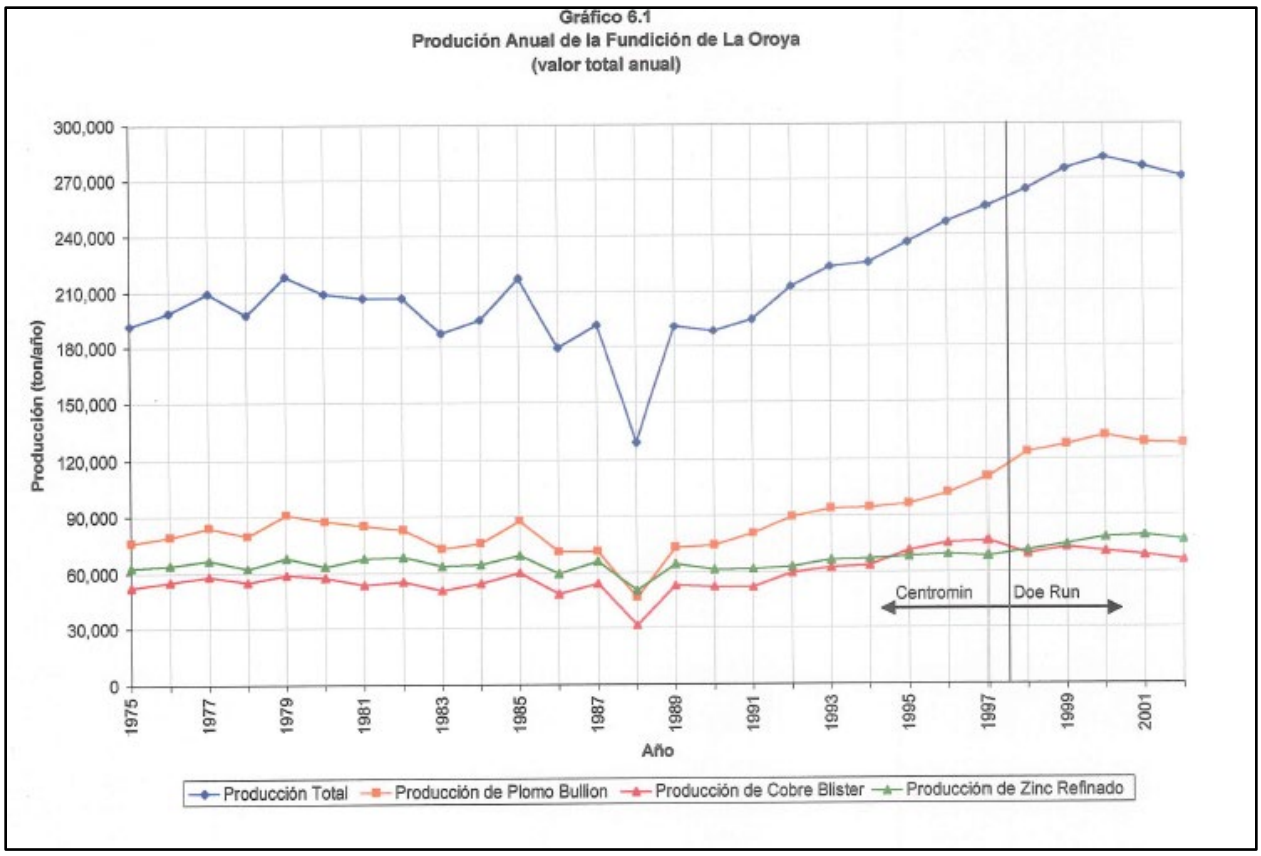
During the bidding process, Peru represented to DRP that it would be permitted to expand production: "Expansion refers to the increase of the capacity of the production circuits." R-201 at 3. Moreover, the STA itself contemplated that DRP could increase production. The investment obligation of $120 million over 5 years could be used for "amplification and expansion in the production capacity of the Company." R-001 at Art. 4.5(B). The STA further recognized that the "capital expenditures" and "extraordinary maintenance and repairs" called for in the PAMA "imply increases in the production capacity and/or efficiency" of the plant. R-001 at Art. 4.5(C).

[26] As stated in the Tribunal's Question 2.c.: *"Under the PAMA and other Peruvian regulations, was DRP allowed to increase production, if so, by how much and under what precise conditions?"*

Nothing in the PAMA prohibited DRP from increasing production. That perhaps explains why MEM never found DRP in default of the PAMA for it. The PAMA referred to "installed capacity" not as a ceiling on production, but rather as a measure of how efficiently the facility could be run over time. The PAMA noted that Centromin had documented increases in installed capacity from 90,000 tons in 1993; to 95,000 tons in 1994; to 100,000 tons in 1995. C-90 at 80. These amounts were not restrictions on production.

Much ado was made at the hearing of DRP's increased production. But the increase in the first two years of DRP's operations merely followed the same upward trend as had occurred under Centromin every year from 1990 to the sale of Metaloroya in late 1997, and then leveled off.[27]

[27] Two years into DRP's operations, Centromin and DRP negotiated an extensive amendment to the STA. C-133 (December 17, 1999). The parties modified Articles 5 and 6 as they related to the handling of certain waste deposits near the plant. In doing so, they expressly reaffirmed the remaining provisions of the STA remained in force and effect. *Id*. at 15. If Centromin had believed that DRP was in breach of the STA at that time, by increased production or otherwise, surely it would have raised the issue at the time of the amendment, but of course it did not.



AA-054 at 81.

At the hearing, Ms. Alegre could cite no prohibition in the PAMA against increasing production. Instead, she testified that it was her belief that DRP should have applied to modify the PAMA to do so. Tr. at 707. Whatever her own personal view of the matter, MEM never took that position. No law, regulation, or PAMA provision required a PAMA amendment in that circumstance.

Ms. Alegre conceded that DRP reported its production regularly to MEM as required by law and yet MEM made no move to limit production until 2006 in the context of responding to DRP's request to extend the deadline to complete the last PAMA project. At that time, MEM was aware of the increased production and

exercised its authority to require additional projects (other than Project No. 1). Tr. at 753. MEM also required DRP to comply with several restrictions, one of which was, starting in May 2006, not to increase the tonnage of concentrates to be treated at the facility.[28] R-289 at 41. There is no finding by MEM or its enforcement arm, OSINERGMIN, that DRP ever exceeded approved levels of production, either before or after the extension was approved.

We will have more to say about Respondents' arguments about increased production as they relate to the exception in Article 5.3(A) below. For purposes of Article 5.3(B), all that matters is whether DRP's increased production violated the PAMA. The bidding materials, the STA, MEM's own actions, and the PAMA itself demonstrate there was no default.

d. *"Dirtier" Concentrates.*

A second contention, the use of so-called "dirtier" concentrates, is yet another made-for-arbitration position never the subject of any adverse finding by MEM. Once again, there is no provision of the PAMA proscribing the use of concentrates with increased percentages of certain metals.

Respondents' suggestion that the use of these concentrates constituted a default of the PAMA is especially curious, because poly-metallic material processing

[28] Even this requirement was not a restriction on production, but rather a restriction on the amount of feedstock to be processed. DRP was allowed to increase production, if it could do so more efficiently with the same amount of feedstock.

is what made the La Oroya smelter unique. The PAMA itself states: "The metallurgic complex is one of four smelters in the world capable of processing polymetallic concentrates with a high percentage of impurities." C-90 at 277. Even Respondents' expert Wim Dobbelaere recognized that the smelter "doesn't live from clean concentrates." Tr. at 1417.

The PAMA recognized that changes would be made in the smelter facilities to handle dirtier concentrates. For example, it discusses modernization of the copper circuit, including installation of "[a] new roaster for dirty concentrates." C-90 at 169-70. In addition, Section 3.3 of the PAMA contains an extensive discussion of the different sources of copper, lead, and zinc concentrates used at the smelter, some from as far away as Australia. C-90 at 64-66. But no section of the PAMA contains a prohibition on any particular type or source of concentrate. C-90 at 169-70.

As part of the 2006 extension of the PAMA, MEM adopted new restrictions on the use of concentrates as one of the conditions to the granting of the extension. R-289 at 43. Even then, the concern was the percentage of bismuth, arsenic, and thalium in the concentrate, not levels of lead or sulfur. *Id*. Respondents produced no evidence that DRP ever violated these new restrictions. Respondents failed to sustain their burden of proof of PAMA default on this issue.

e. *Project No. 1.*

The third contention made by Respondents is that the failure to complete all three of the sulfuric acid plants (designated Project No. 1) breached the PAMA. There is no small irony in this argument since Centromin failed to undertake this project in the 23 years it operated the facility. Moreover, it drafted the PAMA and placed Project No. 1 as the last project in the schedule to be completed. Respondents apparently wish in hindsight they had reordered the PAMA projects, giving priority to Project No. 1. They also now seem to take issue with the several decisions made by MEM granting DRP additional time to complete the acid plant projects. Their belated second-guessing of their own actions changes nothing.

The PAMA originally gave DRP until January 2007 to complete the projects. By January 2007, DRP had completed all the PAMA projects satisfactorily, except Project No. 1. R-214 at 3. Recall that Renco and DRRC were assured they would be responsible for environmental matters only "from the date of non-compliance…." R-201 at 20 (Question 41). Because of the initial 10-year PAMA period, and the absence of any MEM-declared default during that period, there can be no question about Activos Mineros' responsibility, at the least, for all liabilities for contamination predating January 2007.

Having completed all other PAMA projects, DRP sought an extension of time to complete Project No. 1. MEM agreed to extend this deadline in 2006, and again

in 2009. R-287 (2006), C-078 (2009). Before the time the last extension expired in 2012, the smelter was no longer in operation. That means that at no point when the smelter was operating had the operative deadline for completing Project No. 1 expired. There can be no default during DRP's active operations for failure to complete Project No. 1, the precise subject of these extensions, and none was ever found by MEM.

The Tribunal expressed interest in whether the entire PAMA was extended.[29] The Tribunal no doubt noted that the STA provides for a different allocation for environmental matters "after the expiration of the legal term of [DRP's] PAMA." R-001, Arts. 5.4 and 6.3. Does that different allocation apply after January 2007, the original PAMA deadline, or the extended deadline of October 2012?

The answer comes from the Peruvian law dealing with the PAMA and from the STA itself. Both expressly contemplate amendments and extensions of the PAMA. The 1993 Supreme Decree states in the case of projects that require additional time, "the time limit of the PAMA can be extended up to a maximum of 18 months…" R-025 at 14. In 2004, Peru issued a new Supreme Decree expressly permitting extensions of a PAMA "based on exceptional reasons duly

[29] The Tribunal's question in 2.b. states: "*Considering the difference between the Parties regarding whether the entirety of the PAMA or only one of its projects was extended, the Tribunal wishes to hear from the Parties on precisely which PAMA obligations were extended and precisely which PAMA obligations were not extended by each of the so-called PAMA extensions granted in 2006 and 2009?*"

demonstrated." R-029 at 1. The STA also refers to DRP's responsibility for compliance with obligations contained in the PAMA "*and its eventual amendments*…" R-001, Art. 5.1 (emphasis added). These provisions demonstrate the parties intended the PAMA extensions to also extend the period for which Activos Mineros would retain responsibility for environmental matters. Only after October 2012 did the new allocation of responsibilities take effect.

The Tribunal will recall Ms. Alegre's mantra in response to questions about MEM's repeated approvals of DRP's performance of the PAMA. We quoted a few of those approvals at pp. 21-22 above. She argued that MEM's blessings did not apply to Project No. 1. *See, e.g.*, Tr. at 740. But neither Ms. Alegre nor Respondents have pointed to any evidence that MEM found DRP's delay in completing Project No. 1 to constitute a default of the PAMA. Indeed, Ms. Alegre not only participated in the process of evaluating whether to grant an extension to DRP, she signed off on the report recommending the extension. R-280 at 83, 86. Her approval while working at MEM speaks louder than her efforts to backtrack now from that approval. The fact remains that as of the date DRP stopped operations in 2009, it had not defaulted on its PAMA obligations. Thus, the exception in 5.3(B) cannot apply.

2. The Narrow Exception in Article 5.3(A) Also Does Not Apply.

The only other exception in the STA to Centromin's responsibility for environmental matters is in Article 5.3(A), which sets out three requirements to be

met before any environmental claims can be allocated to DRP. Under this narrow exception, DRP would assume liability for third-party environmental claims "*only in the following cases*":

> Those that arise directly due to acts that are [1] not related to [DRP's] PAMA [2] which are exclusively attributable to [DRP] [3] but only insofar as said acts were the result of [DRP's] use of standards and practices that were less protective of the environment or of public health than those that were pursued by Centromin until the date of execution of this contract.

R-001, Article 5.3 (emphasis added). Activos Mineros therefore retains liability for the Missouri Litigations' claims unless it meets all three requirements. It proved none of them.

a. *The Missouri Claims* Are *Related to the PAMA*

Respondents must first demonstrate that the alleged liabilities arose from acts "not related[30] to [DRP's] PAMA." Art. 5.3(A). To fit within this exception, Respondents must demonstrate the absence of a connection or relationship between the claims asserted in the Missouri Litigations and the PAMA. This they cannot do.

Respondents' change of position about what constitutes a breach of the PAMA fatally undermines their ability to rely at all on Article 5.3(A). Given their new

[30] The *Oxford English Dictionary* defines "related" as "[c]onnected or having relation to something else." https://www.oed.com/search/dictionary/ ?scope=Entries&q=related. The Spanish term from the STA is "relacionar" which has the same definition, "establecer relación entre personas, cosas, ideas o hechos," or "to establish a relation between persons, things, ideas, or facts." *See* REAL ACADEMIA ESPAÑOLA: *Diccionario de la lengua española*, 23.a ed., [version 23.7 en línea]. https://dle.rae.es [June 21, 2024].

strategy, it is not surprising that Respondents did not spend much energy attempting to argue that the acts at issue in Missouri were not related to the PAMA. Having decided to assert that increased production and dirtier concentrates violate the PAMA, they cannot now argue those actions are "not related" to the PAMA.

The relationship between the claims of the La Oroya Plaintiffs and the PAMA proved to be one of the few areas in which the parties' experts agreed. Respondents' own expert, Deborah Proctor, expressly tied the Missouri claims to the PAMA. "I understand the Missouri plaintiff' claims are directly related to DRP's failure to complete PAMA Project #1."[31] John Connor—an expert in both the Missouri Litigations and this arbitration—explained that the PAMA "was specifically designed to address the principal environmental impacts associated with operation of the [smelter]," including "stack emissions, wastewater discharges, solid waste streams, and waste disposal facilities." Connor Second Report at 9. "Consequently, any claim regarding the effect of the [smelter] on the environmental or public health during the operations of DRP would by design be related to the PAMA." *Id.* at 10.[32]

[31] Proctor Second Report at 9. This statement is at the heart of Ms. Proctor's opinion. As she further explained: "Ongoing emissions and deposition as dust (indoor and outdoor) were the most significant sources of human exposure to lead while DRP operated the CMLO. These exposures created a public health crisis in La Oroya during DRP's operation of the CMLO, and I understand gave rise to the Missouri plaintiffs' claims." *Id.*at 8.

[32] This is not to say that every environmental matter that could potentially arise would be "related" to the PAMA. A myriad of potential liabilities might arise out of a complex smelter. If, as a hypothetical example, an employee improperly disposed of hydraulic fluid containing alleged contaminants in an onsite landfill, it would be an environmental matter not related to the PAMA.

Indeed, the La Oroya Plaintiffs invoke the PAMA at virtually every turn. In their response to Defendants' Motion for Summary Judgment, for example, they reference the PAMA 104 times. *See generally id.* The Plaintiffs in their Complaint tie their claims against Renco and DRRC to the protection promised by Centromin:

> Defendants' actual knowledge of such risks of harms is ***further evidenced by their negotiation of terms pertaining to environmental remediation and reduction of toxic emissions at the La Oroya Complex in their purchase and acquisition of the metallurgical complex and related facilities in Peru***.

Reid Compl. (**Ex. 3**) ¶ 74 (emphasis added).

The Plaintiffs' claims, however styled, are ultimately negligence claims. Under Missouri law, to establish negligence liability a plaintiff must prove the existence of a standard of care governing the conduct giving rise to the claims, and that the defendants' conduct breached that standard of care. As explained by the Missouri Supreme Court:

> In a negligence action, liability only exists when a defendant's conduct falls below the standard of care established by law for the protection of others against unreasonable risk of harm …. Whether a defendant's conduct falls below the standard of care is a question of fact for the jury. The Court will not, however, submit a case to the jury where no evidence exists to support a finding that defendant's conduct fell below the identified standard of care.

Harris v. Niehaus, 857 SW.2d 222, 225 (Mo. 1993).

But for claims involving air emissions of lead, there simply is no reasoned argument that they are "not related" to the PAMA.

Thus, the La Oroya Plaintiffs' case stands or falls on their ability to establish the applicable standard of care and to prove how and why the defendants allegedly breached that standard of care. To meet that burden, the Plaintiffs offered the expert opinion of Dr. Jack Matson, an environmental engineer. Matson's opinion is that the applicable standard of care required DRP to complete four fugitive emissions projects earlier than required by the PAMA, and that DRP breached the standard of care by failing to do those PAMA projects out of the order dictated by the PAMA.[33]

Specifically, Dr. Matson opined that DRP should have more quickly upgraded the sinter plant, the blast furnace, the drossing plant and paved the roads. He testified that "[t]hose are the highest priority." C-235 (J. Matson Dep. 1/26/21) at 205:10-16. Indeed, the "crux" of Matson's standard of care opinion in this case is that these projects DRP finished in 2006 should have been finished in 2000. And Dr. Matson testified that if those four projects were completed earlier than required by the PAMA, DRP would likely have met the standard of care (and there would be no liability in the Missouri litigation). *Id.* at 235:23-236:6; *see also* C-236 (J. Matson

[33] Dr. Matson also alleges DRP should have taken further steps related to the PAMA, "including negotiating the PAMA prior to purchase of the [smelter]," "negotiating the PAMA shortly after purchase of the [smelter]," and implementing "modernization and maintenance projects outside the scope of PAMA." *Reid*, ECF No. 1225-1 (Matson Rept. 12/1/20), attached in excerpted form as **Exhibit 11**, at 15. He also alleges that "the terms of the PAMA did not alleviate the Defendants' [corporate social responsibility] and standard of care obligations to ensure the operation of the [smelter] was prioritized in a manner that was protective of the health of the surrounding residents." *Reid*, ECF No. 1225-6 (Matson Rept. 5/28/21), attached in excerpted form as **Exhibit 12**, at 2.

Dep. 7/2/21) at 55:20-56:7 ("Q: The issue for you when you're looking at the standard of care in this case is that the projects that were finished by 2006 should have been done five or six years sooner? A: Well, yes").

But the PAMA did not include these four projects until DRP sought to modify the PAMA in 2005, and they were not required to be completed until 2006 or 2007—and DRP complied with those timing requirements. The graphic from Mr. Connor's presentation below shows the projects Matson pointed to highlighted in yellow:

CD-004 at 33.

The failure to craft the PAMA to comply with the standard of care (articulated by Dr. Matson) by putting fugitive emissions projects at the front of the line was Peru's mistake:

> Q: Is it your view that the government of Peru got it wrong in putting anything other than fugitive lead emissions projects as the top priority in the PAMA?
>
> A: Well, they got it wrong in not having fugitive lead emissions as a top priority.

C-235 (Matson Dep. 1/26/2021) at 235:23-236:6. Matson attributed this mistake to Peru's lack of knowledge and sophistication. He testified that the government of Peru "was not sufficiently sophisticated to regulate [the complex] effectively," and that it "didn't really understand how polluting the facility was." *Id.* at 192:18-24.

Thus, Plaintiffs' theory of the entire case is that the defendants' breached the standard of care ***by following the order of projects set forth in PAMA*** and because ***Peru did not properly prioritize the PAMA projects***. It is beyond dispute that the claims are related to the PAMA.

Respondents' recent concessions, the Plaintiffs' allegations and expert testimony, and the experts in this case all concur: Plaintiffs' claims are related to the PAMA. Respondents falter at the very first hurdle of Article 5.3(A)—the inquiry ends there.

b. *The Claims Do Not Arise from Acts Exclusively Attributable to DRP*

As a second hurdle, Respondents must demonstrate that the alleged liabilities "are *exclusively* attributable to" DRP. R-001, Art. 5(A) (emphasis added). Again, Respondents founder. The parties might quibble about the percentage of responsibility to be allocated as between Centromin and DRP, but there was universal agreement that Centromin bears some responsibility and hence the liabilities are not exclusively attributable to DRP.

Respondents have in fact judicially admitted in pleadings filed in DRP's liquidation proceeding that Activos Mineros bears a substantial percentage of responsibility for the environmental problems at La Oroya. DMP-001 at 9. As explained in that filing, Activos Mineros retained an outside expert to evaluate, among other things, the "health and ecological risks and remediation of soils contaminated by emissions of the Metallurgical complex at La Oroya." *Id.* at 6. The results of the evaluation:

Companies	Emission Factor (Femis.)	Soil Concentration Factor (Fconc)	Health risk factor (Frisk)	Amount of liability
C de P Corp. / Centromin Perú S.A.	84%	36%	20%	65%
Doe Run Perú SRL	16%	64%	80%	35%

Id. at 9. Activos Mineros accepted 65% of the liability. It is bound by this admission.

Respondents' own experts concede that residual contamination (often referred to as "historical emissions") from Centromin's operations lingers even today. Tr. at 1158-66. Ms. Proctor agreed that "historical emissions, including emissions under Centromin's operations, played and continue to play a role in the health of the community and the workers in La Oroya." Tr. at 1158. When asked if both parties bear some responsibility, Ms. Proctor replied: "To the total amount of contamination that exists in La Oroya? Absolutely." Tr. at 1162.

Dr. Rosalind Schoof, Claimants' expert, further confirmed these conclusions. As stated in Dr. Schoof's expert report:

> Any environmental exposure that occurred between 1997 and the present cannot be exclusively attributed to DRP. Historical contamination of soil and settled dust by prior Cerro de Pasco and Centromin operations continues to contribute substantially to exposures of La Oroya residents.

Schoof Report at 2. Dr. Schoof reaffirmed these conclusions during her testimony at the hearing. Tr. at 871-74.

These were not new conclusions formed by Dr. Schoof for purposes of the arbitration, but instead reflect conclusions she reached years earlier during her work at the time of DRP's operation of the smelter. In her first visit in 2005, she concluded: "While lead emissions will also be greatly reduced, blood-lead levels are still predicted to exceed health-based goals in 2011. This is due to the fact that dust and soil in La Oroya will still have high residual concentrations of lead from

historical emissions." C-60 at 37. When she returned in 2008, she observed: "It is assumed that soil concentrations are heavily influenced by historical emissions and are not likely to decline dramatically in the short-term." C-139 at 22.

One of the principal reasons for the continuing impact of Centromin's historical emissions, even today, is the failure by Centromin and Activos Mineros to take any materials steps to remediate the soil in areas surrounding La Oroya since 1997. Centromin petitioned MEM for permission to postpone performance of its PAMA obligation, asserting it was more prudent to wait until SO2 emissions were reduced. C-277. Claimants' expert, Dr. Gino Bianchi Mosquera, explains in his first report why postponing remediation was not reasonable. Bianchi Report at 97-98.

The Tribunal asked whether Activos Mineros had undertaken any revegetation or remediation after DRP stopped operations in 2009.[34] After DRP's operations ceased, Activos Mineros performed limited remedial activities, focusing on removal of soil from roadways and walkways, while leaving the areas adjacent to the roads and walkways untouched. The limited revegetation activities were inadequate in terms of scale and scope. Bianchi Report at 98-111.

Both sides agree that Centromin's conduct during its period of operations contributed to the health complaints at issue in the Missouri Litigations. Those

[34] The Tribunal's Question 6.f reads: "*Has there been any revegetation or soil remediation performed by or at the behest of Activos Mineros (or Centromín) since the end of the plant's operations and the liquidation of DRP?*"

alleged injuries are not exclusively attributable to DRP. Respondents cannot clear the second hurdle, which is another opportunity to simply end the inquiry.

c. *DRP's Standards and Practices Were Not "Less Protective" Than Centromin's*

A great deal of hearing time was spent on the "standards and practices" issue. We will respond at length to the Tribunal's questions on this subject, but the Tribunal reaches the question of whether DRP's standards and practices "were less protective of the environment or of public health than those that were pursued by Centromin" only if Respondents can satisfy the two preliminary hurdles, which they have failed to do.

As a preliminary matter, Article 5.3(A) further limits DRP's potential responsibility as "*only insofar as* said acts were the result of the Company's use" of less protective standards. Respondents must prove a direct connection between the claims of the La Oroya plaintiffs, on the one hand, and those standards and practices alleged to be less protective. They made no effort to meet that causation requirement.

The "only insofar" language of Article 5.3(A) means Activos Mineros cannot escape all responsibility even if it could prove DRP's standards and practices were less protective. For example, if Activos Mineros were able to prove that DRP's standards and practices were 10% less protective than Centromin's, that would not absolve Activos Mineros of liability. Activos Mineros would still need to show that

the liabilities in question only arose because DRP was 10% less protective and, if it had been as protective as Centromin, there would have been no claims. On the other hand, DRP, or in this case Claimants, can be responsible only for incremental liability arising from any less protective conduct.

(1) *Defining Standards and Practices*[35]

As the Tribunal notes, the STA does not define the phrase "standards and practices" and gives little guidance for its application. Under Article 170 of the Peruvian Civil Code, expressions that have several meanings "must be understood in the most appropriate way, in accordance with the nature and purpose of the act." Payet First Report at ¶ 51. In other words, we must use common sense, considering the agreement as a whole in the context of its business purposes.

If the Tribunal reaches the issue of "standards and practices," that requirement too must be construed in the context of the parties' intent to maintain Centromin's broad responsibility for environmental matters during the PAMA period. Dr. Bianchi Mosquera, a Peruvian environmental engineer with a doctorate from the University

[35] The Tribunal's Question 4 asks: *"Regarding the phrase "standards and practices that were less protective of the environment or of public health" (Clause 5.3(a) of the STA):"* and then lists several subparts. The first subpart asks:

a. What should the Tribunal understand as "standards and practices"? Does this phrase refer to the manner in which the facilities were operated, to the relevant industry or regulatory norms, or to the results of the facilities' operations (e.g., on emissions, air quality, or human health)?

of California, Los Angeles with over 30 years of experience directing and conducting environmental projects in the North and South America, and specifically Peru, set forth a definition in his expert report of standards and practices:

> For purposes of this report, I interpret "standards and practices" as referring to a company's operating systems and processes that have a potential impact on the environment and/or public health. As such, an evaluation of standards and practices involves a review of a company's environmental performance during a period of time that allows for a trend or tendency to form, including (i) **a comparison of relevant parameters at the start and end of the operational period**, and (ii) **identifying engineering projects processes that improved environmental conditions**.

Bianchi Report at 32 (emphasis added). Respondents chose not to question Dr. Bianchi Mosquera and never offered an alternative definition to his.

It would not be appropriate, as Respondents have urged, to cherry-pick the latest date of Centromin's operation (in October 1997) to compare with the earliest date of DRP's operations (late 1997 or early 1998). The STA does not, as Respondents repeatedly contended, use the phrase "***at*** the date of the signing" of the STA. *See, e.g.,* Respondents' Closing Slides at 31. Rather, the STA uses the phrase, as noted by the Tribunal's question, "those that were pursued by Centromin ***until*** the date of execution of this contract." R-001, Art. 5.3(A). That language requires the entire period of Centromin's operations to be considered.[36] A major feature of the

[36] This responds to Question 4.c., which asks: "*At what time or over what period should Centromín's standards and practices be evaluated for the purposes of the STA in light of the phrase*

PAMA was to provide an operating smelter a period of time to bring a facility into environmental compliance. The entire period of DRP's operations must be considered, and then compared with the entire period of Centromin's operations.

Another part of Article 5.3(A) makes it clear that the entire period of DRP's operations must be taken into account when making the comparison with Centromin's operations.[37] That provision states "but only insofar as *said acts* were the result of the Company's use of standards and practices…." The acts referred to are the acts made the basis of the damages and claims by the third parties. The La Oroya Plaintiffs are complaining they were injured by the DRP's conduct during its entire period of operations, not simply as a result of an incident occurring on one day or in one year in particular. *See, e.g.*, fn. 25, *supra*. In other words, the claims in Missouri put the entire period of DRP's operation at issue.

Nor would it be appropriate to limit the comparison of standards and practices to one single parameter. For one thing, Peru did not even begin to set standards for air quality until two decades into Centromin's operations.[38] For another,

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"that were pursued by Centromín until the date of execution of this contract" in Clause 5.3(a) (e.g., from 1974-1997, in 1997 only, at some other time, or over some other period)?"

[37] This responds to Question 4.d., which asks: "*At what time or over what period should DRP's standards and practices be evaluated for the purposes of the STA (e.g., in 1997, from 1997 until the end of the PAMA period, at or until the date on which the Missouri Litigation claims were filed, at the end of the PAMA period only, at some other time, or over some other period)?"*

[38] We focus in this brief on air quality issues, but it should be noted that the PAMA prioritized projects to clean up effluents discharged into adjacent rivers and also solid wastes from

measurement of some data, such as blood lead levels, is sketchy or nonexistent during the period of Centromin's operations. The Tribunal should not blinder its view but should instead take into account all the available information about both Centromin's and DRP's standards and practices, for their entire period of operations, in a holistic way.

(2) *The Contents of the PAMA*[39]

The PAMA is a good place to start when judging the standards and practices of Centromin, as it sets forth a description of the inadequate environmental practices in place at the time and what improvements remained to be made. But the Tribunal's question recognizes that the PAMA covers both a description of the then-current operations of Centromin, which would be relevant to the question at hand, as well as the prioritization and schedule of the PAMA projects. As for the latter, other than authorship, Centromin did virtually nothing to implement the PAMA projects. It should get no credit for merely identifying what it would not or could not

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the facility. Political pressure from agricultural interests insisted on putting water pollution projects first. Tr. at 850. Respondents have not challenged that DRP's standards and practices regarding water and solid waste projects were superior to Centromin's. A list of all the projects—solid waste, water, fugitive emissions, sulfur dioxide, and other PAMA projects—completed by DRP can be found in the 2009 request for an extension. C-055 at 7-9.

[39] In Question 4.b., the Tribunal asks: "*Given Centromín's authorship of the PAMA, do the contents of the PAMA (both as to the description of the then-current operations of the facilities as well as the prioritization and schedule of PAMA projects) reflect the relevant "standards and practices" of Centromín?"*

accomplish. The standards and practices of Centromin refer to its actual operations, not its aspirational but unfulfilled plans for improvement.

Besides the PAMA, there are other contemporaneous studies that provide background for Centromin's operations and its failure to control emissions in all environmental media, including the air. After the first environmental regulations were introduced in 1993, the MEM required existing facilities to conduct a program to identify and quantify environmental impacts caused by their operations (EVAP, for its acronym in Spanish). The Tribunal can find Centromin's EVAP at GBM-076. The EVAP details Centromin's shortcomings in multiple environment aspects: "Because the mineralized zone abounds in sulfides, metallurgical treatment has led to the production of large volumes of gas, solid, and liquid waste. Gaseous waste affects the quality of the air adjacent to the smelter . . . ." GBM-085 at 5.

In addition, as part of the privatization process, an environmental consulting firm was retained to identify issues and suggest strategies for remediation. The firm Knight Piesold issued its report in September 1996, spotlighting the numerous ways the La Oroya facility failed to meet Peruvian standards, much less accepted world standards. C-108 at 2 ("Airborne emissions of sulphur-dioxide (SO2), metals, and PM-10 particulate matter are high and exceed generally accepted international standards.").

The PAMA and related studies tell only part of the story. The Tribunal heard a direct and personal account of Centromin's operations and the conditions at the plant in the months before the STA was signed. Kenneth Buckley observed those conditions first-hand when he visited La Oroya during the due diligence process. Here is a sample of what he found:

> Well, I got more -- I was able to get into the Plant and take a look more closely. There was obviously -- there was a very much lack of maintenance. There was a very large hole in the gas-handling ductwork. It appeared that the dust collectors were not working, the bag houses, and the electrostatic precipitators were not working. And there was, you know, some nasty-looking liquids pouring out of the Plant into the river nearby. And we did a walk around, what I would describe as old La Oroya, and it was obvious -- I mean, it was very contaminated.

Tr. at 238.

(3) *Standards and Practices under DRP.*

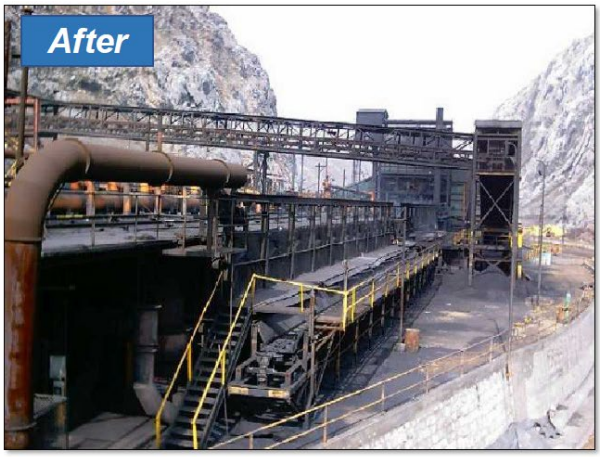
Using the definition of standards and practices that has been presented in this case only by Dr. Bianchi Mosquera, we start by identifying engineering projects and processes that improved environmental conditions. As soon as DRP took over the facility, it instituted efforts to increase employee safety, institute hygiene programs, add personal protective equipment, repair obvious maintenance issues, and plan for the PAMA projects. *See, e.g.*, Tr. at 239-40. The improvement was immediate and continuing.

The Tribunal can find the specific descriptions of the 40 projects undertaken by DRP and the effects those had throughout the record. *See, e.g.*, Bianchi Report,

Section 5.2, PDF pp. 41-69; Connor Second Report, App'x C, Slides 83-126; *see also* CD-004 at 30, 32-42. Here are three salient examples:

Coking Plant Changes (1998). DRP made various improvements to the coking plant, before closing the plant entirely in 2004. Connor Rept., App'x C at 86 (citing JAC-067). As a result of the 1998 changes, total daily emissions from the coking plant were reduced by 75%. *Id.* That reduction happened almost immediately upon DRP taking control of the La Oroya smelter.

Heavy emissions from the coking plant (c. 1998).



Coking plant, after 1998 changes but before decommission (2003).

Huanchan Slag Storage Facilities (2001-02). The remediation project included enclosure, waterproofing, creation of water drainage channels and vegetation works, and cost over $1 million. Connor Rept., App'x C at 96 (citing JAC-035). Before and after pictures show the clear improvement of DRP's effort to stabilize and enclose the slag deposit:

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

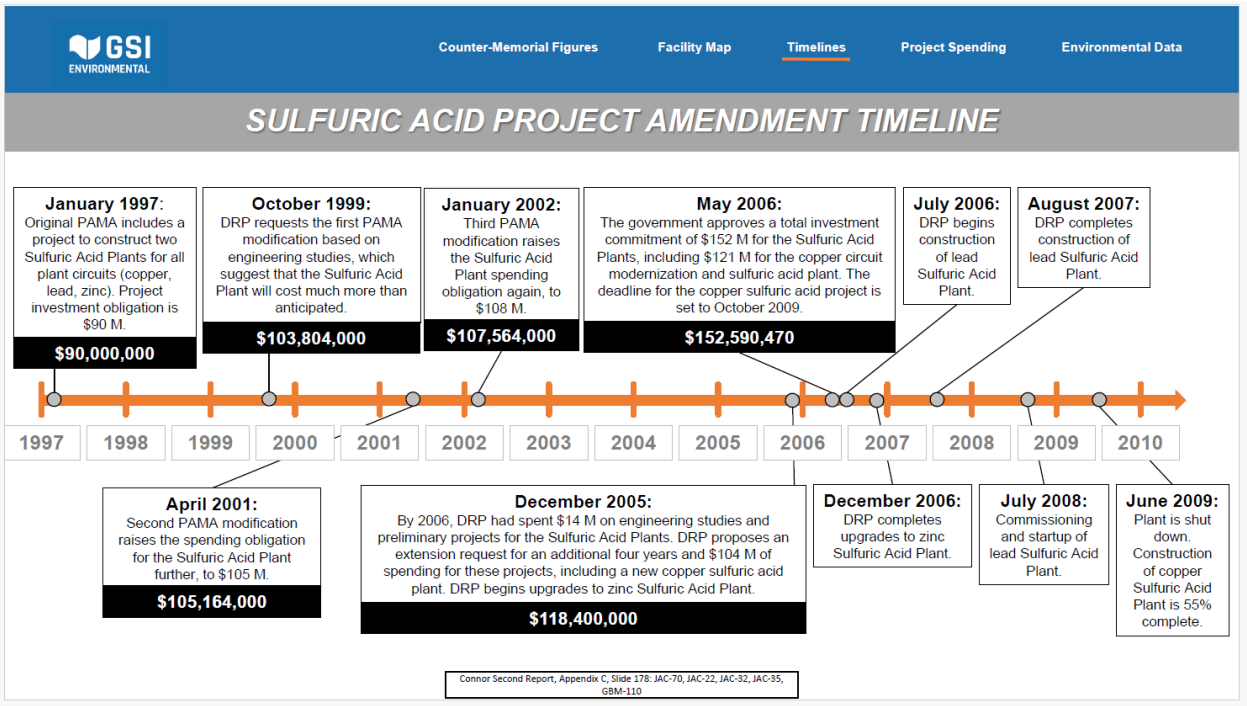
South portion of plant with stabilized slag deposit in background (c. 2008).

Enclosure and Baghouse for Lead Blast Furnace (2006-07). DRP designed and constructed full enclosures for the lead blast furnace and installed a 7-chamber baghouse—the enclosure prevented dust from escaping the building so that it could be captured by the ventilation system and directed into the baghouse filters. Connor Rept., App'x C at 102 (citing JAC-035). Before and after pictures show the upgrade—this was a visibly better standard and practice:

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

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

Much of Respondents' argument at the hearing centered around what did or did not happen to prepare for the SO2 plants during DRP's early years. Respondents' suggestion that DRP did not take any steps to modernize the copper circuit during that time is simply not true. A graphic illustration from Mr. Connor's slides shows the timeline of DRP's copper circuit modernization:



CD-004 at 43.

Respondents assert that DRP should have acted faster in constructing the three sulfuric acid plants. At the time DRP applied for its extension in 2005, in addition to its completion of the other 8 PAMA projects, it had spent $14 million in

engineering work on the sulfuric acid plants. Tr. at 900.[40] This work prompted DRP to seek and obtain successive extensions of the PAMA that substantially increased the budget for the sulfuric acid plants. In addition, on DRP's own recommendation, MEM added 12 additional air-quality projects to the list of items DRP was required to complete. DRP completed all 12 additional projects, plus the sulfuric acid plants for the lead and zinc circuits, and half of the sulfuric acid plant for the copper circuit. Tr. at 898-900. The idea that DRP was sitting on its hands regarding PAMA Project No. 1 is belied by the record.

The hearing time and energy focused on SO2 emissions led the Tribunal to inquire about SO2 standards.[41] The Government of Peru, from time to time after 1993, set air quality standards for certain materials, including SO2. At the time the STA was executed, the air quality standard in effect was a daily peak of 572 µg/m3, with an annual average of 172 µg/m3. This standard had been set by Peru's Ministry

[40] The audits conducted at MEM's direction confirm that DRP was in fact moving forward with these projects in accordance with the schedule set forth in the PAMA. *See, e.g.*, R-160 at 1 (2003 audit) (discussing expenditures for pre-feasibility studies for the sulfuric acid plants); R-160 at 7 (2004 audit) (discussing progress on feasibility studies for the sulfuric acid plants); R-194 at 1-2, 9 (2005 audit) (discussing continued expenditures on the sulfuric acid plants, and finding that DRP "has been complying with the environmental commitments established in the CMLO Environmental Management and Suitability Program").

[41] The Tribunal's specific Question 2.a reads: "*What SO2 emissions standards applied to DRP's operations as of the end of the (original) PAMA period in 2007 and thereafter?"* We assume the Tribunal's question refers to air quality standards, rather than "emissions" standards.

of Energy and Mines ("MEM") in 1996.[42] C-128. The 1993 Supreme Decree permitted operators to contract with MEM to maintain throughout the term of the PAMA the permissible limits in effect at the time of the contract. R-025 at 8. The Stability Contract between MEM and Metaloroya dated October 17, 1997 froze those SO2 standards throughout the period of the initial PAMA. R-199 (Clause 4.1: "These levels will not be subject to modification during the term of the contract.").

In 2001, MEM lowered the air quality standards for SO2 to 365 µg/m3 (daily) and 80 µg/m3 (annual average). The lower standards did not, however, apply to DRP at that time because of the Stability Contract.

When DRP sought an extension of the PAMA for the completion of the sulfuric acid plants, the MEM's approval of the extension request was conditioned, among other things, on reaching the 365/80 lower air quality standards for SO2 by October 2009. C-058 at p. 12. Thus, from the end of the original PAMA period through October 2009, the original air quality standards of 572/172 were in effect. After October 2009, the newer 365/80 standard applied to the facility, but of course the plant had been shut down in June 2009.

It should be noted that MEM never fined or sanctioned DRP for noncompliance with the SO2 air quality standards at any time.

[42] Ms. Alegre confirmed that this was the standard in place through the term of the PAMA. Tr. at 705-06.

(4) *The Myths of Increased Production and Dirtier Concentrates*

The Tribunal inquired about the relationship between production and emissions.[43] Respondents say that DRP's increased production meant more emissions and therefore worse air quality. But increases in production do not always translate into increased emissions. As Mr. Connor testified, improvements to control equipment and facility upgrades can mean that production increases and emissions decrease. Tr. 909-10. That was the case here.

This is not a novel concept but instead a central story of industrial development.[44] The relatively small increases in production during DRP operations were more than offset by the numerous projects undertaken by DRP to modernize the circuits and make them more efficient. These improvements in emissions and air quality are detailed in Dr. Bianchi Mosquera's first report at pages 61-71. As a result of these efforts, DRP was able to increase production while at the same time lower emissions.

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[43] The Tribunal's Question 5 asks: "*The Tribunal has noticed in the chart at Exhibit AA-54 (p. 81 of the PDF) that while production in the lead circuit increased in 1997-2002, production decreased slightly in the copper circuit and increased slightly in the zinc circuit over the same period. How would this be expected to affect lead and SO2 emissions?*"

[44] One need look no further than the PAMA itself and its description of prior improvements at the smelter: "Based on these data, there appears to be a reduction in both SO2 and particulate emissions despite the increase in the blister copper smelter capacity from 60,000 to 75,000 t/year. This reduction in emissions to the environment is primarily due to the change of metallurgical indices and the implementation of the oxy-fuel project." C-90 at 85-86.

Nevertheless, Respondents trotted out several arguments for the myth that DRP's increased production made its standards and practices less protective of the environment and public health than Centromin's. None hold water.

Respondents suggest that DRP's increase in production triggered the need for an Environmental Impact Assessment ("EIA"). But to trigger an EIA, DRP would have to have exceeded the "installed capacity" for 1995 by 150%. That never happened, as shown in the table below:

Metal	1995 Installed Capacity[45]	150% of 1995 Installed Capacity	Max DRP Production[46]	Year	Compliant?
Blister Copper	75,000	112,500	73,060	1999	**YES**
Lead Bullion	100,000	150,000	132,148	2000	**YES**
Refined Zinc	70,000	105,000	79,401	2001	**YES**

Another of Respondents' red herring arguments deals with "fluxes" which are chemical agents added to concentrates during the smelting process. Fluxes are different from both feedstock capacity (concentrates) and installed capacity (production). DRP's operating permit addressed limits on input (that is, concentrates) reflecting feedstock capacity in tons per month for the copper, lead, and zinc circuits. C-243 at 2. Respondents' expert, Mr. Dobbelaere, incorrectly asserted the permitted limits consisted of concentrates plus fluxes. Tr. at 1235.

[45] These figures come directly from the PAMA Table 3.2/1. C-90 at. 80.

[46] These figures are contained in Table 5 of Mr. Bianchi's expert report at p. 179.

The feedstock limits in DRP's operating permit do not include fluxes. We know this with certainty because when DRP-in-Liquidation sought permission to restart the lead and zinc circuits in July 2012, MEM said so. In approving the request, MEM referenced the "installed feedstock capacity *of concentrates*," citing the same tonnage for lead and zinc contained in the operating permit. GMB-038 at 5579.

Likewise, Respondents' arguments about dirtier concentrates are tempests in teapots. The average percentage of lead contained in the copper circuit concentrates increased during DRP's ownership from 1.8% to 2.4%, an increase of just 0.6%. WD-008 at 50, 54. The suggestion that this small change in one circuit overwhelmed the significant improvements made by DRP which we have outlined defies all the objective evidence. We turn now to that objective evidence.

(5) *The Myth of Fugitive Emissions.*

We have set out above why Article 5.3(A) should not be read to limit the comparison of standards and practices to only one element of data. Nevertheless, Respondents suggested fugitive emissions was the one issue that Centromin would compare favorably with DRP. This is another odd contention, as even Mr. Dobbelaere acknowledged there is no data on fugitive emissions during either company's period of operations. Tr. at 1261, 1290, 1368 ("…you cannot measure.").

It is also strange given Mr. Dobbelaere's admission that Centromin had multiple uncontrolled sources of fugitive emissions that it did nothing to address. Tr. at 1391.

In the absence of measured data on fugitives, Mr. Dobbelaere performed a mass balance calculation in which he merely assumed that some undefined percentage of "indeterminate losses" must equate to fugitives. Tr. at 1371 ("I did not go further to say this is the percentages of fugitive emissions because it's an estimate like another estimate.") Moreover, Mr. Dobbelaere acknowledges, as he must, that indeterminate losses are inherently a measurement of error as an element of mass balancing. Tr. at 1367 (agreeing that uncertainties in mass balancing include an "indeterminate category whose quantity reflects sampling inaccuracies, errors in lab analyses, unquantified spills, unquantified waste, among others"); *see also* IGAC, JAC-44, PDF p. 33.

Mr. Dobbelaere admitted he did not verify the data he relied on. A great deal of Mr. Dobbelaere's analysis depended on a report issued by SX-EW in 2012, during DRP's liquidation proceedings. *See* R-150. This was the data Mr. Dobbelaere "reconstructed" for his mass balance. Tr. at 1314-15. But when asked if he had the *actual raw* data reflected in the annexes to the SX-EW report, Mr. Dobbelaere stated that "I only had the data that are in this Report." Tr. at 1386. And when further probed whether "if it's referenced in an annex [to the SX-EW report], you did not have it[,]" Mr. Dobbelaere responded "[i]f it's . . . not in the Report, I did not have

it[,]" and further expounded "I don't know why it would be important for any analysis." *Id.* An expert who does not know whether he had the actual underlying data, much less the accuracy of that data, for his primary opinions is not credible.

With respect to another of his analyses based on the SX-EW report, that Mr. Dobbleare offered to show that DRP had greater fugitive emissions than Centromin, he was unable to explain the method of the underlying analysis or identify where the underlying data was sourced. He also admitted that he failed to identify critical data points in the record that contradicted his opinions. When confronted with these infirmities he responded, "you can prove whatever you want because it is all based on estimates on fugitives . . . ." Tr. at 1360.

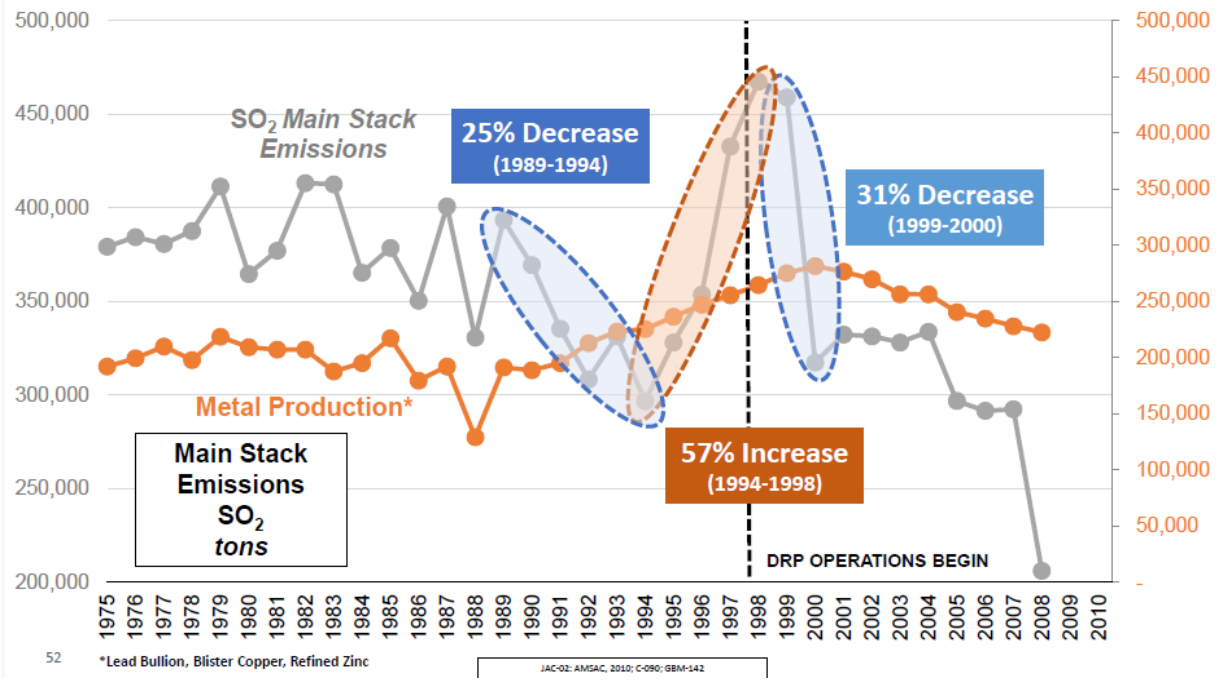
When confronted with any measured data that contradicted his conclusion, Mr. Dobbelaere either dismissed it as unreliable or ignored it. Tr. at 1264, 1292, 1298. For example, ambient air quality—a measured set of data—improved during DRP's operations. Mr. Dobbelaere attempted to wish it away. "I decided not to go into discussions on air monitoring because if you increase at the source, you can do whatever calculation you want. You will get worse. That's enough for me." Tr. at 1331. Of course, it is simply not true that increased feedstock at the source always results in worse air quality—the entire field of environmental engineering is devoted to increasing efficiencies and reducing pollution. In fact, Mr. Connor explained that

the improved air quality proves that emissions actually decreased during DRP's tenure, even while production increased. CD-004 at 73-75.

Likewise, blood lead levels decreased during DRP's operations, true proof that emissions decreased. Yet, Mr. Dobbelaere declined to consider it. He testified that "I will not opine on air quality and not upon lead-blood data. It is not my assignment so I will not opine on it." Tr. at 1422. Mr. Dobbelaere's conclusions—based on his unsupported "indeterminate loss" method—were unscientific, to say the least.

Mr. Dobbelaere's theory that emissions increased during DRP's operations also had to deal with a measured drop in SO2 emissions from 1999 to 2000. A significant amount of his reports (especially the second one) was spent on this issue, even though SO2 emissions are not the subject of the La Oroya plaintiffs' complaints in Missouri. He would not accept the data, concluding this drastic fall could be explained only by either an inaccurate SO2 measurement device, an inaccurate flow rate measurement, or that "DRP shifted emissions from the main stack to fugitive outlets." Dobbelaere Second Report, ¶¶ 235-42.

At the hearing, Mr. Dobbelaere was confronted with a chart with the measured SO2 emissions data:



He was forced to admit that neither the rise in emissions from 1994-1998 or the fall from 1999-2000 were valid. Tr. at 1414 ("I am sure that the SO2 data of these three years [1997-99] are flawed"); *id.* ("Q. Right. So both the increase and the decrease are not valid, in your Opinion? A. Not valid."). But when the "not valid" rise and drop are eliminated, SO2 emissions are shown to be relatively constant or gradually reduced during DRP's operations.

The Tribunal can judge for itself which side's expert to believe on the accuracy of available data, but it need not entertain that debate at all. Far easier it is to compare actual concrete steps taken by Centromin, on the hand, and DRP, on the other, in reducing fugitives. The PAMA itself acknowledges that Centromin had *no* treatment equipment for fugitives:

TABLE No. 4.1.1/1
GAS SOURCES AND DUST

Cod.	Emission source	Emission height m	Treatment equipment
1	Main stack	168	Electrostatic precipitator
2	Secondary stack		
	• Iron stack	91	None
	• Coke stack - Battery "A"	19	None
	• Coke stack - Battery "B"	19	None
	• Bismuth Vent. System. - A.R.P.	15	Gas washer
	• Converter Vent. System. - A.R.P.	19	Bag filters
	• Cupelation Vent. System. - A.R.P.	15	Electrostatic precipitator
	• Vent. System Zinc roasters	30	Gas washer, bag filters
	• Emissions from refinery of Cu, Pb and others		19 Ventilation stacks
3	Fugitive Emissions		None

A.R.P. Anodic Residues Plant

C-90 at 84. Nor did the original PAMA include any projects to reduce fugitive emissions. Even Mr. Dobbelaere conceded that Centromin had done nothing to address fugitives. Tr. 1394 ("like all the plants in South America").

In contrast, when the outside consultant Gradient reported in 2004 that fugitives had a significant impact on community health, DRP voluntarily undertook projects to control them. Tr. at 202-04. Additional projects were added at the time of the 2006 PAMA extension, and those projects were completed. Tr. at 898.[47] When it comes to controlling fugitives, as between Centromin and DRP, there is no comparison.

[47] A list of the projects completed between the two Integral studies may be found in the 2008 Integral report (C-139 at 36). Integral declared "Technology improvements at the Complex have led to notable declines in both stack and fugitive emissions, ultimately reducing concentrations of metals in the air and dust surrounding the smelter." *Id.*

(6) *Evidence Respondents Did Not Want the Tribunal to Hear.*

Though there is ample evidence in the record to evaluate Centromin's standards and practices, much of this evidence was not presented at the hearing. Respondents made a deliberate choice not to air this evidence. Respondents chose, for example, not to examine Jose Mogrovejo, who worked for Centromin from 1982-1994, then worked for the MEM, and later for DRP, giving him personal knowledge of both Centromin's and DRP's standards and practices. His witness statement generally, and specifically at paragraphs 8-15, details the lax attitude Centromin had towards the environment and public health.[48] Rather than fix obvious problems, Centromin would "simply pay the minimal fines and continue business as usual." Mogrovejo St., ¶ 11.

Respondents trumpeted at the hearing that Mr. Dobbelaere was the only metallurgist to present testimony. But Mr. Dobbelaere's singular status at the hearing was merely a function of Respondents' tactical decision not to question Eric Partelpoeg, Claimants' metallurgical expert. Mr. Partelpoeg observed first-hand DRP's operations when he was chosen *by MEM* to serve on a panel of experts to

[48] Respondents also limited evidence of Centromin's practices before the hearing by choosing not to offer *any* witness statement from any person with knowledge of Centromin's standards and practices. One would expect Respondents to have access to numerous current or former employees who could have provided relevant evidence. The Tribunal may fairly infer from the absence of first-hand testimony from any Respondents' witness that had such a witness been tendered, the evidence would not have been helpful to Respondents' position.

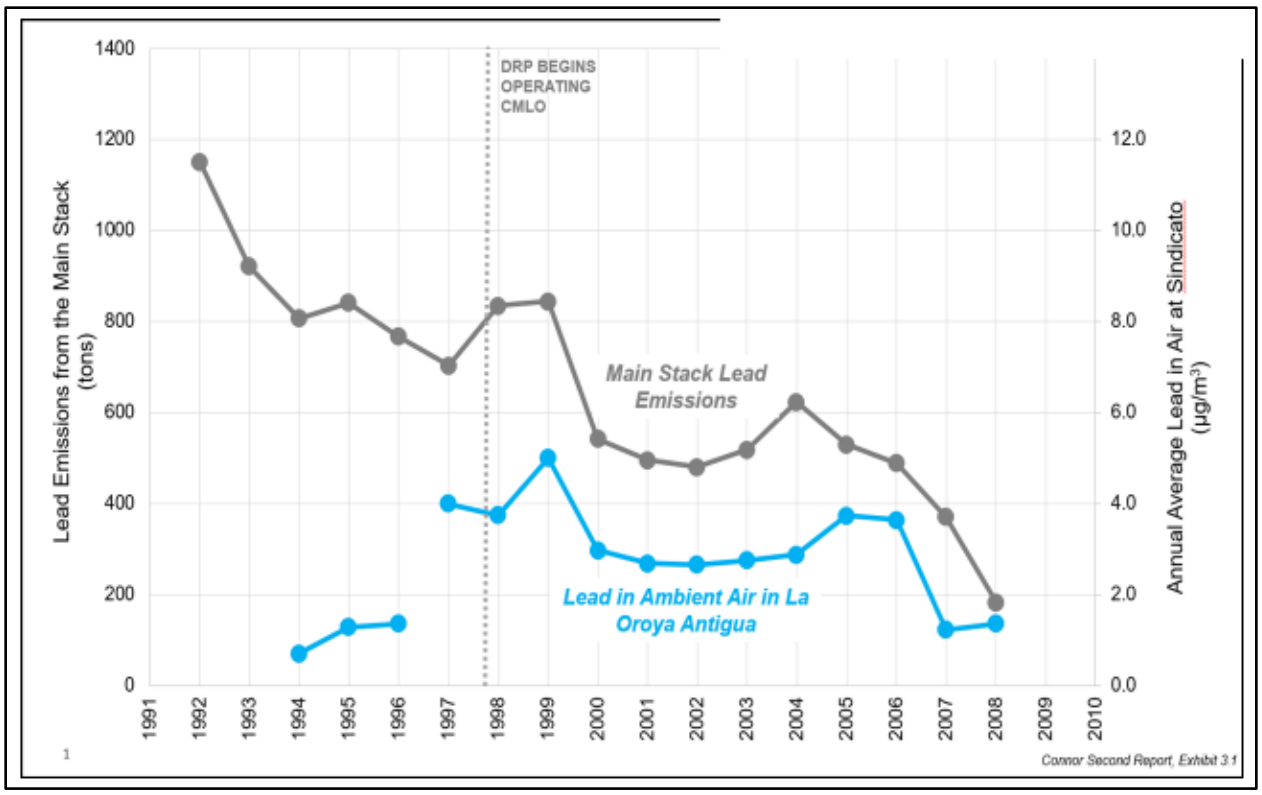
evaluate DRP's request for an extension of the PAMA in 2006. He personally confirmed the significant advances made by DRP in all areas of the PAMA projects and recommended that the extension be granted.[49]

Likewise, Respondents chose not to examine Dr. Bianchi Mosquera, an environmental scientist and geochemist who presented two reports. Dr. Bianchi Mosquera's unchallenged opinions comparing Centromin's practices to DRP's are set out at length in his first report, concluding that DRP's standards and practices were significantly more protective of the environment and public health than Centromin's.

(7) *A Tale of Two Charts.*

Two charts dramatically reflect the improvements made by DRP to the environment and public health. One, from John Connor, shows the measured decrease in lead emissions and the concomitant air quality improvement during DRP's operations:

[49] The primary complaint of Mr. Dobbelaere, like Ms. Proctor, related to the timing of building the sulfuric acid plants. Tr. at 1226. But even he had to agree, albeit begrudgingly, that the completion by DRP of two of the three acid plants had the effect of capturing more sulfuric acid than during Centromin's operations. Tr. at 1275 ("Of course it did.").



CD-001 at 3. The parties debated some of the data points, but no one questioned the accuracy of the air quality monitoring equipment for lead,[50] which documented a downward trend in lead particles in the air over the time DRP operated the plant.

The second chart comes from *Respondents'* toxicology expert, Ms. Proctor.[51] This picture of the steadily decreasing blood levels in children in La Oroya speaks volumes. Ms. Proctor acknowledged that the declining levels of lead resulted from actions taken by DRP to control fugitive emissions:

[50] Mr. Dobbelaere questioned the reliability of some of the data, but he admitted he had no basis to critique the equipment monitoring air quality in the La Oroya area. Tr. at 1245 (citing Dobbelaere Second Report, ¶ 226). A pyrometallurgist has no expertise in the use of air quality monitors; they are, however, a specialty of environmental engineers like Mr. Connor.

[51] Proctor First Report at 16.

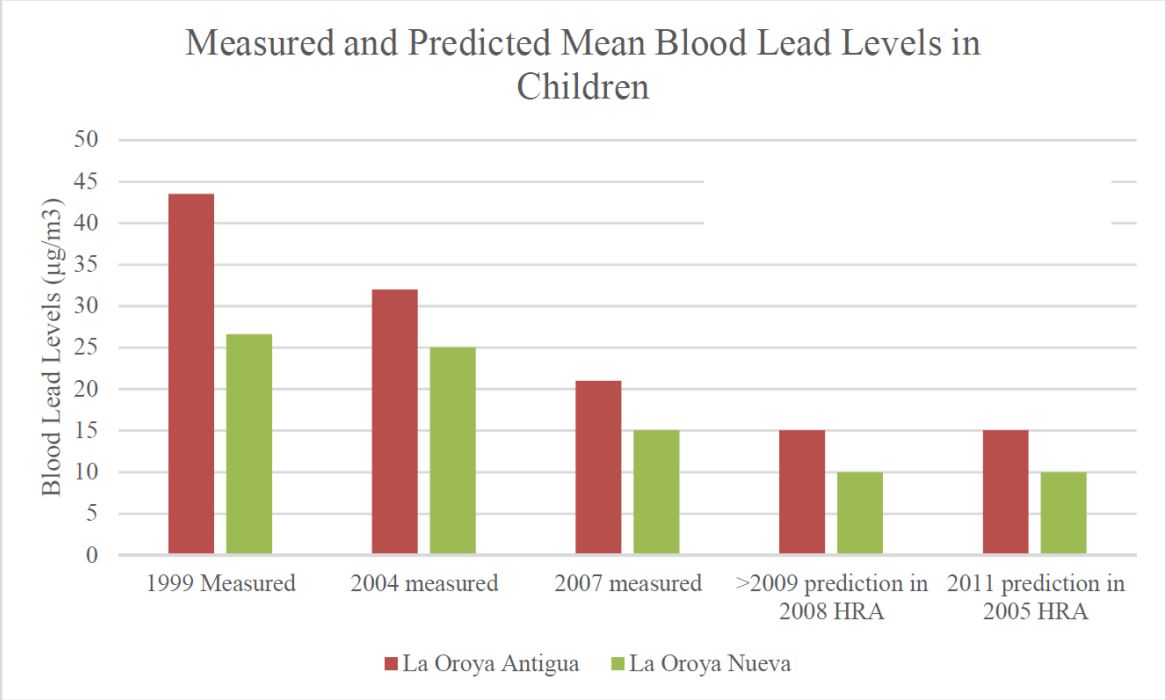


Figure 2. Measured and predicted mean blood lead levels (BLLs) in children measured in 1999–2007 exceed EPA's 10-µg/dL guideline. Predicted BLLs for >2009, assuming that the sulfur dioxide plants are operating by 2009, in the Integral (DMP-049, Integral, 2008) **HRA, and the predictions for 2011 in the Integral** (DMP-048, Integral, 2005) **HRA.**

These charts show real measured data through 2007 from government-verified sources. During DRP's operations, the environment and public health got better. The exception in Art. 5.3(A), therefore, does not apply, and Activos Mineros remains responsible for environmental claims attributable to DRP's activities.

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As a final point, we do not believe it matters whether "standards and practices" are assessed as of the end of the PAMA period or, with the benefit of hindsight,

according to today's understandings.[52] The result is the same. DRP devoted substantially more money and resources to improving the operations of the plant, making it more efficient and cleaner, than did Centromin. The issue is not whether DRP reached world-class standards, or even modern Peruvian standards. It is a simple overall comparison, and it is not even a close call. DRP's standards and practices for the environment and public health were more protective.

Because Respondents failed to prove that either exception in Article 5.3 applies, the responsibility for the claims of the Plaintiffs in the Missouri Plaintiffs remains with Activos Mineros.

D. Subrogation

Claimants agree that under Peruvian law a debt must be paid before a right to subrogation can arise.[53] However, this does not prevent the Tribunal from exercising its authority to declare the rights and obligations of the parties, namely the rights of Renco and DRRC to subrogation from Activos Mineros and the obligation of Activos Mineros to assume responsibility for the claims against Renco and DRRC. Peruvian law supports declarative relief when, as here, legal uncertainty exists.[54]

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[52] This responds to Question 4.e., which asks: "*Should the question of whether "standards and practices […] were less protective" be assessed as seen at the time or according to present understandings with the benefit of hindsight?"*

[53] First Payet Report ¶ 221 *et seq*. The Tribunal asked in Question 9: *"Is it common ground between the Parties that under Peruvian law a debt must be paid before a right to subrogation can arise?"*

[54] Third Payet Report ¶ 102 *et seq*.

Respondents employ a heads-I-win-tails-you-lose tactic regarding the subrogation claim. On the one hand, they contend the claim is unripe because it is simply too early to tell what claims of the La Oroya plaintiffs, if any, will prevail. On the other hand, they argue it is too late for Claimants to assert a subrogation claim because under Peruvian law the statute of limitations for tort claims is two years.

As suggested by the Tribunal's own question, a subrogation claim arises only once a claim is paid. Limitations on a subrogation claim, therefore, cannot begin to run until that occurs. It is not time-barred.[55]

II. CLAIMANTS' TREATY CASE

A. Introduction

Peru's conduct toward DRP makes no sense. Why would a government—one that could not or would not perform its own PAMA obligations—force into liquidation a company that had completed 8 of 9 PAMA projects and made substantial progress on the last one?

Throughout this proceeding we heard complaints from Respondents that DRP did not act fast enough, did not devote enough dollars, and generally did not do more than the PAMA required. As hypocritical as those complaints may be (Respondents

[55] Dr. Payet sets out another reason the subrogation claims are not time-barred. The underlying tort claims of the La Oroya plaintiffs are not governed by Peruvian law; hence, the statute of limitations relied upon by Respondents does not apply. *Id*. ¶ 124.

made the schedule, after all, and approved of DRP's progress until the end), even giving them credence does not answer the larger question.

By any objective measure, DRP improved the facilities at La Oroya. The sheer outlay of funds for PAMA projects—over $300 million—tells us that. The measured parameters of cleaner air and the significant declines in blood lead levels corroborate it. And DRP had a plan to finish the last PAMA project, the sulfuric acid plant for the copper circuit, the project Respondents had agreed, at least before this proceeding, to place last in order. Why then stop the progress and kill the company achieving it?

Did Respondents hope that a new foreign investor could be enticed to pay the Government of Peru another $120 million for the privilege of restarting the plant? Or, better yet, for the privilege of completing the sulfuric acid plant for the copper circuit before the plant could be restarted? If that was the hope, it was unfounded, as the plant has sat idle, for the most part, for the last 15 years. Putting DRP into liquidation was a lose-lose proposition economically and environmentally for the region. DRP's shareholders lost their entire investment, but the people of La Oroya lost their livelihood and their hope for a cleaner town.

1. The Bankruptcy Proceeding

The collective credits claimed in DRP's bankruptcy by MEM and other Peruvian governmental entities (such as OSINERGMIN and the tax authority) were

just under one-third of the total of all creditors.[56] *See, e.g.*, C-176. MEM itself was the largest single creditor, but its influence in the creditor's committee far exceeded its share of the overall outstanding credit.

MEM's position as the authority over the mining and metallurgy industry in Peru gave it outsized heft in the creditor's committee. MEM possessed regulatory power over the vast majority of the other creditors of DRP. These other creditors deferred to MEM's leadership in the creditor's committee, distorting the ability of the committee to choose a path to keep DRP in operation. *See* Schmerler Report at ¶ 290, et seq.

MEM's control of the bankruptcy yielded few if any benefits. *No* progress was made on PAMA Project No. 1 during the bankruptcy proceedings or thereafter by MEM or any successor entity.[57] Once DRP was placed in liquidation, the creditor's committee under MEM's leadership appointed a new entity to take control of the facility and then attempted to sell the plant to a new investor. The amount of MEM's credit and its influence on the creditor's committee remained unchanged throughout the process. There have been no distributions to MEM.

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[56] The Tribunal's Question 6.a asks: "*What specific percentage did MEM's and other public entities' credits represent in the bankruptcy proceedings at the different relevant moments in time?*"

[57] This responds to the Tribunal's Questions 6.d and 6.e, which ask: *"Did DRP make any progress on PAMA Project No. 1 (sulfuric acid plants) during the course of the bankruptcy proceedings? If so, what effect (if any) did this have on the amount of MEM's credit in those proceedings?"* and *"Did MEM ever receive any distribution from DRP's liquidation, and in what amount? Has MEM taken any steps towards the completion of the last sulfuric acid plant?"*

2. The claimed basis for MEM's credit[58]

The majority members of the INDECOPI Court Chamber stated:

> …[T]he claim allowed in favor of MEM does not derive from a quantifiable obligation to do something—which, as already stated, is one of the essential elements giving rise to a claim—which would become impossible to comply with in the event that the an order for relief was entered for DRP's liquidation; it derives from the amount of compensation resulting from a failure to comply with the relevant obligation….

C-174 at 30-31.

This conclusion suffers from three infirmities. First, MEM never argued it was entitled to compensation. The INDECOPI court decision was therefore incongruent with MEM's request. Second, the statutes and regulations governing the PAMA do not give MEM the power to extract compensation for a failure to perform a PAMA project. The sole remedies available to MEM are fines or closure (perhaps explaining why MEM knew not to ask for damages in the first place). Finally, INDECOPI as an administrative agency had no jurisdiction to determine the existence of an obligation to pay compensation, as this is reserved in Peru to the judicial authorities. These points are set out in detail in Mr. Schmerler's reports.

[58] The Tribunal's Question 6.b asks: "*Considering MEM's arguments and the difference in the findings of the administrative authorities and courts in Peru, what was the ultimate basis for the credit asserted by MEM and recognized in the bankruptcy and insolvency proceedings?*"

The credit is unquestionably of a public nature.[59] Quoting again from the INDECOPI court decision: "It therefore follows from the analysis above that MEM has proven to own a claim for the principal amount of US$ 163,046,495.00 against DRP, so that the appealed decision should be reversed and amended to recognize such claim in favor of the *public* entity." C-174 at 31 (emphasis added). Moreover, as set out above, MEM's omnipotent role in the bankruptcy proceedings came from its supervisory authority over the rest of the creditors.

3. Substantive Denial of Justice

For our treaty claims, Claimants invoke each of the Peruvian judicial decisions that approved of MEM's $163 million credit in DRP's bankruptcy.[60] These decisions are discussed at length in Claimants' Counter-Memorial in the Treaty case beginning at ¶ 279. They may be found in the exhibits as follows:

- Resolution 1743-2011/SC1-INDECOPI issued by Chamber No. 1 for the Defense of Competition of INDECOPI, November 18, 2011 [C-174]
- INDECOPI Resolution No. 9340-2011/COO-INDECOPI, Recognition of Credits - Mandate of the Court for Defense of Competition No. 1, December 21, 2011 [C-175]
- Judgment of the Annulment of Administrative Act, Case No. 2012-00368, October 18, 2012 [C-181]

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[59] The Tribunal's Question 6.c asks: "*Considering that MEM's credit was said to have derived from a PAMA-related obligation, is it of a public nature? Was MEM acting with public authority in the bankruptcy proceedings?*"

[60] The Tribunal's Question 7 asks: *"[For the Claimant:] What specific judicial measures (or exact portions of judgments) does Renco invoke as part of its "substantive denial of justice" claim?*"

- 8th Chamber of the Lima Superior Court, Decision No. 38, July 25, 2014 [C-190]
- Peruvian Supreme Court of Justice, Decision on the *Recurso de Casación*, November 3, 2015 [C-193]

4. DRP's Demise Was Not Caused by Renco and DRRC

From the beginning, it was a fundamental premise of the STA that DRP would be permitted to fund the PAMA projects and the modernization of the La Oroya facilities from cash flow generated by operations.[61] The 1993 Supreme Decree required smelters to invest at least one percent of annual sales to implement their PAMA obligations. R-025 at 6. The STA expressly permitted DRP to use for other purposes the new capital that had been contributed. R-001, Art. 3.3. DRP took advantage of the express provision, used the capital for other purposes, and funded PAMA projects with cash flow in compliance with the Supreme Decree.

During DRP's operations, Respondents never challenged DRP's compliance with the STA or Peruvian law regarding funding of the PAMA projects, funding of required improvements, or any financial matters at all. Yet, in this proceeding, Respondents criticize DRP's financial performance and contend DRP's liquidation was its own fault (or the fault of Renco or DRRC). Respondents point, as an example, to what they call "circular transactions" at the outset of DRP's tenure. They also take issue with "intercompany fee arrangements," and cite isolated

[61] *See, e.g.*, Sadlowski Statement (Treaty) ¶ 10.

comments from non-testifying witnesses about financial difficulties. This blame-the-victim strategy comes too late, and it is wrong.

The data points selected by Respondents precede the global financial crisis by many years. The so-called "circular transactions" occurred in 1998 and 2002. The intercompany transactions ended in 2004. Tr. at 1508. There is no evidence those past events hindered DRP's ability to perform. Indeed, by the time of the global financial crisis in 2008, DRP's operations had generated sufficient cash flow to fund the required modernization projects (Tr. at 1491), the entire $120 million investment required by the STA (Tr. at 1492-93), and a total of $313 million toward the PAMA projects (Tr. at 1502, C-214, C-055 at 6). Respondents could not identify any vendors or any taxes DRP had failed to pay (Tr. at 1518), nor is there any evidence that DRP failed to do so. Despite the doom-and-gloom comments (whether uttered at the time by DRP or now by Respondents), DRP met its obligations.

There was direct evidence in the record of what caused DRP's demise, but, once again, Respondents did not want to hear it. Dennis Sadlowski was not called by Respondents to testify, even though he set out the facts in detail in his witness statement. He described why DRP insisted on adding "extraordinary economic alterations" to the list of contractual force majeure events.[62] He laid out how the

[62] Sadlowski Statement (Treaty Case) ¶¶ 23-25.

global financial crisis disrupted DRP's operations.[63] Citing the crisis, DRP declared force majeure and sought an extension of time to complete the sulfuric acid plants. Peru dragged its feet on the request. While Peru dallied, a supplier forced DRP into bankruptcy, but even then Claimants provided a plan to avoid liquidation and complete Project No. 1.[64] Rather than save DRP, MEM asserted its bogus claim, controlled the bankruptcy, and killed the company.[65]

If the Tribunal wants to know what happened to DRP and why it did not finish Project No. 1, it should read the testimony of Dennis Sadlowski, an eyewitness to the entire chain of events. That evidence from a fact witness with personal knowledge is much more worthy of this Tribunal's belief than the speculative musings of an expert hired by Respondents to find fault.[66]

III. THE IACHR DECISION[67]

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[63] *Id.* ¶¶ 27-30. It should be noted that Respondents' expert conceded the 2008 global financial crisis was an "extraordinary economic alteration." Tr. at 1520.

[64] Sadlowski Statement (Treaty Case) ¶¶ 31-69.

[65] *Id.* ¶¶ 76-83.

[66] Respondents also chose not to hear from Bryan Callahan, a financial expert who refutes Ms. Kunsman's theories. His witness statement provides additional details as to how DRP was able to meet its financial commitments until the global financial crisis.

[67] The Tribunal asked in Question 10:

*The Tribunal notes that the Inter-American Court of Human Rights has recently issued a judgment in a case related to the community of La Oroya and the Facility (the "**IACtHR Judgment**"). Accordingly, the Parties are requested to submit the IACtHR Judgment as an exhibit along with the translation of the sections each Party considers appropriate in accordance with paragraph 4.2(c)(ii) of Procedural Order No. 1 of both Cases. Regarding the IACtHR Judgment:*

Claimants were not parties to the IACHR proceeding and had no opportunity to participate. The decision has no binding effect on DRP, on the Claimants, or this Tribunal. Moreover, the standards by which that Court made its ruling differ markedly from the contractual provisions at issue here.

While little or no weight should be accorded to the IACHR decision itself, the Tribunal should give weight to the positions taken by Peru in the proceeding. When faced with allegations that environmental contamination in La Oroya constituted violations of the American Convention on Human Rights, Peru defended its conduct by touting the measures that had been taken by Centromin *and DRP* to improve the environment. Peru argued in 2009 that "in keeping with its international obligations, it has been taking progressive, consistent, cross-cutting, and multisectoral measures to bring about optimal air quality levels, to counteract the health problems of the affected population, and to monitor the activities of the Doe Run Company."[68]

In the IACHR proceeding, Peru noted that water quality standards for various metals, including lead, had been brought within international standards.[69] It cited the 2008 Blacksmith report as evidence of "improvement stemming from measures

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(a) What weight (if any) should the Tribunal grant to the analysis and findings of the Inter-American Court of Human Rights?

(b) Could the Parties please provide any comments they have concerning the IACtHR Judgment?

[68] Report No. 76/09, August 5, 2009, IACHR, attached as **Exhibit 13**, ¶ 37.

[69] *Id*. ¶ 46. The credit for this improvement lies solely with DRP.

taken by [DRP]."[70] It opposed the imposition of sanctions by IACHR as unwarranted. In short, Peru took positions before the IACHR directly inconsistent with the assertions made in this arbitration. Peru's effort to convince this Tribunal that its standards and practices during Centromin's operations were more protective of the environment and public health are disingenuous.

No one denies that the decades of Centromin's operations created a public health and environmental crisis in La Oroya, or that even after the substantial efforts made by DRP that much work remains to be done. Perhaps the most salient conclusion to be drawn from the IACHR decision is that in the 15 years since DRP ceased operations, Peru has done virtually nothing to improve the plight of La Oroya and its citizens.[71] We can all express regret at that unhappy circumstance, while acknowledging it answers none of the issues confronting this Tribunal.

IV. CLAIMANTS' REQUESTS FOR RELIEF

For the Contract Case, Claimants request a declaration that (a) Activos Mineros assumed responsibility for the claims of the plaintiffs in the Missouri Litigations and the liabilities associated therewith, and (b) Activos Mineros owes

[70] *Id.* ¶ 48.

[71] A very recent news article dated May 29, 2024 reports that even after the IACHR's March 22, 2024 decision levels of sulfur dioxide emissions exceeded limits recommended by the Inter-American Court on 39 days. https://laencerrona.pe/2024/05/29/la-oroya-aun-registra-niveles-peligrosos-de-azufre-ante-inaccion-del-estado/

Renco and DRRC indemnity for the fees and costs of the Missouri Litigations and any judgment or settlement that might be entered in the future against Renco and DRRC, and/or (c) alternatively, Renco and DRRC have a right of subrogation against Activos Mineros in the event a judgment or settlement in the Missouri Litigations requires them to make a payment to the plaintiffs. Furthermore, Claimants request a finding that Claimants are entitled to damages in an amount to be determined at the damages phase.

For the Treaty Case, Claimants request findings that (a) Peru treated DRP unfairly and inequitably, (b) Peru denied justice to DRP by allowing MEM to benefit from arbitrary and capricious court decisions, and/or (c) Peru indirectly expropriated DRP's assets, each causing Renco and DRRC to lose their entire investment in DRP. Furthermore, Claimants request a finding that Claimants are entitled to damages in an amount to be determined at the damages phase.

Claimants request that a second hearing be held to determine damages.

Finally, Claimants request they be awarded the fees and costs incurred in these arbitration proceedings.

The word count of this brief, inclusive of footnotes, is: **18,198**

Respectfully submitted,

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APPENDIX

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