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*In the matter of*

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

v.

**The Republic of Peru  
Activos Mineros**  
*Respondents*

# **Response of the Republic of Peru and Activos Mineros**

14 January 2019



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**WHITE & CASE**

# Response of The Republic of Peru and Activos Mineros

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## Response of The Republic of Peru and Activos Mineros

1. The Republic of Peru (“Peru”) and Activos Mineros S.A.C. (“Activos Mineros” and together with Peru, “Respondents”) hereby submit their Response to the Notice of Arbitration dated 23 October 2018 (“Notice of Arbitration”) filed by The Renco Group, Inc. (“Renco”) and Doe Run Resources, Corp. (“DRRC,” and together with Renco, “Claimants”) under the Contract of Stock Transfer, Capital Stock Increase and Stock Subscription of Empresa Metalurgica La Oroya S.A (the “Contract”).<sup>1</sup>

### I. Introduction

2. Renco and DRRC seek to compel Peru and Activos Mineros to appear in U.S. courts or indemnify them for unspecified and undetermined damages that they may be required to pay. The instant arbitration is one in a series of proceedings by which Renco has tried to shift responsibility for its own failures to Peru. Its repackaged claims under the Contract submitted without evidentiary support must likewise fail.

- **The Facility.** Renco seeks an award of unspecified damages for the alleged mistreatment of, and interference with, its alleged investment in Doe Run Peru S.R.LTDA (“DRP”), a Peruvian mining and mineral processing company. In 1997, DRP acquired the smelting and refining complex in La Oroya, Peru (the “Facility”). DRP made specific promises and undertakings to comply with various environmental and investment obligations. Despite multiple extensions of time granted by Peru, DRP failed to comply with its environmental obligations.

- **The U.S. Litigations.** Well before the Treaty entered into force, Renco and certain of its affiliated companies and executives have been involved in personal injury lawsuits in the United States in connection with La Oroya (the “Missouri Lawsuits”). Renco has used the commencement of arbitration against Peru to gain advantages in the U.S. litigation proceedings, which have been ongoing for many years. Neither Peru nor Activos Mineros is a party to the Missouri Lawsuits.

- **The Treaty and Dispute.** Following the entry into force of the Treaty, DRP closed the Facility in 2009 and ceased making payments to its creditors and was placed in bankruptcy. Subsequently, Renco and its affiliates have sought to disregard sovereign immunity to involve Peru and Activos Mineros in the Missouri Lawsuits, and DRP and Renco’s wholly-owned subsidiary Doe Run Cayman Limited (“DRC”) have sought to bar Peru’s Ministry of Energy and Mines (the “MEM”) from participating in the bankruptcy proceedings. Despite multiple challenges in local proceedings, the MEM’s right to participate has been upheld in accordance with Peruvian law.

- **Claimants are Not Entitled to Relief under the Contract.** All of Claimants’ claims in this arbitration are factually and legally meritless. Not only is there no arbitration agreement between Claimants and Respondents, Claimants have failed to show that there is

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<sup>1</sup> The Parties agreed that Respondents would respond and make arbitrator appointments no later than 14 January 2019. See letter from White & Case to King and Spalding dated 17 December 2018.

any contractual obligation involving Claimants and Respondents related to the Missouri Lawsuits and their attempts to pass on any eventual liability must fail.

3. Renco has simultaneously pursued claims against Peru pursuant to the Trade Promotion Agreement between Peru and the United States (the “Treaty”). Peru (together with Activos Mineros) had established a framework with Renco and DRRC to facilitate consultations, and in that context agreed to endeavor to resolve any disputes among them efficiently. For the avoidance of doubt, Respondents do not elect to treat this Response as their Statement of Defense, and expressly continue to reserve all of their rights with regard to this matter.

## II. Facts

### A. The La Oroya Facility

4. In the early 1990s, Peru sought to privatize and to modernize its mining industry, including the La Oroya Facility, which was then held by Empresa Minera Del Centro Del Perú S.A. (“Centromin”), a State-owned mining and mineral processing company.

5. In accordance with the applicable legal framework, Centromin prepared an Environmental Remediation and Management Program (“PAMA”) outlining the actions and investments required to achieve compliance with environmental regulations, which included environmental projects aimed at remediating, mitigating, and preventing environmental degradation to be completed over a period of ten years. The Ministry of Energy and Mines (the “MEM”) adopted the PAMA on 13 January 1997.

6. That year, Centromin transferred its interest in the Facility to Empresa Minera Metaloroya La Oroya S.A. (“Metaloroya”), a State-owned company that had been established by Centromin for purposes of Peru’s privatization program. On 10 July 1997, a consortium formed by Renco and its affiliate DRRC won a public tender for Metaloroya, and proceeded to establish DRP. On 23 October 1997, DRP executed the Contract.

### B. The Environmental Obligations

7. The Contract was executed by “on the one part [...] Empresa Minera del Centro del Peru S.A. (Centromin Peru S.A.) [...] and on the other part Doe Run Peru S.R.Ltda [...] hereinafter the Investor” with the “intervene[ti]on in this Contract [of] the Empresa Metalurgica La Oroya, S.A. (Metaloroya S.A.) [...] hereinafter the Company.”<sup>2</sup> Renco and DRRC participated to “warrant the compliance with the obligations contracted by the Investor, Doe Run Peru.”<sup>3</sup> On 27 October 1997, four days after the Contract was concluded, Centromin agreed to release Renco from its guaranty per Renco’s request.<sup>4</sup>

8. On 21 November 1997, in accordance with Presidential Decree No. 042-97-PCM, Peru entered into a separate Guaranty Agreement. The Guaranty, on its face is between “the PERUVIAN STATE [...] as party of the first part; and DOE RUN PERU S. R. LTDA. [...]

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<sup>2</sup> Contract, Recitals.

<sup>3</sup> Contract, Additional Clause.

<sup>4</sup> See Modification of the Contract to Transfer Shares, Increase Company Capital and Subscription of Shares of Metaloroya S.A. dated 17 Dec. 1999.

hereinafter referred to as THE INVESTOR, as party of the second part.”<sup>5</sup> While Peru is a party to the Guaranty, Renco and Doe Run Resources—the Claimants in this arbitration—are not. The Guaranty provides in Clause 2.1. that the State “guarantees THE INVESTOR the representations, assurances, guarantees and obligations assumed by THE TRANSFEROR [defined in 1.1. as Centromin]” under the Contract. As Clause 2.1 reflects, the rights set out in the Guaranty run specifically the “Investor.” Neither Renco nor DRRC are the “Investor” under the Guaranty.

9. On 30 December 1997, following Renco’s release as a guarantor, Metaloroya merged with DRP, and DRP thus assumed all of Metaloroya’s rights and obligations as the “Company” under the Contract.<sup>6</sup> On 1 June 2001, DRP assigned its contractual position as the “Investor” to Doe Run Cayman Limited (“DRC”);<sup>7</sup> DRC thus assumed all of DRP’s rights and obligations as the “Investor” under the Contract.<sup>8</sup> Finally, on 19 March 2007, Centromin assigned its contractual position to Activos Mineros; Activos Mineros thus assumed all of Centromin’s rights and obligations under the Contract. Activos Mineros is a state-owned company established on 12 July 2006 by Peru’s Private Investment Promotion Agency (PROINVERSION) to remedy mining projects that the State assigns, supervise the post-privatization commitments assumed by mining investors, and assist with private investment promotion in the State’s mining concessions.

10. Accordingly, “Company” and “Metaloroya” refer to DRP; “Investor” refers to DRC; and “Centromin” refers to Activos Mineros. The rights related to third-party liability under the Contract run specifically the “Investor,” or the “Company.” Neither Renco nor DRRC are the “Investor” or the “Company” under the Contract.<sup>9</sup>

11. The Contract establishes the rights and obligations of relevant entities, including related to environmental and investment undertakings, as well as liability for third-party claims. Further to the Contract, the Company undertook to invest US\$ 120 million in the La Oroya Facility within five years. With respect to environmental issues, the Company assumed responsibility for the obligations contained in Metaloroya’s PAMA in accordance with Clause 5.1, while Centromin assumed responsibility for Centromin’s PAMA, as well as other technical obligations, including abandonment of the slag and remediation of areas affected by emissions, in accordance with Clause 6.1. In addition, further to the Contract, the parties undertook to hold themselves harmless and indemnify each other with respect to specific third-party claims. Specifically:

- **Pre-Contractual (Clause 5.5).** “From the signing of this Contract, the Company will not have nor will it assume any liability for damages or for third party claims attributable to Centromin insofar as the same were the result of Centromin’s operations or those of its predecessors up to the execution of this Contract or are due to a default on the part of Centromin with regards to its obligations.”

- **PAMA Period (Clauses 5.3 and 6.2).** “During the period approved for the execution of Metaloroya’s PAMA, the Company will assume liability for damages and claims by third

<sup>5</sup> Guaranty Agreement dated 21 November 1997.

<sup>6</sup> See Modification of the Contract to Transfer Shares, Increase Company Capital and Subscription of Shares of Metaloroya S.A. dated 17 Dec. 1999.

<sup>7</sup> Assignment of Contractual Position between Due Run Peru S.R.L and Doe Run Cayman Ltd. dated 1 June 2001 (“Contract Assignment”), Clause 2.

<sup>8</sup> Assignment of Contractual Position between Due Run Peru S.R.L and Doe Run Cayman Ltd. dated 1 June 2001 (“Contract Assignment”), Clause 2.

<sup>9</sup> Nevertheless, Claimants inaccurately and improperly insert themselves into contractual text. See, e.g., Notice of Arbitration ¶¶ 50-51.

parties attributable to it from the date of the signing of this Contract, only in the following cases: (a) Those that arise directly due to acts that are not related to Metaloroya's PAMA which are exclusively attributable to the Company but only insofar as said acts were the result of the Company's use of standards and practices that were less protective of the environment or of public health than those that were pursued by Centromin until the date of execution of this Contract . . . (b) Those that result directly from a default on the Metaloroya's PAMA obligations on the part of the Company or of the obligations established by means of this Contract . . ." On the other hand, "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."

▪ **Post-PAMA (Clauses 5.4 and 6.3).** "[T]he Company will assume liability for damages and third party claims in the following manner: (a) Those that result directly from acts that are solely attributable to its operations after that period. (b) Those that result directly from a default on the Metaloroya's PAMA obligations on the part of the Company or of the obligations established by means of this Contract in numerals 5.1 and 5.2. (c) Should the damages be attributable to Centromin and to the Company, the Company will assume liability proportionately to its Contribution to the damage." In turn, "Centromin will assume liability for any damages and third party claims attributable to Centromin's and/or its predecessors' activities except for the damages and third party claims for which the Company is liable."

12. Regarding notice of third-party claims, the parties agreed that, "[s]hould the Company or the Investor receive any demand or judicial, administrative notice or notice of any kind, related to any act or fact included within the responsibilities, declaration and guarantees offered by Centromin, they pledge to report it to Centromin within a reasonable term which will allow Centromin to exercise its right to a defense, releasing the Company or the Investor from any obligation with regard to the same and Centromin shall be obliged to immediately assume those obligations as soon as it is notified."<sup>10</sup>

13. During its operation of the La Oroya Facility, DRP requested numerous modifications and extensions of the PAMA obligations, which the MEM granted, including modifications to the schedule of actions, investments, and scope of projects approved on 19 October 1999,<sup>11</sup> 10 April 2001,<sup>12</sup> and 25 January 2002,<sup>13</sup> as well as exceptional extensions of time granted further to new regulations modifying the maximum legal limit.<sup>14</sup> Despite multiple modifications by the MEM, DRP failed to comply with its environmental obligations.

### C. The U.S. Litigations

14. Beginning in 2007, plaintiffs from La Oroya filed lawsuits in the United States alleging various personal injury damages as a result of alleged exposure to harmful substances and environmental contamination from the La Oroya Facility. The named defendants at

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<sup>10</sup> Contract, Clause 8.14.

<sup>11</sup> Directorial Resolution No. 178-99-EM/DG concerning the amendment of the action and investment schedule of the PAMA dated 19 Oct. 1999

<sup>12</sup> Directorial Resolution No. 133-2001-EM-DGAA concerning modifying the PAMA for La Oroya Metallurgical Complex dated 10 Apr. 2001.

<sup>13</sup> Directorial Resolution No. 28-2002-EM/DGAA.

<sup>14</sup> DRP PAMA Extension Request dated 15 Dec. 2005; Ministerial Res. No. 257-2006-MEM/DM dated 29 May 2006; Law No. 29410 Extending the Term for the Financing and Culmination of the "Sulfuric Acid Plant and Modification of the Copper Circuit" Project at the Metallurgical Complex of La Oroya dated 26 Sept. 2009; Supreme Decree No. 075-2009-EM dated 29 Oct. 2009.

present include Renco and DRRC, as well as their U.S.-affiliated companies DR Acquisition Corp., Doe Run Cayman Holdings LLC, and directors and officers Marvin K. Kaiser, Albert Bruce Neil, Jeffrey L. Zelms, Theodore P. Fox III, and Ira L. Rennert (collectively, the “Renco Defendants”). Neither DRP nor DRC is a party to the Missouri Lawsuits.<sup>15</sup>

15. The Missouri Lawsuits are currently consolidated in the U.S. District Court for the Eastern District of Missouri and are styled as *A. et al v. Doe Run Resources Corporation et al.*, Case No. 4:11-cv-00044 (the Reid Cases), and *J.Y.C.C., et al., v. Doe Run Resources, Corp., et al.*, Case No. 4:15-CV-1704-RWS (the Collins Cases). The Renco Defendants have moved to dismiss both proceedings, and the lawsuits are ongoing.

#### D. The Treaty And The Origins of the Dispute

16. The Treaty entered into force on 1 February 2009. Having failed to complete its environmental and investment obligations, DRP closed the Facility on 3 June 2009.<sup>16</sup>

17. Beginning in 2010, the Renco Defendants and DRP sought to involve Peru and Activos Mineros in the Missouri Lawsuits, requesting that “Centromin, Activos Mineros S.A.C., and the Republic of Peru honor their contractual commitments to assume and accept liability for claims by third parties relating to the La Oroya Metallurgical Complex.”<sup>17</sup> Activos Mineros responded reserving all rights and advising that it had not previously received any communication requesting participation in Missouri pursuant to the Contract. As Activos Mineros communicated, the Renco Defendants and DRP presented no basis to assert that the liability that may eventually result from the particular proceedings initiated against DRP’s shareholders in the U.S. corresponds to Activos Mineros.<sup>18</sup>

18. That year, DRP’s creditors began bankruptcy proceedings against DRP before Peru’s National Institute for the Defense of Free Competition and the Protection of Intellectual Property (“INDECOPI”).<sup>19</sup> On 16 August 2010, INDECOPI published notice of the commencement of DRP’s bankruptcy in the official bulletin.<sup>20</sup> The bankruptcy is guided by a Board of DRP’s recognized creditors, which includes, among others, DRP’s labor creditors, Consorcio Minero, Volcan Compania Minera, AYS, Depositos Quimicos Mineros, the MEM, and DRC, a company wholly-owned by Renco.

19. In April 2012, DRP presented a restructuring plan to the Creditors’ Board. The plan did not address various issues facing the La Oroya Facility, and did not incorporate concerns and observations made by the creditors. After the restructuring plan had been rejected, 97% of DRP’s creditors (including DRC) voted to place DRP in liquidation.<sup>21</sup> The liquidation is ongoing in accordance with Peruvian law.

20. As a matter of Peruvian law, the MEM is a creditor of DRP on the basis of DRP’s unfulfilled PAMA investments. In an effort to prevent MEM from participating in the

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<sup>15</sup> See *A. et al. v. Doe Run Resources Corp., et al.*, (E.D. Mo. Case No. 4:11-cv-00044-CDP).

<sup>16</sup> Letter from Doe Run Peru to OSINERGMIN dated 3 June 2009.

<sup>17</sup> See Letter from King & Spalding to MEM, MEF, and Activos Mineros dated 12 October 2010; Letter from DRP to Activos Mineros dated 11 November 2010.

<sup>18</sup> See Letter from Activos Mineros to King & Spalding dated 5 November 2010; Letter from Activos Mineros to DRP dated 26 November 2010; Letter from Activos Mineros to King & Spalding dated 21 January 2011.

<sup>19</sup> See e.g., Cormin Notice Regarding Doe Run Peru’s Bankruptcy to INDECOPI dated 18 Feb. 2010.

<sup>20</sup> INDECOPI Announcement, Official Bulletin dated 16 Aug. 2010.

<sup>21</sup> Doe Run Peru S.R.L. Creditors’ Meeting Minutes of 9 and 12 Apr. 2012, at 38-40; 43-46; 48-49.

bankruptcy proceedings, Renco’s affiliates have opposed and challenged recognition of the MEM’s status as a DRP creditor before INDECOPI and the Peruvian courts:

- **INDECOPI Challenge:** DRP filed an opposition to MEM’s request for recognition of its credit to INDECOPI in 2010.
- **Constitutional Amparo Suit:** DRP filed a constitutional amparo suit with the Superior Court of Justice of Lima in 2010 and filed two appeals in 2011.
- **Contentious Administrative Suit:** DRP filed a contentious administrative action with the Specialized Administrative Contentious Tribunal of Lima in 2012, and, together with DRC, filed a cassation action in 2014.

21. Despite repeated challenges, the validity of MEM’s credit by virtue of DRP’s breach of a quantifiable legal obligation has been upheld in each proceeding.

### E. The First Arbitration

22. On December 29, 2010, Renco sent a Notice of Intent to Commence Arbitration against Peru, followed by a Notice of Arbitration and Statement of Claim on April 4, 2011 against Peru and Activos Mineros on behalf of Renco and DRP.<sup>22</sup> Renco amended its Notice of Arbitration and Statement of Claim on August 9, 2011 by modifying the parties and the arbitration agreements on which it relied. Subsequently, Peru and Renco were parties to a proceeding styled as *The Renco Group, Inc. v. Republic of Peru* (ICSID Case No. UNCT/13/1) pursuant to the Treaty (the “First Treaty Arbitration”). The Renco Defendants used the the First Treaty Arbitration to remove the Missouri Lawsuits from Missouri state court to a U.S. federal court.

23. In the First Treaty Arbitration, Renco argued that Peru breached the Treaty by virtue of the alleged “refusal to honor its contractual and legal commitment to assume responsibility and liability for third-party claims of injury from environmental contamination at the Complex” and the alleged “pattern of mistreatment of Claimant and its investments relating to the Complex when Claimant’s locally-incorporated subsidiary requested a reasonably—and contractually permitted—extension of time to complete the final environmental modernization project.”<sup>23</sup>

24. The tribunal ruled in a Partial Award dated 15 July 2016 that Renco’s claims must be dismissed for lack of jurisdiction because Renco failed to comply with the Treaty’s waiver requirement.<sup>24</sup> The tribunal explained that Renco’s failure to comply with the Treaty was “not a trivial defect which can be easily brushed aside—the defective waiver goes to the heart of the Tribunal’s jurisdiction.”<sup>25</sup> The tribunal concluded that “Renco has failed to establish the requirements for Peru’s consent to arbitrate under the Treaty,” and consequently that

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<sup>22</sup> *Renco v. Republic of Peru*, Partial Award of July 18, 2016 (ICSID Case No. UNCT/13/1) (the “Partial Award”) ¶ 4-5, available at <https://icsid.worldbank.org/>.

<sup>23</sup> Renco’s Memorial on Liability dated 20 February 2014, available at <https://icsid.worldbank.org/>.

<sup>24</sup> *Renco v. Republic of Peru*, Partial Award dated July 15, 2016 (ICSID Case No. UNCT/13/1), ¶ 193 (“Renco has failed to comply with the formal requirements of Article 10.18(2)(b) by including the reservation of rights in the waiver accompanying its Amended Notice of Arbitration because: (i) The reservation of rights is not permitted by the express terms of Article 10.18(2)(b); (ii) The reservation of rights undermines the object and purpose of Article 10.18(2)(b); (iii) The reservation of rights is incompatible with the “no U-turn” structure of Article 10.18(2)(b); and (iv) The reservation of rights is not superfluous.”).

<sup>25</sup> Partial Award ¶ 138.



“Renco’s claims must therefore be dismissed for lack of jurisdiction.”<sup>26</sup> On 9 November 2016, the tribunal issued its Final Award concluding the proceedings and issuing its decision on costs.

25. Renco devotes a significant portion of its Treaty Notice of Arbitration on discussions related to the procedural history involving the waiver objection and asserting that Peru easily could have argued its waiver objection sooner. In fact, Peru sought an efficient and expedient determination of its waiver objection, which Renco opposed at every juncture. In May 2011, within a month of receiving Renco’s Notice of Arbitration and Statement of Claim in the First Arbitration – and although it had no obligation under the Treaty to do so – Peru promptly informed Renco in May 2011 that the notice was inconsistent with the Treaty. Renco subsequently chose to submit an Amended Notice of Arbitration and Statement of Claim, in response to which Peru filed its preliminary response on 9 September 2011, citing various concerns, including, among other things, regarding the scope of the mandatory waiver. Following the tribunal’s adoption of a procedural calendar in consultation with the parties, Peru timely notified preliminary objections in March 2014, and reiterated its request to be heard on the waiver violation in April and October of 2014, and again in May 2015.

26. Ultimately, at Peru’s request, the tribunal agreed to evaluate Peru’s objection as a preliminary matter and Renco’s claim was dismissed without the parties and the tribunal having to engage in an expensive and time-consuming proceeding on the merits. The Tribunal concluded that, in raising its waiver objection, “Peru has sought to vindicate its right to receive a waiver which complies with the formal requirement of Article 10.18(2)(b) and a waiver which does not undermine the object and purpose of that Article” and “[did] not accept the contention that Peru’s waiver objection is tainted by an ulterior motive to evade its duty to arbitrate Renco’s claims.”<sup>27</sup>

## F. The Consultations and Renewed Disputes

27. Following the dismissal of Renco’s claims in the First Treaty Arbitration, Renco sent Peru a new Notice of Intent to Commence Arbitration under the Treaty dated August 12, 2016; and Renco and DRRC sent Peru and Activos Mineros a notice dated August 12, 2016, regarding a dispute under the Contract (the “Notices”). In addition, Renco requested that Peru stipulate that time stopped running when Renco submitted its Amended Notice of Arbitration in the First Treaty Arbitration,<sup>28</sup> thereby waiving its Treaty rights with respect to temporal jurisdiction in future proceedings. As Peru communicated at the time, Peru maintains the continuous reservation of all its rights.<sup>29</sup>

28. Peru and Activos Mineros advised that they disagreed with the allegations set forth in the Notices and confirmed their continuous reservation of all of their rights. They also

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<sup>26</sup> Partial Award, ¶ 193. The tribunal further noted that “[i]n the light of the Tribunal’s conclusion that Renco has failed to comply with the formal requirement of Article 10.18(2)(b) of the Treaty, the Tribunal concludes that it is unnecessary to consider Peru’s second contention, namely that Renco has failed to comply with the formal requirement of Article 10.18(2) because DRP has not provided a waiver in Renco’s Amended Notice of Arbitration. It is also unnecessary to consider Peru’s further contentions regarding DRP’s conduct in the Peruvian bankruptcy proceedings.” *See* Partial Award, ¶ 190.

<sup>27</sup> Partial Award ¶ 186.

<sup>28</sup> Letter from Renco to Peru dated 21 July 2016 (“In light of the Tribunal’s Partial Award on Jurisdiction dated July 15, 2016 in the above referenced matter, The Renco Group, Inc. requests that the Republic of Peru advise in writing whether it accepts that time stopped running for purposes of Article 10.18(1) of the Treaty when Renco filed its Amended Notice of Arbitration in the above referenced case on August 9, 2011.”).

<sup>29</sup> Letter from Peru to Renco dated 12 August 2016.

advised that the resolution of the prior arbitration proceeding facilitated a renewed opportunity to focus on solutions related to La Oroya.

29. Consistent with Article 10.15 of the Treaty, which encourages resolution through consultation and negotiation, Peru (together with Activos Mineros) entered into a Consultation Agreement with Renco (and DRRC) dated 10 November 2016. Following agreements in this context, Peru (together with Activos Mineros) entered into a Framework Agreement with Renco (and DRRC) dated 14 March 2017 to address related issues and facilitate further consultations.<sup>30</sup>

30. Further to the Treaty, Peru sent a letter from the Special Commission That Represents the State in Investment Disputes to the U.S. State Department dated 4 April 2017 addressing the status of the disputes.

31. The period of consultations ended on 20 October 2018 and on 23 October 2018, Renco and DRRC filed this arbitration, as well as a separate arbitration pursuant to the Treaty against Peru related to the bankruptcy proceedings and environmental issues.

### III. Law

32. In the First Treaty Arbitration, Renco alleged that Peru should appear in U.S. court or assume liability in the Missouri Lawsuits. As Peru explained in that context, there is no legal basis for such allegations. Peru's position in this regard was supported by the Legal Opinion of John B. Bellinger III, former Legal Adviser to the U.S. Department of State. As Mr. Bellinger explained, there is an established history in the United States of affording foreign States sovereign immunity, and the Foreign Sovereign Immunities Act sets out the limited circumstances in which U.S. courts may assert jurisdiction over a foreign State. Mr. Bellinger stated that, "[i]n my experience, whenever sovereign States agree to litigate in U.S. courts, they indicate that intent by expressly waiving their sovereign immunity," and concluded that "Peru has neither explicitly nor implicitly waived its immunity from the jurisdiction of U.S. courts under the FSIA with respect to the claims filed in Missouri" and that "it would not be reasonable to conclude that Peru waived its sovereign immunity and actually consented to litigate in U.S. courts."<sup>31</sup>

33. Similarly, in this arbitration, Claimants' request that the Tribunal grant an order that Peru and Activos Mineros "appear in the St. Louis Lawsuits"<sup>32</sup> cannot proceed. Peru and Activos Mineros are presumptively immune from the jurisdiction of U.S. courts under the express language of the Foreign Sovereign Immunities Act and well-established precedent, and they have neither explicitly nor implicitly waived their immunity.

34. Claimants' claims lack evidentiary support and have numerous deficiencies as a matter of jurisdiction, admissibility, and merits. Respondents continue to reserve all of their rights, including, without limitation, their rights to raise preliminary objections, counterclaims, and other defenses, and to fully brief issues at the appropriate time. Among other things, Respondents note, without limitation, the issues set forth below.

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<sup>30</sup> The Parties agreed that communications and interactions by and among them during the Consultation Period were without prejudice and shall be kept confidential. Peru reserves all rights in this regard.

<sup>31</sup> Legal Opinion of John B. Bellinger III, February 20, 2015, ¶¶ 34-35.

<sup>32</sup> Notice of Arbitration ¶ 70.

## A. Jurisdiction

▪ ***There Is No Agreement To Arbitrate Between Claimants And Respondents.*** Claimants filed this arbitration pursuant to the agreement to arbitrate contained in Clause 12 of the Contract. That arbitration clause provides that “any litigation, controversy, disagreement, difference or claim that may arise between the parties with regard to the interpretation, execution or validity derived or in relation to this contract that cannot be resolved by mutual agreement between them, will be submitted to legal arbitration of international character under the rules and procedures of UNCITRAL.”<sup>33</sup> Renco and DRRC (the Claimants) and Peru (one of the Respondents) are not parties to the Contract or its arbitration agreement. Claimants also mention Clause 3 of the Guaranty, which provides that “any litigation, dispute, controversy, difference or claim that may originate from or is related to this Guaranty Agreement will be resolved by applying the provisions set forth in Clause 12 of the [Stock Transfer Agreement].” While Peru (but not Activos Mineros) is a party to the Guaranty, Renco and DRRC—the Claimants in this arbitration—are not.

▪ ***The Claims Are Not Ripe.*** Claimants’ claims for indemnification under the Contract and the Guaranty are premature, as no damages have been awarded giving rise to any obligation to indemnify under the Contract, and adjudication of this issue now may have implications for the ongoing Missouri Lawsuits. The same is true with respect to the soil remediation allegations. Moreover, the parties have not participated in the expert procedure described in Clause 5.4 of the Contract.

## B. Merits

▪ ***Claimants Fail To Establish A Valid Legal Relationship Among The Parties.*** Claimants’ argument that “Activos Mineros and Peru are obligated to cover all losses falling within the scope of its assumption of liability to the members of the Renco Consortium” is wrong, among other things, because Renco and DRRC are not parties to the Contract and have no rights thereunder. The rights invoked by Claimants in Articles 6.2, 6.3, and 6.5 of the Contract run to the “Investor,” or to “Company.” Neither Renco nor DRRC are the “Investor” or the “Company” under the Contract, and the “Investor” and the “Company” are not parties in the Missouri Lawsuits. Similarly, Renco and DRRC are not parties to the Guaranty and have no rights thereunder, nor do the rights contained in the Guaranty run to the affiliates of DRP in any way. Claimants state that “an ‘assumption of liability’ is different from, and broader than, an obligation to indemnify,” but do not provide any legal support under applicable law to construe the Contract’s third-party liability provisions to extend to “any and all third-party claims against Renco and DRP during the period of approved for DRP to complete its PAMA projects.”

▪ ***Doe Run Peru Is Liable For the Lawsuits.*** In the Contract, the parties assumed reciprocal obligations to hold each other harmless and to indemnify each other for third party claims for which they each had assumed liability. The allegations in Missouri relate to liability assumed by DRP and are otherwise unrelated to Respondents.

▪ ***Activos Mineros Has Remediated The Soil.*** Activos Mineros has substantially advanced with soil remediation works, and, in any event, the status of soil remediation does not change DRP’s liability for the Missouri Lawsuits.

▪ ***Peru And Activos Mineros Are Not Liable Under Peruvian Law.*** Claimants argue in the alternative that Respondents may be liable for contribution and unjust enrichment under

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<sup>33</sup> Contract, Clause 12 (emphasis added).

the Peruvian Civil Code, but do not provide any factual or legal support to establish that the elements and conditions set forth by Peruvian law have been met.

▪ ***Renco And DRRC Are Not Entitled To Damages Under The Contract or Guaranty.*** Peru and Activos note that Claimants have failed to show any damages incurred with respect to its claims, and have not indicated the amount involved in connection therewith. Peru and Activos Mineros reserve all of its rights.

## IV. Procedure

35. With regards to Claimants' proposals and the applicable procedure, Peru observes the following:

▪ ***Arbitration Agreement And Legal Instrument.*** Claimants have invoked the Contract and the agreement to arbitrate contained in the Contract, and also refer to the Guaranty. Peru and Activos Mineros reserve all rights to raise any and all comments, objections or defenses – including, without limitation, with respect to jurisdiction and admissibility – related to the legal instruments alleged to give rise to the dispute or to the alleged agreement to arbitrate.

▪ ***Language.*** The rules provide that the arbitral tribunal shall determine the language or languages of the proceeding subject to agreement by the Parties. Claimants have proposed English language proceedings. Respondents' defense requires that the proceeding be conducted in Spanish, the official language of Peru, and accordingly proposes bilingual proceedings in Spanish and English.

▪ ***Place of arbitration.*** The Contract provides that the place of arbitration shall be London or such other location as the parties may agree. Respondents propose Madrid or a seat of arbitration in Latin America, with the particulars subject to discussion. Counsel notes that it may be in a position to discuss the possibility of another seat.

▪ ***Administering Authority.*** The Contract is silent with respect to an Administering Authority. Claimants have proposed that the Permanent Court of Arbitration administer the arbitration. Respondents propose the International Centre for Settlement of Investment Disputes (ICSID).

▪ ***Contact Details.*** Communications to Respondents should be addressed to its counsel of record, and all communications should be served through counsel. The contact details for counsel are in the transmittal letter.

▪ ***Arbitrator Appointment.*** The Contract provides that the arbitral tribunal shall be composed of three arbitrators, one appointed by each party and the presiding arbitrator appointed by agreement of the parties. Claimants have appointed Mr. Horacio A. Grigera Naón. Peru and Activos Mineros hereby appoint John Christopher Thomas QC, a citizen of Canada, as co-arbitrator. Mr. Thomas can be contacted at:

John Christopher Thomas QC  
900 Waterfront Centre,  
200 Burrard Street, PO Box 52,  
Vancouver, British Columbia,  
Canada, V7X-1T2  
Email: jcthomas@thomas.ca

## V. Request for Relief

36. For all the reasons set forth above, and for the reasons Peru and Activos Mineros will articulate and expand upon at the appropriate time in accordance with the Contract and applicable rules, Peru and Activos Mineros respectfully request that the Tribunal:

- Dismiss Claimants' claims in their entirety;
- Award Peru pre-award and post-award interest;
- Award Respondents all costs incurred in connection with this proceeding; and
- Award Respondents such further and other relief as the Tribunal may deem appropriate.

Respectfully submitted,



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**WHITE & CASE**

Washington, D.C.

*Counsel to the Republic of Peru and  
Activos Mineros*

14 January 2019

## Index of Exhibits

<i>No.</i>	<i>Document</i>	<i>Date</i>
Doc. R-1	Contract of Stock Transfer, Capital Stock Increase and Stock Subscription of Empresa Metalurgica La Oroya S.A.	23 October 1997
Doc. R-2	Guaranty Agreement	21 November 1997
Doc. R-3	Modification of the Contract to Transfer Shares, Increase Company Capital and Subscription of Shares of Metaloroya	17 December 1999
Doc. R-4	Assignment of Contractual Position between Due Run Peru S.R.L and Doe Run Cayman Ltd.	1 June 2001
Doc. R-5	Letter from the President of the Council of Ministers to Ambassador of the United States to Peru	31 October 2007
Doc. R-6	Peru-United States Trade Promotion Agreement	1 February 2009
Doc. R-7	Legal Opinion of John B. Bellinger III	20 February 2015
Doc. R-8	Renco v. Republic of Peru, Partial Award (ICSID Case No. UNCT/13/1)	15 July 2016
Doc. R-9	Consultation Agreement (as Amended)	10 November 2016
Doc. R-10	Framework Agreement (as Amended)	14 March 2017
Doc. R-11	Letter from the Special Commission to U.S. State Department	4 April 2017