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' RESPONSE TO
RESPONDENTS' POST-HEARING BRIEF

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Claimants The Renco Group, Inc, and The Doe Run Resources Corp. appreciate the opportunity to respond to Respondents' post-hearing brief. Respondents spent much of their brief drawing conclusions that disregard or miscite the record. We will highlight in this response some of the more egregious examples of Respondents' taking liberties with the evidence.

I. The Contract Case.

A. Returning to the relevant issues.

Respondents continue trying to mask the holes in their case by portraying Claimants as tortfeasors or just bad actors. Given Centromin's own careless stewardship of the environment in La Oroya, this portrayal smacks of hypocrisy, but it also ignores the contract, the law, and the evidence.

One example of Respondents' finger-pointing relates to Peru's emissions standards. Respondents repeatedly claimed in their brief, without any specificity, that DRP exceeded applicable emissions standards,[1] as if that by itself were sufficient to deny Claimants relief in this proceeding. *See, e.g.*, Resp. PHB at ¶¶ 37, 40, 107. It is not.

[1] It is puzzling that Respondents would choose compliance with emissions standards as a yardstick for DRP's conduct. As we will show later in this brief, Respondents' manipulation of the SO2 standards after DRP's operations ceased is a prime example of Peru's unfair and inequitable treatment of DRP.

The STA is quite explicit; the exceptions to Centromin's responsibility for environmental matters during the PAMA period are limited. The two exceptions to Centromin's responsibility do not include whether Claimants were negligent in causing injury to the Plaintiffs in the Missouri Litigations or whether Claimants violated Peruvian emissions regulations. DRP's obligations to meet legal standards in Peru were distinct from its contractual obligations under the STA.[2]

Indeed, Claimants were induced to invest in the facility by two fundamental promises from Respondents—first, Centromin would assume responsibility for virtually all environmental claims or damages during the PAMA period; and, second, DRP would have the entire PAMA period to achieve the relevant emissions standards. During the PAMA period, Centromin assumed liability even if DRP failed to meet emissions standards.

One of the exceptions to Centromin's assumption of liability (Article 5.3(B)) requires proof that MEM found DRP in default of the PAMA. We will discuss the absence of that proof further below, but on this specific point, DRP was excused from meeting the emissions standards during the PAMA period. When Peru

[2] For that reason, Respondents' issue with Claimants' closing argument—that the STA does not require that DRP bring the facility to the maximum permissible limits—misses the point. *Id.* at ¶ 67. This was not "a striking new allegation," as claimed by Respondents. Claimants have always relied on the text of STA to highlight that Article 5.3(A) is a comparison between Centromin and DRP, rather than a test of whether DRP met emissions standards. The full context of the argument (which appears on page 1568 of the transcript, not 1569 as cited in Respondents' PHB, fn. 72) makes this clear.

attempted to impose a fine on DRP for exceeding maximum permissible limits during the PAMA period, OSINERGMIN reversed the fine in 2008:

> The violations related to non-compliance with the maximum permissible limits of atmospheric emissions at two control points (50 ITU) for the "particles" parameter and the one referring to the excess in the maximum permissible limits of metallurgical mining effluents (50 ITU) were determined on the basis of samples taken before the expiration of the date granted to comply with the original PAMA environmental commitment. **Therefore, it could not be concluded that the maximum permissible limits were exceeded when the original PAMA execution period had <u>not yet expired</u>**.
>
> In this regard, keep in mind that, pursuant to Article 9 of the Regulation on Environmental Protection in the Mining-Metal Surgical [sic] Activity, the objective of the PAMA is to reduce environmental pollution until the maximum permissible limits are reached, therefore, **it can only be verified once the original PAMA execution period has expired**….
>
> In this sense, the environmental pollution defined in Article 1 of Supreme Decree No. 016-93-EM, is **determined once the period granted to the PAMA has expired <u>and not before</u>**.

R-212 at 6 (emphasis added). The exception in Article 5.3(B) cannot apply to instances of exceeding emissions standards because DRP was excused from complying with those standards during the PAMA.

The other exception (Article 5.3(A)) requires a comparison of standards and practices (if and only if Respondents could prove any claims were unrelated to the PAMA and were exclusively attributable to DRP, *see infra* at p. 15). Merely proving DRP exceeded emissions standards does not invoke the exception in Article 5.3(A). Respondents bore the burden to prove that DRP's emissions—among other

standards and practices—were comparatively worse than Centromin's. They failed to do so.[3]

The point here is simple. In a contract case, the language of the contract is king. Respondents may hope that merely casting dirt on DRP will hide their failure to prove the exceptions to their assumption of liability. The focus instead should be on the contract itself, which is where we now turn.

B. The exception in Article 5.3(B) does not apply.

1. There is no MEM declaration that DRP defaulted on the PAMA.

The 1993 Supreme Decree sets out the procedure for the "competent authority" (*i.e.*, MEM) to determine and then address non-compliance with the PAMA. The process is well-defined:

> A. Non-compliance prior to the expiration of the PAMA
>
> 1. Once the violation is detected, the Directorate General for Mining will notify the operator so that, within the term of three (3) months, it must comply with the actions contained in the PAMA, under penalty of a fine.
>
> 2. If, after expiry of that period, such non-compliance continues, the Directorate General for Mining shall penalize the operator with a fine equivalent to the percentage of cumulative physical delay applied to 20 UIT:

[3] Any comparison between DRP's history with emissions standards and Centromin's is made virtually impossible by the facts that (a) there were no standards at all during most of Centromin's operations, and (b) the data from the Centromin period is spotty at best. *See* Bianchi First Report at pdf p. 41. The Tribunal cannot make a comparison if the data from one side is missing.

3. If, after six (6) months from the notification referred to in paragraph 1, the non-compliance is verified for the second time, the penalty will be equal to the percentage of cumulative physical delay applied to 40 UIT.

4. In case the non-compliance is verified for the third time, nine (9) months after the notification referred to in paragraph 1, the penalty will be equal to the percentage of cumulative physical delay applied to 60 UIT.

5. In the event that the non-compliance continues twelve (12) months after the notification referred to in paragraph 1, the Directorate General for Mining shall:

    a. Apply a fine equivalent to the percentage of cumulative physical delay applied to 80 UIT; and

    b. It will require the operator to submit, within a maximum period of four (4) months, a Plan for Cessation of Process/ Installation for the operations or facilities that were in violation of the PAMA.

R-025 at 14.

During the hearing, Respondents could point to no action by MEM finding DRP in default of its PAMA obligations. There are none. Small wonder that Respondents sought to strike Claimants' argument that only MEM could find a PAMA breach. Only by sweeping the absence of evidence under the rug could they hope to fashion an argument.

In their post-hearing brief, however, Respondents declare for the first time that "MEM did issue a resolution specifying DRP's non-compliance with the

PAMA." Resp. PHB at ¶ 121.[4] This is objectively false; no resolution appears in the record or elsewhere.

To support their assertion that MEM issued a "resolution," Respondents cite not to any MEM-issued notices or fines or directives, but instead to Exhibit R-314[5] and to Ms. Alegre's testimony. Neither is a "resolution specifying DRP's non-compliance with the PAMA," nor does either corroborate Respondents' statement.

R-314 is a report—"the 2003 SVS Report"—prepared by two consultants, SVS and Golder, who were retained by MEM to evaluate environmental conditions at the smelter. Respondents correctly noted that a focus of the study was the impact of increased production and variations in the quality of concentrate, but that had nothing to do with DRP's PAMA compliance. In fact, the report states DRP was in compliance with its PAMA:

[4] Earlier in their post-hearing brief, Respondents mischaracterize Claimants' position regarding actions by MEM. They state: "Claimants repeatedly asserted during the Hearing that there was neither a report from the MEM nor an official notification to DRP that raised concerns about its practices, nor was there any action taken to compel DRP to implement corrective measures." Id. at ¶ 72. We did not make that assertion. Rather, we focused on whether DRP was in default of its PAMA, which is the relevant standard under Article 5.3(B) of the STA. And as Claimants explained at the hearing and again in our post-hearing brief, only MEM could declare a default. Cl. PHB at 19-21. Whether MEM "raised concerns" or asked DRP to "implement corrective measures" is beside the point. All that matters is a declaration of default, and there was none.

[5] Exhibit R-314 was added to the record just before the hearing. It is a Spanish document with jumbled pagination containing a 2003 SVS report and a MEM report that approves of the SVS report. An English version of the SVS report, without its attachments, may be found as Ex. C-244.

- "From the information provided by Doe Run, it is clear that the company **has been complying** – in general – with the investments contemplated in the PAMA…." C-244 at 8 (emphasis added).
- "The information provided indicated that Doe Run **has been complying** with the program established in the PAMA with regard to air and water quality monitoring, with the exception of item T-1 [for which there was no data]." *Id*. at 49 (emphasis added).
- "According to the information provided by Doe Run, between 1998 and 2002 the company **has been complying** with the investments foreseen in the approved schedule for its PAMA." *Id*. at 66 (emphasis added).

These quotes flatly contradict Respondents' assertion regarding a finding of PAMA default. As the 2003 SVS Report makes clear, the consultants were concerned about environmental risks (such as fugitive emissions) *not* covered by existing PAMA projects, and they recommended steps—in addition to the PAMA projects—that should be taken to improve environmental quality in the area.

This 2003 SVS Report became the subject of an August 22, 2003, MEM report (No. 501-2003) which is embedded in R-314 at pages 156-59. The MEM report also makes no finding that DRP was in default of its PAMA obligations. Rather, it adopts the consultants' recommendations requiring DRP to conduct certain studies and take steps to reduce fugitive emissions.[6] MEM concluded that ***if*** DRP does not take

[6] Following this report and the reports of other consultants, DRP in 2005 voluntarily proposed expanding the PAMA projects to include several additional projects to control both main stack emissions and fugitive emissions. These projects were included in the PAMA extension

appropriate measures to mitigate environmental risk, it might later be sanctioned. R-314 at 159. Again, not a finding of default.

Respondents' citation to Ms. Alegre's testimony is equally unhelpful. At pages 774-76 of the transcript, Ms. Alegre discusses the MEM report, concluding with this dialogue:

> Q: You would recall that Mr. Fogler asked you whether at some point MEM had issued a resolution in connection with the compliance with PAMA or noncompliance with PAMA?
>
> A: Yes. I had forgotten this resolution in my answer.

Id. at 776. That question and corresponding non-answer is the sole "evidence" of DRP's alleged non-compliance with its PAMA. Ms. Alegre never testified that MEM found DRP in default of the PAMA, because it never did. Indeed, she was questioned at length at the hearing about any MEM finding of default (Tr. at 711-48) and she acknowledged there was none:

> Q. It is true, is it not, Ms. Alegre, that there is no opinion, declaration, notice, whatever you want to call it, from the Ministry of Energy and Mines of a three-month notice, a six-month notice, a nine-month notice, or 12-month notice, to DRP that you, DRP, are in noncompliance with the PAMA, is there?
>
> A. Not that I know of.

Id. at 722-23.

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accompanying the extension of Project No. 1 and were implemented by DRP. *See generally* Connor's First Report at pdf pp. 16-19.

We invite the Tribunal to examine the cited report and testimony on its own. There is no MEM finding of default, which means the exception in Article 5.3(B) cannot apply.

2. Increased production.

The absence of any MEM default finding also moots Respondents' complaints about increased production (Tr. at 765), but we are compelled to point out that their briefing on this issue contained a disturbing number of mischaracterizations of the record. Here are four examples of misquotes, omissions, and unsubstantiated assertions Respondents made about DRP's so-called increased production:

First, citations to evidence that does not exist. Respondents claim that "[t]he PAMA did recommend, however—based on the advice received from the external consultants that Centromin retained for the design preparation—that if production were to increase, a third sulfuric acid plaint should be constructed." Resp. PHB at ¶ 64. The cite for this quote is to Respondents' own Counter-Memorial, which in turn cites to page 169 of the PAMA. But the concept of a need for a third plant if production increases is not on page 169, or any other page, of the PAMA. We cannot say where Respondents came up with this idea, but it is not in the PAMA.

Second, omissions of critical portions of testimony. Respondents quote a series of questions and answers from the testimony of Bruce Neil for the proposition that, despite concerns about fugitive emissions, DRP did not reduce production

levels. Resp. PHB at ¶ 124. Respondents mistakenly believe that reducing production was the only way to reduce emissions. But more importantly, the selected quotes conveniently omit portions of Neil's testimony. The ellipses in the quoted portions were inserted in place of Neil's testimony about the steps DRP took to actually reduce emissions. Tr. at 217:15 - 218:3. After Neil testified about these efforts, he concluded "[w]e did make a difference." *Id*. at 218.

Third, wholly unsupported statements of law. Respondents concede DRP was permitted to increase production, but they add this caveat: "provided that it had previously modified its PAMA so that it could be reevaluated and adjusted to the new production levels." Resp. PHB at ¶ 60. No citation accompanies this assertion. They make identical assertions in Paragraphs 60 and 64, also without reference to law or evidence. That's because there is no Peruvian law or regulation that requires the PAMA to be adjusted for increased production.[7]

Fourth, newly manufactured evidence. Respondents include two new charts from Mr. Dobbelaere (at ¶ 130 and ¶ 138 of their PHB), never before included in his reports or his hearing testimony. These new exhibits are not supported by the evidence as the source of the data underlying the charts cannot be identified. The second chart at Paragraph 138, for example, purports to show sulfur emissions from

[7] Smelters that increased production by more than 50% were required to submit an updated Environmental Impact Study (*see* R-25 at 9), but the small increases in production during DRP's operations never got close to that level. *See* AA-54.

the zinc circuit. Yet, neither of the sources cited (WD-008 or WD-030) contain data on sulfur *emissions*. The lines in the chart are parallel because it appears Dobbelaere merely took sulfur *input* and multiplied by a conversion factor to invent an emissions number. Passing off invented data as real data is deceptive.

Perhaps the most astonishing of all Respondents' misstatements about the record is this:

> Claimants have not presented *any evidence*, nor is there any scientific explanation related to the processes or technological advancements that DRP implemented, to support the conclusion that Claimants managed to control or reduce the emissions caused by the increase in production.

Resp. PHB at ¶ 71 (emphasis added). How can Respondents make this statement with a straight face? The reports of several of Claimants' experts—Bianchi, Connor, Partelpoeg, Schoof, among them—detail the work performed by DRP to modernize the plant, fix problems, and reduce emissions.[8] Connor's testimony at the hearing described 42 projects DRP completed that reduced emissions. Tr. at 902. Schoof, as well, verified the reduced emissions. Tr. at 866. The points Respondents seek to make about increased production are contradicted by the overwhelming weight of the evidence.

[8] *See, e.g.*, Bianchi First Report at pdf pp. 41-66; Connor Supp. Report (Interactive Information Tool), App. C; Partelpoeg Report at pdf pp. 24-27; Schoof Report at pdf pp. 29-30. The witness statements of Bruce Neil and Jose Mogrovejo also detail DRP's efforts and resulting improvements.

Contrary to Respondents' assertion, more efficient production does not mean more pollution. Tr. at 909-10. The empirical data presented by Connor in fact substantiated the improvement in air quality. Tr. at 907. Claimants proved that DRP could increase production and at the same time reduce emissions.[9]

Respondents cannot explain the declines in emissions without admitting they resulted from DRP's improvements and superior standards and practices, so they engage in another glaring deceit of the record. They contend blood lead levels actually "rose during the period of DRP's operations, with no significant improvement between 1999 and 2007." Resp. PHB at ¶ 100. The footnote for this quote cites three sources for the surprising assertion: Proctor's first expert report, her second report, and her testimony.

None of the referenced citations support the statement made. In fact, Proctor admitted at the hearing that blood lead levels declined from 1999 to 2007, the exact opposite of the statement attributed to her in Respondents' post-hearing brief:

> Q. We don't have any historical blood-lead information back when Centromin was operating the plant, do we?
>
> A. I have not seen any, no.
>
> Q. Okay. So we don't have any basis to compare the bars in the chart, that you show us here in your Figure 2, to what they would have been in the '90s, before 1997, do we?
>
> A. No.

[9] *See, e.g.*, Bianchi First Report at pdf pp. 72-73.

Q. But what we do see here is that there are declines at La Oroya Antigua and La Oroya Nuevo from 199 to 2004 to 2007, don't we?

A. Well, you know, if you look at my figure that I presented the other day, yesterday—

Q. I'm happy to do that, but can you answer my question first? You see declines.

A. ***Yes, there were declines***.

Q. Okay. And that's a good thing, right?

A. Yes.

Tr. at 1182 (emphasis added). DRP's improvements led directly to measurable declines in blood lead levels in children by 49% over the period of DRP's operations. Tr. at 906.

Respondents' inaccuracies about the record occur with such frequency the Tribunal ought not to comfortably rely on their citations or their conclusions.

3. Dirtier concentrates.

Respondents attempted to justify how decreased production of copper could, in their view, result in increased emissions of lead and sulfur with the use of "dirtier" concentrates. Resp. PHB at ¶¶ 129-138. Many of these arguments are new; they are also wrong.

The copper circuit at La Oroya is designed to handle concentrate in which a large percentage of input material is not copper. The notion that feeding other metals

into the copper circuit is somehow nefarious is absurd. Respondents say when "dirty materials" are introduced in the copper circuit "emissions increase significantly because the circuit is designed to expel such 'dirty materials.'" *Id*. at ¶ 134. That is not how a poly-metallic smelter works.

The copper circuit does not *expel* other minerals. Its equipment is designed to *capture* other minerals.[10] The Cottrell, for example, removes dust particulates from the air emission stream, so that valuable metals in the recaptured dust can be recycled (such as lead sent to the lead circuit). The system collects the remainder as slag to be sent to the landfill. Connor's second report explains the projects undertaken by DRP to make the Cottrell more efficient and install emissions controls. As a result, as less copper was processed, emissions of lead could not, and did not, increase.

C. <u>The exception in Article 5.3(A) does not apply.</u>

1. Respondents cannot clear the first two hurdles.

With two admissions, Respondents have unwittingly defeated any contention that they can surmount the first two hurdles of the exception in Article 5.3(A).

First, as the Tribunal is aware, the exception in Article 5.3(A) applies only to acts not "related to" DRP's PAMA. Going into the hearing, Respondents claimed

[10] Eric Partelpoeg describes in his report how the CMLO facility works. 'It was among the most complex smelting facilities in the world, with numerous interconnections and material flows between circuits." Partelpoeg Report at pdf p.7. His discussion about the copper circuit specifically appears at pdf pages 9-11 of his report.

DRP's acts were not "related to" the PAMA because they had to do with increased production and not completing the final PAMA project—Project No. 1. Of course, by definition, the claim regarding DRP's failure to complete Project No. 1 of the PAMA must be related to the PAMA. It thus cannot constitute a claim subject to the limited exception in Article 5.3(A).

Respondents' other primary argument concerns increased production. But Respondents confirmed in their post-hearing brief their new position that increasing production "violated environmental regulations *and its PAMA*." Resp. PHB at ¶ 75 (emphasis added). Respondents have now conceded that all the allegations of the Plaintiffs in the Missouri Litigations (and all Respondents' complaints) are related to the PAMA.

Second, the exception in Article 5.3(A) applies only to claims "exclusively attributable" to DRP. In their brief, Respondents also concede the claims raised in the Missouri Litigations do not fit that requirement. They say "DRP's contemporaneous emissions, not Centromin's historical emissions, were the *main* cause of the health effects in La Oroya during the time period alleged by the Missouri Plaintiffs." *Id*. at ¶ 185 (emphasis added). They go on: "Peru has never disputed in these arbitrations that there was historical pollution prior to DRP's arrival to La Oroya." *Id*. at ¶ 186. No matter how much or how little Centromin's historical emissions contributed to the health effects in La Oroya during the time period alleged

by the Plaintiffs—a matter of great dispute between the parties—the fact that Respondents admit to *some* contribution takes the claims out of Article 5.3(A).[11]

The happy consequence of these two concessions is that the Tribunal can avoid wrestling with the "standards and practices" comparison at all. Respondents had the burden of proving all three components of the exception in Article 5.3(A). Having conceded the first two components of the exception do not apply, there is no need to deal with the third. Nevertheless, because much ink has already been spilled on the "standards and practices" issue, we will offer a few additional comments.

2. Respondents run from the contract language.

As we predicted, Respondents go all in on their theory that Centromin's standards and practices should be judged "***at the date of signing*** of the STA." *See, e.g.*, Resp. PHB at ¶¶ 87, 108, 111 (emphasis added). They could not find that language in the STA, of course, because it is not there, so they pluck that phrase from a 2010 bankruptcy filing made by Activos Mineros. *Id.* at ¶ 113. We base our contract claim not on Activos Mineros' bankruptcy filing, but, rather, the STA itself. The standards and practices the Tribunal should examine are "those that were pursued by Centromin ***until*** the date of execution of this contract." Art. 5.3(A).

[11] As we will explain, *infra*. at pp. 18-20, Respondents' foot-dragging of its obligations to remediate the soil around La Oroya means the effects of historical emissions lingers even today.

Respondents want the snapshot of "at the date of signing of the STA" because Centromin's operations were at their best then. But the use in the contract of "until" (or "hasta" in Spanish) means "up to" the execution of the contract, including a time before the execution of the contract. It makes sense to compare, at a minimum, similar periods of operation, at least dating back nine years into Centromin's ownership of the smelter, so from 1988 to 1997.

The parties agree on one important aspect of this issue. DRP's standards and practices should be judged "from 1997 until the end of the PAMA period." Resp. PHB at ¶ 115 (note Respondents' use of the word "until"). The parties disagree on when the PAMA period ended (Respondents say January 2007, while we say it extended at least until operations ceased in June 2009, if not later), but it is at least a nine-year period. To judge whether DRP's standards and practices during that nine-year original PAMA period were less protective, the Tribunal should compare DRP's performance to Centromin's from at least nine years *until* the STA was signed.

Even if the Tribunal were to compare DRP's standards and practices through the original PAMA period with Centromin's standards and practices frozen as of 1997, Respondents still would not meet the "less protective" language of Article 5.3(A). Even Respondents' own catchy slogan ("it took DRP less than a year to worsen the situation in La Oroya, and a decade to improve it," Resp. PHB at ¶ 101)

admits as much. Everyone recognized the scope of the environmental problems at La Oroya that existed at the time operations were turned over to DRP. That is why Peru gave DRP a decade to improve the situation. As we have detailed, the environment and public health were better off as a result of DRP's efforts by every objective measure—stack emissions, monitored air quality, and worker and community blood lead levels.

D. Remediation.

Respondents' discussion of their own remediation work is a bit schizophrenic. On the one hand, they want to brag about all the great progress they have made. On the other hand, they disavow any obligation to remediate at all. They are mistaken on both counts.

The very exhibit relied on by Respondents to demonstrate their remediation progress (a 2016 report from Activos Mineros) sets out their obligation:

> The PAMA approved for Centromin was responsible for remedying the old deposits of Vado and Malpaso Arsenic Trioxide and ***the Remediation of Soil Areas Affected by Gas Emissions and Particulate Material*** of the Metallurgical Complex from 1922 to 1997, which amounted to US$ 14.5 million.

R-278 at 3 (emphasis added). So, too, the latest exhibit provided by Respondents dated April 2024 echoes this duty. R-319[12] at 1 ("the assigned task…covers the

[12] Respondents claimed that their progress in remediating La Oroya was documented in the Public Works Information System (INFOBRAS), which led the Tribunal to request the submission of "documents that support its assertion within the timeframe provided in Question 6(f)."

remediation in both the urban area as well as in the rural area"). Respondents acknowledged their obligation to remediate, at least they did before this arbitration incentivized them to take a different position.

Even if it may be debated whether the PAMA included this requirement, the STA plainly did. In Article 6.1(C), Centromin expressly assumed responsibility for "remediation of the areas affected by gaseous and particles emissions from the smelting and refining operations that produced up to until the date of the execution of this contract and of additional emissions during the period that is provided for in the law for Metaloroya's PAMA…." Respondents were obligated to remediate.

Respondents' citations to support their declarations of remediation progress are mysterious. For the assertion Activos Mineros completed 92% and 45% of the urban and rural remediation projects, respectively, they cite a 2021 Activos Mineros press release, devoid of backup or attribution. By contrast, Claimants' expert, Dr. Bianchi, refers to lengthy reports (GBM-109 and GBM-040) in which MEM

Procedural Order No. 13 at 7. The sole document provided by Respondents, R-319, does not appear to come from INFOBRAS at all. It is instead an internal memo from Activos Mineros' Operations Department, designed to present a rosy picture of remediation efforts without the clutter of details.

We note that earlier in the arbitration, Claimants had requested details from INFOBRAS, listing specific codes within the INFOBRAS system. Respondents objected, stating that because the claims of the Plaintiffs in Missouri related solely to the period of DRP's operations and because Activos Mineros did not begin remediation until after DRP's operations ceased in 2009 the materials were irrelevant. The Tribunal denied Claimants' request at that time, Procedural Order No. 8 at 115-18, but Respondents' objection is a powerful admission that Activos Mineros bears responsibility for the claims of the Plaintiffs.

determined that Activos Mineros had remediated only 22% and 34% in 2017 and 2019, respectively. *See* Bianchi First Report at 109-10. Bianchi states in his report:

> Early on, many of these early projects [of Activos Mineros] amounted to little more than civil works. The community certainly benefited from the projects, but **the remediation that was taking place was inadequate, incomplete, and to a large degree, blind**. This is because I have not seen any reference to samples being collected prior to the work to confirm that all critical areas (i.e., those with high lead and arsenic concentrations) were being addressed. It is unreasonable to expect that contamination only would exist in the areas being paved while the immediately adjacent unpaved areas would happen to be uncontaminated.

Id. at 110 (emphasis added). With the wealth of material in their own files, one must wonder why Respondents had to resort to a fluff piece to support their good works.[13]

II. The Treaty Case.

A. Manipulation of SO2 standards as unfair and inequitable treatment.

Because the Tribunal expressed interest through its post-hearing questions in SO2 emissions standards, and because Respondents in their brief made repeated vague references to emissions standards, it is worth reminding the Tribunal how Peru weaponized these standards during and after DRP's bankruptcy proceedings.

[13] The new exhibit Respondents added to the record (R-319) adds no real detail to their remediation efforts, other than to demonstrate that these efforts started late, dragged on for years, with major parts yet undone (and anticipated completion dates still years away). It appears from the date stamps in some of the photographs that new work has been done as late as April 2024, but the scope of the work and the percentage of area remediated are absent from the report.

After the worldwide financial crisis forced DRP to shut down smelter operations in June 2009 and DRP was placed into bankruptcy, DRP proposed several restructuring plans to restart the facility, finish the sulfuric acid plant for the copper circuit, and pay its debts.[14] MEM, as the largest and most influential creditor, opposed the plans. When, for instance, MEM vetoed the May 14, 2012 plan, MEM insisted that any operation of the smelter must comply with then-existing emissions standards. C-115. MEM knew that to meet the 80 µg/m³ standard in place at the time, among the strictest in the world, the copper circuit could not be restarted before completing the sulfuric acid plant, even though the intent of the STA and the PAMA was to give DRP time to finish the acid plant before any new standards would apply. C-196.

MEM never approved any of DRP's efforts to restructure and never relented on full compliance at the moment of resumed operations with the strict SO2 standard for DRP. Yet, MEM permitted Right Business and others, as liquidators, to restart parts of the smelter beginning in August 2012, without any additional environmental investments or improvements.[15] MEM also allowed Right Business to exceed SO2 daily limits on a regular basis. C-201. Later, years after demonstrating complete

[14] These efforts are detailed in the Sadlowski Witness Statement at ¶¶ 76-77.

[15] Mogrovejo Witness Statement at ¶¶ 67, 68. Indeed, in the 2015 Corrective Environment Management Instrument (IGAC), Peru gave the liquidator for DRP *14 years* to meet the updated standards. Bianchi First Report at pdf pp. 38-40.

inflexibility with DRP on the 80 µg/m³ standard, Peru relaxed the standard to 250 µg/m³ to entice a new operator to take over the facility.[16] This is precisely the type of arbitrary and unjust conduct that violates the Treaty's guarantee of fair and equitable treatment.

B. Recognizing MEM's bogus credit was a denial of justice.

Of all Respondents' complaints about so-called extemporaneous arguments, their objection to our listing of Peru's judicial decisions approving MEM's bankruptcy credit was the most startling. Claimants' Treaty Memorial contains 18 pages of discussion about these decisions (¶¶ 290-326). Claimants' expert Mr. Schmerler testified at the hearing that the recognition of MEM's claims constituted a denial of justice. Tr. at 610-11. Respondents' own expert Mr. Hundskopf was cross-examined at length about cases he claimed supported the recognition of MEM's credit. Tr. at 652 *et seq*. It could not have been a surprise.

Indeed, this issue was raised in Claimants' very first pleading in this arbitration dated October 23, 2018:

> The credit that MEM asserted in DRP's bankruptcy is patently absurd. When DRP failed to complete its last PAMA project before the deadline that MEM improperly failed to extend, MEM did not incur any obligation to complete that project itself. The best evidence of that is that to this day—some several years after asserting the credit—MEM has not taken a single step towards completing the last sulfuric acid plant. Judicial reasoning that is so incoherent that it can only be explained by either

[16] *Id*. at ¶ 69.

> incompetence or improper bias constitutes a denial of justice under customary international law.

Claimants' Notice of Arbitration and Statement of Claim at ¶ 67.

Now, almost six years into this arbitration, and over 14 years since MEM claimed a credit in DRP's bankruptcy for the cost of completing the final sulfuric acid plant, the plant for the copper circuit remains untouched since DRP ceased operations. The proof today that the credit was a sham is even stronger than it was when this proceeding began.

III. The Missouri Litigations.

We first advise the Tribunal that the Eighth Circuit on August 1, 2024, affirmed the trial court's denial of Claimant's motion to dismiss in the *Reid* case.[17] Claimants are considering all options for continuing the appeal.

Several aspects of the Missouri Litigations have been misrepresented by Respondents in their post-hearing brief or require further elaboration or clarification.

A. "Direct" liability claims unavoidably encompass DRP's conduct.

Respondents are wrong that the defendants in the Missouri Litigations—including Renco and DRRC—could be found liable for legal duties that do not pass through DRP. Respondents point to the three counts in *Reid* that involve allegations

[17] Given Respondents' repeated objections to new evidence, we hesitate to attach the decision to this brief. We will promptly provide the Tribunal a copy of the decision upon request.

of "direct liability." To begin with, those are only one subset of claims in the litigation. Even if Respondents' characterization of those claims were correct, it would not relieve them of their obligation to assume responsibility because the remaining claims are unequivocally attributable to DRP's conduct.

But the so-called direct liability allegations also necessarily depend on DRP's operation and management of the La Oroya smelter.[18] Indeed, those claims contend that Renco and DRRC were so involved in managing DRP and smelter operations that they themselves should be held directly liable, rather than through a theory of corporate ownership.[19] The very nature of these allegations, based on control over DRP's actions, demonstrates the impossibility of trying to divorce DRP from the analysis.

What Respondents fail to recognize is that these theories of liability rely on DRP's own actions (or inactions) in operating the smelter. Not a single claim against

[18] As the Tribunal will learn, the Eighth Circuit opinion references these same allegations, but even after all the years of litigation, they still remain just allegations. Moreover, the liability theory advanced by the La Oroya Plaintiffs is based on a single case which held a parent company could be held liable under a federal environmental statute (CERCLA) as an "operator" as that term is defined by statute. *United States v. Bestfoods*, 524 U.S. 51 (1998). No case has extended that theory of operator liability under CERCLA to the common law tort claims being pursued by these Plaintiffs. But even if a court were to do so, that would serve only expand the number of potentially responsible parties for the conduct of the actual polluter. In other words, even if DRP were "following orders" from Renco or DRRC in operating the smelter, that would not absolve DRP of its own liability in doing so.

[19] The allegations cited by Respondents from the *Collins* Complaint likewise revolve around Claimants' purported control over the actions of DRP, asserting, for example, that the "unjust use of control proximately caused the minor plaintiffs' injuries." Resp. PHB at 7.

Claimants operates independently of those operations and the resulting emissions of lead and other substances. No matter how styled, this central activity lies at the heart of all the La Oroya Plaintiffs' claims, making it impossible to segregate DRP's conduct from Claimants' conduct.

If, for example, a jury were to conclude that DRP's operation of the smelter was not wrongful, there would be nothing for which to hold Claimants directly liable. The key point is that the La Oroya Plaintiffs' direct liability claims simply seek to *expand* the scope of liability for DRP's actions beyond DRP itself to include Renco and DRRC. But absent evidence that DRP's operation of the smelter was improper, the Plaintiffs in the Missouri Litigations have nothing to complain about.

Simply stated, it is not possible to separate DRP's actions from the claims of the La Oroya Plaintiffs. Any finding of liability against Renco and DRRC would necessarily be "attributable to the activities" of DRP; Activos Mineros assumed responsibility for such claims, thereby triggering Respondents' assumption of responsibility under the STA. R-001 at Art. 6.2.

Moreover, Centromin's assumption of liability during the PAMA period includes "liability for *damages* and claims by third parties that are attributable to the activities of [DRP]…." Art. 6.2 (emphasis added). The language of the provision indicates that Centromin is responsible not merely for claims attributable to DRP's operations, but also damages attributable to those operations. Plaintiffs in the

Missouri Litigations assert their damages—all their damages—were caused by exposure to materials emitted during DRP's operations of the facilities.

B. It matters not which substances are at issue.

Respondents point out, as Claimants also acknowledge in their post-hearing brief, that other substances are alleged to have been injurious to the La Oroya Plaintiffs, including SO2. But at present, Plaintiffs' claims, as particularly demonstrated by the supporting expert materials, all revolve around the emission of lead. The extent, if any, to which other substances might ultimately play a material role in any judgment issued in the Missouri Litigations remains to be seen. It is also beside the point.

The claims asserted in the Missouri Litigations are expressly based on the lead (and other substances) emissions from the smelter during DRP's tenure (1997-2009), which alone is sufficient to trigger the relevant provisions of the STA. The other substances mentioned (such as SO2, for example) are also squarely included in or otherwise addressed by the PAMA. In short, so long as the material claimed to cause harm to the Plaintiffs comes from the smelter, whether lead or otherwise, the analysis of the contract stays the same.

C. The Parties agree that the Tribunal should not delay ruling.

Both parties acknowledge the possibility that the Tribunal's ruling on the contract case could conflict with a decision on the merits in the Missouri Litigations

whether by a judge or jury).[20] But both parties also agree that the Tribunal should not delay issuing its award. Given that agreement, it is curious that Respondents suggest, in the same breath, that the Claimants' claims are "not ripe for determination." With respect to the contract case, what Claimants seek is simply a determination by the Tribunal that Respondents assumed liability over third-party claims, including the claims of the Plaintiffs in Missouri, arising from the operation of the smelter while DRP brought the facility up to the new Peruvian environmental standards under the PAMA.

Further, Respondents' purported concern over the lack of a "claim by claim" analysis of liability under the STA is overblown and unmerited. Indeed, Respondents cite no legal authority, no record evidence, and no provision of the STA in support of this gripe. Again, the analysis is simple and straightforward: all causes of action raised by the La Oroya Plaintiffs allege that the smelter's air emissions and the resulting exposures to lead (and other substances) caused them harm. For this reason, Respondents under the STA are obligated to assume liability for those

[20] Respondents have, for example, claimed that the Missouri Litigations involve strict liability claims that hinge on whether operating a smelter in Peru is a "dangerous activity." *See* Resp. PHB at ¶ 25. However, Claimants continue to believe these "strict liability" claims under Missouri law are meritless, and do not detract from the central issues in this case regarding whether the smelter was operated in a reasonable and prudent manner, which Claimants believe it was. That issue, however, has nothing to do with the question of Respondents' assumption of responsibility which is governed by the language of the STA.

claims, unless they prove that an exception applies. As explained in Claimants' post-hearing brief at length, and at the hearing, they have not done so.

Respondents suggest we brought this contract case "for leverage to get the Missouri Litigations to settle on favourable terms through intervention by Peru." Resp. PHB at ¶ 30. They are off target. Claimants brought this case simply to enforce the contractual rights we bargained for in 1997. Had Respondents complied with their obligations to assume responsibility for the Missouri Litigations, no one knows whether the course of those litigations would have changed,[21] but we do know all the time and money spent on this arbitral contract case (on both sides) would have been unnecessary.

IV. The IACHR decision.

The parties agree that the IACHR judgment does not bind the Tribunal and should be given little, if any, weight. Nevertheless, Respondents devoted several pages to the decision in an apparent attempt to divert the Tribunal away from the main findings of the Inter-American Court.

While it is true that the Court criticized Peru for granting extensions to DRP for completing the PAMA projects, that criticism was but a small part of the much

[21] Respondents seem to misunderstand what it means to assume responsibility for the Missouri Litigations. They say "Activos Mineros cannot possibly defend itself from each of the potential permutations that could arise in the litigations…." Resp. PHB at ¶ 28. The Plaintiffs have not sued Activos Mineros, nor will they. If Activos Mineros complied with its obligation, it would defend Renco and DRRC, not itself, in the Missouri Litigations.

larger overall findings the Court made about Peru's human rights violations. The Court found Peru's failure to enact environmental legislation or regulation before 1993 constituted a violation of the duty to regulate. Judg. at ¶ 162. The Court goes on to conclude:

> Thus, it has been demonstrated that the metallurgical activity of the CMLO polluted the air, water and soil of La Oroya above the environmental quality standards allowed by Peruvian legislation and international recommendations regarding the emissions of toxic substances emitted by the activity of the CMLO, and that the State was aware of this situation. In addition, **the State's actions were the cause of such damage to the environment when Centromin operated the CMLO**, and that its omissions in monitoring Doe Run's activities allowed such damage to continue to occur after the privatization of the company. The foregoing constitutes a violation of the right to a healthy environment, protected by Article 26 of the American Convention.

Id. at ¶ 176 (emphasis added). The violations existed before DRP ever acquired the smelter and continued after DRP stopped operating. *Id.* at ¶ 263. The Court's decision spanned the entire time of the smelter's operation.

If any conclusion can be drawn from the portion of the decision critical of Peru's oversight and supervision of the plant during DRP's operations, it is that the decision supports Claimants' contractual analysis. As we have stated, the STA, in the Article 5.3(B) exception, requires that MEM must have found DRP to have defaulted in its PAMA obligations. The Court believed Peru was too lenient on DRP. Both sides in this arbitration may take issue with that characterization—for different reasons—but it is a recognition that Peru did not find DRP in default.

V. The Tribunal's follow-up questions.

A. Ownership of DRP.

The following exhibits in the record confirm the ownership of DRP at the relevant times. Exhibit R-068 shows that as of October 1997, DRP was wholly owned by Doe Run Mining. Exhibit R-074 at 7 shows that effective December 30, 1997, Doe Run Peru and Metaloroya were merged. Exhibit IK-017 at 7 shows that effective June 1, 2001, Doe Run Cayman Ltd owned 99.9% of DRP.

B. Status of the facility after bankruptcy proceedings.

The chart below provides details on the operations of the smelter after the bankruptcy:

Dates	Operations	Record Reference
8 Aug 2012 – 26 Nov 2012	Zinc circuit only	GBM-038 at 2203
26 Nov 2012 – May 2014	Zinc & lead circuits	GBM-038 at 2203
May 2014 – Sept 2014	No operations	GBM-038 at 2203
Sept 2014 – April 2017	Zinc circuit only	GBM-098 at 3
April 2017 – May 16, 2017	No operations	GBM-098 at 4
May 16, 2017 – Nov 2018	Zinc circuit only	GBM-098 at 3

We believe the zinc circuit continued its operations at least through March 2021, but that information is not in the record.

If the Tribunal needs further information regarding these matters—or any others—we would be happy to provide it.

Claimants ask the Tribunal to award the relief set out in their principal brief.

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