UNDER THE UNCITRAL ARBITRATION RULES (2013)

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

v.

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

PCA Case No. 2019-46
PCA Case No. 2019-47

Respondents' Second Post-Hearing Brief

16 August 2024

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CONTENTS

I. INTRODUCTION

1. Pursuant to the Tribunal's letters of 27 June and 19 July 2024, Respondents hereby submit their response to Claimants' PHB, dated 21 June 2024.[1] The response is structured as follows. In **Section II**, Respondents address the proper allocation of the burden of proof. **Section III** focuses on the Contract Case. Respondents rest on the Treaty Case, and they refer to their pleadings, correspondence, and arguments for matters not addressed here.

II. CLAIMANTS BEAR THE BURDEN OF PROOF

2. Claimants bear the burden of proving the existence of jurisdiction and of proving their claims. In their PHB, Claimants continue their attempt to shift the burden of proof onto Respondents.[2] To avoid any doubt, the English Arbitration Act, the UNCITRAL Rules and *jurisprudence constante* are clear: Claimants' bear the burden of proof.[3]

3. After years of pleadings, the submission of thousands of exhibits and legal authorities, a thorough hearing, and two rounds of post-hearing briefing, in which the Claimants were allowed to submit evidence at each step of the process, if the Tribunal still believes that a lack of clarity remains, it is because Claimants have failed to meet their burden of proof.

[1] Defined terms not included in this submission are incorporated by reference from Respondents' submissions in both the Contract Case and the Treaty Case.

[2] Claimants' PHB, p. 2.

[3] *See* Claimants' Contract Counter-Memorial, § III(A); Claimants' Contract Rejoinder, § II(B); **CLA-013**, English Arbitration Act, Art. 68.

III. THE CONTRACT CASE

1. Claimants' Admission that the Renco Guaranty Has a Distinct Cause Confirms that the STA and the Renco Guaranty are Separate Contracts

4. Respondents have always affirmed that the STA and the Renco Guaranty are separate contracts because they have different causes. Finally, Claimants concede that the Renco Guaranty has a distinct cause: "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)***."[4] (Emphasis added). That is the end of the analysis.

5. ***All*** Peruvian law evidence (including expert reports and authorities) confirms that, under Peruvian law, multiple contracts exist when there are multiple causes.[5] Under Peruvian law, one contract cannot have multiple causes. ***No*** Peruvian law evidence supports an opposite finding.

6. All agree: The Renco Guaranty has a distinct cause. Consequently, Peruvian law requires the Tribunal to find that the STA and the Peru Guaranty are separate contracts.

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[4] Claimants' PHB, p. 4.

[5] *See* Contract Counter-Memorial ¶¶ 462-68; First Varsi Report, ¶¶ 4.7, 4.9, 2.29, 5.27-5.37; **RD-001**, Respondents' Opening Statement, Slides 47; **Hearing Transcript (Day 1)**, 109:7-110:6; **RD-004**, Varsi Direct Presentation, Slides 5-12; **Hearing Transcript (Day 3)**, 522:6-526:71; **RD-010**, Respondents' Closing Statement, Slide 4; **Hearing Transcript (Day 9)**, 1612:09-1613:16; **JAP-109**, Messineo, Franceso, *Doctrina General del Contrato. Tomo I*, p. 390, 393 (English Translation: "where there are a plurality of causes, there will be a plurality of contracts, and if, as is much more common, there are causes corresponding to some other named contracts, there will be a plurality of named contracts") (Official English translation available upon request); **JAP-110,** Gutierrez, Walter, *Los contratos atípicos,* p. 130 (English Translation: "the unity of cause is, we believe, fundamental to the conclusion that there is a single contract, such that if there are several causes, there will be several contracts") (Official English translation available upon request).

2. The Assignments of Contractual Position are Effective, Demonstrating that Claimants are Not STA Parties

7. All agree: The assignments of contractual position are effective.[6] But Claimants did not provide consent for the assignments. That confirms that Claimants are not STA Parties.

8. To recall, Respondents have maintained that there is no evidence that Claimants consented to the assignments—consent that would have been required had they been STA parties. As asserted by Respondents and Dr. Varsi, and as conceded by Dr. Payet, Peruvian law requires the consent of every contracting party for assignments of contractual positions to be effective.[7] Both parties agree that the assignments in this case are effective.[8] The STA Parties consented in advance, in Clause 10 of the STA, to such assignments. Clause 10 establishes the consent of only "Centromin," "the Investor," and "the Company."[9] There is no evidence of consent on the part of Claimants.[10]

9. In a belated rebuttal, Claimants now argue that they consented implicitly, through post-assignment conduct.[11] For the following reasons, Claimants' new argument fails.

10. First, Peruvian law requires Claimants to grant their consent in writing. Assignments under Peruvian law are trilateral—their parties are the assignee, the assignor, and the remaining party.[12] Article 1436 of the Peruvian Civil Code—which specifically governs assignments

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[6] *See* Respondents' PHB, pp. 61-62; Claimants' PHB, pp. 4-5.

[7] *See* Respondents' Contract Rejoinder, ¶¶ 163-167; Varsi Second Expert Report, ¶¶ 3.3-3.8; **Hearing Transcript (Day 3)**, 526:18-527:25; **RD-004**, Varsi Presentation, slides 13, 14; **Hearing Transcript (Day 3)**, 446 ("Q . . .the consent of the assignor, the assignee, and the assigned Party are all necessary for an assignment of contractual position to exist; correct? A. Yes.").

[8] *See* Respondents' PHB, pp. 61-62; Claimants' PHB, pp. 4-5.

[9] *See* **Exhibit R-001**, STA, clause 10.

[10] *See* **RD-010**, Respondents' Closing Statement, slides 5-7; **Hearing Transcript (Day 9)**, 1613:15-1615:05.

[11] Claimants' PHB, p. 5.

[12] **RLA-213**, Manuel de la Puente y Lavalle, *El Contrato en General, Comentarios a la Sección Primera del Libro VII del Código Civil*, Tomo II (Third Edition), 2017, p. 213 ("**de la Puente y Lavalle, *Comentarios Tomo II***").

of contractual positions—requires the form of the assignments to match the form of the primary contract.[13] As Peruvian scholar Manuel de La Puente y Lavalle explains, because assignments are secondary contracts, Article 1436 requires their form to match that of the primary contract.[14] In this case, the STA Parties' consent was granted in writing (in the STA itself). Therefore, Article 1436 requires the consent of the assignee, the assignor, and the remaining party to also be granted in writing. The only written consent, as noted above, is contained in Clause 10 of the STA.

11. Second, the entry-into-force dates of the assignments disprove Claimants' post-assignment-consent theory. Claimants argue that their initiation of the arbitrations in 2019 and some vague passive, post-assignment tolerance evidences their consent.[15] But, as de La Puente y Lavalle explains, under Peruvian law assignments do not exist until the consent of all three parties is perfected and every party is notified of each other's consent.[16]

12. Here, the entry-into-force dates of both assignments far precede the initiation of these arbitrations and any passive, post-assignment tolerance. DRP's assignment, dated 1 June 2001, provided that "[t]he assignment of contractual position contemplated herein shall become effective on 1 June 2001."[17] Similarly, Centromin's assignment, dated 19 March 2007, establishes that it will enter into force upon notice to the other STA Parties (only "the

[13] **RLA-062**, Peruvian Civil Code, Article 1436 ("The ***form of transmission***, the capacity of the parties involved, the defects of consent and the relations between the contracting parties ***are defined according to the act that serves as the basis for the assignment*** and are subject to the relevant legal provisions."). As a provision specifically governing assignments of contractual position, Article 1436 governs in this case to the exclusion of Article 143.

[14] **RLA-213**, de la Puente y Lavalle, *Comentarios Tomo II*, pp. 218-220.

[15] Claimants' PHB, p. 5.

[16] **RLA-213**, de la Puente y Lavalle, *Comentarios*, p. 213.

[17] **Exhibit R-004**, Contract Assignment, clause 2.

Company" and "the Investor").[18] In short, the required consent must have existed, respectively, as of 1 June 2001 and the date of notice to the other STA Parties.

13. The required consent did indeed exist on the relevant dates. Both assignments recognize that the necessary consent is contained in Clause 10 of the STA.[19] None of the assignments reference any pending consent, nor do they subject their existence or effectiveness to any future consent. If Claimants' consent was necessary, the assignments would have recognized it, and they would have subjected their entry into force to the future perfection of Claimants' consent. And if the initiation of these arbitrations constituted consent, the assignments would not have been effective until 2019, something that no party claims.

14. Third, Claimants' passive, post-assignment tolerance cannot constitute consent for an additional reason—under Peruvian law, silence cannot constitute consent in this case. Claimants state that their subsequent conduct evidences their consent to the assignments.[20] But apart from their initiation of these arbitrations, Claimants identify no other conduct, instead merely stating that they treated the assignments as effective.[21] In Claimants' view, their silent tolerance is evidence of consent. That contradicts Peruvian law. Article 142 of the Peruvian Civil Code establishes that "[s]ilence is a manifestation of will when the law or [an agreement] attributes that meaning to it."[22] There is no evidence in the record that

[18] **RLA-062**, Peruvian Civil Code, Article 1435

[19] *See* **Exhibit R-004**, Contract Assignment, clause 1.3. (stating that Clause 10 of the STA provided "all rights and approvals ***necessary***" for DRP's assignment of its contractual position.") (emphasis added); **Exhibit R-284**, Assignment of Centromín's Contractual Position to Activos Mineros, 19 March 2007, clause 3.3 ("In accordance with the provisions of Clause Ten of the Share Transfer Contract, ***Doe Run Perú (the Company) and Doe Run Cayman Limited (the Investor) have granted their consent in advance*** for Centromin to be able to assign its contractual position when it deems it appropriate.") (emphasis added).

[20] Claimants' PHB, p. 5.

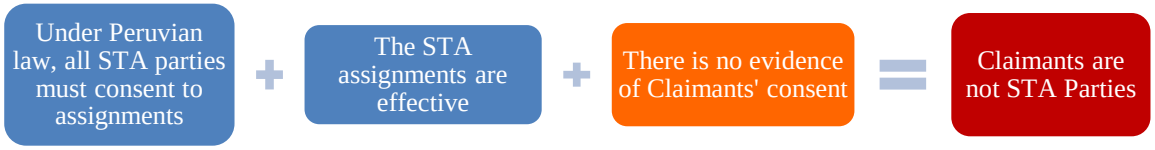
[21] *Id.*

[22] **RLA-062**, Peruvian Civil Code, Article 142.

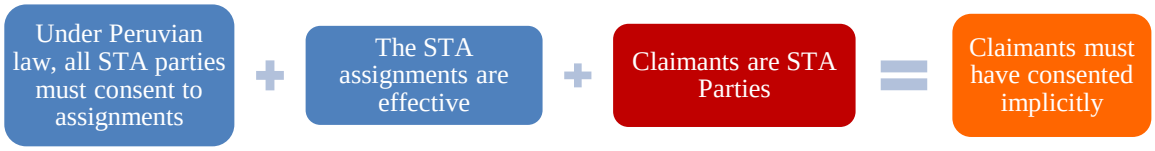
Peruvian law or a party agreement allowed Claimants to provide their consent through silence. Thus, any passive, post-assignment tolerance cannot constitute consent in this case.

15. Fourth, under Peruvian law, implicit consent must be indisputable. Claimants cite to Article 141 of the Peruvian Civil Code to support their new argument, but this provision states that "[a manifestation of will] is tacit when the will is ***undoubtedly inferred*** from an attitude or behavioural circumstances that reveal its existence."[23] (Emphasis added).

16. Here, it is not possible to undoubtedly infer implicit consent. In fact, the only way of doing so is to presume that Claimants are STA Parties. But that cannot be a premise, because it is precisely what the Tribunal must determine for purposes of jurisdiction. As the following graphic shows, Respondents have explained why Claimants' lack of consent to confirms that Claimants are not STA Parties:



17. On the other hand, conclusively inferring implicit consent requires presuming—rather than concluding—that Claimants are STA Parties:



[23] **RLA-062**, Peruvian Civil Code, Article 141.

18. Such reasoning is fallacious and unsupported by the evidence. Instead, reason indicates that Claimants did not consent to the assignments implicitly. To start, the STA, its modifications, and its assignments are multimillion-dollar corporate transactions. It is not credible to assert that sophisticated parties would provide or accept implicit, post-hoc consent to any related transaction. Indeed, the STA, its various modifications and clarifications, and its assignments were all negotiated and memorialized in writing. For an overview, the Tribunal can review the Clauses 1 and 2 of Centromin's assignment.[24] Likewise, the STA Parties provided their consent in writing to assignments in Clause 10 of the STA. Claimants offer no reason why they would fail to include their consent in writing in Clause 10. Nor do they explain why the STA Parties would accept implicit post-assignment consent. There is no reasonable explanation. In any event, at minimum, implicit consent cannot be undoubtably inferred.

19. The assignments are effective. Therefore, the STA Parties are only "Centromin," "the Investor," and "the Company."

3. Claimants Lack Standing to File their Subrogation Claim; the Claim is Unripe; and, in the Alternative, the Claim is Time-Barred

20. All agree: A debt must be paid before a right to subrogation can arise.[25] Claimants have not made any payment, and thus no right to subrogation has arisen. Claimants lack standing to bring their subrogation claim, and the claim is unripe.[26] In the alternative, it is time-barred.

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[24] **Exhibit R-284**, Assignment of Centromín's Contractual Position to Activos Mineros, 19 March 2007, Clauses 1.3, 2.1, 2.2.

[25] *See* Claimants PHB, p. 63 ("Claimants agree that under Peruvian law a debt must be paid before a right to subrogation can arise.").

[26] *See* Contract Counter-Memorial, ¶¶ 616-617, 622-625; *see* Respondents' Contract Rejoinder, ¶ 253.

21. First, Claimants' subrogation claim is unripe, and they lack standing. Claimants argue that the prescription period has not begun to run because "a subrogation claim arises only once a claim is paid."[27] As Respondents have explained, that means, by definition, that the claim has not yet crystalized.[28] To bypass this problem, Claimants rely on supposed declaratory relief. But as Respondents have explained, Claimants do not request declaratory relief; they request damages.[29] Making the point themselves, Claimants now officially "request that a second hearing be held to determine damages."[30] Further, under English law (the *lex arbitri*), the Tribunal cannot grant Claimants declaratory relief.[31] Claimants have never rejected the applicability of English law, nor have they disagreed with it in substance. Finally, even if Peruvian law applied, Claimants would not be entitled to any declaratory relief.[32]

22. Second, if (despite the lack of payment) the Tribunal were to find **(i)** that the subrogation claim is ripe, and **(ii)** that Claimants have standing to bring the claim, then in the alternative the subrogation claim would be time-barred for all claims that the Missouri Plaintiffs could have brought against Activos Mineros by 10 November 2014.

23. As a threshold matter, Claimant's statement that "Dr. Payet sets out another reason the subrogation claims are not time-barred,"[33] is not true. In his third expert report, Dr. Payet

[27] Claimants' PHB, ¶ 64.
[28] *See* Contract Counter-Memorial, ¶¶ 616-617, 622-625.
[29] *See* Respondents' Contract Rejoinder, ¶¶ 273-89.
[30] Claimants' PHB, p. 74.
[31] *See* Respondents' Contract Rejoinder, ¶¶ 290-312.
[32] *See id.*, at ¶¶ 313-27.
[33] Claimants' PHB, p. 64, n. 55.

only states, "I don't know."[34] Nevertheless, Respondents will again explain[35] that Peruvian law, not U.S. law, provides the proper prescription period.

24. Under Peruvian law, subrogation replaces an original creditor with a new creditor, who can then seek recovery from the original debtor. Further, under Peruvian law, a subrogation claim is subject to the prescription period underlying the claim that the original creditor could file against the original debtor. In Claimants' theory, Claimants (the new creditors) would replace the Peruvian nationals (the original creditors) and seek recovery against Activos Mineros (the original debtor). So, in this case, the relevant prescription period is the one applicable to the claim that the Peruvian nationals could originally have filed against Activos Mineros (not against Claimants in Missouri).

25. Claimants' theory has been that the Peruvian nationals had a strict liability claim under Peruvian law against Activos Mineros.[36] Accepting Claimants' theory, the prescription period applicable to their subrogation claim would be the 2-year prescription period of the underlying strict liability claim. Consequently, if the subrogation claim is ripe, then it is time barred for all claims that the Peruvian national plaintiffs could have brought against Activos Mineros by 10 November 2014.

4. Claimants' Comments on the Current Status of the Missouri Litigations Confirm that their Claims are Unripe

26. Claimants' PHB confirms that it is impossible to know what will happen in Missouri.

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[34] Payet Third Expert Report, ¶¶ 124-126.

[35] *See* Respondents' Contract Rejoinder, at ¶¶ 266-73; *see also* Varsi Second Expert Report, ¶¶ 4.55-59; **Exhibit JAP-092**, Luciano Barchi Velaochaga, *Payment of the third and recovery mechanisms of patrimonial loss suffered by the payment of the outside obligation in the Peruvian Civil Code*, 152 IUS ET VERITAS 47, 159 (2013).

[36] *See* Claimants' Reply, ¶¶ 17, 24-28; Claimants' Rejoinder on Jurisdiction, ¶ 51, 54, 72; **CD-001**, Claimants' Opening Statement, Slide 73.

27. At the hearing, Claimants conceded that it was impossible to know *when* the Missouri Litigations will conclude. Claimants' counsel stated that they could last "25 years which could end up being 35 years, which who knows how long it'll go, without anything being resolved."[37] In their PHB, Claimants continue their numerous concessions.[38] Importantly, on 1 August 2024, the Circuit Court of Appeals for the Eighth Circuit issued its opinion in the pending appeal in the Reid Cases. It upheld the district court's opinion.[39] As Claimants note (*see* footnote 38), they could now file further appeals, including up to the U.S. Supreme Court. Thereafter, back at the district court, numerous pre-trial motions could be filed before any trial is scheduled, any jury is empanelled, any evidence is admitted into the record (none of the documents that the Tribunal has admitted is evidence in the Missouri Litigations[40]), and any verdict is reached. After a verdict is reached (if the parties do not settle), it will be subject to further appeals.

28. It is also impossible to determine *how* the Missouri Litigations will end. Claimants state, ***"[i]t is difficult to speculate*** whether and how the resolution of . . . different legal standards [in the Missouri Litigations and these arbitrations] might create conflict when applied to

[37] **Hearing Transcript (Day 1)**, 56:9-13.

[38] Claimants' PHB, p. 8 ("After the Eighth Circuit Court of Appeals issues an opinion "[f]urther appellate proceedings, including requests for rehearing or for certiorari to the U.S. Supreme Court, could follow."); pp. 8-9 ("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."); p. 9 (""Given these circumstances, ***it is not possible to reasonably estimate***—particularly given the pending appeal—when the first of the individual Plaintiff cases might go to trial.") (emphasis added); *id.* ("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.") (emphasis added).

[39] **Annex 1**, Opinion, *Kate Reid et al. v. The Doe Run Resources Corporation*, Case No. 23-1625, Circuit Court of Appeals for the Eighth Circuit, 1 August 2024.

[40] As Respondents have explained, no evidence is admitted into the record in a U.S. litigation until trial. *See* Respondents' Contract Rejoinder, ¶ 300. The jury will never see any of the pre-trial filings that are in the record in these arbitrations. Evidence will be admitted only during the trial, and the judge (at the trial) will rule on whether a particular piece of evidence is admitted or excluded.

often contested facts."[41] (Emphasis added). Yes, it is—because (as Respondents have repeated) it is impossible to know how the Missouri Litigations will evolve.[42] Even statements of feigned certainty betray speculation. Claimants assert that "[i]f either of the Missouri cases ever reaches a trial, the sole issue . . . will be lead."[43] If so, it is inexplicable why the parties expended so much time and money addressing SO2.

29. The Tribunal cannot know *when* or *how* the Missouri Litigations will end. And the Tribunal cannot speculate. Like Claimants, Respondents also "urge the Tribunal to issue its award without waiting for any ruling from Missouri."[44]

5. Claimants' New Interpretation of Clauses 5 and 6 Fails

30. Claimants now argue that, under Clauses 5 and 6 of the STA, Activos Mineros is "required to answer only to third parties whose liabilities were derived from DRP['s]" conduct.[45] The Tribunal reads Claimants' argument as a "narrowing [of] the scope of an argument or request for relief" to only Claimants (thus excluding the phantom claimants).[46] Respondents thus proceed on the premise that Claimants have dropped the claims of the phantom-claimants. Claimants' new interpretation still fails.

31. First, Claimants will not be held liable in Missouri for DRP's conduct in Peru. Claimants argue that "[t]he Plaintiffs' lawyers [in the Missouri Litigations] allege theories under U.S.

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[41] Claimants' PHB, p.16.

[42] *See* Contract Counter-Memorial, ¶¶ 605-614; Respondents' Contract Rejoinder, ¶¶ 292-305; **Hearing Transcript (Day 1)**, 124:12-127:25; **RD-001**, Respondents' Opening Statement, Slides 74-75; **Hearing Transcript (Day 9)**, 1621:09-1627:21; **RD-010**, Respondents' Closing Statement, Slides 14-19.

[43] Claimants' PHB, p.16.

[44] Claimants' PHB, p. 17.

[45] Claimants' PHB, p. 6.

[46] Procedural Order No. 2019-47, ¶ 2.16. To recall, the "phantom-claimants" are the 9 individuals and entities who are also defendants in the Missouri Litigations, and DRP, who is not a defendant in the Missouri Litigations, on behalf of whom Claimants surreptitiously bring claims. *See* Contract Counter-Memorial, ¶¶ 26, 504-05, 546-551, 612.

law would make Renco and DRRC vicariously liable for DRP's conduct."[47] That is not true. Claimants are defendants because of their actions in Missouri.

32. Claimants finally concede that the district court in Missouri does not have jurisdiction over DRP. They admit that "DRP, as a Peruvian company, likely would not have had sufficient contacts with Missouri to be subject to suit there in any event." [48] That is U.S. legalese for "the district court in Missouri lacks jurisdiction over DRP." Respondents made this point in their Contract Rejoinder, explaining that DRP's insufficient connection with the U.S. meant that the district court in Missouri lacked jurisdiction over DRP and its actions.[49]

33. For that reason, the district court in the Reid Cases has already ruled that it will adjudicate only the conduct of U.S. entities that has taken place in the U.S.:

> There is no doubt that the injuries occurred in Peru, but that does not mean that defendants are correct in arguing that the conduct giving rise to injury occurred in Peru . . . Missouri has an interest in applying its tort law because – as the state where defendants are incorporated and the misconduct occurred – Missouri has a greater ability to control corporate behavior by deterrence or punishment than Peru, the place where the injury occurred.[50]

34. In its recent affirmance, the Circuit Court of Appeals for the Eighth Circuit likewise found **(i)** that "the plaintiffs are suing for environmental harms in Peru allegedly caused by conduct that occurred in the United States," **(ii)** that "the harm occurred in Peru, but [the defendants'] alleged conduct occurred in Missouri", and **(iii)** that "the plaintiffs uniquely allege conduct that occurred within the United States as the basis for liability . . . [and that]

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[47] *See* Claimants' PHB, p. 13.

[48] *See* Claimants' PHB, p. 12.

[49] *See* Contract Rejoinder, ¶¶ 343-44

[50] **Exhibit R-018**, Memorandum and Order, Document No. 949, A.O.A. et al. v. Doe Run Resources Corp., et al. (E.D. Mo. Case No. 4:11-cv-00044-CDP), 16 October 2018, pp. 50–51.

the record sufficiently supported claims that decision making in the United States caused the plaintiffs' injuries for purposes of summary judgment."[51]

35. In short, if Claimants are found liable, it will be because of their actions in Missouri. And because the Missouri Plaintiffs' claims stem from Claimants' actions in the United States, they are not subject to the STA's allocation of responsibility.[52]

36. Second, there is no Peruvian law support for Claimants' new interpretation of the STA. Without that evidence, the "interpretation" is just an unsupported statement. As a threshold matter, despite Claimants' protests to the contrary, up to 21 June 2024, they interpreted Clauses 5 and 6 to "run to any party in the world." [53] Dr. Payet's whole interpretation of Clauses 5 and 6 is that the meaning of the phrase "assumes responsibility" is that Activos Mineros is personally liable under Clauses 5 and 6 to any third party who is sued for matters that are its responsibility under these clauses.[54] For that reason, Dr. Payet conceded that, under his interpretation, if the Tribunal were successfully sued for matters assigned to Activos Mineros under Clauses 5 and 6, it could seek indemnity from Activos Mineros.[55]

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[51] **Annex 1**, Opinion, *Kate Reid et al. v. The Doe Run Resources Corporation*, Case No. 23-1625, Circuit Court of Appeals for the Eighth Circuit, 1 August 2024, pp. 6, 7, 8.

[52] *See* Contract Rejoinder, IV.B.1.

[53] *Compare* Claimants' PHB, p. 6 ("Claimants do not suggest that those obligations are unlimited or run to any party in the world.") *with* Contract Memorial, ¶ 166 ("Centromin's assumption of liability for third-party damages and claims under Clauses 6.2 and 6.3 extends ***to anyone who could be sued*** by a third-party for damages falling within the scope of the assumption of liability; ***especially*** [by definition, not limited to] anyone associated with the Renco Consortium considering the context of the privatization and Renco's investment in La Oroya.") (emphasis added); Contract Memorial, ¶ 200 ("[A] party that agrees to assume a liability is obligated to cover the losses (including the litigation costs) ***of anyone who is sued*** for damages falling within the scope of the liability which such party has assumed.") (emphasis added).

[54] *See* **Hearing Transcript (Day 3)**, 389:23-395:25; *see also* Payet First Expert Report, ¶ 151 ("Centromin's declarations assuming liability for damages, losses and claims of third parties for environmental matters, are ***not limited by its terms to one or more specific persons***. The assumption of liability focuses on the liability towards third parties and, with respect to them, Centromin declares that it "***assumes it***"; that is, it is Centromin's own liability. Therefore, if the damages or claims of third parties are related to activities attributable to Centromin, ***regardless of the entity sued for such damages or claims***") (emphasis added).

[55] **Hearing Transcript (Day 3)**, 480:21-481:20.

This broad interpretation resulted in arbitrator Grigera Naón asking Dr. Payet about the impact "on third parties, on the rest of the word."[56]

37. On the substance, Claimants argue that the STA encompasses them because their liability would be for conduct "attributable to" the Company, as phrased in Clauses 5 and 6.[57] But there is no Peruvian law support for reading the phrase "attributable to" as encompassing entities sued under foreign-law derivative or direct liability theories. In fact, when Dr. Payet was asked if he considered derivative liability, he answered, "I'm not sure there is any, you know, part of the Report that is based on that being the case or not being the case."[58] He did not, and his reports do not address derivative liability (nor direct liability).

38. In sum, even if Claimants' new reading of the STA is merely a more limited one, they must still support it with Peruvian law evidence. There is none.

39. Third, Claimants confuse **(i)** U.S. law on derivative liability with **(ii)** who Clauses 5 and 6 encompass. Claimants will be absolved if their conduct does not meet the required U.S. law elements (e.g., corporate ownership). But the scope of Clauses 5 and 6 is independent from U.S. law limitations on U.S. law claims. For example, Dr. Payet stated during his cross examination, "I don't understand how the Tribunal could be sued for environmental damage attributable [to] Metaloroya."[59] Perhaps it could not, but that limitation is provided by U.S. law (or another applicable legal regime). Whether Clauses 5 and 6 encompass the Tribunal if suit is successful is a matter of contractual interpretation under Peruvian law. And, as noted above, Claimants provide no support for their new interpretation.

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[56] **Hearing Transcript (Day 3)**, 507:1-512:10.
[57] Claimants' PHB, p. 12.
[58] **Hearing Transcript (Day 3)**, 426:24-427:1.
[59] **Hearing Transcript (Day 3)**, 480:17-19.

40. Fourth, Claimants still provide no support for reading the STA as permitting them to shift responsibility for fraud. For Claimants to be found liable under the corporate-veil-piercing theory, they must have used the corporate form to perpetuate fraud, injustice or another unlawful purpose.[60] As Dr. Payet admitted, he ***did not*** analyze the Missouri Litigations, so ***he took no position*** on whether Activos Mineros is responsible under the STA.[61] When pressed on whether the STA allows Claimants to shift responsibility for fraud, he explained that it could be relevant but a was difficult question to answer without looking at specifics (which he did not do).[62] There is no support for reading the STA as allowing a fraudster to shift the financial consequences of fraud onto Activos Mineros.

41. Fifth, no Peruvian law evidence supports reading Clauses 5 and 6 as encompassing the Missouri Plaintiffs' direct liability claim. As the district court noted in the Reid Cases,

> [t]he notion of direct participation liability is transaction specific and limited to situations where parental or shareholder meddling is directly tied to the harmful or tortious conduct of the subsidiary; therefore, this form of liability rests on the ***parent's or owner's own conduct*** . . . . The allegations in Counts VIII, IX, and XII are sufficient to allege that those defendants were not wearing their "subsidiary hats" when they operated the La Oroya Complex and took actions that left Doe Run Peru undercapitalized and financially unable to implement pollution-mitigation measures.[63] (Emphasis added).

42. Sixth, Claimants' narrower request for relief confirms that their claims are unripe. For example, if the parties in Missouri settle, and, in exchange for a settlement payment by

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[60] *See* Contract Rejoinder, ¶ 346; **RLA-251**, *Blanks v. Fluor Corp*., Missouri Court of Appeals, Eastern District, Division Four Case No. ED 97810, 450 S.W.3d 308, 16 September 2014, p. 311 ("Piercing the corporate veil' is an equitable doctrine used by the courts to look past the corporate form and impose liability upon owners of the corporation—be they individuals or other corporations—when the owners create or use the corporate form to accomplish a fraud, injustice, or some unlawful purpose.")

[61] **Hearing Transcript (Day 3)**, 412:5-413:24.

[62] **Hearing Transcript (Day 3)**, 428:14-431:3.

[63] **Exhibit R-018**, Memorandum and Order, Document No. 949, A.O.A. et al. v. Doe Run Resources Corp., et al. (E.D. Mo. Case No. 4:11-cv-00044-CDP), 16 October 2018, pp. 44-45.

Claimants, all defendants (including the phantom-claimants) are released, it would be impossible apportion the damages among the Missouri Defendants to determine damages in this arbitration. Likewise, if the Tribunal compares pages 4 and 5 of Exhibit R-0018 (the Missouri Court's order on the Missouri Defendants' motion to dismiss in the Reid Cases) to the table of claims in pages 9 and 10 of Claimants' PHB, it will see that many of claims have been filed against both Claimants and the phantom-claimants. The same is true for the Collins Cases.[64] If Claimants and the phantom-claimants are found liable on one or more of these claims, the Tribunal could not apportion the damages attributable to each Missouri Defendant to determine damages in this arbitration.

6. Claimants' Comments on Contaminants Confirm Their Failure to Meet their Burden of Proof and that their Claims are Unripe

43. As Respondents have stated, and as Claimants have now conceded, the Missouri Litigations include claims based on pollutants other than lead, including arsenic and cadmium.[65] The (potential) future jury in the Missouri Litigations has not been empanelled, let alone determined which pollutants (if any) caused the injuries alleged by the Missouri Plaintiffs. And if Claimants are found liable for the health impacts of arsenic, cadmium, and other pollutants, they would have to prove that Activos Mineros is responsible under Clauses 5 and 6 of the STA. But Claimants have only addressed lead and SO2 in these arbitrations.

[64] *Compare* Claimants' PHB, p. 10 (*Collins Cases* Table) *with* **Exhibit R-307, Complaint,** Doc No. 18, *Father Chris Collins et al. v. Doe Run Resources Corp., et al*. (E.D. Mo. Case No. 4:15-cv-01704-RWS), 13 November 2015.

[65] **RD-010,** Respondents' Closing, slides 17-19; **Hearing Transcript (Day 9)**, 1626:8-1627:21.

Their failure to address the other contaminants is further evidence of their failure to meet their burden of proof and of the premature nature of their claims.[66]

7. Claimants' Abandon their "Leave it Better Than You Found it" Theory and Concede That the Tribunal Must Conduct a Causation Analysis

44. Claimants finally concede that, to determine the allocation of responsibility under the STA, the Tribunal must determine the causal link between the claims of the Missouri Plaintiff's and the specific actions gave rise to each claim.[67]

45. Under Clause 5.3(a) of the STA, Claimants must prove that the Missouri Plaintiffs' claims do not stem from acts that "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 used by Centromín until the date of execution of [the STA]."[68] (Emphasis added) Thus, Respondents have emphasized that Claimants must prove the causal link between the individual claims of the Missouri Plaintiffs and specific actions in Peru.[69] Claimants offered no contrary Peruvian law interpretation. Instead, they tried to divert attention with

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[66] In relation to the Missouri Ligations, Claimants also contend that the Company bears no responsibility for these claims under Clause 5.3(a) of the STA because the Missouri Litigations stem from actions "related" to the PAMA. *See* Claimants' PHB, § I.C.2.a. They argue the Missouri Litigations are related to the PAMA, whether due to the Claimants' non-compliance or compliance with it. *Id.*, at 31, 33. Such claims lack support from STA. Claimants' reading of Clause 5.3(a) requires the Tribunal to believe that: **(i)** everything DRP was doing at the Facility after its acquisition is related to the PAMA and **(ii)** Activos Mineros intended to assume responsibility for environmental contamination that DRP caused from its operation, while implementing the PAMA, no matter how DRP operated the Facility This makes no sense. *See* Contract Counter-Memorial, § V.A.1.a.; Contract Rejoinder, § I.3.a.(ii).

[67] Claimants' PHB, p. 39.

[68] **Exhibit R-001**, STA & Renco Guaranty, Clause 5.3(A).

[69] *See* Contract Counter-Memorial, ¶ 758 ("Claimants rely on generalized assertions about environmental and health conditions in La Oroya but fail to provide any specific information about the Missouri Plaintiffs and their claims. Claimants have not identified where each plaintiff lived, worked, or went to school during the relevant timeframe, what injury each plaintiff claims to have suffered, what toxic substances caused each alleged injury, the evidence on which the plaintiffs rely to support their theory of causation, when and how each plaintiff alleges to have been exposed to any toxic substances, or even the plaintiffs' ages. Without this information, Respondents cannot determine with certainty the source of the Missouri Plaintiffs' injuries. Claimants' failure to provide information about the Missouri Plaintiffs and their claims thus impairs Respondents' right to defend themselves against Claimants' claims"); *see also* Contract Rejoinder, ¶ 463.

a non-legal expert, Mr. Connor, who urged the Tribunal to consider whether DRP and Claimants left the Facility "better than they found it."[70]

46. But for all of Clauses 5 and 6 (not just Clause 5.3(a)), the Tribunal must determine the cause of each alleged Missouri Claim.[71] For that reason, in closing arguments, Respondents explained that adopting a "better than they found it" analysis would be contrary to the STA:

> Claimants must prove that they did better than Centromín, but not in the abstract. While Claimants argue that the Tribunal must determine whether DRP left the Facility better than it found it, that is the incorrect standard. The STA requires the Tribunal to determine whether a specific Missouri Claim [was] caused by acts that are less than, equal to, or more protective than those of Centromín at the date of execution of the STA.
>
> If, as I stated before, a Missouri Claim is for an injury caused in September 1999, it is simply irrelevant how DRP performed in June 2009. Further, the Tribunal must compare DRP's standards to those of Centromín at the date of execution of the STA.[72]

47. Now, Claimants accept Respondents' interpretation—though they try to invert the burden of proof—stating, "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."[73]

48. Given the parties agreement on substance, Respondents trust that the Tribunal will apply the correct burden of proof.

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[70] *See* **Hearing Transcript (Day 5)**, 895, 902, 907, 916, 1004-1013.

[71] *See* **Hearing Transcript (Day 9)**, 1634-35 ("Whether the Facility, in 2009, emitted fewer toxins than it did under Centromín's management in 1997 is not pertinent to the causation analysis. And let me pause on this. The Tribunal must apply the contractual standard that governs Claimants' claims, and, even if the Tribunal thinks that DRP's management of the Facility ended well, any award that relies on Claimants' 'leave it better than DRP found it' theory would be a ruling ex aequo et bono. The Tribunal must take John Doe's specific claim or injury and determine whether it is allocated to DRP or Activos Mineros under the STA."). ***For a complete explanation, Respondents refer to pages 1630 to 1636 of the Day 9 Transcript and slides 28 to 32 of RD-010 (Respondents' closing argument)***.

[72] *See* **Hearing Transcript (Day 9)**, 1644:21-1645:11.

[73] Claimants' PHB, p. 39.

8. The STA Allocates Responsibility to the Company for the Claims Alleged by the Missouri Plaintiffs

49. Air emissions are the basis of the Missouri claims.[74] Nothing in Claimants' PHB changes the fact that they have failed to prove that the STA allocates to the Company the responsibility for the Missouri Plaintiffs' claims.

50. As soon as DRP purchased the Facility, it ramped up production and began using dirtier concentrates, leading inevitably to higher emissions.[75] The increase occurred without prior modernization of the Facility and without implementation of mitigation measures to offset the heightened emissions. Claimants do not dispute this. Instead, they claim that DRP immediately instituted efforts to increase "employee safety", "hygiene programs" and "personal protective equipment."[76] This is a diversion. Those safety measures could not have offset the impact that the increased air emissions had on the community. In short, those measures cannot be "standards and practices" in relation to the Missouri Litigations.

51. Claimants also state that air emissions did not increase because of DRP's "efficient" operation of the Facility.[77] But Claimants have failed to provide any evidence or scientific reasoning to support their assertions of efficiency or of its consequences. Claimants do not actually dispute this. Indeed, Mr. Connor stated at the Hearing that: "[y]ou're asking me, as I understand it, what was the contribution [in reducing emissions] of every Project? We don't know."[78]

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[74] **Hearing Transcript (Day 1)**, 132:14-19, 133:13-23, 135:20-136:17; **Hearing Transcript (Day 9)**, 1567:20-25; **Hearing Transcript (Day 2)**, 202:21-203:16, 211:22-212:11.

[75] First Dobbelaere Expert Report, § IX; s*ee* Peru's Contract Case Counter-Memorial, ¶¶ 187-188.

[76] Claimants' PHB, p. 45.

[77] Claimants' PHB, p. 51.

[78] **Hearing Transcript (Day 6)**, 1052:11-12; **Hearing Transcript (Day 6)**, 1059:4-6 ("[Mr. Connor's] has already testified that he didn't do exact calculations on all these Projects…").

52. The only project that could have effectively abated air emissions was PAMA Project No. 1. Claimants cannot seriously dispute this.[79] No other project initiated or completed by Claimants succeeded in reducing air emissions.[80] For instance, in their PHB Claimants refer to three pictures of three projects that were implemented.[81] But two of these projects are from 2008—i.e., after the PAMA period, and after DRP had been operating the Facility for over a decade. Even assuming those projects had some impact, it is irrelevant to all the health impacts caused by DRP's standards and practices prior to that date (and, to recall, the Reid Cases were filed in 2007). As to the third picture (of the coking plant project), Claimants allege that it resulted in a 75% reduction in emissions.[82] Not true. As explained by Mr. Dobbelaere, the coking plant was not a source of lead emissions, which are the greatest cause of elevated blood lead levels in the population. It is scientifically impossible for the coking plant to have reduced lead emissions.[83]

53. Unable to explain what projects could have reduced emissions effectively, Claimants resort to the "air got better".[84] However, because most of the evidence concerning air quality is challenged, Claimants claim that there are only two charts that can be deemed reliable. Those charts pertain to air quality monitoring (Claimants' PHB, p. 61) and blood lead levels

[79] **Hearing Transcript (Day 2)**, 189:18-190:5, 215:4-16; **Hearing Transcript (Day 9)**, 1641:15-21. Despite Claimants' allegations to the contrary, PAMA Project No. 1 was the most important, costly, and urgent project to build, which Claimants first delayed and ultimately never completed.

[80] Those other projects, therefore, represent a minor element of the overall picture. Mr. Dobbelaere addressed in detail each of these projects, explaining how none of them had a significant impact on emissions and, the ones that could have had it, were finished after the PAMA period. *See*, Second Dobbelaere Expert Report, § 4.

[81] Claimants' PHB, pp. 46-47.

[82] Claimants' PHB, p. 46.

[83] Second Dobbelaere Expert Report, ¶ 105-107.

[84] **Hearing Transcript (Day 6)**, 1052:13.

in children (*Id.* at p. 62). These allegations are not new,[85] but given Claimants' persistent and misleading use of these charts, Respondents reiterate their position below.[86]

54. The first chart, based on Mr. Connor's data, seems to show that lead emissions decreased, and that air quality improved during DRP's operation. This is incorrect. First, the grey curve represents only lead emissions from the main stack, omitting fugitive emissions, which significantly increased during DRP's operations.[87] As explained below, it is undisputed that fugitive emissions—which DRP did not measure—decreased only in 2007, after the installation of lead furnace baghouses. Second, the blue curve, which shows air lead levels in La Oroya Antigua, indicates that air quality *worsened* immediately after DRP acquired the Facility. Third, Claimants' supposition—that air monitoring data from 1994 to 1996 (which shows better air quality in those years) is unreliable, and thus that it cannot be compared with that data with data of DRP's management—lacks evidentiary support.

55. The second chart, Figure 2 of Proctor First Expert Report, in Claimants' view suggests a decrease in blood lead levels in children; Claimants claim this is due to DRP's management of fugitive emissions.[88] However, as Ms. Proctor explained at the hearing, that inference is incorrect.[89] First, the blood lead level data from 1999 reflects DRP's operations, as DRP had been operating the Facility for over a year by then.[90] Second, the blood lead level data for 2004 to 2007 is incomplete. It only includes information relevant to the health risk

[85] *See* **RD-001**, Claimants' Opening Statement, Slide 3.
[86] **Hearing Transcript (Day 6)**, 1109:18-1110:7.
[87] Second Dobbelaere Expert Report, ¶¶ 225-226.
[88] Claimants' PHB, pp. 60-62.
[89] **Hearing Transcript (Day 6)**, 1109:18-1110:7; RD-006, slide 13.
[90] **Hearing Transcript (Day 6)**, 1109:18-24; RD-006, slide 13.

assessment carried out by the expert that DRP instructed; and the figures for 2009 to 2011 are predictions, rather than actual measurements.[91]

56. Instead, as Ms. Proctor explained, Figure 16 from her First Expert Report provided a more complete picture of blood lead levels because it was prepared using comprehensive data from 1999 to 2011. Upon examining Figure 16, Ms. Proctor noted that "2004 [blood lead levels] happened to be lower, but multiple samples in 2005, 2006, and early 2007 were higher".[92] She explained that the discrepancy could be due to a mixture of different age groups of children being sampled.[93] She noted, however, that the data, when grouped, the trends showed no significant improvement in blood lead levels during DRP's operations until after 2007, coinciding with the installation of a lead furnace baghouses in December 2006 (at the MEM's request) to control fugitive emissions.[94]

57. Ms. Proctor's position was confirmed by Claimants' own toxicologist expert, Dr, Schoof:[95]

> A. ***I would say that the conditions in La Oroya in terms of blood-lead levels were very bad***. All the origin of that, I won't say, but there was certainly a contribution -- a significant contribution was from the air [contemporaneous] emissions ***which is why, when there was the first step in reducing the fugitives by 2007, those blood-lead levels fell a lot***." (Emphasis added)

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[91] **RD-006**, Proctor's Presentation, slide 13. *See also* **Hearing Transcript (Day 6)** 1110:1-5.

[92] **RD-006**, Proctor's Presentation, slide 14.

[93] **Hearing Transcript (Day 6)**, 1110:5-16.

[94] **Hearing Transcript (Day 6)**, 1109:18-1111:23; RD-006, Proctor's Presentation, slides 13-15. Ms. Proctor's hearing presentation also included a figure based on the data presented by Claimants' toxicology expert, Dr. Schoof, at slide 15. This figure clearly shows that blood lead levels did not decrease significantly until November 2007. RD-006, Proctor's Presentation, slide 15. See also *Id*., slide 14. Claimants' PHB also confirm this (at p. 58) when they argue they "did better" than Centromin in controlling fugitive with "the additional projects [that] were added at the time of the 2006 PAMA extension" because, in comparison, Centromin had done nothing. It follows that, with no measures in place to control fugitives, DRP (i) takes over the Facility and increases production; and (ii) only manages to control fugitives—and therefore does "better" than Centromin—with MEM's requested additional measures, in December 2006, a decade after. If Claimants believed these allegations improved their case, it is difficult to see how. Further, the allegation that Claimants, who had over 20 years of experience in ore extraction and processing at the time, only became aware of the impact that fugitive had on community in 2004— when they were requested to conduct a health risk assessment—is implausible and cynical, to say the least (see also p. 58 of Claimants' PHB).

[95] **Hearing Transcript (Day 5)** 842:4-13.

58. Claimants bear the burden of proving that the "standards and practices" employed result in responsibility being allocated to Activos Mineros for the Missouri Claims, yet they challenge nearly all the evidence related to it.[96] At the hearing, the Tribunal asked whether a log concerning the Facility data existed. Such a log does exist.[97] DRP's bankruptcy administrator, Right Business, commissioned SX-EW, who created a log of raw data regarding the concentrates processed in the Facility, from 1990 to 2009. The log includes 160 pages of tables of all the inputs that went into the Facility.[98] Despite Claimants' assertions to the contrary, the SX-EW Report is a reliable source. The data included therein are raw data provided by DRP itself to this external advisor.

59. Claimants tried to create confusion at the hearing—and again in their PHB—regarding purported missing information in Mr. Dobbelaere's mass balance calculations based on these data.[99] As stated at the hearing,[100] Mr. Dobbelaere relied on all the information that was available to him and made his own mass balance calculations. Claimants have neither disputed the raw data nor Mr. Dobbelaere's mass balance figures. Any responsible operator would have monitored fugitive emissions by conducting mass balance based on this data, DRP did not. Further, Claimants have not they explained how any purported missing information might have changed Mr. Dobbelaere's primary conclusion: There was a significant increase in fugitive emissions during DRP's operational period. ***That conclusion remains unchallenged***.

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[96] Claimants' PHB, § I.C.2.C.(7).

[97] **Hearing Transcript (Day 9)**, 1651:5-11.

[98] *Id.* at 1651:5-23.

[99] Claimants' PHB, pp. 54-55.

[100] **Hearing Transcript (Day 9)**, 1651:14-1652:16, 1657:12-1658:22; *see* Peru's Contract Rejoinder, ¶ 390.

9. Claimants Allegations on PAMA Defaults, Extensions, and ECA Standards are Unsupported and Cannot Withstand Scrutiny

60. In their PHB, Claimants make various incorrect allegations regarding: **(i)** their PAMA default; **(ii)** the SO2 ECA standards that applied to DRP; and **(iii)** the PAMA extensions. Respondents address each in turn.

61. First, neither Peruvian law nor the STA requires the MEM to officially declare a default of the PAMA. Claimants argue that "Article 5.3(B) of the STA does not apply because the MEM never found DRP to be in default of its PAMA obligations."[101] Yet neither Clause 5.3(B) nor Peruvian law provide any such requirement. Claimants simply attempt to graft on an additional requirement to Clause 5.3(B).[102]

62. To be clear, ***none*** of the experts in this case have ever testified that such a requirement exists.[103] Neither Dr. Payet nor Dr. Varsi has ever opined. During the hearing, Claimants crossed Dr. Alegre, Respondent's expert on Peruvian environmental law.[104] In their PHB, Claimants rely on Dr. Alegre's responses to bolster their re-write of the STA, but they do not reference any portion of the transcript.[105] Perhaps that is because Dr. Alegre's testimony unequivocally contradicts Claimants' position:

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[101] Claimants PHB, ¶ 21.

[102] Claimants seemingly base their view on the answer to Question 41 of the bidding questions. *See id.* at p. 20. But, even if that question did stand for Claimants' proposed requirement (quod non), the requirement is nowhere in the STA. And Clause 18.1(C) of the STA provides that "if there is any discrepancy between the bidding conditions and the [STA], the [STA] shall prevail."

[103] The paragraphs of Respondents' PHB that Claimants refer to in their letter to the Tribunal of 19 July 2024 (in particular, ¶¶ 73, 118-121) discuss the issues of DRP non-compliance and MEM's conduct in relation to it as matters of fact, rather than as issues of legal interpretation of the contract.

[104] **Hearing Transcript (Day 5)**, Alegre's Cross-Examination, p. 709, lines 1-15, p. 710, lines 18-20, pp. 711-712 lines 10- 2., p. 715, lines 7-23

[105] *See, e.g.*, Claimants' PHB, p. 21 ("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.").

> [T]he breaching of a commitment or of a provision, strictly speaking from a legal viewpoint, materializes if a company ceases to do something they had to do or does something that it shouldn't do. **There is no breach because of the declaration by an authority**. As we are taught in law school in Perú, obligations are there to be fulfilled not to be breached.
>
> So no performance is materialized when the Company does not meet the obligation withing the timeline established. And from my viewpoint, there were a number of noncompliances related to that.[106] (Emphasis added)

63. In short, Claimants' request that the Tribunal re-write the STA with an additional requirement to Clause 5.3(B) is unsupported by any Peruvian law evidence.

64. In any event (and contrary to Claimants' assertions[107]), the MEM did not remain silent about DRP's non-compliance.[108] As is detailed below, early as May 2003, MEM expressed concern about **(i)** the manner in which DRP was operating the Facility and the resulting environmental impact, particularly the "worsening" in emissions; **(ii)** the effectiveness of the measures implemented to prevent this impact; and **(iii)** the absence of information both regarding Project No. 1 itself and the progress of its execution.

65. *On 26 March and 5 May 2003*, MEM commissioned an external environmental evaluation of the Facility prompted by concerns regarding DRP's management. The results of this evaluation were very concerning and compiled in the "SVS Report".[109]

66. *Then, on 22 August 2003*, MEM issued a report evaluating the results of the SVS Report and notifying DRP of its concerns. It stated that:

- "the compliance with the PAMA, the prospective evolution and ***increase of the emissions of pollutants caused by operational conditions of the CMLO***

[106] **Hearing Transcript (Day 5)**, Alegre's Cross-Examination, p. 758, lines 13-24.
[107] Claimants' PHB, § 1.C.a.
[108] **Exhibit R-314 (ENG)**, SVS Report including Report No. 501-2003-MEM-DGM-FMI/MA.
[109] **Exhibit R-314 (SPA)**, SVS Report.

… referred to the increase in the production rate and the processing of concentrates with a higher content of polluting elements";

- "[t]he environmental assessment was carried out based on the information provided from 1995 to 2002, ***finding limitations such as the documentation of the PAMA Project "Sulfuric Acid Plant***" […]";
- ***"[t]he air quality in the environment*** of the locality of La Oroya's ***worsened*** […]";
- "***[t]here is concern about the environmental effectiveness of the measures adopted and the feasibility of complying with the PAMA's schedule***, in what regards the sulphuric acid plant project […]."[110]

67. As a result, MEM required DRP to take measures, including conducting a health risk assessment and controlling fugitive emissions:[111]

- ***"[…] considering the worsening of the environmental damage caused by the higher levels of Pb, As, Cd and SO2 in the air***, [DRP] must comply with […]."
- "***In relation to the PAMA 'Sulfuric Acid Plant' project***, due to the magnitude of the project and the negative impact of SO2 to the environment, it must present the following: ***(a) present the studies of technical and economic feasibility*** […]."
- "***Present a plan for the development of a study of risk analysis on the health of the population of La Oroya***, […] and a plan for the monitoring of health […]."
- "***Reduction of uncontrolled (fugitive) emissions*** […]."

68. *On 9 February 2004*, at MEM's request DRP hired experts to conduct a health risk assessment and monitor the health of the population.[112] Mr. Neil testified at the hearing that, upon reviewing this report, he experienced a "wake-up call" concerning the high level

[110] **Exhibit R-314 (ENG)**, SVS Report including Report No. 501-2003-MEM-DGM-FMI/MA, § II Results of the Special Examination.

[111] By Resolution No. 053-2003-MEM-DGM/V the MEM approved the SVS Report and required DRP to execute the requirements included in MEM's Report No. 501-2003-MEM-DGM-FMI/MA within the deadlines established therein. **Exhibit R-314 (ENG)**, SVS Report including Resolution No. 053-2003-MEM-DGM/V.

[112] **DMP-044**, Gradient Corporation, Comparison of human health risks associate with lead, arsenic, cadmium, and SO2 in La Oroya Antigua, Peru, 9 February 2004, compliance with the requirement specified in § 3.8 of MEM's Report No. 501-2003-MEM-DGM-FMI/MA.

of toxicity of the fugitive emissions at the Facility.[113] Yet, DRP kept production levels.[114]

69. *On 17 February 2004*, DRP requested from the MEM another extension of Project No. 1.[115] Following this request, DRP managers and MEM agents regularly met to seek a solution that would allow DRP to complete Project No. 1 after the PAMA period, while ensuring the protection of the La Oroya population and maintaining the operation of the Facility.[116]

70. *On 29 December 2004*, MEM issued a supreme decree permitting mining operators to, under extraordinary circumstances, request an extension for PAMA specific projects.[117]

71. *On 15 December 2005*, DRP submitted its formal request for an extension of Project No. 1, just days before the submission deadline, despite being aware of the need for this extension nearly two years in advance and after having engaged in discussions with MEM for a year.

72. *On 25 and 26 May 2006*, MEM issued, respectively, **(i)** a report, with the assistance of both international and national external advisors, addressing DRP's request;[118] and **(ii)** a resolution granted an extension to complete Project No.1, rather than imposing a penalty on DRP for breaching the PAMA, and with the stated aim of finding a solution for La Oroya.[119] MEM, however, required DRP to, among other things:

- Implement several measures, including the installation of baghouses filters for the lead furnaces by 31 December 2006, to contain fugitive emissions, a significant issue in La Oroya. (These additional measures were not new, irrational burdens on Claimants, but steps needed to be taken to control emissions if Project No. 1 was to experience further delays.)

[113] **Hearing Transcript (Day 2)**, 211:22-212:1.

[114] *Id.* at 217:6-14, 218:4-8.

[115] **Exhibit C-045**, Letter from DRP (B. Neil) to MEM (M. Chappuis) attaching PAMA for the Metallurgical Complex of La Oroya 2004-2011 Period, 17 February 2004.

[116] **Hearing Transcript (Day 2)**, 233:24-234:14.

[117] **Exhibit R-029**, Supreme Decree No. 046-2004-EM, 29 December 2004, articles 1 and 2.

[118] **Exhibit R-289**, Report No. 118-2006-MEM-AAM/AA/RC/FV/AL/HS/PR/AV/FO/CC, 25 May 2006, p. 7.

[119] **Exhibit R-287**, Ministerial Resolution No. 257-2006-MEM/DM, 29 May 2006.

- Not increase the tonnage of concentrates to be treated at the Facility. Claimants argue that the request shows that MEM never found DRP to have exceeded the level of production. Claimants miss the point. As explained, operators are responsible for operating their plants, and they may increase production—capacity permitting—if they comply with the legal LPMs and ECAs.[120] DRP was not in compliance. That MEM requested no further increase production—after the issuance of the SVS Report and DRP management's "wake up call"—instead shows the irresponsibility of DRP's conduct and its disregard for human health.

73. Second—on the SO2 emissions standards applied to DRP's operations—the Parties disagree on Question 2(a). Contrary to Claimants' assertions,[121] the MEM, did not require DRP to comply with the 2001 ECAs for SO2 until 2012. Thus, before 2012, Peru allowed DRP to abide by the more flexible 1996 ECAs.[122] It is also untrue that the Peru never found DRP non-compliant with the SO2 air quality standards.[123] Instead, OSINERGIM (to whom the MEM had transferred its supervisory authority) fined DRP for emitting SO2 emissions without control measures.[124]

74. Third—regarding the extensions granted to DRP—the Parties also disagree on Question 2(b).[125] Claimants contend that the 2006 extension applied to the entire PAMA. They make no mention of the 2009 extension.[126] Instead, the text of, among others, the legal

[120] Respondents' PHB, ¶ 60.

[121] Claimants argue that the MEM required DRP to comply with the 2001 ECAS for SO2 by October 2009. *See* Claimants' PHB, p. 50.

[122] **Exhibit C-078 (Treaty),** Supreme Decree No. 075-2009-EM, § 2, Final, Temporary and Supplementary Provisions, § 4; **Exhibit C-140 (Treaty)**, Ministerial Resolution No. 122-2010-MEM/DM, Art. 1; **Exhibit C-077 (Treaty)**, Law No. 29410, 26 September 2009; First Alegre Expert Report, ¶¶ 72-74. The 1996 ECAs were set at 572 ug/m3 (daily) and 172 ug/m3 (annually).

[123] Claimants' PHB, p. 50.

[124] **Exhibit R-314 (ENG)**, SVS Report including Report No. 501-2003-MEM-DGM-FMI/MA, p.2. **Exhibit R-212**, Resolution No. 646-2008-OS/CD, OSINERGMIN, 28 October 2008, pp. 15-16 and 18. **Exhibit R-214**, Report No. GFM-466-2010, OSINERGMIN, 26 July 2010, p. 7.

[125] Question 2(b): "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?"

[126] *See* Claimants' PHB, pp. 28-29.

instruments granting these extensions is clear: The extensions do not apply to the entire PAMA, but only to Project No. 1.[127]

75. Claimants do not engage with relevant provisions. Instead, they refer to Article 48(B) of the Environmental Mining Law, which addresses situations where, upon the conclusion of the PAMA period, the operator has failed to fulfill their PAMA obligations, and a period of grace is granted to complete a specific project.[128] Article 48(B), however, applies ***at the end*** of the PAMA period, and therefore cannot extend it. In any event, Article 48(B) itself provides that this period of grace does not apply to facilities that engage in smelting, sintering, and/or refining processes, such as the Facility, for which Peruvian law requires PAMA completion within a maximum of 120 months (i.e., 10 years).[129] No provision of Peruvian law allows Claimants to bypass the statutory cap.

76. Further, Claimants assert that Article 48(B), Supreme Decree No. 046-2004-EM[130] and the STA—in referring to "eventual amendments" of the PAMA—"demonstrate that the parties intended the PAMA extensions to also extend the period for which Activos Mineros would retain responsibility for environment matters".[131] The argument of the argument is to alter the allocation of responsibility in the STA. But here too Claimants' argument is unsupported by any expert or Peruvian law authority. To be clear, the relevant regulations

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[127] **Exhibit R-289** at p. 7, which contains Report No. 118-2006-MEM-AAM/AA/RC/FV/AL/HS/PR/AV/FO/CC, 25 May 2006 that was incorporated as part of the Ministerial Resolution No. 257-2006-MEM/DM, 29 May 2006, granting the 2006 extension (**Exhibit R-287**), states the following in one of its titles: "Extension of the period of a specific project, not an extension of the PAMA". A similar passage can be found in Supreme Decree No. 075-2009-EM, 29 October 2009, § 2, regulating the 2009 extension: "The term extension granted by Law No. 29410" . . . "shall apply only and solely to the duties related to [Project No. 1]." The relevant legal passages are cited in full in Respondents Post Hearing Brief at pp. 18-22.

[128] **Exhibit R-025**, Supreme Decree No. 016-93, Article 48(B), which titles reads "*Breach at the end of the deadline*" (in Spanish "*Incumplimiento al término del plazo previsto*").

[129] **Exhibit R-025**, Supreme Decree No. 016-93, Article 48(B)(2)(b), second paragraph.

[130] Issued by MEM in December 2004, allowing mining operators to submit extension requests for specific projects of their PAMAs.

[131] Claimants' PHB, p. 29.

provide that "[the extension] ***does not imply an[] amendment to any of the obligations or the terms stipulated in the agreements*** that [DRP] and its shareholders have entered into [Centromín] and with [Peru]."[132]

10. Comments on the Tribunal's Queries on the Status of the Facility After the Bankruptcy Proceedings[133]

77. The Facility's operations were paralyzed by DRP in June 2009. In July 2012, the Facility's zinc circuit resumed operations.[134] The lead circuit entered operation in November 2012. The cooper circuit (the most contaminating circuit) never reassumed operations. In October 2022, the Facility was transferred to DRP's ex-workers through a new company called Metalurgia Business Perú S.A.C. Further, the Facility's operations were paralyzed on two occasions: **(i)** from 10 February 2020 until 8 July 2020, and **(ii)** from 1 July 2021 until 22 August 2023. The Facility is currently operational.

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[132] **Exhibit R-287**, Ministerial Resolution No. 257-2006-MEM/DM, 29 May 2006, Art. 10. *See also* **Exhibit C-078 (Treaty)**, Supreme Decree No. 075-2009-EM, 29 October 2009, Final, Temporary and Supplementary Provisions, § 6: "Section *Six - Pursuant to Section 62 of the Political Constitution, **none of the provisions established in Law No. 29410 or this Executive Decree may be construed as an Extension to the PAMA or amendment of the terms, duties or responsibilities established in the Contracts executed between Doe Run Perú S.R.L. and/or its related companies with Centromín Peru S.A. and with the Government, which shall remain subject to the legal effects established in those instruments within the contractual terms originally agreed upon*** . . ." (emphasis added).

[133] Tribunal's letter to the Parties, 27 June 2024.

[134] **Exhibit C-199 (Treaty)**, *After 3 years, DRP's La Oroya finally restarts*, MINEWEB, 30 July 2012, p. 2. *See also* Peru's Contract Case Counter-Memorial, ¶¶ 407-08; Respondents' PHB, ¶ 154; **Exhibit C-200 (Treaty)**, *DRP announces smelter restart*, FOX LATINO NEWS, 28 July 2012.

Respectfully submitted,

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