

**IN THE MATTER OF  
AN ARBITRATION UNDER THE RULES OF THE  
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW  
UNCT/13/1**

**THE RENCO GROUP, INC.**

**Claimant**

**v.**

**THE REPUBLIC OF PERU**

**Respondent**

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**Claimant's Supplemental Opposition to Peru's Preliminary 10.20(4) Objection**

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## **I. INTRODUCTION AND SUMMARY OVERVIEW**

1. Claimant, the Renco Group, Inc. (“Claimant” or “Renco”), respectfully submits this Supplemental Opposition to Peru’s Preliminary Objection Under Article 10.20(4) dated February 20, 2015,<sup>1</sup> which the Republic of Peru (“Respondent” or “Peru”) filed pursuant to Procedural Order No. 1 dated August 22, 2013 (“Procedural Order No. 1”). This submission (“Supplemental Opposition”) should be read with Renco’s Opposition to Peru’s 10.20(4) Objection dated April 17, 2015 (“Opposition”), which together respond to Peru’s 10.20(4) Objection in full.

### **Procedural History**

2. As the Tribunal will recall, after a lengthy process that lasted over one year, the Parties agreed to a schedule for the briefing of Peru’s proposed objections under Article 10.20(4) of the Treaty, and the schedule was attached as Annex A to Procedural Order No. 1. On March 21, 2014, Peru filed its Notice of Intention to File Preliminary Objections Pursuant to Article 10.20(4) of the Treaty (the “Notice of Intention”).<sup>2</sup> In its Notice of Intention, Peru listed all of the specific preliminary objections that it proposed to bring under Article 10.20(4), and as the Tribunal required, Respondent’s Notice of Intention described its proposed preliminary objections in sufficient detail so that Claimant could assess whether it believed that the objection properly fell within the mandatory ambit of Article 10.20(4).

3. After extensive written submissions by the Parties, including comments concerning the U.S. Government’s submission interpreting the scope of Article 10.20(4), the Tribunal issued its Decision as to the Scope of the Respondent’s Preliminary Objections Under Article 10.20.4 on December 18, 2014 (the “Scope Decision”). In the Scope Decision, the Tribunal ruled conclusively that Article 10.20(4) of the Treaty does not apply to objections relating to the Tribunal’s competence, stating: “In conclusion, having carefully considered all of the submissions of both Parties and the relevant Treaty texts, the Tribunal has determined that on a proper interpretation of the text of the Treaty provisions, objections as to a tribunal’s

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<sup>1</sup> Peru’s Preliminary Objection Under Article 10.20(4), Feb. 20, 2015 (“Peru’s 10.20(4) Objection”).

<sup>2</sup> Letter from White & Case to ICSID (Secretary of the Tribunal), Mar. 21, 2014.

competence are outside the scope of Article 10.20.4.”<sup>3</sup> And because five of Peru’s six preliminary objections related to the Tribunal’s competence, the Tribunal held that those objections would not be heard or decided during the 10.20(4) phase of the case stating: “In view of the foregoing, and in light of the Tribunal’s finding above that on a proper interpretation of the Treaty Article 10.20.4 objections relating to the Tribunal’s competence fall outside the mandatory scope of Article 10.20.4, the Tribunal declines to hear Peru’s competence objections in the Article 10.20.4 Phase of these proceedings. Peru may bring its competence objections later in these proceedings in accordance with the timetable agreed in Annex A of Procedural order No. 1.”<sup>4</sup>

4. In accordance with the Tribunal’s Scope Decision, the only objection that Peru was permitted to make was preliminary Objection number (5), by which Peru seeks dismissal of Renco’s claim that seeks to hold Peru liable for the third-party claims that Peruvian citizens have brought in U.S. federal court in St. Louis (the “St. Louis Lawsuits”). On this point, the Tribunal stated: “There remains the question of Peru’s preliminary objection based on Claimant’s alleged failure to state a claim for breach of the investment agreement (what the Claimant has characterized as preliminary objection (5). Both parties agree that this objection falls within the scope of Article 10.20.4. Accordingly, the Tribunal decides that this objection shall be briefed and heard as a preliminary objection in the Article 10.20.4 Phase of these proceedings in accordance with a timetable to be set by the Tribunal following further submissions from the parties.”<sup>5</sup> Objection No. (5) is quoted immediately below:

The plain language of Clauses 6.5 and 8.14 of the Contract<sup>6</sup> concern[s] third-party claims relating to Doe Run Peru, the entity referred to in those clauses. However, because Doe Run Peru is not a party to the St. Louis

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<sup>3</sup> Scope Decision at ¶ 213.

<sup>4</sup> Scope Decision at ¶ 250 (emphasis added).

<sup>5</sup> Scope Decision at ¶¶ 251 and 252.

<sup>6</sup> Referring to **Exhibit C-002**, Contract of Stock Transfer between Empresa Minera del Centro del Peru S.A., Doe Run Peru S.R. Ltda., The Doe Run Resources Corporation, and The Renco Group, Inc., October 23, 1997 (“Stock Transfer Agreement”).

Lawsuits, even assuming the facts alleged by Renco are true, Peru, as a matter of law could not have breached the Contract.<sup>7</sup>

5. Disregarding the Tribunal's directive in the Scope Decision, Peru's 10.20(4) Objection of February 20, 2015 raised not only the single permitted objection above relating to Clauses 6.5 and 8.14 of the Stock Transfer Agreement, but also several additional objections, which it had never raised at any time during the Article 10.20(4) scope phase and which all fall outside the scope of Article 10.20(4), as interpreted by the Tribunal in its Scope Decision, because they relate to the Tribunal's competence. In its April 17, 2015 Opposition, Renco addressed Peru's single permitted objection, and opposed Peru's attempt to lodge the additional objections.<sup>8</sup>

6. After briefing from the Parties on these and related issues, the Tribunal issued its Decision Regarding Respondent's Requests for Relief on June 2, 2015 (the "June 2015 Decision"). The Tribunal did not rule on whether Peru's additional objections could be heard properly within the Article 10.20(4) phase. Rather, it "considered the arguments addressed by both Parties," "reject[ed] Peru's request that the Tribunal find Renco has waived its right to respond to the three arguments raised by Peru" in its 10.20(4) Objection but not addressed by Renco in its Opposition, and ruled that "the proper approach, both as a matter of fairness and procedural efficiency, is to require that all of the relevant legal arguments be addressed at the same time."<sup>9</sup> The Tribunal thus directed the Parties to agree on a new briefing schedule, in order to address all of the parties' arguments, namely (i) whether Peru's additional objections properly can be heard within the Article 10.20(4) phase, and (ii) whether any of Peru's objections (to the extent they can be heard within this phase) are sustainable as a matter of law.<sup>10</sup>

7. In its June 2015 Decision, the Tribunal summarized Peru's additional objections in the following terms:

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<sup>7</sup> Peru's Scope Submission dated March 21, 2015, at pp. 5-6 (under the heading entitled "Failure to State a Claim Under the Plain Language of the Contract" and Renco's Submission of April 3, 2014 (describing this as objection No. 5).

<sup>8</sup> Renco's Opposition at ¶ 23.

<sup>9</sup> June 2015 Decision at ¶ 68.

<sup>10</sup> *Id.* at ¶¶ 68-69.

Peru has now advanced a number of legal arguments including that (1) “*there is no investment agreement between Peru and Renco within the meaning of the Treaty*”; (2) “[n]either the Contract nor the Guaranty was executed by both Peru and Renco”; and (3) “*the Guaranty is void.*”<sup>11</sup>

These three additional objections in turn involve numerous sub-parts that do not always fall neatly under the umbrella of one of the three objections. Peru’s decision to disregard the Scope Decision and improperly expand the scope of the 10.20(4) phase to include jurisdictional and other objections outside the single objection (No. 5) that the Tribunal permitted in its Scope Decision has necessitated this fulsome response in opposition. Claimant respectfully requests an award of fees and costs associated with Claimant’s need to address substantively these impermissible competence and other objections during this Article 10.20.4 phase of the case.

8. In this Supplemental Opposition, Renco addresses Peru’s three additional jurisdictional objections by demonstrating that if all of Renco’s factual allegations are taken as true (as they must be for purposes of this 10.20(4) phase): (i) the Stock Transfer Agreement and the Guaranty Agreement constitute an “investment agreement” within the meaning of the Treaty (*see infra* Section V); (ii) Renco has standing to assert claims under the Treaty for breach of the investment agreement (*see infra* Section VI); and (iii) Peru breached the Guaranty Agreement (*see infra* Section VII). Each is addressed briefly below, and more fully in the body of this submission.

9. It should be understood from the outset that each of Peru’s new preliminary objections concerns Renco’s claims for breach of the Stock Transfer Agreement and the Guaranty Agreement. To the extent that the relevant language of the Stock Transfer Agreement or the Guaranty Agreement is ambiguous, Peru’s instant application to dismiss Renco’s claims as a matter of law must fail. Determining party intent with respect to ambiguous contracts is a quintessential question of fact that precludes summary dismissal as a matter of law.

10. The U.S. Implementation Act of the Treaty states that Chapter 10 includes “provisions similar to those used in U.S. courts to dispose quickly of claims a tribunal finds to be

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<sup>11</sup> *Id.* at ¶ 62 (italics in original).

frivolous.”<sup>12</sup> Peru itself has recognized in this arbitration that Article 10.20(4) “is similar to a motion to dismiss a claim for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.”<sup>13</sup> It is well settled that construction of an ambiguous contract is a question of fact that precludes dismissal of claims as a matter of law under Rule 12(b)(6). *See, e.g., Martin Marietta Corp. v. Int’l Telecoms. Satellite Org.*, 991 F. 2d 94, 98 (4th Cir. 1992)<sup>14</sup>; *Kirby v. Frontier Medex, Inc.*, Case No. ELH-13-00012, 2013 U.S. Dist. LEXIS 155357, at \*19 (D. Md. Oct. 30, 2013) (“In the context of a motion to dismiss, the construction of an ambiguous contract is a question of fact which, if disputed, is not susceptible of resolution under a motion to dismiss for failure to state a claim.”) (internal quotation marks and citation omitted)<sup>15</sup>; *Grant & Eisenhofer v. Bernstein Liebhard LLP et al.*, 14-CV-9839 (JMF), 2015 U.S. Dist. LEXIS 51685, at \*7 (S.D.N.Y. Apr. 20, 2015) (“But ‘when the language of a contract is ambiguous, its construction presents a question of fact, which of course precludes summary dismissal’ on a Rule 12(b)(6) motion.”)<sup>16</sup>.

**The Stock Transfer Agreement and the Guaranty Agreement constitute a single “investment agreement” within the meaning of the Treaty**

11. One of Renco’s claims against Peru in this arbitration relates to Peru’s breach of an investment agreement, which breach has resulted in loss or damage to Renco.<sup>17</sup> As detailed in this submission, the Stock Transfer Agreement and the Guaranty Agreement constitute an investment agreement within the meaning of the Treaty, because, among other things, together they constituted a critical component of Peru’s privatization of its mining sector. This

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<sup>12</sup> **CLA-079**, United State-Peru Trade Promotion Agreement Implementation Act, p. 22 (Dec. 14, 2007). *See also CLA-080*, OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 959 (Peter T. Muchlinski, Federico Ortino, and Christoph Schreuer eds., 2008) (“Article 10.20 was inspired by the ‘motion to dismiss’ procedure, in which the defendant asserts that the plaintiff has failed to state a claim upon which relief can be granted (Rules of Federal Procedure, Rule 12(b)(6)).”).

<sup>13</sup> Respondent’s Letter to the Tribunal, Mar. 21, 2014, n.20.

<sup>14</sup> **CLA-073**, *Martin Marietta Corp. v. Int’l Telecoms. Satellite Org.*, 991 F. 2d 94, 97 (4th Cir. 1992).

<sup>15</sup> **CLA-074**, *Kirby v. Frontier Medex, Inc.*, Case No. ELH-13-00012, 2013 U.S. Dist. LEXIS 155357, at \*19 (D. Md. Oct. 30, 2013).

<sup>16</sup> **CLA-075**, *Grant & Eisenhofer v. Bernstein Liebhard LLP et al.*, 14-CV-9839 (JMF), 2015 U.S. Dist. LEXIS 51685, at \*7 (S.D.N.Y. Apr. 20, 2015).

<sup>17</sup> **CLA-001**, Trade Promotion Agreement, U.S.-Peru, Apr. 12, 2006, Article 10.16.1(a) (“Treaty”). Renco also has brought claims for breach of the Treaty’s substantive protections afforded to Renco, such as fair and equitable treatment, national treatment, and protections against unlawful expropriation. *See* Claimant’s Memorial on Liability at ¶ 413 (Renco’s requested relief).

governmental privatization program and the negotiating history of the Stock Transfer Agreement and the Guaranty Agreement both critically inform how these agreements are to be construed.

12. In the early 1970s, following a military coup in 1968, the Republic of Peru nationalized, *inter alia*, the smelting and refining complex in La Oroya, Peru (the “La Oroya Complex” or the “Complex”) and created State-owned *Empresa Minera del Centro del Peru* (“Centromin”) to acquire and hold the Complex, which it did. Centromin was a special entity, wholly owned by the State, with its corporate leadership and decision-makers handpicked by the Peruvian State and its activities approved by the State. Centromin was required to act in harmony with State policy and objectives and to foster socioeconomic development of the region.

13. In late 1991, the Republic of Peru made the policy decision to promote private investment and privatize its mining sector. Its first effort to sell all of the mines and the La Oroya Complex as a single unit failed—without prospective investors submitting even a single bid—in large part because of the substantial risk of liability associated with third-party claims from injury resulting from seventy-five years of historical environmental contamination and dilapidated existing infrastructure at the La Oroya Complex, which continued to pollute. Undeterred in its desire to sell the La Oroya Complex, Peru revised its privatization strategy in 1996, to sell the Complex separately from the mines Centromin owned. Peru’s stated goal was that private investors would undertake to modernize the infrastructure of the Complex, while it continued to fully operate, with projects that would reduce its environmental impact over time pursuant to a *Programa de Adecuación y Manejo Ambiental*, or Environmental Remediation and Management Program (the “PAMA”). Under the revised privatization strategy, Peru would retain and assume responsibility to remediate the existing and continuing environmental contamination until the PAMA Projects were completed, and also retain and assume broad liability for personal injury claims of third parties arising both before and after the sale. Peru advised prospective investors during a written question and answer period conducted prior to the sale that Centromin (and Peru) would accept responsibility for all of the contamination and related claims until the end of the period allowed for the investor to modernize the Complex as outlined in the PAMA, with limited exceptions.

14. As part of its new privatization strategy, Peru made the executive decision not to privatize Centromin as a whole (with all of its assets, including the Complex), but rather to privatize the Complex separately, now owned by a newly-established subsidiary of Centromin—Metaloroya. After Peru held a second public auction for the Complex on April 14, 1997, Renco and its affiliate Doe Run Resources Corporation (the “Renco Consortium”) were awarded the right to negotiate a Stock Transfer Agreement to acquire the La Oroya Complex. Peru required that the Renco Consortium create a local Peruvian entity as the acquisition vehicle, which it did in the form of Doe Run Peru S.R. Ltda (“Doe Run Peru” or “DRP”). In the course of the ensuing negotiations, the Renco Consortium made it clear that Centromin’s and Peru’s stated commitment to assume liability for environmental contamination and third-party claims was the *sine qua non* of Renco’s acquisition of the Complex, as was Peru’s guarantee of Centromin’s contractual obligations. Without them, the Renco Consortium would not have proceeded with the acquisition. As further detailed in this submission, the express terms of the Stock Transfer Agreement and the Guaranty Agreement confirm the Parties’ understanding on these points. Renco thus relied on both agreements in making its investment.

15. In light of the facts set forth in Claimant’s submissions to date—all of which the Tribunal must assume to be true for purposes of Peru’s 10.20(4) Objection—the Stock Transfer Agreement and the Guaranty Agreement must be viewed together as forming a single agreement. They effectuated a single business deal that was negotiated by Peru, on the one hand, and the Renco Consortium on the other hand. The Treaty contemplates that multiple instruments may constitute a single investment agreement, as does arbitral jurisprudence. Peru wrongly insists on viewing these agreements in isolation in this case, in a manner that is inconsistent with the terms of the agreements and divorced from the context in which they were negotiated.

16. For the reasons detailed herein, the Stock Transfer Agreement, the concessions, licenses, and other permits that are transferred pursuant to the Stock Transfer Agreement, as well as the Guaranty Agreement together satisfy each of the elements set forth in the Treaty’s definition of “investment agreement” in Article 10.28 of the Treaty. They are written agreements between Doe Run Peru (a covered investment) and Peru and/or Centromin (which Peru wholly owned and controlled) on which Renco relied in making its investment, and they grant certain categories of rights as set forth in the Treaty. Moreover, each of the Stock Transfer

Agreement and the Guaranty Agreement—on its own—also contains all of the required elements of an investment agreement. Each is a written agreement between a national authority (Peru) and a covered investment (Doe Run Peru) on which Renco relied in making its investment, and each grants rights that relate to natural resources, public services, and infrastructure.

17. Based upon the facts submitted by Claimant, which must be taken as true in this phase, and the applicable Treaty language and jurisprudence, there is an investment agreement within the meaning of the Treaty. To the extent that the parties' intent on this issue is ambiguous, the Tribunal must determine that intent in the merits phase of the case, when the disputed facts are joined with the law.

**Renco has standing to assert claims under the Treaty for breach of the investment agreement**

18. Pursuant to Article 10.16.1(a) of the Treaty, an investor has standing to commence arbitration on its own behalf if (i) it has a claim that the respondent state breached an investment agreement, and (ii) that breach has caused loss or damage to the investor. It is precisely the case here.

19. First, Renco's claim (brought on its own behalf) is that Peru has breached an investment agreement—*i.e.*, the Stock Transfer Agreement (which includes its concessions) and the Guaranty Agreement—by failing to assume liability for the third-party claims and damages asserted in the St. Louis Lawsuits, which includes liability for the substantial litigation fees and costs incurred by Renco and its affiliates in defending those lawsuits. Under the Stock Transfer Agreement, Centromin committed to remediate the areas surrounding La Oroya and to assume broad liability for third-party claims, both of which it has failed to do. Peru guaranteed these obligations but also failed to honor its contractual commitment. Centromin and Peru are in breach of the investment agreement.

20. Second, Renco has suffered damage and continues to suffer damage—both directly and indirectly—as a result of Peru's breaches of the investment agreement. Centromin's and Peru's failure to remediate the areas surrounding La Oroya and to assume liability for the St. Louis Lawsuits has exposed Renco to serious litigation liability, and has caused Renco and its affiliates to suffer damage in the form of years of substantial litigation fees and costs. Moreover, Peru's grossly unfair and arbitrary treatment of Doe Run Peru in connection with its PAMA

extension requests, also inconsistent with the terms and context of the investment agreement and with the Treaty, resulted in Renco's total loss of control over its investment.

21. Renco thus has standing to bring this arbitration under Article 10.16.1(a) of the Treaty.

**Peru breached the Guaranty Agreement**

22. As Renco has detailed in its Memorial on Liability and in this submission, Peru has breached the Guaranty Agreement by failing to guarantee Centromin's performance of its contractual obligations under the Stock Transfer Agreement.

23. In its 10.20(4) Objection, Peru argues that it cannot have breached the Guaranty Agreement because the Guaranty Agreement is void. Peru argues that Doe Run Peru's 2001 assignment to Doe Run Cayman Ltd. of its rights and obligations under the Stock Transfer Agreement required Peru's approval under Peruvian law, failing which the Guaranty Agreement was voided. However, as set forth herein, Peru's consent to the assignment was not required under Peruvian law. Moreover, Peru gave its advance consent to the assignment in the express terms of the Stock Transfer Agreement. To the extent that Peru disputes the meaning of the advance consent language at issue in the Stock Transfer Agreement, the Tribunal will determine that disputed matter in the merits phase of the case.

24. Peru also asserts that it cannot have breached the Guaranty Agreement as a matter of law because Renco's claims are not "ripe." But Renco can seek recovery from Peru today under the Guaranty Agreement: Centromin has refused to perform the contractual obligations that Peru guaranteed; Renco was not required to submit its claim to the expert procedure set forth in the Stock Transfer Agreement; and Renco has suffered and continues to suffer damage as a result of Peru's breaches.

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25. In sum, in light of the factual evidence relating to the State-run privatization process of Peru's state-owned entity Centromin, Renco's direct and active participation in the bidding process, the parties' negotiations of the agreements at issue, and the express terms of the Stock Transfer Agreement and Guaranty Agreement—all of which must be assumed true for

purposes of Peru’s 10.20(4) Objection—Renco’s claim that Peru has breached an investment agreement and has caused Renco loss is legally viable. Peru cannot discharge its heavy burden of persuading the Tribunal that it should dismiss Renco’s claim for breach of an investment agreement as a matter of law pursuant to Article 10.20(4) of the Treaty.

## II. RELEVANT FACTUAL BACKGROUND

### A. PERU CREATED CENTROMIN TO OWN EXPROPRIATED MINING ASSETS THAT INCLUDED THE COMPLEX

26. In 1968, a military dictatorship overthrew Peru’s elected Government; and, in 1973, through Presidential Decree No. 20492, the new Government created the Ministry of Energy & Mines that nationalized, among other things, the Complex.<sup>18</sup> Shortly thereafter, the Government created Centromin, a State-owned entity, to acquire and hold the Complex, which it did.

27. On March 18, 1975, Peru enacted another decree (the “Centromin Organic Law”) affirming that Centromin was wholly owned by the State,<sup>19</sup> and that its capital could only be increased with the approval by supreme decree of the Council of Ministers and endorsed by the Minister of Energy & Mines and the Minister of Economy & Finance.<sup>20</sup> According to the Centromin Organic Law governing at the time, Centromin’s stock could not be transferred.<sup>21</sup> Centromin’s corporate governance structure also solidified Peru’s control over Centromin. The General Shareholders’ Meeting, Centromin’s highest decision-making body, was comprised of four members, all of whom represented the Peruvian State, were proposed by the Ministry of Energy & Mines, and were appointed by Supreme Resolution.<sup>22</sup> Of the nine directors of Centromin’s Board of Directors, six were elected by the General Shareholders’ Meeting with the

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<sup>18</sup> **Exhibit C-030**, Presidential Decree No. 20492 concerning Nationalizing the Cerro Mines, Dec. 24, 1973 (“Decree No. 20492”). *See id.* at Article 2 (“The Ministry of Energy and Mines is authorized to take immediate possession of the business referred to in the preceding Article, assume its direction, arrange for its evaluation, and initiate the corresponding expropriation proceedings, the business to be known as Empresa Minera del Centro del Perú, which may also be referred to as CENTROMIN-PERU”).

<sup>19</sup> **Exhibit C-031**, Organic Law No. 21117 concerning Centromin, Mar. 18, 1975 at Article 1 (“Centromin Organic Law”).

<sup>20</sup> *Id.* at Article 7.

<sup>21</sup> *Id.* at Article 9.

<sup>22</sup> *Id.* at Article 12.

approval of the President of Peru,<sup>23</sup> and the Chairman of the Board was appointed by the President by Supreme Resolution.<sup>24</sup>

28. The Centromin Organic Law further required Centromin to “act in harmony with the policy, objectives, and goals approved by the Ministry of Energy and Mines in conformity with the National Development Plan.”<sup>25</sup> Centromin was dependent on the decisions and policies of the Ministry of Energy & Mines. The Law also provided that Centromin’s purposes were, *inter alia*, to:

Perform the activities intrinsic to the mining industry as approved by the State, assuring the operativity and success of its activity in accordance with the basic principle that State entrepreneurial activity is a fundamental component of the mining industry’s development which contributes to the economic development of the country

[and]

Foster the socioeconomic development of the region where it engages in its mining operations, through its activities[.]<sup>26</sup>

Centromin thus was to serve a public purpose and assist the economic and social development of the Peruvian State. According to its Bylaws, Centromin was required to conduct its activities so as “to develop the highest level of scientific and technological research, promoting the socioeconomic development of the regions and localities where it operates, and promoting the welfare of their workers.”<sup>27</sup> The Peruvian State imposed on Centromin the responsibility of promoting the welfare of its employees and the development of the region and localities where it

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<sup>23</sup> *Id.* at Article 13. See also **Exhibit C-192**, Supreme Decree No. 019-82-EM/VM, June 30, 1982 at Article 29.

<sup>24</sup> **Exhibit C-192**, Supreme Decree No. 019-82-EM/VM, June 30, 1982 at Article 29. Like other governmental entities, Centromin is subject to control by the National Controller (*Contraloría General de la República*) and its internal audit office reports to the National Controller and the controlling entity of the Ministry of the sector. *Id.* at Articles 59, 61. In addition, Centromin is also authorized to obtain government funding. *Id.* at Article 61.

<sup>25</sup> **Exhibit C-031**, Centromin Organic Law at Article 2 (emphasis added).

<sup>26</sup> *Id.* at Article 3(a) and 3(c) (emphasis added).

<sup>27</sup> **Exhibit C-192**, Supreme Decree N° 019-82-EM/VM, June 30, 1982 at Article 2.

operated. And Centromin was empowered to “hold Special Rights of the State according to applicable public policy rules.”<sup>28</sup>

## **B. PERU DIRECTLY PLANNED AND EXECUTED THE PRIVATIZATION OF CENTROMIN**

29. After years of heavy State involvement in, and control over, business activities, in the 1990s, the Government of Peru changed its policies and took the decision to privatize most State-owned companies in various sectors. This policy change crystallized with Legislative Decree No. 674 dated September 27, 1991,<sup>29</sup> by which Peru formally declared the promotion of private investment in State-operated enterprises as a national interest. To implement its privatization program, Peru established the *Comisión para la Promoción de la Inversión Privada* (“COPRI”), a Peruvian inter-ministerial body in charge of designing, authorizing, executing, and supervising the privatization process.<sup>30</sup> For each State-owned company being privatized, COPRI established a special committee, known as a *Comité Especial de Privatización*, responsible for managing and implementing the privatization process of that specific entity, based on guidelines, objectives, and policies approved by COPRI.

30. The mining industry was part of this national privatization policy. In November 1991, the Peruvian Government issued Legislative Decree No. 708, declaring “the promotion of investments in mining activity . . . to be in the national interest” and eliminating the exclusive rights that previously had been granted to State-owned mining companies.<sup>31</sup> Although Decree

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<sup>28</sup> *Id.* at Article 2 (“*La Empresa puede ser titular de derechos mineros en la misma forma que cualquier empresa del Sector Privado, y puede también ser titular de Derechos Especiales del Estado con sujeción a las normas de orden público que los regulan.*”).

<sup>29</sup> **Exhibit C-193**, Legislative Decree No. 674, Sept. 27, 1991.

<sup>30</sup> The legal provisions creating COPRI explain that this entity shall centralize decision-making with respect to the design and implementation of the private investment promotion process in State-owned companies. *See id.* at Article 4 (“*Créase la Comisión de Promoción de la Inversión Privada (COPRI), que se encargará de diseñar y conducir el proceso de promoción de la inversión privada en el ámbito de las empresas que conforman la Actividad Empresarial del Estado, centralizando la toma de decisiones a este respecto, como organismo rector máximo.*”) (emphasis added). During Centromin’s privatization process and at the time of execution of the Stock Transfer Agreement, in 1996-1997, COPRI was comprised of representatives from the following State organs: (i) Ministry of Labor and Social Promotion, (ii) Ministry of Fishery, (iii) Ministry of Economy & Finance, (iv) Ministry of Energy & Mines, and (v) Ministry of the Presidency. **Exhibit C-194**, Supreme Resolution 161-96-PCM, May 11, 1996.

<sup>31</sup> **Exhibit C-033**, Legislative Decree No. 708 concerning promoting investments in the Mining Sector (Nov. 6, 1991), at 1 (“Decree No. 708”). As the Peruvian Government later explained in its official 1999 White Paper, “there was a significant change in the role of the State starting to create the necessary conditions to attract foreign investment and, in parallel, to design a privatization policy aimed at ensuring that the private sector is

No. 708 affirmed that “[a]ll mineral resources shall belong to the State, whose ownership shall be inalienable and not subject to statute of limitations,”<sup>32</sup> it stated that mineral resources “shall be exploited through the business activity of the State and private individuals, through the regimen of concessions.”<sup>33</sup> All mining activities were required to be done “exclusively under the system of concessions,”<sup>34</sup> which “shall be granted for conducting activities characterized as mining activities,” including concessions “to smelt, purify or refine metals” and “to install and operate a system of continuous massive mineral product transport between one or several mining centers and a port or working plant, or a refinery or one or more sections of those distances.”<sup>35</sup>

31. A 1992 Resolution included Centromin in the privatization process.<sup>36</sup> Peru created a Special Privatization Committee to oversee Centromin’s privatization (*Comité Especial de Privatizaciones de Centromin Perú S.A.*), including the sale of the La Oroya Complex (“CEPRI” or “Special Privatization Committee”).<sup>37</sup>

### C. PERU’S FIRST ATTEMPT TO AUCTION CENTROMIN TO FOREIGN INVESTORS FAILED

32. In April 1994, Peru’s Privatization Committee attempted to sell Centromin to private investors.<sup>38</sup> At the time, Centromin owned the La Oroya Complex, as well as several mines and related infrastructure.

33. As Peru later explained in its 1997 and 1999 White Papers, no foreign (or domestic) investor submitted a bid to purchase Centromin, in part because the massive liability for third-party personal injury claims by Peruvian citizens living near the contaminated Complex

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the dynamic engine of the economy.” **Exhibit C-006**, Government of Peru, White Paper concerning the Fractional Privatization of Centromin, 1999 at 18 (“1999 White Paper”).

<sup>32</sup> **Exhibit C-033**, Decree No. 708 at Article 17.

<sup>33</sup> *Id.* (emphasis added).

<sup>34</sup> *Id.* at Article 19.

<sup>35</sup> *Id.* at Article 20(b) and 20(d).

<sup>36</sup> **Exhibit C-034**, Supreme Resolution No. 102-92-PCM concerning privatization of Centromin, Feb. 21, 1992 at 1 (“Resolution No. 102-92”).

<sup>37</sup> **Exhibit C-035**, 1997 White Paper concerning the Privatization of Metaloroya (“1997 White Paper”).

<sup>38</sup> **Exhibit C-038**, B.S. Gentry and L.O. Fernandez, *Mexican Steel*, in PRIVATE CAPITAL FLOWS AND THE ENVIRONMENT: LESSONS FROM LATIN AMERICA 188, 213 (Bradford S. Gentry ed., Edward Elgar Publishing 1998) (“*Mexican Steel*”) (“[A] total of 28 companies, among them several important firms from Canada, England, Japan and China, signed up to participate in the auction [of Centromin]. However, despite the initial interest, during the first call for bids in April 1994, none of the companies submitted a proposal and the auction had to be declared a failure.”).

was too great, and the scope and complexity of Centromin's operations, with its obsolete facilities and equipment, made it too daunting to attempt to modernize.<sup>39</sup>

34. Peru considered simply shutting down the Complex in part because of its massive environmental problems,<sup>40</sup> but Peru decided instead that it needed the Complex to continue operating because it played a crucial role in the social and economic development of the region.<sup>41</sup> Peru made the continued operation of the La Oroya Complex a fundamental objective of its privatization strategy and State policy.<sup>42</sup> Centromin thus did not independently take the decision to sell the La Oroya Complex to a private investor. Rather, Peru made that decision as a matter of privatization policy, and Peru implemented it through Centromin as a governmental instrument.

**D. PERU REVISED ITS PRIVATIZATION STRATEGY BY ASSUMING LIABILITY FOR ENVIRONMENTAL REMEDIATION AND THIRD-PARTY CLAIMS RELATING TO ENVIRONMENTAL CONTAMINATION**

35. Peru revised its privatization strategy and began to implement measures to address potential investors' concerns with the La Oroya Complex, noting overwhelming market concern with "the existence and problems arising from the environmental, labor and social liabilities."<sup>43</sup> Under the new privatization strategy, the State, through Centromin, as the seller, would retain responsibility "to remediate the environmental problems accumulated in the past, as well as the claims of third parties in relation to environmental liabilities." The purchaser of the Complex would take responsibility for designing, constructing and implementing environmental

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<sup>39</sup> **Exhibit C-035**, 1997 White Paper at 6, 20 ("[T]he main aspects which led to the possible investors rejecting [the purchase of Centromin] were: the size of the Company, the complexity of its operations, the accumulated environmental liabilities and the social setting."); **Exhibit C-006**, 1999 White Paper at 5-6 ("The main problems perceived by potential investors, and that have frustrated their interest were: the size of the company and the complexity of its mining operations; the accumulated environmental liabilities; the low level of reserves in the mines; little interest in the La Oroya Smelter; the obsolescence of the equipment; the complex nature of the commitments in the social environment.").

<sup>40</sup> **Exhibit C-035**, 1997 White Paper at 19.

<sup>41</sup> **Exhibit C-028**, Centromin, Environmental Impact Program, La Oroya Metallurgical Complex, Jan. 13, 1997 at 20 ("The importance of the Metallurgic Complex for the social and economic development of the region makes it unlikely that its operations will cease in the long or medium term.") ("PAMA Operative Version"). See also **Exhibit C-035**, 1997 White Paper at 35; **Exhibit C-006**, 1999 White Paper at 62-63.

<sup>42</sup> **Exhibit C-006**, 1999 White Paper at 32, 36.

<sup>43</sup> *Id.* at 34-35.

projects that would upgrade and modernize the Complex in order to ultimately bring it into compliance with Peru’s environmental standards.<sup>44</sup>

36. As part of the new privatization strategy, Peru prepared to implement a second bidding round. On January 18, 1996, through Supreme Resolution 016-96-PCM, Peru authorized the establishment of subsidiaries of the operating units of Centromin,<sup>45</sup> and on May 9, 1996, Centromin established Empresa Metalúrgica La Oroya Sociedad Anónima – Metaloroya, as a Centromin subsidiary owning the La Oroya Complex.<sup>46</sup>

37. On January 27, 1997, Peru’s Special Privatization Committee (CEPRI) announced International Public Tender No. PRI-16-97 and invited private investors to bid for Metaloroya, the company that owned the Complex.<sup>47</sup> The bidding rules made clear that CEPRI—not Centromin—was responsible for accepting or rejecting drafting proposals from bidders: “CEPRI reserves its right to accept, at its own discretion, any amendments to the draft agreement suggested by the bidders to improve its wording or adjust it to particular circumstances, but it will not accept substantive amendments of its terms.”<sup>48</sup>

38. During that process, Centromin answered questions from bidders, including publishing two rounds of bidders’ questions and official answers about the La Oroya Complex.<sup>49</sup> The Stock Transfer Agreement that the parties ultimately executed provides expressly by its terms that these written answers by Centromin are of “supplemental validity”<sup>50</sup> for interpreting the Stock Transfer Agreement, the Guaranty Agreement, and the PAMA obligations.

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<sup>44</sup> *Id.* at 62.

<sup>45</sup> **Exhibit C-035**, 1997 White Paper at 1.

<sup>46</sup> *Id.* at 2.

<sup>47</sup> *Id.* at 50-51.

<sup>48</sup> **Exhibit C-195**, Centromin, Public International Bidding Conditions, PRI-16-97, Mar. 26, 1997 at 16.

<sup>49</sup> **Exhibit C-046**, Centromin, Public International Bidding PRI-116-97 – First Round of Consultations and Answers, Feb. 27, 1997 (“Consultation Round 1”); **Exhibit C-047**, Centromin, Public International Bidding PRI-16-97 – Second Round of Consultations and Answers, Mar. 26, 1997 (“Consultation Round 2”).

<sup>50</sup> **Exhibit C-002**, Stock Transfer Agreement, Clause 18.1(A) at 64.

39. In Consultation Round 1, in February 1997, Centromin made clear that it was retaining responsibility for environmental contamination, through the period during which Metaloroya performed its PAMA obligations:<sup>51</sup>

**QUESTION No. 115 (Model of Contract of Capital Increase and Stock Subscription)**

Clause 4.1 - See paragraph two of preceding point B-6. Besides, CENTROMIN may assume responsibility not only for the aspects mentioned in paragraphs a, b and c; but also for dusts, wastes, residues, etc. and for the known or contingent environmental damages derived from La Oroya's operations up to the date of closing of the transaction.

**ANSWER**

***CENTROMIN's responsibility in Environmental Matters referred to in Clause 4.1 corresponds to obligations of environmental remedying for environmental damage resulting from the operation of La Oroya's metallurgical complex up to its transfer, such as the technical abandonment of deposits where residues of the processes (arsenic trioxide, slag, zinc ferrites -optional) have been stored and remedying the area impacted by smelter damp.***

***Furthermore, Clause 4.2 establishes that CENTROMIN assumes responsibility for third-party claims corresponding to situations or conditions existing prior to the transfer, including such claims corresponding to LA EMPRESA's obligations under Clauses 3.1 and 3.2, while it fulfills such obligations. In case to the contrary, the responsibility will belong to LA EMPRESA from the date of the non-compliance of the obligation, according to the competent authority's opinion.***

40. Likewise, in Consultation Round 2, in March 1997, Centromin confirmed to all that Centromin would “accept responsibility for all the contaminated land, water and air until the end of the period covered by the PAMA”:<sup>52</sup>

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<sup>51</sup> **Exhibit C-046**, Consultation Round 1, Question No. 115 (highlighting added).

<sup>52</sup> **Exhibit C-047**, Consultation Round 2, Question No. 41 (highlighting added).

**QUESTION No. 41**

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

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

**ANSWER**

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

Centromin also confirmed that it had set aside monies to finance its environmental liabilities and obligations, which would ensure Centromin's compliance with its obligations.<sup>53</sup>

**QUESTION No. 42**

Assuming that the new owners of Metaloroja comply with the PAMA's terms and the same measures against contamination to comply with National and International norms, but CENTROMIN fails to clean the existing environmental obstacles (pre-transfer) and a legal (local or foreign) entity presents a claim before a National or International court...

¿How does CENTROMIN propose to free METALOROYA from responsibility?

**ANSWER**

**CENTROMIN has ordered the organization and provided the funds to comply with the environmental remedies of which it is responsible, guaranteeing, therefore, their compliance.**

41. In April 1997, the formal bidding process was conducted and the winning bidder was Servicios Industriales Peñoles S.A. de C.V. ("Peñoles") from Mexico, but Peñoles withdrew its bid on July 9, 1997.<sup>54</sup> Peru's Special Privatization Committee then notified the Renco

<sup>53</sup> *Id.* at Question No. 42 (highlighting added).

<sup>54</sup> **Exhibit C-035**, 1997 White Paper at 51. *See also* Witness Statement of Mr. Dennis A. Sadlowski, dated February 19, 2014, Claimant's Memorial on Liability Annex-D at ¶¶ 18-19 (emphasis added) ("Sادلowski Witness Stmt.").

Consortium, the second place bidder, that Peñoles had withdrawn its bid,<sup>55</sup> and the Renco Consortium agreed to enter into negotiations with Peru to acquire Metaloroya through a Stock Transfer Agreement.<sup>56</sup> As required in the bidding conditions, the investor, the Renco Consortium, also agreed to establish a local Peruvian company to acquire the shares, and the Renco Consortium did so, creating Doe Run Peru.<sup>57</sup>

**E. PERU’S ASSUMPTION OF LIABILITY FOR ENVIRONMENTAL CONTAMINATION AND THIRD-PARTY CLAIMS WAS THE *SINE QUA NON* OF RENCO’S ACQUISITION OF THE COMPLEX**

42. The negotiations leading to execution of the Stock Transfer Agreement involved Renco, Doe Run Resources, and the Peruvian Government, in addition to Doe Run Peru and Centromin.<sup>58</sup>

43. Throughout the negotiations of the Stock Transfer Agreement, all parties understood that Centromin would take responsibility for “clean-up and assume liability for all claims relating to the contamination.”<sup>59</sup> Dennis Sadlowski, Vice President of Law for Renco, has provided fact testimony in this arbitration, putting the negotiations between Peru and the Renco Consortium in their proper context: “when we agreed to purchase the Complex, we insisted that Centromin retain liability for third-party claims and that such protection must extend to Doe Run Peru, Renco, Doe Run Resources (all signatories to the STA) and of any related parties.”<sup>60</sup> Both Mr. Sadlowski and Mr. Kenneth Buckley, President and General Manager of Doe Run Peru, made clear to Peru during the negotiation of the Stock Transfer Agreement that it would need to retain and assume liability for third-party claims relating to environmental contamination, as Peru already stated in the written Consultations that it was willing to do. As Mr. Buckley has

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<sup>55</sup> **Exhibit C-035**, 1997 White Paper at 52. *See also* Sadlowski Witness Stmt. at ¶¶ 18-19.

<sup>56</sup> Sadlowski Witness Stmt. at ¶ 19.

<sup>57</sup> **Exhibit C-047**, Consultation Round 2, Question No. 7 at 5 (“If the bidder that is awarded the Bid or the subsidiary to which it transfers said award, is not Peruvian, and there is an intent to acquire shares that CENTROMIN possesses in the COMPANY, one or the other must establish a Peruvian subsidiary in order to execute the contract”). *See also* **Exhibit C-048**, Deed of Incorporation for Doe Run Peru, S.A., Sept. 8, 1997; Witness Statement of Mr. Kenneth Buckley, Former General Manager and President of Doe Run Peru, dated February 10, 2014, Claimant’s Memorial on Liability Annex-A at ¶ 8 (emphasis added) (“Buckley Witness Stmt.”); Sadlowski Witness Stmt. at ¶¶ 7-8.

<sup>58</sup> Buckley Witness Stmt. at ¶¶ 8-9.

<sup>59</sup> *Id.* at ¶ 11.

<sup>60</sup> Sadlowski Witness Stmt. at ¶¶ 15-16.

testified, “we insisted at our meetings with the government and Centromin that they had to do the clean-up and assume liability for all claims relating to the contamination caused by the operation of the Complex over the previous 75 years, as well [as] contamination occurring while we upgraded the facility to ultimately bring it into compliance with environmental regulations.”<sup>61</sup> This was “not an issue of serious contention. Centromin and Peru had already announced to prospective investors . . . that Centromin and Peru would retain liability for third-party environmental claims.”<sup>62</sup> Consistent with the government’s pre-sale representations and assurances, as part of the sale transaction that ultimately occurred, the Republic of Peru provided a written guarantee by which it guaranteed Centromin’s “representations, securities, guarantees and obligations” under the Stock Transfer Agreement.<sup>63</sup>

44. Just as no investor bid on the project in the first round of bidding when the investor was expected to take on the environmental liabilities, Peru’s agreement to retain and assume liability for claims relating to environmental contamination was fundamental to the Renco Consortium’s decision to execute the Stock Transfer Agreement. Without this agreement, the Renco Consortium would not have proceeded with its acquisition of the La Oroya Complex:

Throughout the negotiations, we communicated to Centromin and CEPRI representatives that we would not proceed with the purchase unless: (i) Centromin retained the liability, and undertook the responsibility, for remediation of the historical contamination in and around La Oroya; (ii) Centromin retained and assumed liability for any and all third-party claims related to the environmental condition at La Oroya (including, of course, claims against the entities conducting the negotiations—Renco and Doe Run Resources) . . .<sup>64</sup>

. . . We made it very clear . . . that . . . we would not agree to acquire the Complex[] unless Centromin agreed (1) to retain and assume liability for all third party claims relating to historical contamination and (2) to remediate the areas in and around the town of La Oroya . . . I personally reiterated the same points for the benefit of Mr. Merino[, the General Manager of Centromin,] and told him that this was a “deal-breaker” if they

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<sup>61</sup> Buckley Witness Stmt. at ¶ 11.

<sup>62</sup> Sadlowski Witness Stmt. at ¶ 25.

<sup>63</sup> **Exhibit C-003**, Guaranty Agreement between the Republic of Perú and Doe Run Perú S.R. Ltda., Nov. 21, 1997, Article 2.1 (“Guaranty Agreement”).

<sup>64</sup> Sadlowski Witness Stmt. at ¶ 23 (emphasis added).

did not agree to these key terms . . . Mr. Merino said that Centromin would agree to assume liability for past harm and harm that occurred while DRP was upgrading the outdated facility to control its emissions, and to remediate the town and surrounding areas.<sup>65</sup>

45. The express terms of the Stock Transfer Agreement confirm the Parties' understanding, as further discussed below.

**F. THE STOCK TRANSFER AGREEMENT PROTECTS THE RENCO CONSORTIUM FROM THIRD-PARTY CLAIMS**

46. Because Peru's assumption of liability for third-party claims was the *sine qua non* of Renco's acquisition of the Complex, the parties agreed to introduce Clause 6.2 and Clause 6.3 into the Stock Transfer Agreement so as to protect the Renco Consortium from third-party liability. This was consistent with Centromin's answers to the various questions from potential investors during the consultation process referenced in paragraphs 38 to 40 above. As Mr. Sadlowski recalls, "to ensure that the necessary clarification was there, Centromin agreed to draft 6.2 and 6.3 of the STA broadly, so that they encompassed claims against parent entities or other third parties."<sup>66</sup> Clause 6.2 of the Stock Transfer Agreement concerns liability for third-party claims arising during the PAMA period, providing in its entirety that:

During the period approved for the execution of Metaloroya's PAMA, Centromin will assume liability for any damages and claims by third parties that are attributable to the activities of the Company [*i.e.*, Metaloroya or Doe Run Peru, after the merger of Metaloroya and Doe Run Peru in December 1997], of Centromin and/or its predecessors, except for the damages and third-party claims that are the Company's responsibility in accordance with Numeral 5.3.<sup>67</sup>

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<sup>65</sup> Buckley Witness Stmt. at ¶ 12 (emphasis added).

<sup>66</sup> Sadlowski Witness Stmt. at ¶ 27.

<sup>67</sup> **Exhibit C-002**, Stock Transfer Agreement, Clause 6.2 at 27. In turn, Clause 5.3 narrowly circumscribes Doe Run Peru's liability for third-party damages and claims arising during the PAMA period to: (1) damages and claims that are "exclusively attributable" to Doe Run Peru, "but only insofar" as they are attributable both to business operations of Doe Run Peru "not related" to the PAMA and to its use of standards and practices that are "less protective of the environment or of the public health than those applied by Centromin"; and (2) damages and claims that arise directly from a default by Doe Run Peru on the performance of its PAMA obligations or the obligations specified in Clauses 5.1 and 5.2 of the Stock Transfer Agreement (which are not relevant here). *Id.* at Clause 5.3 at 21-22. *See also* Claimant's Memorial on Liability at ¶¶ 250-252.

47. Clause 6.3 of the Stock Transfer Agreement concerns liability for third-party claims arising after the expiration of the PAMA period, stating in full:

After the expiration of the legal term of Metaloroya’s PAMA, Centromin will assume liability for any damages and third party claims attributable to Centromin’s and/or its predecessors’ activities except for the damages and third party claims for which the company is liable in accordance with numeral 5.4. In the case that damages may be attributable to Centromin and the Company, the provisions set forth in numeral 5.4.C shall apply.<sup>68</sup>

48. With the addition of Clauses 6.2 and 6.3 set forth above to the Stock Transfer Agreement, the Renco Consortium “felt comfortable that it was clear that Centromin and Peru were retaining responsibility for all third-party claims against any party, including DRP’s parent entities. Any other understanding would have been absurd.”<sup>69</sup>

49. Despite the language of Clauses 6.2 and 6.3, as well as the clear representations that Centromin made during the bidding and negotiation process—which the parties agreed in the Stock Transfer Agreement would constitute “supplemental validity”<sup>70</sup> when interpreting the intent of the parties concerning the Stock Transfer Agreement and the Guaranty Agreement—Peru has failed to assume liability for third-party claims and damages arising in the St. Louis Lawsuits. Seeking now to avoid and evade its promises to the investor, Peru contends that the obligations contained in the Stock Transfer Agreement “run only to DRP and DRC Ltd., and not to [the investor] Renco.”<sup>71</sup> As Mr. Sadlowski recalls, “Centromin specifically agreed that it would assume liability for all third-party claims. This assumption of liability was not limited to

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<sup>68</sup> **Exhibit C-002**, Stock Transfer Agreement, Clause 6.3 at 27. *See also* Claimant’s Memorial on Liability at ¶¶ 253-254. In turn, Clause 5.4 specifies the scope of Doe Run Peru’s liability for third-party damages and claims arising after the expiration of the time approved for completing the PAMA projects. Under Clauses 5.4(A) and (B), Doe Run Peru assumes sole liability for third-party damages and claims arising after the PAMA period if and only if they result directly from (1) “acts that are solely attributable to its operations after that period” or (2) a default by Doe Run Peru on the performance of its PAMA obligations or the obligations specified in Clauses 5.1 and 5.2. Under Clause 5.4(C), Doe Run Peru assumes “proportion[ate]” liability for damages and claims arising after the PAMA period to the extent that Doe Run Peru’s operations after the PAMA expired contributed to the third-party’s damage. **Exhibit C-002**, Stock Transfer Agreement, Clause 5.4 at 22-23. Doe Run Peru did not operate the Complex after the PAMA period expired, and thus can have no proportionate liability under Clause 5.4.

<sup>69</sup> Sadlowski Witness Stmt. at ¶ 38.

<sup>70</sup> **Exhibit C-002**, Stock Transfer Agreement, Clause 18.1(A) at 64.

<sup>71</sup> Peru’s 10.20(4) Objection at ¶ 3. *But see* Claimant’s Memorial on Liability at ¶¶ 79-90.

liability in favor of only [the local Peruvian entity] Doe Run Peru.”<sup>72</sup> In fact, “[w]hat . . . Peru [is] now claiming (*i.e.*, that the Renco Consortium members and related entities are somehow liable for third-party environmental claims that . . . Peru agreed to retain) is exactly the type of scenario that we advised [Peru] was unacceptable and would result in the purchase of La Oroya not moving forward.”<sup>73</sup>

50. The factual record in this case demonstrates that the parties heavily negotiated Clauses 6.2 and 6.3, which were clearly designed to cover the Renco Consortium.

51. For the avoidance of any doubt, the parties also negotiated and included Clause 5.5, which provides that “the Company will not have [now] nor will it assume any liability for damages or for third-party claims attributable to Centromin insofar as the same were the result of Centromin’s operations or those of its predecessors up to the execution of this contract or are due to a default on the part of Centromin with regards to its obligations that are specified in Numeral 6.1 [*i.e.*, Centromin’s PAMA obligations and its obligation to remediate the area around the Complex].”<sup>74</sup> Indeed, Clause 5.9 provides that “[a]ll other liabilities [*i.e.*, all environmental liabilities not specifically allocated to the Company under Clause 5] shall correspond to Centromin in accordance with the Sixth Clause.”<sup>75</sup>

52. Peru assumed broad liability for third-party claims.<sup>76</sup> This made sense: Centromin and its predecessor Cerro de Pasco had been operating the Complex for 75 years without environmental regulation and without investing in necessary technological upgrades.<sup>77</sup> Modernization of a massive, integrated, and technologically complex smelting and refining complex takes many years. No investor had been willing to assume liability for third-party claims arising from the environmental contamination that existed and that would continue to

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<sup>72</sup> Sadlowski Witness Stmt. at ¶ 42.

<sup>73</sup> *Id.* (emphasis added).

<sup>74</sup> **Exhibit C-002**, Stock Transfer Agreement, Clause 5.5 at 23-24 (emphasis added).

<sup>75</sup> *Id.*, Clause 5.9 at 25 (emphasis added).

<sup>76</sup> *See* Buckley Witness Stmt. at ¶¶ 10-11.

<sup>77</sup> *See* Sadlowski Witness Stmt. at ¶ 15; Expert Report of Mr. Eric Partelpoeg, EHP Consulting, Inc., Review of La Oroya Smelter, dated February 18, 2014, Claimant’s Memorial on Liability Annex-F at §§ 5.0, 9.0 at 12-15, 28-29.

accumulate during construction of the PAMA projects.<sup>78</sup> And the Renco Consortium would only agree to take on the financial responsibility of modernizing the Complex if it were fully protected from liability for third-party damages attributable to the operation of the Complex while carrying out the upgrades, and if it remained protected from liability for third-party damages attributable to residual contamination afterwards.<sup>79</sup> That is precisely what the Stock Transfer Agreement accomplished.

**G. PERU GUARANTEED CENTROMIN’S OBLIGATIONS, INCLUDING ITS ASSUMPTION OF LIABILITY FOR THIRD-PARTY CLAIMS**

53. The Renco Consortium requested and received a specific guarantee from Peru to assure itself that the obligations and commitments that Centromin undertook in the Stock Transfer Agreement were backed by the full force of the State.<sup>80</sup> This guarantee was a precondition to the Renco Consortium’s decision to invest in Peru. Indeed, as Mr. Sadlowski has stated, “Peru’s Guaranty of Centromin’s representations, assurances and obligations was also a key condition insisted upon by Renco and Doe Run Resources and without which, we *never* would have executed the [Stock Transfer Agreement].”<sup>81</sup>

54. On September 19, 1997, President Fujimori issued a Supreme Decree resolving that the “Peruvian State” would enter into a contract with the Renco Consortium guaranteeing the “declarations, assurances, guarantees and obligations assumed by [Centromin]” in the Stock Transfer Agreement.<sup>82</sup> The Supreme Decree recognized that, pursuant to Peruvian law, the Peruvian State was authorized to grant by contract to foreign investors investing in State companies “the assurances and guarantees that are considered necessary to protect their acquisitions and investments.”<sup>83</sup>

55. The Stock Transfer Agreement that the parties executed in October 1997 referred to the Peruvian Government’s guarantee of all of Centromin’s contractual obligations: “[b]y reason of Supreme Decree No. 042-97-PCM approved on September 19, 1997 in accordance

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<sup>78</sup> See Sadlowski Witness Stmt. at ¶¶ 15-16.

<sup>79</sup> See *id.* at ¶¶ 25-38.

<sup>80</sup> *Id.* at ¶¶ 12, 28.

<sup>81</sup> *Id.* at ¶ 12 (emphasis in original).

<sup>82</sup> **Exhibit C-162**, Supreme Decree No. 042-97-PCM, Sept. 18, 1997.

<sup>83</sup> *Id.*

with Decree No. 25570 and Act No. 26438, and the corresponding [G]uaranty [C]ontract entered into under that decree, the Government of Peru is obliged to guarantee all of the obligations of Centromin under this contract, and said [G]uaranty shall survive the transfer of any of the rights and obligations of Centromin and any liquidation of Centromin.”<sup>84</sup>

56. That is what transpired. In conjunction with the Stock Transfer Agreement, the Republic of Peru provided a written guarantee that guaranteed all of the “representations, securities, guarantees and obligations” that Centromin had assumed in the Stock Transfer Agreement:

The STATE hereby guarantees THE INVESTORS the representations, securities, guarantees and obligations assumed by the TRANSFEROR [Centromin] under the Stock Transfer Capital Increase and Stock Subscription Contract . . .<sup>85</sup>

57. By executing the Guaranty Agreement, Peru thus gave concrete contractual assurances that it would guarantee the “representations, securities, guarantees and obligations” of Centromin in the Stock Transfer Agreement, which include, of course, Centromin’s retention and assumption of liability for third-party claims. The Renco Consortium reasonably relied upon these assurances when deciding to invest in Peru.<sup>86</sup>

**H. CENTROMIN AND PERU HAVE FAILED TO PERFORM CENTROMIN’S PAMA OBLIGATIONS AND TO REMEDIATE THE AREAS AROUND THE COMPLEX**

58. As set forth in detail in Claimant’s Memorial on Liability,<sup>87</sup> Centromin made contractual commitments to perform the PAMA projects that were allocated to it, and to remediate the cumulative environmental impacts caused by the operation of the Complex.

59. Specifically, Clause 6.1 of the Stock Transfer Agreement provides that “Centromin assumes responsibility [for] [c]ompliance with the obligations contained in Centromin’s PAMA according to its eventual amendments approved by the relevant authority

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<sup>84</sup> **Exhibit C-002**, Stock Transfer Agreement, Clause 10 at 58.

<sup>85</sup> **Exhibit C-003**, Guaranty Agreement, Article 2.1.

<sup>86</sup> Sadlowski Witness Stmt. at ¶¶ 12, 28.

<sup>87</sup> See Claimant’s Memorial on Liability at Section II.F.

and the legal applicable requirements in force.”<sup>88</sup> And Centromin’s PAMA includes the obligation to remediate, as set forth in PAMA Project No. 4 (Rehabilitation of La Oroya).<sup>89</sup> Moreover, Clause 6.1(C) states that “Centromin assumes responsibility [for] . . . [r]emediation of the areas affected by gaseous and particles emissions from the smelting and refining operations that have produced up 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.”<sup>90</sup> Remediation was important because it would reduce the health risk to the local population from existing toxins in the soil from historic operations.<sup>91</sup> Dr. Rosalyn Schoof—a board certified toxicologist with more than 25 years of experience assessing human health effects and exposures from chemical substances—explains that “remediation of the soil was necessary to achieve desired reductions in lead exposures,” because “the settled dust and soil in La Oroya would still have high residual concentrations of lead from historical emissions.”<sup>92</sup>

60. The negotiating history of the Stock Transfer Agreement reflects the high level of importance that the Renco Consortium attached to Centromin’s remediation obligations.<sup>93</sup> Under

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<sup>88</sup> **Exhibit C-002**, Stock Transfer Agreement, Clause 6.1 at 25.

<sup>89</sup> *See* **Exhibit C-028**, PAMA Operative Version at 207-17.

<sup>90</sup> **Exhibit C-002**, Stock Transfer Agreement, Clause 6.1(C) at 26. The agreement to remediate the areas Centromin contaminated excluded only “those areas which are the responsibility of [Doe Run Peru] in accordance with the fifth [C]lause” of the Stock Transfer Agreement. *Id.* This did not impose any obligation on Doe Run Peru to remediate areas contaminated by Centromin. Clause 5 provides that the Company is responsible “only” for environmental matters it expressly assumed (Stock Transfer Agreement, Clause 5.1), and Clause 5.9 provides that “[a]ll other liabilities shall correspond to Centromin in accordance with the sixth [C]lause.” Clauses 5.1-5.4 then limit Doe Run Peru’s environmental responsibilities to (1) its own PAMA obligations (the “Metaloroya PAMA”) (Stock Transfer Agreement, Clause 5.1); (2) potential future situations in which Doe Run Peru decided to assume certain of Centromin’s PAMA obligations (like the closure of zinc ferrite deposits) (Stock Transfer Agreement, Clause 5.1-5.2); and (3) very limited liability for harm to third parties (Stock Transfer Agreement, Clause 5.3-5.4).

<sup>91</sup> *See* Buckley Witness Stmt. at ¶ 12; Sadlowski Witness Stmt. ¶ 15.

<sup>92</sup> Expert Statement of Rosalind A. Schoof, PhD., DABT dated Feb. 18, 2014 at 14 (“R. Schoof Expert Stmt.”). Through her affiliation with the consulting company Integral, Dr. Schoof, a toxicologist, was hired by Doe Run Peru and approved by the Ministry to conduct an independent study of health risks in La Oroya in 2005 and 2008. She also has submitted an expert report in these proceedings. Dr. Schoof’s conclusions were based on her own studies at La Oroya in 2005 and 2008 (when Centromin still had not remediated) and on the following: “Prior Complex operations by Cerro de Pasco and Centromin created pervasive environmental contamination in the region of La Oroya that I believe has contributed significantly to exposures of minors in La Oroya to lead and other metals since 1997. These contributions are due both to direct contact with the soil, as well as to the contribution of historically contaminated soils to the metals in outdoor and indoor dust and in food. Even *Activos Mineros*’ (the State-owned successor to Centromin) own consultants concluded in a May 13, 2009 presentation made by Todd Hamilton of GWI that soil alone would cause a high prevalence of elevated blood lead levels in the children of La Oroya.”

<sup>93</sup> *See* Buckley Witness Stmt. at ¶¶ 9-13.

the Model Stock Transfer Agreement that Peru had provided to the bidders, Centromin assumed responsibility only for the technical abandonment of certain slag, arsenic and ferrite deposits.<sup>94</sup> By contrast, Clause 6.1 of the final Stock Transfer Agreement requires Centromin not only to take responsibility for the technical abandonment of these deposits, but also to perform its PAMA obligations and to remediate the area around La Oroya.<sup>95</sup> Moreover, to address the Renco Consortium's concern that Centromin and Peru would not perform their soil remediation obligations, the final Stock Transfer Agreement provides that the Company would not have any liability if Centromin and Peru defaulted on these obligations, which they undeniably have. Specifically, Clause 5.5 provides that "the Company will not have [now] nor will it assume any liability for damages or for third-party claims attributable to Centromin insofar as the same . . . are due to a default on the part of Centromin with regards to its obligations that are specified in Numeral 6.1."<sup>96</sup>

61. Peru's failure and breach of its obligation under the Stock Transfer Agreement and the Guaranty Agreement to remediate has caused and continues to cause direct harm to the local population,<sup>97</sup> and thus also to Renco and its affiliates through the third-party claims in St. Louis.

62. Lead from the historical operation of the La Oroya Complex made its way into the soil, homes and streets of La Oroya. The historical lead deposits have been shown to contribute to elevated blood lead levels in the community.<sup>98</sup> In 1999, an NGO study found average blood

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<sup>94</sup> **Exhibit C-071**, Model Contract, Capital Increase and Share Subscription Contract of Empresa Metalurgica La Oroya S.A, February 6, 1997, Art. 4.1 at 4-5 (part of bidding documents) ("1997 Model Contract").

<sup>95</sup> **Exhibit C-002**, Stock Transfer Agreement, Clause 6.1 at 25-27.

<sup>96</sup> *Id.*, Clause 5.5 at 23-24.

<sup>97</sup> See Buckley Witness Stmt. at ¶ 16 (discussing MEM's April 2000 decision to approve "a request by Centromin to postpone much of its clean-up work" and observing that "MEM's decision . . . meant that for at least seven more years, the local community would continue to be exposed to the high concentrations of lead and other contaminants that had accumulated in the soil over the past 78 years.").

<sup>98</sup> R. Schoof Expert Stmt. at 9-11, 13-14, 16-17. See also **Exhibit C-022**, Letter from B. Neil (Doe Run Peru) to M. Chappuis (Ministry of Energy & Mines), PAMA for the Metallurgical Complex of La Oroya 2004-2011 Period, Feb. 17, 2004, Annex VI at 6-7 ("Doe Run Peru Request No. 1453558"); **Exhibit C-073**, Doe Run Peru, *Report to Our Communities Advances, La Oroya, Province of Yauli, Junin Peru*, 1998-2002 at 75-76 ("1998-2002 DRP Report") ("The study conducted by Doe Run Peru identified La Oroya's sources of lead exposure as the lead deposited in the soil during the Smelter's 80 years of operations (an environmental liability), the prevalent use of 84-octane gasoline, the Metallurgical Complex's current emissions (which will be controlled with the implementation of the PAMA), as well as paint, play dough, toys, solder, etc."); **Exhibit C-074**, AMEC International (Chile) S.A., *Report on Doe Run Peru's Proposed La Oroya Bankable Feasibility Study*

lead levels around the Complex at rates that exceeded the U.S. CDC levels of concern, and stated that lead exposure posed a risk to the local population.<sup>99</sup> This study and follow-up studies confirmed that historical lead deposited in the soil contributed significantly to the elevated blood lead levels in La Oroya,<sup>100</sup> and has become an increasingly important contributor as Doe Run Peru reduced heavy metal emissions from the plant.<sup>101</sup>

63. Given the impact on human health,<sup>102</sup> Centromin was to immediately commence its cleanup efforts under the timetable of actions and associated investments proposed by Centromin and approved by the Ministry of Energy & Mines.<sup>103</sup> This included commencing the study described in PAMA Project No. 4 (intended to delimit the area impacted by the Complex’s operations and to identify future corrective actions)—to be completed by 2002,<sup>104</sup> as well as preliminary soil-stabilization work, which Centromin was scheduled to complete by the end of 1997.<sup>105</sup> The remediation was to be completed by 2005.<sup>106</sup> Centromin did not commence the study or perform any remediation work.<sup>107</sup>

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for PAMA Projects and a Modernization Program, July 11, 2006 at 8-9 (“2006 AMEC Report”). See generally **Exhibit C-075**, *Dirección General de Salud Ambiental* (“DIGESA”), Study of Blood Lead Levels in a Selected Population of La Oroya, November 23-30, 1999 (“1999 DIGESA Study”).

<sup>99</sup> See **Exhibit C-075**, 1999 DIGESA Study; see **Exhibit C-022**, Doe Run Peru Request No. 1453558, Annex VI at 9-10, 14, 19. See also Buckley Witness Stmt. at ¶ 18.

<sup>100</sup> See **Exhibit C-073**, 1998-2002 DRP Report at 75-76. See also **Exhibit C-075**, 1999 DIGESA Study at 21; **Exhibit C-022**, Doe Run Peru Request No. 1453558, Annex VI at 9-10, 14, 19.

<sup>101</sup> See generally **Exhibit C-076**, Integral Consulting Inc., *Complementary Human Health Risk Assessment, La Oroya Metallurgical Complex*, November 21, 2008, Conclusions at 7-1 to 7-8 (“2008 Integral Report”). See also **Exhibit C-077**, Centers for Disease Control and Prevention, *Development of an Integrated Intervention Plan to Reduce Exposure to Lead and Other Contaminants in the Mining Center of La Oroya, Peru*, May 2005 at 12-13 (recommending “implement[ing] interventions . . . demonstrated scientifically to reduce lead exposure from historical soil contamination”) (“2005 CDC Report”); **Exhibit C-078**, Integral Consulting Inc., *Human Health Risk Assessment Report, La Oroya Metallurgical Complex*, December 2, 2005 at xxxvi (“While lead emissions will also be greatly reduced, blood lead levels are still predicted to exceed health-based goals in 2011. This is due to the fact that dust and soil in La Oroya will still have high residual concentrations of lead from historical emissions. For that reason, Integral recommends continuing and expanding many of the community-based programs that help to reduce lead exposures and the associated health burden.”) (“2005 Integral Report”).

<sup>102</sup> See Buckley Witness Stmt. at ¶¶ 13-14.

<sup>103</sup> See *id.*

<sup>104</sup> See Expert Report of Mr. Gino Bianchi Mosquera, GSI Environmental Inc., *Environmental Issues Associated with the La Oroya Metallurgical Complex, Junin, Peru*, dated February 18, 2014, at 22 (“Bianchi Expert Report”).

<sup>105</sup> **Exhibit C-028**, PAMA Operative Version at 1-13, 207-17. A slightly amended PAMA may have moved the dike completion date to 1998. **Exhibit C-045**, Letter from K. Dwyer (Knight Piésold) to D. L. Vornberg (Doe Run Perú), *Technical and Regulatory Review of Commitments Outlined in the December La Oroya PAMA*, Aug. 29, 1997 at 21 (“Knight Piésold PAMA Review”). See also Buckley Witness Stmt. at ¶ 16.

64. Rather, Centromin requested that the Ministry of Energy & Mines defer Centromin’s remediation obligations and excuse its missed deadlines.<sup>108</sup> On April 17, 2000, the Ministry of Energy & Mines granted Centromin’s request that PAMA No. 4 be extended and modified – passing a resolution that approved a revised schedule for the remediation work, claiming that it would be “a futile investment to re-vegetate the areas around the La Oroya Metallurgical Complex when the SO<sub>2</sub> emissions in the smelter have yet to be controlled.”<sup>109</sup> Thus, the Ministry allowed Centromin to “re-program[]” its required PAMA investments for the rehabilitation work such that “basic physical stabilization activities would be carried out between 2000 and 2003 and the maintenance and monitoring of those activities would be conducted between 2004 and 2006.”<sup>110</sup> And “[r]e-vegetation of the areas affected by smoke from the La Oroya smelter would be carried out as part of the Plan for closing the affected areas and would commence in 2007, after the La Oroya smelter controls SO<sub>2</sub> emissions, and would conclude in 2010.”<sup>111</sup>

65. As Mr. Buckley notes in this witness statement in this arbitration, the Ministry of Energy & Mines’ “decision to postpone the clean-up work meant that for at least seven more years, the local community would continue to be exposed to the high concentrations of lead and other contaminants that had accumulated in the soil over the past 75 years.”<sup>112</sup>

66. Dr. Gino Bianchi—a geochemist with more than 25 years of experience directing and conducting environmental projects in the United States, Canada, and Latin America, and broad experience with the remediation of contaminated sites, the preparation of environmental impact assessments, and the evaluation of environmental compliance in Peru and other areas of Latin America—explains in his expert report that Centromin’s rationale to delay implementation of PAMA Project No. 4 “until after the La Oroya smelter controls SO<sub>2</sub> emissions” was “not

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<sup>106</sup> **Exhibit C-009**, Directorial Resolution No. 334-97-EM-DGM, Oct. 16, 1997 at 4 (“Resolution No. 334-97”). See also **Exhibit C-011**, Directorial Resolution No. 082-2000-EM-DGAA, Apr. 17, 2000 at Table 1 (showing PAMA schedule for Centromin’s projects) (“Resolution No. 082-2000”).

<sup>107</sup> Buckley Witness Stmt. at ¶¶ 14-18.

<sup>108</sup> *Id.* at ¶ 19.

<sup>109</sup> **Exhibit C-011**, Resolution No. 082-2000 at 4.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Buckley Witness Stmt. at ¶ 19; Bianchi Expert Report at 23, 27.

reasonable or justified under the circumstances” and was without “scientific basis.”<sup>113</sup> For one, “ongoing emissions, including ongoing emissions of SO<sub>2</sub>, provide no basis to defer site characterization studies to identify areas that require immediate action due to potential impacts to public health resulting from the presence of high concentrations of lead and other heavy metals”—which “should have been the primary focus of the remedial program.”<sup>114</sup> Moreover, “the stated need to [first] control SO<sub>2</sub> emissions fails to address changes in facility emissions, and thus the area of impact over time.” As the area impacted by aerial emissions had decreased over time, “there are areas outside the current area of impacts that contain high concentrations of lead and other heavy metals in soil that could be studied and remediated notwithstanding ongoing emissions.”<sup>115</sup>

67. Peru still has not required compliance with the remediation obligations that Centromin assumed more than sixteen years ago. Centromin, now Activos Mineros, did not even obtain the remediation study until 2009.<sup>116</sup>

68. As Activos Mineros’ consultant GWI has stated, “there is a significant probability (between 24 and 96 percent) that a child will have blood lead levels above 10 µg/dL in all the communities of interest evaluated, based only on exposure to the contaminated soils.”<sup>117</sup> These elevated blood lead levels and other heavy metal contamination underpin the third-party allegations in the St. Louis Lawsuits in which Renco is a defendant. At least some (if not most) of the lead in the plaintiffs’ blood would be directly due to residual lead concentrations in the soil from historical emissions—something that could have been significantly reduced, if not avoided entirely, had Peru followed through on the remediation work it committed to perform.<sup>118</sup>

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<sup>113</sup> Bianchi Expert Report at 22-23.

<sup>114</sup> *Id.* at 23.

<sup>115</sup> *Id.* at 23.

<sup>116</sup> See **Exhibit C-079**, Activos Mineros S.A.C., *Remediation of Contaminated Soil as Recommended by the Study Prepared by MWH*, May, 10, 2010 (“2010 Activos Mineros Report”). See also Buckley Witness Stmt. at ¶ 16 (stating “[d]uring the entire six-year period that I ran DRP’s operations, Centromin never did any clean-up of the town or surrounding area.”); Witness Statement of José Mogrovejo Castillo, Former Vice-President of Environmental Affairs for Doe Run Peru, dated February 19, 2014, Memorial Annex-B at ¶ 24 n.8 (“Mogrovejo Witness Stmt.”); Bianchi Report at 24 (noting as well that the study itself “appears to be inadequate to develop an effective remedial program”).

<sup>117</sup> R. Schoof Expert Stmt., Exhibit E, March 13, 2009 presentation by Activos Mineros’ consultant GWI.

<sup>118</sup> R. Schoof Expert Stmt. at 16 (“If during the PAMA period Centromin had investigated the magnitude and extent of contamination of soil and settled dust, and implemented programs to reduce exposures to the existing

This is particularly true given that Doe Run Peru dramatically reduced lead emissions from the Complex after Renco invested in the Complex.<sup>119</sup> As Dr. Rosalind Schoof found in her 2008 Health and Human Risk Assessment (the 2008 *HHRA*), the health risk from historic contamination remained high, even though Doe Run Peru had made “substantial progress [] to mitigate health impacts”<sup>120</sup> and the Complex’s “reduced lead emissions had resulted in reduced lead exposures in 2007 compared with those observed in 2005.”<sup>121</sup>

**I. DOE RUN PERU SIGNIFICANTLY EXPANDED ITS EFFORTS, ENGAGED IN NUMEROUS COMPLEMENTARY PROJECTS TO ADDRESS PUBLIC HEALTH ISSUES, AND FOCUSED ON HELPING THE LOCAL POPULATION**

69. After acquiring the La Oroya Complex in 1997, Doe Run Peru began to engage in the ever-evolving and complex process of upgrading the La Oroya Complex to meet emissions standards and addressing public health issues. Moreover, as it learned more through technical studies and evaluations, Doe Run Peru voluntarily expanded its efforts spending hundreds of millions of dollars to adequately address air and water emissions, as well as implementing public health and social programs to reduce worker and community exposure to lead and other substances emitted from the Complex.<sup>122</sup>

70. Dr. Schoof notes that “[Doe Run Peru] went far beyond the terms of the PAMA in pursuing numerous, diverse actions to attempt to reduce impacts of emissions to the residents . . . . The breadth and depth of such community interventions in La Oroya was impressive . . . .”<sup>123</sup> She continues, “[i]t is important to recognize the unprecedented diversity and magnitude of the programs being carried out to attempt to mitigate exposure to lead and other metals in La Oroya.

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contaminated soil and settled dust, then exposures due to historical contamination would have been significantly reduced.”). *See generally* **Exhibit C-022**, Doe Run Peru Request No. 1453558, Annex VI.

<sup>119</sup> **Exhibit C-014**, Doe Run Peru, *Request for Extension of Deadline to Complete the Copper Circuit Sulfuric Acid Plant Project Based on Act of God or Force Majeure Grounds*, July 8, 2009 at 76 (noting a “[r]eduction of lead emission by 68%, achieving the MPL in 2006.”) (“Doe Run Peru 2009 Extension Request”).

<sup>120</sup> R. Schoof Expert Stmt. at 16.

<sup>121</sup> *Id.* at 14.

<sup>122</sup> Buckley Witness Stmt. at ¶¶ 20-35; Mogrovejo Witness Stmt. at ¶¶ 26-34. *See generally* Claimant’s Memorial on Liability at Section II.G.

<sup>123</sup> R. Schoof Expert Stmt. at 14.

Programs that I am aware of . . . in other smelter communities are much more limited than the programs that Doe Run Peru implemented and supported in La Oroya.”<sup>124</sup>

71. Between 1998 and 2002, Doe Run Peru’s engineering and design studies showed that Centromin had severely underestimated the cost and complexity of updating the Complex to meet the environmental standards, and Doe Run Peru made multiple requests to expand the scope of its PAMA obligations.<sup>125</sup> On October 19, 1999, the Ministry of Energy & Mines approved Doe Run Peru’s request to amend its PAMA obligations by adding more tasks and increasing the investment amount by US\$ 60,767,000 to US\$ 168,342,000.<sup>126</sup> On January 25, 2002, the Ministry approved another Doe Run Peru request to increase its PAMA commitment to US\$ 173.05 million.<sup>127</sup>

72. Acknowledging that the PAMA did not address a number of critical issues, the Ministry requested that Doe Run Peru engage in eight new emissions reduction projects.<sup>128</sup> Although an independent environmental auditor had not suggested the new undertakings during its inspection or in the “Inspection Report on Compliance with Environmental Protection and Conservation Standards for the second half of 2002,”<sup>129</sup> Doe Run Peru nevertheless added the new projects to its growing list of projects that it was required to undertake and complete within the original ten-year timeframe of the PAMA.

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<sup>124</sup> Schoof Expert Stmt. at 14.

<sup>125</sup> See, e.g., **Exhibit C-014**, Doe Run Peru 2009 Extension Request at 7; **Exhibit C-044**, Letter from K. Buckley (Doe Run Perú) to Director General of Mining (Ministry of Energy & Mines), Dec. 15, 1998 at 2 (“Request for PAMA Modification No. 1215214”).

<sup>126</sup> **Exhibit C-081**, Ministry of Energy & Mines Report No. 1237-99-EM-DGM-DFM/DFT concerning Environmental Mitigation and Management Plan (“PAMA”) and Modification of Timeline for “PAMA” actions and investments, October 18, 1999 at 3 (“There have been economic changes at the conclusion of some projects with budgeted amounts for investments due to detailed engineering studies, so the mentioned company referred asked to increase investment in the approved PAMA, which was scheduled to be executed into 2006 with an investment of US\$ 107,575,000.00 (see Table 1) and in the new projection, execution is considered with an investment of US\$ 168,342,000.00 (see Table 2), i.e., an increase of US\$ 60,767,000.00 in the same period, advising that the amount invested in all projects would increase, except the Vado and Malpaso Arsenic Trioxide Deposit (No. 14), where the investment would decrease from US\$ 2,000,000.00 to US\$ 1,858,000.00”) (“MEM Report No. 1237-99”).

<sup>127</sup> **Exhibit C-022**, Doe Run Peru Request No. 1453558 at 17.

<sup>128</sup> **Exhibit C-015**, Memorandum No. 732-2002-Em-DGM-DFM/MA from V. Lozada Garcia (Ministry of Energy & Mines) to Director General of Doe Run Perú, Dec. 10, 2002 at 3.

<sup>129</sup> **Exhibit C-082**, Letter from K. Buckley (Doe Run Peru) to M. Chappuis (Ministry of Energy & Mines), December 27, 2002 at 1.

73. Doe Run Peru also engaged in numerous activities beyond the scope of the PAMA projects to reduce lead contamination and to address public health concerns related to lead exposure for both workers and the community.<sup>130</sup> Doe Run Peru reduced blood lead levels in its workers from 51.1 µg/dl at the time Doe Run Peru acquired the Complex in 1997, to 38.0 µg/dl in 2002, through (among other things) the mandated use of respirators and the change room (where workers start and end each day in a clean set of clothes), the use of spray trucks to reduce dust, and frequent medical check-ups.<sup>131</sup> By 2002, the workers' blood lead levels were thus below the World Health Organization's recommended worker levels of 40 µg/dl for men and 30 µg/dl for women.<sup>132</sup> And these average numbers continued to drop, reaching 32.18 µg/dl at the end of 2005.<sup>133</sup> Moreover, Doe Run Peru's new practices dramatically reduced accidents at the Complex,<sup>134</sup> and Doe Run Peru received awards for its safety record.<sup>135</sup>

74. Also not included in the original PAMA were the lead reduction measures Doe Run Peru implemented at the Complex to prevent the transmission of contaminants to the workers' homes. These measures included constructing on-site change-houses,<sup>136</sup> washing trucks before they left the facility, and mandating that workers shower and change clothes after their shift.<sup>137</sup>

75. In addition, Doe Run Peru took a number of immediate measures to reduce emissions from the main stack and to control fugitive emissions (which were the main source of

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<sup>130</sup> **Exhibit C-083**, Doe Run Peru, *Report to Our Communities In La Oroya, Province of Yauli, Junín-Peru*, 2001 at 31 ("2001 DRP Report to Our Communities"). See also Buckley Witness Stmt. at ¶¶ 23-25.

<sup>131</sup> **Exhibit C-073**, 1998-2002 DRP Report at 30-31. See also **Exhibit C-083**, 2001 DRP Report to Our Communities at 29, 31; Buckley Witness Stmt. at ¶¶ 22-26; Witness Statement of Mr. A. Bruce Neil, Former President and Chief Executive Officer of Doe Run Resources, dated February 18, 2014, Memorial Annex-C at ¶¶ 9-12 ("Neil Witness Stmt.").

<sup>132</sup> **Exhibit C-073**, 1998-2002 DRP Report at 30-31; **Exhibit C-083**, 2001 DRP Report to Our Communities at 29. See also Buckley Witness Stmt. at ¶ 26.

<sup>133</sup> **Exhibit C-084**, Doe Run Peru, *Report to Our Communities, La Oroya*, 2006 at 19 ("2006 DRP Report to Our Communities").

<sup>134</sup> *Id.*; **Exhibit C-085**, Doe Run Peru, *Report to Our Communities, La Oroya*, 2005 at 8 ("2005 DRP Report to Our Communities"). See also Buckley Witness Stmt. at ¶¶ 32-34; *id.* ¶ 33 ("For a year and a half . . . I would go beat the drum at La Oroya about safety. Supervisors who didn't comply with the safety procedures would get fired. To achieve workplace safety, you need to have zero tolerance for accidents.").

<sup>135</sup> **Exhibit C-085**, 2005 DRP Report to Our Communities at 8. See also Buckley Witness Stmt. at ¶ 34.

<sup>136</sup> **Exhibit C-073**, 1998-2002 DRP Report at 32; **Exhibit C-084**, 2006 DRP Report to Our Communities at 16.

<sup>137</sup> See generally **Exhibit C-073**, 1998-2002 DRP Report at 17-24; **Exhibit C-083**, 2001 DRP Report to Our Communities at 31. See also Buckley Witness Stmt. at ¶ 25; Neil Witness Stmt. ¶ 8.

lead and other heavy metal emissions):<sup>138</sup> it installed a television system in an environmental control center to monitor and immediately address visible fugitive emissions related to operational issues, like malfunctioning machines or open windows,<sup>139</sup> introduced portable radios to facilitate real-time communications on the Complex, repaired the flues to improve dust recovery, and repaired and changed filter bags in 27 bag houses, increasing dust recovery from 96.5 percent to 98.1 percent, among other projects.<sup>140</sup> By the end of 2001, Doe Run Peru had reduced the amount of particulate matter emitted from the main stack by 27.6 percent.<sup>141</sup>

76. Doe Run Peru also performed a blood-lead level study in 2000 to 5,000 residents, including children,<sup>142</sup> and created the Hygiene and Environmental Health Program to carry out a series of actions based on the general recommendations of the United States Centers for Disease Control and Prevention and the World Health Organization.<sup>143</sup> These actions included: (1) evaluating and monitoring the physical and psychological well-being of the children of La Oroya;<sup>144</sup> (2) utilizing social workers to evaluate the family situation and potential risk factors for high blood lead levels in the home;<sup>145</sup> (3) providing personalized training in hygiene and nutrition during house visits, including training in hand washing and bathing and training in proper cleaning of the house;<sup>146</sup> (4) creating leaders in health and hygiene through community workshops;<sup>147</sup> (5) sponsoring presentations on health and hygiene in local schools, including an educational puppet show and children's book;<sup>148</sup> and (6) sponsoring a campaign to clean the

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<sup>138</sup> See generally **Exhibit C-073**, 1998-2002 DRP Report at 57-68; **Exhibit C-014**, Doe Run Peru 2009 Extension Request at 79-82, 102, 115-16. See also Buckley Witness Stmt. at ¶ 22.

<sup>139</sup> Mogrovejo Witness Stmt. at ¶ 31.

<sup>140</sup> **Exhibit C-073**, 1998-2002 DRP Report at 60-65.

<sup>141</sup> **Exhibit C-083**, 2001 DRP Report to Our Communities at 73-79.

<sup>142</sup> The results of the study were presented on July 24, 2001. See **Exhibit C-083**, 2001 Report to Our Communities at 151.

<sup>143</sup> **Exhibit C-073**, 1998-2002 DRP Report at 76. See also Neil Witness Stmt. at ¶¶ 9-12.

<sup>144</sup> **Exhibit C-073**, 1998-2002 DRP Report at 84-87.

<sup>145</sup> *Id.* at 87-88.

<sup>146</sup> *Id.* at 88.

<sup>147</sup> *Id.* at 89.

<sup>148</sup> *Id.* at 92-96.

schools, roads, and neighborhoods on a weekly basis, for which Doe Run Peru provided cleaning supplies and pressurized water from a water truck.<sup>149</sup>

77. In 2003, at Doe Run Peru's insistence, Peru's Ministry of Health entered into an agreement with Doe Run Peru to support a public health program.<sup>150</sup> Through this agreement, Doe Run Peru offered to provide financial support to the Peruvian Ministry of Health to achieve the following objectives: (1) establishing a culture of prevention in the population with the adoption of healthy habits that reduce exposure to dust; (2) establishing a safer water system, a program for potable water, monitoring programs for the soil, crops, wild vegetation and animals, and air quality, and monitoring of blood lead levels; (3) gradually reducing blood lead levels; (4) creating a program to treat children and pregnant women with high blood lead levels; and (5) signing cooperation agreements with various local authorities and agencies.<sup>151</sup> Prior to 2006 when the Ministry of Energy & Mines mandated its continuance,<sup>152</sup> Doe Run Peru provided financial and other support (up to US\$ 1 million/year) for this program on a voluntary basis.

78. In another voluntary effort to reduce blood lead levels in the community, Doe Run Peru hired the consulting firm Gradient Corporation in 2003 to perform a study on the human health risks in La Oroya.<sup>153</sup> Based on Gradient's conclusions, Doe Run Peru began a series of

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<sup>149</sup> *Id.* at 97-99.

<sup>150</sup> **Exhibit C-087**, Contract, Cooperation Agreement No. 008-2003 by and between The Ministry of Health and Doe Run Peru S.R.L., July 4, 2003 ("2003 DRP-Ministry of Health Contract"). *See also* Buckley Witness Stmt. at ¶ 30.

<sup>151</sup> **Exhibit C-087**, 2003 DRP-Ministry of Health Contract, Third Clause at 2-3.

<sup>152</sup> **Exhibit C-088**, Ministerial Resolution No. 257-2006-MEM/DM concerning partially approving the Application for Exceptional Extension of the "Sulfuric Acid Plants" Project, May 29, 2006, art. 4 at 8 ("Resolution No. 257-2006").

<sup>153</sup> **Exhibit C-089**, Gradient Corporation, *Comparison of Human Health Risks Associated with Lead, Arsenic, Cadmium, and SO<sub>2</sub> in La Oroya Antigua, Peru*, Feb. 9, 2004 ("Gradient Corp. Report"). *See also* Bruce Neil Witness Stmt. at ¶ 10.

complementary projects to reduce lead (and other particulate) emissions<sup>154</sup> and fugitive emissions<sup>155</sup> from the facility.<sup>156</sup>

79. Doe Run Peru implemented these complementary projects alongside its rapidly expanding PAMA projects, with the twin goals of better environmental performance at the Complex and reducing blood lead levels in its workers and the community. As Mr. Buckley explained, Doe Run Peru performed the complementary projects, because, “[W]e had to do something. I was not prepared to wait for the [G]overnment, which had been dodging its obligation since the beginning.”<sup>157</sup> When Doe Run Peru later applied for a PAMA extension, Doe Run Peru proposed that it complete the complementary projects as part of an enlarged commitment to address public health issues.<sup>158</sup>

80. Doe Run Peru also sponsored and implemented social and public health projects for the community, spending more than US\$ 30 million between 1998 and 2010 on quality-of-life improvements.<sup>159</sup> Indeed, Doe Run Peru was one of the first companies in Peru to implement this type of voluntary corporate social responsibility program.

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<sup>154</sup> **Exhibit C-090**, Letter from J. C. Mogrovejo (Doe Run Peru) to J. Bonelli (Ministry of Energy & Mines), Request for an Exceptional Extension of Deadline to Complete the Sulfuric Acid Plants Projects, Dec. 15, 2005 at 63-66 (“Detailed Request for a PAMA extension”); **Exhibit C-013**, Ministry of Energy & Mines Report No. 118-2006-MEM-AAM/AA/RC/FV/AL/HS/PR/AV/FO/CC, *Request for Exceptional Extension of the Sulfuric Acid Plants Project in the Adaptation and Environmental Management Program of the Metallurgical Complex of La Oroya of Doe Run Perú S.R.L.*, May 25, 2006 at 34-42 (“Report No. 118-2006”); **Exhibit C-084**, 2006 DRP Report to Our Communities at 30; **Exhibit C-090**, Detailed Request for a PAMA extension at 7.

<sup>155</sup> **Exhibit C-090**, Detailed Request for a PAMA extension at 63-66; **Exhibit C-013**, Report No. 118-2006 at 39-44; **Exhibit C-084**, 2006 DRP Report to Our Communities at 30.

<sup>156</sup> Neil Witness Stmt. at ¶¶ 10-11 (“The measures we took to address blood lead levels in our workers and in the surrounding community were not PAMA obligations, they were simply the right thing to do.”).

<sup>157</sup> Buckley Witness Stmt. at ¶ 27.

<sup>158</sup> See Claimant’s Memorial on Liability at Sections II.G.3 & II.H.2.

<sup>159</sup> See **Exhibit C-091**, Doe Run Peru, *Report to Our Communities*, May 2011 at 24 (“2011 DRP Report to Our Communities”); **Exhibit C-073**, 1998-2002 DRP Report at 126-36, 142-43, 195, 236, 300; **Exhibit C-084**, Doe Run Peru, *La Oroya: Report to Our Communities 2006*, 44-48; see also Buckley Witness Stmt. at ¶¶ 28-31, 35.

**J. PERU AND CENTROMIN HAVE BREACHED THE STOCK TRANSFER AGREEMENT AND THE GUARANTY AGREEMENT BY FAILING TO ASSUME LIABILITY FOR THE CLAIMS ASSERTED IN THE ST. LOUIS LAWSUITS**

81. Peru and Centromin have failed to comply not only with their obligation under Clause 6.1 to remediate the areas around the Complex,<sup>160</sup> but also with their obligations under Clauses 5.9, 6.2 and 6.3 *et seq.* of the Stock Transfer Agreement to assume liability for the claims asserted in the St. Louis Lawsuits.

82. As of the date of Claimant’s Memorial on Liability,<sup>161</sup> 967 plaintiffs, all of whom are Peruvian citizens and residents of La Oroya, filed 22 cases which currently are pending in the Eastern District of Missouri.<sup>162</sup> The number of Peruvian plaintiffs has since increased to 1,101, and the number of cases has increased to 24. The plaintiffs “seek recovery from Defendants [Renco, Doe Run Resources, Doe Run Acquisition Corp., and Renco Holdings, Inc.] for injuries, damages and losses suffered by each and every minor plaintiff . . . who were minors at the time of their initial exposures and injuries as a result of exposure to the release of lead and other toxic substances . . . in the region of La Oroya, Peru.”<sup>163</sup> The St. Louis Lawsuits are precisely the type of third-party claims that Centromin and Peru agreed to retain and assume when signing the Stock Transfer Agreement and the Guaranty Agreement.<sup>164</sup>

83. The factual evidence establishes that Doe Run Peru is not liable under Clause 5.3 for claims asserted in the St. Louis Lawsuits that arose during the PAMA period because:

- (1) Dr. Schoof’s expert report establishes that the claims asserted in the St. Louis Lawsuits are not “exclusively attributable” to Doe Run Peru’s operation of the Complex;<sup>165</sup>
- (2) Mr. Mogrovejo’s witness statement establishes that Doe Run Peru did not engage in any business operations during the PAMA period that were “not related” to its PAMA;<sup>166</sup>

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<sup>160</sup> For a detailed discussion of Peru’s and Centromin’s breach of their contractual obligation to remediate the areas around the Complex, see Section II.H above and Section II.F of Claimant’s Memorial on Liability.

<sup>161</sup> Claimant’s Memorial on Liability at ¶¶ 76-78, 274-293.

<sup>162</sup> **Exhibit C-163**, Letter from King & Spalding to White & Case, Aug. 15, 2013.

<sup>163</sup> *Id.*, ¶ 1 of attached pleading.

<sup>164</sup> See *supra* Sections II.E, II.F, and II.G. See also Sadlowski Witness Stmt. at ¶¶ 25-38.

<sup>165</sup> R. Schoof Expert Stmt. at 6, 17.

- (3) Dr. Bianchi’s expert report establishes that Doe Run Peru did not engage in standards and practices that were “less protective of the environment or of public health than those Centromin used . . .”;<sup>167</sup> and
- (4) Doe Run Peru did not default on its PAMA obligations or the obligations specified in Clauses 5.1 and 5.2 of the Stock Transfer Agreement.<sup>168</sup>

84. At the very least, these factual issues are disputed, and therefore may not be resolved in an Article 10.20(4) preliminary objection because all facts alleged by Claimant must be assumed to be true.

85. Because Doe Run Peru is not liable under Clause 5.3 for claims asserted in the St. Louis Lawsuits for alleged injuries that arose *prior* to completion of all of the PAMA projects, all such claims fall within the scope of Centromin’s and Peru’s assumption of liability under Clauses 5.9 and 6.2.

86. Centromin’s and Peru’s liability for the claims asserted in the St. Louis Lawsuits is governed by Clause 6.3 of the Stock Transfer Agreement to the extent the underlying damage and claims arose *after* the PAMA period. Clause 6.3 provides that even after the PAMA period expires, Centromin will continue to “assume liability for any damages and claims attributable to Centromin’s and/or its predecessors’ activities,” except if Doe Run Peru is liable under Clause 5.4. Again, neither of the limited exceptions under Clause 5.4 applies in this case. In particular, (1) the Plaintiffs’ damages cannot be “solely attributable to [Doe Run Peru’s] operations after the [PAMA] period” because Doe Run Peru stopped operating the Complex in June 2009, four months before the PAMA period expired in October 2009; and (2) Doe Run Peru did not default on its PAMA obligations.<sup>169</sup> Because the narrow exception in Clause 5.4 does not apply, “all

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<sup>166</sup> Mogrovejo Witness Stmt. at ¶ 51.

<sup>167</sup> Bianchi Report at 6-21, 24-25.

<sup>168</sup> **Exhibit C-014**, Doe Run Peru 2009 Extension Request.

<sup>169</sup> Because the Renco Defendants have not had any ability to influence or control Doe Run Peru’s management since the appointment of Right Business S.A. (“Right Business”) as liquidator in July 2012 (Profit Consultoria Inversiones S.A.C. recently replaced Right Business), it is inconceivable that they could be held liable for any alleged harms attributable to any operation of the Complex by the liquidators.

other liabilities shall correspond to Centromin in accordance with the Sixth Clause” pursuant to Clause 5.9.

87. In sum, no matter how the claims asserted in the St. Louis Lawsuits are characterized, the Stock Transfer Agreement’s comprehensive liability regime requires Activos Mineros and Peru to accept liability for those claims under these circumstances.<sup>170</sup>

88. Yet Activos Mineros and Peru have refused to assume any liability for the St. Louis Lawsuits.<sup>171</sup> As explained in Claimant’s Memorial on Liability,<sup>172</sup> Renco and its affiliates repeatedly wrote to Centromin (now Activos Mineros), the Ministry of Energy & Mines and the Ministry of Economics & Finance, urging them to honor their contractual obligations to assume liability in relation to the St. Louis Lawsuits, and requesting that they defend the St. Louis Lawsuits and release, protect and hold harmless Renco and its affiliates from those third-party claims, which they have refused to do.<sup>173</sup>

### III. PERU’S ADDITIONAL OBJECTIONS ARE NOT PROPERLY WITHIN THE ARTICLE 10.20(4) PHASE

89. The principal clause of Article 10.20(4) states that “a tribunal shall address and decide as a preliminary question any objection by respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26.”<sup>174</sup> In its Scope Decision, the Tribunal noted that “there is a meaningful distinction between an objection that mounts a challenge to the sustainability of a legal claim, and an

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<sup>170</sup> **Exhibit C-159**, Peruvian Civil Code, Article 168.

<sup>171</sup> Sadlowski Witness Stmt. at ¶¶ 39-43.

<sup>172</sup> See Claimant’s Memorial on Liability at Section II.E(3).

<sup>173</sup> See, e.g., **Exhibit C-051**, Letter from King & Spalding to Ministry of Energy & Mines, *et. al.*, Oct. 12, 2010, **Exhibit C-053**, Letter from J. Carlos Huyhua (Doe Run Peru) to V. Carlos Estrella (*Activos Mineros*), November 11, 2010; **Exhibit C-054**, Letter from King & Spalding to Ministry of Energy & Mines, *et. al.*, Dec. 14, 2010; **Exhibit C-055**, Letter from King & Spalding to Activos Mineros, Feb. 18, 2011, **Exhibit-056**, Letter from King & Spalding to White & Case, July 12, 2011; **Exhibit C-057**, Letter from King & Spalding to White & Case, Jan. 27, 2012; **Exhibit C-058**, Letter from King & Spalding to White & Case, Mar. 20, 2012; **Exhibit C-059**, Letter from King & Spalding to White & Case, July 18, 2012; **Exhibit C-060**, Letter from King & Spalding to White & Case, Aug. 9, 2012; **Exhibit C-061**, Letter from King & Spalding to White & Case, Nov. 16, 2012; **Exhibit C-062**, Letter from King & Spalding to White & Case, Jan. 17, 2013; **Exhibit C-063**, Letter from King & Spalding to White & Case, June 21, 2013.

<sup>174</sup> **CLA-001**, Treaty, Article 10.20(4). Footnote 10 of the Treaty clarifies that “as a matter of law” may include the law of the Respondent (*i.e.*, Peruvian law). *Id.* at Article 10.24(4), n.10.

objection to a tribunal’s competence to hear a dispute.”<sup>175</sup> That distinction, in turn, raises two different questions:

when addressing an Article 10.20.4 objection for legal insufficiency of a claim, a tribunal will be called to decide whether the claim is “legally hopeless.” Consideration of an objection to competence, however, requires a tribunal to ask a different kind of question: whether the objection is “hearable” at all, irrespective of a party’s substantive Treaty rights or the legal merit of the claim.<sup>176</sup>

The Tribunal concluded that “objections as to a tribunal’s competence are outside the scope of Article 10.20.4.”<sup>177</sup>

90. In its February 20, 2015 Preliminary Objection, Peru raised not only the sole objection permitted under the Tribunal’s Scope Decision (which relates to whether the Stock Transfer Agreement requires Peru and Centromin to assume liability for the St. Louis Lawsuits), but also several additional objections that are unrelated to this objection and were previously disallowed by the Tribunal, or were never raised at all by Peru during the entire 10.20(4) scope phase.

91. In its Opposition, Renco argued that Peru’s additional objections should not be heard in the Article 10.20(4) phase because:

- (1) Peru’s failure to notify the objections in accordance with Procedural Order No. 1 undermined the integrity of the procedural framework established by the parties and the Tribunal to determine whether Peru’s proposed objections fall within the scope of Article 10.20(4); and
- (2) in any event, the objections relate to the Tribunal’s competence and must therefore be addressed together with the merits, in accordance with Procedural Order No. 1 and the Tribunal’s Scope Decision.<sup>178</sup>

92. In subsequent correspondence, Peru has argued that its additional objections “are not *separate* objections under Article 10.20.4 . . . but rather are arguments in support of Peru’s

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<sup>175</sup> Scope Decision at ¶ 206.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at ¶¶ 213, 240.

<sup>178</sup> Renco’s Opposition at ¶¶ 11-21.

preliminary objection that none of Renco’s claims relating to Peru’s alleged violation of Renco’s purported investment agreements can be sustained as a matter of law.”<sup>179</sup> Peru thus attempts to recast its sole permitted objection—whether the Stock Transfer Agreement requires Peru and Centromin to assume liability for the St. Louis Lawsuits—in the broadest possible terms as an objection that “none of Renco’s claims relating to Peru’s alleged violation of Renco’s purported investment agreements can be sustained as a matter of law,” characterizing its additional objections as merely “arguments.”

93. Peru’s position has no merit. First, to shoehorn its additional objections into its sole permitted objection, Peru has recast the latter objection in such broad terms that it encompasses the competence objections that the Tribunal has held fall outside the scope of Article 10.20(4).<sup>180</sup> For example, Peru’s objection that “there is no investment agreement between Peru and Renco within the meaning of Article 10.28 of the Treaty”<sup>181</sup> constitutes a quintessential objection to the Tribunal’s jurisdiction (and thus competence). Peru should not be permitted to nullify the principal holding in the Tribunal’s Scope Decision by unilaterally recasting the sole objection that it was permitted to bring under that decision.

94. Second, Peru’s attempt to bring competence objections during the Article 10.20(4) phase of this arbitration subverts the whole purpose of the process in which the Parties and the Tribunal engaged over the course of 2014 to determine which objections Peru could bring appropriately under Article 10.20(4). That lengthy and expensive process—the result of which the Tribunal memorialized in Procedural Order No. 1 with the consent of both Parties—was intended to spare the Parties the time and expense of litigating the merits of preliminary objections that might later be deemed by the Tribunal to fall outside the scope of Article 10.20(4). Peru should not be allowed to undermine the integrity of that process by recasting its sole permitted objection in such broad terms that it encompasses objections and/or legal arguments that neither the Parties nor the Tribunal ever had the opportunity to consider throughout the Article 10.20(4) scope phase.

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<sup>179</sup> Letter from Respondent to Tribunal, Apr. 29, 2015, at 3 (emphasis in original).

<sup>180</sup> See Scope Decision at ¶ 240 (concluding that “objections to a tribunal’s competence fall outside the scope of Article 10.20.4”).

<sup>181</sup> Letter from Respondent to Tribunal, Apr. 29, 2015, at 3.

95. Finally, in light of the Tribunal’s Scope Decision, it is clear from the face of Peru’s submissions that each of its additional objections relates to the Tribunal’s competence (*i.e.*, to the Tribunal’s jurisdiction and/or to the admissibility of Renco’s claims) and therefore falls outside the scope of Article 10.20(4).

96. As already discussed, Peru’s objection that there is “no investment agreement” constitutes a quintessential jurisdictional objection under investment treaty law. In its Notice of Arbitration, Renco asserts claims against Peru for breach of an investment agreement under Article 10.16(1)(a)(i)(C) of the Treaty. Peru’s objection based on the alleged non-existence of an investment agreement thus directly relates to the Tribunal’s jurisdiction.

97. Peru’s objection that it cannot have breached any obligations to Renco under the Stock Transfer Agreement “because [it] is not a party to [that agreement]”<sup>182</sup> likewise directly relates to the Tribunal’s jurisdiction. Article 10.28 of the Treaty provides, in part, that the term “investment agreement” means “a written agreement between a national authority of a Party and a covered investment or an investor of another Party . . . .” Peru contends that the Stock Transfer Agreement does not constitute an “investment agreement” under Article 10.28 because Peru is not a party to the agreement and Centromin (which is a party) does not qualify as a “national authority” of Peru.<sup>183</sup> Peru’s objection based on its status as a non-signatory of the Stock Transfer Agreement (though Peru is a signatory to the Guaranty Agreement) thus relates directly to the question of whether the Tribunal has jurisdiction over Renco’s claims for breach of an investment agreement.

98. Similarly, Peru’s objection that it cannot have breached any obligations to Renco under the Guaranty Agreement “because the Guaranty [Agreement] is void under Peruvian law”<sup>184</sup> also concerns the Tribunal’s jurisdiction, as Peru’s own submissions make clear. Specifically, on the basis of the alleged voidness of the Guaranty Agreement, Peru contends that “as a matter of law, the Guaranty [Agreement] . . . does not qualify as an ‘investment agreement’ under the Treaty.”<sup>185</sup> Like Peru’s objection based on its status as a non-signatory of the Stock

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<sup>182</sup> Peru’s 10.20(4) Objection at ¶ 3.

<sup>183</sup> *Id.* at ¶ 28.

<sup>184</sup> *Id.* at ¶ 3.

<sup>185</sup> *Id.* at ¶ 33.

Transfer Agreement, its never-before-asserted objection based on the alleged voidness of the Guaranty Agreement relates directly to the question of whether the Tribunal has jurisdiction over Renco's claims for breach of an investment agreement.

99. Peru's objection that "Renco's claims under the Guaranty [Agreement] . . . are not ripe"<sup>186</sup> relates not to the Tribunal's jurisdiction but to the admissibility of the particular claims in question. It is well-established that the ripeness of a claim relates to whether the claim is admissible, *i.e.*, whether it can be heard in any forum. As explained by Professor William Park, "whether a claim is ripe enough (or too stale) for adjudication" is a question of the "admissibility" of the claim.<sup>187</sup> Similarly, Professor Jan Paulsson has noted that an arbitral tribunal's conclusion that a claim was "premature" denoted that the claim was "inadmissible," not that the tribunal lacked jurisdiction over the claim.<sup>188</sup> Because the Tribunal held in its Scope Decision that an admissibility objection "clearly goes to the competency of the Tribunal"<sup>189</sup> and that "objections relating to the Tribunal's competence fall outside the mandatory scope of Article 10.20.4,"<sup>190</sup> Peru's ripeness objection must be heard together with the merits.<sup>191</sup>

100. Peru's disregard of the Tribunal's Scope Decision is perhaps most brazen with respect to its objection based on Renco's alleged failure to submit two factual issues for determination by a technical expert.<sup>192</sup> Peru notified this objection in its Notice of Intention dated March 21, 2014, and the Tribunal ruled expressly at paragraphs 249-50 of its Scope Decision that "this objection is one of admissibility" and "clearly goes to the competency of the Tribunal,"<sup>193</sup> thus falling outside the scope of Article 10.20(4). Notwithstanding the Tribunal's ruling, Peru reasserted the objection at paragraph 69 of its 10.20(4) Objection.

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<sup>186</sup> *Id.* at ¶ 3.

<sup>187</sup> **CLA-076**, William W. Park, *The Nature of Arbitral Authority: A Comment on Lesotho Highlands*, 21 *ARB. INT'L* (2005) 483, 488.

<sup>188</sup> **CLA-077**, Jan Paulsson, *Jurisdiction and Admissibility*, in *GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION, LIBER AMICORUM IN HONOUR OF ROBERT BRINER* (2005), at 607.

<sup>189</sup> Scope Decision at ¶ 249.

<sup>190</sup> *Id.* at ¶ 250.

<sup>191</sup> *Id.* ("Peru may bring its competency objections later in these proceedings in accordance with the timetable agreed in Annex A of Procedural Order No. 1").

<sup>192</sup> Peru's 10.20(4) Objection at ¶ 69.

<sup>193</sup> Scope Decision at ¶ 249.

101. Renco thus respectfully requests the Tribunal to reject Peru’s additional objections (or “arguments” as it attempts to recast them) as falling outside the scope of the 10.20(4) phase, in accordance with the Tribunal’s Scope Decision, and to award Claimant’s costs associated with Claimant’s need to address substantively these impermissible objections during this 10.20(4) phase, which Claimant does below.

#### IV. STANDARD OF REVIEW UNDER ARTICLE 10.20(4) OF THE TREATY

##### A. ALL FACTS ALLEGED BY RENCO MUST BE ACCEPTED AS TRUE, AND PERU BEARS THE BURDEN OF PROOF

102. Article 10.20(4)(c) of the Treaty confirms that, in assessing Peru’s 10.20(4) preliminary objections, the Tribunal must presume all allegations in Renco’s submissions to date to be true.<sup>194</sup> This includes all facts alleged by Renco, including those contained in the Memorial on Liability, witness statements, expert reports, and documents submitted in support.<sup>195</sup> The Tribunal recognized this standard in its Scope Decision when it stated that it “is required to adopt an evidentiary standard which assumes that all of claimant’s factual allegations in support of its claims as set out in the pleadings are true.”<sup>196</sup> Thus, “the question under Article 10.20.4 is whether the facts as alleged by the Claimant are capable of constituting a breach of a legal right protected by the Treaty.”<sup>197</sup> As discussed more fully below, Peru’s preliminary challenges under Article 10.20(4) to certain of Renco’s claims in this arbitration must fail.

103. The “burden of persuading the tribunal to grant the preliminary objection must rest on the party making that objection, namely the respondent.”<sup>198</sup> In attempting to satisfy the

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<sup>194</sup> **CLA-001**, Treaty, Article 10.20(4)(c) (“In deciding an objection under this paragraph, the tribunal shall assume to be true claimant’s factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.”).

<sup>195</sup> Article 10.20(4)(c) expressly references Article 18 of the 1976 UNCITRAL Rules, which sets forth the content of a statement of claim. This article has been superseded by Article 20 of the 2010 UNCITRAL Rules, which are the arbitral rules that govern this arbitration. **CLA-065**, 2010 UNCITRAL Rules, Article 20.

<sup>196</sup> Scope Decision at ¶ 189(c).

<sup>197</sup> *Id.* at ¶ 92.

<sup>198</sup> **CLA-066**, *Pac Rim Cayman LLC v. The Rep. of El Salvador*, ICSID Case No. ARB/09/17, Decision on the Respondent’s Preliminary Objection under CAFTA Articles 10.20.4 and 10.20.5, Aug. 2, 2010 ¶ 111 (Guido Tawil, Brigitte Stern, V.V. Veeder (President)) (“*Pac Rim v. El Salvador*”). *See also id.* at ¶ 114 (“as the party invoking these procedures it is of course for the Respondent to discharge the burden of satisfying the Tribunal

burden of persuasion, “there can be no evidence from the respondent contradicting the assumed facts alleged in the notice of arbitration; and it should not ordinarily be necessary to address at length complex issues of law, still less legal issues dependent on complex questions of fact or mixed questions of law and fact.”<sup>199</sup>

104. Importantly, the Tribunal therefore must accept as true all of the facts alleged by Renco regarding the parties’ common intention at the time that they concluded the Stock Transfer Agreement and the Guaranty Agreement. As explained in Claimant’s Memorial on Liability, evidence regarding the intent of the parties (including the testimony of the Renco representatives who participated in the negotiation of the Stock Transfer Agreement and the Guaranty Agreement) is relevant to the interpretation of the agreements under the Peruvian Civil Code.<sup>200</sup> Taken as true, the facts alleged by Renco regarding the parties’ intent support its claim that Peru is obligated under the agreements to compensate Renco for all losses resulting from third-party claims such as those asserted against Renco in the St. Louis Lawsuits. This alone makes it impossible for Peru to meet its burden under Article 10.20(4).

105. As mentioned above in Section I, the U.S. Implementation Act of the Treaty states that Chapter 10 includes “provisions similar to those used in U.S. courts to dispose quickly of claims a tribunal finds to be frivolous.”<sup>201</sup> More specifically, commentators have observed that “Article 10.20 was inspired by the ‘motion to dismiss’ procedure, in which the defendant asserts that the plaintiff has failed to state a claim upon which relief can be granted (Rules of Federal Procedure, Rule 12(b)(6).”<sup>202</sup> In the context of a motion to dismiss brought under Rule 12(b)(6), all of the plaintiff’s factual allegations must be accepted as true.<sup>203</sup> Construction of an ambiguous

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that it should make a final decision dismissing the relevant claim or claims pleaded by the Claimant in these arbitration proceedings.”).

<sup>199</sup> *Id.* at ¶ 112.

<sup>200</sup> See Claimant’s Memorial on Liability at ¶¶ 241-245.

<sup>201</sup> **CLA-079**, United State-Peru Trade Promotion Agreement Implementation Act, p. 22 (Dec. 14, 2007).

<sup>202</sup> **CLA-080**, OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 959 (Peter T. Muchlinski, Federico Ortino, and Christoph Schreuer eds., 2008). See also **CLA-078**, Federal Rule of Civil Procedure 12(b)(6).

<sup>203</sup> See, e.g., **CLA-073**, *Martin Marietta Corp. v. Int’l Telecoms. Satellite Org.*, 991 F.2d 94, 97 (4th Cir. 1992) (“In considering a motion to dismiss, the claims must be construed in the light most favorable to the non-moving party and its allegations taken as true”); **CLA-081**, *Markos v. Sears, Roebuck & Co.*, No. CV 05-3051 CBM (JWJx), 2005 U.S. Dist. LEXIS 46436, at \*6 (C.D. Cal. Dec. 6, 2005) (“All material factual allegations in the complaint are assumed to be true and construed in the light most favorable to the plaintiff”).

contract is a question of fact that precludes dismissal of a claim as a matter of law.<sup>204</sup> Similarly, because the construction of a contract is a question of fact under the Peruvian Civil Code, and because Article 10.20(4)(c) of the Treaty requires the Tribunal to accept as true all of Renco’s factual allegations regarding the parties’ common intention at the time of conclusion of the Guaranty Agreement and the Stock Transfer Agreement, Peru’s preliminary objections under Article 10.20(4) must be denied.

**B. THE TRIBUNAL SHOULD EXERCISE ITS DISCRETION TO DISMISS A CLAIM PURSUANT TO ARTICLE 10.20(4) CAUTIOUSLY SO AS NOT TO DEPRIVE CLAIMANT OF DUE PROCESS**

106. Article 10.20(4) provides that a tribunal will assess any objection by respondent that, “as a matter of law, [a] claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26.” The use of the word “may” in Article 10.20(4), by its very nature, affords the Tribunal considerable discretion in determining whether to grant or deny a preliminary objection, and such discretion must be exercised cautiously. In *Pac Rim v. El Salvador*, in denying respondent’s 10.20(4) objection under that treaty, the tribunal observed that “the word [‘may’] recognizes a position where a tribunal considers that an award could eventually be made upholding a claimant’s claim or, equally, where the tribunal considers that it was premature at this early stage of the arbitration proceedings to decide whether or not such an award could not be made.”<sup>205</sup>

107. The *Pac Rim* tribunal stressed the gravity of granting a preliminary objection under Article 10.20(4), recognizing that “a tribunal must have reached a position, both as to all relevant questions of all and all relevant alleged or undisputed facts, that an award should be made finally dismissing the claimant’s claim at the very outset of the arbitration proceedings, without more” and that “there are many reasons why a tribunal might reasonably decide not to

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<sup>204</sup> See, e.g., **CLA-073**, *Martin Marietta Corp. v. Int’l Telecoms. Satellite Org.*, 991 F. 2d 94, 98 (4th Cir. 1992); **CLA-074**, *Kirby v. Frontier Medex, Inc.*, Case No. ELH-13-00012, 2013 U.S. Dist. LEXIS 155357, at \*19 (D. Md. Oct. 30, 2013) (“In the context of a motion to dismiss, the construction of an ambiguous contract is a question of fact which, if disputed, is not susceptible of resolution under a motion to dismiss for failure to state a claim.”) (internal quotation marks and citation omitted); **CLA-075**, *Grant & Eisenhofer v. Bernstein Liebhard LLP et al.*, 14-CV-9839 (JMF), 2015 U.S. Dist. LEXIS 51685, at \*7 (S.D.N.Y. Apr. 20, 2015) (“But ‘when the language of a contract is ambiguous, its construction presents a question of fact, which of course precludes summary dismissal’ on a Rule 12(b)(6) motion.”).

<sup>205</sup> **CLA-066**, *Pac Rim v. El Salvador* at ¶ 109.

exercise such a power against a claimant, even where it considered that such a claim appeared likely (but not certain) to fail if assessed only at the time of the preliminary objection.”<sup>206</sup>

108. The Tribunal thus should not exercise its discretion to dismiss any of Renco’s claims pursuant to Article 10.20(4) if it is not “certain” that these claims *will* fail, as a matter of law. If the Tribunal believes that these claims *may*—not “will”—fail or if the Tribunal cannot ascertain at this stage whether an award in favor of Renco could not be made, then the Tribunal must resolve these doubts in favor of Renco and decline to exercise its discretion to dismiss the claims.

**V. THE STOCK TRANSFER AGREEMENT AND THE GUARANTY AGREEMENT CONSTITUTE A SINGLE “INVESTMENT AGREEMENT” UNDER THE TREATY**

109. The Treaty provides a detailed definition setting forth several requirements for agreements to constitute an “investment agreement,” and the Treaty also expressly provides that multiple instruments may, when viewed together or holistically, constitute a single “investment agreement.” In the present case, the Stock Transfer Agreement, its annexes, and the Guaranty Agreement comprise the single “investment agreement” at issue and that agreement satisfies all of the requirements set forth in the Treaty. In its 10.20(4) Objection, Peru argues that each such instrument, on its own, must satisfy all of the Treaty’s requirements (with one exception) when analyzed for an “investment agreement.” Under this faulty framework, Peru divorces the Stock Transfer Agreement from its annexes and the Guaranty Agreement and analyzes each in isolation in support of its assertion that none constitutes an “investment agreement” individually, and that they cannot combine to form an investment agreement. Peru’s argument is inconsistent with the Treaty’s text, structure, context, purpose, and history, as well as international law. Moreover, and in any event, each of the Stock Transfer Agreement and the Guaranty Agreement—on its own—constitutes an investment agreement.

**A. MULTIPLE AGREEMENTS CAN COMBINE TO FORM A SINGLE INVESTMENT AGREEMENT UNDER THE TREATY**

110. The rules of treaty interpretation codified in Articles 31-33 of the Vienna Convention on the Law of Treaties (“Vienna Convention”) reflect the rules of treaty

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<sup>206</sup> *Id.* at ¶ 110.

interpretation under customary international law.<sup>207</sup> Those rules require that a treaty be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”<sup>208</sup> Under Article 31(4) of the Vienna Convention, “[a] special meaning shall be given to a term if it is established that the parties so intended.”<sup>209</sup> Defined terms in a treaty thus should be interpreted in accordance with their definition.

111. Article 10.16.1(a) of the Treaty provides that a claimant may submit to arbitration a claim on its own behalf that the respondent State has breached an “investment agreement.” In turn, Article 10.28 provides a precise definition of “investment agreement”:<sup>210</sup>

**investment agreement** means a written agreement<sup>16</sup> between a national authority<sup>17</sup> of a Party and a covered investment or an investor of another Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor:

- (a) with respect to natural resources that a national authority controls, such as for their exploration, extraction, refining, transportation, distribution, or sale;
- (b) to supply services to the public on behalf of the Party, such as power generation or distribution, water treatment or distribution, or telecommunications; or
- (c) to undertake infrastructure projects, such as the construction of roads, bridges, canals, dams, or pipelines, that are not for the exclusive or predominant use and benefit of the government;

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<sup>16</sup> “Written agreement” refers to an agreement in writing, executed by both parties, whether in a single instrument or in multiple instruments, that creates an exchange of rights and obligations, binding on both parties under the law applicable under Article 10.22.2. For greater certainty, (a) a unilateral act of an administrative or judicial authority, such as a permit, license, or authorization issued by a Party solely in its regulatory capacity, or a decree, order, or judgment, standing alone; and (b) an administrative or judicial consent decree or order, shall not be considered a written agreement.

<sup>17</sup> For purposes of this definition, “national authority” means an authority at the central level of government.

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<sup>207</sup> See, e.g., **CLA-082**, *Mondev v. United States*, ICSID Case No. ARB(AF)/99/2, Award, Oct. 11, 2002, ¶ 43 (“*Mondev v. United States*”) (citing *Case concerning Kasikili/Sedudu Island* (Botswana/Namibia), 1999 ICJ Reports 1045, at pp. 1059-1060 (¶¶ 18-20)) (Stephen Schwebel, James Crawford, Ninian Stephen (President)).

<sup>208</sup> **CLA-083**, Vienna Convention on the Law of Treaties, Art. 31(1).

<sup>209</sup> *Id.* at Art. 31(4).

<sup>210</sup> **CLA-001**, Treaty, Article 10.28 at 10-25 and 10-26.

In interpreting this definition of “investment agreement” under Article 10.28 of the Treaty, the Tribunal should consider the text, structure, purpose, and history of the Treaty, all of which demonstrate that multiple instruments can constitute a single “investment agreement.”

112. Article 10.28 of the Treaty defines a “written agreement” as an agreement that can be comprised of one or multiple instruments. In its footnote 16, the Treaty states that the term “written agreement” refers to “an agreement in writing, executed by both parties, whether in a single instrument or in multiple instruments, that creates an exchange of rights and obligations....”<sup>211</sup>

113. Annex 10-H(4) of the Treaty further confirms that the Treaty contemplates multiple instruments combining to comprise a single “investment agreement”: “A stability agreement referred to in paragraph 1 may constitute one of multiple written instruments that make up an ‘investment agreement,’ as defined in Article 10.28.”<sup>212</sup> In its submission, Peru argues that Annex 10-H(4) is irrelevant because neither the Stock Transfer Agreement nor the Guaranty Agreement is a “stability agreement.”<sup>213</sup> But this argument is a straw man. Renco never asserted that any of the instruments that comprise its “investment agreement” are a “stability agreement.” Renco cited Annex 10-H(4) as additional evidence in the Treaty’s text that multiple instruments can comprise a single “investment agreement.”

114. The structure and purpose of Article 10.16 and the numerous defined terms in Chapter 10 confirm this straightforward, textual interpretation that multiple instruments can combine to comprise one “investment agreement.” Chapter 10 is designed to cover complex investments in diverse circumstances, in the real world. Article 10.16 provides that a covered investor may assert claims for breach of an investment agreement on its own behalf or on behalf of an enterprise (defined as a juridical person of the respondent State that the investor directly or indirectly controls).<sup>214</sup> Article 10.16 also provides that a claim for breach of an investment agreement can be asserted if the subject matter and claimed damages relate directly to the covered investment that was established or acquired in reliance on the relevant investment

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<sup>211</sup> *Id.* at Article 10.28 n.16 (emphasis added).

<sup>212</sup> *Id.* at Annex 10-H, Article 4.

<sup>213</sup> Peru’s 10.20(4) Objection at ¶ 38.

<sup>214</sup> **CLA-001**, Treaty, Article 10.16.

agreement.<sup>215</sup> The Treaty’s definition of “investment” provides that it includes every asset that has the characteristics of an investment and lists several examples, including enterprises, stocks, debt instruments, futures, contracts, licenses, and other types of property.<sup>216</sup> And the Treaty’s definition of “investment agreement” requires that the agreement concern natural resources, public services, or infrastructure projects and sets forth several, non-exhaustive lists of examples of the types of rights that might fall under those three categories.<sup>217</sup>

115. This high degree of diversity and detail in the Treaty’s structure and the investment activities that it covers reflects the reality that international investments are complex transactions. That is especially so with respect to investments that are governed by investment agreements. Such transactions inevitably will involve numerous legal instruments, and the Treaty’s definition of “investment agreement” is designed to capture and cover this reality.

116. Consistent with the express language of the Treaty, the Treaty’s negotiating history confirms further that an “investment agreement” may be comprised of multiple instruments, which come together to form a single investment agreement. For example, Peru’s Ministry of External Commerce and Tourism (“MINCETUR”) confirmed that, at the Thirteenth and final round of negotiations regarding the Treaty, Peru and the United States agreed that the investor-State dispute resolution mechanism extends to claims of breaches of an investment agreement, including mining concession contracts and all related contracts:

This mechanism [of investor-state arbitration] also applies, by extension, to breaches, by a state, of a promise assumed in a particular manner with an investor who has acquired rights with respect to the exploration of natural resources, provision of public services, or development of infrastructure (investment agreements). Under this concept, mining concession contracts...and all contracts related to such contracts on which the investor relies to develop its investment are covered.<sup>218</sup>

The Stock Transfer Agreement records the transfer of mining concessions and other governmental authorizations, and it expressly references the Guaranty Agreement as the

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<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at Article 10.28.

<sup>217</sup> *Id.*

<sup>218</sup> **Exhibit C-196**, 13th (final) Round of Negotiations of the Treaty (emphasis added).

instrument in which Peru guarantees all of Centromin’s obligations under the Stock Transfer Agreement. Together, they are “mining concession contracts . . . and all contracts related to such contracts,” and Renco relied on all of these instruments together when making its investment.

117. This interpretation also is consistent with arbitral jurisprudence. In its Third Interim Award on Jurisdiction and Admissibility, the *Chevron v. Ecuador* Tribunal held that a 25-year oil concession executed in 1973 and a Settlement and Release Agreement executed in 1995 constituted one “investment agreement.”<sup>219</sup> The treaty at issue used the term “investment agreement,” but did not define it.<sup>220</sup> That tribunal held that there was an “inextricable link” between the 1973 Concession—the central instrument governing the oil operations—and the 1995 Settlement and Release Agreement—which concerned remediation of some impacts that those oil operations caused and a corresponding release of liability.<sup>221</sup> In the tribunal’s reasoning, the 1995 Agreement was a “continuation” of the 1973 Concession Agreement and thus those two instruments, when viewed together, were part of (and formed) the single, same “investment agreement.”<sup>222</sup>

118. The Stock Transfer Agreement and the Guaranty Agreement are part of the same investment, and Renco relied on both legal instruments in making its investment. National authorities of Peru controlled and used Centromin as an instrument of national policy to implement a privatization of State-owned assets. The Background Section of the Stock Transfer Agreement acknowledges this fact expressly. “Legislative Decree No. 674 dated September 25, 1991 states it is of national interest to promote private investment in enterprises comprising the state’s entrepreneurial activity” and that national authorities (COPRI) issued Supreme Resolutions including Centromin in this privatization process.<sup>223</sup> Under control and instructions of national authorities of Peru, Centromin executed the Stock Transfer Agreement.

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<sup>219</sup> **CLA-084**, *Chevron Corp. et al v. Republic of Ecuador*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility, Feb. 27, 2012, ¶ 4.32 (Horacio Grigera Naón, Vaughan Lowe, V.V. Veeder (President)).

<sup>220</sup> *Id.* at ¶ 4.30.

<sup>221</sup> *Id.* at ¶ 4.32.

<sup>222</sup> *Id.*

<sup>223</sup> **Exhibit C-002**, Stock Transfer Agreement at 5-6.

119. Clause 8.5 of the Stock Transfer Agreement provides that several concessions are included in an annex to the Stock Transfer Agreement: “Annex 8.5 contains a complete list of all the surface lands, concessions and mining rights and licenses for water use which refer to the La Oroya Metallurgical Complex. All the titles of real estate, concession and mining rights and water use licenses have been duly transferred and registered by Centromin to the Company.”<sup>224</sup> Clause 8.10 of the Stock Transfer Agreement provides that a separate annex lists all of the “licenses, permits, rights, certifications, franchises, authorizations, approvals and consents” related to the Complex, all of which “have been duly transferred by Centromin to the Company.”<sup>225</sup> And these annexes “are incorporated into and form an integral part of this contract.”<sup>226</sup> The Stock Transfer Agreement also states that Peru is “obliged to guarantee all of the obligations of Centromin under this contract,”<sup>227</sup> which Peru did in the form of the Guaranty Agreement.<sup>228</sup>

120. Simply put, the Stock Transfer Agreement, its annexes, and the Guaranty Agreement are multiple instruments that encompass and record one agreement. The entire investment was predicated on all of these instruments together—not on any one individually. Mr. Buckley has testified that the guarantee by Peru was a *sine qua non* to Renco’s execution of the Stock Transfer Agreement and the making of the entire investment.<sup>229</sup> And the Stock Transfer Agreement provides that the annexed concessions form an “integral part” of that agreement. These links are even more “inextricable” than the link in the *Chevron v. Ecuador* dispute between a concession agreement executed in 1973 and a settlement and release agreement executed 18 years later in 1995.

121. In an effort to rewrite the clear text of the Treaty which states that an investment agreement may be comprised of multiple legal instruments, Peru argues that each legal instrument that comprises an “investment agreement” must satisfy all of the elements needed to

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<sup>224</sup> *Id.*, Clause 8.5 at 38-39. See also **Exhibit C-197**, Stock Transfer Agreement, Annex 8.5.

<sup>225</sup> **Exhibit C-002**, Stock Transfer Agreement, Clause 8.10 at 43-44.

<sup>226</sup> *Id.*, Clause 18.4 at 65.

<sup>227</sup> *Id.*, Clause 10 at 58.

<sup>228</sup> **Exhibit C-003**, Guaranty Agreement, Article 2.1.

<sup>229</sup> Buckley Witness Stmt. at ¶ 12.

qualify as an investment agreement. Specifically, Peru argues that each legal instrument that combines with other legal instruments to form an investment agreement, must—standing alone—be between a national authority and a covered investment or investor and create an exchange of rights and obligations.<sup>230</sup> Peru’s argument, however, is inconsistent with the Treaty’s text, structure, purpose, history, and common sense.

122. As mentioned above, the Treaty defines “written agreement” as an “agreement” with four postpositive modifiers. “‘Written agreement’ refers to an agreement [1] in writing, [2] executed by both parties, [3] whether in a single instrument or multiple instruments, [4] that creates an exchange of rights and obligations, binding on both parties under the law applicable under Article 10.22.2.”<sup>231</sup> The phrase “whether in a single instrument or in multiple instruments” appears after the postpositive modifiers “in writing” and “executed by both parties” but before the modifier “that creates an exchange of rights and obligations.” As a matter of normal grammar and usage, the phrase “whether in a single instrument or in multiple instruments” either modifies the subject (*i.e.*, “agreement”) or the immediately preceding modifier (*i.e.*, “executed by both parties”). Under the “Series-Qualifier” canon of interpretation,<sup>232</sup> all four modifiers, including “whether in a single instrument or in multiple instruments” modify the word “agreement.” In other words, the agreement can be comprised of multiple instruments and whether that agreement satisfies the elements of an “investment agreement” under the Treaty must be viewed holistically across the instruments.

123. If every instrument that constitutes an “investment agreement” were required to satisfy all of the elements of an investment agreement by itself, there would be no reason to provide that an “investment agreement” could be comprised of multiple instruments, because each of the component parts could stand by itself. The “multiple instruments” language would be rendered superfluous and without effect, contrary to accepted canons of interpretation (*effet utile*). As the Tribunal noted at paragraph 177 of its Scope Decision, “the principle of effectiveness (*effet utile*) is broadly accepted as a fundamental principle of treaty interpretation.”

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<sup>230</sup> Peru’s 10.20(4) Objection at ¶ 39.

<sup>231</sup> **CLA-001**, Treaty, Article 10.28 n.16.

<sup>232</sup> **CLA-085**, Justice Antonin Scalia & Bryan A. Garner, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 147-51 (2012).

124. This interpretation comports with the Treaty’s structure, purpose, and context, which recognize and address the fact that investments in natural resources, public services, and infrastructure are complex transactions that inevitably involve multiple legal instruments and documents that combine to form a single investment transaction. This interpretation also is consistent with the second sentence in the definition of “written agreement” at footnote 16, which clarifies that the requirement of a mutual exchange of rights and obligations is not to ensure that every instrument that comprises an “investment agreement” contain such an exchange, but rather to exclude unilateral acts of state “standing alone”: “For greater certainty, (a) a unilateral act of an administrative or judicial authority, such as a permit, license, or authorization issued by a Party solely in its regulatory capacity, or a decree, order, or judgment, standing alone; and (b) an administrative or judicial decree or order, shall not be considered a written agreement.”<sup>233</sup> The Treaty’s negotiating history confirms this interpretation by stating that all contracts related to a mining concession on which an investor relies fall within the concept of “investment agreement” and nothing in that history suggests that related contracts on which the investor relies will not comprise part of the “investment agreement” if they fail to contain all of the elements of an “investment agreement” in isolation.<sup>234</sup>

125. An alternative interpretation, consistent with the “Nearest-Reasonable-Referent” Canon,<sup>235</sup> is that the phrase “whether in a single instrument or in multiple instruments” modifies the phrase that immediately precedes it—namely “executed by both parties.” In other words, the single-or-multiple-instruments phrase merely requires that “a national authority” and a “covered investment” or “investor” have executed one of the multiple instruments that comprise the “investment agreement.” Yet that tenable, though more implausible, interpretation still does not support Peru’s interpretation, which seeks to dissociate the Guaranty Agreement from the Stock Transfer Agreement by impermissibly viewing them in isolation as though they concerned two completely unrelated investments. Indeed, no reasonable interpretation of the Treaty’s text supports Peru’s position that each and every instrument that comprises an “investment agreement” must be with a national authority or must create an exchange of rights and

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<sup>233</sup> **CLA-001**, Treaty, Article 10.28 n.16.

<sup>234</sup> **Exhibit C-196**, 13th (final) Round of Negotiations of the Treaty (emphasis added).

<sup>235</sup> **CLA-085**, Justice Antonin Scalia & Bryan A. Garner, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 152-53 (2012).

obligations. The word “each” does not appear in the Treaty’s definition of “written agreement.” And in all events, the requirement that the agreement be between a national authority and a covered investment or investor is an element of an “investment agreement”; it is not an element of the more narrow, sub-element “written agreement” as defined in footnote 16 of the Treaty. Peru makes no effort in its submission to articulate how its interpretation comports with the Treaty’s structure, context, purpose, or history, because it does not.

**B. THE STOCK TRANSFER AGREEMENT AND THE GUARANTY AGREEMENT TOGETHER CONSTITUTE AN “INVESTMENT AGREEMENT” UNDER ARTICLE 10.28 OF THE TREATY**

126. As stated above, the Treaty’s definition of “investment agreement” in Article 10.28 essentially contains four elements: (1) a written agreement, (2) between a national authority and a covered investment or investor, (3) on which the investment or investor relies in making the investment, and (4) that grants rights regarding natural resources, public services, or infrastructure. Having established that an investment agreement may be comprised of multiple instruments, Claimant sets forth below why the Stock Transfer Agreement (including its annexes) and the Guaranty Agreement together satisfy these four elements.

**1. A “Written Agreement”**

127. The Treaty defines a “written agreement” as an “agreement in writing, executed by both parties, whether in a single instrument or multiple instruments, that creates an exchange of rights and obligations, binding on both parties under the law applicable under Article 10.22.2.”<sup>236</sup> The Stock Transfer Agreement, the concessions, licenses and all other documents in its annexes, and the Guaranty Agreement are all “in writing.” The covered investment (Doe Run Peru) is a party to all of these instruments, Renco executed the Stock Transfer Agreement, and Peru is a party to the Guaranty Agreement and several of the annexed concessions. All of these instruments combine to create rights and obligations on the covered investment and on Peru. Therefore, the Stock Transfer Agreement, the annexed concessions, and the Guaranty Agreement constitute a “written agreement” under the treaty’s definition of “investment agreement.”

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<sup>236</sup> CLA-001, Treaty, Article 10.28 n.16.

## 2. “Between a National Authority of a Party and a Covered Investment or an Investor of Another Party”

128. The Treaty defines a “national authority” as “an authority at the central level of government.”<sup>237</sup> The State of Peru executed the Guaranty Agreement. Peru’s Ministry of Energy & Mines, its Ministry of Agriculture, and its Ministry of Health—all authorities at the central level of the Peruvian government—executed the mining concessions and licenses for water use that are annexed to the Stock Transfer Agreement and that are transferred from Centromin to Metaloroya.<sup>238</sup> And as detailed below at paragraph 136, Peru—as a national authority—directly and indirectly through its organs, ministries, and instrumentalities, dictated the terms of the privatization of Metaloroya, effectuated the transfer of the requisite concessions, licenses, and permits from Centromin to Metaloroya, and ultimately caused Centromin to execute the Stock Transfer Agreement. More importantly, the Stock Transfer Agreement is one of many related instruments, and national authorities of Peru are parties to several of those related instruments, including the Guaranty Agreement signed by the Republic itself.

129. The Treaty does not provide that an “investment agreement” must include both a “covered investment” and an “investor” as parties to the agreement. Rather, Article 10.28 of the Treaty uses the disjunctive “or” thereby providing that either the “covered investment” or the “investor” must be a party to the “investment agreement.” The terms of the Treaty make it clear that it is sufficient for Renco’s “covered investment” to be a party to each of the instruments that comprise an investment agreement, which is precisely the case here. Doe Run Peru is Renco’s covered investment, and Doe Run Peru is a party to the Stock Transfer Agreement, the annexed concessions and related rights, and the Guaranty Agreement.

130. Moreover, Renco was a signatory to the Stock Transfer Agreement. Specifically, while Jeffery Zelms signed the Stock Transfer Agreement on behalf of Doe Run Peru and Doe Run Resources Corporation, Marvin Koenig signed the Stock Transfer Agreement on behalf of the Renco Group Inc.<sup>239</sup> Renco’s subsequent release of obligations under the Stock Transfer Agreement does not nullify or negate its signature of the Stock Transfer Agreement for purposes

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<sup>237</sup> *Id.*, Article 10.28 n.17.

<sup>238</sup> **Exhibit C-002**, Stock Transfer Agreement, Clause 8.5 at 38-29. *See also* **Exhibit C-197**, Stock Transfer Agreement, Annex 8.5.

<sup>239</sup> **Exhibit C-002**, Stock Transfer Agreement at 67.

of this analysis. Renco’s signature of the Stock Transfer Agreement is sufficient to satisfy this prong of the definition of “investment agreement,” and in all events, Renco retains rights under the Stock Transfer Agreement as set forth in Section VI.B. below.

**3. “On Which the Covered Investment or the Investor Relies in Establishing or Acquiring a Covered Investment”**

131. Renco relied on Centromin’s commitments in the Stock Transfer Agreement, the rights and obligations set forth in the annexed concessions and other governmental authorizations, and Peru’s commitments in the Guaranty Agreement when it acquired the Complex. Renco “would not proceed with the purchase” unless Centromin retained and assumed liability for third-party claims,<sup>240</sup> and “unless Centromin agreed (1) to retain and assume liability for all third party claims relating to historical contamination and (2) to remediate the areas in and around the town of La Oroya.”<sup>241</sup> These terms were a “deal-breaker” for Renco.<sup>242</sup> The Guaranty Agreement “was also a key condition insisted upon by Renco and Doe Run Resources and without which, we *never* would have executed” the Stock Transfer Agreement.<sup>243</sup> Given these facts, which must all be assumed true, the reliance element of the definition of “investment agreement” is satisfied.

**4. “That Grants Rights to the Covered Investment or Investor...”**

132. Peru argues that neither the Stock Transfer Agreement nor the Guaranty Agreement grants rights to natural resources, public services, or infrastructure.<sup>244</sup> According to Peru, “these instruments are not concession contracts, nor are they licenses.”<sup>245</sup> But Peru’s argument ignores that the Stock Transfer Agreement confirmed the transfer of several concessions, licenses, and other governmental authorizations, which it incorporates in its annexes and which form an “integral part of the contract.”<sup>246</sup> The concessions grant Renco’s covered investment the right to do one or more of the following: explore, extract, refine, transport,

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<sup>240</sup> Sadlowski Witness Stmt. at ¶ 23.

<sup>241</sup> Buckley Witness Stmt. at ¶ 12.

<sup>242</sup> *Id.* at ¶ 12.

<sup>243</sup> Sadlowski Witness Stmt. at ¶ 12 (emphasis in original).

<sup>244</sup> Peru 10.20(4) Objection at ¶ 29.

<sup>245</sup> *Id.*

<sup>246</sup> **Exhibit C-002**, Stock Transfer Agreement, Clause 18.4.

distribute, and sell natural resources that Peru and the Ministry of Energy and Mines control. As such, that grant satisfies category (a) (natural resources) in the definition of “investment agreement.”

133. Although the grant of rights falling within category (a) is sufficient, the investment agreement also granted Renco’s covered investment rights that satisfy the other two categories of rights that the Treaty references. Category (b) concerns rights to supply services to the public on behalf of the State, and it lists water treatment as one example.<sup>247</sup> In acquiring the Complex, Doe Run Peru assumed obligations to undertake several environmental projects—including water treatment projects—that benefitted the local population. Before Doe Run Peru acquired the Complex, those obligations lay with Peru and its wholly State-owned companies. Similarly, category (c) in the definition of “investment agreement” concerns rights to undertake infrastructure projects that are not for the exclusive or predominant use or benefit of the government.<sup>248</sup> Here, Renco’s covered investment acquired rights and obligations to implement massive upgrades to a complex poly-metallic refining facility that fuels the local and national economy and, in particular, to build infrastructure that would protect the health of the local population. Therefore, Renco’s investment agreement satisfies this sub-element of the definition of “investment agreement” under the Treaty.

134. In sum, the instruments that comprise Renco’s investment agreement are in writing, and national authorities of Peru are parties to them, together with Renco’s covered investment. Renco executed the Stock Transfer Agreement, and Renco relied on these instruments when it made its investment, and those instruments grant rights to Renco’s covered investment that satisfy all three categories of rights set forth in the Treaty’s definition of “investment agreement.” Thus, Renco’s investment agreement is an investment agreement under Article 10.28 of the Treaty. At minimum, these disputed issues of fact concerning the scope and extent of rights transferred by the Stock Purchase Agreement and Guaranty preclude resolution of these issues as a matter of law.

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<sup>247</sup> **CLA-001**, Treaty, Article 10.28.

<sup>248</sup> *Id.*

### C. THE STOCK TRANSFER AGREEMENT IS AN INVESTMENT AGREEMENT

135. Even if, as Peru argues, the Stock Transfer Agreement were to be considered in isolation—which it should not be for the reasons set forth in this Supplemental Opposition—the Stock Transfer Agreement contains all of the required elements of an “investment agreement” within the definition of the Treaty.

136. The Stock Transfer Agreement is a “written agreement” executed by both a covered investment (Doe Run Peru) and a national authority (Peru, through Centromin), which creates a mutual exchange of rights and obligations. Peru argues that the Stock Transfer Agreement is not an “investment agreement” because no “national authority” is a party to it.<sup>249</sup> Peru’s argument, however, is pedantic. Centromin was created specifically to own Peru’s nationalized assets; it was wholly owned by the State; it was required to promote the economic development of the regions where it operated; and it was empowered to “hold Special Rights of the State according to applicable public policy rules.”<sup>250</sup> Peru—through COPRI, CEPRI, and its Ministry of Energy & Mines—decided to privatize the Complex, dictated the terms of the bidding process, and negotiated the terms of the Stock Transfer Agreement (all the whilst Centromin, as an instrument of Peru’s privatization strategy, pliantly obliged). A national authority controlled Centromin when it executed the Stock Transfer Agreement, the Peruvian State guaranteed Centromin’s obligations under the Stock Transfer Agreement, and the Ministries of Energy & Mines, Agriculture, and Health—all authorities at the central level of the Peruvian government—granted the numerous concessions and other rights that are listed at Annex 8.5 of the Stock Transfer Agreement,<sup>251</sup> that are transferred from Centromin to Metaloroya,<sup>252</sup> and that “are incorporated into and form an integral part of this contract [the Stock Transfer Agreement].”<sup>253</sup>

137. Renco relied on the Stock Transfer Agreement (including the concessions, licenses, and other permits that are transferred in connection to it) when making its investment.

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<sup>249</sup> Peru 10.20(4) Objection at ¶ 28.

<sup>250</sup> **Exhibit C-192**, Supreme Decree No. 019-82-EM/VM, Article 2.

<sup>251</sup> **Exhibit C-197**, Stock Transfer Agreement, Annex 8.5.

<sup>252</sup> **Exhibit C-002**, Stock Transfer Agreement, Clause 8.5 at 38-39.

<sup>253</sup> *Id.*, Clause 18.4 at 65.

138. Finally, as detailed above,<sup>254</sup> the Stock Transfer Agreement grants rights that relate to natural resources, public services, and infrastructure.

#### **D. THE GUARANTY AGREEMENT IS AN INVESTMENT AGREEMENT**

139. Although the Guaranty Agreement should be interpreted as one instrument among others that combine to comprise Renco’s investment agreement, the Guaranty Agreement on its own also contains all of the required elements of an investment agreement. First, the Guaranty Agreement is a “written agreement.” It is in writing. Both Peru and a covered investment (Doe Run Peru) executed it, and it creates a mutual exchange of rights and obligations. As noted above, the last sentence of footnote 16 to Article 10.28 of the Treaty, which defines an “investment agreement,” specifies “[f]or greater certainty” that certain unilateral acts of state should not be considered a “written agreement.”<sup>255</sup> Although Peru could have granted its guarantee to Renco in the form of a unilateral act, it did not do so. The Guaranty Agreement is expressly structured as a bilateral contract between the State of Peru and Doe Run Peru. The preamble confirms that this is a bilateral contract, not a unilateral act: “THE STATE, as party to the first part” and “DOE RUN PERU S.R. LTDA...as the second party.”<sup>256</sup> Moreover, the fourth clause of the Guaranty Agreement states that this instrument is a “contract.”<sup>257</sup>

140. Second, the Guaranty Agreement is a written agreement between a “national authority”—Peru—and Renco’s “covered investment”—Doe Run Peru.

141. Third, Renco relied on the Guaranty Agreement when making its investment.<sup>258</sup>

142. Finally, the Guaranty Agreement grants rights—specifically, a guarantee of contractual obligations—that related to natural resources, public services, and infrastructure.<sup>259</sup>

143. Peru does not argue in its submission that any of these elements are lacking with respect to the Guaranty Agreement or that the Guaranty Agreement per se is not an “investment

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<sup>254</sup> See *supra* ¶¶ 132-134.

<sup>255</sup> **CLA-001**, Treaty, Article 10.28 n.16.

<sup>256</sup> **Exhibit C-003**, Guaranty Agreement, Preamble.

<sup>257</sup> *Id.*, Article 4.

<sup>258</sup> Sadlowski Witness Stmt. at ¶¶ 12, 23; Buckley Witness Stmt. at ¶ 12. See also *supra* ¶ 131.

<sup>259</sup> See *supra* ¶¶ 132-134.

agreement.” Instead, Peru argues that Renco may not assert claims for breach of the Guaranty Agreement.<sup>260</sup> Renco addresses this separate issue in the next section.

## **VI. RENCO HAS STANDING TO ASSERT CLAIMS UNDER THE TREATY FOR BREACH OF THE INVESTMENT AGREEMENT**

144. Chapter 10 of the Treaty provides for the protection of U.S. investors’ investments in Peru and for the arbitration of investment disputes between U.S. investors and Peru. Specifically, Article 10.16.1 of the Treaty provides as follows:

In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation –

- (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim
    - (i) that the respondent has breached
      - (A) an obligation under Section A,
      - (B) an investment authorization, or
      - (C) an investment agreement; and
    - (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach,
- [ . . . ]

provided that a claimant may submit pursuant to subparagraph (a)(i)(C) or (b)(i)(C) a claim for breach of an investment agreement only if the subject matter of the claim and the claimed damages directly relate to the covered investment that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement.

145. An investor-claimant thus has standing to commence arbitration on its own behalf if it has (i) a claim that the respondent state breached an investment agreement, and (ii) that breach has caused loss or damage to the investor-claimant. As the *Waste Management* tribunal stated with respect to an analogous provision (Article 1116) in the NAFTA, “it is sufficient that the investor has the nationality of a Party and has suffered loss or damage as a result of action in

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<sup>260</sup> Peru 10.20(4) Objection at ¶ 32.

breach of one of the specified obligations . . . the extent of that loss or damage is a matter of quantum, not jurisdiction.”<sup>261</sup>

146. As detailed below, accepting all allegations in Renco’s submissions to date to be true—as the Tribunal must—Renco has made a viable claim that Peru has breached the Stock Transfer Agreement and the Guaranty Agreement, together an investment agreement, and that this breach has caused Renco damage.

#### **A. RENCO HAS A CLAIM THAT PERU BREACHED AN INVESTMENT AGREEMENT**

147. Clauses 6.2 and 6.3 of the Stock Transfer Agreement were negotiated and included in the Stock Transfer Agreement to allocate liability for third-party claims to Centromin. Centromin’s assumption of liability, which has the full backing of the State, is broad, and it extends to Renco. Without it, and without Peru’s guarantee of Centromin’s obligations, Renco would not have acquired Metaloroya. Activos Mineros’ failure to assume responsibility for the St. Louis Lawsuits constitutes a breach of the Stock Transfer Agreement, and Peru’s failure to ensure Activos Mineros’ performance of its contractual obligations constitutes a breach of the Guaranty Agreement.

148. Peru raises a number of arguments to attack Renco’s claim for breach of an investment agreement under Article 10.16.1(a)(i)(C), but these arguments are essentially the same as those which Peru raises to challenge the existence of an investment agreement in the first instance.

#### **1. Peru Has Obligations Under the Stock Transfer Agreement**

149. Peru argues first that, as a matter of law, Peru cannot breach the Stock Transfer Agreement because it is not a party to the contract and has no obligations thereunder.<sup>262</sup> However, the Stock Transfer Agreement does not exist in a vacuum. The Stock Transfer Agreement and the Guaranty Agreement go hand-in-hand and were executed as part of the same deal, as is clear not only from the negotiating history of these agreements but from their very terms. The Stock Transfer Agreement expressly states that Peru is “obliged to guarantee all of

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<sup>261</sup> **CLA-014**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, Apr. 30, 2004, ¶ 83 (Benjamin Civiletti, Eduardo Magallón Gómez, James Crawford (President)).

<sup>262</sup> Peru’s 10.20(4) Objection at ¶ 42.

the obligations of Centromin under this contract, and said [G]uaranty shall survive the transfer of any of the rights and obligations of Centromin and any liquidation of Centromin.”<sup>263</sup> This is precisely what Peru did in the Guaranty Agreement: it guaranteed all of the “representations, assurances, guarantees and obligations” that Centromin had assumed in the Stock Transfer Agreement.<sup>264</sup> Contrary to Peru’s assertions, Peru absolutely has obligations under the Stock Transfer Agreement: it is “obliged to guarantee all of the obligations of Centromin under this contract.”<sup>265</sup> The exact terms of that guarantee are set forth in the Guaranty Agreement.

150. As detailed above, the Stock Transfer Agreement and the Guaranty Agreement together form an investment agreement and impose specific obligations on Peru. Peru’s failure to guarantee Centromin’s obligation to remediate the areas surrounding La Oroya and to assume liability for third-party claims and mounting legal fees and costs in the St. Louis Lawsuits constitutes a breach of the investment agreement. To allow Peru to disassociate the Guaranty Agreement and the Stock Transfer Agreement would be counter to the Treaty, the terms of the Stock Transfer Agreement and Guaranty Agreement, the reality of the deal that was executed, and of the intent of the parties.

## **2. Renco Has Rights Under the Stock Transfer Agreement**

151. Peru then argues that, even if it could be treated as a party to the Stock Transfer Agreement, the contractual obligations that Centromin retained and assumed (and today, its successor Activos Mineros) run only to Doe Run Peru and to DRC Ltd., not to Renco.<sup>266</sup> Peru further argues that Peru could not have breached any obligations to Renco under the Stock Transfer Agreement because Renco was released as a guarantor and thus has no rights or obligations thereunder.<sup>267</sup> Peru makes a similar argument in connection with the Guaranty Agreement, namely that Peru could not have breached any obligation to Renco under the Guaranty Agreement because Renco is not a party to it and has no rights under it.<sup>268</sup>

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<sup>263</sup> **Exhibit C-002**, Stock Transfer Agreement, Clause 10 at 58 (emphasis added).

<sup>264</sup> **Exhibit C-003**, Guaranty Agreement, Article 2.1.

<sup>265</sup> **Exhibit C-002**, Stock Transfer Agreement, Clause 10 at 58.

<sup>266</sup> Peru’s 10.20(4) Objection at ¶ 43.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.* at ¶¶ 36, 62-63.

152. Again, Peru recasts one of the arguments that it advances for why there is no investment agreement—namely, that Renco is not a party to the agreements at issue here—into an argument for why there is no *breach* of an investment agreement as a matter of law. However framed, the response to this argument is the same: there is no requirement in the definition of “investment agreement” that the investor under the Treaty (Renco) be a party to the investment agreement. Article 10.28 defines investment agreement as an agreement between a national authority and a “covered investment or an investor of another Party.” The use of the disjunctive makes it clear that it is sufficient that a “covered investment” be a party to the investment agreement. The parties to the Treaty expressly adopted an expansive definition of “investment agreement” to ensure that a qualifying investor like a parent company (Renco) would benefit from the protections of the Treaty even if the State were to require the investor to enter into the investment agreement through a local subsidiary (Doe Run Peru), which is what happened here. Peru required the Renco Consortium to establish a local, Peruvian entity to enter into the Stock Transfer Agreement to acquire the shares in Metaloroya. The Treaty’s broad definition of “investment agreement” closes a loophole in the extant of Treaty protections that otherwise would be created by this requirement of local incorporation: it was intended to prevent a State from eviscerating the protections afforded to an investment agreement simply by always requiring a local subsidiary as a contractual counterparty and never entering into a contract directly with the foreign investor.

153. And there is nothing in the language of Article 10.16.1(a)(i)(C) that limits a claimant’s or investor’s standing to bring a claim on its own behalf to a claim that the State breached an investment agreement entered into only with the claimant-investor. Article 10.16.1(a)(i)(C) refers to a claim that the respondent State “breached an investment agreement,” which in turn is defined in Article 10.28 of the Treaty, as detailed above. Whether Renco is a signatory to the Stock Transfer Agreement (which it was) and/or the Guaranty Agreement is inapposite. Renco’s covered investment—Doe Run Peru<sup>269</sup>—is a signatory to the Stock Transfer Agreement and the Guaranty Agreement, and that is sufficient to satisfy that element of the definition of “investment agreement.” As the *Waste Management* tribunal noted, “[w]here a

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<sup>269</sup> Doe Run Cayman Ltd., to which Doe Run Peru assigned its rights and obligations under the Stock Transfer Agreement on June 1, 2001, is also a “covered investment” under Article 10.28 of the Treaty for the same reasons that Doe Run Peru is an “investment” under the Treaty. See Claimant’s Memorial on Liability at ¶¶ 219-220.

treaty spells out in detail and with precision the requirements for maintaining a claim, there is no room for implying into the treaty additional requirements, whether based on alleged requirements of general international law in the field of diplomatic protection or otherwise.”<sup>270</sup>

154. In all events, as detailed in Renco’s Opposition, the Claimant Renco *has* rights under the Stock Transfer Agreement, and this fact undermines Peru’s factual argument that Renco does not have any rights under the Stock Transfer Agreement (and consequently under the Guaranty Agreement). At minimum, this is a disputed fact that cannot be decided under Article 10.20(4) of the Treaty where all of Renco’s allegations are taken as true.

155. Peru’s expert, Professor Cárdenas, cites to Article 1363 of the Civil Code for the proposition that “the parties to a contract are the only ones entitled to demand performance of the obligations arising from the contract.”<sup>271</sup> He concludes that because Renco and Doe Run Resources are not parties to the Stock Transfer Agreement, they “cannot demand performance from Centromin/Activos Mineros of its obligation to assume responsibility for third-party claims attributable to the activities of the Company...”<sup>272</sup> He also states, “my view is that it is not possible to conclude that the obligations and warranties contained in the Contract apply to parties other than those mentioned in the relevant clauses of the Contract. An interpretation according to the express words of the Contract does not allow such conclusion.”<sup>273</sup> Professor Cárdenas further asserts that Renco and Doe Run Resources “were involved in the Contract, solely and exclusively, in order to establish themselves as guarantors of the buyer/Investor (DRP).”<sup>274</sup>

156. Putting aside the fact that Professor Cárdenas’s legal analysis is incorrect for the reasons set forth below, Renco’s expert, Dr. Fernando de Trazegnies, concludes that Renco did indeed receive rights under the express terms of the Stock Transfer Agreement. Dr. de Trazegnies has been the Principal Professor of Law of Pontificia Universidad Católica of Peru since 1964. He is one of the most prominent legal scholars in Peru, and Latin America. In addition to his many academic posts, Dr. de Trazegnies was a member of the Official

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<sup>270</sup> **CLA-014**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, Apr. 30, 2004, ¶ 85.

<sup>271</sup> Legal Opinion of Carlos Cárdenas Quirós, Feb. 20, 2015, §III.B.2 at 12-14 (“Cárdenas Opinion”).

<sup>272</sup> *Id.* at 13.

<sup>273</sup> *Id.* at 14

<sup>274</sup> *Id.* at 10.

Commission for the reform of the Peruvian Civil Code which has been in force in Peru since 1964.

157. In reaching his conclusion, Dr. de Trazegnies takes into account the following facts, among others: (i) Doe Run Peru was formed in order to comply with Peruvian law that the company receiving property (the shares of Metaloroya) must be a Peruvian company; (ii) the bidding process was managed by Renco; (iii) the Stock Transfer Agreement was negotiated point by point by Renco; (iv) Doe Run Peru was created afterwards; (v) Renco intervened directly and signed the Stock Transfer Agreement; (vi) based on the language of the Stock Transfer Agreement, Renco would benefit from the provisions of the Stock Transfer Agreement exempting it from liability for third-party claims; and (vii) witness testimony in the arbitration supports this interpretation of the Stock Transfer Agreement.<sup>275</sup>

158. Thus, Dr. de Trazegnies concludes that based on all of these facts and circumstances “it cannot be said that the role of Renco and Doe Run Resources was necessarily limited to appearing in the CONTRACT to grant a guarantee to the Peruvian Government.”<sup>276</sup> In any event, there is simply nothing that suggests that Renco and Doe Run Resources signed the Stock Transfer Agreement for the “sole purpose” of establishing themselves as guarantors and that, because Renco was released as a guarantor, it “no longer had any role in the contract.”<sup>277</sup>

159. To the contrary, Dr. de Trazegnies concludes:

Thus, it is possible to interpret that the obligations and liabilities contracted by CENTROMIN in the CONTRACT were not only with D[oe] R[un] P[eru], but rather the two foreign companies intervened directly and also signed the CONTRACT. According to what the witnesses have stated, it was clear to all parties involved in the CONTRACT, without there being any doubt whatsoever that Renco and Doe Run Resources would also benefit from the provisions of the CONTRACT that exempted them from liability for prior environmental damages and for such as occurred through the end of the PAMA.<sup>278</sup>

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<sup>275</sup> Legal Report of Dr. Fernando de Trazegnies, Apr. 14, 2015, §5.4 at 19-20 (“Dr. de Trazegnies Report”).

<sup>276</sup> *Id.*, §5.4 at 20.

<sup>277</sup> Cárdenas Opinion, §I.A at 3. *See also* Peru’s 10.20(4) Objection at ¶ 30.

<sup>278</sup> Dr. de Trazegnies Report, §5.4 at 20.

160. Even if one were to assume that Renco was not a party to the Stock Transfer Agreement (which it was), the principle of contractual privity under Peruvian law, referenced by Professor Cárdenas, is not absolute.<sup>279</sup> In certain cases, contracts may confer rights upon third parties. For example, Articles 1457 to 1469 of the Civil Code refer expressly to contracts in favor of a third party.<sup>280</sup> That is, under Peruvian law, depending on the facts of the case, third parties may directly enforce contractual provisions contained in contracts to which they are not parties or where they did not participate.

161. Article 1457 of the Peruvian Civil Code states that:

In a contract in favor of a third party, the promisor commits to the promisee to perform an obligation in favor of a third party.<sup>281</sup>

Article 1457 thus recognizes that third parties may invoke rights under a contract. The doctrine of third-party beneficiaries is not unique to Peruvian law; it is widely recognized in various jurisdictions.<sup>282</sup>

162. The rights that accrue to Renco are detailed above and in Claimant's Memorial on Liability. Pursuant to Clauses 6.2 and 6.3 of the Stock Transfer Agreement, Centromin and Peru contractually agreed to retain and assume liability for all third-party claims arising from operation of the La Oroya Complex.<sup>283</sup>

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<sup>279</sup> Cárdenas Opinion, §II.B at 7.

<sup>280</sup> See, e.g., **Exhibit C-159**, Peruvian Civil Code, Article 1457.

<sup>281</sup> *Id.* (emphasis added).

<sup>282</sup> See, e.g., **Exhibit C-191**, French Civil Code, Article 1121. Article 1121 of the French Civil Code, which codifies the third-party beneficiary doctrine into French law, permits a party to a contract to confer a benefit, through that contract, onto a third party, even though that third party is not a party to the contract. Article 1121 states:

One may likewise stipulate for the benefit of a third party when such is the condition for a stipulation that one makes for oneself or for a donation which one makes to another. He who made that stipulation may no longer revoke it if the third party has declared that he wishes to take advantage of it.

See also Claimant's Memorial on Liability at ¶¶ 256-261 (citing various U.S. cases applying the third-party beneficiary doctrine). Compare Peru's 10.20(4) Objection at ¶¶ 52-56 with Claimant's Memorial on Liability at ¶¶ 255-261.

<sup>283</sup> Claimant's Memorial on Liability at ¶¶ 250-254, 259-261.

163. Peru accuses Renco of reading Clauses 6.2 and 6.3 of the Stock Transfer Agreement “in isolation” and urges that these provisions should be read together with Clauses 6.5 and 8.14, which extend Centromin’s indemnification obligation only to Doe Run Peru.<sup>284</sup> For Peru, because “the indemnification provisions in Clauses 6.2, 6.3 and 6.5 of the Contract do not name any party apart from the ‘Company,’ i.e., DRP, and do not specify any other category of covered party,” the Stock Transfer Agreement “does not express a ‘direct or clear intent to benefit’ anyone associated with the Renco Consortium.”<sup>285</sup>

164. In making these contentions, however, Peru ignores the clear distinction between assumption of liability clauses and indemnity and “hold harmless” clauses. An assumption of liability clause, such as Clause 6.2, is not only distinct from but also broader than, an indemnification provision, such as Clause 6.5.<sup>286</sup> Stock purchase agreements (such as the Stock Transfer Agreement at issue here) and asset purchase agreements (whereby one company purchases all or substantially all of another company’s assets) frequently contain an assumption of liability clause specifying whether third-party liabilities are to be retained by the seller or assumed by the buyer.<sup>287</sup> As Renco explained in its Memorial on Liability, it is well-settled that such clauses are distinct from, and broader than, indemnity and hold harmless clauses.<sup>288</sup> It is

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<sup>284</sup> Peru’s 10.20(4) Objection at ¶¶ 46-47.

<sup>285</sup> *Id.* at ¶ 55.

<sup>286</sup> See also Renco’s Opposition at Section III.C.5.

<sup>287</sup> See, e.g., **CLA-005**, *Caldwell Trucking PRP v. Rexon Technology Corp.*, 421 F.3d 234, 241-42 (3d Cir. 2005) (stock purchase agreement contained “retention of liabilities” clause specifying that seller “agrees to assume ... any and all liabilities and obligations ... arising out of or relating to ... any actual or alleged violation of or non-compliance by [the acquired company] with any Environmental Laws as of or prior to the Closing Date”); **CLA-006**, *Lee-Thomas, Inc. v. Hallmark Cards, Inc.*, 275 F.3d 702, 705 (8th Cir. 2002) (asset purchase agreement contained “assumption of liabilities” clause specifying that “buyer shall assume all the liabilities of the seller existing on the date of the closing, and liabilities arising solely out of the business conducted by seller prior to the closing”); **CLA-008**, *Thrifty Rent-A-Car System, Inc. v. Toye*, 1994 U.S. App. LEXIS 8034, at \*14-19 (10th Cir. Apr. 19, 1994) (asset purchase agreement contained “assumption of liability” clause specifying that “Buyer agrees to assume ... the liabilities listed on Exhibit C to this Agreement”).

<sup>288</sup> See Claimant’s Memorial on Liability, February 20, 2014 at ¶¶ 255-58. See also **CLA-005**, *Caldwell Trucking*, 421 F.3d at 243 (distinguishing between assumption of liabilities clause and indemnity provision in stock purchase agreement and holding that assumption of liabilities clause “has a more expansive scope than a mere indemnification provision”); **CLA-069**, *Goodman v. Challenger Int’l*, 1995 WL 402510, No. CIV. A. 94-1262, at \*4 (E.D. Pa. July 5, 1995) (noting that “courts have distinguished these assumption arrangements from mere indemnification agreements”), *aff’d*, 106 F.3d 385 (3d Cir. 1996); **CLA-009**, *Bouton v. Litton Industries Inc.*, 423 F.2d 643, 651 (3d Cir. 1970) (“[O]ne who assumes a liability, as distinguished from one who agrees to indemnify against it, takes the obligation of the transferor unto himself, including the obligation to conduct litigation.”).

also well-settled that assumption of liability clauses entitle third parties to assert claims directly against the party that has assumed (or retained) the relevant liability.<sup>289</sup>

165. Thus, Renco maintains that the language of the Stock Transfer Agreement, namely the broad language used in Clauses 6.2 and 6.3, corresponds to the common intention of the parties to grant Renco the protections contained therein.

166. Professor Cárdenas asserts that there is nothing in the Stock Transfer Agreement specifying *where* third-party claims that would trigger liability might be filed and that, accordingly, it is *implied* that such third-party claims would be initiated in Peru.<sup>290</sup> However, the absence of any limiting language in the Stock Transfer Agreement confirms exactly the opposite, *i.e.*, third-party claims could be filed anywhere. This is especially true in light of Mr. Sadlowski's testimony that:

We advised them we were concerned about, among other things, potential lawsuits against Renco and others in the United States, or elsewhere, and that without such protection we would not go forward with the deal. It was a challenge to explain to the government why such a clause would be necessary, given their background in Peruvian law. Nevertheless, and to ensure that the necessary clarification was there, Centromin agreed to draft 6.2 and 6.3 of the STA broadly, so that they encompassed claims against parent entities, or other third parties.<sup>291</sup>

167. Faced with a lack of geographically-limiting language in the Stock Transfer Agreement, Peru seeks to restrict Centromin's assumption of liability for third-party claims to claims brought in Peru on the basis that neither the Stock Transfer Agreement nor the Guaranty Agreement contains any express waiver of sovereign immunity from the jurisdiction of U.S.

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<sup>289</sup> See, e.g., **CLA-070**, *Girard v. Allis Chalmers Corp.*, 787 F. Supp. 482, 488-89 (W.D. Pa. 1992) ("It is ... indisputable that when an agreement provides for the assumption of 'all debts, obligations and liabilities,' it ... transfers direct responsibility for contingent product liability claims unless they are expressly excluded.") (emphasis added); **CLA-005**, *Caldwell Trucking*, 421 F.3d at 241-42 (third party entitled to assert contribution claim for environmental liabilities against polluter's former parent company on basis of former parent company's express assumption of environmental liabilities in stock purchase agreement); **CLA-006**, *Lee-Thomas*, 275 F.3d at 705-06 (third party entitled to assert product liability claims against purchaser of manufacturer's assets on basis of purchaser's express assumption of manufacturer's liabilities in asset purchase agreement); **CLA-071**, *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1425 (7th Cir. 1993) ("If ... the parties have specified whether liabilities are to be retained by the seller or assumed by the buyer, the court will enforce the specified allocation[.]").

<sup>290</sup> Cárdenas Opinion, §II.C at 15.

<sup>291</sup> Sadlowski Witness Stmt. at ¶ 27 (emphasis added).

courts under the Foreign Sovereign Immunities Act (“FSIA”).<sup>292</sup> This argument, however, misses the point entirely. There is nothing in either agreement or in the FSIA that prevents Peru from waiving its sovereign immunity at the time that it “exercise[s] its right to a defense” pursuant to Clause 8.14 of the Stock Transfer Agreement.<sup>293</sup> The fact that it did not do so preemptively in the agreements at issue does not preclude it from doing so at the time that it complies with its contractual obligations thereunder (and to do so in whatever jurisdiction may require it), or to compensate Renco for Peru’s failure and refusal to do so.

168. In conclusion, the Parties disagree whether the Stock Transfer Agreement requires Peru to assume liability for third-party claims asserted against Renco and Doe Run Resources. All of the facts submitted by Renco in support of its interpretation of the contractual language at issue are assumed to be true. This leads to the inexorable conclusion that Renco’s claim does not fail as a matter of law and Peru’s 10.20.(4) Objection must be dismissed.<sup>294</sup>

**B. RENCO HAS SUFFERED DAMAGE ARISING OUT OF PERU’S BREACHES OF AN INVESTMENT AGREEMENT**

169. As stated above, under Article 10.16.1(a)(i)(C) of the Treaty, an investor has standing to commence arbitration on its own behalf if it has a claim that the respondent State breached an investment agreement and that breach has caused loss or damage to the investor.

170. Several NAFTA tribunals have examined the latter element—that the breach caused loss or damage to the investor—particularly in the context of an investor being the sole owner of the investment (whether held directly or indirectly), as is the case here with Renco (investor) and Doe Run Peru (investment). In *Pope & Talbot*, the tribunal stated that “where the investor is the sole owner of the enterprise (which is a corporation, and thus an investment within the definitions contained in Articles 1139 and 201), it is plain that a claim for loss or damage to its interest in that enterprise/investment may be brought under Article 1116” of the NAFTA,<sup>295</sup> the analogous provision to Article 10.16.1(a) of the Treaty. In *UPS v. Canada*, Canada argued

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<sup>292</sup> Peru’s 10.20(4) Objection at ¶¶ 66-67.

<sup>293</sup> **Exhibit C-002**, Stock Transfer Agreement, Clause 8.14.

<sup>294</sup> See, e.g., *supra* n.204 (“when the language of a contract is ambiguous, its construction presents a question of fact, which of course precludes summary dismissal”).

<sup>295</sup> **CLA-086**, *Pope & Talbot Inc. v. Government of Canada*, Award in Respect of Damages, May 31, 2002, ¶ 80 (emphasis added) (Benjamin Greenberg, Murray Belman, Lord Dervaird (President)).

that the tribunal lacked jurisdiction because UPS had brought its claims on its own behalf under Article 1116 (analogous to Article 10.16.1(a) of the Treaty) rather than on behalf of its wholly-owned investment, UPS Canada, under NAFTA Article 1117 (analogous to Article 10.16.1(b) of the Treaty). Canada argued that “any harm flowing from the conduct complained of primarily affects UPS Canada rather than UPS.”<sup>296</sup> The tribunal rejected Canada’s jurisdictional objection and held that UPS had brought the claims properly on its own behalf under Article 1116.<sup>297</sup> For the tribunal, UPS was “entitled to file a claim for its losses, including losses incurred by UPS Canada,”<sup>298</sup> and “[w]hether the damage is directly to UPS or directly to UPS Canada and only indirectly to UPS is irrelevant to our jurisdiction over these claims.”<sup>299</sup>

171. Similarly, here, Renco is the sole ultimate owner of Doe Run Peru. It has suffered damage—both directly and indirectly—arising out of Peru’s breaches of the investment agreement. Centromin’s and Peru’s failure to remediate the areas surrounding La Oroya, and to assume liability for the St. Louis Lawsuits, has caused Renco and its affiliates to suffer damage in the form of years of ongoing litigation costs and expenses. Renco is continuing (and will continue) to suffer such damage as the litigation progresses, and the financial harm to Renco will increase further if the St. Louis Lawsuits culminate in a jury verdict or settlement. The fact that the damages will increase over time does not change the fact that damages exist currently.

172. Moreover, Peru’s failure to honor the *force majeure* clause in the Stock Transfer Agreement by failing to grant PAMA extensions to Doe Run Peru—as detailed further below<sup>300</sup>—also caused Renco substantial damage. The lack of PAMA extension forced Doe Run Peru to shut down operations at the Complex and ultimately enter involuntary bankruptcy. As a result, Renco lost control of its investment.

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<sup>296</sup> **CLA-087**, *United Parcel Service of America Inc. v. Government of Canada*, Award on the Merits, May 24, 2007, ¶ 32 (“*UPS v. Canada*”) (Ronald Cass, Yves Fortier, Kenneth Keith (President)).

<sup>297</sup> *Id.* at ¶ 35. See also **CLA-082**, *Mondev v. United States*, ¶¶ 82-83 (holding that Mondev had standing to bring its claim under Article 1116 of the NAFTA concerning the U.S. courts’ decisions that impacted its investment).

<sup>298</sup> **CLA-087**, *UPS v. Canada*, ¶ 35 (emphasis added).

<sup>299</sup> *Id.* (emphasis added). See also **CLA-082**, *Mondev v. United States*, ¶ 82 (“In the Tribunal’s view, it is certainly open to Mondev to show that it has suffered loss or damage by reason of the decisions it complains of, even if loss or damage was also suffered by the enterprise itself, LPA.”).

<sup>300</sup> See *infra* ¶¶ 211-214.

173. Renco thus has demonstrated that it has suffered damage arising out of Peru’s breaches of the Stock Transfer Agreement and Guaranty Agreement. The “extent of that loss or damage is a matter of quantum, not jurisdiction.”<sup>301</sup>

## VII. PERU BREACHED THE GUARANTY AGREEMENT

### A. CENTROMIN HAS BREACHED THE STOCK TRANSFER AGREEMENT, AND PERU HAS DONE NOTHING TO REMEDY THESE BREACHES

174. Peru argues that, because neither Doe Run Peru nor Doe Run Cayman is a defendant in the St. Louis Lawsuits, the obligations set forth in Clauses 6.2, 6.3, 6.3, and 8.14 of the Stock Transfer Agreement and Article 2.1 of the Guaranty Agreement “have not been triggered”<sup>302</sup> and, thus, Peru could not have breached the Guaranty Agreement as a matter of law.<sup>303</sup> But this argument rests on the erroneous premise that Centromin’s assumption of liability for third-party claims does not extend to Renco. As set forth in detail herein, however, Centromin’s assumption of liability for third-party claims is not limited to Doe Run Peru and Doe Run Cayman; it also covers Renco and its affiliates. This is evident in the plain language of Clauses 6.2 and 6.3, which contain no limiting terms, and in the parties’ negotiations of the deal, during which Centromin clarified in its answers to questions from bidders that it was assuming liability for third-party claims (without limitation) and Renco clarified that this assumption of liability was a *sine qua non* to its acquisition of the Complex.<sup>304</sup>

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<sup>301</sup> **CLA-014**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, Apr. 30, 2004, ¶ 83.

<sup>302</sup> Peru’s 10.20(4) Objection at ¶ 65.

<sup>303</sup> *See generally id.* at ¶¶ 62-67.

<sup>304</sup> *See* Sadlowski Witness Stmt. at ¶ 23 (“we communicated to Centromin and CEPRI representatives that we would not proceed with the purchase unless: (i) Centromin retained the liability, and undertook the responsibility, for remediation of the historical contamination in and around La Oroya; (ii) Centromin retained and assumed liability for any and all third-party claims related to the environmental condition at La Oroya (including, of course, claims against the entities conducting the negotiations—Renco and Doe Run Resources); *id.* at ¶ 12 (“Peru’s Guaranty of Centromin’s representations, assurances and obligations was also a key condition insisted upon by Renco and Doe Run Resources and without which, we *never* would have executed” the Stock Transfer Agreement); Buckley Witness Stmt. at ¶ 12 (“We made it very clear . . . that the Renco Consortium . . . would not agree to acquire the Complex[] unless Centromin agreed (1) to retain and assume liability for all third party claims relating to historical contamination and (2) to remediate the areas in and around the town of La Oroya”). *See also* Sadlowski Witness Stmt. at ¶ 38 (Renco “felt comfortable that [with the addition of Clauses 6.2 and 6.3,] it was clear that Centromin and Peru were retaining responsibility for all third-party claims against any party, including DRP’s parent entities. Any other understanding would be absurd”); *id.* at ¶ 42 (“Centromin specifically agreed that it would assume liability for all third-party claims.

175. Moreover, even if Activos Mineros’/Peru’s liability for third-party claims ran only in favor of Doe Run Peru (which is not the case), it still would be “triggered” due to Doe Run Peru’s obligation to indemnify all of the Renco Defendants in the St. Louis Lawsuits.<sup>305</sup> Doe Run Peru is itself obligated to indemnify the Renco Defendants for any judgment entered against them in the St. Louis Lawsuits, as well as for any fees and costs incurred in relation to the St. Louis Lawsuits, and in turn Centromin and Peru are obligated to indemnify Doe Run Peru under Clauses 6.5 and 8.14 of the Stock Transfer Agreement.<sup>306</sup> Doe Run Peru’s liability to its affiliates for these claims makes Activos Mineros and Peru ultimately liable—as they agreed to be.

**B. DRP’S 2001 ASSIGNMENT OF ITS RIGHTS AND OBLIGATIONS UNDER THE STOCK TRANSFER AGREEMENT DID NOT VOID THE GUARANTY AGREEMENT**

176. Peru argues that the Guaranty Agreement “has been rendered void as a result of DRP’s assignment to DRC Ltd. of its rights and obligations as the ‘Investor’ under the Contract,”<sup>307</sup> which Peru itself placed into the record, and that the Guaranty Agreement is thus void vis-à-vis all parties.<sup>308</sup> According to Peru, for the Guaranty Agreement to survive a transfer

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This assumption of liability was not limited to liability in favor of only [the local Peruvian entity] Doe Run Peru.”)

<sup>305</sup> **Exhibit C-067**, Letter from J. Carlos Huyhua (Doe Run Peru) to P. Sanchez Gamarra (Ministry of Energy & Mines) *et al.*, Nov. 19, 2010. *See also* **Exhibit C-054**, Letter from King & Spalding to Ministry of Energy & Mines, *et. al.*, Dec. 14, 2010 at 2 (notifying Doe Run Peru that, pursuant to applicable law, it is required to indemnify its parent entities and affiliates against any judgment entered against them and any ongoing costs incurred in the St. Louis Lawsuits).

<sup>306</sup> **Exhibit C-002**, Stock Transfer Agreement, Clause 6.5 at 28 and Clause 8.14 at 45-46.

<sup>307</sup> Peru’s 10.20(4) Objection at ¶ 59.

<sup>308</sup> Even if Doe Run Peru’s assignment could void the Guaranty Agreement (which it cannot), it would only be voided as regards Doe Run Peru and would have no impact on Renco’s claims. Peru undertook valid and binding commitments towards the Renco Consortium, not only towards Doe Run Peru, which was a local Peruvian subsidiary created by the Consortium for the specific purpose of acquiring the shares in Metaloroya, as Peru required under the bidding rules. Renco and Doe Run Resources were signatories to the Stock Transfer Agreement, pursuant to which they have rights that have not been assigned. As beneficiaries of the Guaranty Agreement, Renco and Doe Run Resources would still have a valid and enforceable claim under said guaranty, which remains in full force and effect to their benefit. There is no basis for voiding in full a guaranty to multiple beneficiaries because of the assignment by a single beneficiary.

This is confirmed by the terms of Article 1439 of the Peruvian Civil Code, were it applicable in this instance (which it is not) and had Peru not consented to the assignment (which it did). As cited by Peru, Article 1439 provides that “[t]he guarantees offered by a third party do not pass to the assignee without the express authorization of the third party.” By its own terms, Article 1439 does not invalidate, void, or extinguish the guarantees in case of assignment without approval. It only limits their effects with respect to the assignee, namely, the assignee will not benefit from the guarantees. Nothing in this provision suggests that the assignor’s co-beneficiaries of the guarantees (here, Renco and Doe Run Resources) would not be entitled to assert claims

of Doe Run Peru’s rights and obligations, “Peru, as the guarantor, must provide its express consent to that transfer, as required under Article 1439 of the Peruvian Civil Code,” which Peru asserts Doe Run Peru did not do.<sup>309</sup> Peru relies on the opinion of Professor Cárdenas,<sup>310</sup> and concludes that “Peru no longer has any obligations under it [the Guaranty].”<sup>311</sup>

177. In making this argument, Peru misinterprets Article 1439 of the Peruvian Civil Code in a manner that ignores its purpose, which is made clear by Peruvian legal academics. Peru’s express consent to the assignment from Doe Run Peru to Doe Run Cayman was not required under Peruvian law. Moreover, Peru granted its consent in the Stock Transfer Agreement. For both of these reasons, Peru’s objection fails.

### 1. Peru Is Not A “Third Party” With Respect to Centromin for Purposes of Article 1439 of the Civil Code

178. Article 1439 of the Peruvian Civil Code refers to guarantees offered by *third parties* in favor of the secured creditor: “[t]he guarantees offered by a third party do not pass to the assignee without the express authorization of the third party.”<sup>312</sup> The threshold question as to the applicability of Article 1439 to the Guaranty Agreement here is thus whether the Guaranty Agreement was “offered by a third party.”

179. As explained above,<sup>313</sup> Peru is not a “third-party” guarantor to the business deal that Renco and Peru reached and memorialized in the Stock Transfer Agreement. Peru—through COPRI, CEPRI, and its Ministry of Energy & Mines—decided to privatize Centromin, and when its attempt failed, it decided to privatize only the Complex (and Centromin pliantly followed Peru’s lead and change of strategy). The bidding procedures, the negotiations, and the final

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under the original guaranty. Peru’s argument reads into this provision text that is not there and contradicts Article 219 of the Peruvian Civil Code, which provides limited grounds for annulling a legal act. **Exhibit C-159**, Peruvian Civil Code, Article 219. None of the grounds for nullity is present here. Rather, Article 1439 specifically sets forth the consequence in case of non-approval to an assignment: the guarantees “do not pass” to the assignee. But they remain valid to the benefit of the original beneficiaries.

<sup>309</sup> Peru’s 10.20(4) Objection at ¶¶ 60-61. *See also id.* at ¶ 59 (“under article 1439 of the Peruvian Civil Code, the guarantees offered by third parties do not pass to the assignee without the express authorization of the third party.”).

<sup>310</sup> Cárdenas Opinion at 19-20.

<sup>311</sup> Peru’s 10.20(4) Objection at ¶ 60.

<sup>312</sup> **RLA-42**, Peruvian Civil Code, Article 1439 (“*Las garantías constituidas por terceras personas no pasan al cesionario sin la autorización expresa de aquellas*”).

<sup>313</sup> *See supra* Section II.

terms of the deal were all driven by Peru directly and indirectly through its various organs and instruments. For Renco, the State guaranty was a key component of the deal going forward: “Peru’s Guaranty of Centromin’s representations, assurances and obligations was also a key condition insisted upon by Renco and Doe Run Resources without which we *never* would have executed the STA.”<sup>314</sup>

180. Peru’s attempt to distance itself from the Stock Transfer Agreement by claiming today that it is a “third-party guarantor” ignores the realities of how this transaction transpired. Peru was not a “third” party—it was an *essential and necessary* party to the Stock Transfer Agreement and, of course, the Guaranty Agreement. It was one and the same with the debtor—Centromin—and Peru’s guarantee of Centromin’s obligations under the Stock Transfer Agreement was tantamount to the debtor guaranteeing its own obligations. Peru’s contractual position as debtor (nominally, through Centromin/Activos Mineros) under the Stock Transfer Agreement was not impacted by Doe Run Peru’s assignment to Doe Run Cayman. Peru’s obligations as debtor-guarantor remained the same. As acknowledged by Professor Luciano Barchi (whom Respondent cites) in his commentary to Article 1439 of the Peruvian Civil Code, upon the assignment of an agreement, “the guarantees granted by the debtor will survive, as well as the legal rules applicable to the legal and economic relationship.”<sup>315</sup>

181. In light of the above, Article 1439 of the Peruvian Civil Code is inapplicable to the Guaranty Agreement, and there is no valid basis to claim that the Guaranty Agreement was voided as a result of the 2001 assignment from Doe Run Peru to Doe Run Cayman. What *is* applicable, however, is Article 1211 of the Peruvian Civil Code, which governs here and sets forth the general principle that “the assignment of rights includes the transfer to the assignee of all privileges, *in rem* and personal guarantees and ancillary elements of the assigned rights, except for any provision to the contrary.”<sup>316</sup> Thus, an assignment of contractual position, as is the case here, includes all guarantees granted by the debtor, here the Guaranty Agreement.

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<sup>314</sup> Sadlowski Witness Stmt. ¶ 12 (emphasis in original).

<sup>315</sup> **CLA-088**, Luciano Barchi Velaochaga, Commentary to Article 1439 of the Civil Code, CÓDIGO CIVIL COMENTADO POR LOS 100 MEJORES ESPECIALISTAS 581 (Gaceta Jurídica, Lima 2011).

<sup>316</sup> **Exhibit C-159**, Peruvian Civil Code, Article 1211 (“*Artículo 1211.- La cesión de derechos comprende la transmisión al cesionario de los privilegios, las garantías reales y personales, así como los accesorios del*

## 2. Article 1439 of the Civil Code Applies Only When the Assignor is the Debtor of the Guaranteed Obligation, Not the Creditor

182. Even if Peru could be considered a “third-party guarantor” (which it is not), Article 1439 of the Civil Code still does not apply to the Guaranty Agreement because that provision is triggered only if the debtor—not the creditor—assigns its rights and obligations to another party. The purpose of Article 1439 requiring express consent from the guarantor in the event of an assignment is to protect the guarantor from the risk that the debtor will assign its guaranteed obligations to a party that may be unknown to the guarantor and that may have a greater risk of default, thereby exposing the guarantor to a greater risk that the guarantee will be called.

183. This is the example given by commentators to Article 1439 of the Peruvian Civil Code:

(...) according to article 1439 of the Civil Code, guarantees granted by third parties do not pass to the assignee without the guarantor’s consent. This is explained by a matter of trust, as described above. For example, if in a lease agreement “D” is the guarantor of the debt assumed by “A” in favor of “B” (which is to pay rent) and now “A”’s contractual position is assigned to “C”, it is not reasonable to oblige “D” to keep the guarantee originally granted in favor of “A”, now in favor of “C”. It is evident that “D” had a certain level of trust in “A”, but “C”, however, could be a complete stranger to “D”.<sup>317</sup>

As is clear from the above, Article 1439 aims to protect a guarantor that has already done diligence on the debtor’s solvency and ability to perform the contractual obligations that are to be guaranteed. If the identity of the debtor changes, it is fair to allow the guarantor to perform a new assessment of risk and decide whether the guarantee should remain in place for the new debtor. The same concerns are not present, however, if the identity of the secured creditor changes—the diligence underlying the guarantor’s decision to issue the guaranty is not impacted by a change of creditor, only by a change of debtor.

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*derecho transmitido, salvo pacto en contrario. En el caso de un bien dado en prenda, debe ser entregado al cesionario si estuviere en poder del cedente, mas no si estuviere en poder de un tercero.”)*

<sup>317</sup> CLA-089, Revista Jurídica del Perú, 94 GACETA JURÍDICA 426 (2008) (emphasis added).

184. In the case of the Stock Transfer Agreement and the Guaranty Agreement, express consent from Peru, the guarantor, would only be required in the event that Centromin (now Activos Mineros), the debtor of the guaranteed obligations, were to assign its rights and obligations under the Stock Transfer Agreement.

185. In fact, Clause 10 of the Stock Transfer Agreement confirms precisely this interpretation of Article 1439 of the Peruvian Civil Code when it specifies that “said guaranty shall survive the transfer of any of the rights and obligations of Centromin and any liquidation of Centromin.”<sup>318</sup> This is Peru (the guarantor) giving its express consent to the continued existence of the Guaranty Agreement in the event of a transfer or assignment of Centromin’s (the debtor’s) contractual rights and obligations. There is no analogous provision with respect to the transfer or assignment of Doe Run Peru’s (the creditor’s) rights or obligations precisely because express consent from Peru (the guarantor) is not necessary in the event of a change of secured creditor.

186. In any event, even if Peru’s consent were needed (which it was not), Peru granted this consent, in advance, in the terms of the Stock Transfer Agreement, in approving its text through CEPRI, in executing the agreement through Centromin, and in executing the Guaranty Agreement through the Ministry of Energy & Mines. Clause 10 of the Stock Transfer Agreement provides:

The Investor and the Company grant their approval, in advance, to the substitution of the contractual position derived from this contract or the assignment of the rights and/or obligations that might originate from it that Centromin might fulfill and Centromin grants the corresponding rights and approvals to the Investor and the Company, subject to applicable law and this contract in Numeral 7.2 above.<sup>319</sup>

In turn, Clause 7.2 provides that the “Investor” (Doe Run Peru) shall own, at all times until the investment commitment is fulfilled, at least 25% of Metaloroya’s shares, either directly or indirectly “by either member of the Consortium, or any subsidiary member of the group of companies owned directly or indirectly by them.”<sup>320</sup> This provision demonstrates that the parties

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<sup>318</sup> **Exhibit C-002**, Stock Transfer Agreement, Clause 10 (emphasis added).

<sup>319</sup> *Id.* (emphasis added).

<sup>320</sup> *Id.*, Clause 7.2 (emphasis added).

contemplated the possibility that a company affiliated with the Renco Consortium—*i.e.*, with Renco and Doe Run Resources—would hold the shares in the Complex in lieu of Doe Run Peru. Read together with Clause 10, it is clear that Peru (on its own and through Centromin) accepted and approved in advance Doe Run Peru’s assignment of its rights and obligations under the Stock Transfer Agreement to an affiliated company (here, Doe Run Cayman). Among the contractual rights that Doe Run Peru has and could assign (and did assign) is the right to be protected by the Guaranty Agreement as set forth in Clause 10: “By reason of Supreme Decree 042-97-PCM approved on September 19, 1997 in accordance with Decree Law No. 25570 and Act No. 26438, and the corresponding Guaranty Contract entered into under that Decree, the Government of Peru is obliged to guarantee all of the obligations of Centromin under this contract.”<sup>321</sup> And the Guaranty Agreement expressly recognized that it “shall be in force as long as, pursuant to the [Stock Transfer Agreement] mentioned in numeral 1.1. hereof, [Centromin] has pending obligations,”<sup>322</sup> which Centromin certainly has to this day.

187. Peru approved the text of the Stock Transfer Agreement and granted the Guaranty Agreement on the basis of that same text. For Peru to assert today that it did not consent to an assignment of the rights and obligations under the Stock Transfer Agreement contradicts the plain language of the parties’ agreements. It also makes no logical sense. If Article 1439 of the Peruvian Civil Code were to apply here, as Peru maintains today, why would Doe Run Peru secure approval to assign its contractual position under the Stock Transfer Agreement but, in doing so, jeopardize the continued protection of the Guaranty Agreement, which was “a key condition insisted upon by Renco and Doe Run Resources without which we *never* would have executed the [Stock Transfer Agreement]”<sup>323</sup>?

### C. RENCO’S CLAIMS FOR BREACH OF THE GUARANTY AGREEMENT ARE RIPE

188. Peru’s assertion that it could not have breached the Guaranty Agreement as a matter of law because Renco’s claims are not “ripe” is without merit. The first prong of Peru’s fourfold ripeness argument—namely that Renco must first seek but fail to obtain recovery from

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<sup>321</sup> *Id.*, Clause 10 (emphasis added).

<sup>322</sup> **Exhibit C-003**, Guaranty Agreement, Article 4.

<sup>323</sup> Sadlowski Witness Stmt. ¶ 12 (emphasis in original).

Activos Mineros before proceeding against the Republic of Peru<sup>324</sup>—rests on an erroneous interpretation of Peruvian law and fails on the basis of the facts alleged by Renco in these proceedings (which must be presumed true for present purposes) (Section C.1 below). Peru’s second ripeness argument, which relies on the requirement in the Stock Transfer Agreement to refer disputes to an expert procedure,<sup>325</sup> misconstrues the applicability of the expert procedure (Section C.2 below). Peru then challenges the ripeness of Renco’s claims by focusing on the absence of a judgment in the St. Louis Lawsuits and of damages awarded against Renco,<sup>326</sup> but Peru wholly ignores the fact that Renco has incurred and is continuing to incur millions of dollars of damages by litigating these Lawsuits (Section C.3 below). Finally, Peru’s argument that there can be no breach of the Guaranty Agreement on the basis that Peru failed to grant Doe Run Peru a PAMA extension for reasons of *force majeure* is equally without merit for the reasons set forth in Section C.4 below.

**1. Renco Can Seek Recovery from Peru Today under the Guaranty Agreement**

a. *The Guaranty Agreement is not a fianza (surety) agreement but a Privatization Government Guaranty*

189. Peru argues that Renco must seek (but fail) to obtain recovery from Activos Mineros before its claim against Peru may go forward because, pursuant to Articles 1868 and 1879 of the Peruvian Civil Code, all guaranties have a “subsidiary nature,” which means that “the creditor must proceed first against the principal debtor’.”<sup>327</sup> But Peru’s argument rests on the erroneous premise that the Guaranty Agreement is a *fianza* (surety) agreement, a specific type of personal guaranty that triggers the application of Articles 1868 and 1879 of the Peruvian Civil Code. However, as is explained below, the Guaranty Agreement is not a *fianza* (surety) agreement, but a very different type of guaranty.

190. The Guaranty Agreement is a specific type of government guaranty that is provided in the context of a privatization under a specific regulatory framework, constituted by Legislative Decree No. 674, Law Decree 25570, Law 26438 and Article 1357 of the Peruvian

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<sup>324</sup> Peru’s 10.20(4) Objection at ¶ 68.

<sup>325</sup> *Id.* at ¶ 69.

<sup>326</sup> *Id.* at ¶ 70.

<sup>327</sup> *Id.* at ¶ 68.

Civil Code. Law 26438 authorizes the State to execute contracts granting “assurances and guaranties” to individuals or legal entities in the context of privatizations and private investment in the public sector:

As set forth in article 1357 of the Civil Code, the State is authorized to execute contracts granting individuals and legal entities, local and foreign, who invest in State-owned companies or government entities included in the process referred to in Legislative Decree 674, under any form stated in article 2 of said Decree,<sup>328</sup> the assurances and guaranties approved by Supreme Decree and that may be deemed necessary in each case to protect their acquisitions and investments, according to current legislation.<sup>329</sup>

The State is thus expressly empowered to issue whatever guaranties may be necessary to protect private investments and are approved by supreme decree (Privatization Government Guaranties).

191. That is what happened with the Guaranty Agreement, which was executed on behalf of the Republic of Peru by the Ministry of Energy & Mines under express authorization granted by Supreme Decree No. 042-97-PCM.<sup>330</sup> The Guaranty Agreement itself makes reference to that applicable legal framework, as does the Stock Transfer Agreement.<sup>331</sup> Peru inexplicably ignores this language in the agreements and the applicable framework, seeking instead to apply legal provisions intended for a different type of guaranties (*fianza*, or surety, agreements). Peru cannot point to any reference in the Guaranty Agreement to the Peruvian Civil Code provisions on which it now relies in its 10.20(4) Objection. Nor does the Guaranty Agreement use the word “*fianza*” or any of its derivations, which would have been expected if the parties had intended for it to be a *fianza* agreement as Peru now maintains.

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<sup>328</sup> As detailed below, pursuant to Legislative Decree No. 674, State guaranties may only secure commitments contained, *inter alia*, in agreements that effectuate a full or partial transfer of government-owned shares or assets. *See infra* ¶ 199.

<sup>329</sup> **Exhibit C-198**, Law 26438, Article 6, amending Article 2 of Law 25570 (emphasis added) (“*Artículo 2.- De acuerdo a lo señalado en el Artículo 1357 del Código Civil, el Estado queda autorizado para otorgar mediante contrato, a las personas naturales y jurídicas, nacionales y extranjeras, que realicen inversiones en las empresas y entidades del Estado, incluidas en el proceso a que se refiere el Decreto Legislativo N° 674, bajo cualquiera de las modalidades previstas por el Artículo 2 de dicha norma, las seguridades y garantías que mediante Decreto Supremo, en cada caso, se consideren necesarias para proteger sus adquisiciones e inversiones, de acuerdo a la legislación vigente.*”).

<sup>330</sup> **Exhibit C-162**, Supreme Decree No. 042-97-PCM.

<sup>331</sup> **Exhibit C-003**, Guaranty Agreement, Article 1.2. *See also* **Exhibit C-002**, Stock Transfer Agreement, Clause 10 at 58 (referring to the Peruvian Government’s guarantee of all of Centromin’s contractual obligations issued “[b]y reason of Supreme Decree No. 042-97-PCM approved on September 19, 1997”).

192. Peru’s reliance on Articles 1868 and 1879 of the Peruvian Civil Code assumes that every guaranty (other than an *in rem* guaranty) under Peruvian law is a *fianza*. This is incorrect. *Fianza* (surety) agreements are only *one* of the most common types of personal guaranties under Peruvian law and are expressly regulated under the Peruvian Civil Code. It is not uncommon for parties to execute different types of guaranty agreements under Peruvian law that are *not* surety agreements, and there is nothing in Peruvian law that prevents parties from entering into such agreements. Privatization Government Guaranties are an example of such agreements: they are a special kind of guaranty, with their own purpose and their own regulatory framework. Another type of government guaranties are so-called “*garantías financieras*” or financial guaranties, which are also subject to their own rules, different from those that govern surety agreements.<sup>332</sup>

193. As Manuel De La Puente y Lavalle—cited by Respondent as a recognized authority in Peruvian civil law matters<sup>333</sup>—explained in 2004, guaranty agreements other than *fianza* (surety) agreements have become more commonplace in Peru: “in international trade, guaranty agreements have increasingly become more common; creating a distance between domestic legislation applicable to surety agreements”<sup>334</sup> and “this is a legislatively atypical contractual form that has however become socially typical in banking and, particularly, in international trade.”<sup>335</sup> As Professor De La Puente explained further, these guaranties are not subject to the limitations imposed by the Peruvian Civil Code on *fianza* (surety) agreements; on the contrary, under such contracts, “the guarantor, in these circumstances, has a formal

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<sup>332</sup> As the Ministry of Economy & Finance clearly explains, a financial guarantee is “*an assurance provided by the State which is unconditional and immediately enforceable (...) its purpose is to back the payment commitments assumed by the State in Concession Agreements.*” **Exhibit C-199**, Ministry of Economy & Finance’s webpage, Frequently Asked Question Number 40, retrieved from: [http://www.mef.gob.pe/index.php?option=com\\_quickfaq&view=items&cid=7%3Adeuda-publica&id=328%3A40-ique-es-una-garantia-financiera&lang=es](http://www.mef.gob.pe/index.php?option=com_quickfaq&view=items&cid=7%3Adeuda-publica&id=328%3A40-ique-es-una-garantia-financiera&lang=es). This definition is also used in article 10 of Legislative Decree 1012: “*Son aquellos aseguramientos de carácter incondicional y de ejecución inmediata, cuyo otorgamiento y contratación por el Estado tiene por objeto respaldar las obligaciones del privado, derivadas de préstamos o bonos emitidos para financiar los proyectos de APP, o para respaldar obligaciones de pago del Estado.*” **Exhibit C-200**, Legislative Decree 1012.

<sup>333</sup> Professor Cardenas, Respondent’s legal expert, refers to Manuel de la Puente as “one of the most eminent experts in the field of contract law in the country.” Cardenas Report, p. 6.

<sup>334</sup> **CLA-090**, Manuel de la Puente y Lavalle, *EL CONTRATO DE GARANTÍA* 207 (Themis 49, Lima, Asociación Civil Themis, 2004).

<sup>335</sup> *Id.* at 208 (emphasis added).

obligation with the beneficiary, the performance of which does not allow exceptions of any kind other than those arising from their direct relationship.<sup>336</sup>

194. Peruvian law thus recognizes that there are many different types of guaranties that are governed by different legal regimes, some of which provide for their subsidiary nature and some of which provide otherwise. For example, the Peruvian Civil Code regulates guaranties such as the antichresis,<sup>337</sup> mortgage,<sup>338</sup> right of retention,<sup>339</sup> and surety agreements (*fianzas*),<sup>340</sup> while the Securities Law (*Ley de Títulos Valores*) approved by Law 27287 regulates the *aval*, which is a form of guaranty that does not have a subsidiary nature.<sup>341</sup>

195. Professor Cardenas is well aware that a *fianza* (surety) agreement is not the only type of guaranty that exists under Peruvian law. In a scholarly publication, he recognized that “the term ‘guaranty’ comprises many different conceptions and applications in different areas of the law. Under a wide interpretation, it may include any mechanism oriented to protect or ensure satisfaction of a credit. (...) This objective is achieved by different mechanisms of a very diverse nature.”<sup>342</sup> It is surprising that in the report he submitted in these arbitral proceedings, Professor Cardenas simply *assumes* that the Guaranty Agreement is a *fianza* agreement, without considering the possibility that it may be a Privatization Government Guaranty as the legal regime expressly referenced in the Guaranty Agreement makes clear.

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<sup>336</sup> *Id.* at 207 (emphasis added).

<sup>337</sup> **Exhibit C-159**, Peruvian Civil Code, Article 1091.

<sup>338</sup> *Id.* at Article 1097.

<sup>339</sup> *Id.* at Article 1123.

<sup>340</sup> *Id.* at Article 1869.

<sup>341</sup> **Exhibit C-201**, Law 27287, Article 59 (“Article 59: Liability of the guarantor. 59.1 The guarantor is obliged in the same form as the guaranteed debtor and its obligation will survive the invalidity of the guaranteed obligation, except if the invalidity is caused by a formal defect of the security. 59.2 The guarantor cannot invoke personal defenses of the guaranteed debtor against the secured creditor.”) (“*Artículo 59.- Responsabilidad del aval: 59.1 El avalista queda obligado de igual modo que aquél por quien prestó el aval; y, su responsabilidad subsiste, aunque la obligación causal del título valor avalado fuere nula; excepto si se trata de defecto de forma de dicho título. 59.2 El avalista no puede oponer al tenedor del título valor los medios de defensa personales de su avalado. (...)*”).

<sup>342</sup> **CLA-091**, Carlos Cárdenas Quirós, *LAS GARANTÍAS DEL DERECHO DE CRÉDITO Y LA REFORMA DEL CÓDIGO CIVIL DEL PERÚ DE 1994* 219 (Derecho & Sociedad, Vol. 16, Asociación Civil Derecho y Sociedad, Lima, 2001) (emphasis added).

b. *The Rules applicable to surety agreements are not applicable to the Guaranty Agreement*

196. As mentioned above, a specific legal regime governs the execution of Privatization Government Guaranties. The scope and purpose of Privatization Government Guaranties differ from those of *fianza* (surety) agreements and thus call for the application of different rules and principles.

197. First, *fianza* (surety) agreements have a limited scope; they may only guarantee the performance of “obligations” (a commitment to *deliver*, to *do* or to *refrain from doing*<sup>343</sup>):

Under a surety agreement, the grantor undertakes the obligation in favor of the creditor to perform a certain obligation as security for a third party’s obligation, if it is not performed by said third party.<sup>344</sup>

In contrast, under Law 26438 and its regulations, Privatization Government Guaranties have a broader scope. This is evident from the very terms of the Guaranty Agreement, which guarantees Centromin’s “representations, assurances, guaranties and obligations,”<sup>345</sup> thus on its face exceeding the scope of a *fianza*, which can only guarantee “obligations.” Similarly, other Privatization Government Guaranties into which Peru has entered extend beyond the scope of what a *fianza* (surety) agreement could guarantee, *e.g.*, by guaranteeing that certain legal provisions will remain into effect<sup>346</sup> or that certain foreclosure and enforcement proceedings will not be sought against the investor.<sup>347</sup>

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<sup>343</sup> See **Exhibit C-159**, Chapter VI of the Peruvian Civil Code.

<sup>344</sup> **Exhibit C-159**, Peruvian Civil Code, Article 1868.

<sup>345</sup> **Exhibit C-003**, Guaranty Agreement, Article 2.1.

<sup>346</sup> **Exhibit C-202**, Guaranty Agreement between Peru and H2Olmos S.A. executed on June 11, 2010 (“...the State guarantees the Investor that (i) during the term of the Concession Agreement, the Water Reserve referred to in Executive Decree 059-82-AG, as extended under Resolution No. 331-2010-ANA will remain in effect, including the guarantee of the volume of water necessary to execute the Olmos Irrigation Project and performance of the Service (as defined in the Concession Agreement) and (ii) the water allocation algorithm of the Huancabamba River with respect to the Piura region will remain in effect during the term of the Concession Agreement in the same or more favorable terms as set forth in Executive Decree No. 011-2009-AG.”).

<sup>347</sup> **Exhibit C-203**, Guaranty Agreement approved by Executive Decree 001-96-PCM (authorizing “the guarantee of the State in favor of Minera Sunshine del Perú S.A. that it will not be affected by mortgage foreclosures and enforcement of pledges and liens recorded in the Mining Public Records over assets owned by Empresa Minera Especial Mishki S.A. in favor of Banco Minero del Perú.”).

198. Second, the existence of a separate legal framework governing Privatization Government Guaranties reinforces the conclusion that these guaranties were intended to have a broader scope than simple *fianza* (surety) agreements. In commenting on the specific legal framework applicable to government guaranties, Professor De La Puente recognized that Privatization Government Guaranties are of a different nature because they extend assurances that only the State may undertake:

However, given the nature of these transactions, it would not be justified for the State to be authorized by law based on reasons of social, national or public interest to grant guarantees and assurances of performance through contracts, as this is an obligation of any party to any agreement. It is obvious, then, that article 1357 is intended to allow granting guarantees and assurances related to public matters inherent to the State.<sup>348</sup>

199. Third, *fianza* (surety) agreements may guarantee obligations contained in any type of agreement or transaction, while Privatization Government Guaranties have a more restricted use. As set forth in Legislative Decree 674, Government Guaranties may only secure commitments contained in the following types of privatization agreements:

- (i) Full or partial transfer of government-owned shares and/or assets.
- (ii) Capital increase.
- (iii) Partnership, joint venture, association, service, lease, management and concession agreements, among other similar agreements.
- (iv) Disposition or sale of government-owned assets, when said disposition or sale takes place due to the liquidation of a government-owned company or government entity.<sup>349</sup>

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<sup>348</sup> **CLA-092**, Manuel de la Puente y Lavalle, EL CONTRATO EN GENERAL 271, Vol. I. (Lima, Palestra, 2007) (emphasis added).

<sup>349</sup> **Exhibit C-193**, Legislative Decree 674, Article 2, which provides:

*“Artículo 2.- Las modalidades bajo las cuales se promueve el crecimiento de la inversión privada en el ámbito de las empresas que conforman la Actividad Empresarial del Estado, son las siguientes:*

*a. La transferencia del total o de una parte de sus acciones y/o activos.*

*b. El aumento de su capital.*

*c. La celebración de contratos de asociación, “joint venture”, asociación en participación, prestación de servicios, arrendamiento, gerencia, concesión u otros similares.*

In this case, the Stock Transfer Agreement is an agreement for the transfer of government-owned shares, described in numeral (i) above. Thus, although Privatization Government Guaranties may guarantee more than just “obligations” (and, in that respect, have a broader scope than *fianzas*), they may be issued only in the limited circumstances delineated above (and, in that respect, have a more limited application than *fianzas*).

200. Finally, the economic purpose (*causa*) of a Privatization Government Guaranty is not the same as that of a surety agreement. Privatization Government Guaranties are granted as *contratos-ley* to promote and protect private investment, specifically to promote the privatization of government-owned assets and businesses. Legislative Decree 674 expressly declares private investment in State-owned companies and government entities a matter of national interest.<sup>350</sup> In contrast, *fianza* (surety) agreements are designed to protect private creditors generally.

201. According to the Peruvian Constitutional Tribunal (the highest ranking court in charge of interpreting the Constitution), *contratos-ley* are:

agreements that private parties may execute with the State in cases and for purposes authorized by the law. By said agreements, the State may grant guarantees and assurances, which in both cases are inalienable. The State, by exercise of its *ius imperium* creates guarantees and assurances and submits to the legal regime set forth in the agreement and the legal provisions set forth in laws applicable to said agreement. By their own nature, by *contratos-ley*, the State seeks to attract private investment to promote activities the State considers have been insufficiently developed according to the plans and objectives set in the design of the State’s economic policies. Their purpose is to propitiate a safe environment for investors not only in private matters but also in public activities.<sup>351</sup>

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*d. La disposición o venta de sus activos, cuando ello se haga con motivo de su disolución y liquidación.*

*Cuando, de acuerdo a lo anterior, el Estado resulte, en forma directa o indirecta, con una participación accionaria minoritaria, sus derechos y obligaciones se regirán exclusivamente por la Ley General de Sociedades.”*

<sup>350</sup> See **Exhibit C-193**, Legislative Decree 674, Article 1.

<sup>351</sup> **Exhibit C-204**, Constitutional Tribunal ruling in Case No. 005-2003-AI/TC, Oct. 3, 2003 ¶¶ 33 and 34 (emphasis added) (“*Pese a ello, puede precisarse que el contrato-ley es un convenio que pueden suscribir los contratantes con el Estado, en los casos y sobre las materias que mediante ley se autorice. Por medio de él, el Estado puede crear garantías y otorgar seguridades, otorgándoles a ambas el carácter de intangibles. Es decir, mediante tales contratos-ley, el Estado, en ejercicio de su ius imperium, crea garantías y otorga seguridades y, al suscribir el contrato-ley, se somete plenamente al régimen jurídico previsto en el contrato y a las disposiciones legales a cuyo amparo se suscribió éste.*”)

The Peruvian Constitutional Tribunal further recognized that *contratos-ley* relate to the protection of private investment and should be interpreted in a manner that optimizes their effectiveness: “the creation and regulation of the *contrato-ley* relates to the protection of private investment in national economies within a framework in which investors are offered assurance, then it is not constitutionally adequate to interpret this type of contract in a manner that instead of optimizing it, it is deprived of its effectiveness.”<sup>352</sup>

202. In sum, Privatization Government Guaranties are governed by a legal regime that is distinct from the regime applicable to *fianza* (surety) agreements and that contains no requirement for a creditor to proceed against the debtor before demanding compliance from the guarantor. To import this requirement from the regime governing *fianza* (surety) agreements is wrong as a matter of Peruvian law and inconsistent with the mandate of the Peruvian Constitutional Tribunal that Privatization Government Guaranties should be interpreted in a manner that maximizes their effectiveness. Peru should not be permitted to evade its obligations under the Guaranty Agreement.

c. *Even if the Guaranty Agreement were deemed a fianza agreement, Renco has satisfied all requirements to bring a claim thereunder*

203. Even if the Guaranty Agreement were considered a *fianza* (surety) agreement—which it is not—Renco has satisfied all legal requirements to assert a claim against Peru under such agreement.

204. Peru asserts that “under Peruvian law, a creditor may proceed to enforce its guarantee against the debtor’s guarantor only after it has exhausted all means of recourse against the debtor,”<sup>353</sup> and accordingly “DRP thus cannot invoke the protections set out in the Guaranty until it has been established that Activos Mineros has failed to comply with its obligations under

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*Por su propia naturaleza, a través del contrato-ley, el Estado busca atraer inversiones privadas (de capital) a fin de que promuevan aquellas actividades que el Estado considera que vienen siendo insuficientemente desarrolladas, de acuerdo con los planes y objetivos que se pueda haber trazado en el diseño de la política económica del Estado. Tienen como contenido propiciar un marco de seguridad a los inversionistas no sólo en asuntos privados de la administración, sino, también, en la prestación de actividades de derecho público.”*

<sup>352</sup> **Exhibit C-204**, Constitutional Tribunal ruling in Case No. 005-2003-AI/TC, Oct. 3, 2003, ¶ 34 (emphasis added).

<sup>353</sup> Peru’s 10.20(4) Objection at ¶ 70.

the Contract.”<sup>354</sup> This is not true, however. Peruvian law does not require *exhausting all means of recourse*, as Peru claims. It only requires that the debtor fail to comply and that the creditor seek payment from the defaulting debtor first: “[t]hrough the *fianza*, the grantor of the surety assumes an obligation to the creditor to do what is specified in order to secure an obligation assumed by the debtor, in case the debtor does not comply,”<sup>355</sup> and “[t]he grantor of the surety cannot be compelled to pay the creditor without the creditor first seeking payment from the debtor.”<sup>356</sup> This is called “*beneficio de excusión*” and is set forth in Article 1879 of the Peruvian Civil Code.

205. As detailed above<sup>357</sup> and in Claimant’s Memorial on Liability,<sup>358</sup> Renco and its affiliates repeatedly have written to Centromin (now Activos Mineros), the Ministry of Energy & Mines and the Ministry of Economics & Finance, urging them to honor their contractual obligations to assume liability in relation to the St. Louis Lawsuits, and requesting that they defend the St. Louis Lawsuits and release, protect and hold harmless Renco and its affiliates from those third-party claims.<sup>359</sup> But Activos Mineros has refused to assume any liability or responsibility for the claims in the St. Louis Lawsuits,<sup>360</sup> and the Peruvian Government has ignored Renco’s requests to date. Accordingly, the requirements set forth by Peruvian law—that the debtor default on its obligations and that the creditor seek payment from the debtor first—are both satisfied here.

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<sup>354</sup> *Id.* at ¶ 69.

<sup>355</sup> **Exhibit C-159**, Peruvian Civil Code, Article 1868 (“*Por la fianza, el fiador se obliga frente al acreedor a cumplir determinada prestación, en garantía de una obligación ajena, si ésta no es cumplida por el deudor. La fianza puede constituirse no sólo en favor del deudor sino de otro fiador.*”).

<sup>356</sup> *Id.* at Article 1879 (“*El fiador no puede ser compelido a pagar al acreedor sin hacerse antes excusión de los bienes del deudor.*”).

<sup>357</sup> *See supra* ¶ 88.

<sup>358</sup> Claimant’s Memorial on Liability at Section II.E(3). *See also* Sadlowski Witness Stmt. at ¶¶ 39-43.

<sup>359</sup> *See, e.g.,* **Exhibit C-051**, Letter from King & Spalding to Ministry of Energy & Mines, *et. al.*, Oct. 12, 2010, **Exhibit C-053**, Letter from J. Carlos Huyhua (Doe Run Peru) to V. Carlos Estrella (*Activos Mineros*), November 11, 2010; **Exhibit C-054**, Letter from King & Spalding to Ministry of Energy & Mines, *et. al.*, Dec. 14, 2010; **Exhibit C-055**, Letter from King & Spalding to Activos Mineros, Feb. 18, 2011, **Exhibit-056**, Letter from King & Spalding to White & Case, July 12, 2011; **Exhibit C-057**, Letter from King & Spalding to White & Case, Jan. 27, 2012; **Exhibit C-058**, Letter from King & Spalding to White & Case, Mar. 20, 2012; **Exhibit C-059**, Letter from King & Spalding to White & Case, July 18, 2012; **Exhibit C-060**, Letter from King & Spalding to White & Case, Aug. 9, 2012; **Exhibit C-061**, Letter from King & Spalding to White & Case, Nov. 16, 2012; **Exhibit C-062**, Letter from King & Spalding to White & Case, Jan. 17, 2013; **Exhibit C-063**, Letter from King & Spalding to White & Case, June 21, 2013.

<sup>360</sup> Sadlowski Witness Stmt. at ¶¶ 39-43.

206. Moreover, and in any event, even if the Guaranty Agreement could be a *fianza* (which it is not), Peru cannot demand the application of the “*beneficio de excusión*” in the present circumstances. The Peruvian Civil Code expressly provides that this benefit is not applicable when “the grantor of the surety has a joint and several obligation with the debtor.”<sup>361</sup> Here, given the nature of the Guaranty Agreement and its relation to the Stock Transfer Agreement, Peru’s obligations are not subsidiary to Centromin’s, but rather Peru has a joint and several obligation to honor Centromin’s/Activos Mineros’ obligations under the Stock Transfer Agreement.<sup>362</sup>

## 2. Renco Is Not Required to Submit Its Claim to the Expert Procedure Set Forth in the Stock Transfer Agreement

207. Peru argues that where, as here, Activos Mineros disputes whether the St. Louis Lawsuits fall within the scope of its contractual obligations, “the parties are required to follow the expert procedure set out in Clauses 5.3.A, 5.4.C, and 12 of the Contract.”<sup>363</sup> Because the parties have not done so, Peru argues, Renco’s claim that Peru has breached the Guaranty Agreement by failing to assume liability for the claims asserted in the St. Louis Lawsuits is “premature.”<sup>364</sup>

208. Peru’s ripeness objection based on the Parties’ non-invocation of the expert procedure provided for under the Stock Transfer Agreement fails. The expert procedure constitutes a precondition to arbitration *only* if a dispute is submitted to arbitration in accordance with Clause 12 of the Stock Transfer Agreement. Clauses 5.3(A) and 5.4(C) of the Stock Transfer Agreement provide that Centromin and DRP shall refer disputes about certain issues to

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<sup>361</sup> **Exhibit C-159**, Peruvian Civil Code, Article 1883 (“*La excusión no tiene lugar: 1.- Cuando el fiador ha renunciado expresamente a ella. 2.- Cuando se ha obligado solidariamente con el deudor. 3.- En caso de quiebra del deudor.*”).

<sup>362</sup> In any case, even if Peru could invoke the “*beneficio de excusión*,” it has not complied (or offered to comply) with the relevant legal requirements. Under a surety agreement, as provided by Article 1880 of the Peruvian Civil Code, “for the guarantor of a surety to be entitled to the *beneficio de excusión*, it must invoke this benefit after the creditor demands payment and must provide evidence of available assets of the debtor within Peruvian territory which are sufficient to cover the amount of the pending obligation.” **Exhibit C-159**, Peruvian Civil Code, Article 1880 (“*Para que el fiador pueda aprovecharse del beneficio de la excusión, debe oponerlo al acreedor luego que éste lo requiera para el pago y acreditar la existencia de bienes del deudor realizables dentro del territorio de la República, que sean suficientes para cubrir el importe de la obligación.*”). Peru has not provided any evidence of available assets of Activos Mineros in Peru upon which Renco could collect. Since the legal requirements have not been fulfilled, Peru cannot invoke the *beneficio de excusión*.

<sup>363</sup> Peru’s 10.20(4) Objection at ¶ 69.

<sup>364</sup> *Id.*

an expert for an “opinion” or “decision” before one or both of them “may submit the matter to arbitration, in accordance with Clause 12 of this Contract.”<sup>365</sup> Here, Renco has submitted its dispute with Peru to arbitration in accordance with Article 10.16.1 of the Treaty, not Clause 12 of the Stock Transfer Agreement. Accordingly, the expert procedure contained in the Stock Transfer Agreement is inapplicable and has no bearing on the ripeness of Renco’s claim.

209. In any event, Activos Mineros categorically has denied that it has any responsibility whatsoever for claims asserted against Renco in the St. Louis Lawsuits. It would therefore be futile for Renco to initiate an expert procedure under Clauses 5.3(A) and 5.4(C) of the Stock Transfer Agreement. Several investment treaty tribunals have held that a claimant’s non-compliance with a precondition to arbitration under the relevant treaty may be ignored where compliance would have been futile.<sup>366</sup> Moreover, the claims in the St. Louis Lawsuits for personal injuries and punitive damages exceed the \$50,000 threshold under the Stock Transfer Agreement, such that any expert decision rendered pursuant to this procedure would not be binding on the parties and thus would not finally resolve their dispute.

### **3. Renco’s Claim Is Ripe Since It Has Suffered and Continues to Suffer Damage**

210. Peru points to the absence of a judgment in the St. Louis Lawsuits and of damages awarded against Renco to argue that no indemnification obligation has arisen under the Stock Transfer Agreement, and thus Renco’s claim is premature.<sup>367</sup> However, as stated above,<sup>368</sup> Renco has suffered damage in the form of millions of dollars of litigation costs and expenses, and is continuing (and will continue) to suffer such damage as the litigation progresses and culminates in a verdict or settlement that may impose further damage on Renco. These are losses and damages suffered directly by Renco as a result of Peru’s and Centromin’s/Activos Mineros’ disregard of their contractual obligations to remediate the areas surrounding La Oroya, and to assume liability for the St. Louis Lawsuits.

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<sup>365</sup> **Exhibit C-002**, Stock Transfer Agreement, Clause 5.4(C). *See also id.*, Clause 5.3(A) (referring to the expert procedure “described in [Clause] 5.4(C)”).

<sup>366</sup> *See, e.g., CLA-093, Teinver S.A. v. Argentina*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, Dec. 21, 2012, at ¶¶ 126-129; **CLA-094, Occidental Petroleum Corporation v. Ecuador**, ICSID Case No. ARB/06/11, Decision on Jurisdiction, Sept. 9, 2008, at ¶ 94 and n.10.

<sup>367</sup> Peru’s 10.20(4) Objection at ¶ 70.

<sup>368</sup> *See supra* ¶ 169.

#### 4. Renco Has A Claim that Peru Breached the Guaranty Agreement By Failing to Grant Doe Run Peru a PAMA Extension

211. Peru's final ripeness argument focuses on Renco's claim that Peru failed to honor the *force majeure* clause in the Stock Transfer Agreement by failing to grant PAMA extensions to Doe Run Peru. Peru repackages its previous arguments that (i) it is not a party to the Stock Transfer Agreement and thus has no obligation to honor the *force majeure* clause therein, and (ii) Renco must seek recourse against Activos Mineros under the Stock Transfer Agreement before Peru can be found in breach of the Guaranty Agreement.<sup>369</sup> Both of these arguments have been addressed in earlier sections of this Supplemental Opposition, to which Renco respectfully refers the Tribunal.<sup>370</sup>

212. Peru makes the additional argument that it could not have violated the Guaranty Agreement "by allegedly failing to grant DRP reasonable and adequate extensions of time to fulfill its PAMA obligations, because Activos Mineros itself has no such obligation under the Contract."<sup>371</sup> In other words, according to Peru, it cannot have failed to guarantee an obligation that was not an obligation contained in the Stock Transfer Agreement in the first place.

213. This argument rests on an interpretation of the Stock Transfer Agreement and the Guaranty Agreement that is not grounded in good faith. Centromin agreed that, in cases of economic *force majeure*, it would not insist on Doe Run Peru fulfilling its obligations under the Stock Transfer Agreement.<sup>372</sup> And Peru guaranteed that undertaking, *i.e.*, Peru agreed that Centromin—which Peru used as a vehicle to implement its privatization policy—would not insist on performance in cases of economic *force majeure*. This was an important part of the negotiations between the Renco Consortium and Peru and of the final agreement that they reached.<sup>373</sup>

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<sup>369</sup> Peru's 10.20(4) Objection at ¶ 72.

<sup>370</sup> See *supra* Sections V, VI.A.1, and VII.C.1.

<sup>371</sup> Peru's 10.20(4) Objection at ¶ 73.

<sup>372</sup> **Exhibit C-002**, Stock Transfer Agreement, Clause 15 ("Neither of the contracting parties may demand from the other the fulfillment of the obligations assumed in this contract, when the fulfillment is delayed, hindered or obstructed by causes that arise that are not imputable to the obliged party and this obligation [sic] has not been foreseen at the time of the execution of this contract . . .").

<sup>373</sup> Sadlowski Witness Stmt. at ¶ 44 ("We were very clear with Centromin/CEPRI that a broad *force majeure* clause, including protection in the event of a depression in metal prices or other adverse economic conditions,

214. The position that Peru now advances in its 10.20(4) Objection seeks to circumvent an essential term of the deal that the parties reached. But Peru cannot, on the one hand, agree to excuse Doe Run Peru from its contractual obligations in cases of economic *force majeure*, while at the same time insist on Doe Run Peru's performance of these obligations by refusing to grant the PAMA extension. This is tantamount to the State giving with one hand and taking away with the other. Peru's argument is the antithesis of a good faith interpretation of the parties' agreement and a good faith performance of that agreement, as Article 1362 of the Peruvian Civil Code requires.<sup>374</sup> Moreover, like all of the other arguments that Peru advances concerning interpretation and construction of disputed contract provisions, this objection cannot be resolved under Article 10.20(4) of the Treaty where all of Renco's asserted facts are assumed to be true.

#### VIII. PRAYER FOR RELIEF

215. For the foregoing reasons, Peru has failed to make the requisite showing that Renco's claims fail as a matter of law. Renco respectfully requests that Respondent's 10.20(4) Objection be dismissed, in its entirety, and Renco be afforded the opportunity to present its claim at the merits stage of these proceedings.

216. Renco also seeks an award of fees and costs associated with Renco's need to address substantively Peru's impermissible objections that the Tribunal determined in its Scope Decision were outside the ambit of this Article 10.20(4) phase. Peru's decision to ignore the Scope Decision not only has undermined Procedural Order No. 1 and the Tribunal's Scope Decision, but has resulted in substantial fees and costs that Renco would not have incurred if Peru had honored and followed the Tribunal's ruling.

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was an essential part of the deal without which we would not go forward with the purchase.”). *See also id.* at ¶¶ 45-47.

<sup>374</sup> **Exhibit C-159**, Peruvian Civil Code, Article 1362. *See also* Dr. de Trazegnies Report, §4.1 at 14 (“In other words, those who sign a contract, at all times, from its negotiation through its performance, must be motivated by reciprocal good faith and by the common intent of the parties which must be discovered not through rereading the text but rather through an adequate interpretation.”) (emphasis added).

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Respectfully submitted,



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