

## CONTENTS

I.	INTRODUCTION AND EXECUTIVE SUMMARY .....	1
A.	Nearly the entirety of Peru’s Counter-Memorial is uncontested .....	2
B.	There are ineluctable facts material to the merits of the dispute that are undisputed .....	3
C.	It is uncontested that the Tribunal has no jurisdiction over all but one of Claimant’s claims.....	4
D.	All of Claimant’s claims should be dismissed for lack of merit.....	4
II.	PRELIMINARY MATTERS NECESSARY TO GUIDE THE TRIBUNAL AS IT EVALUATES THE DISPUTE.....	8
A.	Claimant has not contested material facts.....	8
1.	The Complex’s PAMA and its implementation.....	8
2.	Claimant compromised DRP’s ability to meet its obligations.....	10
a.	Claimant failed to address evidence presented in Peru’s Counter-Memorial showing that Renco’s financial mismanagement of DRP caused DRP’s failure .....	11
b.	In its Reply, Claimant ignores the material evidence discussed above and focuses on alleged facts that are irrelevant.....	16
B.	Claimant bears the burden of proof to establish jurisdiction and prove its claims .....	17
1.	Claimant bears the burden of proving the existence of jurisdiction .....	17
2.	Claimant bears the burden of proving every aspect of each claim it presents .....	19
III.	CLAIMANT COMPLETELY FAILED TO ADDRESS THE JURISDICTIONAL FLAWS OF ITS CASE.....	21
A.	Claimant failed to contest the Tribunal’s lack of jurisdiction over Renco’s expropriation claims for failure to establish a prima facie case.....	21
B.	Claimant failed to contest the Tribunal’s lack of jurisdiction <i>ratione temporis</i> over all of Renco’s alleged fair and equitable treatment claims.....	21
IV.	CLAIMANT COMPLETELY FAILED TO ADDRESS THE FLAWS OF ITS FAIR AND EQUITABLE TREATMENT AND EXPROPRIATION CLAIMS.....	25

A.	Claimant completely failed to address any of the flaws of its fair and equitable treatment claims that Peru raised in its Counter-Memorial.....	25
B.	Claimant completely failed to address any of the flaws of its expropriation claims that Peru raised in its Counter-Memorial .....	25
V.	CLAIMANT HAS FAILED TO ESTABLISH A DENIAL OF JUSTICE CLAIM .....	27
A.	The customary international law standard of denial of justice is undisputed .....	27
B.	Claimant failed to address Peru’s responses to nearly all of Claimant’s denial of justice claims in its Reply .....	28
C.	INDECOPI Chamber No. 1’s approval of the MEM’s credit does not place Peru in breach of the customary international law standard of denial of justice .....	29
1.	INDECOPI Chamber No. 1’s approval of the MEM credit was appropriate .....	30
a.	INDECOPI Chamber No. 1’s did not misapply Peruvian law when it approved the MEM’s credit against DRP .....	34
b.	Claimant’s allegations of impropriety or corruption behind INDECOPI Chamber No. 1’s decision are baseless .....	40
2.	Claimant’s reliance on <i>Dan Cake</i> is misguided.....	42
a.	Claimant mischaracterized the facts of <i>Dan Cake</i> and the <i>Dan Cake</i> tribunal’s decision.....	42
b.	The <i>Dan Cake</i> case supports Peru’s position.....	43
VI.	PRAYER FOR RELIEF .....	49

## I. INTRODUCTION AND EXECUTIVE SUMMARY

1. The Renco Group Inc.'s (“**Claimant**” or “**Renco**”) anemic Reply confirms what the Republic of Peru (“**Respondent**” or “**Peru**”) has been saying all along: this case should have never been brought. Claimant is using this proceeding, and this Tribunal, to leverage its position in the Missouri Litigations, where Claimant faces serious allegations of environmental harm that have survived summary judgment by a U.S. Federal Court.
2. Claimant has shown a consistent pattern of bad practice and distortion throughout this proceeding, from its failure to comply with the waiver requirement in its initial Notice of Arbitration,<sup>1</sup> to its baseless and exaggerated claims for compensation, to its selective and incomplete presentation of facts and evidence,<sup>2</sup> to its poor behavior during the document production phase where it sought to extract information to help it avoid responsibility in the Missouri Litigations in exchange for providing documents that it was legally obligated to provide, to its latest cynical Reply, which is at best a clumsy attempt at gamesmanship, but at bottom does not acknowledge the existence of most of Respondent’s arguments and evidence. The Claimant’s Reply ignores the most basic principles of treaty interpretation, international law, burden of proof, and frankly candor. At some point it is time to say enough.
3. Claimant has wasted over a decade of Peru’s time and has caused Peru significant prejudice and harm. Peru knows that this arbitration is meritless and is being brought as a pressure tactic. But Peru respects the Investment-Treaty system, and because of its commitment to its international obligations, Peru has dedicated the time and effort to address all of Claimant’s allegations, no matter how meritless. Peru has expended enormous resources doing so. This good faith participation in the system has been met with disrespect and contempt. In its Reply, Claimant did not present a serious and credible response to Peru’s Counter-Memorial, and despite a robust extension of time, fails to address nearly all of Peru’s Counter-Memorial. It is a submission that mocks investment arbitration practice,

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<sup>1</sup> See [Exhibit R-008](#), Partial Award on Jurisdiction, *The Renco Group Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, 15 July 2016.

<sup>2</sup> See e.g., Treaty Counter-Memorial, ¶¶ 169-178, 218-292, 531, 559, and 827; Treaty Rejoinder, § II.A.

burden of proof standards, obligations to put forth evidence-backed facts and arguments, and the Tribunal's own procedural orders agreed to by the Parties.

4. To find for Claimant, the Tribunal must accept that Claimant has no burden to establish jurisdiction. It would have to find that Claimant has no duty to prove its claims. It would have to agree that Claimant has no obligation to rebut facts presented by Peru in its Counter-Memorial that, if true, dismantle Claimant's claims. And it would have to find that the State has the onerous obligation to ensure at all costs — regardless of a foreign investor's financial and corporate mismanagement and misdeeds — that the foreign investor extracts a profit.
5. Peru respectfully urges the Tribunal to reject Claimant's claims in their entirety, and to award Peru full costs and attorneys' fees for this cynical misuse of the international investment treaty system.

**A. Nearly the entirety of Peru's Counter-Memorial is uncontested**

6. Claimant initiated two separate arbitrations with distinct legal issues against Peru, yet, Claimant submitted a single, threadbare Reply, ostensibly meant to cover both the Treaty Case and Contract Case. Respondent supports procedural economy, but Claimant is not being efficient, it is conceding the case. Claimant had the opportunity in its Reply to address all of the jurisdictional objections and merits defenses raised in Peru's Counter-Memorial, but Claimant has decided to simply ignore nearly all of Peru's Counter-Memorial. This is not an exaggeration.
7. Despite Peru providing in its Counter-Memorial over 30 pages of detailed factual and legal analysis confirming that Claimant's expropriation and fair and equitable treatment claims must fail for lack jurisdiction, Claimant did not dedicate a single sentence of its Reply to respond. Not one sentence.
8. Despite Peru providing in its Counter-Memorial over 100 pages of detailed factual and legal analysis confirming that Claimant's expropriation and fair and equitable treatment claims must fail for lack of merit, Claimant did not dedicate a single sentence of its Reply to respond. Again, not one sentence.

9. The only legal claim that Claimant doggedly pursues in its scattershot Reply is denial of justice, for which it has no standing or support under the governing customary international law standard. Claimant presses its denial of justice claim with total disregard for the well-established principle that denial of justice claims are not appeals and are not opportunities to revisit rulings on issues of evidence or interpretation of domestic law. Regardless, Claimant still fails to respond to nearly all of Peru's defenses set forth with respect to almost all of Claimant's allegations. In short, Claimant does not even come close to meeting the standard for denial of justice under international law that it accepts governs the analysis.

**B. There are ineluctable facts material to the merits of the dispute that are undisputed**

10. The failure to respond to Peru's legal arguments is not the only notable omission from Claimant's Reply. With respect to the facts that do not help its case, Claimant has decided that the best strategy is silence. As such, while Peru could simply point to the relevant section from the Counter-Memorial and note for the Tribunal that Claimant failed to address, and thus concedes, almost all of the facts, Peru is compelled to highlight at least two sets of facts – now undisputed – that compel the Tribunal to dismiss these claims.
11. The first set of facts relate to the true story of the Complex's PAMA and its implementation, and will highlight the timeframe of the legal PAMA period (which ran from 23 October 1997 to 13 January 2007) ("**PAMA Period**"), the importance of DRP's failure to comply with its obligation to implement and complete Project 1 of the PAMA, the Sulfuric Acid Plant, and the true reasons for the delay and ultimate failure in its implementation and completion.
12. The second set of facts relate to how Claimant compromised DRP's ability to meet its obligations, highlighting Claimant's financial mismanagement of DRP and the DRP executives, auditors, and banks that repeatedly raised concerns and grave warnings about DRP's financial mismanagement and subsequent viability.
13. Peru will explain how these facts – which Claimant concedes by its silence – supports Peru's position on several legal issues in dispute.

**C. It is uncontested that the Tribunal has no jurisdiction over all but one of Claimant’s claims**

14. Peru provided over 30 pages of detailed factual and legal analysis confirming that Claimant’s expropriation and fair and equitable treatment claims must fail for lack of jurisdiction in its Counter Memorial. Claimant’s response is silence. Not one word in response.
15. This Tribunal lacks jurisdiction over claims of Treaty breaches based on alleged State acts or omissions that pre-dated the Treaty’s entry into force on 1 February 2009.<sup>3</sup> A review of the acts or facts constituting the alleged violations of the Treaty demonstrates that the bulk of Claimant’s claims (all of its fair and equitable treatment claims) fall outside of the Tribunal’s jurisdiction *ratione temporis* under the Treaty.<sup>4</sup> Claimant’s response: silence.
16. This Tribunal lacks jurisdiction over Claimant’s direct expropriation and indirect expropriation claims because it has failed to state a *prima facie* case as required under Article 10.7 and Annex 10-B.3.b of the Treaty.<sup>5</sup> Claimant’s response: silence.
17. Peru respectfully submits that the Tribunal cannot ignore Claimant’s silence. Claimant has decided to remain silent, either to attempt to gain some advantage in subsequent submissions or at the hearing, or because it has nothing it can say in response. Perhaps both – but in any case, the result is the same: Claimant has conceded. There are legal and procedural consequences to Claimant’s failure to respond, and Peru accordingly requests an order from the Tribunal that precludes Claimant from raising new arguments or defenses regarding jurisdiction in its subsequent written submission or the hearing that could have been raised in its Reply.

**D. All of Claimant’s claims should be dismissed for lack of merit**

18. Even assuming that the Tribunal has jurisdiction over Claimant’s claims, *quod non*, all of its claims should be dismissed for lack of merit. Claimant has not demonstrated — because

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<sup>3</sup> See generally Peru’s Memorial on Preliminary Objections, §§ III.A, III.B.

<sup>4</sup> See Treaty Counter-Memorial, § III.B.

<sup>5</sup> See Treaty Counter-Memorial, § III.A.

it cannot — that Peru has violated its obligations under the Treaty. All three of Claimant’s claims under the Treaty must fail.

19. Claimant alleged in its Memorial that Peru violated Article 10.5 of the Treaty, which expressly establishes that the fair and equitable treatment standard that applies to the present case is the minimum standard of treatment under customary international law. Peru demonstrated in its Counter-Memorial that Claimant seeks to apply an autonomous treaty standard of fair and equitable treatment, which does not correspond to the minimum level of treatment under customary international law. Peru further demonstrated that even under the standard proposed by Claimant, Peru has not violated its obligations under Article 10.5 of the Treaty. Claimant’s response: silence. This wasteful claim should be dismissed.
20. Claimant also alleged in its Memorial that a series of measures adopted by Peru resulted in the indirect and direct expropriation of its investment. As noted above, Renco has failed to state a *prima facie* case of indirect expropriation as required under Annex 10-B.3.b of the Treaty and direct expropriation under Article 10.7 of the Treaty, and therefore this Tribunal has no jurisdiction over this claim. Should the Tribunal nevertheless determine that it has jurisdiction over Renco’s indirect expropriation claims, as well as its direct expropriation claims, Peru demonstrated in its Counter-Memorial that Claimant’s expropriation claims otherwise fail because Claimant has failed to articulate cognizable expropriation claims, has failed to identify the correct legal standard for expropriation, and the measures identified by Claimant do not meet the legal standard applicable to indirect expropriation claims under Article 10.7 of the Treaty. Claimant’s response: silence. These claims of expropriation are not serious and should be dismissed.
21. Finally, Claimant alleged in its Memorial that a series of measures adopted by Peru constitute a denial of justice under Article 10.5 of the Treaty. Peru demonstrated in its Counter-Memorial that Claimant’s denial of justice claims fail because, among other reasons, a denial of justice claim entails a high legal standard that requires more than the misapplication of domestic law, speculative observations of undue influence, or disagreement with the structure and operation of a judicial system. Claimant’s response: silence to all but a handful of arguments, and the responses that Claimant does submit

continue to exhibit a marked disregard for the most rudimentary aspects of applicable customary international law. These wasteful claims should be dismissed.

22. The only measure with respect to denial of justice that Claimant directly addressed in its Reply was INDECOPI Chamber No. 1's approval of the Ministry of Energy and Mine's ("MEM") credit, alleging erroneously that this approval was a misapplication of Peruvian law. Claimant further sabotages its denial of justice claim by admitting that INDECOPI Chamber No. 1's approval of MEM's credit did not cause Claimant any damages; rather, an entirely different state entity (the MEM), caused the alleged damage to Claimant. Claimant's already frivolous denial of justice claim takes a bizarre twist, as Claimant asserts, "[T]he Peruvian administrative courts denied justice, and MEM used the denial of justice to cause damages."<sup>6</sup> Yet again, Claimant's claim does not even come close to meeting the standard for denial of justice under international law and therefore should be dismissed.

\* \* \*

23. In summary, Claimant's claims suffer from numerous defects, including on jurisdiction and the merits, which justify the dismissal of all of its claims. Its Reply lays bare the truth of what we have all known since the inception of these arbitrations: this is about leverage in the Missouri Litigations, not Peru's conduct. Its claims are cynical, facetious, and frankly meant to pressure Peru to act against the interests of its own citizens in U.S. Federal Court. Given the nature of these claims and Claimant's abuse of basic procedure, in addition to the dismissal of all claims, a full award of costs and legal fees against Claimant is justified.
24. Peru respectfully submits that Claimant's silence in its Reply on the jurisdictional objections, merits defenses, and factual allegations, raised by Peru in its Counter-Memorial is fatal to all its claims. When the Tribunal reviews Claimant's Reply, it will note that Claimant only dedicated 21 pages on Treaty-related issues to respond to Peru's 374 page Counter-Memorial.

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<sup>6</sup> Reply, ¶ 178.



25. Claimant's silence has consequences. It cannot be rewarded or excused by the Tribunal. It is a confirmation that Peru's objections are well-founded, conceded, and conclusive. It is a basis for the Tribunal to dismiss Claimant's claims for lack of jurisdiction and/or merit.
26. The present Rejoinder is supported by six expert reports, exhibits R-303 to R-313 and legal authorities RL-226 to RL-269.
27. The six reports are from the following experts:
- Ada Carmen Alegre Chang, a Peruvian lawyer, who provides a second expert report explaining the regulatory framework governing mining operations in Peru at the time DRP acquired the Facility and opines on Claimant's environmental obligations under the PAMA and Peruvian law ("**Alegre Second Expert Report**").
  - Oswaldo Hundskopf, a Peruvian bankruptcy law expert, who provides an expert report that responds to comments made by Claimant and Daniel Schmerler to his first expert report and explains that the MEM's credit claim against DRP was valid under Peruvian law ("**Hundskopf Second Expert Report**").
  - Wim Dobbelaere, a pyrometallurgy expert, who provides a second expert report that responds to comments made by Claimant and its environmental expert, Mr. Connor, and addresses DRP's failure to implement the modernization and PAMA projects necessary to meet its environmental obligations, as well as the company's standards and practices when operating the Facility ("**Dobbelaere Second Expert Report**").
  - Deborah Proctor, a toxicology expert, who provides a second expert report that addresses the effects of DRP's operations on public health and responds to comments made by Claimant to her first expert report ("**Proctor Second Expert Report**").
  - Isabel Kunsman, a financing and accounting expert from AlixPartners, who provides a second expert report that responds to comments made by Claimant and Bryan Callahan to her first expert report and explains how DRP was undercapitalized to complete its obligations under the PAMA and how DRP's own financial decisions resulted in its failure to complete the PAMA and its obligations under the STA ("**Kunsman Second Expert Report**").
28. Additionally, Peru includes a Glossary at the beginning of this Rejoinder to assist the Tribunal.

## II. PRELIMINARY MATTERS NECESSARY TO GUIDE THE TRIBUNAL AS IT EVALUATES THE DISPUTE

29. The following section highlights for the Tribunal some of the key topics that merit its attention.

### A. Claimant has not contested material facts

30. Claimant completely fails to address at least two sets of material facts in its Reply. Claimant does not, because it cannot, contest facts concerning Doe Run Peru S.R.L.’s (“DRP”) Environmental Remediation and Management Program (or “PAMA” for its Spanish initials “*Programa de Adecuación y Manejo Ambiental*”) and DRP’s financial mismanagement and has therefore conceded them.

31. Peru limits its Rejoinder to these two sets of facts, notwithstanding that Claimant’s failure to dispute key facts is pervasive throughout its Reply. Peru reserves the right to point out these additional omissions and concessions in its oral argument and in response to any questions from the Tribunal should the need arise.

### 1. The Complex’s PAMA and its implementation

32. In its telling of the PAMA and its implementation, Claimant makes several misrepresentations.

33. First, Claimant suggests that the PAMA period lasted until 2009.<sup>7</sup> This is incorrect. The PAMA period ran, as legally mandated, from 23 October 1997 to 13 January 2007.<sup>8</sup> The 2006 and 2009 Extensions gave DRP more time to complete Project 1, but they did not affect DRP’s contractual obligation to complete its PAMA projects by 13 January 2007 nor did they extend the PAMA period as a whole.<sup>9</sup> Thus, contrary to Claimant’s assertions, the extensions beyond the PAMA period to complete Project 1 do not change the fact that the PAMA period officially ended on 13 January 2007. In response, Claimant says nothing in its Reply. These facts – which Claimant concedes by its silence – mean that after 13 January 2007 the Company assumed responsibility for third-party claims if they

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<sup>7</sup> See, e.g., Contract Reply Memorial, ¶ 129.

<sup>8</sup> Contract Counter-Memorial, §§ II.A.4, II.C.3.b.; see also ¶¶ 75, 117 and 209–210.

<sup>9</sup> See Contract Counter-Memorial, ¶ 771, citing Varsi First Expert Report-Treaty, ¶¶ 6.20–6.23; Alegre First Expert Report, ¶¶ 53–55; [RLA-036](#), Political Constitution of Peru, enacted on 29 December 1993, article 62.

(i) “default[ed] on [DRP’s] PAMA obligations” within the meaning of Clause 5.3 of the STA, and (b) stem from its operations.

34. Second, Claimant boasts about investing millions of dollars in modernizing the Complex<sup>10</sup> and that it *only* failed to comply with Project 1 of the PAMA, the Sulfuric Acid Plant.<sup>11</sup> Project 1 was, however, the most environmentally significant and costly PAMA project.<sup>12</sup> As Peru has demonstrated —and Claimant does not deny— Project 1 would have dramatically reduced the Facility’s sulfur dioxide and lead emissions by approximately 89%.<sup>13</sup> Because Claimant deliberately chose not to implement Project 1, and in fact took no meaningful actions to abate emissions until 2006,<sup>14</sup> its decision to increase production and use dirtier materials in the first years of operating the Facility was not only disastrous for the already critical situation in La Oroya but also constitutes: (i) a practice “less protective of the environment or of public health” within the meaning of Clause 5.3 of the STA; and (ii) a breach of the PAMA. In response, Claimant says nothing in its Reply. These facts —which Claimant concedes by its silence— also support Peru’s position in the Contract Case regarding the occurrence of the scenario contemplated under Clause 5.3 of the STA.
35. Third, Claimant attempts to attribute the delay in implementing Project 1 to the PAMA’s original design, and its designer, Peru.<sup>15</sup> This is wrong. Peru’s experts have demonstrated that the PAMA’s design for Project 1 was both feasible and consistent with contemporaneous state of the art. Further, DRP’s own conduct demonstrates that Claimant’s arguments are a fabrication. Apart from Claimant’s own decisions to maximize production while flouting the intent and purpose of the PAMA, there was no reason to delay.<sup>16</sup> In response, Claimant says nothing in its Reply. These facts —which Claimant

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<sup>10</sup> Contract Reply Memorial, ¶ 3.

<sup>11</sup> Contract Reply Memorial, ¶ 12.

<sup>12</sup> Contract Counter-Memorial, § II.C.3.a.

<sup>13</sup> See Contract Counter-Memorial, ¶ 779; Dobbelaere First Expert Report, ¶ 66; and Dobbelaere Second Expert Report, ¶ 96.

<sup>14</sup> Contract Counter-Memorial, ¶¶ 172–173; Dobbelaere First Expert Report, §§ VI, X; and Dobbelaere Second Expert Report, ¶¶ 89 and 93.

<sup>15</sup> Contract Reply Memorial, ¶ 126.

<sup>16</sup> Dobbelaere First Expert Report, Section VIII; Proctor First Expert Report, Sections 3.4 & 3.5.

concedes by its silence— support Peru’s position on these issues in the Treaty Case regarding the fact that DRP could have completed Project 1 on time.

36. After operating the Facility for seven years without making any significant progress on Project 1, DRP requested an extension from Peru to implement Project 1.<sup>17</sup> This is despite the fact that it had requested a substantial modification of its design in 1998.<sup>18</sup> In its extension request, it questioned *for the first time* the achievability of Project 1, and proposed to return to the original PAMA design —the same one it now holds responsible for its delay— reversing its 1998 decision.<sup>19</sup> Claimant’s position is untenable; it is solely to blame for this delay and for the environmental consequences that it caused in La Oroya. As explained in the Counter-Memorial<sup>20</sup> and further in this Rejoinder,<sup>21</sup> it was the depletion of DRP’s capital that seriously compromised and delayed its ability to complete the PAMA. Again, in response Claimant says nothing in its Reply. These facts —which Claimant concedes by its silence— support Peru’s position in the Contract Case that DRP breached its PAMA, and support Peru’s in the Treaty case that DRP caused its own delay and was not entitled to an extension.

## 2. Claimant compromised DRP’s ability to meet its obligations

37. In its Counter-Memorial, Peru presented evidence that Claimant imposed severe financial obligations and constraints on DRP and the resulting statements from key executives and employees within DRP, Renco and its affiliates. These employees and executives protested Renco’s transactions by raising concern that Renco’s financial management was putting DRP in an untenable and dire position. In its Reply, Claimant did not deny that these financial transactions or statements were made. In fact, Claimant completely ignored all the evidence Peru presented on this matter. Yet another series of concessions. For the Treaty Case, these facts demonstrate that Renco is the architect of DRP’s financial

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<sup>17</sup> Contract Counter-Memorial, ¶¶ 216–218; A. Bruce Neil First Witness Statement, 17 December 2020, ¶ 25.

<sup>18</sup> [Exhibit R-155](#), Report to the MEM on the PAMA and Request for Approval of Modifications in the Program, DRP, December 1998, p. 2.

<sup>19</sup> Contract Counter-Memorial, ¶ 217; [Exhibit C-050 \(Treaty\)](#), Letter from DRP (J. C. Mogrovejo) to Ministry of Energy & Mines (J. Bonelli) *attaching* Request for an Exceptional Extension of Deadline to Complete the Sulfuric Acid Plants Projects, 15 December 2005; Dobbelaere First Expert Report, ¶¶ 162–163.

<sup>20</sup> Contract Counter-Memorial, § II.C.1.

<sup>21</sup> See Section II.A.2 below.

downfall, which in turn precluded DRP's completion of its PAMA obligations. For the Contract Case, these facts demonstrate that Claimant failed to allocate the appropriate amount of resources to comply with DRP's environmental obligations, which in turn resulted in DRP violating its PAMA obligations.

a. Claimant failed to address evidence presented in Peru's Counter-Memorial showing that Renco's financial mismanagement of DRP caused DRP's failure

(i) Claimant's financial management of DRP

38. While the Tribunal can find a detailed explanation of key and undisputed facts regarding Claimant's financial mismanagement of DRP in Section II.C.1.a of Peru's Counter-Memorial, for the Tribunal's convenience below, Peru provides a summary of the key and now undisputed facts relating to Claimant's financial mismanagement of DRP. All of the following facts are undisputed:

- a. On the same day the Facility was purchased, DRP provided a USD 125 million interest-free loan to DRM (the USD 125 million was taken from the Acquisition Loan, meaning the USD 225 million loan from Bankers Trust Company and other Lenders that Renco used to finance the acquisition of the Complex). The Stock Transfer Agreement between "Centromin," "the Investor," and "the Company," executed on 23 October 1997 ("STA") explicitly provided that these funds would be allocated to DRP's fulfillment of the PAMA project.<sup>22</sup>
- b. In March 1998, DRP became a guarantor of Doe Run Resources Corporation's ("DRRC") (Renco's subsidiary) high-yield (*i.e.*, junk) bond debt. This required DRP to pledge the entirety of its assets and prohibited it both from incurring other indebtedness, unless subordinate to the guarantee, and from entering any revolving credit facility greater than USD 60 million.<sup>23</sup>

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<sup>22</sup> Contract Counter-Memorial ¶ 140; *see also* ¶¶ 36, 131–133; *see Exhibit R-095*, Acquisition Loan, p. 45, Clause 2.5(f); *see Exhibit R-094*, DRRC SEC Form S-4, PDF p. 31.

<sup>23</sup> Contract Counter-Memorial ¶ 145(b); *see Exhibit R-069*, Indenture between DRRC and State Street Bank and Trust Company, 12 March 1998, p. 1, 15–16, 55–56; *see also Exhibit R-068*, DRP Intercompany Note: Summary of Facts, undated, p. 6.

- c. DRRC loaned the bond proceeds to DRM – the “Back-to-Back Loan.” DRM then used the loaned bond proceeds to pay off the Acquisition Loan and other acquisition related debt. DRM thus became indebted to DRRC for USD 125 million, plus over USD 14 million a year in interest.<sup>24</sup> While DRP did not make any payments of principal or interest in the relevant time period, such debt stressed DRP’s liquidity and made it more difficult for DRP to obtain financing, as Ms. Kunsman points out.<sup>25</sup>
- d. In 2001, DRP and DRM merged, leading to significant financial repercussions. First, the debt from the USD 125 million loan from DRP to DRM was simply “eliminated”<sup>26</sup> and DRP never recovered their initial loan.<sup>27</sup> Second, DRP became the debtor on the Back-to-Back Loan, saddling DRP with the outstanding debt from its own acquisition,<sup>28</sup> which became USD 139.1 million after interest.<sup>29</sup>
- e. During this period, DRP also paid many separate intercompany fee arrangements to Renco and its U.S. affiliates. For example, from October 1997 to March 1998 DRP entered into five such agreements, paying over USD 70 million to upstream Renco affiliate entities over the next three years.<sup>30</sup> Within this arrangement, DRP paid tens of millions of dollars to DRM –even though DRM was a company with

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<sup>24</sup> Contract Counter-Memorial, ¶ 145(c); see [Exhibit R-070](#), Special Term Deposit Contract, 12 March 1998. The bond proceeds were used to secure the USD 125 million Back-to-Back Loan from Banco de Credito Overseas Limited to Doe Run Mining; see [Exhibit R-071](#), Contract for a Loan in Foreign Currency, 12 March 1998.

<sup>25</sup> See Kunsman Second Expert Report, ¶ 58 (“Mr. Callahan misses the point that existing debt, whether you are paying it or not, affects a company’s liquidity because it prevents the company from raising additional debt. In this case the intercompany debt stressed DRP’s liquidity since the intercompany debt was not incurred to fund DRP’s capital investments required to comply with the PAMA Requirements but instead to fund Renco’s acquisition of the Facility”).

<sup>26</sup> Contract Counter-Memorial, ¶ 145(d); see [Exhibit R-068](#), DRP Intercompany Note: Summary of Facts, undated, p. 7.

<sup>27</sup> Contract Counter-Memorial, ¶ 146(a).

<sup>28</sup> Contract Counter-Memorial, ¶ 145(d); see [Exhibit R-068](#), DRP Intercompany Note: Summary of Facts, undated, p. 7.

<sup>29</sup> Contract Counter-Memorial, ¶ 145(e); see [Exhibit R-073](#), Letter from Doe Run Company (J. Zelms) to Banco de Credito Overseas Ltd., 12 September 2002; see [Exhibit R-072](#), Subordinated Promissory Note, 12 September 2002; see also [Exhibit R-068](#), DRP Intercompany Note: Summary of Facts, undated, p. 9.

<sup>30</sup> Contract Counter-Memorial, ¶ 150; see, e.g., [Exhibit R-074](#), DRP Financial Statements, as of 31 October 2000 and 1999, pp. 16–18 (addressing “Related party transactions”).

no offices or employees, and offered no services.<sup>31</sup> These agreements were often signed by one executive on behalf of both counterparties.<sup>32</sup>

39. What Claimant does contest, is as baffling as it is incomplete and false. In its Reply, Claimant alleges for the first time that there was a correlation between DRP’s international sales and the related party transactions, as the related party transactions allegedly gave DRP “a host of services and significant access to international markets for DRP’s product sales.”<sup>33</sup> However, as Ms. Kunsman points out in her second expert report, Claimant and Mr. Callahan simply assume that the related party transactions had a direct impact on DRP sales without any basis.<sup>34</sup> Correlation is not the same as causation.<sup>35</sup> DRP’s sales were affected by a host of factors, such as market conditions.<sup>36</sup>
40. Claimant provides no evidence to substantiate this proposition, and DRP’s alleged dependence on the intercompany fee arrangements is belied by the fact that when proposing restructuring plans, DRP was willing to stop the related party transaction until Project 1 was complete.<sup>37</sup>
- (ii) DRP executives, auditors, and banks repeatedly raised concerns about DRP’s financial management and subsequent viability
41. In the Counter-Memorial,<sup>38</sup> Peru provided ample evidence that key employees and affiliates repeatedly responded to Renco’s financial transactions by raising concerns. In its Reply, Claimant neither denies nor address the transactions. It is simply silent.

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<sup>31</sup> Contract Counter-Memorial, ¶ 152; see **Exhibit R-076**, Kenneth Richard Buckley Deposition (excerpts), Document No. 764-5, A.O.A. et al. v. Doe Run Resources Corp., et al. (E.D. Mo. Case No. 4:11-cv-00044-CDP), 9 June 2017, p. 34:6–16; see also, *id.*, pp. 33:16–34:5; see **Exhibit R-077**, Marvin Kaiser Deposition (excerpts), Document No. 764-3, A.O.A. et al. v. Doe Run Resources Corp., et al. (E.D. Mo. Case No. 4:11-cv-00044-CDP), 28 June 2017, p. 60:1–3.

<sup>32</sup> Contract Counter-Memorial ¶ 151; see **Exhibit R-075**, Technical, Managerial and Professional Services Agreement between Doe Run Mining S.R. Ltda. and DRP, 9 March 1998, p. 6.

<sup>33</sup> Contract Reply, ¶ 136.

<sup>34</sup> See Kunsman Second Expert Report, ¶¶ 68-70.

<sup>35</sup> See Kunsman Second Expert Report, ¶ 69.

<sup>36</sup> See Kunsman Second Expert Report, ¶ 69.

<sup>37</sup> See **Exhibit IK-002**, Restructuring Plan, p. 7 (The “Project” is understood to mean Sulfuric Acid Plant and Copper Circuit Modification).

<sup>38</sup> See Contract Counter-Memorial, § II.C.1.c.

42. In the wake of this silence, Peru here again speaks the now uncontested facts:
- a. In August 1998, DRP treasurer Eric Peitz warned that DRP “could not satisfy the obligations that were imposed upon” it and would need to decide which obligations, “we can’t do or aren’t going to do in order to be -- in order to be viable as a going concern.”<sup>39</sup> Peitz later confirmed during testimony in the Missouri Litigations that the undercapitalization of DRP contributed to its ultimate bankruptcy, calling it, “reasonably foreseeable” that bankruptcy would result from, “start(ing) out undercapitalized.”<sup>40</sup>
  - b. DRP president Kenneth Buckley stated in a 2000 memo written to the President/CEO of DRRC that “[t]he time for business as usual is over. Doe Run’s situation is deteriorating, Renco is not coming to the rescue” and “Doe Run’s business model—100% debt financing—is flawed ... and we are unaware of any company, in any industry, that has managed a similar feat... The system isn’t working ... business is not good, and ... Doe Run’s future is very much in doubt.”<sup>41</sup>
  - c. Several banks involved with DRP also shared this concern. In June 2000, for example, Credit Lyonnais wrote to the Vice President of Finance for DRRC. In reference to their intracompany financial transactions, they stated, “DRP cash flow generation can not sustain the continuation of this money transfer.”<sup>42</sup>

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<sup>39</sup> Contract Counter-Memorial, ¶ 142; see [Exhibit R-067](#), Eric Peitz Deposition (excerpts), Document No. 764-6, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 27 July 2017, pp. 78:5–79:20.

<sup>40</sup> Contract Counter-Memorial, ¶ 141; see [Exhibit R-067](#), Eric Peitz Deposition (excerpts), Document No. 764-6, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 27 July 2017, pp. 73:20–75:2; see also *id.*, p. 75:17–19.

<sup>41</sup> Contract Counter-Memorial, ¶ 158; see [Exhibit R-085](#), Memorandum from DRP (J. Zelms), 4 September 2000, p. 4.

<sup>42</sup> Contract Counter-Memorial, ¶ 159; see [Exhibit R-083](#), Email from Credit Lyonnais (A. Corvalan) to M. Kaiser, 30 June 2000; see also [Exhibit R-084](#), Email from Credit Lyonnais (A. Corvalan) to DRP (Eric Peitz), 4 July 2000.



- d. By 2001, DRP’s auditors stated that DRP, “faces liquidity issues that raise substantial doubt about its ability to continue as going concern.”<sup>43</sup> They reiterated these same concerns again in 2003.<sup>44</sup>
- e. In August 2005, DRP Treasurer Mr. Peitz noted: “I sounded the alarm in writing in August 1998 and it did nothing but discredit me with management.... Aside from the fact that the Company’s capital was drained, its current earning power is not strong enough to cover its costs. I say again, drastic measures need to be taken.”<sup>45</sup> Pietz characterized DRP as “in volatile waters” because “[t]he sponsors have only invested \$2 million in DRP and DRP has sent some \$125 million to the US.”<sup>46</sup>
- f. In fall 2005, Pierre Larroque, an outside financial strategist hired by Claimant, noted the impact the debt was having on DRM. He stated that existing liens and negative pledges on DRP’s assets “now needs to be resolved as a priority” as “[n]o bank will proceed with arranging financing for Doe Run Peru until it is assured that adequate collateral will be available.”<sup>47</sup>
- g. In December 2005, Renco demanded DRP wire it an additional USD 1 million, plus USD 333,000 every month following. DRP objected: “The budget was not planned in that way ... we are trying to build enough cash to comply with the MEM requirement[.] Increasing your liquidity is obviously reducing our liquidity, and is putting in danger the objective to extend the PAMA.”<sup>48</sup> DRRC replied with one-line: “[P]lease have the [USD] 333[,000] sent the first working day of Jan.”<sup>49</sup>

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<sup>43</sup> Contract Counter-Memorial, ¶ 160; see [Exhibit R-086](#), DRP Combined Financial Statements, as of 31 October 2001 and 2000, p. 2 (KPMG Independent Auditor’s Report, 5 December 2001).

<sup>44</sup> Contract Counter-Memorial, ¶ 160; see [Exhibit R-087](#), DRP Financial Statements, as of 31 October 2003 and 2002, p. 2 (KPMG Independent Auditor’s Report, 4 February 2004).

<sup>45</sup> Contract Counter-Memorial, ¶ 161; see [Exhibit R-089](#), Email chain between DRRC to DRP, 30 August and 28 December 2005, pp. 4–5.

<sup>46</sup> Contract Counter-Memorial, ¶ 161; see [Exhibit R-089](#), Email chain between DRRC to DRP, 30 August and 28 December 2005, pp. 4.

<sup>47</sup> Contract Counter-Memorial, ¶ 162; see [Exhibit R-090](#), Email from DRRC (J. Zelms) to Renco Group (I. Rennert), *attaching* the Pierre Larroque Report on Peru Financing Status, 19 October 2005, pp. 2 and 4.

<sup>48</sup> Contract Counter-Memorial, ¶ 164; see [Exhibit R-089](#), Email chain between DRRC to DRP, 30 August and 28 December 2005, p. 1.

<sup>49</sup> Contract Counter-Memorial, ¶ 165; see [Exhibit R-089](#), Email chain between DRRC to DRP, 30 August and 28 December 2005, p. 1.

- h. In the subsequent years proceeding bankruptcy, DRP continued to raise concerns. For example, in March 2006 Mr. Peitz said, “Please note that the cash flow is not sufficient to support PAMA ... We run out of money in 2007.”<sup>50</sup> Later that month, Peitz warned that “[t]he company has to stop spending money like it grows on trees.”<sup>51</sup>
43. In its Reply brief, Claimant denies none of the above. It does not suggest these statements by its own employees and affiliates are incorrect, and for that matter, how could it? Claimant’s silence is once again a dispositive concession.
- b. In its Reply, Claimant ignores the material evidence discussed above and focuses on alleged facts that are irrelevant
44. In its Reply brief, while neither denying nor addressing the occurrence of the aforementioned financial transactions, Claimant argues against the conclusions necessarily drawn from these undisputed facts. Namely, Claimant attempts to argue that the financial transactions did not result in DRP being immediately undercapitalized and burdened financially.
45. Claimant claims that DRP spent USD 313 million to meet its PAMA investment obligations and that, because of this, it is impossible that they experienced a liquidity crisis or were financially burdened. In other words, Claimant argues that because DRP allegedly spent a large sum of money, DRP could not have been financially burdened or unstable.
46. Notwithstanding the issue of whether these alleged expenditures occurred, Claimant somehow misses the point, placing in full relief the logical fallacy propping up their argument. Establishing that some funds – even a considerable amount of funds – were invested in the PAMA project over a ten-year period does not prove the absence of Claimant’s financial mismanagement of DRP, or DRP’s resulting precarious position. DRP’s own executives stand as a repeated testament to the serious strain Claimant placed on DRP’s financial position. Even if the alleged expenditures were made, Renco stretched DRP to its breaking point with liens, stripping, debts, and a lack of liquidity. Renco

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<sup>50</sup> Contract Counter-Memorial, ¶ 166; see [Exhibit R-092](#), Email from DRP (E. Peitz) to DRRC (B. Neil), 13 March 2006, p. 1.

<sup>51</sup> Contract Counter-Memorial, ¶ 166; see [Exhibit R-093](#), Email from DRP (E. Peitz) to DRRC (B. Neil), 30 March 2006, p. 1.

managed DRP's financials in this manner, knowing that DRP was obligated to complete its PAMA obligations. Claimant's argument is simply: large expenditures are not made by financially unstable entities. Peru disagrees.

47. In its Reply, in one of the few points in opposition it makes, Claimant also denies that DRP paid tens of millions of dollars in interest on debt originating from their own acquisition.<sup>52</sup> Claimant does not provide any support for this position. Claimant relies on the "Callahan Report" to support this point, which states, "DRP never made any payment of principal or interest on the debt as DRP was not obligated to make payments ... until the Sulfuric Acid portion of the PAMA was satisfied."<sup>53</sup> Callahan's report supports this claim by citing to the "Third Revised and Amended Subordinated Promissory Note", which only lays out the terms of the loan agreement.<sup>54</sup> Notably, Callahan's report does not contain any relevant financial records that might prove his point.
48. Notably, none of the above-mentioned information is new to Claimant, as Peru provided a detailed account of Claimant's mismanagement of DRP in **Section II.C.1** of its Counter-Memorial, Claimant just decided not to respond.

**B. Claimant bears the burden of proof to establish jurisdiction and prove its claims**

49. The claimant bears the burden of proving the facts required to establish the jurisdiction of the arbitral tribunal over the dispute. The claimant also bears the burden of proving the facts necessary to its claims.

**1. Claimant bears the burden of proving the existence of jurisdiction**

50. International tribunals have consistently applied the basic burden-of-proof rule that the party who makes an assertion must prove it.<sup>55</sup> This principle is established in Article 27(1)

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<sup>52</sup> See Reply, ¶ 133; see Contract Counter-Memorial, ¶ 146(c).

<sup>53</sup> Callahan First Expert Report, ¶ 30.

<sup>54</sup> Callahan First Expert Report, ¶ 30; see **Exhibit R-303**, Third Revised and Amended Subordinated Promissory Note, 16 March 2007.

<sup>55</sup> See **RLA-180**, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, ¶ 2.11; **RLA-181**, *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Award, 7 July 2004, ¶ 58; **RLA-182**, *Limited Liability Company Amtó v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, ¶ 64.

of the UNCITRAL Rules, which govern this proceeding.<sup>56</sup> Claimant, as the party asserting that the Tribunal possesses jurisdiction, must therefore prove the facts necessary to establish such jurisdiction.<sup>57</sup> As the tribunal in *Pacific Rim* explained, it is impermissible for the Tribunal to find its jurisdiction on any of the Claimant’s claims on the basis of an assumed fact.<sup>58</sup> Instead, as the AAPL tribunal noted, a claimant “must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency, of proof.”<sup>59</sup>

51. The jurisdiction of international arbitral tribunals is founded on consent. For that reason, when a jurisdictional question involves the existence (or not) of arbitral consent, a claimant bears the burden of proving clear and unequivocal (rather than probable) consent. As the AMTO tribunal recognized, “Consent to arbitrate, as the foundation of the jurisdiction of an arbitral tribunal, should be unequivocal.”<sup>60</sup> Said another way, “[C]onsent should be expressed in a manner that leaves no doubts.”<sup>61</sup> And because a tribunal’s jurisdiction is coextensive with the scope arbitral consent,<sup>62</sup> the clear and unequivocal threshold applies both to the existence and scope of arbitral consent. As the *Fireman’s Fund* tribunal explained, “a foreign investor is [not] entitled to the benefit of the doubt with respect to the existence and scope of an arbitration agreement.”<sup>63</sup>

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<sup>56</sup> UNCITRAL Rules, article 27(1).

<sup>57</sup> See [RLA-183](#), *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB 12/20, Award, 26 April 2017, ¶ 66; [RLA-184](#), *Abaclat et al. v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, ¶ 678.

<sup>58</sup> See [RLA-180](#), *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections, 1 June 2012, ¶ 2.8.

<sup>59</sup> [RLA-170](#), *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, ¶ 56.

<sup>60</sup> [RLA-182](#), *Limited Liability Company Amtco v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, ¶ 46.

<sup>61</sup> [RLA-185](#), *Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3, Award, 2 August 2011, ¶ 113.

<sup>62</sup> [RLA-186](#), Nigel Blackaby et al., *Redfern and Hunter on International Arbitration (6th Edition)*, 17 September 2015, § 2.63; see [RLA-187](#), *Achmea B.V. v. The Slovak Republic*, PCA Case No. 2013-12, Award on Jurisdiction and Admissibility, 20 May 2014, ¶ 117.

<sup>63</sup> [RLA-188](#), *Fireman’s Fund Insurance Company v. United Mexican States*, ICSID Case No. ARB(AF)/02/1, Decision on the Preliminary Question, 17 July 2003, ¶ 64; see also [RLA-189](#), *National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7, Award, 3 April 2014, ¶ 117; see [RLA-190](#), *Menzies Middle East & Africa S.A. and Aviation Handling Services International Ltd. v. Republic of Senegal*, ICSID Case No. ARB/15/21, Award, 5 August 2016, ¶ 130.

52. Claimant cannot ignore this burden as it presents its arguments.

**2. Claimant bears the burden of proving every aspect of each claim it presents**

53. A claimant bears the burden of proving every aspect of each claim it presents, both in commercial and investment arbitration.

54. In commercial arbitration, claimants have the sole burden of proving every aspect of their claim for damages in accordance with the general *actori incumbit probatio* principle of international law (each party bears the burden of providing the facts necessary to its claims or defenses).<sup>64</sup> The tribunal in *International Consultants v. Reynolds* accordingly decided that the burden of proof laid on the party contending the claim, and that the tribunal would reject the allegations if the evidence proved unconvincing.<sup>65</sup> A few institutional arbitration rules codify this issue,<sup>66</sup> and the rules applicable to this case, UNCITRAL Rules, are representative: “[e]ach party shall have the burden of proving the facts relied on to support its claim or defense.”<sup>67</sup>

55. Investment arbitration follows the same principle. In 1994, the *Biloune v. Ghana* tribunal determined that “each party has the burden of proving the facts upon which it relies for its claim or defence.”<sup>68</sup> Since then, the *Apotex v. USA* tribunal determined that it is for the claimant to “prove its positive test” and for the respondent to “prove its positive defence, if it has a case to meet.”<sup>69</sup> Likewise, the tribunal in *Rompetrol Group v. Romania* applied “the widely accepted international principle that a party in litigation bears the burden of proving the facts relied on to support its claim or defence,” and determined that “[a] claimant before an international tribunal must establish the facts on which it bases its case

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<sup>64</sup> **RLA-231**, General Assembly, United Nations, Report of the UNCITRAL on the Work of Its Ninth Session, U.N. Doc. A/31/17 (Supplement No. 17), Annex II (Report of the Committee of the Whole II relating to the UNCITRAL Arbitration Rules, pp. 183–184 (¶116).

<sup>65</sup> **RLA-227**, *International Consultants Inc. v. Reynolds Construction Company Limited*, ICC Case No. 15612/FM/JEM/MLK, Award, 24 June 2010, ¶¶ 180–81.

<sup>66</sup> See, e.g., **RLA-232**, 2002 ICDR Rules, article 21(1); **RLA-233**, 2018 HKIAC Rules, article 22(1); **RLA-234**, 2015 CIETAC Rules, article 41(1); see also **RLA-235**, 2012 SCAI Rules, article 24(1).

<sup>67</sup> 2021 UNCITRAL Rules, article 27(1).

<sup>68</sup> **CLA-055 (Treaty)**, *Antoine Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre*, UNCITRAL, Award on Jurisdiction and Liability, 27 October 1989, p. 207.

<sup>69</sup> **RLA-226**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, ¶ 8.9.

or else it will lose the arbitration.”<sup>70</sup> In fact, according to the *Rompetrol* tribunal, the respondent did not bear a “burden of (dis)proof.”<sup>71</sup> The respondent’s burden of proof would only be triggered if it chose to “put forward fresh allegations of its own in order to counter or undermine the claimant’s case.”<sup>72</sup> That burden on respondents to put forward fresh allegations of their own in order to counter or undermine a claimants’ case, however, is only triggered if a claimant actually proves all the elements necessary to establish its case in the first place. This principle was confirmed in *Chevron v. Ecuador*, which applied UNCITRAL Article 24(1) and highlighted that “whilst the evidential burden may shift from one side to the other depending on the evidence, it remains always for the Claimants to prove their positive case.”<sup>73</sup>

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<sup>70</sup> **RLA-230**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, ¶ 179.

<sup>71</sup> **RLA-230**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, ¶ 179.

<sup>72</sup> **RLA-230**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, ¶ 179.

<sup>73</sup> **CLA-039 (Treaty)**, *Chevron Corporation and Texaco Petroleum Corporation v. Republic of Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II, 30 August 2018, ¶¶ 4.4, 8.3.

### **III. CLAIMANT COMPLETELY FAILED TO ADDRESS THE JURISDICTIONAL FLAWS OF ITS CASE**

56. Claimant completely failed in its Reply to address Peru’s objections regarding jurisdiction. These jurisdictional flaws are discussed at length in Section III of Peru’s Counter-Memorial, Claimant simply chose not to address them in its Reply. Below Peru (A) reiterates the jurisdictional flaws with Claimant’s expropriation claim, which Claimant has completely failed to address in its Reply, and (B) reiterates the jurisdictional flaws with Claimant’s alleged fair and equitable treatment claims, which Claimant has completely failed to address in its Reply. These flaws are now properly before the Tribunal for decision. Below Peru also explains that (C) due process requires that the Tribunal preclude Claimant from raising arguments regarding jurisdiction in subsequent written submissions that could have been raised in prior submissions.

#### **A. Claimant failed to contest the Tribunal’s lack of jurisdiction over Renco’s expropriation claims for failure to establish a prima facie case**

57. Claimant provides no response.<sup>74</sup>

#### **B. Claimant failed to contest the Tribunal’s lack of jurisdiction *ratione temporis* over all of Renco’s alleged fair and equitable treatment claims**

58. Claimant provides no response.<sup>75</sup>

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59. Claimant has failed to meet its burden of affirmatively establishing the existence of the Tribunal’s jurisdiction over its fair and equitable treatment and expropriation claims, and yet it has not responded to numerous of Peru’s objections. Accordingly, the Tribunal

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<sup>74</sup> In its Memorial, Claimant submitted expropriation claims. Peru then dedicated seven pages of its Counter-Memorial to explain why the Tribunal lacks jurisdiction over Renco’s expropriation claims for failure to establish a prima facie case. In Claimant’s Reply, on the other hand, it has not dedicated a single sentence to rebut the failures set forth by Peru on this issue. Peru invites the Tribunal to review **Section III.A** of the Counter-Memorial, wherein it explains why the Tribunal lacks jurisdiction over Renco’s expropriation claims.

<sup>75</sup> In its Memorial, Claimant submitted claims alleging that Peru violated its right to fair and equitable treatment. Peru then dedicated 26 pages of its Counter-Memorial to explain why the Tribunal lacks jurisdiction *ratione temporis* over all of Renco’s alleged fair and equitable treatment claims. In Claimant’s Reply, on the other hand, it has not dedicated a single sentence to rebut the failures set forth by Peru on this issue. Peru invites the Tribunal to review **Section III.B** of the Counter-Memorial, wherein it explains why the Tribunal lacks jurisdiction over Renco’s fair and equitable treatment claims.

should dismiss the fair and equitable treatment and expropriation claims in full for lack of jurisdiction.

60. Separately, due process principles require that the Tribunal preclude Claimant from raising arguments regarding jurisdiction in subsequent written submissions or at the hearing that could have been raised in its Reply.

61. Due process is a foundational principle of international arbitration.<sup>76</sup> Under both French law and the UNCITRAL Arbitration Rules, the Tribunal must conduct this arbitration in a manner that safeguards Peru’s due process rights—in particular the right to present its case and defend itself. Article 1510 of the French Code of Civil Procedure mandates that

“[i]rrespective of the procedure adopted, the arbitral tribunal shall ensure that the parties are treated equally and shall uphold the principle of due process[.]”<sup>77</sup>

62. Article 17(1) of the UNCITRAL Arbitration Rules provides similar protections to Peru.<sup>78</sup> Due process is also required by Article V(1)(b) of the New York Convention.

63. The procedural orders and the UNCITRAL Arbitration Rules governing this case contain specific rules to preserve each party’s right to present its case and to defend itself. To ensure that proper notice of arguments and evidence is given to the opposing party (which allows the opposing party to properly prepare a response), Procedural Order No. 1 (“**PO1**”) requires that

“[t]he Parties [ ] submit with their written submissions all evidence and authorities on which they intend to rely in support of the factual and legal arguments advanced therein, including witness statements, expert reports, exhibits, legal authorities and all other evidence and authorities in whatever form.”<sup>79</sup>

64. PO1 therefore explicitly *required* Claimant to submit *all evidence* on which it based its arguments in its Reply.

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<sup>76</sup> **RLA-243**, Gary B. Born, *International Commercial Arbitration* (Third Edition), Chapter 15, 1 August 2021, § 15.04[B][3].

<sup>77</sup> **RLA-264**, French Code of Civil Procedure, Title II regarding international arbitration, article 1510.

<sup>78</sup> UNCITRAL Rules, article 17(1).

<sup>79</sup> Procedural Order No. 1, clause 6.2; *see also* UNCITRAL Arbitration Rule, article 20.



65. To ensure that the arbitration proceeds on clearly defined issues, without any party having to respond to distracting, irrelevant points, PO1 also requires that in “subsequent written submissions, such evidence shall only be submitted in support of the factual or legal arguments advanced *in rebuttal* to the other side’s prior written submission”<sup>80</sup> (emphasis added). Thus, the parties (as relevant here, Peru) could respond only to the prior written submission (as relevant here, Claimant’s Reply) in its submission (here, this Rejoinder).
66. And to prevent argument by surprise, which would eviscerate the opposing party’s right to notice and ability to properly present any response, PO1 prohibits the parties from (i) presenting evidence in subsequent written submissions that could have been presented earlier,<sup>81</sup> and (ii) presenting new evidence after the last written submission.<sup>82</sup>
67. Claimant’s tactics seriously prejudice Peru’s due process rights. Claimant was required to present its arguments and supporting evidence responding to Peru’s objections in its Reply, thus providing notice to Peru. Peru was then provided the opportunity in this submission with rebutting Claimant’s responses. Claimant has eviscerated that framework by refusing to respond to any of Peru’s objections on jurisdiction, and Claimant still has one pleading left. Should Claimant be permitted to submit responses in its Rejoinder on Jurisdiction that it has refused to present in its Reply, Claimant will have been granted improper advantage by being permitted (i) to refuse to respond in the proper pleading (its second pleading), to which Peru can reply, and instead (ii) to respond only in the final pleading, to which Peru cannot reply. Allowing Claimant to remain silent in its Reply only to assert arguments in its Rejoinder on Jurisdiction would constitute a drastic departure from the principles of due process and equal treatment of the parties, and eviscerate Peru’s right to a reasonable opportunity to present its case.<sup>83</sup>

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<sup>80</sup> See Procedural Order No. 1, clause 6.3.

<sup>81</sup> See Procedural Order No. 1, clause 6.2.

<sup>82</sup> See Procedural Order No. 1, clause 6.4.

<sup>83</sup> See UNCITRAL Rules, article 17(1) (“Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties’ dispute.”).

68. Accordingly, Peru requests that the Tribunal preserve its due process rights by precluding Claimant from submitting responses to objections on jurisdiction that it could have submitted in its Reply. These objections on jurisdiction are not only identified above but is identified for ease of reference in the cover letter that Peru submitted with this Rejoinder and the cover letter's Annex A.

**IV. CLAIMANT COMPLETELY FAILED TO ADDRESS THE FLAWS OF ITS FAIR AND EQUITABLE TREATMENT AND EXPROPRIATION CLAIMS**

69. Claimant once again has failed to devote even a single sentence to address the defenses raised by Peru in its Counter-Memorial to Claimant’s expropriation and fair and equitable treatment claims.

70. Although Peru discusses the flaws of these claims at length in Section IV.A (fair and equitable treatment) and IV.B (expropriation) of its Counter-Memorial, Claimant simply chose not to address them in its Reply. These flaws are now properly before the Tribunal for decision. Below Peru also explains that due process requires the Tribunal preclude Claimant from raising new arguments regarding the flaws of these two merits claims at the hearing if those arguments could have been raised in prior submissions.

**A. Claimant completely failed to address any of the flaws of its fair and equitable treatment claims that Peru raised in its Counter-Memorial**

71. Claimant provides no response.<sup>84</sup>

**B. Claimant completely failed to address any of the flaws of its expropriation claims that Peru raised in its Counter-Memorial**

72. Claimant provides no response.<sup>85</sup>

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73. Claimant, in both its Memorial and Reply briefs, has not met the burden of proof needed to show that there was a violation of the Treaty provisions regarding minimum standard of treatment (or as Claimant puts it in its Memorial, the “fair and equitable treatment

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<sup>84</sup> In its Memorial, Claimant submitted fair and equitable treatment claims. Peru then dedicated 86 pages of its Counter-Memorial to explain why Renco’s fair and equitable treatment claims must fail, including by addressing the correct legal standard, application, and relevant facts. In Claimant’s Reply, on the other hand, it has not dedicated a single sentence to rebut the flaws in its fair and equitable treatment case set forth by Peru. Peru invites the Tribunal to review **Section IV.A** of the Counter-Memorial, wherein it explains why Renco’s fair and equitable treatment claims must fail.

<sup>85</sup> In its Memorial, Claimant submitted expropriation claims. Peru then dedicated 20 pages of its Counter-Memorial to explain why Renco’s expropriation claims must fail, including by addressing the correct legal standard, application, and relevant facts. In Claimant’s Reply, on the other hand, it has not dedicated a single sentence to rebut the flaws in its expropriation case set forth by Peru. Peru invites the Tribunal to review **Section IV.B** of the Counter-Memorial, wherein it explains why Renco’s expropriation claims must fail.

standard”) or expropriation. Accordingly, all fair and equitable treatment and expropriation claims should be dismissed for lack of jurisdiction.

74. Separately, Peru reserves the right to make a similar request that it makes with respect to Claimant’s failure to present any response in its Reply to the merits defenses Peru raised in its Counter-Memorial as it makes with respect to Claimant’s failure to address Peru’s jurisdictional objections. Claimant does not have another opportunity to present a written submission on merits issues in this case, but should Claimant elect to present new arguments on the merits for the first time at the hearing, such action would seriously prejudice Peru’s due process rights and Peru would seek to protect its rights.

## V. CLAIMANT HAS FAILED TO ESTABLISH A DENIAL OF JUSTICE CLAIM

75. In its Counter-Memorial, Peru explained the applicable legal standard for denial of justice and the factual and legal reasons why each of Claimant’s assertions must fail. In its Reply, Claimant accepted the customary international law standard for denial of justice but failed to address nearly all of the factual and legal reasons why the measures allegedly meet this standard. The only measure that Claimant addresses in its exiguous Reply is INDECOPI Chamber No. 1’s approval of the MEM’s credit, alleging erroneously that this approval was a misapplication of Peruvian law. In short, Claimant does not even come close to meeting the standard for denial of justice under international law that Claimant itself accepts governs the analysis.
76. Below we (A) briefly summarize the customary international law standard of denial of justice accepted by both Parties, (B) summarize and highlight for the Tribunal the uncontested defenses raised in Peru’s Counter-Memorial, and (C) demonstrate why Claimant’s sole remaining denial of justice claim relating to INDECOPI Chamber No. 1’s approval of the MEM’s credit must fail.

### A. The customary international law standard of denial of justice is undisputed

77. Customary international law imposes a high standard for denial of justice, one that rests on the categorical failure of a State’s entire domestic legal system, and exhibits a failure on the part of the State’s judiciary as a whole to accord justice to the claimant.<sup>86</sup> Numerous tribunals have accordingly agreed that claimants cannot prevail on denial of justice claims based on the misapplication of or even errors in law by States’ judiciaries. The *H&H Enterprises* tribunal noted that “its role is not to correct procedural or substantive errors that might have been committed by the local courts.”<sup>87</sup> The *Philip Morris* tribunal likewise observed, “it is not enough to have an erroneous decision or an incompetent judicial procedure, arbitral tribunals not being courts of appeal.”<sup>88</sup> And Claimant’s repeated citation of Jan Paulsson’s seminal work on the subject is pitiful.<sup>89</sup> Claimant’s denial of

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<sup>86</sup> RLA-023, *Corona* (Award on the Preliminary Objections), ¶ 254.

<sup>87</sup> RLA-088, *H&H Enterprises* (Award), ¶ 400.

<sup>88</sup> RLA-087, *Philip Morris Brands* (Award), ¶ 500.

<sup>89</sup> See, e.g., Treaty Memorial, fns. 572–573, 577, 580, 602–603, 605.

justice claims here could not be farther from the principles Professor Paulsson sets forth, to wit: “denial of justice is always procedural” save for extreme cases where “the substance of a decision is so egregiously wrong” that the decision must be “the product of bias or some other violation of ... due process.”<sup>90</sup>

78. In its Reply, Claimant does not deny the heightened customary international law standard for denial of justice that Peru articulated in its Counter-Memorial.<sup>91</sup> Even the tribunal in *Dan Cake v. Hungary*, a case on which Claimant heavily relies in its Reply, acknowledged this heightened standard.<sup>92</sup>
79. Yet, somewhat bafflingly, Claimant advances the argument that Peru’s administrative and judicial courts contravened Peruvian law to uphold the MEM’s credit against DRP recognized by the INDECOPI.<sup>93</sup> In doing so, Claimant is asking this Tribunal to sit as a court of appeal and determine whether Peruvian courts misapplied Peruvian law. Neither the Treaty nor customary international law provides this Tribunal with such authority.

**B. Claimant failed to address Peru’s responses to nearly all of Claimant’s denial of justice claims in its Reply**

80. When confronted with Peru’s defenses to the alleged procedural deficiencies in its legal system that formed the basis of Claimant’s denial of justice claims, Claimant is silent. Claimant has the burden of proving its claims. In response to Peru’s defenses, Claimant abandons the following arguments it asserted in its Memorial:

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<sup>90</sup> [RLA-079](#), Jan Paulsson, Denial of Justice in International Law, 2005, pp. 82, 98.

<sup>91</sup> Treaty Counter-Memorial, ¶¶ 810–820.

<sup>92</sup> Peru explains later why this case is inapposite, but for purposes of the legal standard of denial of justice, notably, the *Dan Cake* tribunal evaluated Dan Cake’s denial of justice claim based on whether Hungary’s legal system revealed “a willful disregard of due process of law, an act which shock[ed], or at least surprise[d], a sense of judicial propriety.” [CLA-041 \(Treaty\)](#), *Dan Cake S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Admissibility, 24 August 2015 (“**Dan Cake (Decision)**”), ¶ 146; see also [RLA-096](#), *ELSI* (Judgment), ¶ 131; [RLA-080](#), *Loewen* (Award), ¶ 132). In doing so, the tribunal upheld the standard adopted by previous tribunals, searching for “clearly improper and discreditable” conduct that exhibited a “[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety.” (*Dan Cake (Decision)*, ¶ 146). The *Dan Cake* tribunal further explained that a misapplication of domestic law is never a denial of justice when it said “[i]t is not the task of [the] Tribunal to determine whether it agrees, or disagrees, with the Metropolitan Court [] as to whether the items required were indeed necessary. The Tribunal is not a court of appeal. A mere disagreement with what the Metropolitan Court [] decided on one or another point would not establish that the decision was unfair or inequitable.” (*Dan Cake (Decision)*, ¶ 117).

<sup>93</sup> Reply, ¶¶ 143 and 155.

- a. *Abandoned*: An improperly constituted and “unduly influenced” transitory court denied DRP’s challenge to INDECOPI Chamber No. 1’s decision;<sup>94</sup>
  - b. *Abandoned*: The transitory court canceled an oral argument on the day it was scheduled and transferred the matter to the 8th Chamber, which completed its review in a delayed manner;<sup>95</sup> and
  - c. *Abandoned*: The Supreme Court of Justice of Peru (“**Supreme Court**”) erroneously dismissed DRP’s and Doe Run Cayman LTD’s (“**DRCL**”) appeal “on baseless technical grounds.”<sup>96</sup>
81. Peru advanced in its Counter-Memorial<sup>97</sup> the facts and law that are relevant for this Tribunal to adjudge all three of these claims. Peru showed that Claimant’s procedural claims are both factually incorrect and, even if true, *quod non*, fall short of the denial of justice standard established by the International Court of Justice and countless other tribunals.<sup>98</sup>
82. The Reply provided Claimant with yet another opportunity to satisfy its burden of proving the procedural deficiencies necessary for this Tribunal to find in its favor. Nevertheless, Claimant has elected not to address its procedural denial of justice claims and therefore, these abandoned claims fail for the reasons set forth in the Counter-Memorial.<sup>99</sup>
- C. INDECOPI Chamber No. 1’s approval of the MEM’s credit does not place Peru in breach of the customary international law standard of denial of justice**
83. The only denial of justice claim that Claimant addresses in its Reply is the allegation that INDECOPI’s Bankruptcy Commission granted the MEM’s credit in breach of Peru’s bankruptcy law. Claimant does not explain how this alleged breach, even if proven, would amount to a denial of justice under the applicable standard it accepts. Instead, Claimant’s denial of justice claim is based on four flawed premises: (i) mischaracterization and omission of the relevant facts; (ii) Claimant’s disagreement with the Commission’s

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<sup>94</sup> Treaty Memorial, ¶ 312.

<sup>95</sup> Treaty Memorial, ¶¶ 317–319.

<sup>96</sup> Treaty Memorial, ¶¶ 322.

<sup>97</sup> Treaty Counter-Memorial, Sections IV.C.2(b)–(d).

<sup>98</sup> Treaty Counter-Memorial, Sections IV.C.2(b)–(d).

<sup>99</sup> Treaty Counter-Memorial, Sections IV.C.2(b)–(d).

interpretation of Peruvian law, which is incorrect and, in any event, not a matter for this Tribunal to review; (iii) Claimant's reliance on the decision of one investment arbitration tribunal that Claimant mischaracterizes and that is not relevant or persuasive for this case; and (iv) a host of unsubstantiated suspicions of impropriety held by Renco, which are unsupported by any evidence and which fail to demonstrate any bias or impropriety by INDECOPI's Bankruptcy Commission. As this section will demonstrate, Claimant's one remaining denial of justice claim is without merit, and the Tribunal must reject it.

**1. INDECOPI Chamber No. 1's approval of the MEM credit was appropriate**

84. The only measure that Claimant addresses in its Reply is INDECOPI Chamber No. 1's approval of the MEM's credit. Claimant's listing argument lands on two erroneous allegations: (1) that INDECOPI Chamber No. 1's approval was a misapplication of Peruvian law; and, at times, (2) unsupported conjecture of impropriety or corruption. In short, both allegations are based on a misreading of the law and mischaracterizations and/or omissions of fact, and, even if true, which they are not, do not meet the standard for denial of justice under international law.
85. Before addressing Claimant's two arguments regarding the alleged impropriety of INDECOPI Chamber No. 1's approval of the MEM, Peru wishes to set the record straight regarding two important facts that Claimant has not rebutted.
86. *First*, Claimant disagrees with INDECOPI Chamber No. 1's understanding and application of Peruvian law. And this is not the first time Claimant –through its affiliates DRP and DRCL– has attempted to persuade adjudicators to overturn the decision of INDECOPI Chamber No. 1. Having attempted and failed at numerous appeals before various fora in Peru over six years, Claimant now brings its dissent before this Tribunal. In this context, Claimant encourages the Tribunal to second guess Peru's administrative and judicial courts, re-examine evidence, and re-evaluate Peruvian law to keep its appeal alive.<sup>100</sup> The Tribunal should not, because it cannot, hear Claimant's appeal.<sup>101</sup> Peru noted this issue in

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<sup>100</sup> See generally Treaty Memorial, § IV.C.2.

<sup>101</sup> **CLA-118 (Treaty)**, *Azinian* (Award), ¶ 99; **RLA-008**, *Mondev* (Award), ¶¶ 126, 127; **RLA-089**, *Liman* (Award), ¶ 274; **CLA-121 (Treaty)**, *RosInvestCo* (Final Award), ¶ 489; **CLA-043 (Treaty)**, *Arif* (Award), ¶ 441; **RLA-091**, *ECE* (Award), ¶ 4.764.



its Counter-Memorial,<sup>102</sup> and Claimant has remained silent to the fact. The appellate nature of Claimant’s argument is highlighted in the following table, where it is clear that DRP and DRCL made the same two arguments in multiple instances before local courts: (i) there is no legal basis for INDECOPI to determine the existence of compensation owed by DRP to MEM; and (ii) INDECOPI’s decision to determine the quantum of damages has no precedents.

Claimant’s Claim in the Reply	DRP’s Claim in Domestic Proceedings	Domestic Court’s Finding
There is no legal basis for INDECOPI to determine the existence of compensation owed by DRP to MEM. <sup>103</sup>	<p><b>Administrative Tribunals</b></p> <p>DRP raised this argument before both: (a) the INDECOPI Commission<sup>104</sup>; and (b) the INDECOPI Court.<sup>105</sup></p>	Initially upheld, <sup>106</sup> but ultimately dismissed. <sup>107</sup>

<sup>102</sup> See Treaty Memorial, § IV.C.2.

<sup>103</sup> See Reply, ¶¶ 142–143.

<sup>104</sup> See e.g., [Exhibit OHE-005](#), Response of Doe Run Peru SRL before INDECOPI opposing MEM’s credit claim, 11 November 2010 (where DRP alleges that “*el MINEM no mantiene un derecho de crédito frente a la recurrente, toda vez que la obligación ... no es cuantificable en dinero ni auto-determinable por el MINEM y, por lo [mismo] no es susceptible de reconocimiento para efectos concursales.*” (Spanish original); see also [Exhibit OHE-006](#), Additional arguments in support of Doe Run Peru SRL’s Response before INDECOPI opposing MEM’s credit claim, 15 November 2010, Sections II and III; [Exhibit OHE-009](#), Letter from DRP to INDECOPI, 15 December 2010; and [Exhibit OHE-010](#), Additional arguments in support of Doe Run Peru SRL’s opposition of MEM’s credit claim, 20 December 2010, p. 2.

<sup>105</sup> See, e.g., [Exhibit C-172 \(Treaty\)](#), DRP’s Response to MEM Appeal, 18 May 2011, p. 5 (Spanish original: “no existe norma que faculte al Estado en general, ni al MINEM en particular, a ‘cobrar’ o reclamar los montos dinerarios que pudieran resultar necesarios para desarrollar los trabajos para cumplir con el objeto de la obligación impuesta a los administrados por ley, ni de los deberes que emanan de ésta. En efecto, el Estado (a través de sus instituciones habilitadas) sólo está autorizado para fiscalizar y sancionar el incumplimiento (o incentivar el cumplimiento).”) and p. 10; see also [Exhibit C-173 \(Treaty\)](#), DRP’s Brief to INDECOPI in Opposition to Appeal by MEM, 16 November 2011, ¶ 11.

<sup>106</sup> [Exhibit C-168 \(Treaty\)](#), Resolution No. 1105-2011/CCO-INDECOPI, 23 February 2011.

<sup>107</sup> [Exhibit C-174 \(Treaty\)](#), Resolution No. 1743-2011/SC1-INDECOPI, 18 November 2011.

Claimant’s Claim in the Reply	DRP’s Claim in Domestic Proceedings	Domestic Court’s Finding
	<p><b>Constitutional Amparo</b></p> <p>DRP raised this argument before both: (a) the Superior Court of Justice of Lima<sup>108</sup>; and (b) the Constitutional Court of Peru.<sup>109</sup></p>	Dismissed. <sup>110</sup>
	<p><b>Administrative Contentious Action</b></p> <p>DRP raised this argument before both: (a) the Specialized Administrative Contentious Tribunal of Lima<sup>111</sup>; and (b) the Peruvian Supreme Court of Justice.<sup>112</sup></p>	Dismissed. <sup>113</sup>

<sup>108</sup> **Exhibit C-164 (Treaty)**, DRP’s Constitutional Amparo Recourse, 22 November 2010, p. 3 (Spanish original: “la obligación contenida en el ... PAMA no es un crédito, tal como éste es definido en la Ley General del Sistema Concursal, más aún si se considera que el supuesto crédito no es una obligación cierta y exigible”); see also ¶ III.1.8 and ¶ III.1.10.

<sup>109</sup> **Exhibit R-134**, Constitutional Tribunal, Exp. No. 04620-2011PA/TC, Lima, Numerals 5 and 9, 24 June 2016, p. 1 (Spanish original: “I. ... [DRP] *interpone demanda de amparo contra el ... MEM[], solicitando que se declare: i) que las acciones del MEM para obtener el reconocimiento de créditos concursales frente a ella son inconstitucionales porque la obligación contenida en el ... PAMA[] no es un crédito*”).

<sup>110</sup> **Exhibit C-165 (Treaty)**, Dismissal of DRP’s Constitutional Amparo Recourse, 11 January 2011; **Exhibit R-134**, Constitutional Tribunal, Exp. No. 04620-2011PA/TC, Lima, Numerals 5 and 9, 24 June 2016. The decisions were not on the merits, but rather based on the fact that DRP had not met the requirements to demand constitutional protection.

<sup>111</sup> **Exhibit R-141**, DRP Request for Annulment of Administrative Decision, 16 January 2012, pp. 6–7 and Section V.C (titled “*La obligación de cumplir el PAMA no constituye una obligación dineraria ni cuantificable.*” (Spanish original)).

<sup>112</sup> **Exhibit C-186 (Treaty)**, DRP Appeal to the 18 October 2012 First Instance Judgment, 5 November 2012; p. 2 (Spanish original: “no hay norma legal que faculte al Ministerio de Energía y Minas a exigir el pago de la inversión estimada para la realización del PAMA en caso de un incumplimiento en su realización por parte del titular del derecho minero, como ocurre en el caso de autos.”); **Exhibit C-191 (Treaty)**, DRP’s *Recurso de Casación* filed before the Peruvian Supreme Court of Justice, 25 August 2014, p. 3 (Spanish original: “2.1 ... no exist[e] norma legal alguna, por la que se establezca que el PAMA, y menos el incumplimiento de la última de sus ocho etapas, pueda ser considerado un crédito, ni que el titular de [e]ste supuesto como inexistente crédito, pueda ser el Ministerio de Energía y Minas.”).

<sup>113</sup> **Exhibit C-181 (Treaty)**, Judgment of the Annulment of Administrative Act, Case No. 2012-00368, 18 October 2012, p. 14.

Claimant's Claim in the Reply	DRP's Claim in Domestic Proceedings	Domestic Court's Finding
That INDECOPI's decision to determine the quantum of damages has no precedents. <sup>114</sup>	<b>Administrative Tribunals</b> DRP raised this argument before both: (a) the INDECOPI Commission <sup>115</sup> ; and (b) the INDECOPI Court. <sup>116</sup>	Initially upheld, but ultimately dismissed. <sup>117</sup>
	<b>Constitutional Amparo</b> DRP raised this argument before the Superior Court of Justice of Lima. <sup>118</sup>	Dismissed. <sup>119</sup>
	<b>Administrative Contentious Action</b> DRP raised this argument before both: (a) the Specialized Administrative Contentious Tribunal of Lima <sup>120</sup> ; and (b) the Peruvian Supreme Court of Justice. <sup>121</sup>	Dismissed. <sup>122</sup>

87. It could not be clearer: Claimant is asking the Tribunal to sit as an international court of appeal.

<sup>114</sup> See Reply, ¶¶ 142–143.

<sup>115</sup> **Exhibit OHE-005**, Response of Doe Run Peru SRL before INDECOPI opposing MEM's credit claim, 11 November 2010 (Alleging that DRP's obligation "no es cuantificable en dinero ni auto-determinable por el MINEM" (Spanish original)); **Exhibit OHE-006**, Additional arguments in support of Doe Run Peru SRL's Response before INDECOPI opposing MEM's credit claim, 15 November 2010, Section 1.3; **Exhibit OHE-009**, Letter from DRP to INDECOPI, 15 December 2010, Section 2.1; and **Exhibit OHE-010**, Additional arguments in support of Doe Run Peru SRL's opposition of MEM's credit claim, 20 December 2010, p. 9.

<sup>116</sup> See **Exhibit C-172 (Treaty)**, DRP's Response to MEM Appeal, 18 May 2011, pp. 7–9 (Spanish original: "al ser el objeto de las obligaciones nacidas de las normas que regulan el PAMA ... el proteger el medio ambiente de una actividad dañosa, no podría cumplirse con tal obligación entregando dinero al Estado o a un tercero").

<sup>117</sup> **Exhibit C-174 (Treaty)**, Resolution No. 1743-2011/SC1-INDECOPI, 18 November 2011.

<sup>118</sup> See **Exhibit C-164 (Treaty)**, DRP's Constitutional Amparo Recourse, 22 November 2010, ¶ III.1.10 (Spanish original: "la obligación de cumplir con el PAMA no constituye una obligación dineraria, ni cuantificable").

<sup>119</sup> **Exhibit C-165 (Treaty)**, Dismissal of DRP's Constitutional Amparo Recourse, 11 January 2011 (the decisions were not on the merits, but rather based on the fact that DRP had not met the requirements to demand constitutional protection).

<sup>120</sup> See **Exhibit R-141**, DRP Request for Annulment of Administrative Decision, 16 January 2012, Section V.D (titled "La sala no puede fijar indemnizaciones dado que esa es una atribución propia y exclusiva del poder judicial." (Spanish original). See also p. 7.

<sup>121</sup> See **Exhibit C-186 (Treaty)**, DRP Appeal to the 18 October 2012 First Instance Judgment, 5 November 2012, pp. 4 (Spanish original: "(2) ... si bien esta parte indicó que la inversión estimada para concluir el proyecto es de US\$ 163,046,495.00 millones de dólares, ello no comporta ni genera un reconocimiento de una acreencia a favor del MINEM, por ser sólo un estimado del valor o presupuesto de las obras a ser ejecutadas para cumplir el objetivo del PAMA; por tanto, al no ser verificable en forma fehaciente el origen, la existencia legitimidad y cuantía de los créditos invocados por el MINEM, INDECOPI no debió reconocerlos") and 5; see also **Exhibit C-191 (Treaty)**, DRP's Recurso de Casación filed before the Peruvian Supreme Court of Justice, 25 August 2014, pp. 6–9.

<sup>122</sup> **Exhibit C-181 (Treaty)**, Judgment of the Annulment of Administrative Act, Case No. 2012-00368, 18 October 2012, p. 13–15.

88. *Second*, Claimant makes no effort to claim due process violations. DRP had every opportunity to question INDECOPI Chamber No. 1's decision, and it did. And even if the Tribunal allows Claimant to press its substantive disagreements with Peruvian law in this forum, which it should not, where are the due process violations? Notably, Claimant does not allege that the Peruvian legal system egregiously deprived DRP of its opportunity to be heard or present arguments in the proceeding before INDECOPI Chamber No. 1. Claimant makes no allegation because it cannot. DRP exercised its right to present arguments regarding the recognition of the MEM's credit on every occasion.<sup>123</sup> Peru raised this fact in its Counter-Memorial, and Claimant has remained silent.
89. Peru will now address the allegations Claimant made in its Reply, arguing, on the one hand, that INDECOPI Chamber No. 1's approval of MEM's credit against DRP was a misapplication of Peruvian law and, on the other hand, that the decision was tainted by impropriety or corruption.
- a. INDECOPI Chamber No. 1's did not misapply Peruvian law when it approved the MEM's credit against DRP
90. Claimant's criticisms regarding the approval of the MEM's credit by Peruvian courts are incorrect. In its Counter-Memorial, Peru set forth a complete and accurate description of INDECOPI Chamber No. 1 proceedings.<sup>124</sup> In its Reply, Claimant did not contest most of Peru's description of events but continues to present blanket assertions that INDECOPI Chamber No. 1 misapplied various provisions of Peruvian law,<sup>125</sup> offering three primary arguments against INDECOPI Chamber No. 1's decision:
- a. **First argument:** there is no legal basis for INDECOPI to determine the existence of compensation derived from civil liability;<sup>126</sup>

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<sup>123</sup> Hundskopf First Expert Report, ¶ 69; *see also* [Exhibit OHE-005](#), Response of Doe Run Peru SRL before INDECOPI opposing MEM's credit claim, 11 November 2010; [Exhibit OHE-006](#), Additional arguments in support of Doe Run Peru SRL's Response before INDECOPI opposing MEM's credit claim, 15 November 2010; [Exhibit OHE-009](#), Letter from DRP to INDECOPI, 15 December 2010; [Exhibit OHE-010](#), Additional arguments in support of Doe Run Peru SRL's opposition of MEM's credit claim, 20 December 2010; [Exhibit OHE-013](#), Doe Run Peru's Response to MEM's Appeal, 18 May 2011.

<sup>124</sup> *See* Treaty Counter-Memorial, § IV.C.2.

<sup>125</sup> *See generally* Reply, § IV.

<sup>126</sup> Reply, ¶¶ 142–145.

- b. **Second argument:** “INDECOPI[‘s decision to] determine the quantum of damages had no precedents.”<sup>127</sup>
- c. **Third argument:** there are two decisions by the Court of Defense of Competition and Intellectual Property holding that “neither the Supreme Decree No. 016-93 nor the PAMA entitled MEM to recover as damages the amount of the guaranties[.]”<sup>128</sup>
91. By asserting these alleged flaws and ignoring much of Peru’s Counter-Memorial, Claimant tries to paint a picture of a proceeding replete with violations of law. Under the light of fact, that picture simply does not exist.
92. **First: INDECOPI can determine the existence of compensation derived from civil liability.** In its Counter-Memorial,<sup>129</sup> Peru provided an exhaustive explanation of why INDECOPI can determine the existence of compensation derived from civil liability. Notably, one of the many points Professor Hundskopf made in his First Expert report was that “there is no law in the Peruvian legal system that establishes such prohibition on INDECOPI, nor is there any law that establishes that such function only corresponds to the judiciary.”<sup>130</sup>
93. This is the only substantive point Claimant addressed in its Reply. Claimant simply repeats its previous position, that administrative bodies (including INDECOPI) cannot establish compensation amounts, because such power corresponds solely to the judiciary and other jurisdictional bodies (such as arbitration and military tribunals).<sup>131</sup> In support of such a sweeping affirmation, Claimant relies upon Mr. Schmerler, who cites article 232.1 of the *Ley del Procedimiento Administrativo General del Perú* (“LPAG”) to support the notion that administrative bodies cannot establish compensation amounts:

“Article 232.1 of the Peruvian General Administrative Procedure Law, in effect at the time when INDECOPI examined the MEM’s request for recognition against DRP, it was provided that ‘*The administrative sanctions imposed on the party subject to administration are compatible with the requirement to restore the*

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<sup>127</sup> Reply, ¶ 143.

<sup>128</sup> Reply, ¶ 147.

<sup>129</sup> Treaty Counter-Memorial, § IV.C.2.a.

<sup>130</sup> Treaty Counter-Memorial, ¶ 829; Hundskopf First Expert Report, ¶ 72.

<sup>131</sup> Treaty Memorial, ¶ 303.

*situation altered by such to its previous state, as well as with the compensation for the harm caused, which will be determined in the appropriate judicial process.”*<sup>132</sup>

94. Claimant and Mr. Schmerler are wrong. Professor Hundskopf clarifies that it is incorrect to rely upon Article 232.1 of the LPAG because the article is only applicable to disciplinary proceedings (*procedimiento sancionador*).<sup>133</sup> Such is clear from the plain text of Article 232.1 of the LPAG, which when stating that the corresponding judicial process will determine compensation for damages caused references such requirement in the context of a disciplinary proceeding.
95. A request for recognition of a credit before INDECOPI is not a disciplinary proceeding; rather, it is what under Peruvian law is referred to as a trilateral proceeding (*procedimiento trilateral*).<sup>134</sup> The credit recognition procedure is a trilateral proceeding in which the following parties participate: (i) the creditor who claims a credit or rather requests its recognition; (ii) the bankrupt subject (who the creditor argues is the debtor); and, (iii) the administrative authority (INDECOPI) that through its chambers decide who is right in the disputed or claimed right.<sup>135</sup> The credit recognition procedure is not a sanctioning procedure, since it is not aimed at establishing an offense and imposing a sanction.<sup>136</sup> The fact that credit recognition procedures are trilateral procedures and not sanctioning procedures is consistent with Peruvian legal doctrine.<sup>137</sup>

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<sup>132</sup> Schmerler Second Report, ¶ 12 (Spanish original: “[E]n el artículo 232.1 de la Ley del Procedimiento Administrativo General del Perú, vigente en la oportunidad en que INDECOPI analizó el pedido de reconocimiento del MEM frente a DRP, se encontraba establecido que ‘Las sanciones administrativas que se impongan al administrado son compatibles con la exigencia de la reposición de la situación alterada por el mismo a su estado anterior, así como con la indemnización por los daños y perjuicios ocasionados, los que serán determinados en el proceso judicial correspondiente’”. (Emphasis in original)

<sup>133</sup> See Hundskopf Second Expert Report, ¶ 43.

<sup>134</sup> See Hundskopf Second Expert Report, ¶ 44.

<sup>135</sup> See Hundskopf Second Expert Report, ¶ 40.

<sup>136</sup> See Hundskopf Second Expert Report, ¶ 40.

<sup>137</sup> **Exhibit OHE-110**, Renzo Agurto Isla, A 25 años de su creación, 2017, p. 160 (“La relación entre ambas entidades, por la naturaleza y estructura propias del sistema concursal, es inevitable y se puede dar a lo largo de todas las etapas del concurso. Indecopi es la autoridad a cargo de la tramitación de los procedimientos concursales –que son procedimientos administrativo trilaterales–, y tiene competencia para conocer cualquier asunto vinculado a los mismos hasta la declaración judicial de quiebra del deudor o hasta que concluya el procedimiento concursal”); see also **Exhibit OHE-119**, Hugo Gomez Apac, El Procedimiento Trilateral, 2011, pp. 16–17 (Spanish original: “Los asuntos que son materia de competencia de la autoridad administrativa en un Procedimiento trilateral son aquellos: (i) Que fueron extraídos del ámbito del Poder Judicial (v.g. los procedimientos concursales).”).

96. As Professor Hundskopf explains, the application of a rule envisaged for a disciplinary proceeding (such as Article 232.1 of the LPAG) to a trilateral proceeding is inconsistent with the Peruvian legal norms and with fundamental rights recognized in the Constitution.<sup>138</sup> As such, Claimant’s reliance on Art. 232.1 of the LPAG to claim that administrative bodies cannot under any circumstances establish compensation amounts, because such power corresponds solely to the judiciary, is unfounded.
97. As Peru explained in its Counter-Memorial and Professor Hundskopf expands upon in his second report, pursuant to articles 38 and 39 of Law No. 27809, the General Law of the Bankruptcy System of Peru Bankruptcy Law (“**Bankruptcy Law**”), and as confirmed by bankruptcy chamber decisions and Peruvian legal doctrine,<sup>139</sup> the Bankruptcy Law grants broad powers to the bankruptcy authority in evidentiary and investigative matters to perform the credit recognition process.<sup>140</sup> Mr. Schmerler ignores the nature of the INDECOPI and its broad powers<sup>141</sup> in its role as the administrative body that resolves credit recognition proceedings.<sup>142</sup>

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<sup>138</sup> See Hundskopf Second Report, ¶ 47; see also [RLA-036](#), Political Constitution of Peru, enacted on 29 December 1993, en su Capítulo I sobre Derechos Fundamentales de la Persona, article 2 (Spanish original: “Toda persona tiene derecho: 24. A la libertad y a la seguridad personales. En consecuencia: a. Nadie está obligado a hacer lo que la ley no manda, ni impedido de hacer lo que ella no prohíbe”).

<sup>139</sup> See [Exhibit OHE-110](#), Renzo Agurto Isla, A 25 años de su creación, 2017, p. 163 (Spanish original: “[El] Indecopi investigará la existencia, origen, legitimidad y cuantía de los créditos invocados por los acreedores a fin de emitir un pronunciamiento sobre la procedencia de las solicitudes. Sin embargo, existen ciertas particularidades en el trámite del reconocimiento de créditos que reflejan la interacción entre Indecopi y el Poder Judicial, como es el caso del registro como contingentes de aquellos créditos respecto de los que existe una controversia sobre su existencia, origen, legitimidad y cuantía, así como la consecuente suspensión del trámite del reconocimiento de tales créditos hasta que la controversia sea definida.”); [Exhibit OHE-114](#), Luis Francisco Echeandía Chiappe, *Odisea concursal y crisis empresarial*, 2001, pp. 211–212 (Spanish original: “la Ley ha establecido un procedimiento en el cual la actividad procesal a cargo de la autoridad administrativa tiene por objeto comprobar el derecho de cada solicitante a participar en el proceso concursal. El análisis, en este caso, pretende cubrir todos los elementos de la relación crediticia con la empresa y exige al acreedor presentar el sustento documentario de su derecho, que deberá ser comprobado por la Comisión (...). Si nos atenemos al texto legal, debemos concluir que el reconocimiento de créditos no es cualquier cosa, sino que exige de la autoridad concursal todo un trabajo de análisis y comprobación que le permita validar la existencia del derecho invocado, determinar su real cantidad y características o, de lo contrario, sustentar un pronunciamiento denegando el pedido.”).

<sup>140</sup> See Hundskopf Second Expert Report, ¶ 65; Hundskopf First Expert Report, ¶ 76; [Exhibit OHE-056](#), Law No. 27809, General Law of the Bankruptcy System, Arts. 3 and 38; [Exhibit R-244](#), Resolution No. 0466-2014/SCO-INDECOPI, 12 August 2014.

<sup>141</sup> While INDECOPI’s powers are broad in the context of bankruptcy proceedings, INDECOPI’s decisions and be reviewed and are in essence controlled by the judicial authority through administrative contentious proceedings.

<sup>142</sup> See Hundskopf Second Expert Report, § III.

98. As such, although the judiciary has the power to establish claims derived from compensation, Professor Hundskopf explains the Peruvian legal system does not preclude the bankruptcy authority from recognizing credits derived from compensation in certain circumstances, for example, when the compensation amount can be determined by an evaluation of the evidence, the law, contract, or declaration of the parties.<sup>143</sup> As Peru explained in its Counter-Memorial,<sup>144</sup> this has been applied in previous bankruptcy cases.<sup>145</sup> Claimant has not addressed any of these arguments in its Reply.
99. As a result, Mr. Schmerler’s opinion that administrative authorities, like INDECOPI, “cannot under any circumstances determine the existence of compensation derived from civil liability” is incorrect.<sup>146</sup> Peruvian law makes it clear, unsurprisingly, that when the compensation can be derived from the evidence, the law, contract, or declaration of the parties, INDECOPI Chamber No. 1 can establish and/or determine the existence of compensation owed from civil liability.
100. **Second: INDECOPI’s decision to determine the quantum of damages had precedents.** In the Memorial, Claimant argued INDECOPI’s decision to determine the quantum of damages had no precedents. In its Counter-Memorial, Peru presented multiple instances where INDECOPI determined the quantum of damages.<sup>147</sup> Claimant did not address the cases presented by Peru in its Reply –instead, Claimant attempted to recast its indefensible claim: “The decision by the Peruvian administrative courts that DRP owed MEM compensation under the Supreme Decree No. 016-93 and that INDECOPI could determine the quantum of damages had no precedents.”<sup>148</sup> Claimant misunderstands what precedent entails, perhaps conflating *res judicata* with precedent. By Claimant’s logic —and the successive addition of choice case details— there could be no precedent; one could continue adding detail upon detail to a case description until the possibility of precedent is foreclosed. This is a wasteful distraction. Returning to the legal issue at hand, in his second

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<sup>143</sup> See Hundskopf Second Expert Report, ¶ 14; Hundskopf First Expert Report, ¶ 77.

<sup>144</sup> See Treaty Counter-Memorial, ¶ 833.

<sup>145</sup> See Hundskopf First Expert Report, ¶ 97.

<sup>146</sup> Treaty Memorial, ¶ 305.

<sup>147</sup> See Treaty Counter-Memorial, ¶ 833.

<sup>148</sup> Reply, ¶ 143.



report, Professor Hundskopf reaffirms the relevant precedent from his first report and provides additional decisions where INDECOPI has explicitly stated that an administrative body has broad powers in evaluating requests for the recognition of credits.<sup>149</sup>

101. **Third:** the two decisions Claimant references, holding that “neither the Supreme Decree No. 016-93 nor the PAMA entitled MEM to recover as damages the amount of the guaranties”, are inapposite. In the Reply, Claimant asserts:

“In two separate but very similar opinions, the Court of Defense of Competition and Intellectual Property confirmed INDECOPI’s decision[s], denying MEM’s claims to credit against the Quiruvilca and Aurifera mining projects], holding that neither the Supreme Decree No. 016-93 nor the PAMA entitled MEM to recover as damages the amount of the guaranties because it was unknown whether the guaranteed sums resembled the actual cost to close the mines and that, in any event, that the administrative courts lacked the authority to determine this issue.”<sup>150</sup>

102. Upon review of the Quiruvilca and Aurifera decisions,<sup>151</sup> it is evident that the matters are far from “very similar opinions” to INDECOPI No. 1’s decision to recognize the MEM’s credit against DRP.
103. Claimant and Mr. Schmerler’s characterization of and reliance on the Quiruvilca and Aurifera decisions are misplaced. While these cases involve the issue of recognition of

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<sup>149</sup> See Hundskopf Second Report, ¶ 65; [Exhibit OHE-132](#), Resolution No. 079-97-TDC, 24 March (Spanish original: “Tal como se ha señalado, la aplicación de la Ley de Reestructuración Empresarial enfrenta el riesgo de que se desvirtúen los fines de sus normas y los mecanismos de protección del patrimonio se utilicen indebidamente, para evadir o diferir el pago de obligaciones. Por ello, las normas han provisto a los órganos administrativos encargados de la tramitación de dichos procedimientos de facultades suficientes para hacer las investigaciones que resulten necesarias para verificar la real existencia del estado de insolvencia de una empresa, así como los créditos invocados frente a ella. En estos casos, la Comisión no solo actúa en atención a los legítimos intereses del solicitante (ya sea éste la empresa deudora o un acreedor), sino de todos los demás posibles acreedores de la empresa, que podrían verse perjudicados por la simulación de un estado de insolvencia. Por eso, los órganos administrativos deben verificar que se cumplan los supuestos legales para la declaración de insolvencia de una empresa y para el reconocimiento de los créditos invocados frente a ella, ejerciendo en la etapa investigatoria de los procedimientos, las atribuciones y facultades que le confieren la Ley y el Reglamento, así como el Título I del Decreto Legislativo N° 807, a los que ya se ha hecho referencia. (...) Para efectos de la verificación mencionada, los acreedores podrán presentar la documentación que sustente los créditos invocados que consideren pertinente. Sin embargo, cuando a criterio de la autoridad administrativa la documentación presentada no resulte suficiente o cuando existan elementos que le hagan presumir una posible simulación de obligaciones, o por seguridad jurídica del procedimiento, cuando se detecte la posible existencia de vinculación entre la deudora y su acreedor, se debe verificar, necesariamente, el origen del crédito, investigando su existencia, como exige el artículo 8 del Reglamento, por todos los medios”).

<sup>150</sup> Reply, ¶ 147.

<sup>151</sup> [Exhibit DS-058](#), Resolution No. 0551-2021/SCO-INDECOPI of 9 August 2021; [Exhibit DS-059](#), 0706-2021/SCO-INDECOPI of 5 October 2021.

credits, they are of limited probative value for the case of DRP because the relationships and obligations between the Quiruvilca and Aurifera debtors and the MEM were distinct from those between DRP and the MEM. More specifically, the credits at issue in the Quiruvilca and Aurifera matters were derived from the breach of norms related to mine closure plans, and, notably, with compensation amounts estimated by the General Directorate of Environmental Affairs for Mining of MEM. Despite Claimant’s assertions to the contrary, the obligations in the matter between the MEM and DRP are not similar. Here, the obligation DRP owed is not related to a mine closure and is not governed by the same laws as those which applied to the Quiruvilca and Aurifera matters. Further, here the amount of the credit was not “estimated” by the MEM; rather, it was calculated by DRP itself after performing vast technical studies.<sup>152</sup> Claimant’s reliance on the Quiruvilca and Aurifera cases is thus incorrect, as is Claimant’s assertion that those cases support its argument that INDECOPI was prohibited from recognizing the MEM’s credit against DRP.

b. Claimant’s allegations of impropriety or corruption behind INDECOPI Chamber No. 1’s decision are baseless

104. In its Reply, Claimant makes two audacious statements with no explanation or support:

“That the courts knowingly exceeded the scope of their jurisdiction to uphold MEM’s credit **for political reasons** is made clear given two later bankruptcies.”<sup>153</sup> (Emphasis added)

“In sum, the Peruvian administrative courts and MEM (both belonging to the Peruvian state, of which INDECOPI and MEM are part) **worked arm-in-arm** to deny Claimants justice.”<sup>154</sup> (Emphasis added)

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<sup>152</sup> See [Exhibit C-174 \(Treaty\)](#), Resolution No. 1743-2011/SC1-INDECOPI, 18 November 2011, ¶¶ 71–72 (Spanish original: “En el expediente obra copia del informe presentado el 27 de enero de 2010 per DRP ante la Dirección General de Minería del MEM, por el cual la empresa concursada comunicó a la referida entidad estatal que el importe necesario para financiar y construir el proyecto asciende a US\$ 163 046 495,00. Si bien DRP ha alegado que ese monto solo es un estimado (aproximado) del costo de la inversión requerida para construir el proyecto, debe considerarse que se trata de un importe que, además del hecho de que la necesidad de su cuantificación es exigida por las normas en materia ambiental, tiene un respaldo técnico en los estudios de factibilidad y demás análisis de tipo financiero realizados por la propia empresa para determinar la viabilidad del proyecto, por lo que su valorización constituye la referencia necesaria al momento de establecer el equivalente pecuniario del daño ocasionado por el incumplimiento del PAMA, en la medida que ello permitirá al Estado o terceros culminar con la realización del proyecto a fin de poder completar la implementación del referido programa de adecuación ambiental, el cual resulta indispensable para poder continuar la realización de la actividad minera de la empresa concursada.”).

<sup>153</sup> Reply, ¶ 145.

<sup>154</sup> Reply, ¶ 157.

105. Claimant’s attempt to cast vague aspersions implying the very serious charge of corruption is wholly improper. Indeed, “The seriousness of the accusation of corruption,” particularly when it “involves officials at the highest level of the [respondent’s] Government”<sup>155</sup> requires that the party alleging corruption<sup>156</sup> provide “clear and convincing evidence” of corruption.<sup>157</sup> In other words, “[i]t is not sufficient to present evidence which could possibly indicate that there might have been or even probably was corruption. Rather, [a claimant] ha[s] to prove corruption.”<sup>158</sup> Claimant has provided no evidence to support the conclusions it asks the Tribunal to draw, and, at best, even when Claimant alleges that the MEM “insit[ed] on measures that were arbitrary and unfair”<sup>159</sup> in the Board of Creditors, Claimant itself admits that at best it has “circumstantial evidence.”<sup>160</sup> To be clear, Claimant cannot provide proof of corruption because none exists.
106. In its Counter-Memorial, Peru pointed out Claimant’s impropriety in making similar, vague and unsubstantiated statements in its Memorial, and reserved its right to present additional submissions on this point in the event that Claimant actually provided evidence of such vague allegations.<sup>161</sup> With its Reply, Claimant continued with unsubstantiated insinuations of corruption. Thus, after two submissions on the merits, Claimant has nothing to corroborate its insinuations. The opportunity to present actual evidence of supposed corruption has come and gone, and the Tribunal should not entertain any further discussion on the subject. Claimant’s innuendo does not come close to satisfying the applicable standard for a denial of justice finding or to sustaining the very serious charge of corruption.

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<sup>155</sup> **RLA-101**, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009 (“**EDF Services (Award)**”), ¶ 221.

<sup>156</sup> See **RLA-102**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award, 10 December 2014 (“**Fraport (Award)**”), ¶ 491; **RLA-168**, *Wena Hotels Ltd. Arab Republic of Egypt*, ICSID Case No. ARB/98/4 (Award, 8 December 2000), ¶¶ 77, 117.

<sup>157</sup> **RLA-101**, *EDF Services (Award)*, ¶ 221. See also **RLA-103**, *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017, ¶ 492; **RLA-090**, *Oostergetel (Final Award)*, ¶ 303; **RLA-089**, *Liman (Award)*, ¶¶ 422, 424; **RLA-104**, *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20, Award, 16 May 2012, fn. 8; **RLA-102**, *Fraport (Award)*, ¶ 491.

<sup>158</sup> **RLA-089**, *Liman Caspian (Award)*, ¶ 424.

<sup>159</sup> Reply, ¶ 165.

<sup>160</sup> Reply, ¶ 165.

<sup>161</sup> See Treaty Counter-Memorial, ¶ 852 (where Peru responded to Claimant’s vague allegations that the “specially-created transitory court” was “considered” to be “unduly influenced by the Peruvian government.”).

## 2. Claimant's reliance on *Dan Cake* is misguided

107. Claimant cites one case, *Dan Cake v. Hungary*, to support its denial of justice claim. Peru gladly also will rely on *Dan Cake*, as it readily demonstrates why Claimant's claims fail.
- a. Claimant mischaracterized the facts of *Dan Cake* and the *Dan Cake* tribunal's decision
108. Claimant asserts in its Reply that the tribunal in *Dan Cake* held in favor of the investor on the denial of justice claims because the metropolitan court "ignored its obligations to the detriment of Danesita" when it refused to convene a composition hearing until Danesita satisfied several conditions.<sup>162</sup> Claimant then noted the court's condition that Danesita place into an escrow account an amount sufficient to satisfy all creditor claims, implying that such a requirement contributed to a denial of justice.<sup>163</sup> This is a bald mischaracterization.
109. The tribunal in *Dan Cake* found it natural to require an escrow account to satisfy payment obligations.<sup>164</sup> The tribunal's disapproval rather lay with the court's order that Danesita place the funds in escrow at the time of requesting a hearing, which was not required by the law, and within 15 days, a condition that "appear[ed] almost impossible to satisfy."<sup>165</sup>
110. In fact, the tribunal in *Dan Cake* acknowledged that the metropolitan court may require debtors to satisfy additional conditions and submit supplemental filings that are not required under Hungary's bankruptcy act but are deemed necessary by the court.<sup>166</sup> The tribunal rather adjudged the procedural deficiencies in the order as constituting a denial of justice, highlighting that the court (1) required unnecessary filings that breached fundamental rights and were impossible to satisfy; (2) unnecessarily delayed any future hearing by four months despite the 60-day window *required by law*; and (3) insisted on the prompt sale of Danesita's assets within 120 days of a prior liquidation order.<sup>167</sup>

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<sup>162</sup> Treaty Reply, ¶¶ 152, 154.

<sup>163</sup> Treaty Reply, ¶¶ 152, 154.

<sup>164</sup> [CLA-041 \(Treaty\)](#), *Dan Cake* (Decision), ¶ 123.

<sup>165</sup> [CLA-041 \(Treaty\)](#), *Dan Cake* (Decision), ¶ 124.

<sup>166</sup> [CLA-041 \(Treaty\)](#), *Dan Cake* (Decision), ¶ 113.

<sup>167</sup> [CLA-041 \(Treaty\)](#), *Dan Cake* (Decision), ¶ 122.

b. The *Dan Cake* case supports Peru's position

111. Claimant's mischaracterization of *Dan Cake* is not surprising because an accurate analysis of *Dan Cake* supports Peru's position. The *Dan Cake* decision stands apart from this matter because (1) the nature of the metropolitan court's requirements are not comparable to the reasonable conditions imposed by the MEM; and (2) the metropolitan court denied Danesita its right to be heard, whereas DRP enjoyed its right to a fair hearing at every instance in relation to their appeals of INDECOPI's recognition of the MEM's credit. However, before addressing Claimant's reliance on *Dan Cake*, Peru notes that it is unclear whether when addressing *Dan Cake* Claimant is suggesting that the conditions the MEM allegedly placed on DRP's restructuring plan constituted a denial of justice. If so, Peru notes that it is the first time Claimant makes such a claim and that such a claim would be wholly unfounded, as the Board of Creditors, not the MEM, was the decision maker with respect to DRP's restructuring plans. Further, the denial of justice claim would be unfounded as denial of justice claims are reserved for judicial and administrative proceedings, and not for a bankruptcy proceeding by a Board of Creditors where there are no decisions being made by a State entity.<sup>168</sup> In any event, even if the Tribunal treats Claimant's apparent denial of justice claims with respect to the decisions of the Board of Creditors as viable, the MEM conditions were not comparable to what happened in *Dan Cake*.
112. The *Dan Cake* tribunal's decision turned on whether the metropolitan court "administer[ed] justice in a seriously inadequate way" that the tribunal considered "clearly improper and discreditable," and reflecting a "[m]anifest injustice in the sense of a lack of due process...."<sup>169</sup> The Tribunal's attention to due process once again adhered to the high customary international law standard for denial of justice claims.
113. The *Dan Cake* Tribunal found that the metropolitan court imposed unreasonable conditions that were unsupported by Hungary's bankruptcy laws and contravened Danesita's right to

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<sup>168</sup> See [RLA-080](#), *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003 ("**Loewen (Award)**"), ¶ 123.

<sup>169</sup> [CLA-041 \(Treaty\)](#), *Dan Cake* (Decision), ¶ 146.

a hearing (a composition hearing).<sup>170</sup> Despite an express directive in Hungary's bankruptcy law to provide Danesita with a composition hearing, the court barred Danesita's shareholder Dan Cake from the hearing.<sup>171</sup> The court then required documents that would help determine whether Danesita would likely meet the conditions for a composition agreement during the composition hearing, which was not a requirement under the law.<sup>172</sup> The court also refused to grant the hearing until Dan Cake's and Danesita's pending objections to the bankruptcy court against the liquidator were concluded, a condition that contravened a prior judgment of the Metropolitan High Court of Appeal.<sup>173</sup> In addition to the imposition of conditions that departed from precedent, the court imposed other conditions that further postponed the required composition hearing and "defeat[ed] common sense."<sup>174</sup>

114. Unlike the Metropolitan Court of Budapest, neither INDECOPI, Peru's administrative courts, nor the MEM imposed unnecessary or unreasonable requirements on DRP. As explained above and in Professor Hundskopf's expert reports, INDECOPI No. 1's decision to recognize the MEM's credit against DRP conforms to Peruvian law and Claimant has been unable to point to any denial of DRP's procedural due process.
115. With respect to the proceedings before DRP's Board of Creditors, also unlike the actions that were the subject of the Dan Cake decision, no entity conditioned DRP's restructuring on unnecessary requirements that breached DRP's fundamental rights and were impossible to satisfy within a reasonable timeframe. As a creditor participating in the Board of Creditors, the MEM consistently encouraged consensus among the creditors and focused on solutions.<sup>175</sup> On 13 January 2012, the MEM voted alongside 99.8% of the Board in favor of restructuring DRP in a manner that respected Peru's environmental regulations.<sup>176</sup> On 12 April 2012, the MEM reiterated its support for the restructuring and voted alongside

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<sup>170</sup> **CLA-041 (Treaty)**, *Dan Cake* (Decision), ¶ 127 (Hungary's bankruptcy act provided that the court "shall" hold composition negotiations within 60 days of a debtor's petition, making it clear that a settlement petition cannot be refused with a view to foreseeable/predictable shortcomings on the merit.").

<sup>171</sup> **CLA-041 (Treaty)**, *Dan Cake* (Decision), ¶ 132.

<sup>172</sup> **CLA-041 (Treaty)**, *Dan Cake* (Decision), ¶ 126.

<sup>173</sup> **CLA-041 (Treaty)**, *Dan Cake* (Decision), ¶ 133, 137.

<sup>174</sup> **CLA-041 (Treaty)**, *Dan Cake* (Decision), ¶ 119.

<sup>175</sup> Shinno Witness Statement, ¶ 47.

<sup>176</sup> **Exhibit R-110**, DRP Creditors' Meeting Minutes, 13 and 18 January 2012, p. 13.

97% of the Board to place DRP into operational liquidation, the only option left at that point that allowed DRP to restructure in the future.<sup>177</sup> True to its word, the MEM immediately welcomed a meeting with DRP to discuss restructuring after DRP removed the proposal items that concerned the Board, remained open to negotiations for the next four months while continuously communicating to DRP the MEM's agreeable terms, and even presented an amended restructuring plan in August 2012.<sup>178</sup>

116. DRP's failure to salvage Renco's investment did not result from the MEM's involvement in the Board of Creditors but rather from Renco's poor planning and sabotage of DRP's obligations and subsequently DRP's own unwillingness to cooperate with the Board. In *Dan Cake*, a composition hearing was the only way to avoid the sale of Danesita's assets because a creditor's committee did not exist.<sup>179</sup> Here, DRP's creditors established a Board of Creditors, and DRP had years to reach an agreement independently of whether DRP succeeded in its appellate challenges.
117. Furthermore, unlike the bankruptcy proceedings in *Dan Cake*, DRP's bankruptcy proceedings did not involve undue delays,<sup>180</sup> and in no event did the proceedings involve delays or requirements that foreclosed appeals or the possibility of DRP's restructuring.<sup>181</sup> In fact, DRP's multiple appeals in and of themselves differentiate this matter from *Dan Cake*, where the tribunal drew attention to Danesita's inability to appeal the metropolitan court's order.<sup>182</sup> The failed appellate system in *Dan Cake* stands in stark contrast to DRP's case. In the domestic proceedings, not once did DRP argue a violation of its right to be heard. In fact, quite the opposite occurred. DRP has had the opportunity to pursue

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<sup>177</sup> [Exhibit C-231](#), DRP Creditors' Meeting Minutes, 9 and 12 April 2012, pp. 18–19.

<sup>178</sup> Treaty Counter-Memorial, ¶¶ 393–99.

<sup>179</sup> [CLA-041 \(Treaty\)](#), *Dan Cake* (Decision), ¶ 50.

<sup>180</sup> See [CLA-041 \(Treaty\)](#), *Dan Cake* (Decision), ¶ 103 (The court insisted, without a legal basis, on waiting to hold a hearing for at least four months even after Danesita submitted a request that met the court's requirements.).

<sup>181</sup> See [CLA-041 \(Treaty\)](#), *Dan Cake* (Decision), ¶ 103 (After postponing the hearing for at least 120 days, the court instructed the liquidator to proceed with the sale in 120 days. The court's decision thus reflected an "alleged [. . .] impossibility [for Dan Cake] to abide by the law and hold a composition hearing within a 60-day period" to avoid the sale of its investment.).

<sup>182</sup> [CLA-041 \(Treaty\)](#), *Dan Cake* (Decision), ¶ 140 (The *Dan Cake* tribunal reasoned that Danesita could not have re-submitted a petition without incurring increasing losses and withdrawing its pending objections to the initial liquidation proceedings. Based on "the absence of any reasonably available further recourse against the Court," the matter reflected a "systemic" breakdown in Hungary's judicial system.).

exhaustive and meritless challenges against the MEM’s creditor status before several administrative and constitutional appellate courts.<sup>183</sup> In fact, although the 8th Chamber’s judgment was final, binding, and not conventionally subject to appeal, Peruvian courts allowed DPR to seek a cassation before the Supreme Court.<sup>184</sup> In any event, Claimant has completely failed to respond to Peru’s defenses on this issue,<sup>185</sup> and the Tribunal should thus conclude that they are conceded.

118. In sum, *Dan Cake* is not instructive of a denial of justice finding here. In *Dan Cake*, domestic courts imposed “obviously unnecessary” conditions that were unsupported by law despite the investor’s unequivocal rights to be heard and to participate in the composition hearing, and to object to the liquidation of its assets.<sup>186</sup> Here, DRP exercised on every occasion its right to present arguments contesting the recognition of the MEM’s credit. Claimant has failed to identify any unnecessary, unduly burdensome requirements imposed upon DRP or DRCL that breached their fundamental due process rights. Peru did not render the loss of DRP’s investment inevitable, and this matter exhibits no “manifest sign[s] that [Peru] did not want, for whatever reason, to do what was mandatory.”<sup>187</sup>

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119. In conclusion, Claimant’s denial of justice claims must fail.
120. Peru notes that Claimant presents a bizarre argument on the element of causation for its denial of justice claim, under Section V of its Reply. According to Claimant, while the Peruvian administrative courts allegedly denied it justice, the administrative courts did not cause damages to Claimant. Instead, MEM —somehow taking advantage of the administrative courts’ purported denial of justice— caused Claimant’s alleged damages.

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<sup>183</sup> See generally [Exhibit OHE-005](#), Response of Doe Run Peru SRL before INDECOPI opposing MEM’s credit claim, 11 November 2010; [Exhibit OHE-006](#), Additional arguments in support of Doe Run Peru SRL’s Response before INDECOPI opposing MEM’s credit claim, 15 November 2010; [Exhibit OHE-009](#), Letter from DRP to INDECOPI, 15 December 2010; [Exhibit OHE-010](#), Additional arguments in support of Doe Run Peru SRL’s opposition of MEM’s credit claim, 20 December 2010; [Exhibit R-141](#), DRP Request for Annulment of Administrative Decision, 16 January 2012.

<sup>184</sup> See generally [Exhibit C-164 \(Treaty\)](#), DRP’s constitutional amparo recourse, 22 November 2010; [Exhibit R-134](#), Constitutional Tribunal, Exp. No. 04620-2011PA/TC, Lima, Numerals 5 and 9, 24 June 2016.

<sup>185</sup> See Treaty Counter-Memorial, Sections IV.C.2(b)–(d).

<sup>186</sup> [CLA-041 \(Treaty\)](#), *Dan Cake* (Decision), ¶ 145.

<sup>187</sup> [CLA-041 \(Treaty\)](#), *Dan Cake* (Decision), ¶ 142.



121. This claim is both meritless and a factual misrepresentation. Given that the Tribunal has ordered the bifurcation of proceedings, thereby postponing quantum issues to a separate phase, Claimant’s argument is procedurally improper.
122. Given the procedural impropriety of addressing quantum issues at this phase of a bifurcated proceeding, Peru will only succinctly reply to Claimant’s argument here. First, the notion that one state entity (in this case, MEM) could cause a denial of justice by proxy for another state entity (the administrative courts), is wholly unsupported by customary international law principles underlying the standards for denial of justice. In Claimant’s own words: “[I]n this case, the Peruvian administrative courts denied justice, and MEM used the denial of justice to cause damages.” That the MEM could somehow pick up an alleged denial of justice by the administrative courts that, according to Claimant, caused zero damage, and then then wield it against Claimant to cause some untold amount of damage is untenable.
123. Second, the denial of justice claim would be unfounded as denial of justice claims are reserved for judicial and administrative proceedings, and not for a bankruptcy proceeding by a Board of Creditors where there are no decisions being made by a State entity.<sup>188</sup>
124. Third, Claimant’s explanation of the decisions adopted by DRP’s Board of Creditors regarding its bankruptcy is, at best, misleading. Claimant asserts that “the only objections lodged to the Plan were those by MEM.”<sup>189</sup> While the MEM did indeed make several observations to the restructuring plan, as Claimant itself cites, both “[t]he creditors and the Ministry ... hope[d] that th[o]se points c[ould] be resolved.”<sup>190</sup> As already explained in Section IV.B.2.c. of Peru’s Counter-Memorial, the MEM was not the only creditor to vote against DRP’s proposed restructuring plan. Rather, the plan was rejected by the majority of the Board of Creditors.
125. Fourth, Claimant’s contention that “[n]o support can be found in any of the minutes from the meetings of the creditors committee for MEM’s statement that creditors (other than MEM) insisted that DRP comply with current environmental standards<sup>191</sup> is yet another

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<sup>188</sup> See [RLA-080](#), *Loewen* (Award), ¶ 123.

<sup>189</sup> Reply, ¶ 162.

<sup>190</sup> Reply, ¶ 163.

<sup>191</sup> Reply, ¶ 164.

misrepresentation. As Peru pointed out in its Counter-Memorial, Apoyo Consultoría S.A.—the third party the Board of Creditors appointed as DRP’s environmental supervising entity— noted that DRP’s restructuring plan would result in SO2 and lead emissions beyond the acceptable standards under Peruvian law, and as a result there would not be a way to implement the plan.<sup>192</sup>

126. Fifth, Claimant’s suggestion that “[h]ad the creditors voted in favor of reorganization, Claimants would not have lost their investment”<sup>193</sup> is simply unfounded and belied by the facts. As previously explained, Renco its affiliates caused DRP’s downfall, and DRP’s restructuring plan was rejected for being unviable.<sup>194</sup>
127. Peru reserves its right to expand on these arguments in a second phase of the proceedings, should the Tribunal decide—which it should not—that Claimant’s claims are meritorious.

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<sup>192</sup> [Exhibit C-231](#), DRP Creditors’ Meeting Minutes, 9 and 12 April 2012, PDF p. 13.

<sup>193</sup> Reply, ¶ 177.

<sup>194</sup> Treaty Counter-Memorial, ¶ IV.B.2.c.

## VI. PRAYER FOR RELIEF

128. For the foregoing reasons, Peru respectfully requests that the Tribunal:
- a. Dismiss Claimant's claims for an alleged violation of FET under Article 10.5 of the Treaty in their entirety, for lack of jurisdiction;
  - b. Dismiss Claimant's claims for an alleged expropriation under Article 10.7 of the Treaty, for lack of jurisdiction;
  - c. Dismiss Claimant's claims for an alleged denial of justice under Article 10.5 of the Treaty in their entirety, for lack of merit; or
  - d. In the event the Tribunal finds it has jurisdiction over Claimant's claims for an alleged violation of FET under Article 10.5 of the Treaty and Claimant's claims for an alleged expropriation under Article 10.7 of the Treaty, dismiss all of Claimant's claims for lack of merit.
129. Additionally, Peru requests an order as soon as practical from the Tribunal that precludes Claimant from raising new arguments regarding jurisdiction in its subsequent written submission or the hearing that could have been raised in its Reply.
130. Peru further requests that the Tribunal order Claimant to pay all of Peru's costs, including the totality of the arbitral costs that Peru incurred in connection with this proceeding, as well as the totality of its legal fees and expenses.
131. Should Renco's claims proceed to a quantum phase, Peru reserves its rights to request that the Tribunal order the appropriate set off to any damages award to account for Renco's contribution to DRP's failure to satisfy its obligations, including its environmental obligations under the PAMA and its obligations under Clause 2 of the Legal Stability Agreement between the Peruvian State and Doe Run Perú S.R.Ltda.<sup>195</sup>

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<sup>195</sup> **Exhibit R-094**, Securities and Exchange Commission Form S-4, DRRC, 11 May 1998, pp. 1578-1584 (Legal Stability Agreement between the Peruvian State and Doe Run Perú S.R.Ltda, Clause 10: "In the event that [DRP] incurs in one of the previously mentioned causes of termination of the present Agreement, and if as a result of the legal stability conferred by the authority of the same agreement [DRP] enjoyed a lighter tax burden that would have corresponded to it if it had not been under the authority of said Agreement, it shall be obliged to reimburse the STATE for the actual amount of the taxes that would have affected it if such Agreement had not been signed, plus the corresponding surcharges referred to in the Tax Code.").

Respectfully submitted,

*Allen & Overy*

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