UNDER THE UNCITRAL ARBITRATION RULES (2013)

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

v.

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

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

Respondents' Post-Hearing Brief

21 June 2024

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CONTENTS

I. INTRODUCTION

1. Pursuant to Procedural Order No. 12 in *The Renco Group Inc., v. The Republic of Peru*, PCA Case No. 2019-46 (the "**Treaty Case**"),[1] and Procedural Order No. 13 in *The Renco Group Inc., and Doe Run Resources Corp. v. Activos Mineros S.A.C.*, PCA Case No. 2019-47 (the "**Contract Case**"), The Republic of Peru ("**Peru**") and Activos Mineros S.A.C. ("**Activos Mineros**") (together, the "**Respondents**") present responses to the questions of the Tribunal appended to the procedural orders as Annex 2 and a final articulation of Respondents' request for relief for each case.

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

II. TRIBUNAL QUESTIONS

1. Regarding the Missouri Litigations:

a. What is the current status of the Missouri Litigations and the expected date of any forthcoming judgment(s)?

2. As the Tribunal is aware, there are two sets of lawsuits against the parent companies of Doe Run Peru ("**DRP**") (the "**Missouri Litigations**"): (i) the subset of Missouri Litigations styled as *A.O.A. et al v. Doe Run Resources Corporation et al.*, Case No. 4:11-cv-00044 (the "**Reid Cases**"); and (ii) the subset of Missouri Litigations styled *J.Y.C.C., et al., v. Doe Run Resources, Corp., et al.*, Case No. 4:15-CV-1704-RWS (the "**Collins Cases**").

3. The Reid Cases are currently in the summary judgment[2] phase and stayed pending an interlocutory appeal by the defendants. The defendants appealed the district court's decision to deny the defendants' motion to dismiss the action pursuant to various transnational doctrines, including international comity.[3] The interlocutory appeal was argued and submitted to a three-judge panel in the 8th Circuit on 9 January 2024.[4] That appellate panel's decision is pending.[5]

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[2] Summary judgment is a procedural mechanism that enables a U.S. court to resolve claims prior to trial. It typically takes place after discovery. *See infra* note 6. A party to a suit may move for summary judgment, after which both parties would brief the court either in support of or in opposition to the motion for summary judgment. Based on the briefing and any oral argument, the court will then decide whether to grant summary judgment if the moving party demonstrates the absence of any genuine dispute over any material fact relevant to the case. If that standard is met, the court may then dispense with a trial and decide the case based on the legal arguments in the parties' briefing materials. If the court decides disputes exist over material facts relevant to the case, a trial may occur to present evidence and for the factfinder to make findings of fact.

[3] Note there is no record evidence to support this proposition, however, support can be found on page one of Docket Entry 1380, dated 5 September 2023, for case number 4:11-cv-00044-CDP in the Eastern District of Missouri. Respondents are prepared to submit this document at the Tribunal's request.

[4] Note there is no record evidence to support this proposition, however, support can be found at Docket Entry 92, dated 9 January 2024, for case number 23-1625 in the United States Court of Appeals for the Eighth Circuit. Respondents are prepared to submit this document at the Tribunal's request.

[5] The Eight Circuit panel's decision is pending as of 21 June 2024.

4. The Collins Cases are currently in the discovery phase.[6] On 30 April 2024, the court issued a case management order which sets the deadline for filing dispositive motions on 16 February 2026, with responses to any dispositive motions due 3 April 2026, and replies in support of any dispositive motions due 29 April 2026.[7]

5. Currently, it is not possible to determine when the Missouri Litigations will end or the dates of any forthcoming dispositive judgments. Final disposition of the Missouri Litigations will take considerable time. After any trials and judgments in the court of first instance, an appeals process is likely to follow. This appeals process could entail reversals, remands, re-trials, and secondary appeals that could delay final disposition of the Missouri Litigations for several years.

b. Could the Parties please list the precise causes of actions asserted by the plaintiffs that remain pending for trial in the Missouri Litigations (with appropriate references to the Complaint(s) and other court filings or decisions)? If any causes of actions originally pleaded have been abandoned or ruled inadmissible by the Courts, please identify them.

6. There are seven active counts in the Reid Cases and seven active counts in the Collins Cases.[8]

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[6] Discovery is a phase of litigation prior to trial during which the parties exchange documents, communications, and other information relevant to the dispute. Each party's goal is to collect evidence to support its respective claims and/or defenses. There are several methods of obtaining discovery, including: (i) initial disclosures; (ii) depositions; (iii) interrogatories; (iv) document production requests; (v) requests for admission or joint statements of fact; and (vi) expert testimony.

[7] Note there is no record evidence to support this proposition, however, support can be found on page five of Docket Entry 840, dated 30 April 2024, for case number 4:15-cv-01704-RWS in the Eastern District of Missouri. Respondents are prepared to submit this document at the Tribunal's request.

[8] *See* Peru's Contract Case Rejoinder, ¶ 345, Table 5.

7. In the Reid Cases, the plaintiffs amended their complaint on 21 February 2017 after the case was removed from state court in Missouri to a federal district court in Missouri.[9] The amended complaint that was filed in federal district court included 12 causes of action. The federal district court dismissed five of these for failure to state a claim, including:

a. Count III for Civil Conspiracy against defendants The Renco Group, Inc. ("**Renco**"), Doe Run Resources Corporation ("**DRRC**"), DR Acquisition Corp. ("**DR Acquisition**"), Doe Run Cayman Holdings LLC ("**Cayman Holdings**"), several Ira Rennert Trusts (the "**Trusts**"), Ira L. Rennert ("**Rennert**"), Roger L. Fay ("**Fay**"), Marvin M. Koenig ("**Koenig**"), John A. Siegel Jr. ("**Siegel**"), Dennis A. Sadlowski ("**Sadlowski**"), John A. Binko ("**Binko**"), and Michael C. Ryan ("**Ryan**");

b. Count IV for Civil Conspiracy against defendants Rennert, Marvin K. Kaiser ("**Kaiser**"), Albert Bruce Neil ("**Neil**"), Jeffery L. Zelms ("**Zelms**"), Theodore P. Fox III ("**Fox**"), Fay, Koenig, Siegel, Sadlowski, Binko, and Ryan;

c. Count V for Absolute or Strict Liability against defendants Renco, DRRC, DR Acquisition, Cayman Holdings, the Trusts, Rennert, Fay, Koenig, Siegel, Sadlowski, Binko, and Ryan;

d. Count VI for Absolute or Strict Liability against defendants Rennert, Kaiser, Neil, Zelms, Fox, Fay, Koenig, Siegel, Sadlowski, Binko, and Ryan; and

e. Count VII for Contribution Based on Tortious Conduct of Entities Acting in Concert as to all defendants in the Reid Cases.[10]

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[9] **Exhibit R-294**, Amended Complaint for Damages – Personal Injury, Document No. 474, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 21 February 2017.

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

8. This leaves the following causes of action pending in the Reid Cases:

   a. Count I for Negligence against defendants Renco, DRRC, DR Acquisition, and Cayman Holdings;

   b. Count II for Negligence against defendants Rennert, Kaiser, Neil, Zelms, and Fox;

   c. Count VIII for Direct Liability for Breach of Assumed Duties Pertaining to Foreseeable Harms against defendants DRRC, Cayman Holdings, Kaiser, Neil, Zelms, and Fox;

   d. Count IX for Direct Liability for Breach of Assumed Duties Pertaining to Foreseeable Harms against defendants Renco, DR Acquisition, and Rennert;

   e. Count X for Negligent Performance of an Undertaking against defendants DRRC, Cayman Holdings, Kaiser, Neil, Zelms, and Fox;

   f. Count XI for Negligent Performance of an Undertaking against defendants Renco, DR Acquisition, and Rennert; and

   g. Count XII for Direct Participation Liability against defendants Renco and Rennert.[11]

9. In the Collins Cases, none of the causes of action have been dismissed. The pending causes of action are:

   a. Count I for Negligence against defendants DRRC, DR Acquisition, Renco Group, and Renco Holdings, Inc. ("**Renco Holdings**");

   b. Count II for Civil Conspiracy against defendants DRRC, DR Acquisition, Renco, and Renco Holdings;

   c. Count III for Absolute or Strict Liability against defendants DRRC, DR Acquisition, Renco, and Renco Holdings;

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

d. Count IV for Negligence against defendants Fox, Jerry J. Pyatt ("**Pyatt**"), Zelms, Fox, Rennert, and Kaiser;

e. Count V for Civil Conspiracy against defendants Fox, Pyatt, Zelms, Fox, Rennert, and Kaiser;

f. Count VI for Absolute or Strict Liability against defendants Fox, Pyatt, Zelms, Fox, Rennert, and Kaiser; and

g. Count VII for Contribution Based on Tortious Conduct of Entities Acting in Concert against all defendants in the Collins Cases.[12]

c. Is it possible under Missouri law that the defendants in the Missouri Litigations could be found liable for breach of one or more legal duties that do not pass through to DRP (and thus might not touch upon the allocation of responsibilities set forth in Sections 5 and 6 of the STA)?

10. Yes, it is possible that the defendants in the Missouri Litigations could be found liable for a breach of one or more legal duties that do not pass through to DRP. For example, as discussed above, three pending causes of action in the Reid Cases—Counts VIII, IX, and XII—are based on theories of direct liability. The liability of the relevant defendants under these counts will not depend upon the legal duties of DRP. Instead, as the district court in the Reid Cases explained, "this form of liability rests on the parent's or owner's own conduct."[13]

11. The same is true of the Collins Cases. Plaintiffs' allegations there are based upon the defendant's liability for actions in the United States, not secondary liability for DRP's

[12] **Exhibit R-307**, Complaint, *Father Chris Collins et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:15-cv-01704-RWS), 13 November 2015.

[13] **Exhibit R-018**, Memorandum and Order, Document No. 949, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 16 October 2018, p. 43.

conduct in Peru. To support their cause of action for negligence, plaintiffs' allegations are based on the relevant defendants' conduct in the United States. For instance, in their first count plaintiffs allege defendants, "while located in the States of Missouri or New York, exert complete control, not merely stock control, but complete domination of finances, policies, and business practices of Doe Run Peru."[14] Plaintiffs allege defendants "control from the States of Missouri and New York, the expenditures, production practices, use of technology that would limit emissions, and policies including public relations and decision-making policies regarding information given to the minor plaintiffs" and that the "unjust use of control proximately caused the minor plaintiffs' injuries."[15] The plaintiffs incorporate the allegations above by reference in each of their subsequent causes of action.[16]

12. A finding of liability based on these claims would therefore under no circumstance touch upon the allocation of responsibilities set forth in Sections 5 and 6 of STA.

d. Put a slightly different way, could any potential judgment in the Missouri Litigations pronounce itself (i) upon DRP's liability or conduct; (ii) exclusively upon the liability or conduct of Renco, and/or DRRC and/or any of the other named defendants; or (iii) upon Renco, and/or DRRC and/or any of the other named defendants and DRP?

[14] **Exhibit R-307**, Complaint, *Father Chris Collins et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:15-cv-01704-RWS), 13 November 2015, ¶ 33.

[15] **Exhibit R-307**, Complaint, *Father Chris Collins et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:15-cv-01704-RWS), 13 November 2015, ¶ 33.

[16] **Exhibit R-307**, Complaint, *Father Chris Collins et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:15-cv-01704-RWS), 13 November 2015, ¶¶ 41, 48, 54, 64, 71, 77.

13. Any potential judgment in the Missouri Litigations will not make a finding on DRP's liability or conduct. As such, the scenarios reflected in romanettes (i) and (iii) in the Tribunal's question above will not materialize.

14. As an initial matter, DRP has not been named as a defendant or otherwise appeared in the Missouri Litigations, nor have the courts in the Missouri Litigations established personal jurisdiction over DRP. Absent personal jurisdiction over DRP, the courts in the Missouri Litigations lack the power to adjudicate the rights and liabilities of DRP.

15. There is no jurisdiction over DRP in U.S. courts. As discussed in further detail in paragraph 343 of Respondents' Rejoinder, United States federal courts like the ones overseeing the Missouri Litigations have no jurisdiction over foreign companies for foreign conduct that resulted in foreign injuries.

16. The plaintiffs' claims in the Missouri Litigations are premised on the defendants' conduct in the United States and how that conduct proximately caused injury in Peru. DRP's decision-making in Peru is not necessary to establish plaintiffs' claims in the Missouri Litigations. The defendants' conduct in the United States is sufficient.

17. As a factual matter, the finders of fact—either the judge or jury—in the Missouri Litigations may consider the factual background involving DRP in Peru. If for example, plaintiffs' claims of negligence are based on the defendants' conduct that caused pollution, the finder of fact may at most consider whether DRP factually polluted in Peru. Whether the defendants were negligent, however, will depend upon: (i) the duty of care owed by the defendants to the plaintiffs; (ii) whether the defendants' conduct in the United States breached that duty; (iii) whether the conduct displayed in the United States caused injuries in Peru; and (iv) that injuries did in fact occur. The fact that DRP polluted in Peru may

play some role in the factual chain linking the defendants' conduct to the plaintiffs' injuries, but DRP's decision-making is not dispositive to the analysis.

18. As such, any potential judgment in the Missouri Litigations will be based exclusively upon the liability or conduct "of Renco, and/or DRRC and/or any of the other named defendants," as reflected in romanette (ii) of the Tribunal's question.

e. Do the Missouri Litigations concern claims for the effects on human health arising from lead contamination exclusively, or do they also concern SO2 and other contaminants?

19. The Missouri Litigations concern claims for the effects on human health arising from lead, as well as from other contaminants, including sulfur dioxide ("**SO2**"), arsenic, and cadmium.

20. The plaintiffs in the Reid Cases allege "[a]t critical times during gestation and/or their developmental years and to the present, Plaintiffs were exposed to damaging levels of lead and other toxic substances, including but not limited to arsenic, cadmium, and sulfur dioxide."[17] The plaintiffs further allege "[s]ulfur dioxide, . . . emitted at an excessive level from the La Oroya Complex, damages the circulatory and respiratory systems, increases mortality, and is linked to lung cancer, especially when present along with elevated levels of particulate matter, as is the case in La Oroya."[18] They continue, "[c]admium and arsenic are known carcinogens and antimony can cause lung (including cancer), liver, and heart damage, and vision problems."[19]

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[17] **Exhibit R-294**, Amended Complaint for Damages – Personal Injury, Document No. 474, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 21 February 2017, ¶ 2.

[18] **Exhibit R-294**, Amended Complaint for Damages – Personal Injury, Document No. 474, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 21 February 2017, ¶ 7.

[19] **Exhibit R-294**, Amended Complaint for Damages – Personal Injury, Document No. 474, *A.O.A. et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:11-cv-00044-CDP), 21 February 2017, ¶ 7.

21. Similarly, the plaintiffs in the Collins Cases allege the defendants in those cases made decisions that "resulted in the release of metals and other toxic and harmful substances, including lead, arsenic, cadmium, and sulfur dioxide, into the air and water and onto properties on which the minor plaintiffs reside, use or visit, which has resulted in toxic and harmful exposures to the minor plaintiffs."[20]

f. To what extent (if any) could the award in either of the present Cases and the ruling in the Missouri Litigations contradict each other? If such a potential conflict exists, would this warrant waiting to issue the award in either Case until after the Missouri Litigations have concluded?

22. With respect to the Treaty Case, there should be no overlap with the ruling in the Missouri Litigations. The issues and legal considerations in the Treaty Case are distinct and should be treated as separate from those adjudicated in Missouri.

23. With respect to the Contract Case, the award and the ruling in the Missouri Litigations could contradict each other. However, this possibility does not justify delaying the issuance of the award in the Contract Case until the conclusion of the Missouri Litigations. The reasons for this are elaborated upon below. Initially, it is essential to recognize that predicting the outcomes of the Missouri Litigations at this stage is not possible. The courts have a variety of remedies at their disposal, and the relief granted to the plaintiffs may vary significantly based on the evolution of the proceedings.

24. The award in the Contract Case and the ruling in the Missouri Litigations may contradict each other in two respects.

[20] **Exhibit R-307**, Complaint, *Father Chris Collins et al. v. Doe Run Resources Corp., et al.* (E.D. Mo. Case No. 4:15-cv-01704-RWS), 13 November 2015, ¶ 24.

25. First, the Tribunal in the Contract Case could rule that the pollution was in fact the cause of the injuries suffered in Peru. A factfinder in either of the Missouri Litigations could, on the other hand, find the pollution did not cause the injuries. Second, as identified by Respondents in their opening statement,[21] the defendants in the Missouri Litigations have argued that, under Peruvian law, operating a smelting facility does not meet the "dangerous activity" aspect of strict liability. Conversely, Claimant's subrogation claims in the Contract Case based on strict liability ask that the Tribunal find that operating a smelting facility *is* a "dangerous activity" under Peruvian law. In other words, Renco itself is arguing for conflicting findings of fact in the different fora that it has brought its claims. Depending on the courts' and the Tribunal's analysis and findings, a contradiction could arise with respect to the above. Further, such contradictions, along with other possible conflicts between the judicial bodies, are a reflection that Claimants' claims are not ripe for determination.

26. The potential conflicts should not, however, delay issuance of an award in the Treaty Case and the Contract Case, even with the Missouri Litigations still pending.

27. The Tribunal should not wait to issue its award until after the Missouri Litigations have concluded as this would result in a violation of Activos Mineros' due process rights. The Missouri Litigations have already been ongoing for more than a decade, with the Reid Cases only in the summary judgment phase and the Collins Cases only in the discovery phase. With both trials yet to occur—followed by a judgment, then possible appeals, remands, re-trials, and further adjudication—if the Tribunal decided to wait until the Missouri Litigations have concluded, it likely would need to wait a decade or more. If at

[21] Hearing Transcript, Day 1, Respondents' Opening Statement, p. 129, lines 2-12.

that point the Tribunal finds Activos Mineros responsible for some or all of the claims in the Missouri Litigations, Activos Mineros would have lost its right to defend itself in those claims.

28. This risk, however, also does not support the argument that the Tribunal should rule in favor of Claimants as soon as possible. At the present, Claimants have not been able to explain how any of the 14 active causes of action in the Missouri Litigations will be determined. Claimants have been unable to explain—claim by claim—exactly how Activos Mineros would be responsible under the specific language of the STA, which it must do for the Tribunal to find Activos Mineros responsible. There are numerous potential defenses, evidence to be submitted at trial, arguments to be made, liability to be adjudicated, among other considerations. Activos Mineros cannot possibly defend itself from each of the potential permutations that could arise in the Missouri Litigations, nor should it be forced to do so unless Claimants can prove to the Tribunal that Activos Mineros has that responsibility under the STA. As discussed in more detail in paragraphs 306 through 312 of Respondents' Rejoinder, a ruling from the Tribunal granting declaratory relief now would violate Respondents' due process rights.

29. To illustrate the point further, the STA requires that the Tribunal determine whether conduct resulting in pollution and injury is the responsibility of Centromín or Metaloroya (i.e., the "Company") under clauses 5 and 6. If Respondents' do not know what claims the defendants are deemed liable for in the Missouri Litigations, they cannot present a defense in this case. In other words, without a determination of liability that can then be analyzed through the lens of Clauses 5 and 6 under the STA, Respondents lack the necessary information to make their case.

30. To be clear: Claimant brought this action now, claimant decided to press its claims here, claimant decided not to wait – all for leverage to get the Missouri Litigations to settle on favourable terms through intervention by Peru. Peru has not intervened in the Missouri Litigations to aid Claimants, and thus we are here. The Tribunal should not now "wait" because Claimant's influencing strategy has been unsuccessful.

31. Consequently, the Tribunal in the Contract Case should not delay issuing the award until the conclusion of the Missouri Litigations. At present, it possesses sufficient information to rule in favor of Activos Mineros.

2. Regarding the PAMA

a. What SO2 emissions standards applied to DRP's operations as of the end of the (original) PAMA period in 2007 and thereafter?

32. The SO2 emission standards that applied to DRP's operations at the end of the PAMA period in 2007 were those approved by Ministerial Resolution 315-96-EM/VMM of 19 July 1996. This regulation approved, for the first time in Peru, the environmental pollution control parameters applicable to the mining sector.[22]

33. The control parameters—or emissions standards—were the maximum permissible limits of pollution ("**LMPs**") and the environmental air quality standards ("**ECAs**"). The LMPs controlled the emissions at the outlet of discharge ducts, while the ECAs regulated the quality of the air, water, and soil outside industrial facilities.[23]

[22] **Exhibit C-128 (Treaty)**, Ministerial Resolution No. 315-96 of 19 July 1996. Hearing Transcript, Day 5, Alegre's Direct Presentation, p. 692, lines 6-12.

[23] Hearing Transcript, Day 5, Alegre's Direct Presentation, p. 697, lines 11-24.

34. Ministerial Resolution 315-96-EM/VMM set different levels for LMPs based on the amount of sulfur introduced in the process, as shown in the table below.[24]

ANNEX 1

PERMISSIBLE EXPOSURE LIMITS FOR EMISSIONS OF SULFUR ANHYDRIDE FOR MINING-METALLURGY UNITS

SULFUR THAT ENTERS THE PROCESS (t/d)	PERMISSIBLE EXPOSURE LIMITS FOR SULFUR ANHYDRIDE (t/d)
<10	20
11 –15	25
16 – 20	30
21 – 30	40
31 – 40	50
41 – 50	60
51 – 70	66
71 – 90	72
91 – 120	81
121 – 150	90
151 – 180	99
181 – 210	108
211 – 240	117
241 – 270	126
271 – 300	135
301 – 400	155
401 – 500	175
501 – 600	195
601 – 900	201
901 – 1200	207
1201 – 1500	213
>1500	0.142 **(S)***

*(S) = Total sulfur that enters the process.

35. Further, Ministerial Resolution 315-96-EM/VMM provided that until ECAs were determined in subsequent regulation, the limits set in Annex 3 would apply to the control of air quality in the environment of mining operations, as well as to the ECAs.[25] The ECA values for SO2 were set at 572 ug/m3 (daily) and 172 ug/m3 (annually) (together with the LPMs referred to as the "**1996 LPMs and ECAs**"). In 2001, by Supreme Decree No. 074-2001-PCM of 24 June 2001, the MEM approved new values for ECAs, setting an SO2 value of 365 ug/m3 (daily) and 80 ug/m3 (annually) (the "**2001 ECAs**"). These stricter ECAs, however, never applied to DRP.[26]

[24] **Exhibit C-128 (Treaty)**, Ministerial Resolution No. 315-96 of 19 July 1996, Art. 1, 2, and Annex I.

[25] **Exhibit C-128 (Treaty)**, Ministerial Resolution No. 315-96 of 19 July 1996, Art. 6, p 4.

[26] **Exhibit C-093 (Treaty)**, Supreme Decree. No. 074-2001-PCM, 22 June 2001, Annex 1.

36. Further, the Environmental Mining Law that regulated the PAMA in 1993 permitted mining and metallurgical operators—such as DRP—to enter into administrative stability agreements with the MEM.[27] These agreements would "freeze" the LMPs and ECAs in force at the time, such that they would not be modified during the execution of the PAMA period.[28]

37. On 17 October 1997—one day after signing the STA—Metaloroya and the MEM signed the administrative stability agreement for the Facility, "freezing" the LMPs and ECAs in force at the time of the STA during the ten-year PAMA period.[29] Thus, pursuant to this agreement, DRP was allowed to operate the Facility according to the 1996 LMPs and ECAs until the end of the PAMA (i.e. until 13 January 2007), after which time it would be required to comply with the updated environmental standards.[30]

38. In December 2005, however, DRP requested an extraordinary extension beyond the PAMA period to comply with the sulfuric acid plants project, PAMA Project No. 1.[31] In May 2006, the MEM granted DRP an extension of two years and ten months to complete this project.[32] As explained above, however, once the PAMA deadline of 13 January 2007 had passed (which meant that the PAMA period ended, as it could not be extended beyond the ten-year term), DRP's administrative stability agreement benefit expired, and Peru had the right to apply updated LMPs and ECAs to DRP. As stated by Peruvian environmental law

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[27] **Exhibit R-025**, Supreme Decree No. 016-93, Arts. 4.3 and 18.

[28] *See* Peru's Contract Case Counter-Memorial, ¶¶ 58, 100, 241.

[29] **Exhibit R-199**, Environmental Administrative Stability Contract, 4 May 1998, Arts. 2, 3, 4.1.

[30] However, even during the ten-year PAMA period, DRP failed to comply with the applicable standards. *See* First Proctor Expert Report, §§ 3.3-3.4.

[31] **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.

[32] **Exhibit R-287**, Ministerial Resolution No. 257-2006-MEM/DM, 29 May 2006, Art. 1.

expert, Ms. Alegre, "by failing to carry out its PAMA obligations within 120 months since its approval, DRP lost the benefit of the Stability Agreement, and was then subject to the new regulatory framework that the Peruvian government had in place as of 13 January 2007."[33]

39. Despite the administrative stability agreement's expiration, the MEM decided to extend the application of the 1996 LMPs and ECAs to DRP and did not require DRP's compliance with the 2001 ECAs until the end of the 2006 extension period, i.e., until January 2010.[34] DRP was therefore given nearly three additional years to meet the 2001 ECAs. Throughout that time, until January 2010, DRP remained obligated to comply with the 1996 ECAs.[35]

40. As it had done within the ten years of the PAMA period, however, DRP continued to exceed applicable emission standards during this extension period.[36] By the end of 2009, DRP had not completed PAMA Project No. 1 and was still requesting extensions.

41. On 25 September 2009, the Peruvian Congress passed Law No. 29410, granting DRP the second extraordinary extension of PAMA Project No. 1 for an additional 30-month term, until 27 March 2012. Through the Ministerial Resolution No. 122-2010-MEM, the MEM also extended the applicable schedule to DRP to comply with the 2001 ECAs for SO2 by an additional five years, until 27 March 2012. During this extended period, DRP remained obligated to comply with the 1996 ECAs.[37]

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[33] First Alegre Expert Report, ¶ 40.

[34] **Exhibit R-289**, Report No. 118-2006-MEM-AAM/AA/RC/FV/AL/HS/PR/AV/FO/CC, 25 May 2006, p. 20.

[35] Hearing Transcript, Day 5, Alegre's Direct Presentation, p. 705-706, lines 21–11.

[36] *See* Peru's Contract Case Counter-Memorial, ¶¶ 174, 243-49

[37] **Exhibit C-078 (Treaty)**, Supreme Decree No. 075-2009-EM, § 2, Final, Temporary and Supplementary Provisions, § 4; **Exhibit C-140 (Treaty)**, Ministerial Resolution No. 122-2010-MEM/DM, Art. 1; **Exhibit C-077 (Treaty)**, Law No. 29410, 26 September 2009; First Alegre Expert Report, ¶¶ 72-74.

42. Thus, DRP initially had ten years to comply with the 1996 LPMs and ECAs and an additional five years to reach the 2001 ECAs—already in force for all companies that operated in Peru since 2001. DRP had until **2012** to meet these levels, but it never did.[38] And throughout that time, the Peruvian Government continued to require that DRP comply with the 1996 ECAs.

43. The 2001 ECAs were supplemented and modified by Supreme Decree No. 003-2008-MINAM dated 22 August 2008. The Supreme Decree significantly reduced the ECAs in force, setting the new ECAs for SO2 at 80 ug/m3 (daily), effective as of 1 January 2009, and 20 ug/m3 (daily), effective as of 1 January 2014.[39] However, the daily SO2 level of 20 ug/m3 never came into effect. Supreme Decree No. 006-2013-MINAM approved supplementary provisions for the application of ECAs that set the daily SO2 limit applicable in La Oroya at 80 ug/m3.[40]

44. In July 2015, the MEM granted DRP in liquidation a term of 14 years to implement measures to ensure compliance with a daily SO2 average of 80 ug/m3. Meanwhile, during the adjustment term, the limits were 365 ug/m3 for the daily average and 80 ug/m3 for the annual average (i.e., the limits approved in 2001).[41]

45. Further, with respect to these parameters, Respondents note that the allegations of discrimination made by the Claimants concerning DRP in liquidation are equally

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[38] Hearing Transcript, Day 5, Alegre's Direct Presentation, p. 703, lines 15-25, p. 706, lines 3-19.

[39] First Alegre Expert Report, ¶ 12; **Exhibit AA-011**, Approval of Environmental Quality Standards for Air through Supreme Decree No. 003-2008-MINAM, 22 August 2008, Annex 1.

[40] First Alegre Expert Report, ¶ 13; **Exhibit AA-012**, Approval of the Supplementary Provisions for the Application of the Environmental Air Quality Standard (ECA) by Supreme Decree No. 006-2013-MINAM of 7 June 2017; **Exhibit AA-013**, Establishment of the Airsheds to which numbers 2.2 and 2.3 of article 2 of D.S. No. 006-2013-MINAM will be applicable, which approves Supplementary Provisions for the Application of the Environmental Air Quality Standard (ECA) by Ministerial Resolution No. 2005-2013-MINAM of 12 July 2013.

[41] First Alegre Expert Report, ¶¶ 105, 106; **Exhibit AA-020**, Directorial Resolution No. 272-2015-MEM-DGAAM, Arts. 1, 5, Annex No. 3.

unsubstantiated and unfounded.[42] DRP was given 15 years to comply with the less demanding standards, yet it still failed to do so.[43]

b. Considering the difference between the Parties regarding whether the entirety of the PAMA or only one of its projects was extended, the Tribunal wishes to hear from the Parties on precisely which PAMA obligations were extended and precisely which PAMA obligations were not extended by each of the so-called PAMA extensions granted in 2006 and 2009?

46. The PAMA finalized on 13 January 2007. Under both extensions, the only PAMA obligation that was extended—and that could have been legally extended—was PAMA Project No. 1.

47. According to the Environmental Mining Law, the maximum legal term for the execution of the PAMA of the Facility was ten years.[44]

> "Article 9
>
> […] The terms for execution shall be specified by the Competent Authority, and **may in no case go beyond** five (5) and **ten (10) years**, respectively, **for activities** that do not include **sintering and/or smelting processes** and for those that do include said processes." (Emphasis added)

[42] Hearing Transcript, Day 1, Claimants' Opening Presentation, p. 30, lines 20-25.

[43] Hearing Transcript, Day 5, Alegre's Direct Presentation, pp. 705-706, lines 25-11.

[44] **Exhibit C-088 (Treaty)**, Supreme Decree No. 016-93-EM, 28 April 1993, Arts. 3, 9. *See also* First Alegre Expert Report, Section III.B; Second Alegre Expert Report, ¶ 59.

48. As the former vice Minister of the MEM, Mr. Isasi, and Ms. Alegre indicated—respectively, in their witness statement[45] and expert report,[46] and as later reiterated during the Hearing[47]—even though the Environmental Mining Law did not allow an extension beyond the PAMA period, the MEM sought to find solutions for DRP.

49. Consequently, in December 2004, the MEM issued Supreme Decree No. 046-2004-EM granting interested parties—i.e., mining operators—the ability to submit extension requests for specific projects of their PAMAs (the "**2004 Extension Regulation**"). The 2004 Extension Regulation specified that the extension would only apply to the particular project or projects for which the application was made, and not to the entirety of the PAMA.[48]

50. Article 1.3 of the 2004 Extension Regulation stated:[49]

> "Article 1. Extension of terms, on an exceptional basis, for completion of specific environmental projects.
>
> 1.3 The extension of the term shall only apply to the project or projects for which the application was made and shall not affect the terms or schedules of execution of other projects indicated in the PAMA."

[45] Mr. Isasi Witness Statement, Section IV.

[46] First Alegre Expert Report, Section IV.F.

[47] Hearing Transcript, Day 2, Cross Examination of Mr. Isasi, pp. 307-308, lines 5-7, p. 309, lines 12-19; Hearing Transcript, Day 5, Alegre's Direct Presentation, pp. 719-720, lines 21-7.

[48] First Alegre Expert Report, ¶¶ 53-54.

[49] **Exhibit R-029**, Supreme Decree No. 046-2004-EM, 29 December 2004, Arts. 1, 2.

51. Therefore, Supreme Decree No. 046-2004-EM only allowed an extension of the deadline for those projects that needed an extension for "*exceptional reasons duly demonstrated*."[50] In no case did it allow the entire PAMA to be extended.[51]

52. In December 2005, DRP requested an extension in accordance with the 2004 Extension Regulation.[52] DRP was the only company to request an extension pursuant to this regulation,[53] which the MEM granted.

53. The MEM Ministerial Resolution No. 257-2006-MEM/DM granting this extension stated in unequivocal terms that the extension only applied to a specific project and that it did not result in an extension to the PAMA:[54]

> "Extension of the period of a specific project, not an extension of the PAMA
>
> The request for an exceptional extension refers to the performance of a specific environmental project, which does not mean an extension to the PAMA of the requesting party, which, for legal purposes, expires without fail on the date established for its termination. The period that is exceptionally extended only refers to the project that is the matter of the request, which does not affect the terms or conditions of compliance with the other obligations arising under the PAMA of the requesting entity."

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[50] **Exhibit R-029**, Supreme Decree No. 046-2004-EM, 29 December 2004, Art. 1.1.

[51] Second Alegre Expert Report, ¶ 59.

[52] **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. DRP was the only mining-metallurgical company in Peru to request and obtain an extension for the term to fulfill its PAMA obligations and, even after 15 years, DRP still had not complied with the execution of Project No. 1. *See* Second Alegre Expert Report, ¶ 66.

[53] Second Alegre Expert Report, ¶ 66.

[54] **Exhibit R-289**, Report No. 118-2006-MEM-AAM/AA/RC/FV/AL/HS/PR/AV/FO/CC, 25 May 2006, p. 7. This report was incorporated as part of the **Exhibit R-287**, Ministerial Resolution No. 257-2006-MEM/DM, 29 May 2006.

54. The MEM also specified that the term of the extension was a "**final and non-renewable term,**"[55] and that it did not amend any other obligation.[56]

> "Article 10
>
> **This Ministerial Resolution does not imply an[] amendment to any of the obligations or the terms** stipulated in the agreements that Doe Run Peru S.R.L. and its shareholders have entered into Centromín Peru S.A. and with the Peruvian State […]." (Emphasis added)

55. As stated above, following the 2006 Extension, DRP carried out a minimal amount of work to finalize PAMA Project No. 1 and sought additional extensions.[57] On 26 September 2009, Peru enacted Law No. 29410 which further extended the deadline for the completion of PAMA Project No. 1.

56. This extension, however, did not—and could not—apply to the PAMA. It was specific to Project No. 1 for two reasons. First, the PAMA had already concluded nearly two years before, at the expiration of the maximum legal term set forth in the Environmental Mining Law (13 January 2007). Second, PAMA Project No. 1 was the only obligation under the PAMA that was extended by the 2006 Extension.[58]

57. Moreover, Supreme Decree No. 075-2009, which regulated Law No. 29410, clearly established that the term of the extension only applied to the relevant project:[59]

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[55] **Exhibit R-287**, Ministerial Resolution No. 257-2006-MEM/DM, 29 May 2006, Art. 1 (emphasis added).

[56] **Exhibit R-287**, Ministerial Resolution No. 257-2006-MEM/DM, 29 May 2006, Art. 10.

[57] *See* Peru's Contract Case Counter-Memorial, ¶¶ 243-245.

[58] Second Alegre Expert Report, ¶ 60.

[59] **Exhibit C-078 (Treaty)**, Supreme Decree No. 075-2009-EM, 29 October 2009, Section 2.

> "Section 2 - Term for completion of the Environmental Project Sulfuric Acid Complex and the Modification of the Copper Circuit
>
> 2.1 **The term extension granted by Law No. 29410** shall run as from the effective date of that law and **shall apply only and solely to the duties related to the Project**, and all other duties stated in the applicable regulatory framework shall remain in full force and effect and subject to the current terms…." (Emphasis added)

58. Also, Section Six of the Final Provision of Supreme Decree No. 075-2009 established that none of its provisions or the provisions of Law No. 29410 should be interpreted as an Extension to the PAMA.[60]

> "Section Six - Pursuant to Section 62 of the Political Constitution, none of the provisions established in Law No. 29410 or this Executive Decree may be construed as an Extension to the PAMA or amendment of the terms, duties or responsibilities established in the Contracts executed between Doe Run Perú S.R.L. and/or its related companies with Centromín Peru S.A. and with the Government, which shall remain subject to the legal effects established in those instruments within the contractual terms originally agreed upon. . . ."

59. In sum, the legal framework that regulated the PAMA, along with the two exceptional extensions provided to DRP, explicitly stated that these extensions were granted solely for Project No. 1 and not for the PAMA.

[60] **Exhibit C-078 (Treaty)**, Supreme Decree No. 075-2009-EM, 29 October 2009, Final, Temporary and Supplementary Provisions, Section 6.

c. Under the PAMA and other Peruvian regulations, was DRP allowed to increase production, if so, by how much and under what precise conditions?

60. DRP was permitted to increase production—just as any other facility in the country was—provided that it had previously modified its PAMA so that it could be reevaluated and adjusted to the new production levels. Additionally, DRP could increase production as long as: (i) it complied with its environmental obligations, both under the general Peruvian mining environmental regulations and its PAMA; and (ii) it met the environmental standards for maximum permitted levels of pollution and ambient air quality (the LMPs and ECAs discussed above).

61. However, when DRP took over the Facility—without previously evaluating and updating its PAMA—it immediately increased production, used dirtier concentrates, and failed to implement any substantive measures to mitigate the resulting surge in emissions that was anticipated. Further, it deferred the modernization of the Facility and essential PAMA projects aimed at controlling emissions, ultimately failing to comply with emissions standards and its PAMA. Such actions aggravated pollution in the Facility and, consequently, the health crisis in La Oroya, a concern that the MEM addressed in early 2003.

62. First, like any other mining operator in Peru, DRP was permitted to increase production at the Facility. There are no provisions that pertain exclusively to DRP in this regard. The Environmental Mining Law, passed in April 1993, granted mining operators the right to operate their facilities while simultaneously holding them accountable for the operation,

and the potential environmental impact resulting from their activities.[61] To that end, mining operators were required to conduct Environmental Impact Assessment ("**EIA**") studies to determine the environmental damage that their activities would cause,[62] and had to adhere to current LPMs and ECAs set by law. As explained above, LPMs and ECAs were intended to become progressively more stringent to improve air quality and the living conditions of those in proximity to the facilities.[63] Further, the Environmental Mining Law also required mining operators to implement environmental remediation programs, known in Peruvian environmental regulations as PAMAs, to bring facilities into compliance with LPMs and ECAs.[64]

63. Under its PAMA, DRP committed to significant investment obligations to meet these environmental objectives. The primary goal of privatizing the Facility was to maintain its operational status while simultaneously modernizing it to reduce pollution.[65] During the bidding process, Claimants represented that they possessed the experience, knowledge, and capital required for this challenging undertaking.[66]

64. Claimants contend, however, that regardless of these environmental commitments, both the Environmental Mining Law and certain responses provided to bidders during a Q&A round in the privatization process explicitly envisaged that mining concessionaires would expand the operations immediately upon taking on the Facility, before completing the

[61] **Exhibit R-025**, Supreme Decree No. 016-93, Arts. 5, 6. *See also* Second Alegre Expert Report, ¶ 30.

[62] **Exhibit R-025**, Supreme Decree No. 016-93, Chapter III. *See also* First Alegre Expert Report, ¶ 2.

[63] **Exhibit R-025**, Supreme Decree No. 016-93, Arts. 5, 9. *See also* First Alegre Expert Report, Section III(A).

[64] **Exhibit R-025**, Supreme Decree No. 016-93, Chapter II. *See*, also, First Alegre Expert Report, Section III(B).

[65] Peru's Contract Case Counter-Memorial, ¶¶ 66, 67.

[66] Peru's Contract Case Counter-Memorial, Section II.A.3.

PAMA.[67] Yet neither the Environmental Mining Law nor the bidding documents make any such statement. The PAMA did recommend, however—based on the advice received from the external consultants that Centromín retained for the design preparation—that if production were to increase, a third sulfuric acid plant should be constructed. This is because emissions would evidently increase.[68] Therefore, if DRP wanted to increase production, it should have previously modified the PAMA to adapt it to the new emission levels of the increased production. However, DRP did not do so.

65. An immediate increase in production without having had the time to implement any substantial changes to a facility's processes or technologies, would contravene the Environmental Mining Law. It would also contradict the fundamental objective of the PAMA and, quite frankly, contradict common sense. Yet this is what Claimants did.

66. Following the advice of its consultant, Fluor Daniel, DRP intended to meet its "environmental requirements with the minimum capital expenditure."[69] As a result, in January 1998, immediately after taking up the Facility, DRP increased production using lower-quality, more polluting materials and simultaneously delayed its modernization program and the implementation of PAMA Project No. 1, the most expensive and environmentally important PAMA project.[70] This strategy quickly proved detrimental. It took less than a year for environmental conditions to deteriorate significantly in La Oroya.[71]

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[67] Hearing Transcript, Day 1, Claimants' Opening Statement, p. 22, lines 13-25.

[68] Peru's Contract Case Counter-Memorial, ¶ 80.

[69] **Exhibit WD-015**, 10 Year Master Plan Report, Fluor Daniel, September 1998, p. 7.

[70] Peru's Contact Case Counter-Memorial, ¶¶ 171-172.

[71] *See* RD-010, Respondents' Closing Presentation, slide 48; Second Dobbelaere Expert Report, ¶ 187.

67. At the Hearing, Claimants contended that under the STA they were not obligated to "bring the Facility to the maximum permissible limits."[72] This is a striking new allegation that demonstrates Claimants' total disregard for Peruvian regulation.

68. As any other Peruvian operator, DRP was subject to Article 9 of the Mining Environmental Law which stated: "[t]he purpose of the [PAMA] is that the operators of the mining activity **reduce their levels of environmental pollution to achieve the maximum permissible levels**."[73] The PAMA states that its purpose is to: "comply with the legal stipulations in force and help **achieve acceptable environmental standards** in compliance with current environmental levels expected."[74] Claimants' denial of this fundamental aspect of the PAMA and Peru's environmental regulatory framework is a reflection of their conduct when they took over the Facility.

69. Claimants also argue that the Environmental Mining Law allowed DRP to increase production without conducting any new EIA to evaluate the effects of this increased output. They note that the Environmental Mining Law only mandated new EIAs if a production increase exceeded 50%, a threshold not met by the Facility.[75] As explained by Ms. Alegre,[76] however, in situations where operators intended to increase production by less than 50% but concerns existed regarding the sufficiency of the approved EIA, operators were obligated to seek counsel from public authorities to reassess the existing EIA and determine whether further environmental measures were required. The PAMA functioned as the

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[72] Hearing Transcript, Day 9, Claimants' Closing Statement, p. 1569, lines 12-13.

[73] **Exhibit R-025**, Supreme Decree No. 016-93, Art. 9 (emphasis added). *See also* First Alegre Expert Report, ¶¶ 15-16.

[74] *See* **Exhibit C-020 (Contract)**, PAMA Report, Project No. 4, PDF p. 3 (emphasis added).

[75] Hearing Transcript, Day 5, Alegre's Cross-Examination, p. 757, lines 2-12, and p. 758, lines 4-7.

[76] Hearing Transcript, Day 5, Alegre's Cross-Examination, pp. 757-58, lines 13-3, and p. 758, lines 13-24. *See also* Hearing Transcript, Day 5, Alegre's Direct Presentation, p. 696, lines 4-13.

Facility's EIA. Therefore, before DRP could increase production, it was necessary to modify the PAMA. Claimants failed to take this step.

70. Claimants do not deny that, immediately upon acquiring the Facility, they increased production and used dirtier concentrates.[77] The decision to rapidly increase production without implementing necessary emission mitigation measures rendered it impossible for DRP to fulfill its environmental obligations. This was, however, a commercial decision that Claimants made, fully aware of the consequences for both the environment and DRP's adherence to its commitments.

71. Claimants further contend that the increase in production did not cause an increase in emissions because they operated the Facility "efficiently."[78] This claim is, however, neither true nor substantiated. There was an increase in emissions, a fact Claimants acknowledge. As reported by health workers in La Oroya at the time "[s]ince the foundry was taken over by the American company DOE RUN in 1997, emissions of gases and heavy metals have increased to gigantic proportions."[79] Claimants have not presented any evidence, nor is there any scientific explanation related to the processes or technological advancements that DRP implemented, to support the conclusion that Claimants managed to control or reduce the emissions caused by the increase in production.[80]

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[77] *See* **CD-001**, Claimants' Opening Statement, slide 58, Graphic 6.1 on annual production of the complex; Hearing Transcript, Day 9, Claimants' Closing Statement, p. 1571, lines 13-17.

[78] Hearing Transcript, Day 9, Claimants' Closing Statement, p. 1572, lines 1-5. In particular, Claimants contend that they did "*basic maintenance, fix*[] *the holes in the ductwork, mak*[e] *sure equipment* [was] *done properly*" and "hav[e] *a protocol to run things.*"

[79] **Exhibit DMP-116**, Visit to a mining hell: La Oroya, where children are born with lead in their blood, EL MUNDO, 16 August 2007.

[80] Second Dobbelaere Expert Report, Section 4.

72. Second, Claimants repeatedly asserted during the Hearing that there was neither a report from the MEM nor an official notification to DRP that raised concerns about its practices, nor was there any action taken to compel DRP to implement corrective measures.[81] This is false.

73. In early 2003, in response to escalating public concerns regarding DRP's management of the Facility, the MEM engaged SVS Ingenieros S.A., an independent consultancy, to conduct an evaluation of the Facility.[82] Following this assessment, the MEM issued a resolution in which it: (i) expressed serious concerns about DRP's increased production, the use of dirtier concentrates, and the efficacy of the emission control projects implemented up to that point; and (ii) ordered DRP to reduce fugitive emissions, undertake a public health risk assessment and submit detailed and substantiated reports on the progress made and on the measures pending execution.[83]

74. Upon examination of the risk assessments that DRP was instructed to perform, Mr. Neil experienced, as he testified, a "wake-up call" concerning the high levels and toxicity of the fugitive emissions from DRP's Facility.[84] Yet Claimants decided to maintain the production levels at the Facility and continued to seek extensions for the implementation of PAMA Project No. 1.[85] The consequences of DRP's increased emissions and continuous delay of its environmental obligations were disastrous for La Oroya.

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[81] Hearing Transcript, Day 5, Alegre's Cross Examination, p. 721, lines 20-23; pp. 722-723: 16-6; p. 758, lines 9-20.

[82] *See* Hearing Transcript, Day 5, Alegre's Redirect, p. 771-772, lines 18-23.

[83] **Exhibit R-314**, Report No. 501-2003-MEM-DGM-IFM/MA, including Resolution No. 053-2003-MEM-DGM/V, August 2003, pp.1-4.

[84] Hearing Transcript, Day 2, Neil's Cross-Examination, pp. 211-212, lines 22-1.

[85] Hearing Transcript, Day 2, Neil's Cross-Examination, p. 217, lines 6-14; p.218, lines 4-8.

75. By increasing production immediately, before adopting any measures to mitigate the corresponding rise in emissions, DRP violated environmental regulations and its PAMA. As the operator of the facility, DRP was permitted to increase production, provided that it previously modified its PAMA to adapt it to the new production levels, complied with the LPMs and ECAs, and met the fundamental objective of the PAMA: to reduce emissions in La Oroya. It failed to do so.

3. Regarding the STA in general

a. Clause 3.6 states that on the date of the signing of the STA, a "special general meeting of shareholders of the Company" would take place "for the purpose of adopting the necessary agreements for the execution of this contract". Did such a meeting take place? If so, who participated in the meeting, and what was discussed?

76. Clause 3.6 of the STA states: "on the date of the signing of this contract, the Investor and Centromín commit themselves to hold a special general meeting of shareholders of the Company for the purpose of adopting the necessary agreements for the execution of this contract."

77. After conducting a search of its records, Activos Mineros could not locate information regarding the holding of a general shareholders' meeting on the date the STA was signed. Activos Mineros also contacted Peru's Private Investment Promotion Agency ("**ProInversión**"), which reviewed documentation concerning the process of privatizing Metaloroya and could not locate relevant information concerning such a meeting of the general shareholders.

78. Respondents have examined other archives contemporaneous with the signing of the STA in 1997 but were unable to locate records of a special general meeting of shareholders of the Company when the STA was signed.

79. Respondents remain available to answer additional questions the Tribunal may have concerning the events that took place during the signing of the STA, and will do so to the best of their ability based on available records.

b. It appears to be common ground between the Parties that Clause 8.14 bears upon the matters in dispute in the Contract Case. The Tribunal has noted the existence of Clause 8.10, which deals with certain representations and warranties of Centromín and the Company which provides that "Centromín agrees to indemnify, defend and protect from damages the Company and its shareholders, directors, officers, employees, agents and independent contractors from claims, demands, suits, actions, procedures and harm caused by or as a result of any inaccuracy in the aforementioned representation" (Tribunal's emphasis). From the Tribunal's reading of the STA, this is the only indemnification, defence, and protection obligation that explicitly extends the scope of the beneficiaries to the shareholders, etc. of the Company. What effect, if any, does this Clause have for the interpretation of Clauses 5 and 6 and the balance of Clause 8 of the STA?

80. Clause 8.10 of the STA simply confirms that Clauses 5 and 6 of the STA encompass only the Company and Centromín.

81. As we explained in paragraphs 501 through 503 of Respondents' Counter-Memorial of the Contract Case, the STA has multiple provisions that follow the same responsibility-consequence structure of Clauses 6 and 8.14, further confirming Respondent's interpretation. The provisions: (i) specify the relevant responsibility, representation, or

warranty; (ii) define the scope of the indemnity and/or defense obligation; and (iii) identify the holder, or holders, of the indemnity and/or defense right.

82. The parallel structures of clauses (i) 5.3, 5.4 and 5.8, (ii) 8.4, (iii) 8.9, (iv) 8.10, (v) 8.16, (vi) 8.16 and 8.9, and (vii) 8.14, show that when the STA Parties provided for indemnity or defense, they did so by identifying the nature of responsibility, representation, or warranty and linking it to a detailed indemnity or defense obligation. Moreover, when the STA Parties intended to indemnify or defend anyone other than the Company—i.e., "its shareholders, directors, officers, employees, agents and independent contractors"—they established so expressly. They did not subsume indemnity obligations into amorphous "assumption of liability" clauses or extend them to an unknown number of entities.

c. The Tribunal has noted the description of DRP's ownership in the assignment agreement of 1 June 2001 (R-4). Who owned DRP at the time the STA was signed, and at all relevant points in time?

83. Respondents defer the response to this question to Claimants. Respondents reserve the right to comment in response should Claimants provide a response that surprises or is unsupported by the documentary evidence in the record.

4. Regarding the phrase "standards and practices that were less protective of the environment or of public health" (Clause 5.3(a) of the STA)

a. What should the Tribunal understand as "standards and practices"? Does this phrase refer to the manner in which the facilities were operated, to the relevant industry or regulatory norms, or to the results of the facilities' operations (e.g., on emissions, air quality, or human health)?

84. Respondent's position is that "standards and practices" refer both to: (i) the manner in which the Facility was operated; and (ii) the results of the Facility's operations.

85. Based on a literal interpretation of the relevant provision of the STA, "standards and practices less protective of the environment or of public health than those that were pursued by Centromín" means that, if DRP used standards and practices that resulted in increased possibility of damage to the environment, DRP would be responsible for damages and claims.[86] Claimants concur with this interpretation.

86. For instance, Claimants' expert, Mr. Connor, testified at the Hearing that:

> "Standards and practices are the operations and processes that can contribute to impacts to human health. The environment stuff that comes out of the Facility . . . ."[87]

87. The Parties disagree, however, on the specific point in time at which this assessment should be made. This point is further addressed in response to the Tribunal's question 2(e) below, but, succinctly, Respondent's position is that the "standards and practices" must be assessed at the date of the signing of the STA. That is 1997. In contrast, Claimants'

[86] Peru's Contract Case Counter-Memorial, ¶ 667.

[87] *See* Hearing Transcript, Day 6, Connor's Direct Presentation, p. 900, lines 7-10.

position is that assessing "standards and practices" necessitates an examination of "trends", to ascertain whether the operator, DRP, left the facility in 2009 "better than it found it" in 1997. According to Claimants, this requires a comparison to Centromín's two decades of prior operation.

88. Such a comparison is, however, neither relevant—for the causation analysis this Tribunal must undertake under Clauses 5.3 and 5.4, as explained below——nor appropriate.

89. When DRP assumed control of the Facility, the Facility was already in the process of environmental enhancements, with Centromín actively pursuing these improvements.[88] "Since 1992, the [Facility] has undergone environmental improvements," the PAMA states in its first pages.[89]

90. Starting in the 1990s, Peru embarked on a series of environmental reforms.[90] These reforms were aligned with concurrent international efforts to improve environmental regulation and aimed at protecting the health of Peruvian citizens through the development of a comprehensive national environmental policy. The establishment of Peru's regulatory framework, with its focus on environmental protection and public health, had significant implications for prospective investors in La Oroya.[91]

91. As explained by Mr. Dobbelaere, the Facility was still "a long way from being compliant with environmental standards" but it "was heading in the right direction under Centromin's management."[92] The remedial actions taken by Centromín are outlined in the PAMA.[93]

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[88] Peru's Contract Case Counter-Memorial, Section II.A.2.

[89] **Exhibit C-020 (Contract)**, PAMA Report, PDF p. 19.

[90] Peru's Contract Case Counter-Memorial, Section II.A.1.

[91] Peru's Contract Case Counter-Memorial, ¶¶ 49-51.

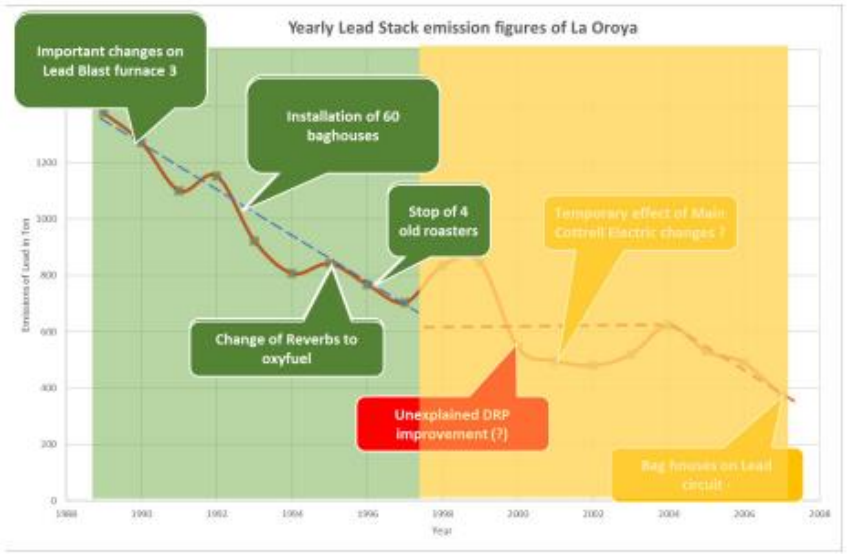
[92] First Dobbelaere Expert Report, ¶ 238. *See also id.*, Section IX(D).

[93] **WD-003**, Environmental Impact Program, La Oroya Metallurgical Complex, Centromín, 1996, pp. 3-9.

These include, among others, the reduction of production lines, the construction of a new oxygen plant, and the shutdown of six roasters.[94] These measures had a positive impact on emissions, which Peru hoped to enhance—or at least sustain—through the involvement of an experienced, well-capitalized, and committed private investor. DRP's practices, however, "halted [the Facility]'s cycle of continuous improvement."[95]

92. The table below from Dobbelaere Second Report highlights the most significant remedial actions undertaken by Centromín and the progress made in reducing lead stack emissions.[96]

WD Figure 29



93. Thus, the "standards and practices" that DRP was to apply within the Facility—in terms of its operations and outcomes—could not be "inferior" to those present in 1997. Those present in 1997 represented the minimum permissible threshold.

94. To suggest that the point of reference for these "standards and practices" should be examined some 20 years prior to that is absurd. It undermines the main goal of the

[94] *See* First Dobbelaere Expert Report, p. 94, Figure 29.

[95] First Dobbelaere Expert Report, title of Section IX(D).

[96] First Dobbelaere Expert Report, p. 94, Figure 29.

privatization of the Facility and contradicts the then-current environmental regulation and DRP's commitments under the STA and the PAMA. Essentially, it would imply that DRP could renege on the improvements already implemented at the Facility and evade all accountability.

95. The proper comparators are, therefore, both the manner in which the Facility was operated and the results of the Facility's operations, at date of execution of the STA.

96. Regarding the first element, the answer is very simple: DRP operated the Facility in a manner that was less protective of the environment and public health. With the same Facility it had acquired, and without making any substantial changes to its processes or technologies, DRP immediately increased production and introduced dirtier concentrates into the smelter.

97. It is an undisputed fact that DRP increased production beyond that of Centromín immediately after taking over the Facility. At the Hearing, Claimants stated that: "yes, when -- when DRP took control of the Facility, it did increase production."[97] Mr. Connor himself admits this in his reports.[98]

98. Claimants have also not rebutted the fact that DRP used inputs that had higher concentrations of lead and sulfur, i.e., dirtier concentrates. Mr. Connor tried to minimize the use of dirtier concentrates,[99] but Mr. Dobbelaere explained that even a 30% increase in dirtiness makes a significant impact.[100]

[97] Hearing Transcript, Day 9, Claimants' Closing Statement, p. 1571, lines 15-17.

[98] Second Connor Expert Report, p. 13.

[99] Hearing Transcript, Day 6, Connor's Direct Presentation, pp. 916-17, lines 11-24.

[100] Hearing Transcript, Day 8, Questions from the Tribunal to Mr. Dobbelaere, pp. 1452-54, lines 17-19.

99. Regarding the second element, the immediate ramp-up in production inevitably led to higher emissions. As stated above, DRP took no measures to abate emissions—nor could it have done so effectively given the immediacy of the production increase. Respondents have presented substantial evidence, indicating that no significant measure to reduce emissions was implemented until late 2006—just prior to the January 2007 PAMA deadline.[101]

100. Claimants downplay the effect this increase in emissions had on air quality, asserting that it represented an "upward trend."[102] As Ms. Proctor stated, however, DRP's worsening emissions were a grave problem. Blood lead levels rose during the period of DRP's operations, with no significant improvement between 1999 and 2007.[103] It was not until late December 2006—with the installation of the furnace baghouse—that a notable change in blood lead levels was observed.[104]

101. It took DRP less than a year to worsen the situation in La Oroya, and a decade to improve it.[105] This reflects a standard and practice that is less protective of the environment and the population of La Oroya. The consequences of this materialized in the Missouri Litigations.

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[101] Second Dobbelaere Expert Report, Sections 4.1 and 4.2; First Proctor Expert Report, § 3.3.

[102] Hearing Transcript, Day 9, Claimants' Closing Statements, p. 1572, lines 20-23: "Yes, there's a trend upward in production, and that's reflected in the air monitoring data. We're not running away from that. We're not saying that didn't happen."

[103] First Proctor Expert Report, § 3.3; Second Proctor Expert Report, § 3.7; Hearing Transcript, Day 6, Proctor's Direct Presentation, pp. 1110-11, lines 23-24.

[104] Second Dobbelaere Expert Report, ¶¶ 75-77; First Proctor Expert Report, § 3.3.

[105] Hearing Transcript, Day 1, Respondent's Opening Presentation, p. 133, lines 13-23; Hearing Transcript, Day 9, Respondent's Closing Presentation, p. 1640, lines 3-8, and p. 1650, lines 12-24; **RD-010**, Respondent's Closing Presentation, Slide 47.

b. Given Centromín's authorship of the PAMA, do the contents of the PAMA (both as to the description of the then-current operations of the facilities as well as the prioritization and schedule of PAMA projects) reflect the relevant "standards and practices" of Centromín?

102. Before providing a response to the question posed by the Tribunal, the Respondents deem it necessary to make two preliminary comments.

103. First, in the preparation of the PAMA, Centromín consulted with numerous external advisors to receive recommendations on the projects to be incorporated into the PAMA and on its overall structure.[106] All potential bidders for the Facility—Claimants included—were granted access to these reports from external advisors and were furnished with comprehensive documentation pertaining to the Facility.[107] Bidders, however, assumed the responsibility of conducting their own due diligence on the Facility, either independently or through third parties.[108] They were also allowed to inspect the Facility in person—as the Claimants did—and to inquire about any pertinent documentation.[109] This was key because, by the end of the bidding process, the successful bidder would be solely responsible for the Facility's operations and environmental performance.[110]

104. Second, the PAMA prepared by Centromín included a detailed description of the Facility's status at that time and provided an appropriate design for its implementation.[111] It was, in

[106] Peru's Contract Case Counter-Memorial, ¶ 71 et seq.

[107] Peru's Contract Case Counter-Memorial, ¶¶ 86, 103.

[108] Peru's Contract Case Counter-Memorial, ¶ 103 et seq.

[109] Peru's Contract Case Counter-Memorial, ¶ 103 et seq; **Exhibit R-187**, Bidding Terms (Second Round), Clauses 2.1.5, 5.1, 7.1.

[110] First Alegre Expert Report, ¶ 5; Second Alegre Expert Report, ¶¶ 30-31, 36.

[111] Peru's Contract Case Counter-Memorial, ¶ 70 et seq.

essence, a forward-looking document, outlining how the Facility looked, and should look, within the legally mandated PAMA ten-year timeframe.[112]

105. Bidders were, however, expected to enhance and refine this initial PAMA plan to bring the Facility into compliance with relevant standards.[113] It was imperative for the Facility's prospective operator to, *first and foremost*, reduce the Facility's emissions to adhere to legal thresholds. The strategy for achieving these legal limits, along with those proposed in the PAMA, was left to the experienced judgment of the successful bidder,[114] who was permitted to propose modifications to the PAMA—as DRP did, especially concerning PAMA Project No. 1.[115]

106. The above implied that DRP had to ensure that the Facility met the relevant standards, even if it required taking measures that went *beyond* the PAMA obligations. DRP's representatives involved in the acquisition and operation of the Facility acknowledged this. Mr. Neil, former President and Manager of DRP, who gave testimony in these proceedings, stated that he recognized at the time that DRP had a responsibility "to minimize their impacts on the surrounding communities", and was "obliged" to find a solution and minimize emissions if they saw an emission source that had not been properly evaluated, even if it went beyond the government standards.[116]

107. Thus, the contents of the PAMA, both as to the description of the then-current operations of the Facility as well as the prioritization and schedule of PAMA projects, reflected the

[112] Peru's Contract Case Counter-Memorial, ¶ 72.

[113] Peru's Contract Case Counter-Memorial, ¶ 104;Second Alegre Expert Report, ¶¶ 34, 36.

[114] Peru's Contract Case Counter-Memorial, ¶ 183.

[115] Peru's Contract Case Counter-Memorial, Section II.C.3; First Alegre Expert Report, Section IV.D.

[116] Peru's Contract Case Counter-Memorial, ¶ 104.

relevant "standards and practices" of Centromín, including the experience and know-how that Centromín had accumulated at the time, as well as the guidance from the external advisors it had engaged. As the operator responsible for the Facility, however, Claimants were obligated to meet legal standards, and, if necessary, to go beyond the actions established in the PAMA to ensure their compliance. Claimants failed to do so.

c. At what time or over what period should Centromín's standards and practices be evaluated for the purposes of the STA in light of the phrase "that were pursued by Centromín until the date of execution of this contract" in Clause 5.3(a) (e.g., from 1974- 1997, in 1997 only, at some other time, or over some other period)?

108. When this Tribunal is analyzing whether a practice by DRP is more or less protective than one of Centromín, what happened in 1922, 1975, or 1989 is irrelevant. As Respondents explained in their closing at the Hearing,[117] the proper comparator is Centromín's standards and practices "at the date of the signing" of the STA in 1997. This is the only acceptable interpretation.

109. As a preliminary matter, there is no clause in the STA that provides clear guidance for what time or over what period Centromín's standards and practices should be evaluated for the purposes of the STA in light of the phrase "that were pursued by Centromín until the date of execution of this contract" in Clause 5.3(a).

110. The purpose of the decision to privatize the Facility should govern the Tribunal's interpretation of this language.

[117] *See* **RD-010**, Respondents' Closing Presentation, Slide 31.

111. The State privatized the Facility to improve the smelter's environmental performance. Therefore, the only sensible interpretation would be to measure against the standards and practices that were employed by Centromín at the date of the signing of the STA, meaning the time period immediately preceding DRP's acquisition of the Facility.

112. This interpretation is further supported by Activos Mineros' pleading in the bankruptcy proceeding in 2010 that Claimants referenced in slide 54 of their opening at the Hearing.

113. In that pleading, Activos Mineros argued the following:

> "During the period approved during the execution of METALOROYA PAMA, the Company (Doe Run) assumes liability for damages and harm and claims of third parties attributable to it, beginning from the signing of this agreement, solely in the following cases:
>
> (a) Those which are directly due to the METALOROYA PAMA which are exclusively attributable to the company (DOE RUN), but only to the extent that these actions were the result of the application of standards and practices by the Company which were less protective to the environment or public health **than those followed by Centromin Perú S.A. at the date of signing of this agreement**." (Emphasis added)[118]

114. An interpretation that holds the Company responsible if the standards and practices employed are less protective to the environment or public health than those followed by Centromín in the 1970s would be nonsensical and contrary to the purpose of the privatization.

[118] **DMP-001**, AMSAC (Activos Mineros, S.A.C.), Request for acknowledgement of credit, 27 September 2010, p. 3.

d. At what time or over what period should DRP's standards and practices be evaluated for the purposes of the STA (e.g., in 1997, from 1997 until the end of the PAMA period, at or until the date on which the Missouri Litigation claims were filed, at the end of the PAMA period only, at some other time, or over some other period)?

115. The time at which DRP's standards and practices should be evaluated for purposes of the STA should be when the "acts" occurred that resulted in the "damages and claims," as required under Clause 5.3 of the STA. This would be sometime from 1997 until the end of the PAMA period. After the end of the PAMA period, Clause 5.4 of the STA applies, which broadens the Company's assumption of responsibility and does not limit the Company's responsibility for damages and claims to those that "arise directly due to acts that are not related to Metaloroya's PAMA which are exclusively attributable to the Company but only insofar as said acts were the result of the Company's use of standards and practices that were less protective of the environment or of public health than those that were pursued by Centromín until the date of execution of [the STA]."

116. As we explained in our closing,[119] the STA requires the Tribunal to rule based on causation: in order for Claimants' claims to succeed, they would have to prove that John Doe's claim or injury was caused by an act that, under the elements of Clauses 5.3 and 5.4, is assigned to Centromín.

e. Should the question of whether "standards and practices […] were less protective" be assessed as seen at the time or according to present understandings with the benefit of hindsight?

[119] *See* **RD-010**, Respondents' Closing Presentation, Slide 32.

117. The evaluation of whether the "standards and practices […] were less protective" must be assessed as seen at the time of the event that activated DRP's responsibility under Clause 5.3 of the STA. This event is the significant increase in emissions resulting from DRP's actions, including: (i) the increase of production levels; (ii) the use of dirtier concentrates; and (iii) the failure to modernize the Facility.

118. When DRP took over the Facility, emissions dramatically increased, which led to public concern. As stated in paragraph 73 above, in response to this, the MEM commissioned SVS Ingenieros, S.A. and Golder Associates to conduct an environmental evaluation of the Facility, which was done in May 2003 (the **SVS Report**).[120] The results of the evaluation were very concerning.

119. Following the environmental assessment carried out by SVS and Golder Associates, the MEM issued Report No. 151-2003-MEM-DGM-FMI/MA, in which it evaluated the SVS Report, as well as Resolution No. 053-2003-MEM, in which it approved the SVS Report and required DRP to comply with the requirements outlined in the MEM's report.

120. The MEM's report concluded that air quality of La Oroya had deteriorated and expressed serious concerns about DRP's increased production, the use of dirtier concentrates, and the efficacy of the emission control projects implemented up to that point. As a result, the MEM ordered DRP to: (i) reduce fugitive emissions; (ii) undertake a public health risk assessment; and (iii) present, for each project, the amount invested and to be invested, as well as the activities that were developed and that were to be developed (the latter because

[120] **Exhibit R-314**, Report No. 151-2003-MEM-DGM-FMI/MA, August 2003, p. 1.

the information previously provided by DRP was not detailed, rendering it impossible to determine the level of progress of the PAMA projects).[121]

121. As Ms. Alegre stated during the Hearing, the requirements imposed on DRP reflected the MEM's concerns and demonstrated that, contrary to Claimants' assertions at the Hearing, the MEM did issue a resolution specifying DRP's non-compliance with the PAMA.[122]

122. There is, therefore, evidence from as early as 2003 that demonstrates DRP's standards and practices were adversely affecting the health of the population and the environment of La Oroya, indicating that its practices were less protective.

123. During the second day of the Hearing, both Mr. Neil and Mr. Buckley, who served as General Managers and Presidents of DRP (Mr. Buckley first, followed by Mr. Neil), acknowledged their awareness of the harmful effects that DRP's standards and practices were having on the population and environment of La Oroya.

124. Mr. Neil conceded that there were concerns about the fugitive emissions from the Facility. However, despite these concerns, they did not reduce production levels:[123]

> Q. Mr Neil, I'm going to show you again the photo of the fugitive emissions coming off of the copper converters. Can you see that on your screen?
>
> A. Yes, I can see it.
>
> Q. This situation -- this fugitive emissions situation would not have changed until the copper circuit modernization was complete; correct?
>
> A. That is correct.
>
> Q. So the fugitive emissions coming off of the copper converters that were there during your time at DRP were also there during Mr. Buckley's time; correct?

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[121] **Exhibit R-314**, Report No. 151-2003-MEM-DGM-FMI/MA, August 2003, pp. 2-4. *See* also, Hearing Transcript, Day 5, Alegre's Redirect, pp.774-775, lines 7-22.

[122] Hearing Transcript, Day 5, Alegre's Redirect, pp.774-776, lines 7-7.

[123] Hearing Transcript, Day 2, Neil's Cross-Examination, p. 211, lines 7-21, p. 217-18, lines 6-8.

A. I would think so.

Q. And just for clarification, Mr. Buckley was your predecessor as General Manager and President of DRP?

A. That is correct.

[…]

Q. Going back to 2004, when you had the wake-up call with respect to fugitive emissions, Mr. Neil, and their highly toxic impact on the community, once you had that wake-up call, why didn't you reduce the amount of inputs, or your production, if you had such a wake-up call?

A. I believed at the time that if we identified each of the sources of the fugitive emissions and prioritized them, that we could make an impact very quickly on those -- on the fugitive emissions.

[…]

Q. But just to be clear, Mr. Neil, you never decided to reduce your production during that time -- correct? -- after your wake-up call?

A. We did not reduce our production, that I -- that's my recollection.

125. Moreover, Respondents showed Mr. Buckley during his cross examination: (i) the sulfur balance, included in Annex III of the SVS Report[124] and in DRP's Report to the community;[125] in contrast with (ii) the annual numbers measured at the main stack that DRP reported to the MEM.[126] The discrepancy between these two figures showed the fugitive emissions that the Facility emitted during DRP's operation.[127] Mr. Buckley acknowledged that such a discrepancy would indeed be concerning. However, again,

[124] **Exhibit R-314 (Spanish version)**, Report No. 151-2003-MEM-DGM-FMI/MA, August 2003, Annex 3.

[125] **Exhibit C-047 (Treaty)**, Report to the La Oroya Community, PDF p. 10.

[126] **WD-011**, Review of La Oroya Smelter, EHP Consulting, Inc., Appendix B, PDF p. 39.

[127] Respondents invite the Tribunal to review Mr. Buckley's cross-examination in detail (see Hearing Transcript, Day 2, pp. 271-295, lines 5-1), along with RD-003, projected in Mr. Buckley's cross-examination.

despite having access to both figures, DRP chose to report only the lower figure to the MEM: the emissions measured at the main stack.[128]

> Q. Right. So in the year 2000 -- and, again, these mass balance numbers, these sulfur balanced numbers come from DRP. This is from your Report to the community. So DRP, it looks like, was definitely doing its own sulfur balance calculation.
>
> Now, Mr. Buckley, if you -- as President and General Manager of DRP -- if you saw in the year 2000 that there was a 41,000-metric-ton discrepancy between what you were measuring at the main stack, what you thought was coming out of the main stack, and the mass balance calculation, you would be concerned; right?
>
> […]
>
> A. I would most certainly be asking questions why was the discrepancy, yes.
>
> Q. But as a metallurgist, if the calculations were correct, would you have to assume that you have over 40,000 15 metric tons of fugitive emissions?
>
> A. I would most certainly have to give it consideration. That's for sure.
>
> Q. Right. Because those 41 -- those 41,000 metric tons are going somewhere. They can't disappear. That's the whole point of a mass balance; right?
>
> A. That is correct.
>
> Q. And if you have that level, you know, 41,000 metric tons of fugitive emissions leaving the plant, that would be concerning because fugitive emissions are particularly toxic to the La Oroya community; correct?
>
> A. It would be a concern, that's correct.

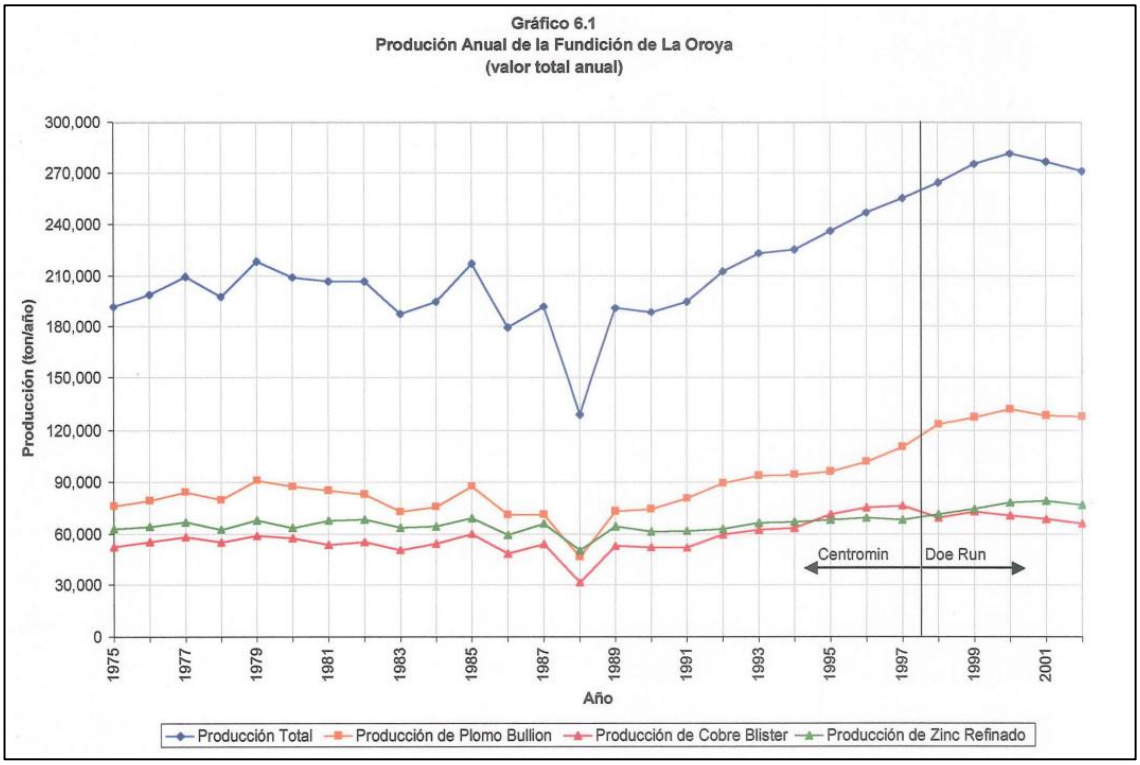
126. Thus, DRP operated the Facility with standards and practices that were less protective than those pursued by Centromín, as seen at the time of the relevant events. DRP was fully aware of this. The MEM had communicated its concerns through the report and resolution that evaluated and approved the SVS Report, respectively, and required DRP to address

[128] Hearing Transcript, Day 2, Buckley's Cross-Examination, pp. 293-295, lines 16-1.

this situation. This awareness of the detrimental situation was also acknowledged by those who held the highest responsibilities at DRP during its operation of the Facility.

5. **The Tribunal has noticed in the chart at Exhibit AA-54 (p. 81 of the PDF) that while production in the lead circuit increased in 1997-2002, production decreased slightly in the copper circuit and increased slightly in the zinc circuit over the same period. How would this be expected to affect lead and SO2 emissions?**

127. The chart at Exhibit AA-54 (p. 81 of the PDF) is set out below, which shows the annual amounts of metals produced in different years (from 1975 to 2001).

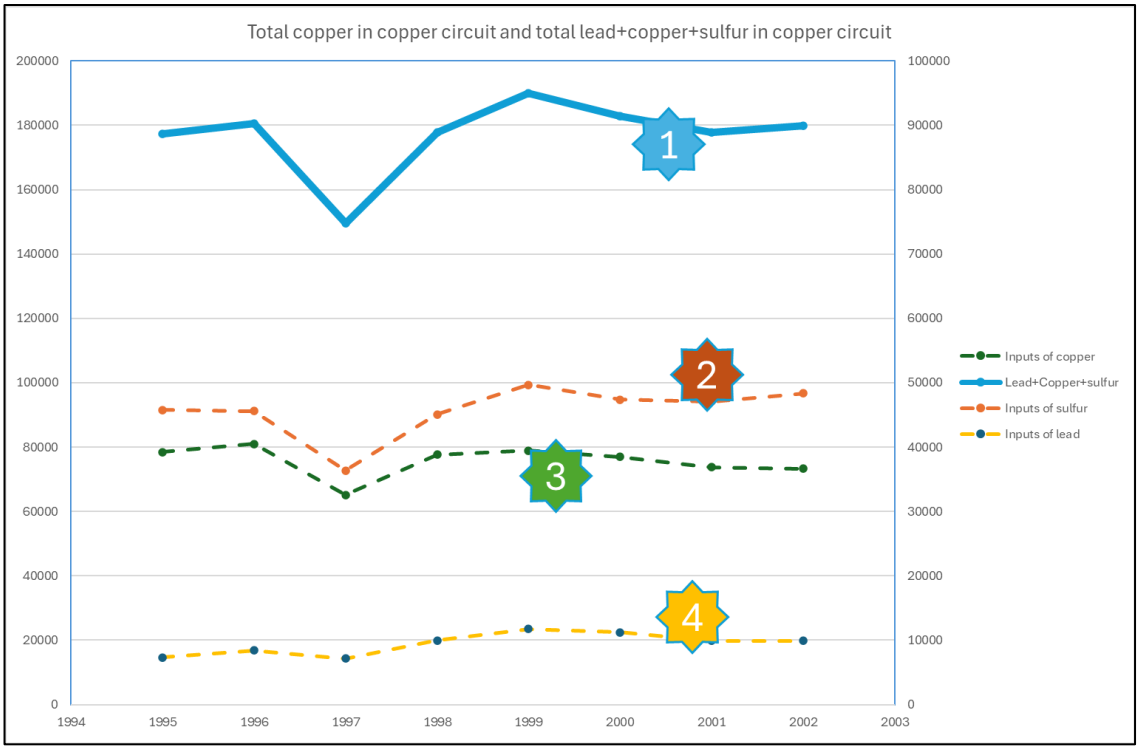


128. The chart illustrates a slight decrease in copper production and a slight increase in zinc production during the period from 1997 to 2002, compared to the period when Centromín operated the complex, which was until 1996 (with 1997 marking the year of the transaction).

129. This slight decrease in copper production did not, however, lead to a reduction in lead and SO2 emissions. On the contrary, there was an increase in emissions of both lead and SO2 during the period from 1997 to 2002. The reason for this increase is that higher amounts of lead and sulfur were introduced into the circuit. As explained further below, introducing a metal into a circuit different from the metal the circuit is meant to produce—for example, adding lead or sulfur to the copper circuit instead of copper, or adding sulfur to the zinc circuit instead of zinc—results in significantly higher levels of emissions than if the appropriate metals are introduced into their respective circuits. The slight increase in zinc production led to higher SO2 emissions due to the increased sulfur input in the zinc circuit. Both circuits are addressed below.

130. Regarding the cooper circuit, the graphic below created by Mr. Dobbelaere[129] shows the total input of lead, copper, and sulfur in the copper circuit during the years 1994 to 2003.

[129] Mr. Dobbelaere prepared this graphic using data from exhibits WD-008 and WD-030 (both documents are from Consultant SXEW and gather, among other things, the amount of concentrates introduced in each circuit). **WD-008**, SXEW Lima Peru Consultant – Location and selection of information related to the Mineral Copper, Lead and Zinc in the Metallurgical Complex of La Oroya, November 2012; **WD-030**, SXEW Mass Balances, 1990-2009.



131. The figures on the left and right represent the input volumes, each using a different scale,[130] while the numbers along the bottom row correspond to the different years.

132. In particular: (i) line number 1 in blue represents the combined total input of lead, copper and sulfur; (ii) line number 2 in orange indicates the total input of sulfur; (iii) line number 3 in green shows the total input of copper; and (iv) line number 4 in yellow shows the total input of lead.

133. The input of copper in the copper circuit, represented by the green line number 3, decreased during the years 1997 to 2002, compared to the period when Centromín operated the

[130] Both scales are smaller than the one used to represent the production volume in Graphic 6.1 of Exhibit AA-54, particularly the scale on the right. The reason for using smaller numbers is to facilitate a clearer understanding of the input curves for the various metals. Lines numbered 1, 2, and 3 should be interpreted using the scale on the left side, while line number 4 should be read using the scale on the right side, as it represents a lower value.

complex, which was until 1996.[131] The decrease in the input of copper means that the production of copper also decreased during these years (as less input means less production), which is in line with graphic 6.1 of Exhibit AA-54. However, the decrease of input of copper did not reduce lead and SO2 emissions for the following reasons.

134. As stated above, the primary goal of any circuit is to retain as much of the type of metal it is supposed to produce and to eliminate any other material. Therefore, the main goal of the copper circuit is to retain as much copper as possible and to eliminate any other element (such as lead and sulfur), which are considered "dirty materials."[132] When "dirty materials" are introduced into the copper circuit, emissions increase significantly because the circuit is designed to expel such "dirty materials." Conversely, the introduction of copper in the copper circuit does not significantly affect emissions since copper is the desired element that the circuit aims to retain, and later convert into a valuable product for sale.

135. Mr. Dobbelaere's graphic shows that during the years 1998 to 2002, DRP introduced more sulfur (indicated by the orange line number 2)[133] and lead (indicated by the yellow line number 4)[134] into the copper circuit, compared to the period when Centromín operated the complex. The increase in the input of lead and sulfur was harmful, constituted a worse

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[131] **Exhibit WD-008**. SXEW Lima Peru Consultant – Location and selection of information related to the Mineral Copper, Lead and Zinc in the Metallurgical Complex of La Oroya, November 2012, Annexes 1a (for Centromin's period) and 2a (for DRP's period) (look at column of "*cobre*;" in particular, the column of "*TMS*;" and then line of "*total tratado*" for each year).

[132] The term "dirty concentrate(s)" is a translation from the term "*concentrados sucios*" used in the PAMA (*see* **Exhibit C-020 (Contract)**, PAMA Report, PDF pp. 154, 169, 170.

[133] **Exhibit WD-008**. SXEW Lima Peru Consultant – Location and selection of information related to the Mineral Copper, Lead and Zinc in the Metallurgical Complex of La Oroya, November 2012, Annexes 1a (for Centromin's period) and 2a (for DRP's period) (look at column of "*azufre*;" in particular, the column of "*TMS*;" and then line of "*total tratado*" for each year).

[134] **Exhibit WD-008**. SXEW Lima Peru Consultant – Location and selection of information related to the Mineral Copper, Lead and Zinc in the Metallurgical Complex of La Oroya, November 2012, Annexes 1a (for Centromin's period) and 2a (for DRP's period) (look at column of "*plomo*;" in particular, the column of "*TMS*;" and then line of "*total tratado*" for each year).

environmental practice, and resulted in higher emissions, even if the input of copper decreased.

136. The increased sulfur input in the copper circuit was especially damaging. This circuit was the most significant source of pollution of the Facility, and, at that time, there was no SO2 abatement project in place. The sulfuric acid plants that constituted PAMA Project No. 1, the most important of the PAMA projects, had not yet been constructed. In fact, the sulfuric acid plant for the copper circuit was never completed.[135]

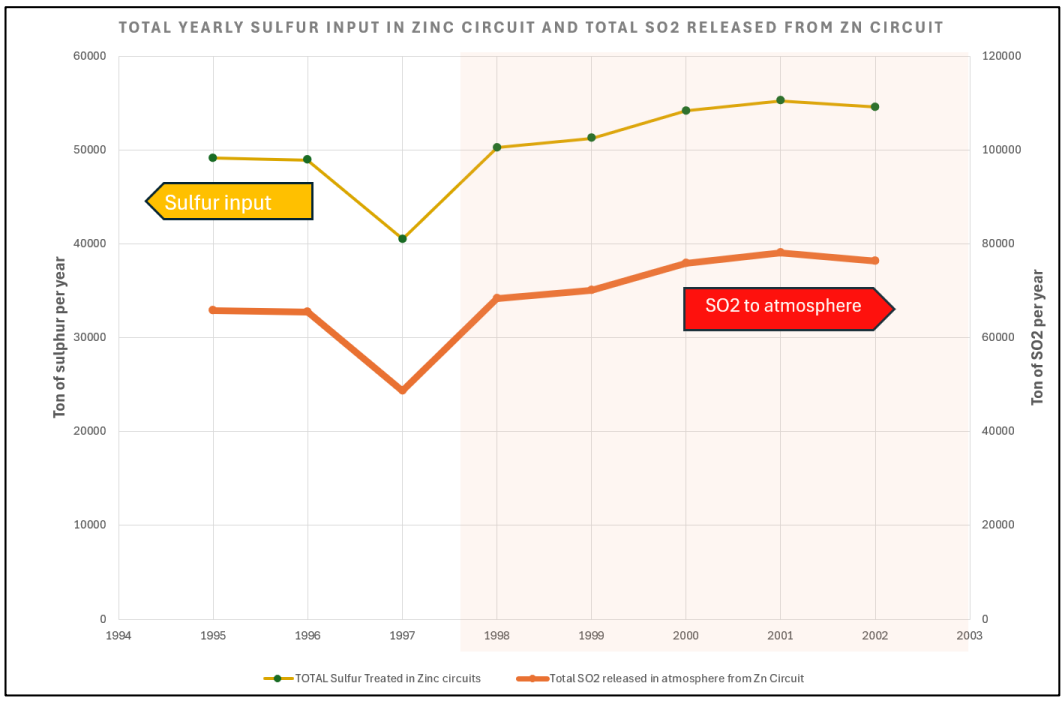
137. The increased lead input in the copper circuit, although seemingly modest, also had a significant impact. The amount of lead captured in the slag depends on the volume of slag produced. Given the slag volume during DRP's operations did not rise substantially,[136] most of the additional lead introduced into the copper circuit was released through the main cottrell (the Facility's main chimney) or as fugitive emissions.[137] The increased lead input was therefore also particularly harmful because it increased the pressure of dust on the main cottrell, and consequently, emissions.

[135] Hearing Transcript, Day 9, Respondents' Closing Statement, p. 1640, lines 19-25.

[136] **Exhibit WD-030**, SX/EW Mass Balances, Annex 10 C.

[137] First Dobbelaere Expert Report, Section IX.B. *See also* Second Dobbelaere Expert Report, ¶ 153, Figure C.

138. Regarding the zinc circuit, the increase in production raised SO2 emissions which is evident from the graph below created by Mr. Dobbelaere.[138] The orange line on the graph indicates the total amount of SO2 released into the atmosphere from the zinc circuit.



139. The input of sulfur into the zinc circuit, as indicated by the yellow line in Mr. Dobbelaere's graph representing the total sulfur treated in the zinc circuit, increased significantly during the years that DRP operated the Facility—compared to the years under Centromín's operation—increasing, as a result, SO2 emissions in this circuit.[139]

140. The zinc circuit already had a sulfuric acid plant to capture SO2 emissions, but it was of limited capacity and thus, extra SO2 produced went immediately to the main stack to be

[138] Mr. Dobbelaere prepared this graphic using data from exhibits WD-008 and WD-030 (both documents are from Consultant SXEW and gather, among other things, the amount of concentrates introduced in each circuit). **WD-008**, SXEW Lima Peru Consultant – Location and selection of information related to the Mineral Copper, Lead and Zinc in the Metallurgical Complex of La Oroya, November 2012; and **WD-030**, SXEW Mass Balances, 1990-2009.

[139] **Exhibit WD-008**. SXEW Lima Peru Consultant – Location and selection of information related to the Mineral Copper, Lead and Zinc in the Metallurgical Complex of La Oroya, November 2012, Annexes 1c (for Centromin's period) and 2c (for DRP's period) (look at column of "*azufre*;" in particular, the column of "*TMS*;" and then line of "*total tratado*" for each year).

released as gas. The 1996 PAMA stipulated that all zinc roasters had to be replaced by 1999 to capture an overall of 99,5% of SO2.[140] DRP did not, however, follow the PAMA. Instead of replacing the roasters in 1999, DRP continued operating them for another five years, shutting them down in December 2004. As a result, DRP emitted an extra 37,000 to 47,450 tons of SO2 per year for the next five years.[141]

141. The 1996 PAMA also mandated that the zinc and lead circuits share a single sulfuric acid plant with a capacity of 270,000 metric tons (MT) of sulfuric acid.[142] To achieve this, the existing sulfuric acid plant for the zinc circuit needed to be modernized early in DRP's operations. DRP chose to deviate from PAMA's plan, opting instead to construct an additional sulfuric acid plant exclusively for the lead circuit. This decision resulted in a delay not only in the modernization of the existing plant for the zinc circuit—until December 2006—but also in the construction of the new acid plant for the lead circuit that did not enter into operation until October 2008.[143] Further, DRP's approach resulted in two separate acid plants for the zinc and lead circuits that possessed a lower SO2 capacity than what the PAMA had required for the shared plant serving both circuits.[144]

142. With respect to lead emissions, the input of lead in the zinc circuit did not significantly change from the time when Centromín operated the Facility. In general, the operations of the zinc circuit stayed the same in terms of "lead contamination."[145]

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[140] **Exhibit C-020 (Contract)**, PAMA Report, PDF pp. 154.

[141] First Dobbelaere Expert Report, ¶ 251.

[142] **Exhibit C-020 (Contract)**, PAMA Report, PDF p. 157.

[143] Second Dobbelaere Expert Report, ¶¶ 89, 93.

[144] Second Dobbelaere Expert Report, ¶ 90.

[145] **Exhibit WD-008**. SXEW Lima Peru Consultant – Location and selection of information related to the Mineral Copper, Lead and Zinc in the Metallurgical Complex of La Oroya, November 2012, Annexes 1c (for Centromin's period) and 2c (for DRP's period) (look at column of "*azufre*l" in particular, the column of "*TMS*;" and then line of "*total tratado*" for each year).

143. In conclusion, both the slight decrease in copper production and the slight increase in zinc contributed to higher emissions of SO2 and lead from 1997 to 2002. This was because more lead and SO2 were introduced into the copper circuit and more SO2 was introduced into the zinc circuit.

6. Regarding MEM's credit and the bankruptcy proceedings

a. What specific percentage did MEM's and other public entities' credits represent in the bankruptcy proceedings at the different relevant moments in time?

144. The public entities that held credits in the DRP bankruptcy proceedings included: (i) the MEM; (ii) Osinergmín; and (iii) the tax authority.

145. On 13 January 2012, when the Board of Creditors approved the restructuring of DRP with 99.18% of the approved creditors voting in favor of the restructuring: (i) the MEM's credits represented 36.901344%; (ii) Osinergmín's credits represented 0.074773%; and (iii) the tax authority represented 0.01446%.[146]

146. On 12 April 2012, when the Board of Creditors voted against the restructuring plan (disapproved by 59% of the vote): (i) the MEM's credits represented 31.8936%; (ii) Osinergmín's credits represented 0.0651%; and (iii) the tax authority represented 13.5742%.[147]

147. On 25 August 2012, when DRP's elected liquidator, Right Business, noted that DRP's restructuring plan of 14 May 2012 was unacceptable: (i) the MEM's credits represented

[146] **Exhibit R-110**, DRP Creditors' Meeting Minutes, 13 and 18 January 2012, pp. 13-14; Peru's Treaty Case Counter-Memorial, ¶ 387; Peru's Contract Case Counter-Memorial, ¶ 374.

[147] **Exhibit C-231 (Treaty)**, DRP Creditors' Meeting Minutes, 9 and 12 April 2012, PDF pp. 3-4; Peru's Treaty Case Counter-Memorial, ¶ 390; Peru's Contract Case Counter-Memorial, ¶ 377.

31.633536%; (ii) Osinergmín's credits represented 0.066064%; and (iii) the tax authority represented 13.77303%.[148]

148. On 27 August 2014, when the Board of Creditors voted to abandon the restructuring plan that Right Business had proposed and voted to place DRP in operational liquidation: (i) the MEM's credits represented 32.1479%; (ii) Osinergmín's credits represented 0.0619%; and (iii) the tax authority represented 12.9089%.[149]

149. In September 2015, when the Board of Creditors voted, it unanimously elected the MEM to act as president of the Board of Creditors: (i) the MEM's credits represented 29.98826%; (ii) Osinergmín's credits represented 0.113109%; and (iii) the tax authority represented 10.616185%.[150] This election occurred after no other creditor was willing to accept the position.[151]

b. Considering MEM's arguments and the difference in the findings of the administrative authorities and courts in Peru, what was the ultimate basis for the credit asserted by MEM and recognized in the bankruptcy and insolvency proceedings?

150. INDECOPI Chamber No. 1 found that the ultimate basis for the credit asserted by the MEM was Peruvian law.[152] More specifically, INDECOPI Chamber No. 1 agreed with DRP that the source of the obligation to finance and construct the project named "Sulfuric Acid Plant

[148] **Exhibit R-122**, DRP Creditors' Meeting Minutes, 24 and 29 August 2012, pp. 17, 34.

[149] **Exhibit R-127**, DRP Creditors' Meeting Minutes, 22 and 27 August 2014, pp. 1, 14; Peru's Treaty Case Counter-Memorial, ¶ 404; Peru's Contract Case Counter-Memorial, ¶ 391.

[150] **Exhibit R-145**, DRP Creditors' Meeting Minutes with Liquidation in Process, 15 and 18 September 2015, pp. 1, 6.

[151] *See* Shinno Witness Statement, ¶ 46.

[152] **OHE-015**, Resolution 1743-2011/SC1-INDECOPI, 18 November 2011, Section III.2, ¶¶ 19-20; First Hundskopf Expert Report, ¶ 60(a); Peru's Treaty Case Counter-Memorial, ¶ 357; Peru's Contract Case Counter-Memorial, ¶ 344.

and Modification of the Copper Circuit of the La Oroya Metallurgical Complex" (i.e., Project No. 1 or the Sulfuric Acid Plant Project) was contained in the PAMA.[153]

151. Furthermore, INDECOPI Chamber No. 1 reasoned that a breach of a legal obligation not only generates administrative effects but can also generate civil consequences.[154] If the applicable law does not provide for civil consequences in case of breach with the underlying obligation, the provisions on breach of obligations provided in Article 1150 and subsequent articles of the Civil Code are applicable in a supplementary manner.[155]

c. Considering that MEM's credit was said to have derived from a PAMA-related obligation, is it of a public nature? Was MEM acting with public authority in the bankruptcy proceedings?

152. The MEM's credit is not of a public nature. As INDECOPI explained, the credit that the MEM has with DRP is of a civil nature.[156] The fact that the regulations governing the PAMA expressly impose consequences of administrative nature in the event of breach does not prevent civil consequences from also arising.[157]

153. As Peru has explained in its Counter-Memorial and Mr. Shinno confirmed in his witness statement, the MEM has participated in the bankruptcy proceedings always as a creditor.[158]

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[153] **OHE-015**, Resolution 1743-2011/SC1-INDECOPI, 18 November 2011, Section III.2, ¶¶ 19-20.

[154] **OHE-015**, Resolution 1743-2011/SC1-INDECOPI, 18 November 2011, Section III.2, ¶ 33.

[155] **OHE-015**, Resolution 1743-2011/SC1-INDECOPI, 18 November 2011, Section III.2, ¶ 33.

[156] **OHE-015**, Resolution 1743-2011/SC1-INDECOPI, 18 November 2011, Section III.2, ¶ 34.

[157] **OHE-015**, Resolution 1743-2011/SC1-INDECOPI, 18 November 2011, Section III.2, ¶ 34.

[158] Peru's Treaty Case Counter-Memorial, ¶ 383; Peru's Contract Case Counter-Memorial, ¶ 370; Shinno Witness Statement, Section VI.

d. Did DRP make any progress on PAMA Project No. 1 (sulfuric acid plants) during the course of the bankruptcy proceedings? If so, what effect (if any) did this have on the amount of MEM's credit in those proceedings?

154. DRP did not make any progress on PAMA Project No. 1 (sulfuric acid plants) during the bankruptcy proceedings. Because there has been no progress, the copper circuit of the Facility has not restarted to date. However, after determining that the zinc circuit could comply with the emissions standards, Right Business restarted operations of the circuit on 28 July 2012.[159] The lead circuit restarted operations in November of the same year.[160]

155. There has been no effect on the amount of the MEM's credit in DRP's bankruptcy proceedings.

e. Did MEM ever receive any distribution from DRP's liquidation, and in what amount? Has MEM taken any steps towards the completion of the last sulfuric acid plant?

156. The MEM has never received any distribution from DRP's liquidation. If the MEM were to receive any distribution, it would have to wait first until the four creditors in front of it in the proceedings receive their distributions.[161]

157. No steps have been taken towards the completion of the sulfuric acid plant and the copper circuit has been shut down as a result.

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[159] **Exhibit C-199 (Treaty)**, After 3 years, Doe Run Peru's La Oroya finally restarts, MINEWEB, 30 July 2012; **Exhibit C-200** (**Treaty)**, Doe Run Peru announces smelter restart, FOX LATINO NEWS, 28 July 2012.

[160] **Exhibit R-231**, New owner of the La Oroya refinery in August 2013, GESTIÓN, 13 November 2012; **Exhibit R-232**, Peru's La Oroya smelter to restart lead production Nov. 28, MINEWEB, 27 November 2012.

[161] **OHE-015**, Resolution 1743-2011/SC1-INDECOPI, 18 November 2011, Section III.5, ¶¶ 87, 89.

f. Has there been any revegetation or soil remediation performed by or at the behest of Activos Mineros (or Centromín) since the end of the plant's operations and the liquidation of DRP?

158. Before detailing the remediation plan implemented by Activos Mineros, it should be noted that soil remediation was not an obligation under Centromín's (or Activos Mineros's) PAMA.[162]

159. Under the PAMA, Centromín had to execute—among others—Project No. 4, titled: "Revegetation of Areas Affected by Fumes" by which Centromín had to revegetate La Oroya. The PAMA did not, however, contemplate the obligation to remediate the soils, which involved the removal and treatment of polluted soils, a process distinct from revegetation.[163]

160. PAMA Project No. 4 was subsequently modified by MEM's Directorial Resolution No. 082-2000-EM-DGAA dated 17 April 2000, transferring part of the revegetation activities to the closing plan (which included the activities that had to be done after competition of the PAMA), once DRP had controlled emissions, which was its responsibility under the PAMA.[164]

161. In Directorial Resolution No. 082-2000-EM-DGAA, the MEM also clarified that Centromín PAMA Project No. 4 only included the revegetation of the soils, not the

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[162] *See* Peru's Contract Case Counter-Memorial, Section V.B; Peru's Contract Case Rejoinder, Section IV.C; First Alegre Expert Report, Section VI; Second Alegre Expert Report, Section VI.

[163] First Alegre Expert Report, Section VI. *See* also **Exhibit C-020 (Contract)**, PAMA Report, PDF p. 205, noting that the objective of Project No. 4 was "[t]o delimit and rehabilitate the area affected by smoke considering the existing flora, fauna, soils, water, etc." The rehabilitation process specifically included: "Cover crops[,] Gully Control trough dikes[,] Terrace Cultivation and Planting[, and] Slope Modification."

[164] **Exhibit R-277**, Directorial Resolution No. 082-2000-EM-DGAA, 17 April 2000, PDF p. 4.

remediation: "[i]n accordance with the approved PAMA, this project seeks to re-vegetate the areas around the La Oroya smelter."[165] Thereafter, the MEM ordered various inspections to verify the fulfilment of Centromín's PAMA, including an inspection of the revegetation project.[166] In its report of 17 March 2004, the MEM: (i) further confirmed that "[t]he modification of the PAMA approved by the authority does not hold [Centromín] liable for soil remediation";[167] (ii) acknowledged that Centromín had fulfilled its PAMA revegetation obligations;[168] and (iii) recommended that Centromín develop a soil remediation plan.[169]

162. In August 2007, Activos Mineros announced its intention to assess the extent of the damage to the soil and vegetation in La Oroya caused by the Facility's emissions and invited proposals from firms interested in conducting the study. Between June 2008 and March 2009, Ground Water International, the firm selected for the task, examined an area of 280,000 hectares in the La Oroya region and found that metal contaminants were highest in the areas closest to the Facility and in the southeastern areas downwind of the Facility,

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[165] **Exhibit R-277**, Directorial Resolution No. 082-2000-EM-DGAA, 17 April 2000, PDF p. 4.

[166] The first special examination in relation to the Revegetation Project was during 19-22 June 2003, and was carried out by SVS Ingenieros, S.A., which determined that: (i) Centromín had complied with its PAMA, as modified by Directorial Resolution No. 082-2000-EM-DGAA; and (ii) the PAMA did not include soil remediation activities. *See* **AA-054**, "Examen Especial de Evaluación del Proyecto Revegetación de Áreas afectadas por los humos, correspondiente al PAMA de CENTROMÍN PERÚ S.A. en La Oroya" made by SVS Ingenieros SA in August 2003, PDF p. 18.

[167] **Exhibit R-290**, Report Nº 144-2004-MEM-DGM, 17 March 2004, PDF p. 2. The full text reads as follows: "The modification of the PAMA approved by the authority does not hold CMP liable for soil remediation, since it only mentions a revegetation program that would be carried out once DRP concludes with the implementation of the PAMA in 2007, without having considered other remeasurement activities in the PAMA."

[168] **Exhibit R-290**, Report Nº 144-2004-MEM-DGM, 17 March 2004, PDF pp. 2-3. Centromín's compliance with the Revegetation Project, as defined in Centromín PAMA Project No.4 and later modified by Directorial Resolution No. 082-2000-EM-DGAA, was further confirmed through other audit reports, resolutions, and reports issued by the MEM. *See* First Alegre Expert Report, ¶¶ 115-122.

[169] **Exhibit R-290**, Report Nº 144-2004-MEM-DGM, 17 March 2004, PDF pp. 2-3.

and that the contaminants were concentrated in the uppermost 10 cm of the soil.[170] The study's principal recommendations for remedial actions included: (i) prioritize urban areas over rural areas to maximize public health benefits; (ii) pave most exposed areas in urban settings and replace soil in parks and other open spaces; (iii) minimize wind and rain erosion in rural areas; and (iv) improve agricultural capacity of soils in areas used for farming.[171]

163. Activos Mineros completed 92% of the urban remediation projects and 45% of the rural remediation projects,[172] investing approximately USD 25 million in soil remediation and revegetation, nearly four times the amount contemplated in the original PAMA.[173] Activos Mineros concluded over 30 projects in urban settings, including removing the uppermost 10 cm of all exposed soils, paving over exposed areas, reforesting the immediate surroundings, and constructing several works for public use (such as showers, paved sports surfaces, recreation centers, schools, plazas, and paved stairways).[174] Activos Mineros has also conducted soil revegetation and remediation in various rural areas.[175] The company continues to undertake soil remediation and restoration efforts in La Oroya today.[176]

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[170] **Exhibit R-278**, Letter No. 280-2016-AM/GO from Activos Mineros S.A.C. (A. Pérez Muñoz) to MINAM (G.P.Becerra Celis), 13 October 2016, pp. 3-4.

[171] **Exhibit R-278**, Letter No. 280-2016-AM/GO from Activos Mineros S.A.C. (A. Pérez Muñoz) to MINAM (G.P.Becerra Celis), 13 October 2016, p. 4.

[172] **Exhibit R-291**, La Oroya: Peruvian State Delivers New Soil Remediation Works, AMSAC, 14 December 2021.

[173] **Exhibit R-278**, Letter No. 280-2016-AM/GO from Activos Mineros S.A.C. (A. Pérez Muñoz) to MINAM (G.P.Becerra Celis), 13 October 2016, pp. 10-12; **Exhibit R-277**, Directorial Resolution No. 082-2000-EM-DGAA, 17 April 2000 attaching Report No. 21-2000-DGAA/LS, 24 March 2000, p. 4.

[174] **Exhibit R-278**, Letter No. 280-2016-AM/GO from Activos Mineros S.A.C. (A. Pérez Muñoz) to MINAM (G.P.Becerra Celis), 13 October 2016, pp. 6-10.

[175] **Exhibit R-278**, Letter No. 280-2016-AM/GO from Activos Mineros S.A.C. (A. Pérez Muñoz) to MINAM (G.P. Becerra Celis), 13 October 2016, p. 11.

[176] These activities are, since 2012, documented in the Public Works Information System (**INFOBRAS**).

7. [For the Claimants:] What specific judicial measures (or exact portions of judgments) does Renco invoke as part of its "substantive denial of justice" claim?

164. Renco's substantive denial of justice claim is captured in paragraph 143 of its Reply:

> "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."[177]

165. In sum, there are two specific judicial measures Renco has invoked as part of its substantive denial of justice claim. The first is that the Peruvian administrative courts' decision that DRP owed the MEM compensation under Supreme Decree No. 016-93 had no precedents. The second is that there was no precedent to find that INDECOPI could determine the quantum of damages.

166. Peru respectfully refers the Tribunal to Section V.C.1.a of its Reply for its response to these unfounded allegations and to Section III.2 of Resolution 1743-2011/SC1-INDECOPI, whereby INDECOPI Chamber No. 1 provided its reasoning for recognizing the MEM's credit derived by Supreme Decree No. 016-93 and the reasons why the quantum of damages was established in this case.

167. Peru further respectfully notes that to the extent Renco's response to this inquiry of the Tribunal goes beyond the comments Renco has made in any of its previous submissions, such response would be wholly inappropriate and violate Peru's due process rights and the procedural integrity of the proceeding. As such, in Renco's response it must reference precisely where the Tribunal and Peru can find its response in its previous submissions.

[177] Claimant's Reply, ¶ 143.

8. Having regard to the STA's provisions concerning the assignment of interests, and Dr. Payet's acknowledgment that on his interpretation of the Additional Clause there might be an "imperfection" given the fact that not all of the parties represented at the execution of the STA and the Additional Clause subsequently consented to the two assignments of contractual rights: if Dr. Payet is correct, does it follow that the assignments were ineffective under Peruvian law? If they were ineffective, what would be the impact of such ineffectiveness on the present Contract Case proceedings?

168. As a preliminary matter, Activos Mineros notes that it was unable to locate where in the record or transcript Dr. Payet affirmatively testifies that there is an imperfection in the STA. Upon review, it appears Dr. Payet muses that contracts may have imperfections, but he does not appear to affirmatively testify that the STA contained a specific imperfection.

169. In the event Dr. Payet did testify that there was an imperfection, however, such an argument at this point would be procedurally improper because neither Renco, nor DRRC, nor Dr. Payet have ever advanced the argument or supported the argument with Peruvian law. None of Renco, DRRC, or Dr. Payet have ever argued in this proceeding that despite the lack of evidence or consent the assignments in discussion were ineffective. Therefore, the **only** conclusion that is supported by evidence and arguments, including Payet's testimony, is that Claimants are not parties to the STA. No evidence supports an interpretation to the contrary.

170. None of the assignments contain Renco or DRRC's consent. There is no evidence in the record, and Dr. Payet confirmed that he has never seen such consent in the assignments that have never been questioned in this arbitration or in the record as ineffective.

171. Even if the Tribunal were to assume that the assignments were ineffective, *quod non*, then the only conclusion is that Renco and DRRC should have presented the arbitration under the STA against Centromín and not Activos Mineros.

9. Is it common ground between the Parties that under Peruvian law a debt must be paid before a right to subrogation can arise?

172. It is correct that it is common ground between the Parties that under Peruvian law a debt must be paid before a right to subrogation can arise. Indeed, Dr. Payet expressly states so in paragraph 98 of his Second Report when he states the following:

> "Respondents argue that subrogation only operates when a payment has already been made. It is true that Activos Mineros and Peru can only be ordered to pay specific amounts to Renco and DRR once these have made payments pursuant to the Missouri Claims."[178]

173. Such understanding is further evidenced by the prayer for relief contained in Claimants' submissions. For example, in paragraph 194 of Claimants' Reply, they make the following request for relief:

> "In the alternative, a declaration that, **if Claimants are found liable and are ordered to pay damages in the St. Louis Lawsuits**, Claimants are entitled to recover from Respondents all the amounts that Claimants may, or may be forced to, pay as damages in satisfaction of any judgment in the St. Louis Lawsuits, under the Peruvian legal theories of subrogation, contribution, and/or unjust enrichment."[179] (Emphasis added)

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[178] *See* Second Payet Expert Report, ¶ 98.

[179] Claimants' Reply, ¶ 194.

174. There is no dispute between the Parties on the fact that under Peruvian law a debt must be paid before a right to subrogation can arise.

10. The Tribunal notes that the Inter-American Court of Human Rights has recently issued a judgment in a case related to the community of La Oroya and the Facility (the "IACtHR Judgment"). Accordingly, the Parties are requested to submit the IACtHR Judgment as an exhibit along with the translation of the sections each Party considers appropriate in accordance with paragraph 4.2(c)(ii) of Procedural Order No. 1 of both Cases. Regarding the IACtHR Judgment:

a. What weight (if any) should the Tribunal grant to the analysis and findings of the Inter-American Court of Human Rights?

175. As a preliminary matter, the IACtHR Judgment is not binding on this Tribunal. The Inter-American Court of Human Rights ("**IACtHR**") is a regional human rights tribunal whose primary function is to interpret and apply the provisions of the American Convention on Human Rights.[180] While authoritative on matters of human rights within the jurisdictions of the States that have accepted its competence, the IACtHR's judgments are not binding on arbitral tribunals like this one, whose mandate is to adjudicate based on the specific provisions of the STA and the Treaty.

176. Due process considerations also caution against assigning significant weight to the analysis and findings of the IACtHR. The IACtHR Judgment is based on a different set of arguments and evidence presented to a different court. Giving substantial weight to the IACtHR Judgment would infringe upon the due process rights of the Parties.

[180] See the IACtHR's website, available online at https://www.corteidh.or.cr/que_es_la_corte.cfm?lang=en (last accessed on June 19, 2024).

177. Respondents emphasize in this respect that, despite Peru being engaged in both the arbitration proceedings and the proceedings before the IACtHR, the risk of due process violations remains a valid concern. First, Peru's involvement in the IACtHR case and the Treaty Case arises from separate sets of claims. The submissions, including arguments, evidence, and defenses that Peru advanced in the IACtHR proceedings, did not relate to the Treaty or the STA. Second, Activos Mineros, which is the exclusive responding party in the Contract Case, has not taken part in the IACtHR proceedings. Activos Mineros has not had the opportunity to present its position or defend its interests in the IACtHR forum. Third, the Claimants also did not participate in the IACtHR case. This absence is significant because the IACtHR has not evaluated the arguments that Claimants have brought in these arbitrations and Peru has not had the opportunity to respond to them in that context.

178. Further, the IACtHR's substantive focus on human rights results in findings that are grounded in the protection of fundamental rights and freedoms. The IACtHR attributes responsibility to the Republic of Peru on the grounds that Peru has failed to fulfill its obligations under the American Convention on Human Rights, an issue that Peru regards with utmost seriousness. This focus, however, does not reflect the legal questions before this Tribunal, whose answers depend solely and exclusively upon on the interpretation of the Parties' specific obligations under the STA and the Treaty that govern these arbitrations.

179. If, however, the Tribunal were to afford any weight to the IACtHR Judgement, it should follow a structured approach to determine the significance of the IACtHR's analysis and findings. First, the Tribunal should identify and examine the specific issues that the

IACtHR analyzed. Second, the Tribunal should assess whether a given issue has any relevance to the matters being considered in the Treaty Case or the Contract Case. If the issue is outside the scope of the claims in these cases, the Tribunal should deem it irrelevant. In cases where there may be an overlap, the Tribunal should reflect on the reasons for this overlap and the extent to which the IACtHR's analysis might be pertinent to the cases at hand. The Tribunal should then apply these same two steps to the IACtHR's express findings.

180. Through this structured approach, the Tribunal can systematically determine the applicability of the IACtHR Judgment to the underlying cases. However, the Tribunal should base its decisions on the arguments and evidence presented in these arbitrations, not on those submitted to the IACtHR. To do otherwise risks undermining the due process rights of the Parties.

181. For instance, the Tribunal could deem relevant the IACtHR's findings on Peru's granting of extensions for environmental compliance measures. The IACtHR found that Peru was liable for granting extensions to DRP while aware of the amount of pollution that DRP was emitting.[181] The Tribunal may consider whether that specific finding supports the conclusion that Peru went beyond what was necessary to fulfill its FET obligations to allow DRP to fulfill the PAMA. While the Tribunal could examine this finding, it should nevertheless exercise extreme caution and the more prudent approach is to not give reference to the judgement at all. In any event, the IACtHR Judgment should not be determinative of the outcome of these proceedings.

[181] IACtHR Judgment, ¶ 263. *See also id.*, ¶¶ 165-66, 168.

b. Could the Parties please provide any comments they have concerning the IACtHR Judgment?

182. As noted above, Respondents recall the non-binding nature of the IACtHR Judgment on these arbitrations. Respondents nevertheless highlight the following five findings from the IACtHR Judgment in the event the Tribunal considers affording them weight.

183. First, the IACtHR finds that Peru breached its international obligations by granting extensions to DRP despite Peru's awareness of the significant pollution that DRP was emitting and the company's delay in completing the PAMA projects.[182] This finding supports several of Respondents' positions. In the Contract Case, it supports the position that DRP failed to comply with its contractual obligations under the PAMA.[183] In the Treaty Case, it supports the positions that: (i) DRP caused its own delay and was not entitled to an extension;[184] (ii) therefore Peru, through its extraordinary support of DRP, has exceedingly complied with its obligation under Article 10.5 of the Treaty;[185] and (iii) the MEM's alleged rejection of DRP's request for an extension of time to complete the Sulfuric Acid Plant Project does not constitute basis for expropriation under the Treaty.[186]

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[182] IACtHR Judgment, ¶¶ 71-75, 163-68.

[183] Peru's Contract Case Counter-Memorial, ¶¶ 237, 242, 770-77; Peru's Contract Case Rejoinder, ¶¶ 46-49, 432, 461-63. *See also* Second Alegre Expert Report, ¶ 39 and Section III; **AA-040**, Report No. 118-2006-MEM-AAM, 25 May 2006, p. 79; Hearing Transcript, Day 1, Claimants' Opening Statement, pp. 84-85, lines 23-19; Hearing Transcript, Day 5, Alegre's Presentation, pp. 707-08, lines 24-6; Hearing Transcript, Day 9, Claimants' Closing Statement, pp. 1639-40, lines 17-25.

[184] *See* Peru's Treaty Case Rejoinder, ¶¶ 33, 36.

[185] Peru's Treaty Case Counter-Memorial, § IV.A.

[186] Peru's Treaty Case Counter-Memorial, § IV.B.2.a. *See also* Peru's Treaty Case Rejoinder, ¶¶ 8, 20; Hearing Transcript, Day 1, Claimants' Opening Statement, pp. 148-52, lines 13-12.

184. Second, the IACtHR recognizes and explains the projects that DRP completed required less investment and had less of an impact on the environment. Further, the IACtHR emphasizes that: (i) the PAMA aimed to reduce environmental contamination levels until achieving the maximum permissible levels;[187] and (ii) Sulfuric Acid Plant Project, PAMA Project No. 1, which was DRP's sole responsibility and had the potential for a significant environmental impact, was consistently delayed and ultimately never completed.[188] This finding supports the Respondents' positions under the Contract Case that: (i) PAMA Project No. 1 was not only the most expensive but also the most environmentally significant PAMA project, with the potential to significantly lower emissions; and (ii) DRP never completed its PAMA obligations.[189]

185. Third, the IACtHR cites numerous studies from the 2000s and 2010s showing large amounts of pollution in the air and water.[190] It also found that during the time in which the Facility was inactive, there was a significant decrease in the atmospheric pollutants.[191] These findings support the Respondents' positions under the Contract Case that: (i) DRP emitted tons of harmful pollutants; and (ii) DRP's contemporaneous emissions, not Centromín's historical emissions, were the main cause of health impacts in La Oroya during the time period alleged by the Missouri Plaintiffs.[192]

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[187] *See*, *e.g.*, IACtHR Judgment, ¶ 161.

[188] IACtHR Judgment, ¶¶ 71-74, 163-65.

[189] *See* fn. 181 above.

[190] IACtHR Judgment, ¶¶ 76-84, 170-74, 191-96.

[191] IACtHR Judgment, ¶¶ 173.

[192] Peru's Contract Case Counter-Memorial, ¶¶ 178, 285-91, 720-34; Peru's Contract Case Rejoinder, ¶¶ 353-54. *See also* First Proctor Expert Report, pp. 10-11 and § 3.1-3.3; Hearing Transcript, Day 1, Claimants' Opening Statement, pp. 135-36, lines 20-12; Hearing Transcript, Day 6, Proctor's Presentation, p. 1120, lines 16-19, and p. 1121, lines 5-10; Hearing Transcript, Day 9, Claimants' Closing Statement, pp. 1638-39, lines 22-16.

186. Fourth, the IACtHR's general findings that Peru polluted, did not control DRP's pollution, and did not assist citizens to remedy pollution are not relevant to these arbitrations. Peru has never disputed in these arbitrations that there was historical pollution prior to DRP's arrival to La Oroya.[193] The question before this Tribunal in the Contract Case—which is Claimants' burden to prove—is whether Activos Mineros is responsible for the damages and claims pursuant to Clause 5.3 or 5.4 of the STA alleged by the Missouri Plaintiffs.

187. Fifth, the IACtHR framed the 2006 and 2009 Extensions as broadening both the entire PAMA and the timeframe for DRP to fulfill its obligations under the PAMA.[194] These findings are incorrect, as Respondents have explained responding to the Tribunal's question 2(b) above. The 2006 and 2009 Extensions expressly stated that they pertained solely to the Sulfuric Acid Plant Project, not to the PAMA in its entirety.[195] These extensions were not granted as means to facilitate DRP's compliance with the PAMA. They were granted *in spite of* DRP's failure to meet its obligations,[196] taking into consideration the various interests involved in the completion of the Sulfuric Acid Plant

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[193] In fact, the precise reason Peru wanted to privatize the Facility was to stop it from polluting and causing harm to the environment and surrounding population. *See* Peru's Contract Case Counter-Memorial, ¶¶ 65-67, 168; Peru's Treaty Case Counter-Memorial, ¶¶ 78-80, 181; Hearing Transcript, Day 1, Claimants' Opening Statement, p. 132, lines 22-25.

[194] IACtHR Judgment, ¶¶ 71-75, 163-65.

[195] **Exhibit R-287**, Ministerial Resolution No. 257-2006-MEM/DM, 29 May 2006, Arts. 1, 10; **Exhibit R-289**, Report No. 118-2006-MEM-AAM/AA/RC/FV/AL/HS/PR/AV/FO/CC, 25 May 2006, pp. 7, 26, 36-51; **Exhibit C-077 (Contract)**, 2009 Extension Law, Art. 2; **Exhibit C-078 (Treaty)**, Decree No. 075-2009-EM, 29 October 2009, Final, Temporary and Supplementary Provisions, Section Six. *See also* Peru's Contract Case Counter-Memorial, ¶¶ 771-77; First Alegre Expert Report, ¶¶ 53-54; Second Alegre Expert Report, ¶¶ 59-60.

[196] Peru's Contract Case Counter-Memorial, ¶¶ 675, 771-77; Peru's Contract Case Rejoinder, ¶ 46; First Alegre Expert Report, ¶¶ 37-40, 53-55, 67, 92-93, 126; Second Alegre Expert Report, ¶¶ 58-63; Varsi Expert Report-Treaty, ¶¶ 6.20-6.23. *See also* Hearing Transcript, Day 2, Isasi's Cross-Examination, p. 313, lines 10-20; Hearing Transcript, Day 5, Alegre's Cross-Examination, pp. 750-51, lines 24-2, and p. 785, lines 5-10.

Project.[197] These extensions were targeted and extraordinary measures that did not excuse DRP from its prior breaches.[198]

188. Sixth, the IACtHR dismissed the notion that it had to find a causal link between the injuries suffered by the Peruvian nationals and pollution to find liability.[199] This finding on causation is not applicable to the underlying arbitrations. First, the issue of causation regarding injuries suffered by the Peruvian nationals is irrelevant to the Treaty Case. Second, in the context of the Contract Case, the Tribunal has a distinct role from the IACtHR, with the STA providing clear instructions for the indemnity analysis. As the Respondents have explained, the STA establishes two steps to carry out the indemnity analysis: (i) first, isolating the specific claims raised in Missouri; and (ii) then, determining the cause of that injury.[200] This two-step process is essential for the Tribunal's determination of whether DRP or Centromin is responsible under Clauses 5, 6, and 8.14.

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[197] *See* Isasi Witness Statement, ¶¶ 25-27; Hearing Transcript, Day 2, Isasi's Cross-Examination, pp. 307-08, lines 16-15; Hearing Transcript, Day 5, Alegre's Direct Presentation, pp. 719-20, lines 21-7.

[198] *See* Hearing Transcript, Day 2, Isasi's Cross-Examination, p. 313, lines 10-20 (stating that the 2006 Extension "did not constitute any form of forgiveness. It was just a moratorium granted on an exceptional and non-extendable basis. It was just granted for one time for the construction of the Sulfuric Acid Plants. Just for that. It did not imply an extension of the environmental obligations nor the PAMA obligations. In particular, the Ministerial Resolution granting the Extension states that. It also states that the Extension will not affect the Contract relationship that Doe Run had with Centromín and other actors because this is an independent area from the legal obligations.").

[199] IACtHR Judgment, ¶¶ 204 *et seq*.

[200] Day 9 Hearing Transcript, p. 1608, lines 9-20.

III. PRAYER FOR RELIEF

189. For the foregoing reasons, Peru respectfully requests that the Tribunal:

a. Regarding the **Treaty Case**:

i. Dismiss Claimant's claims for an alleged violation of FET under Article 10.5 of the Treaty in their entirety, for lack of jurisdiction;

ii. Dismiss Claimant's claims for an alleged expropriation under Article 10.7 of the Treaty, for lack of jurisdiction;

iii. 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

iv. 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.

b. Regarding the **Contract Case**:

i. Dismiss all of Claimants' claims for lack of jurisdiction; or

ii. Dismiss all of Claimants' claims based on alleged violations of the STA for lack of merit; and

iii. Dismiss all of Claimants' claims based on alleged violations of the Peruvian Civil Code for lack of merit; and

iv. Dismiss all of Claimants' claims under customary international law for lack of merit.

c. With regard to Claimants' subrogation claim, Respondents request that the Tribunal rule that Claimants have failed to meet their burden of proof on the timeliness of the

claim, or, in the alternative, that all claims in the Missouri Litigations that were or could have been filed by 10 November 2014 are time-barred, and allow Respondents to identify the claims subject to the time-bar in the quantum phase of the Contract Case (if any).

190. Peru further requests that the Tribunal order Claimant to pay all of Peru's and Activos Mineros's costs, including the totality of the arbitral costs incurred in connection with these proceedings, as well as the totality of their legal fees and expenses.

191. Should Renco's Treaty Case 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.[201]

[201] **Exhibit R-094**, Securities and Exchange Commission Form S-4, DRRC, 11 May 1998, p. 1600 (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,

A&O Shearman

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