

PCA CASE No. 2019-46

**IN THE MATTER OF AN ARBITRATION
BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH
THE TRADE PROMOTION AGREEMENT BETWEEN THE REPUBLIC OF PERU
AND THE UNITED STATES OF AMERICA**

- and -

THE UNCITRAL ARBITRATION RULES 2013

THE RENCO GROUP, INC.

CLAIMANT,

v.

THE REPUBLIC OF PERU

RESPONDENT.

CLAIMANT'S MEMORIAL

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January 25, 2021

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I. INTRODUCTION AND SUMMARY OVERVIEW

Richard Kamp figured he had seen the worst wastelands the mining industry was able to create. But that was before the American environmentalist – a specialist on the U.S.-Mexican border area – laid eyes on La Oroya, home to Centromin, Peru’s biggest state-owned mining company. Last month, as his car rattled toward the town through hills that once were green, Kamp fell silent. Dusted with a whitish powder, the barren hills looked like bleached skulls. Blackened slag lay in heaps on the roadsides. At La Oroya, Kamp found a dingy cluster of buildings under wheezing smelter smokestacks. Pipes poking out of the Mantaro River’s banks sent raw waste cascading into the river below. ‘This,’ he said, ‘is a vision from hell.’

“How Brown Was My Valley,” Newsweek, April 18, 1994¹

1. This investment dispute arises from Respondent Republic of Peru’s sale in 1997 of its State-owned smelting and refining complex in La Oroya, Peru (the “La Oroya Complex” or the “Complex”) to a consortium led by Claimant The Renco Group, Inc., and Respondent’s subsequent mistreatment of Claimant and its investments relating to the Complex when Claimant’s locally-incorporated subsidiary Doe Run Peru requested a reasonably—and contractually permitted—extension of time to complete a final environmental modernization project. Peru’s initial denial of that reasonable extension request and its related conduct thereafter constitute breaches of Peru’s obligations under the Treaty and resulted in substantial losses for Claimant, including the expropriation of Claimant’s investments.

2. When the Republic of Peru declared in late 1991 that it would promote private investment and privatize its mining sector, there was little reaction from the investment community. Peru’s first effort to sell its State-owned mining operations in 1994 failed—without prospective investors submitting even a single bid—in large part because of the substantial risk of liability associated with third-party claims from injury resulting from seventy-five years of

¹ **Exhibit C-103**, Corinne Schmidt, *How Brown Was My Valley*, NEWSWEEK, April 18, 1994 (*hereinafter* “Apr. 18, 1994 NEWSWEEK”).

historical environmental contamination and dilapidated existing infrastructure that continued to pollute. As Peru later reported in an official White Paper, the smelting and refining complex in La Oroya was particularly problematic, because of its visually obvious and well-known environmental problems,² as depicted in the 1994 NEWSWEEK article quoted above.

3. Undeterred in its desire to sell the La Oroya Complex and other mining operations held by State-owned *Empresa Minera del Centro del Peru* (“Centromin”), Peru revised its privatization strategy in 1996, with the stated goal that private investors would undertake to modernize the infrastructure at the Complex with projects that would reduce its environmental impact over time pursuant to a *Programa de Adecuación y Manejo Ambiental*, or Environmental Remediation and Management Program (the “PAMA”). Under the revised privatization strategy, Peru would retain and assume responsibility to remediate the existing environmental contamination and also retain and assume broad liability for claims of third parties arising both before and after the sale.³ Peru advised prospective investors during a written question and answer period conducted prior to the sale that Centromin (and Peru through a guaranty) would accept responsibility for all the contamination and related claims until the end of the period allowed for the investor to modernize the smelting Complex outlined in the PAMA, with limited exceptions.

4. After Peru held a second public auction for the Complex on April 14, 1997, Claimant and its affiliate Doe Run Resources Corporation (the “Renco Consortium”) were awarded the right to negotiate a Stock Transfer Agreement to acquire the La Oroya Complex.⁴ Peru required that the Renco Consortium create a local Peruvian entity as the acquisition vehicle, which it did in the form of Doe Run Peru S.R. Ltda (“Doe Run Peru” or “DRP”). The Renco Consortium negotiated the Stock Transfer Agreement with State-owned Centromin, and the parties executed the Stock Transfer Agreement on October 23, 1997 as well as a Guaranty issued by Peru

² **Exhibit C-104**, Government of Peru, White Paper concerning the Fractional Privatization of Centromin, 1999 at 6 (*hereinafter* “1999 White Paper”).

³ **Exhibit C-104**, 1999 White Paper at 62 (explaining that under the new privatization strategy formulated in 1996, Centromin, as seller would retain responsibility “to remediate the environmental problems accumulated in the past, as well as the claims of third parties in relation to environmental liabilities....”).

⁴ **Exhibit C-105**, Contract of Stock Transfer between Empresa Minera del Centro del Peru S.A., Doe Run Peru S.R. Ltda., The Doe Run Resources Corporation, and The Renco Group, Inc., October 23, 1997 (*hereinafter* the “Stock Transfer Agreement” or “STA”).

on November 21, 1997,⁵ by which Peru guaranteed all of Centromin’s “representations, securities, guaranties and obligations” under the Stock Transfer Agreement.

5. Peru has not disputed that the PAMA approved by Peru’s Ministry of Energy and Mines (the “MEM”) prior to DRP’s acquisition of the Complex grossly underestimated the scope of work that needed to be done at the Complex, and the time and cost of completing the PAMA projects.⁶ An outside environmental consultant that Centromin retained in 1996 concluded that completion of the PAMA would take “in excess of the ten year implementation schedule being considered by the Ministry” and that “considerable flexibility in the implementation and application of the new standards will be necessary.”⁷ It was against this backdrop, and after assurances of flexibility by Peru, that the Renco Consortium agreed to enter into the Stock Transfer Agreement.

6. The Government allocated the PAMA projects between DRP (modernization and updating the Complex itself) and Centromin (remediation of existing contamination).⁸ However, Peru treated Centromin more favorably than DRP by deferring Centromin’s remediation obligations far into the future while mistreating DRP, despite the fact that DRP went well above and beyond its obligations under the Stock Transfer Agreement and PAMA.⁹ At the same time it was working on its PAMA modernization projects, DRP focused intensely on public health issues and on helping the local communities.¹⁰ However, when DRP requested a four-year extension in

⁵ **Exhibit C-106**, Guaranty Agreement between the Republic of Peru and Doe Run Per S.R. Ltda., November 21, 1997 (*hereinafter* the “Guaranty Agreement”).

⁶ **Exhibit C-107**, Centromin, Environmental Impact Program, La Oroya Metallurgical Complex, August 1996 (*hereinafter* “Centromin Preliminary PAMA”).

⁷ **Exhibit C-108**, Knight Piésold, Environmental Evaluation of La Oroya Metallurgical Complex, September 18, 1996 at 33 (*hereinafter* “Knight Piésold Report for Centromin”).

⁸ **Exhibit C-089**, Directorial Resolution No. 334-97-EM/DGM concerning the split of PAMA for the La Oroya Metallurgical Complex, October 16, 1997 (*hereinafter* “Resolution No. 334-97”); **Exhibit C-109**, Letter from Centromin to Ministry of Energy & Mines, September 19, 1997 at 9-12 (*hereinafter* “September 19, 1997 Letter”); **Exhibit C-105**, Stock Transfer Agreement, Clause 5, preamble. *See also* Witness Statement of Mr. Kenneth Buckley, Former General Manager and President of Doe Run Peru, dated November 18, 2020 at ¶¶ 11-13 (*hereinafter* “Buckley Witness Stmt.”).

⁹ **Exhibit C-092**, Directorial Resolution No. 082-2000-EM-DGAA concerning Centromin’s request for the modification of the PAMA for La Oroya Metallurgical Complex, April 17, 2000 at 4 (*hereinafter* “Resolution No. 082-2000”).

¹⁰ Buckley Witness Stmt. at ¶¶ 22-24.

2006 to finish the sulfuric acid plant project, the MEM gave it only two years and ten months, despite the opinion of its own consultants that more time likely was needed.¹¹ The MEM also unilaterally foisted many additional projects and onerous conditions upon DRP, significantly expanding the complexity (and cost) of the work that DRP was required to perform within the timeframe.¹² Despite this, by the end of 2008, DRP had completed all of its PAMA projects except for the sulfuric acid plant project, which was over 50% completed even though it had been totally redesigned in 2006.¹³ DRP already had spent over US\$ 300 million (three times the approximate US\$ 107 million estimated by Centromin) on its PAMA projects and additional projects to benefit the community.¹⁴

7. At the end of 2008, the global financial crisis severely impacted DRP and its ability to operate, and essentially wiped out the profits of the Cobriza mine which constituted DRP's main source of funding for the PAMA projects. DRP lost its US\$ 75 million credit facility and its lenders refused to extend credit without an official statement by the Peruvian Government extending time for DRP to complete the remainder of its final PAMA modernization project (the sulfuric acid plants project). Although the financial crisis constituted an economic *force majeure* condition, a specifically negotiated term that warranted an extension under the Stock Transfer Agreement, Peru repeatedly denied DRP's extension requests.¹⁵ The Peruvian Government also demanded concessions from DRP in exchange for the extension, while refusing to sign a Memorandum of

¹¹ **Exhibit C-062**, S. Clark, E. Partelpoeg, James W.S. Young, *Expert Comments on Exceptional Fulfillment Extension Request for the Sulfuric Acid Plant Project of La Oroya Metallurgical Complex PAMA*, May 10, 2006 at 15 (*hereinafter* "2006 Clark et al, Review of PAMA Projects"); Expert Report of Dr. Eric Partelpoeg, January 21, 2021, § 7 at 21-57 (*hereinafter* "Partelpoeg Expert Report").

¹² **Exhibit C-059**, Ministry of Energy & Mines Report No. 118-2006-MEM-AAM/AA/RC/FV/AL/HS/PR/AV/FO/CC, *Request for Exceptional Extension of the Sulfuric Acid Plants Project in the Adaptation and Environmental Management Program of the Metallurgical Complex of La Oroya, of Doe Run Peru S.R.L.*, May 25, 2006 (*hereinafter* "Report No. 118-2006").

¹³ **Exhibit C-055**, Doe Run Peru, *Request for Extension of Deadline to Complete the Copper Circuit Sulfuric Acid Plant Project Based on Act of God or Force Majeure Grounds*, July 8, 2009 at 14-71 (*hereinafter* "Doe Run Peru 2009 Extension Request"); **Exhibit C-110**, Memorandum No. 732-2002-EM-DGM-DFM/MA from V. Lozada Garcia (Ministry of Energy & Mines) to Director General of Doe Run Peru concerning fulfillment of recommendations and measures for the control of the environment, December 10, 2002 at 3 (*hereinafter* "Memorandum No. 732-2002"); Partelpoeg Expert Report, § 7.5, at 48-51.

¹⁴ **Exhibit C-055**, Doe Run Peru 2009 Extension Request at 5.

¹⁵ **Exhibit C-105**, Stock Transfer Agreement, Clause 15 at 61.

Understanding that the parties had negotiated,¹⁶ or provide information to DRP regarding the length of any extension.

8. At the same time these demands were being made by Peru, Government officials were making public statements that DRP would receive only a three-month extension or no extension at all, and President Garcia, seeing DRP's precarious state, passed an Emergency Decree in May 2009 restricting participation of related creditors in bankruptcy proceedings.¹⁷

9. In July 2009, after having been forced to shut down the Complex the month prior due to the Government's refusal to grant the extension, DRP submitted a final, comprehensive request for an extension.¹⁸ As Dr. Partelpoeg explains, this request "was reasonable and necessary given the project's complexity, particularly at the [La Oroya Complex]; the insufficient completion time Peru had previously provided, as I had noted in 2006; and the global financial crisis and the resulting impact on metal prices."¹⁹ The Peruvian Government formed a technical commission to study DRP's request (the "Technical Commission").²⁰ On September 12, 2009, more than six months after DRP's initial request, the Government's Technical Commission recommended that DRP be given a significant extension to obtain financing, restart the Complex and complete the remainder of the sulfuric acid plants project.²¹ On September 26, 2009, Congress passed a law

¹⁶ **Exhibit C-111**, Memorandum of Understanding between Peru, Doe Run Peru, Doe Run Cayman Ltd., and Doe Run Cayman Holdings LLC, March 27, 2009 (*hereinafter* the "MOU").

¹⁷ **Exhibit C-067**, *Government to extend for three more months term for Doe Run to complete the PAMA*, EL COMERCIO, April 4, 2009 (*hereinafter* "Apr. 4, 2009 EL COMERCIO"); **Exhibit C-068**, *Peru shall not grant any more term extensions to Doe Run for Environmental plan*, MINES AND COMMUNITIES, May 20, 2009 (*hereinafter* "May 20, 2009 MINES AND COMMUNITIES"); **Exhibit C-112**, Emergency Decree No. 061-2009 concerning the participation of creditors in preventive bankruptcy, May 27, 2009 (*hereinafter* "Emergency Decree No. 061-2009").

¹⁸ *See generally* **Exhibit C-055**, Doe Run Peru 2009 Extension Request. *See also* Witness Statement of Mr. A. Bruce Neil, Former President and Chief Executive Officer of Doe Run Resources, dated December 17, 2020 at ¶ 45 (*hereinafter* "Neil Witness Stmt."); Witness Statement of Mr. Dennis A. Sadlowski, dated January 20, 2021, at ¶¶ 40-41 (*hereinafter* "Sادلowski Witness Stmt."); Partelpoeg Expert Report, §§ 2, 7.6, at 3-4, 51-57.

¹⁹ Partelpoeg Expert Report, § 2, at 3.

²⁰ **Exhibit C-102**, Supreme Resolution No. 209-2009-PCM concerning creation of the La Oroya Technical Commission, August 19, 2009 (*hereinafter* "Resolution No. 209-2009"). *See also* Neil Witness Stmt. at ¶ 46; Sadlowski Witness Stmt. at ¶ 42.

²¹ **Exhibit C-043**, La Oroya Technical Commission, Executive Summary, September 12, 2009 (bringing the time for completion of the SO₂ plants to Doe Run Peru's initial estimate of five years) (*hereinafter*

granting DRP a 30-month extension (ten months to obtain financing and restart the Complex, and twenty months after that to complete the remainder of the final PAMA project – until March 27, 2012).²²

10. However, the MEM quickly undermined the extension by issuing a Supreme Decree on October 27, 2009, which imposed onerous regulations, including requiring DRP to channel 100% of its revenues from any source into a trust controlled by the MEM (the “MEM Trust”). As Dr. Partelpoeg explains, these demands “directly interfered with DRP’s ability to complete the PAMA projects in the time provided” and were “the kiss of death for DRP’s effort to complete its project to modernize the copper circuit and construct the sulfuric acid plant.”²³ The Supreme Decree made the extension that DRP had received worthless because DRP could not obtain financing to complete the remainder of the final PAMA project if it did not have any cash flow from which to repay its creditors.²⁴ Finally, less than two months before DRP was to have obtained financing and restarted the Complex pursuant to the extension that the MEM undermined, the MEM issued an amended decree reducing the 100% trust requirement to 20%.²⁵ However, this was too little too late, because it was not possible for DRP to obtain financing and restart the Complex in less than two months.

11. After DRP was forced into bankruptcy due to the Peruvian Government’s actions in 2010, Peru continued its campaign against DRP. The MEM improperly injected itself into the bankruptcy proceedings by asserting a bogus claim of US\$ 163 million (the “MEM Credit”)

“2009 Technical Commission Report”); **Exhibit C-045**, Letter from B. Neil (Doe Run Peru) to M. Chappuis (Ministry of Energy & Mines), PAMA for the Metallurgical Complex of La Oroya 2004-2011 Period, February 17, 2004 at 1 (*hereinafter* “Doe Run Peru Request No. 1453558”). *See also* Neil Witness Stmt. at ¶ 47; Sadlowski Witness Stmt. at ¶ 43.

²² **Exhibit C-077**, Law No. 29410 Extending the Term for the Financing and Culmination of the “Sulfuric Acid Plant and Modification of the Copper Circuit” Project at the Metallurgical Complex of La Oroya, March 27, 2012 (*hereinafter* “Law No. 29410”).

²³ Partelpoeg Expert Report, §§ 2, 7.6.3, at 4, 55-57.

²⁴ Sadlowski Witness Stmt. at ¶¶ 44-48.

²⁵ *See* **Exhibit C-082**, Supreme Decree No. 032-2010-EM, Amending Supreme Decree No. 075-2009-EM, which regulated Law No. 29410, that granted an additional term for financing of the “Sulfuric Acid Plant and Modification of the Copper Circuit” Project of the La Oroya Metallurgy Complex, El Peruano, June 11, 2010 (*hereinafter* “Supreme Decree No. 032-2010”). *See also* Neil Witness Stmt. at ¶ 53; Sadlowski Witness Stmt. at ¶¶ 59-61.

alleging that US\$ 163 million would be required to finish the final sulfuric acid plant, and that this amount was a bankruptcy “credit” running from DRP to the MEM.²⁶

12. Using the bogus MEM Credit, the MEM ensured that the committee of creditors in the bankruptcy, largely comprised of other governmental entities (SUNAT and OSINERGMIN) and mining companies, traders and suppliers beholden to MEM for their continued operations, rejected DRP’s restructuring plans, even though the plans provided for US\$ 200 million in financing, payment of creditors, completion of the final PAMA project, and the ultimate survival of DRP.²⁷ In opposing DRP’s plans of restructuring, the MEM steadfastly refused to permit DRP to operate the Complex while completing the final PAMA project, and demanded that DRP comply with all *current* environmental regulations, including the 80 µg/m³ SO₂ standard (one of the lowest in the world) on the day that DRP restarted operations.²⁸

13. The MEM’s demands were inconsistent with (i) the letter and spirit of the original PAMA, (ii) the terms and context of the Stock Transfer Agreement and Guaranty, which included an agreement that DRP would be operating the Complex while completing its PAMA projects, and that by the end of the PAMA period the Complex would be in compliance with the environmental standards in place at the time the Stock Transfer Agreement was executed in 1997 (and that DRP would be given additional time like all other companies to reach current standards to the extent they were different), and (iii) the 2006 and 2009 PAMA extensions.

14. Peru’s arbitrary and unfair treatment of DRP in connection with its extension requests and its abusive use of the patently improper MEM Credit in the DRP bankruptcy proceedings resulted in substantial losses, including the expropriation of Claimant’s investments, and constitutes multiple violations of the Treaty.

²⁶ **Exhibit C-113**, Ministry of Energy & Mines Claim Request to INDECOPI, September 14, 2010 (*hereinafter* “2010 MEM Request to INDECOPI”). *See also* Sadlowski Witness Stmt. at ¶¶ 62-64.

²⁷ **Exhibit C-114**, Doe Run Peru, *Restructuring Plan*, May 14, 2012 (*hereinafter* “2012 DRP Restructuring Plan”).

²⁸ **Exhibit C-115**, Letter from M. del Rosario Patiño (Ministry of Energy & Mines) to I. L. Rennert (Renco), June 26, 2012 (*hereinafter* “June 26, 2012 Letter”).

II. FACTUAL BACKGROUND

A. FROM 1922 TO 1997, PERU CREATED ONE OF THE WORLD'S MOST POLLUTED SITES: THE LA OROYA COMPLEX

15. The town of La Oroya is located in the central Andean highlands of Peru, at an elevation of 3,750 meters above sea level. It lies at the confluence of the Mantaro and Yauli rivers, 185 km northeast of Lima in the department of Junín.

16. In 1922, the privately owned Cerro de Pasco Copper Corporation established the La Oroya Complex for copper smelting and refining. Cerro de Pasco added a lead smelter and refinery in 1928, a sulfuric acid plant in 1939, a silver refinery in 1950, and a zinc refinery in 1952. As a result, the Complex comprises four key circuits. These circuits are the copper smelter and refinery (the “Copper Circuit”); the lead smelter and refinery (the “Lead Circuit”); an anode residue plant and silver refinery (the “Precious Metals Circuit”); and zinc roasting plant, leaching and purification plant and refinery (the “Zinc Circuit,” and collectively the “Circuits”).²⁹ The Complex also includes numerous other facilities designed to process by-products released during the smelting process, including sulfuric acid plants, an oxygen plant, and several pilot plants to recover minor metallic by-products.

²⁹ The documents reference three to four circuits, as the Precious Metals Circuit is a smaller circuit with limited environmental impacts; **Exhibit C-090**, Centromin, Environmental Impact Program, La Oroya Metallurgical Complex, January 13, 1997, § 3.1 at 63 (*hereinafter* “PAMA Operative Version”).

17. The following diagram shows the main facilities in each circuit and the interrelationships between the four circuits:

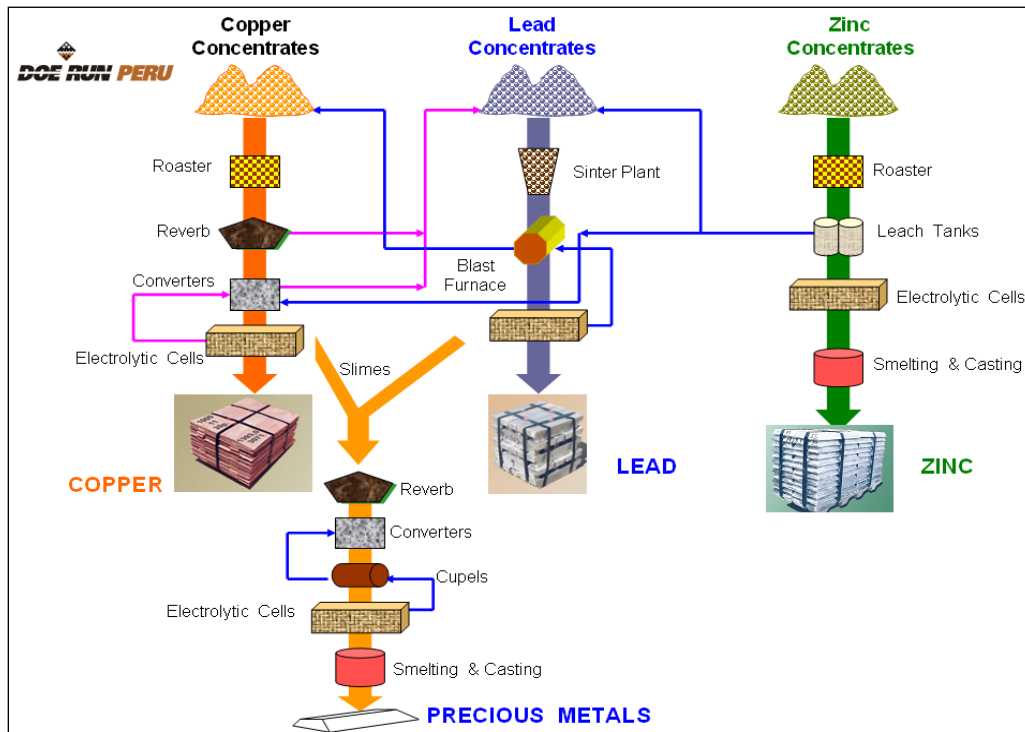


Figure 1. Diagram of the Complex's Four Integrated Circuits³⁰

18. Because smelters process concentrates to create pure metals by burning-off and/or separating out unwanted impurities, it is very difficult to control emissions of such substances.³¹ This is true of any smelter, but the La Oroya Complex faces particular challenges in this regard because the integrated smelting processes are among the most complex in the world. Indeed, the La Oroya Complex is one of only four smelting facilities worldwide capable of recovering numerous metals and by-products from complex, poly-metallic concentrates with high levels of impurities.³² While most smelters recover only one or two metals and a few by-products from a

³⁰ **Exhibit C-116**, J. Carlos Huyhua, General Manager, Doe Run Peru, *Business in the Central Highlands of Peru (La Oroya): Future Potential in the National and World Context, and Business Potential in the 21st Century*, November 29, 2007 at 16 (*hereinafter* "2007 Huyhua Report").

³¹ Concentrate is produced at the mine by finely grinding the raw ore extracted from the ground and removing the gangue (waste), thus "concentrating" the metal components of the ore.

³² **Exhibit C-090**, PAMA Operative Version, § 3.0 at 18. The other three international complexes with comparable technology for poly-metallic mineral processing are: Union Minière Group Hoboken in Belgium, Boliden Minerals Roonskar in Sweden, and Dowa Mining in Japan.

“clean” concentrate (*i.e.*, a concentrate with a high level of the target metal and a low level of impurities), the La Oroya Complex recovers 11 metals (copper, zinc, silver, lead, cadmium, indium, bismuth, gold, selenium, tellurium and antimony) and numerous by-products (*e.g.*, zinc sulfate, copper sulfate, sulfuric acid, arsenic trioxide, zinc dust, zinc-silver concentrates) from the poly-metallic concentrates produced by the central Andean mines.³³

19. The composition of the concentrates processed at the Complex has major implications for its design and operation and for its potential environmental impacts. The Complex’s four circuits are integrated so as to allow by-products and intermediary substances produced during the processing of concentrates in one circuit to be further processed and refined in the other circuits, thus maximizing the recovery of valuable metals.³⁴ At the same time, the concentrates contain high levels of other substances that either lack economic value or that cannot be fully recovered, including sulfur, arsenic, and cadmium. Thus, the process of isolating and refining the target metals creates substantial quantities of by-products, which contain substances that may be harmful to the environment.

1. In the 1970s, Peru Expropriated the Decades-Old La Oroya Complex

20. In 1968, a military dictatorship overthrew Peru’s elected government. In 1973, the new government created the MEM which nationalized, among other things, the Complex.³⁵ Shortly thereafter, the government created Centromin, a State-owned entity, to acquire and hold the Complex, which it did.³⁶ On March 18, 1975, Peru enacted another decree affirming that Centromin was wholly owned by the State and requiring that it “act in harmony with the policy, objectives, and goals approved by the Ministry of Energy and Mines in conformity with the National Development Plan.”³⁷

³³ **Exhibit C-090**, PAMA Operative Version, § 3.1 at 63.

³⁴ **Exhibit C-117**, Offering Memorandum, La Oroya Metallurgical Complex (Oct. 1996), at 24; Partelpoeg Expert Report, § 7.3.1, at 36-37.

³⁵ **Exhibit C-118**, Presidential Decree No. 20492 concerning Nationalizing the Cerro Mines, December 24, 1973 (*hereinafter* “Decree No. 20492”).

³⁶ **Exhibit C-118**, Decree No. 20492.

³⁷ **Exhibit C-119**, Organic Law No. 21117 concerning Centromin, March 18, 1975 (*hereinafter* “Law No. 21117”). The 1975 Organic Law also provided that Centromin’s purposes included “[p]erforming the activities intrinsic to the mining industry as approved by the State,” and “assuring the operativity and

2. Peru's Mining Sector Operated with Little or No Regulatory Oversight

21. From 1922 through the 1990s, Peru's mining sector operated with little or no regulatory oversight. Mining companies were not required to control their emissions, nor were they required to remediate their environmental impacts.³⁸ Peru's only environmental regulation was the General Law of Water, enacted in 1969 (47 years after the Complex was founded), which established ambient quality standards (*Estándares de Calidad Ambiental* or "ECAs") for water bodies.³⁹ ECAs are generally applicable standards establishing the level of a particular contaminant present in a receiving body (*e.g.*, a river or the ambient air) that is considered by the Peruvian Government not to pose a threat to human health or the environment. But the Peruvian Government generally either failed to enforce the ECAs established by the General Law of Water, or imposed only nominal penalties on companies that violated the ECAs through their liquid effluent discharges.⁴⁰

B. DURING THE EARLY 1990S, PERU WAS UNABLE TO PRIVATIZE CENTROMIN AS A WHOLE BECAUSE OF THE LA OROYA COMPLEX'S ENVIRONMENTAL LEGACIES AND OBSOLETE CONDITION

22. In November 1991, the Peruvian Government issued Legislative Decree 708, declaring the promotion of private investment in the mining sector in the national interest and eliminating the exclusive rights that previously had been granted to State-owned mining

success of its activity in accordance with the basic principle that State entrepreneurial activity is a fundamental component of the mining industry's development which contributes to the economic development of the country[.]”

³⁸ **Exhibit C-120**, World Bank, *Wealth and Sustainability: The Environmental and Social Dimensions of the Mining Sector in Peru*, December 1, 2005 at 63-4 (“The regulatory framework prior to the 1990’s did not include any mechanisms that would require companies to comply with environmental or social standards or with the remediation/compensation of environmental degradation Thus, the reforms to the institutional and legal framework governing protection of the environment in the 1990’s has contributed to a gradual change in the behavior of mining companies . . . which have taken concrete steps and invested substantial sums to improve their environmental performance. [I]t is worth recognizing that in the past 10 years or so, the regulatory landscape for addressing and promoting environmental compliance has improved considerably.”) (*hereinafter* “2005 World Bank Report”).

³⁹ Witness Statement of José Mogrovejo Castillo, Former Vice-President of Environmental Affairs for Doe Run Peru, dated January 11, 2021 at ¶ 11 (*hereinafter* “Mogrovejo Witness Stmt.”)

⁴⁰ Mogrovejo Witness Stmt. at ¶ 11.

companies.⁴¹ A 1992 Resolution included Centromin in the privatization process.⁴² Peru created a special committee to oversee Centromin's privatization (*Comité Especial de Privatización*), including the sale of the La Oroya Complex (the "Special Privatization Committee" or "CEPRI").⁴³ At the same time, the Peruvian Government began to implement a modern environmental legal framework.

23. The new Environmental and Natural Resources Code (enacted in September 1990) imposed several general requirements on mining and metallurgical companies, including obligations to include in their facilities equipment for control of contaminants and to treat wastewaters used in the processing of minerals.⁴⁴ In June 1993, the Peruvian Government issued Regulations for Environmental Protection in Mining and Metallurgy.⁴⁵ Article 5 of the Regulations provided that companies operating in the sector would be "liable for any emissions, discharges and disposal of waste to the environment occurring as a result of processes carried out at their installations," and it obligated them "to avoid and prevent any elements and/or substances from surpassing the maximum allowable levels" to be issued by the MEM.

1. Peru's Attempt to Auction Centromin to Foreign Investors Failed Because of Potential Investors' Concerns about Environmental Liability and the Costs of Upgrading the Complex

24. In April 1994, Peru's Privatization Committee attempted to sell Centromin to private investors.⁴⁶ At the time, Centromin owned the La Oroya Complex, as well as several mines and related infrastructure.

⁴¹ **Exhibit C-121**, Legislative Decree No. 708 concerning promoting investments in the Mining Sector, November 6, 1991 at 1 (*hereinafter* "Decree No. 708"); **Exhibit C-104**, 1999 White Paper at 18.

⁴² **Exhibit C-122**, Supreme Resolution No. 102-92-PCM concerning privatization of Centromin, February 21, 1992 at 1 (*hereinafter* "Resolution No. 102-92").

⁴³ **Exhibit C-123**, White Paper concerning the Privatization of Metaloroya, 1997 (*hereinafter* "1997 White Paper").

⁴⁴ **Exhibit C-085**, Legislative Decree No. 613 concerning the Environmental and Natural Resources Code, September 9, 1990, arts. 65 and 66 at 16 (*hereinafter* "Decree No. 613").

⁴⁵ **Exhibit C-088**, Supreme Decree No. 016-93-EM concerning Regulations for Environmental Protection in Mining and Metallurgy, April 28, 1993, art. 5 at 5 (*hereinafter* "Decree No. 016-93").

⁴⁶ **Exhibit C-124**, B.S. Gentry and L.O. Fernandez, *Mexican Steel*, in PRIVATE CAPITAL FLOWS AND THE ENVIRONMENT: LESSONS FROM LATIN AMERICA 188 (Bradford S. Gentry ed., Edward Elgar Publishing 1998) 213 ("[A] total of 28 companies, among them several important firms from Canada,

25. Peru's first effort to privatize Centromin failed.⁴⁷ As Peru later explained in its 1997 and 1999 White Papers, no foreign (or domestic) investor even submitted a bid to purchase Centromin, in part because the liability associated with environmental contamination claims was too great, and the scope and complexity of Centromin's operations, with its obsolete facilities and equipment, made it too daunting to attempt to modernize.⁴⁸

26. Peru considered simply shutting down the Complex in part because of its environmental problems,⁴⁹ but Peru decided that it needed the Complex to continue operating because it played a crucial role in the social and economic development of the region.⁵⁰ The Complex was a major employer and provider of health care and educational services for the local population.⁵¹ It also was the only facility in the region able to process the complex poly-metallic concentrates produced at surrounding mines, meaning that the mines—which were themselves a crucial source of employment—would have difficulty selling their ores if the Complex were closed. Ultimately, Peru's determination that it needed to “maintain . . . continuity” of Centromin's operations prevailed, and Peru made the continued operation of the La Oroya Complex a fundamental objective of its privatization strategy.⁵²

England, Japan and China, signed up to participate in the auction [of Centromin]. However, despite the initial interest, during the first call for bids in April 1994, none of the companies submitted a proposal and the auction had to be declared a failure.”) (*hereinafter* “*Mexican Steel*”).

⁴⁷ **Exhibit C-124**, *Mexican Steel* at 213; **Exhibit C-104**, 1999 White Paper at 20 (explaining that “in spite of the interest shown until the last moment by some of the most important companies, there was no concrete proposal during the auction on May 10, 1994”). *See also* Sadlowski Witness Stmt. at ¶¶ 6, 16-18.

⁴⁸ **Exhibit C-123**, 1997 White Paper at 6, 20 (“[T]he main aspects which led to the possible investors rejecting [the purchase of Centromin] were: the size of the Company, the complexity of its operations, the accumulated environmental liabilities and the social setting.”).

⁴⁹ **Exhibit C-123**, 1997 White Paper at 19.

⁵⁰ **Exhibit C-090**, PAMA Operative Version at 20 (“The importance of the Metallurgic Complex for the social and economic development of the region makes it unlikely that its operations will cease in the long or medium term.”).

⁵¹ *See* **Exhibit C-123**, 1997 White Paper at 35; **Exhibit C-104**, 1999 White Paper at 62-3.

⁵² **Exhibit C-104**, 1999 White Paper at 32, 36.

2. Peru Revised Its Privatization “Strategy” Such That Peru Would Sell the Complex but Retain Liability for Environmental Remediation and Third-Party Claims Relating to Environmental Contamination

27. Under Peru’s revised strategy, Peru began to implement measures to address potential investors’ concerns with the La Oroya Complex, noting overwhelming market concern with “the existence of problems arising from the environmental, labor and social liabilities.”⁵³ As Peru explained in its 1999 White Paper, under the new privatization strategy Centromin, as the seller, would retain responsibility “to remediate the environmental problems accumulated in the past, as well as the claims of third parties in relation to environmental liabilities,” the purchaser of the Complex would take responsibility for designing, constructing and implementing environmental projects that would upgrade and modernize the Complex in order to ultimately bring it into compliance with Peru’s environmental standards.⁵⁴

3. Peru Adopted Measures Intended to Bring the Complex into Compliance with New Environmental Standards

28. Peru’s attempt to privatize the La Oroya Complex was further complicated by the fact that Peru simultaneously was rolling out new environmental standards, after years of contamination, minimal regulations and ineffective enforcement, accompanied by a general failure to maintain or modernize the Complex.

29. In view of the obsolete condition and environmental legacy of facilities such as the La Oroya Complex, Peru’s new environmental regulations provided a transitional regime applicable to companies with existing operations.⁵⁵ This regime required companies with existing operations to engage in a preliminary environmental study (*Evaluación Ambiental Preliminar*) to

⁵³ **Exhibit C-104**, 1999 White Paper at 34-5.

⁵⁴ **Exhibit C-104**, 1999 White Paper at 62. As part of this process, Peru hired a market consultant, who surveyed potential investors and found that they were overwhelmingly concerned with the existence of problems arising from the environmental, labor and social liabilities. Peru followed all of the consultant’s recommendations, including “creat[ing] an environmental fund to finance the clean-up tasks and resolution of the problems identified in an Environmental Study,” “[having a] recognized international consultant prepare an environmental study to identify the environmental liabilities of each unit,” and “designat[ing] the entity to take care of the claims of third parties for damages related to environmental practices before the transfer date.” *Id.* at 35. In addition, Peru was advised to “establish the guidelines on the attention to the claims, verify its source and determination of compensation.” *Id.*

⁵⁵ *See e.g.*, Partelpoeg Expert Report, §§ 2, 5, at 3-4, 15-22.

identify the environmental problems generated by their operations,⁵⁶ and then to submit for approval by the MEM a PAMA proposing projects intended to reduce pollutants and to bring their operations into compliance with different standards set by the Peruvian Government (the ambient quality standards or ECAs and the maximum permissible levels (*Limites Máximos Permisibles* or “LMPs”) for liquid effluent discharges from mining and metallurgical facilities).⁵⁷

30. Under these regulations, a company performing PAMA projects is deemed to be in compliance with the applicable environmental standards (LMPs and ECAs) during the period approved to complete the PAMA projects.⁵⁸ The objective of the PAMA is to ultimately bring the company into compliance with the applicable standards by the end of the period approved for completing the PAMA.⁵⁹

a. *Centromin’s Preliminary Environmental Evaluation of the La Oroya Complex Highlighted Significant Environmental Issues*

31. In accordance with the 1993 environmental regulations, Centromin conducted a preliminary evaluation of the environmental situation at the La Oroya Complex in 1994, and submitted its results in the form of a preliminary environmental assessment (*Evaluación Ambiental Preliminar*) in March 1995 (the “Preliminary Environmental Assessment” or “EVAP”).⁶⁰

32. Centromin’s Preliminary Environmental Assessment highlighted a number of issues, including substantial lead, arsenic and other heavy metal contamination of nearby rivers

⁵⁶ **Exhibit C-088**, Decree No. 016-93-EM, Interim Provision 2(a) at 14. *See also* Mogrovejo Witness Stmt. at ¶¶ 16-19.

⁵⁷ **Exhibit C-088**, Decree No. 016-93-EM, Interim Provision 2(b) at 15. *See also* Mogrovejo Witness Stmt. at ¶¶ 16-19.

⁵⁸ Mogrovejo Witness Stmt. at ¶¶ 17-18.

⁵⁹ **Exhibit C-088**, Decree No. 016-93-EM, art. 9 at 6. *See also* **Exhibit C-120**, 2005 World Bank Report at 88. *See also* Mogrovejo Witness Stmt. at ¶¶ 16-19.

⁶⁰ **Exhibit C-125**, Centromin, *Preliminary Environmental Evaluation (“EVAP”) Monitoring Report on Water and Air Quality and Emissions (March 1994 to February 1995)*, March 1995 (*hereinafter* “1995 Centromin Report”). **Exhibit C-126**, Centromin, *Preliminary Environmental Evaluation (“EVAP”) Monitoring Report of Gaseous Emissions and Environmental Air Quality*, March 1995 (*hereinafter* “1995 Centromin Gaseous Emissions and Environmental Air Quality Report”).

through leakage and direct discharges from the plant,⁶¹ as well as particulate emissions of lead and other heavy metals throughout the plant.⁶²

33. The MEM approved the Preliminary Environmental Assessment on July 31, 1995, and gave Centromin until August 30, 1996 to submit its PAMA that would detail the proposed projects to address the environmental problems identified in the Preliminary Environmental Assessment, and ultimately bring the Complex into compliance with the LMPs and ECAs issued by the MEM.⁶³

34. In September 1996, Peru created a new legal entity, Empresa Metalúrgica La Oroya S.A. (“Metaloroya”), and made it the owner of the La Oroya Complex, thus segregating the Complex from Centromin’s other business operations.⁶⁴

b. *Peru’s Independent Environmental Expert Advised that Ten Years Was Not Sufficient to Meet the New Air Quality Standards, Recommended Flexibility in Implementation of the PAMA and Recommended Setting Reasonable Goals*

35. After the MEM approved the Preliminary Environmental Assessment, Peru’s Privatization Committee in charge of privatizing the Complex retained Knight Piésold, a U.S. environmental consulting group, to provide an independent environmental evaluation of the Complex,⁶⁵ and assess the proposed PAMA projects in light of the stated goal of the PAMA to bring the Complex into compliance with Peru’s new LMPs and ECAs for mining and metallurgical facilities.

36. Given the absence of good data and engineering studies, Knight Piésold considered it too early to list specific actions required for compliance. Knight Piésold also noted that discharges from the Complex into the surrounding rivers significantly exceeded Peruvian legal

⁶¹ **Exhibit C-125**, 1995 Centromin Water, Air Quality, and Emissions Report at 20, 24-5.

⁶² **Exhibit C-126**, 1995 Centromin Gaseous Emissions and Environmental Air Quality Report at 2, 4-5.

⁶³ **Exhibit C-107**, Centromin Preliminary PAMA, § 1.1. at 12 (“After all *Evaluación Ambiental Preliminar* observations were acquitted; with documents presented to the Ministry of Energy, Environmental Affairs General Office on the 31 of July 1995. A date for the submission of PAMA was set, August 30 1996”).

⁶⁴ **Exhibit C-123**, 1997 White Paper at 21.

⁶⁵ **Exhibit C-108**, Knight Piésold Report for Centromin.

limits for lead and arsenic, among other contaminants.⁶⁶ Knight Piésold then questioned whether “an older facility” like the La Oroya Complex would ever be able to comply with the ECA issued by the MEM in July 1996 for SO₂ in ambient air affected by mining and metallurgical facilities (572 µg/m³ daily average and 172 µg/m³ annual average).⁶⁷ Knight Piésold noted that “achievement of this level of control at La Oroya cannot be expected except by multiple process changes and/or major modifications to much of the smelter.”⁶⁸

37. In short, Knight Piésold advised in its 1996 report to the Peruvian Government that:

- (i) There was no simple remedy to the existing air quality problem, which extended to lead, SO₂ and other particulate emissions.⁶⁹
- (ii) Any solution would require “detailed engineering evaluation beyond the scope of the present evaluation.”⁷⁰
- (iii) Implementation of adequate controls to meet standards may take “in excess of the ten year implementation schedule being considered by the Peruvian Ministry.”⁷¹
- (iv) “Considerable flexibility in the implementation and application of new standards will be necessary if La Oroya is to continue as an economically viable operation.”⁷²
- (v) “Continued long-term operation of the smelter and progress on privatization can be achieved only if La Oroya is subject to realistic requirements to gradually reduce emissions.”⁷³

⁶⁶ **Exhibit C-108**, Knight Piésold Report for Centromin at 38-39.

⁶⁷ **Exhibit C-108**, Knight Piésold Report for Centromin at 27-8, 32.

⁶⁸ **Exhibit C-108**, Knight Piésold Report for Centromin at 2, 33.

⁶⁹ **Exhibit C-108**, Knight Piésold Report for Centromin at 33.

⁷⁰ **Exhibit C-108**, Knight Piésold Report for Centromin at 33.

⁷¹ **Exhibit C-108**, Knight Piésold Report for Centromin at 33.

⁷² **Exhibit C-108**, Knight Piésold Report for Centromin at 33.

⁷³ **Exhibit C-108**, Knight Piésold Report for Centromin at 33.

c. *The La Oroya PAMA Provided Ten Years to Complete 16 Projects, but Did Not Address Key Issues*

38. In late 1996, Centromin submitted for approval by the MEM a final PAMA setting forth 16 environmental projects that Centromin deemed sufficient to bring the Complex into compliance with the LMPs and ECAs in existence as of 1996.⁷⁴ The MEM approved the PAMA for the La Oroya Complex on January 13, 1997.⁷⁵

39. Despite Knight Piésold's warning that compliance with air emissions standards likely would require more than ten years,⁷⁶ the MEM granted only ten years to complete all PAMA projects, including those related to air emissions.⁷⁷ The MEM understood, however, that this completion date was "arbitrary" and "without any reference to how long it would actually take to meet emissions levels at a facility."⁷⁸ The final PAMA estimated that the total cost to complete the 16 projects would be US\$ 129 million.⁷⁹

40. Broadly speaking, the 16 PAMA projects were intended to address four basic categories of environmental impacts: (i) air emissions and air quality, (ii) soil remediation and rehabilitation, (iii) control of liquid effluents, and (iv) management of slag and other waste deposits (these projects were later divided between Centromin and DRP, with Centromin retaining the soil remediation and rehabilitation projects and some of the slag management projects).

- i. **Air Emissions and Air Quality**: The facility's processes for smelting and refining ore generate SO₂ (as sulfur-containing compounds are heated and

⁷⁴ See generally **Exhibit C-090**, PAMA Operative Version at 24, 167-71, 279.

⁷⁵ **Exhibit C-090**, PAMA Operative Version; **Exhibit C-123**, 1997 White Paper, at 38-9.

⁷⁶ **Exhibit C-108**, Knight Piésold Report for Centromin at 33 ("Implementation of adequate controls to meet standards may take "in excess of the ten year implementation schedule being considered by the Peruvian Ministry").

⁷⁷ **Exhibit C-129**, Memorandum, No. 1020-96-EM/DGAA from J. Mogrovejo (Doe Run Peru) to Director General of Mining (Ministry of Energy & Mines), December 27, 1996 (*hereinafter* "Memorandum No. 1020-96").

⁷⁸ Mogrovejo Witness Stmt. at ¶ 36 n. 18 (At the time, Mr. Mogrovejo was MEM's General Director of Environmental Affairs. He notes in this regard that "MEM recognized this [that it was arbitrary] at the time. For example, I recall that one MEM official mentioned that similar updates in Chile took up to twenty years.").

⁷⁹ **Exhibit C-090**, PAMA Operative Version at 20-26.

oxidized) and particulate matter, including lead, arsenic and other heavy metals. The PAMA included several projects intended to reduce (but not eliminate) these emissions. PAMA Project No. 1 required construction of two sulfuric acid plants—one for the Copper Circuit and one for the Lead and Zinc Circuits—which would reduce SO₂ emissions by capturing SO₂ and converting it into sulfuric acid, which could then be commercially sold or safely stored.⁸⁰ These proposed acid plants represented the majority of the anticipated cost of the PAMA—US\$ 90 million of the estimated US\$ 129 million—and were to be completed last according to the terms of the PAMA.⁸¹ The PAMA also included a project to reduce previously uncontrolled particulate emissions from the Coke Plant (PAMA Project No. 2),⁸² as well as a project intended to reduce nitrogen oxide (NOx) emissions from the Copper Circuit (PAMA Project No. 3).⁸³

- ii. **Soil Remediation and Rehabilitation:** The PAMA also explained that the facility’s air emissions from 1922 to 1997 had proved damaging to a large area around the Complex. Under the new privatization strategy adopted by the Peruvian Government after the failure of the 1994 auction, Centromin itself (*not* the prospective new investor) would retain the responsibility for remediating the contaminated soil in this area. According to the PAMA, SO₂ and heavy metals contained in the “smoke” emitted from the Complex had damaged in excess of 14,000 hectares.⁸⁴ Although the vegetation had redeveloped on a portion of this land following Cerro de Pasco’s installation of electrostatic precipitators to control particulate emissions, almost 4,000

⁸⁰ **Exhibit C-090**, PAMA Operative Version at 157, 168-70.

⁸¹ **Exhibit C-090**, PAMA Operative Version at 156; **Exhibit C-054**, Letter from K. Buckley (Doe Run Peru) to Director General of Mining (Ministry of Energy & Mines), December 15, 1998, Table 2 at 5 (*hereinafter* “Request for PAMA Modification No. 1215214”). The original PAMA schedule called for this project to be completed last, with construction beginning in 2003 and finishing in 2006.

⁸² **Exhibit C-090**, PAMA Operative Version at 157, 197-203.

⁸³ **Exhibit C-090**, PAMA Operative Version at 158, 204-5.

⁸⁴ **Exhibit C-090**, PAMA Operative Version at 207.

hectares remained severely impacted.⁸⁵ Because the scope and extent of the contamination from Centromin’s operations remained largely unknown, however, PAMA Project No. 4 required Centromin to undertake studies to “delimit” and “[d]etermine the area of impact.”⁸⁶ As the PAMA explained, this “affected area delimitation project” was “aimed at determining the area damaged by smoke [gases and suspended particles containing lead, arsenic, cadmium, and other hazardous materials], conducting studies to establish the condition of the affected areas regarding flora, fauna, soils, water, etc., as well as establishing control points for air and land quality monitoring...”⁸⁷ The PAMA anticipated that these initial characterization studies would “supply valuable information that will allow us [Centromin] to outline measures to rehabilitate the study area and other appropriate zones”⁸⁸ and to “plan the actions to be taken to restore the damaged areas.”⁸⁹ The project also included a number of shorter-term measures intended to control erosion in soil that had been denuded by the Complex’s emissions, including dike building, gully modification, terraces, and rehabilitation of soil and re-vegetation.⁹⁰

- iii. **Control of Liquid Effluents:** The PAMA included several projects designed to address severe water contamination in the area around the Complex. At the time, water used in the lead smelting process and copper refining processes, as well as raw sewage, ran untreated into the surrounding rivers.⁹¹ Project No. 5 required the construction of a copper refinery water

⁸⁵ **Exhibit C-090**, PAMA Operative Version at 207. Limiting the impacted area to 4,000 hectares was an error. As there had been no remediation done on the 14,000 hectares, that land continued to have high levels of heavy metal contaminants.

⁸⁶ **Exhibit C-090**, PAMA Operative Version at 158, 205-7.

⁸⁷ **Exhibit C-090**, PAMA Operative Version at 209.

⁸⁸ **Exhibit C-090**, PAMA Operative Version at 209.

⁸⁹ **Exhibit C-090**, PAMA Operative Version at 158.

⁹⁰ *See generally* **Exhibit C-090**, PAMA Operative Version at 207-17.

⁹¹ *See generally* **Exhibit C-090**, PAMA Operative Version at 68, 74, 88-96, 183-184, 218.

treatment plant to treat contaminated water being discharged directly to the Yauli River.⁹² Project No. 6 required completion of a smelter cooling water recirculating system.⁹³ Project No. 7 called for improved handling and disposal of acid solutions in the fragmenting process at the silver refinery.⁹⁴ Project No. 8 called for the construction of an industrial liquid effluent plant to treat effluents from the plant.⁹⁵ Project No. 9 required construction of a concrete wall for lead mud residues to prevent “lead mud” from “pouring into the Mantaro River.”⁹⁶ Project No. 10 called for the recirculation of contaminated water used in the lead speiss granulation process, “containing mostly arsenic, antimony and suspended particles,” which was “being poured into the Mantaro River.”⁹⁷ Project No. 11 required the construction of a new automatic washing anode system to prevent “untreated water” laden with harmful metals from pouring into the Mantaro River.⁹⁸ Project Nos. 8-11 were merged into one project, initially estimated to cost only US\$ 2.6 million.⁹⁹ Project No. 16 required the creation of a sewage treatment plant and garbage disposal facility in La Oroya for domestic waste to treat the raw sewage and trash discharged directly into the Mantaro and Yauli rivers.¹⁰⁰

- iv. **Management of Slag and Other Deposits:** The PAMA also included projects to address the inadequate disposal and storage of certain by-

⁹² **Exhibit C-090**, PAMA Operative Version at 158, 218-26.

⁹³ **Exhibit C-090**, PAMA Operative Version at 159.

⁹⁴ **Exhibit C-090**, PAMA Operative Version at 159.

⁹⁵ **Exhibit C-090**, PAMA Operative Version at 160, 183-86.

⁹⁶ **Exhibit C-090**, PAMA Operative Version at 227.

⁹⁷ **Exhibit C-090**, PAMA Operative Version at 228.

⁹⁸ **Exhibit C-090**, PAMA Operative Version at 229, 161.

⁹⁹ **Exhibit C-090**, PAMA Operative Version at 160-61.

¹⁰⁰ **Exhibit C-090**, PAMA Operative Version at 74, 166, 270-75.

products, which were leaching or spilling into the surrounding rivers.¹⁰¹ Project No. 12 required improved management and disposal of copper and lead slag.¹⁰² At the time, the 1930s disposal equipment was “obsolete and create[d] many operative, maintenance and transportation difficulties,”¹⁰³ and the water used in the granulation process was directly discharged into the river, carrying “fine and/or suspended slag [25% of the annual production of copper and lead slags], as well as dissolved metals [*e.g.*, lead, cadmium and arsenic], [and] thus creating a serious pollution condition.”¹⁰⁴ Project No. 13 required the closure and abandonment of the copper and lead deposits at Huanchan, a disposal site near the Mantaro River.¹⁰⁵ The deposit was located on the bank of the Mantaro River, which received all of the rainwater runoff and drainage from the deposit.¹⁰⁶ In turn, Project No. 14 required the closure of the existing arsenic trioxide deposit and construction of a new structure to safely deposit future arsenic trioxide generated by the Complex,¹⁰⁷ because arsenic and other contaminants were leaching directly into the Mantaro River.¹⁰⁸ PAMA Project No. 15 called for the closure of the zinc ferrite deposit, which was pumping zinc ferrite pulp directly into the Mantaro River, while other contaminants like zinc, cadmium, and lead entered the river through dust and rain channels.¹⁰⁹

¹⁰¹ **Exhibit C-090**, PAMA Operative Version at 91-95.

¹⁰² **Exhibit C-090**, PAMA Operative Version at 162.

¹⁰³ **Exhibit C-090**, PAMA Operative Version at 230.

¹⁰⁴ **Exhibit C-090**, PAMA Operative Version at 230.

¹⁰⁵ **Exhibit C-090**, PAMA Operative Version at 162, 239-42.

¹⁰⁶ **Exhibit C-090**, PAMA Operative Version at 239-42.

¹⁰⁷ **Exhibit C-090**, PAMA Operative Version at 163.

¹⁰⁸ **Exhibit C-090**, PAMA Operative Version at 92-93, 243-49.

¹⁰⁹ **Exhibit C-090**, PAMA Operative Version at 93-95, 164-65, 255-61.

C. THE RENCO CONSORTIUM PURCHASED THE LA OROYA COMPLEX FROM CENTROMIN ON OCTOBER 23, 1997, WITH A GUARANTY AGREEMENT FROM PERU FOR ALL OF CENTROMIN'S CONTRACTUAL OBLIGATIONS

41. On January 27, 1997, less than a month after the MEM approved the PAMA, Peru's Special Privatization Committee announced International Public Tender No. PRI-16-97 and invited private investors to bid for Metaloroya, the company that owned the Complex.¹¹⁰ The bidders included, among others, *Servicios Industriales Peñoles S.A. de C.V.* ("Peñoles") from Mexico and the Renco Consortium.¹¹¹

42. The auction of Metaloroya's shares (and thus the Complex) took place on April 14, 1997.¹¹² The bid initially was awarded to Peñoles, but Peñoles withdrew its bid on July 9, 1997 (forfeiting its bid bond).¹¹³ On July 10, 1997, Peru's Special Privatization Committee notified the Renco Consortium, as the runner-up bidder, that Peñoles had withdrawn its bid.¹¹⁴ The Renco Consortium agreed to enter into negotiations with Peru's Special Privatization Committee to acquire Metaloroya through a Stock Transfer Agreement. As required in the bidding conditions, the Renco Consortium also agreed to establish DRP.¹¹⁵

43. On October 23, 1997, Centromin and DRP, with the intervention of Metaloroya S.A., The Doe Run Resources Corporation and The Renco Group, Inc. entered into the Stock Transfer Agreement.¹¹⁶ Pursuant to the Stock Transfer Agreement, DRP (defined in the Stock Transfer Agreement as the "Investor") acquired 99.98% of the outstanding shares of Metaloroya

¹¹⁰ **Exhibit C-123**, 1997 White Paper at 50-51.

¹¹¹ **Exhibit C-123**, 1997 White Paper at 51.

¹¹² **Exhibit C-123**, 1997 White Paper at 51.

¹¹³ **Exhibit C-123**, 1997 White Paper at 51. *See also* Sadlowski Witness Stmt. at ¶¶ 16-17

¹¹⁴ **Exhibit C-123**, 1997 White Paper at 52. *See also* Sadlowski Witness Stmt. at ¶¶ 16-17.

¹¹⁵ **Exhibit C-131**, Consultation Round 2, Question Consultation No. 7 at 5 ("If the bidder that is Awarded the Bid or the subsidiary to which it transfers said award, is not Peruvian, and there is an intent to acquire shares that CENTROMIN possesses in the COMPANY, one or the other must establish a Peruvian subsidiary in order to execute the contract..."); **Exhibit C-132**, Deed of Incorporation for Doe Run Peru, S.A., September 8, 1997 (*hereinafter* "DRP Incorporation"). *See also* Sadlowski Witness Stmt. at ¶¶ 7-8.

¹¹⁶ **Exhibit C-105**, Stock Transfer Agreement, Preamble at 2-3. Jeffery L. Zelms signed the Stock Transfer Agreement on behalf of the Doe Run Resources Corporation, Marvin M. Koenig on behalf of the Renco Group, Cesar Polo Robillard on behalf of Centromin and Jorge Merino Tafur on behalf of Metaloroya.

(defined in the Stock Transfer Agreement as the “Company”) in return for two purchase price payments to Centromin in the total amount of US\$ 121,440,608.¹¹⁷ In addition to its purchase price payments to Centromin, DRP made a separate capital contribution of US\$ 126,481,383.24 to Metaloroya on October 23, 1997 in accordance with Clause 3 of the Stock Transfer Agreement.¹¹⁸

44. The Stock Transfer Agreement also refers to the Peruvian Government’s guarantee of all of Centromin’s contractual obligations.¹¹⁹ That guarantee was further confirmed in the Guaranty Agreement of November 21, 1997.¹²⁰ Specifically, Clause 2.1 of the Guaranty Agreement provides that Peru “guarantee[s] the representations, securities, guaranties and obligations” undertaken by Centromin in the Stock Transfer Agreement.¹²¹

45. On December 30, 1997, Metaloroya merged into DRP following approval from the Peruvian Government.¹²²

D. AS IT LEARNED MORE ABOUT WHAT REALLY NEEDED TO BE DONE, DRP SIGNIFICANTLY EXPANDED ITS EFFORTS, ENGAGED IN NUMEROUS COMPLEMENTARY PROJECTS TO ADDRESS PUBLIC HEALTH ISSUES, AND FOCUSED ON HELPING THE LOCAL POPULATION

46. After acquiring the La Oroya Complex in 1997, DRP began to engage in the ever-evolving and complex process of upgrading the La Oroya Complex to meet emissions standards and addressing public health issues. Moreover, as it learned more through technical studies and evaluations, DRP voluntarily expanded its efforts spending hundreds of millions of dollars to adequately address air and water emissions, as well as implementing public health and social programs to reduce worker and community exposure to lead and other substances.¹²³

¹¹⁷ **Exhibit C-105**, Stock Transfer Agreement, arts. 1.2, 1.3 at 9-10; **Exhibit C-123**, 1997 White Paper at 13. *See also* Sadlowski Witness Stmt. at ¶ 18.

¹¹⁸ **Exhibit C-123**, 1997 White Paper at 13; **Exhibit C-105**, Stock Transfer Agreement, Clauses 3.2, 3.4 at 11-12. *See also* Sadlowski Witness Stmt. at ¶ 18.

¹¹⁹ **Exhibit C-105**, Stock Transfer Agreement, Clause 10 at 58.

¹²⁰ **Exhibit C-106**, Guaranty Agreement.

¹²¹ **Exhibit C-106**, Guaranty Agreement, art. 2.1 at 2.

¹²² *See* **Exhibit C-133**, Modification of the Contract to Transfer Shares, Increase Company Capital and Subscription of Shares of Metaloroya S.A., signed by Doe Run Peru and Centromin, December 17, 1999 at 7 (*hereinafter* “1999 Contract Modification”).

¹²³ Buckley Witness Stmt. at ¶¶ 20-23; Mogrovejo Witness Stmt. at ¶¶ 26-34.

1. DRP Expanded Its PAMA Obligations

47. Between 1998 and 2002, DRP's engineering and design studies showed that Centromin had severely underestimated the cost and complexity of updating the Complex to meet the environmental standards, and DRP made multiple requests to expand the scope of its PAMA obligations.¹²⁴ On October 19, 1999, the MEM approved DRP's request to amend its PAMA obligations by adding more tasks and increasing the investment amount by US\$ 60,767,000 to US\$ 168,342,000.¹²⁵ On January 25, 2002, the MEM approved another DRP request to increase its PAMA commitment to US\$ 173.05 million.¹²⁶

48. Acknowledging that the PAMA did not address a number of critical issues, the MEM requested that DRP engage in eight new emissions reduction projects. On December 13, 2002, in a quarterly report on the outside auditor's findings, the MEM wrote to DRP approving its progress to date,¹²⁷ but directing DRP to "implement additional actions to attain the fulfillment of the objectives of the projects agreed to in the PAMA" and to "present an execution schedule of the following activities that are considered of an urgent nature."¹²⁸ In particular, the MEM requested that DRP do the following:

- (1) separate treatment for dusts to eliminate recirculation;
- (2) encapsulate the concentrates during warehousing;
- (3) an environmental management plan for the Huanchan deposit;
- (4) ongoing cleaning program for the plant;

¹²⁴ See, e.g., **Exhibit C-055**, Doe Run Peru 2009 Extension Request at 7; **Exhibit C-054**, Request for PAMA Modification No. 1215214 at 2.

¹²⁵ **Exhibit C-044**, Ministry of Energy and Mines Report No. 1237-99-EM-DGM-DFM/DFT concerning Environmental Mitigation and Management Plan ("PAMA") and Modification of Timeline for "PAMA" actions and investments, October 18, 1999 at 3 ("There have been economic changes at the conclusion of some projects with budgeted amounts for investments due to detailed engineering studies, so the mentioned company referred asked to increase investment in the approved PAMA, which was scheduled to be executed into 2006 with an investment of US\$ 107,575,000.00 (see Table 1) and in the new projection, execution is considered with an investment of US\$ 168,342,000.00 (see Table 2), i.e., an increase of US\$ 60,767,000.00 in the same period, advising that the amount invested in all projects would increase, except the Vado and Malpaso Arsenic Trioxide Deposit (No. 14), where the investment would decrease from US\$ 2,000,000.00 to US\$ 1,858,000.00") (*hereinafter* "MEM Report No. 1237-99").

¹²⁶ **Exhibit C-045**, Doe Run Peru Request No. 1453558 at 17.

¹²⁷ **Exhibit C-110**, Memorandum No. 732-2002 at 3.

¹²⁸ **Exhibit C-110**, Memorandum No. 732-2002 at 3.

(5) establish self-limitations on the treatment of concentrates with high contents of arsenic and cadmium with the aim of reducing the levels of emission to acceptable national and international levels; (6) better the plant maintenance in order to reduce the emission of gasses and dust; (7) design a system of alert to prevent the occurrence of emission peaks; and (8) coordinate with the civil society the relocation of the educational centers of La Oroya Antigua, including transportation of the students.¹²⁹

49. On December 27, 2002, DRP responded to the MEM's request, noting that an independent environmental auditor, *Sociedad de Estudios y Representaciones Mineras S.R. Ltda.*, had not suggested the new undertakings during its inspection or in the "Inspection Report on Compliance with Environmental Protection and Conservation Standards for the second half of 2002."¹³⁰ In a show of good faith, DRP nevertheless added the new projects to its growing list of projects that it was required to undertake and complete within the original ten-year timeframe of the PAMA.

2. DRP Identified Lead Contamination as a Public Health Risk and Engaged in Numerous Activities Outside the Scope of the PAMA to Address It

50. DRP also engaged in numerous activities beyond the scope of the PAMA projects to reduce lead contamination and to address public health concerns related to lead exposure for both workers and the community.

51. Mr. Buckley, the President and General Manager of DRP from 1997 to 2003, summarized some of DRP's immediate efforts in lead reduction:¹³¹

We knew lead was an issue, and embarked on a very intensive program to get the La Oroya workers' blood lead levels under control . . . One of the first things that I did when we took over the Complex was to stand down all workers until they could be issued protective gear and trained in standard safety practices. Their equipment was so out of date. It was difficult to get the right protective equipment, but we brought in protective gear that

¹²⁹ **Exhibit C-110**, Memorandum No. 732-2002 at 3.

¹³⁰ **Exhibit C-134**, Letter from K. Buckley (Doe Run Peru) to M. Chappuis (Ministry of Energy & Mines), December 27, 2002 at 1 (*hereinafter* "December 27, 2002 Letter").

¹³¹ **Exhibit C-046**, Doe Run Peru, *Report to Our Communities In La Oroya, Province of Yauli, Junín-Peru*, 2001 at 31 (*hereinafter* "2001 DRP Report to Our Communities").

covered the entire face ... Our workers' blood leads came down immediately.

We also had to stop workers from eating on the job. Eating on the job is a key way to get lead poisoning. So we built kitchens and lunch-rooms where people could eat in clean conditions, and we required that they wash their hands before eating.

We also built showers, and required that workers shower and change their boots and clothes before leaving for home, and leave their dirty clothes at the plant.¹³²

52. As Mr. Buckley's witness statement highlights, DRP reduced blood lead levels in its workers from 51.1 µg/dl at the time DRP acquired the Complex in 1997, to 38.0 µg/dl in 2002, through (among other things) the mandated use of respirators and the change room (where workers start and end each day in a clean set of clothes), the use of spray trucks to reduce dust, and frequent medical check-ups.¹³³ By 2002, the workers' blood lead levels were thus below the World Health Organization's recommended worker levels of 40 µg/dl for men and 30 µg/dl for women.¹³⁴ These average numbers continued to drop, reaching 32.18 µg/dl at the end of 2005.¹³⁵ Moreover, DRP's new practices dramatically reduced accidents at the Complex,¹³⁶ and DRP received awards for its safety record.¹³⁷

53. Also not included in the original PAMA were the lead reduction measures DRP implemented at the Complex to prevent the transmission of contaminants to the workers' homes.

¹³² Buckley Witness Stmt. at ¶¶ 11-13.

¹³³ **Exhibit C-047**, 1998-2002 DRP Report at 30-31; *see also* **Exhibit C-046**, 2001 DRP Report to Our Communities at 29, 31. *See also* Buckley Witness Stmt. at ¶¶ 11-14; Neil Witness Stmt. at ¶¶ 9-12.

¹³⁴ **Exhibit C-047**, 1998-2002 DRP Report at 30-31; **Exhibit C-046**, 2001 DRP Report to Our Communities at 29. *See also* Buckley Witness Stmt. at ¶ 14.

¹³⁵ **Exhibit C-051**, Doe Run Peru, *Report to Our Communities, La Oroya*, 2006 at 19 (*hereinafter* "2006 DRP Report to Our Communities").

¹³⁶ *Id.*; **Exhibit C-135**, Doe Run Peru, *Report to Our Communities, La Oroya*, 2005 at 8 (*hereinafter* "2005 DRP Report to Our Communities"). *See also* Buckley Witness Stmt. at ¶¶ 20-22; *id.* ¶ 21 ("For a year and a half . . . I would go beat the drum at La Oroya about safety. Supervisors who didn't comply with the safety procedures would get fired. To achieve workplace safety, you need to have zero tolerance for accidents.").

¹³⁷ **Exhibit C-135**, 2005 DRP Report to Our Communities at 8. *See also* Buckley Witness Stmt. at ¶ 22.

These measures included constructing on-site change-houses,¹³⁸ washing trucks before they left the facility, and mandating that workers shower and change clothes after their shift.¹³⁹

54. In addition, DRP took a number of immediate measures to reduce emissions from the main stack and to control fugitive emissions:¹⁴⁰ it installed a television system in an environmental control center to monitor and immediately address visible fugitive emissions related to operational issues, like malfunctioning machines or open windows,¹⁴¹ introduced portable radios to facilitate real-time communications on the Complex, repaired the flues to improve dust recovery, and repaired and changed filter bags in 27 bag houses, increasing dust recovery from 96.5% to 98.1%, among other projects.¹⁴² By the end of 2001, Doe Run Peru had reduced the amount of particulate matter emitted from the main stack by 27.6%.¹⁴³

55. In November 1999 the technical arm of the Peruvian Ministry of Health (DIGESA) reported the results of a study of blood lead levels in a selected population of La Oroya Township.¹⁴⁴ Several months later, in March 2000, an NGO issued a report assessing blood lead levels of children under three and pregnant women in La Oroya.¹⁴⁵ Both studies showed elevated blood-lead levels in the examined population.¹⁴⁶

¹³⁸ **Exhibit C-047**, 1998-2002 DRP Report at 32; **Exhibit C-051**, 2006 DRP Report to Our Communities at 16.

¹³⁹ *See generally* **Exhibit C-047**, 1998-2002 DRP Report at 17-24; **Exhibit C-046**, 2001 DRP Report to Our Communities at 31. *See also* Buckley Witness Stmt. at ¶ 13; Neil Witness Stmt. at ¶ 9.

¹⁴⁰ *See generally* **Exhibit C-047**, 1998-2002 DRP Report at 57-68; **Exhibit C-055**, Doe Run Peru 2009 Extension Request at 79-82, 102, 115-16. *See also* Buckley Witness Stmt. at ¶ 19.

¹⁴¹ Mogrovejo Witness Stmt. at ¶ 31.

¹⁴² **Exhibit C-047**, 1998-2002 DRP Report at 60-65.

¹⁴³ **Exhibit C-046**, 2001 DRP Report to Our Communities at 73-79.

¹⁴⁴ Buckley Witness Stmt. at ¶ 19; **Exhibit C-052**, *Dirección General de Salud Ambiental* (“DIGESA”), Study of Blood Lead Levels in a Selected Population of La Oroya, November 23-30, 1999.

¹⁴⁵ **Exhibit C-136**, Consorcio Unión Para El Desarrollo Sostenible (“UNES”), *Evaluation of Lead Levels and Exposure Factors Among Pregnant Women and Children Under 3 Years Old in the City of La Oroya*, March 2000 at 5-6 (*hereinafter* “2000 UNES Report”). This study analyzed 48 pregnant women and 30 children.

¹⁴⁶ **Exhibit C-136**, 2000 UNES Report at 6.

56. To determine the scope of the issue, DRP performed a follow-up blood-lead level study in 2000 to 5,000 residents including children¹⁴⁷ and created the Hygiene and Environmental Health Program to carry out a series of actions based on the general recommendations of the United States Centers for Disease Control and Prevention and the World Health Organization.¹⁴⁸ These actions included: (1) evaluating and monitoring the physical and psychological well-being of the children of La Oroya;¹⁴⁹ (2) utilizing social workers to evaluate the family situation and potential risk factors for elevated blood-lead levels in the home;¹⁵⁰ (3) providing personalized training in hygiene and nutrition during house visits, including training in hand washing and bathing and training in proper cleaning of the house;¹⁵¹ (4) creating leaders in health and hygiene through community workshops;¹⁵² (5) sponsoring presentations on health and hygiene in local schools, including an educational puppet show and children's book;¹⁵³ and (6) sponsoring a campaign to clean the schools, roads, and neighborhoods on a weekly basis, for which DRP provided cleaning supplies and pressurized water from a water truck.¹⁵⁴

57. In 2003, at DRP's insistence, the Peruvian Ministry of Health entered into an agreement with DRP to support a public health program.¹⁵⁵ Through this agreement, DRP offered to provide financial support to the Peruvian Ministry of Health to achieve the following objectives: (1) establishing a culture of prevention in the population with the adoption of healthy habits that reduce exposure to dust; (2) establishing a safer water system, a program for potable water, monitoring programs for the soil, crops, wild vegetation and animals, and air quality, and monitoring of blood lead levels; (3) gradually reducing blood-lead levels; (4) creating a program

¹⁴⁷ The results of the study were presented on July 24, 2001. See **Exhibit C-046**, 2001 Report to Our Communities at 151.

¹⁴⁸ **Exhibit C-047**, 1998-2002 DRP Report at 76. See also Neil Witness Stmt. at ¶¶ 9-12.

¹⁴⁹ **Exhibit C-047**, 1998-2002 DRP Report at 84-87.

¹⁵⁰ **Exhibit C-047**, 1998-2002 DRP Report at 87-88.

¹⁵¹ **Exhibit C-047**, 1998-2002 DRP Report at 88.

¹⁵² **Exhibit C-047**, 1998-2002 DRP Report at 89.

¹⁵³ **Exhibit C-047**, 1998-2002 DRP Report at 92-96.

¹⁵⁴ **Exhibit C-047**, 1998-2002 DRP Report at 97-99.

¹⁵⁵ **Exhibit C-048**, Contract, Cooperation Agreement No. 008-2003 by and between The Ministry of Health and Doe Run Peru S.R.L., July 4, 2003 (*hereinafter* "2003 DRP-Ministry of Health Contract"). See also Buckley Witness Stmt. at ¶ 18.

to treat children and pregnant women with elevated blood-lead levels; and (5) signing cooperation agreements with various local authorities and agencies.¹⁵⁶ Prior to 2006 when the MEM mandated its continuance,¹⁵⁷ DRP provided financial and other support (up to US\$ 1 million/year) for this program on a voluntary basis.

58. In another voluntary effort to reduce blood-lead levels in the community, DRP hired the consulting firm Gradient Corporation in 2003 to perform a study on the human health risks in La Oroya.¹⁵⁸ Based on Gradient's conclusions, DRP began a series of complementary projects to reduce lead (and other particulate) emissions from the facility.¹⁵⁹

59. The additional projects to reduce lead (and other particulate) emissions through chimneys or stacks included (1) installation of baghouse filters for the lead furnaces, the arsenic kitchen, and the lead foam reverberator furnace, (2) preparation of units 1, 2 and 3 of the Cottrell Process for the sintering plant, and (3) reducing particulate material from copper converters and from the Cottrell Process in the anode residue plant.¹⁶⁰ DRP also added an electrostatic precipitator to the Cottrell Central, which reduced particulate emissions by 23%.¹⁶¹ Combined with stopping one line roasters in the Zinc Circuit, the project created a 35% reduction in particulate emissions from the chimney.¹⁶²

60. The projects to reduce lead (and other particulate) fugitive emissions, in turn, included (1) repowering of ventilation systems A, B, C and D of the lead sintering plant, (2) closure

¹⁵⁶ **Exhibit C-048**, 2003 DRP-Ministry of Health Contract, Third Clause at 2-3.

¹⁵⁷ **Exhibit C-058**, Ministerial Resolution No. 257-2006-MEM/DM concerning partially approving the Application for Exceptional Extension of the "Sulfuric Acid Plants" Project, May 29, 2006, art. 4 at 8 (*hereinafter* "Resolution No. 257-2006").

¹⁵⁸ **Exhibit C-049**, Gradient Corporation, *Comparison of Human Health Risks Associated with Lead, Arsenic, Cadmium, and SO₂ in La Oroya Antigua, Peru*, February 9, 2004 (*hereinafter* "Gradient Corp. Report"). *See also* Neil Witness Stmt. at ¶ 10.

¹⁵⁹ Neil Witness Stmt. at ¶¶ 10-11 ("The measures we took to address blood lead levels in our workers and in the surrounding community were not PAMA obligations, they were simply the right thing to do.").

¹⁶⁰ *See, e.g.*, **Exhibit C-050**, Letter from J. C. Mogrovejo (Doe Run Peru) to J. Bonelli (Ministry of Energy & Mines), Request for an Exceptional Extension of Deadline to Complete the Sulfuric Acid Plants Projects, December 15, 2005 at 63-66 (*hereinafter* "Detailed Request for a PAMA extension"); **Exhibit C-059**, Report No. 118-2006 at 34-42; **Exhibit C-051**, 2006 DRP Report to Our Communities at 30.

¹⁶¹ **Exhibit C-050**, Detailed Request for a PAMA extension at 7.

¹⁶² **Exhibit C-050**, Detailed Request for a PAMA extension at 7.

of lead furnace buildings and foam plant, (3) management of lead plant fusion beds, (4) management of copper plant fusion beds, (5) management of nitrous gases at the anode residue plant, (6) a new ventilation system for the anode residue plant building, (7) reduction of recirculating fines and (8) restriction on entry of concentrates. DRP also added industrial sweepers and paved the roads to the different plants.¹⁶³

61. DRP implemented these complementary projects alongside its rapidly expanding PAMA projects, with the twin goals of better environmental performance at the Complex and reducing blood-lead levels in its workers and the community. As Mr. Buckley explained, DRP performed the complementary projects because, “[W]e had to do something. I was not prepared to wait for the [G]overnment, which had been dodging its obligation since the beginning.”¹⁶⁴ When DRP later applied for a PAMA extension, DRP proposed that it complete the complementary projects as part of an enlarged commitment to address public health issues.¹⁶⁵

3. DRP Engaged in Numerous Additional Social and Public Health Projects to Help the Community

62. DRP also sponsored and implemented social and public health projects for the community, spending more than US\$ 30 million between 1998 and 2010 on quality-of-life improvements.¹⁶⁶ Indeed, DRP was one of the first companies in Peru to implement this type of voluntary corporate social responsibility program.

63. DRP’s social programs included the following:

- Offering special programs for the women from the communities: training programs focused on budget planning, child rearing, nutrition, and social responsibility, training a team of health promoters to educate the communities about health risks and orient pregnant women on pre-natal care, and extensive small business training.¹⁶⁷

¹⁶³ **Exhibit C-050**, Detailed Request for a PAMA extension at 63-66; **Exhibit C-059**, Report No. 118-2006 at 39-44; **Exhibit C-051**, 2006 DRP Report to Our Communities at 30.

¹⁶⁴ Buckley Witness Stmt. at ¶ 15.

¹⁶⁵ See Sections II.G.3 & II.H.2.

¹⁶⁶ See **Exhibit C-137**, Doe Run Peru, *Report to Our Communities*, May 2011 at 24 (*hereinafter* “2011 DRP Report to Our Communities”). See also Buckley Witness Stmt. at ¶¶ 16-18, 23.

¹⁶⁷ **Exhibit C-047**, 1998-2002 DRP Report at 126-36.

- Instituting the Human and Social Ecology Program, which monitored the health of at-risk children and provided daily nutritional lunches.¹⁶⁸
- Sponsoring (1) training programs in animal husbandry targeted to the farming communities around La Oroya and (2) the Forestation and Andean Gardening program, in which DRP and community participants planted more than 121,000 seedlings¹⁶⁹ and 132,000 square meters of gardens by 2006.¹⁷⁰
- Founding the Ecological Recreation Center, a wildlife refuge and garden center with free access to the public.¹⁷¹
- Upgrading several community facilities, including marketplaces, community centers, and educational facilities.¹⁷²
- Spending over US\$ 600,000 to rebuild the Central Highway that runs through La Oroya.¹⁷³

E. IN 2006, THE MEM AND DRP AGREED, AS DID THE MEM'S INDEPENDENT OUTSIDE CONSULTANT, THAT AN EXTENSION OF TIME FOR DRP TO COMPLETE THE SULFURIC ACID PLANTS PAMA PROJECT WAS NECESSARY

1. The MEM Granted DRP an Extension to Complete the Sulfuric Acid Plants PAMA Project

64. On May 25, 2006, the MEM granted DRP an extension of two years and ten months beyond the original ten-year PAMA period for DRP to complete the PAMA. The MEM explained that this extension was justified for the following reasons:

The PAMA in the mining sector was the first experience of using this instrument in Peru, thus the PAMA presented in this first phase, including the PAMA of the La Oroya Metallurgical Complex, were prepared with limited technical detail and a very basic level of engineering (conceptual), which did not contemplate the remediation of some environmental problems, which in some cases were significant, as they were not completely or adequately identified or characterized.

¹⁶⁸ **Exhibit C-047**, 1998-2002 DRP Report at 142-143.

¹⁶⁹ **Exhibit C-051**, Doe Run Peru, La Oroya: Report to Our Communities 2006, 46-47; **Exhibit C-047**, 1998-2002 DRP Report at 195.

¹⁷⁰ **Exhibit C-051**, Doe Run Peru, La Oroya: Report to Our Communities 2006 at 46-48.

¹⁷¹ **Exhibit C-047**, 1998-2002 DRP Report at 236.

¹⁷² **Exhibit C-051**, Doe Run Peru, La Oroya: Report to Our Communities 2006 at 44-45.

¹⁷³ **Exhibit C-047**, 1998-2002 DRP Report at 300.

In the specific case of the PAMA for the La Oroya Metallurgical Complex, one of the sources of contamination that was not initially identified was fugitive emissions, the importance of which was not fully understood, since in addition to the emissions of particulate material, including heavy metals, they were not sufficiently measured. Their effects on health, particularly the effects of lead, were detected through subsequent monitoring in 1999, within the initial context of the studies performed to eliminate lead from gasoline in the country.¹⁷⁴

65. DRP had initially requested a five-year extension to complete its PAMA.¹⁷⁵ Later DRP reduced its request to four years. The extension of only two years and ten months granted by the MEM was disappointing.¹⁷⁶

66. As DRP had informed the MEM on February 17, 2004, despite DRP's many additional projects, the La Oroya Complex would not meet the LMPs and ECAs for contaminants like lead without significantly more work, investment and importantly, time.¹⁷⁷ The two main sources of lead were soil and particulate emissions. The PAMA, however, did not allocate any funds, or identify the necessary projects, to address these sources.¹⁷⁸ To the contrary, the PAMA required that DRP devote enormous resources to construction of the sulfuric acid plants, which did not address the lead issue.¹⁷⁹

67. In 2006, the MEM hired technical experts to assist it in evaluating DRP's request for an extension. Dr. Partelpoeg, the smelting and operations expert whom the MEM hired in 2006 (and who has provided an expert opinion in these proceedings), concluded in 2006 that the three-year extension that the MEM was considering was "very aggressive" and would require an "extraordinary effort" by DRP to ensure timely completion of the Copper Circuit project.¹⁸⁰

¹⁷⁴ **Exhibit C-059**, Report No. 118-2006 at 6.

¹⁷⁵ See Neil Witness Stmt. at ¶¶ 18-19.

¹⁷⁶ See Neil Witness Stmt. at ¶¶ 28-31; Mogrovejo Witness Stmt. at ¶ 43.

¹⁷⁷ **Exhibit C-045**, Doe Run Peru Request No. 1453558, Annex VI at 9-11; **Exhibit C-138**, 2005 CDC Report, Conclusions at 33-35; **Exhibit C-139**, 2008 Integral Report, Conclusions at 7-1 to 7-8.

¹⁷⁸ **Exhibit C-045**, Doe Run Peru Request No. 1453558 at 17, 30-31, 35, 47-75.

¹⁷⁹ See **Exhibit C-090**, PAMA Operative Version at 152, 157, 169.

¹⁸⁰ **Exhibit C-062**, 2006 Clark et al., Review of PAMA Projects, § 4.3 at 15.

68. A human health expert, Dr. Scott Clark, also hired by the MEM in 2006 likewise confirmed to the MEM the importance of taking immediate action to address lead emissions and public health initiatives to deal with lead exposure in the population.¹⁸¹ He also noted that a major problem was lead-contaminated soil and interior dust build-ups in housing units,¹⁸² which it was Centromin's obligation to remediate, and recommended an area-wide soil lead assessment.¹⁸³

69. Moreover, as DRP explained to the MEM, the sulfuric acid plants project (PAMA Project No. 1) would require a complete redesign to meet the LMPs and ECAs for SO₂,¹⁸⁴ something that could not be completed in the allotted time frame. The MEM's smelting expert at the time, Dr. Partelpoeg, agreed.¹⁸⁵

70. The original sulfuric acid plants project was intended to reduce the emission of SO₂ from the facility by introducing new technologies, and the original PAMA had called for the construction of two sulfuric acid plants—one for the Copper Circuit and one for the Lead and Zinc Circuits—to treat SO₂ emissions.¹⁸⁶ Under the PAMA schedule, this project was to be completed last, with construction beginning in 2003 and finishing in 2006.¹⁸⁷ In the planning and design process, DRP engineers discovered that the only design that could meet the LMPs and ECAs for SO₂ required the construction of three separate sulfuric acid plants—one for each circuit; not two (and not a single sulfuric acid plant either).¹⁸⁸

¹⁸¹ **Exhibit C-062**, 2006 Clark et al., Review of PAMA Projects, Appendix Cat 17 *et seq.*

¹⁸² **Exhibit C-062**, 2006 Clark et al., Review of PAMA Projects, Appendix C at 23-27.

¹⁸³ **Exhibit C-062**, 2006 Clark et al., Review of PAMA Projects, Appendix C at 28.

¹⁸⁴ **Exhibit C-050**, Detailed request for a PAMA extension at 49-50. *See also* Neil Witness Stmt. at ¶¶ 15-16.

¹⁸⁵ **Exhibit C-062**, 2006 Clark et al., Review of PAMA Projects, Appendix A at 38. *See also* Partelpoeg Expert Report, §§ 2, 7.4.3, at 3-4, 44-47.

¹⁸⁶ **Exhibit C-054**, Request for PAMA Modification No. 1215214, Table 2 at 5; **Exhibit C-090**, PAMA Operative Version, Section 3.3.2 at 171-72. *See also* Neil Witness Stmt. at ¶¶ 15-16.

¹⁸⁷ **Exhibit C-054**, Request for PAMA Modification No. 1215214, Table 2 at 5.

¹⁸⁸ **Exhibit C-050**, Detailed request for a PAMA extension at 49-50. *See also* Neil Witness Stmt. at ¶¶ 15-16.

71. Building three separate plants required significant additional investment in a weak global metals market, and, more importantly, time.¹⁸⁹ As Knight Piésold had noted in its 1996 report to Centromin, developing sulfuric acid plants was a very time-intensive and expensive project.¹⁹⁰ DRP's then CEO, Bruce Neil, stated that in 2004 "[w]e understood that given the complexity, time and cost of designing and building three distinct sulfuric acid plants, it would be next to impossible to complete all plants by January 2007, as required in the initial PAMA."¹⁹¹ The MEM's expert agreed with this assessment.¹⁹²

2. The MEM's Extension Imposed Onerous Conditions and Significantly Expanded the Cost and Complexity of DRP's PAMA Obligations, While Granting Only an Additional Two Years and Ten Months

72. Though it ultimately recognized that an extension was fair and necessary, the MEM imposed a number of onerous conditions, additional projects, and provided a timeline to modernize the copper circuit and complete the sulfuric acid plants that even its own expert described as "very aggressive."¹⁹³

73. Many months after receiving DRP's initial request for a five-year extension, the MEM passed Law 046-2004-EM on December 29, 2004, providing that a company making an extension request would need to submit an exhaustive report by December 29, 2005, audited financial statements for the five fiscal years preceding submission of the extension request, statements of public support, and establish a trust account.¹⁹⁴ The granting of an extension was not

¹⁸⁹ **Exhibit C-050**, Detailed request for a PAMA extension at 38-41; **Exhibit C-045**, Doe Run Peru Request No. 1453558 at 46. *See also* Neil Witness Stmt. at ¶¶ 17, 25.

¹⁹⁰ **Exhibit C-108**, Knight Piésold Report for Centromin at 33 (emphasis added).

¹⁹¹ Neil Witness Stmt. at ¶ 17; Mogrovejo Witness Stmt. at ¶¶ 39-40.

¹⁹² **Exhibit C-062**, 2006 Clark et al., Review of PAMA Projects, § 5.2, Appendix A at 9, 38; Partelpoeg Expert Report, §§ 2, 7.4.3, at 3-4, 44-47.

¹⁹³ **Exhibit C-062**, 2006 Clark et al., Review of PAMA Projects, § 4.3 at 15.

¹⁹⁴ **Exhibit C-056**, Supreme Decree No. 046-2004-EM concerning Law Establishing Provisions for the Extension of Terms on an Exceptional Basis for the Completion of Specific Environmental Projects Contemplated in Environmental Remediation Programs, December 29, 2004 (*hereinafter* "Decree No. 046-2004"), art. 7 at 3-4.

new (the MEM had at that point granted numerous other PAMA extensions to Centromin, and to other mine and smelter operators),¹⁹⁵ but the conditions were new and burdensome.

74. The regulation allowed for a maximum extension of four years.¹⁹⁶ On December 15, 2005, DRP filed a request to extend the term of Project No. 1 for four years.¹⁹⁷ In its exhaustive report, DRP described its operations and compliance efforts, and the urgency of dealing with lead contamination.¹⁹⁸ DRP estimated that from a technical perspective it would take a minimum of three-and-a-half to four years to complete the three sulfuric acid plants, in light of the engineering required and the complexity of constructing inside an operating metallurgical plant—particularly one as complex as La Oroya.¹⁹⁹ In total, DRP’s estimated PAMA investment increased to US\$ 195.86 million.²⁰⁰

75. DRP also committed to complete all outstanding PAMA projects other than Project No. 1 (sulfuric acid plants) by the end of 2006, under the previously-approved schedule for their execution.²⁰¹ At the time, DRP was still working on Projects No. 8 and 16, but they were nearing completion.²⁰²

76. On February 17, 2006, the MEM provided a preliminary response to DRP’s extension request, stating that it “[may] make the approval of the extension requested by the mining holder conditional upon the adoption of special measures such as reprioritization of environmental

¹⁹⁵ See Mogrovejo Witness Stmt. at ¶ 36 (stating “MEM understood that the original PAMA (like the PAMAs for other facilities in Peru) as drafted was incomplete, underestimated the amount of work to be done and underestimated the cost involved. MEM had created arbitrary PAMA completion periods like five years for mines and ten years for smelters, without any reference to how long it would actually take to meet emissions levels at a facility As a result, MEM had granted PAMA extensions to numerous other companies: in 2000, MEM had granted an extension to Centromin for its portion of the La Oroya PAMA;[] in 2001, MEM had granted a blanket one-year extension to mining companies that had been unable to meet their five-year PAMA deadline and six additional months for certain special projects;[] and, in 2003, it had granted an extension to the Southern Peru copper smelter.”)

¹⁹⁶ **Exhibit C-056**, Decree No. 046-2004, art. 1.2 at 1.

¹⁹⁷ **Exhibit C-050**, Detailed Request for a PAMA Extension.

¹⁹⁸ See **Exhibit C-050**, Detailed Request for a PAMA Extension.

¹⁹⁹ **Exhibit C-050**, Detailed Request for a PAMA Extension at 39.

²⁰⁰ **Exhibit C-050**, Detailed Request for a PAMA Extension at 5, 11-12.

²⁰¹ **Exhibit C-050**, Detailed Request for a PAMA Extension at 5-8.

²⁰² **Exhibit C-050**, Detailed Request for a PAMA Extension at 5-8.

goals of the PAMA, rescheduling suspension or substitution of projects, as well as any other supplementary measure geared to preventing and reducing risks to the environment, health or the safety of the population and to safeguard the proper execution of the PAMA.”²⁰³

77. Despite DRP’s detailed submissions in support of its extension request, the MEM provided 90 “observations” on the extension request and asked DRP to respond within 30 days.²⁰⁴ For example, the MEM stated that “Doe Run Peru must define specific objectives as regards the reduction in levels of metals in the soil, in accordance with international standards.”²⁰⁵ This “observation” was particularly unexpected and inappropriate, because remediation of the soil was Centromin’s (and Peru’s) obligation under both the PAMA and the Stock Transfer Agreement.²⁰⁶ Some of the 90 observations were also impossible to achieve, including the MEM’s unreasonable call for “the *total* elimination of fine recirculants.”²⁰⁷

78. After working around the clock to meet the 30-day deadline, DRP responded to the MEM’s observations on March 20, 2006, and provided thousands of pages in support.²⁰⁸

79. The MEM engaged a team of experts, mentioned above, who on May 10, 2006, recommended granting the extension.²⁰⁹

80. The MEM issued its final report and regulation in May 2006, granting a draconian extension. As a threshold matter, the extension provided for only two years and ten months and included numerous conditions.²¹⁰ Two years and ten months was an extraordinarily aggressive

²⁰³ **Exhibit C-061**, Order No. 157-2006 at 7.

²⁰⁴ **Exhibit C-061**, Order No. 157-2006.

²⁰⁵ **Exhibit C-061**, Order No. 157-2006, Observation 4 at 14.

²⁰⁶ *See Exhibit C-105*, Stock Transfer Agreement, Clause 6 at 25. *See also* Sections F, G, H, I.

²⁰⁷ **Exhibit C-061**, Order No. 157-2006, Observation 30 at 19.

²⁰⁸ Mogrovejo Witness Stmt. at ¶ 41 (“We filed our report in December 2005 Upon receiving our report, MEM required that [Doe Run Peru] respond to an additional 90 requests for detailed information (interlaced with recommendations) in 30 days, which meant that we had to stop everything to pull together the required information. MEM subsequently requested another round of additional information, which we provided.”)

²⁰⁹ **Exhibit C-062**, 2006 Clark et al., Review of PAMA Projects, § 6.2 at 19.

²¹⁰ Neil Witness Stmt. at ¶ 30.

timeline.²¹¹ As Mr. Neil points out, “[DRP] would not have asked for four to five years if we thought it could be done in less time.”²¹² The MEM’s experts also observed with regard to the two year and ten month timeline that “this schedule was very aggressive and would require an extraordinary effort to ensure its timely completion.”²¹³

81. Dr. Partelpoeg notes in his expert report that “[d]ue to its complexity, the copper circuit replacement was inherently a multi-year project” and reaffirms his finding that the 2009 completion date was very aggressive.²¹⁴ He then explains that the normal schedule for a project such as the copper smelter project Doe Run Peru proposed in 2006 is in the range of five to seven years, and that factors specific to the La Oroya Complex further complicated design and execution of the project.²¹⁵

82. First, the Complex is located in a relatively remote section of the Andes Mountains at a high altitude, which affects design and execution (because the systems are made for lower altitudes) and imposes transportation constraints, requiring equipment to be fabricated on-site.²¹⁶ Second, the Complex “was in particularly poor condition by world standards when it was acquired in October 1997... As a result, a great deal of work in virtually every operational area was required to modernize [it].”²¹⁷ The poly-metallic nature of the facility’s metal production circuits also increased the time and complexity of the projects, because “impurity elements can enter production processes through multiple sources,” all of which must be accounted for and addressed.²¹⁸ Third, the project to modernize the copper circuit and construct the sulfuric acid plant had been incorrectly designed by Centromin and its consultant, SNC-Lavalin, forcing DRP “to re-assess copper circuit modernization options” and incur delays while it corrected “the deficiencies of the

²¹¹ See e.g., Partelpoeg Expert Report, §§ 2, 7.4, at 4, 40-48. See also **Exhibit C-062**, 2006 Clark et al., Review of PAMA Projects, § 5.2 at 15.

²¹² Neil Witness Stmt. at ¶ 31; Mogrovejo Witness Stmt. at ¶ 40.

²¹³ See also **Exhibit C-062**, 2006 Clark et al., Review of PAMA Projects, § 4.3 at 15.

²¹⁴ Partelpoeg Expert Report, §§ 2, 8, at 4, 60.

²¹⁵ Partelpoeg Expert Report, § 7.1, at 27-30.

²¹⁶ Partelpoeg Expert Report, § 7.2.4, at 33-34.

²¹⁷ Partelpoeg Expert Report, § 7.2.2, at 31-32.

²¹⁸ Partelpoeg Expert Report, § 7.2.2, at 32.

project technology selected by Centromin and the PAMA”²¹⁹ Fourth, conditions in the metals market and the relative size of the La Oroya Complex further hampered DRP’s efforts to complete its work on the copper circuit. As Dr. Partelpoeg explains, the initial period of this work was during a “boom” in the metals market, when “there was intense movement to complete projects associated with copper production at other smelters,” which results in delays because “facilities must compete for design, engineering, and fabrication resources.”²²⁰

83. Intensifying the unfair and unnecessary time crunch, the MEM imposed a number of conditions to the extension: (1) the MEM accepted all six of DRP’s suggested projects for reduction of emissions of particulate matter through chimneys,²²¹ and added six additional obligations;²²² (2) the MEM accepted all eight of DRP’s suggested projects for reduction of

²¹⁹ Partelpoeg Expert Report, § 7.2.1, at 31.

²²⁰ Partelpoeg Expert Report, § 7.2.5, at 34-35.

²²¹ **Exhibit C-059**, Report No. 118-2006 at 36-37 (Doe Run Peru’s suggested projects were: (1) “Installation of baghouse filter for the lead furnaces”; (2) “scrubbing area and the dust capture efficiency using units 1, 2 and 3 of the Cottrell Process that are released, with suspension of the operation of the three New Jersey roasters (Fluid Bed Roaster) at the zinc plant, reducing the dust that is emitted through the main chimney from 0.60 to 0.52 MT/day at the start of 2007”; (3) “Installation of the baghouse filter after the arsenic kitchen”; (4) “Installation of baghouse filter for the lead foam reverb furnace”; (5) “increasing the number of Cottrell Process units from 6 to 9, which is a product of the project to install baghouse filters to trap dust from the lead furnaces, and units 13, 14 and 15 will be freed and will be used to increase the area for treating dust from the converters, increasing the dust capture efficiency from 96.68% to 97.15%”; (6) “Decrease of particulate material from the Cottrell Process from the anode waste plant. The gases currently coming from the fusion reverbs of the copper and lead anode sludge at the anode waste plant are treated in a Cottrell Process with 94.8 percent efficiency, with particulate emissions of 0.24 MT/day. The improvement plan consists of including the waste gases from the Cottrell Process from the plant to units 1, 2 and 3 of the Cottrell Process, in which recovery of 0.09 MT/day of particulate material is estimated, reducing the amount emitted through the chimney from 0.24 MT/day, to 0.15 MT/day”).

²²² **Exhibit C-059**, Report No. 118-2006 at 38-39 (the additional obligations included: (1) “present detailed schedules of activities and investments for the following projects to control emissions through chimneys”; (2) “Present a concise report every two weeks to the General Division of Mining on the activities taken to implement the measures to reduce particulate material through chimneys”; (3) “Form a technical team to conduct continuous inspections at all CMLO facilities in order to detect possible failure in gas conduction systems and other possible sources of fugitive emissions with particulate material content, and be able to immediately and efficiently take corrective measures”; (4) “present the detailed maintenance program of the different teams and channels to implement for control of particulate material through chimneys every month”; (5) “Every six months, analyze the size of dust particles emitted through chimneys in order to take corrective measures for more efficient capture”; (6) conduct an evaluation of the efficiency of the equipment and whether it was “technically possible to raise the plume from the main chimney”).

particulate matter through fugitive emission,²²³ and added eight conditional obligations;²²⁴ (3) the MEM accepted all of DRP's supplemental environmental projects, and added three additional obligations;²²⁵ (4) the MEM converted all of DRP's voluntary public health projects into more

²²³ **Exhibit C-059**, Report No. 118-2006 at 39-41 (Doe Run Peru's suggested projects were: (1) "the repotentialization of the baghouses currently in systems A and B of the sintering plant, the installation of a baghouse in system D, and replacement of the scrubber in system C with a baghouse"; (2) "closure of the loading floor of the lead furnaces and foam plant, which includes installation of a ventilation system formed by ducts, negative pressure fans and two dust collectors (baghouse) to maintain adequate air quality inside the enclosures"; (3) "lateral closure of the buildings where the fusion beds are prepared for lead and copper smelting, supplemented with the installation of a roof-mounted water-spraying system in order to maintain adequate humidity when time conditions so require, and to prevent eolic dragging of the concentrated particles toward the surrounding means. The closure around the perimeter of the lead and copper fusion beds will be formed by a concrete wall 1.50 meters high, using prefabricated metal sheets on the upper portion. [Doe Run Peru] has the detailed engineering study"; (4) "treating nitrous gases that are released through a low-height chimney close to cupellation furnaces in a gas-scrubbing system, with the goal of absorbing them and preventing them from being emitted into the environment;" (5) installing a new ventilation system for the anode waste plant building, including the installation of ducts and a seven-compartment dust-collection system (baghouse) that traps dust from the gases in the plant's environment in order to control the fugitive emissions that occur in the different processes of the anode waste plant; (6) reduction of recirculating fines through "a series of sub-projects [] defined for differentiated handling of dust, which was included in the request for extension of the period for the Sulfuric Acid Plants project, such as installation of dust collectors to separate dust from lead with high cadmium content, and copper dust with high arsenic content. In this way the amount of dust sent to the Cottrell Process would be reduced, and the precipitation units would be made independent through the installation of separators or curtains," (7) creating proper storage of concentrates, and (8) restriction in entry of concentrates).

²²⁴ **Exhibit C-059**, Report No. 118-2006 at 42-43 (additional measures include (1) a concise report every two weeks of measures taken, (2) continuous maintenance and (3) reporting from a technical team, (4) "[i]f, after the projects listed above have been implemented as special measures, there are reasonable indications of possible breach of Air Quality Standards, Doe Run Peru must close the sintering plant, unless it shows that the fugitive emissions created there are not significant contributors to air quality contamination in La Oroya, in addition to evaluating other projects that cover all sources of fugitive emissions, such as "closure of combined grinding systems," (5) "approximately 23,000 MT of fine recirculants (balance of fine materials – 2005), with an approximate lead content of 30%, which return to the lead beds, and that will comprise a risk factor to consider in the generation of fugitive emissions. Therefore, no later than January 31, 2007, Doe Run Peru is required to show through a detailed technical report presented to the General Division of Mining, that the influence of fine recirculants in fugitive emissions close to the plants or reactors that receive these fine materials is not significant, or lacking this, to establish detailed measures to reduce (and eventually eliminate) this source," (6) control of other metallic elements, (7) efficiency improvement, and (8) continuous monitoring and inventory of fugitive emissions).

²²⁵ **Exhibit C-059**, Report No. 118-2006 at 43-44 (4.1.3.1 Operation of industrial sweepers; 4.1.3.2. Paving roads to the different smelting and refining plants; 4.1.3.3. System for washing the tires and hoppers of vehicles that enter CMLO; continuous monitoring of dust and heavy metals in paved areas, an optimization program, tire washing procedures for all light and heavy vehicles that enter the Complex, among others).

than 60 mandatory projects;²²⁶ and (5) the Ministry unilaterally added numerous other projects and obligations.²²⁷

84. Moreover, the PAMA initially was designed so that DRP would bring the Complex into compliance with emissions standards that were in place in 1997.²²⁸ To the extent that new emissions standards were in place in 2007, DRP would be given additional time to come into compliance with such standards. Yet in granting the two year and 10 month extension in 2006, the MEM required that DRP come into compliance with the 2007 standards for all contaminants except SO₂ by 2007.

85. And in a similarly unfair manner, the MEM imposed more stringent environmental requirements on DRP than the national standards and the standards imposed on other companies. First, with respect to air quality, the MEM required DRP to meet a 0.5 µg/m³ annual lead standard by January 2007, when it should have only had to meet a 1.0 µg/m³ standard by that date even assuming the new regulations should apply to DRP so quickly. The relevant regulations made clear that the 0.5 µg/m³ annual lead standard was an impossible requirement for DRP to meet: they provided operating companies up to five years to meet the 0.5 µg/m³ *after receiving* the Government's plan of action to address ambient air quality.²²⁹ DRP was told to meet the 0.5 µg/m³

²²⁶ **Exhibit C-059**, Report No. 118-2006 at 45-51.

²²⁷ **Exhibit C-059**, Report No. 118-2006 at 27-33, 51-59, 62-63, 64-65, 69-76.

²²⁸ **Exhibit C-140**, Ministerial Resolution No. 122-2010-MEM/DM concerning amendment requiring permanent health agreement with MINSAs, March 18, 2010 (*hereinafter* "Resolution No. 122-2010"). *See also* Mogrovejo Witness Stmt. at ¶ 44 ("In granting the extension, MEM imposed all of these 2007 regulatory standards on [Doe Run Peru] overnight. It did so without taking into account the fact that the PAMA was intended to enable [Doe Run Peru] to meet 1997 regulations by 2007. As a result, MEM entirely changed the goal-posts from 1997 standards to 2007 standards. This was shocking.")

²²⁹ Mogrovejo Witness Stmt. at ¶ 45. In 2001, MEM had passed Supreme Decree No. 074-2001-PCM, establishing the first ECAs. The decree did not stipulate either the transitory or the final ECAs for lead. **Exhibit C-093**, Supreme Decree No. 074-2001-PCM concerning Environmental Air Quality National Standards Regulation, 2001 (*hereinafter* "Decree No. 074-2001") Seventh, Annex 1, Annex 2. In 2003, MEM issued Supreme Decree No. 069-2003-PCM, which set the transitory standard at 1.0 µg/m³, and the final standard at 0.5 µg/m³. **Exhibit C-098**, Supreme Decree No. 069-2003-PCM concerning Establishing Annual Lead Concentration Value, July 14, 2003 (*hereinafter* "Decree No. 069-2003"). It stated that the processes for transitory measures set forth in the 2001 decree would apply to companies who were currently exceeding those standards. The 2001 decree, in turn, provided that such companies had up to five years to meet the final standard after a governmental group known as the "Zonal Gesta" created an action plan, and that the Zonal Gesta would also set forth the time in which they had to meet the transitory standard. **Exhibit C-093**, Decree No. 074-2001, Seventh at 12. But the Zonal Gesta

standard by January 2007, yet the Peruvian Government provided DRP with the plan of action a mere six months earlier on June 23, 2006.²³⁰

86. The MEM also imposed a number of emissions and ambient air limitations on DRP for metals that were not regulated under Peruvian law, including antimony, thallium, bismuth and cadmium.²³¹

87. DRP's Vice-President of Environmental Affairs, Jose Mogrovejo—who had been the General Director of Environmental Affairs of the MEM at the time of the privatization—expressed surprise at the MEM's treatment of DRP's extension request.²³² “I did not expect [the MEM] to react negatively to our extension request. For one, [the MEM] understood that the original PAMA (like the PAMAs for other facilities in Peru) as drafted was incomplete, underestimated the amount of work to be done and underestimated the cost involved.”²³³ In fact, the MEM “had created arbitrary PAMA completion periods like five years for mines and ten years for smelters, without any reference to how long it would actually take to meet emissions levels at a facility.”²³⁴

88. According to Mr. Mogrovejo: “the extension terms imposed [on DRP] by the [G]overnment were unfair. I felt that many members of [G]overnment agencies, including Centromin and CONAM [the National Environmental Council or *Consejo Nacional del Ambiente*], were trying to set Doe Run Peru up to fail. I had heard from friends in the [G]overnment that people in both agencies were against the extension, and were always trying to complicate the

created Doe Run Peru's action plan for the Complex on March 1, 2006 and approved the plan on June 23, 2006. **Exhibit C-096**, Gesta Zonal del Aire de La Oroya, *Action Plan to Improve the Air Quality and Health of La Oroya*, March 1, 2006 (*hereinafter* “Gesta Zonal del Aire de La Oroya Report”) at 22. Under the plan, Doe Run Peru was required to meet the 0.5 µg/m³ standard by January 1, 2007.

²³⁰ See **Exhibit C-096**, Gesta Zonal del Aire de La Oroya Report.

²³¹ Mogrovejo Witness Stmt. at ¶ 46.

²³² Mogrovejo Witness Stmt. at ¶¶ 36-37.

²³³ Mogrovejo Witness Stmt. at ¶ 36.

²³⁴ Mogrovejo Witness Stmt. at ¶ 36.

extension. It was also apparent given the short time-line and all of the emissions and air quality standards that were imposed just on [DRP].”²³⁵

F. BY DECEMBER 2008, DRP HAD COMPLETED ALL PAMA PROJECTS EXCEPT ONE OF THE THREE SULFURIC ACID PLANTS, AND HAD DRAMATICALLY REDUCED THE COMPLEX’S ENVIRONMENTAL IMPACTS

89. By the end of 2008, DRP’s total investment on the PAMA and related projects had increased to more than US\$ 300 million.²³⁶ DRP had completed all of the PAMA projects, except for one of the three sulfuric acid plants in PAMA Project No. 1, a project that had been totally redesigned in 2006.

90. DRP worked diligently on completing PAMA Project No. 1, spending almost US\$ 160 million on it in 2007 and 2008.²³⁷ By the fall of 2008, DRP had completed the sulfuric acid plants for two of the Complex’s three primary circuits, completely updating the sulfuric acid plant for the Zinc Circuit and finishing construction on a new sulfuric acid plant for the Lead Circuit.²³⁸ In addition, DRP had made good progress on the Copper Circuit sulfuric acid plant project, which required DRP both to substantially redesign and overhaul its copper smelting process and to construct another new sulfuric acid plant.²³⁹ DRP had completed the detailed engineering work for the redesign of its copper smelting operations.²⁴⁰ It had issued more than 90% of the purchase orders for the work on this project, including for a new state-of-the-art furnace

²³⁵ Mogrovejo Witness Stmt. at ¶ 47.

²³⁶ **Exhibit C-055**, Doe Run Peru 2009 Extension Request at 5.

²³⁷ See **Exhibit C-141**, October 2009 PowerPoint, Situación Ambiental and Financiera de Doe Run Peru, slides 19, 20 (*hereinafter* “October 2009 PowerPoint Presentation”), Slide 19 (showing the total amounts spent on the PAMA and related projects). See also Mogrovejo Witness Stmt. at ¶ 49; Neil Witness Stmt. at ¶ 34.

²³⁸ **Exhibit C-142**, Teresa Céspedes, *Doe Run inaugural segunda planta de ácido sulfúrico en Andes Perú*, REUTERS, September 30, 2008 (*hereinafter* “Sept. 30, 2008 REUTERS”). See also Neil Witness Stmt. at ¶ 34; Sadlowski Witness Stmt. at ¶ 28.

²³⁹ **Exhibit C-142**, Sept. 30, 2008 REUTERS at 95, 105-114; Partelpoeg Expert Report, §§ 2, 6.3, 7.4, at 3-4, 24-25, 40-48.

²⁴⁰ **Exhibit C-055**, Doe Run Peru 2009 Extension Request at 108; Partelpoeg Expert Report, §§ 7.5, 7.6.2, at 48-51, 54-55.

that was the centerpiece of the Copper Circuit overhaul.²⁴¹ It had contracts for all preliminary and structural work, and it had issued RFPs for the final installation of the remaining mechanical and electrical equipment.²⁴² And it was making good progress on the actual construction of the reconfigured copper smelting facility, having completed more than 25% of the total construction work, including about 55% of the site work and almost 40% of the structural work.²⁴³

91. At the same time, DRP was continuing work on the construction of the new sulfuric acid plant for the Copper Circuit. This too was a complicated engineering task, requiring DRP to design essentially two separate facilities—one to clean the process gas (that is, to remove the particulate matter, heavy metals, and acid gases) and a second “gas contact and sulfuric acid production system” to convert the cleaned gas into commercial grade (98.5% pure) sulfuric acid.²⁴⁴ Here, again, DRP was making good progress: the detailed engineering work was virtually complete, more than three quarters of the contracts had been let, site work was more than 85% complete, and fully one-third of the mechanical and structural construction work had been completed.²⁴⁵

92. DRP’s efforts yielded remarkable environmental results when compared to the situation DRP had inherited from Centromin in 1997. DRP effectively eliminated liquid effluent discharges from the Complex to the Yauli River and brought discharges to the Mantaro and Yauli River into compliance with Peru’s Class III water standards by building an industrial wastewater treatment plant and making other changes to the effluent handling and storm water systems.²⁴⁶ At the same time, DRP dramatically reduced air emissions from the Complex, bringing the emissions from significant emission control points (stack) into compliance with the applicable emission

²⁴¹ **Exhibit C-055**, Doe Run Peru 2009 Extension Request at 108; Partelpoeg Expert Report, §§ 7.5, 7.6.2, at 48-51, 54-55.

²⁴² **Exhibit C-055**, Doe Run Peru 2009 Extension Request at 108; Partelpoeg Expert Report, §§ 7.5, 7.6.2, at 48-51, 54-55.

²⁴³ **Exhibit C-055**, Doe Run Peru 2009 Extension Request at 108; Partelpoeg Expert Report, §§ 7.5, 7.6.2, at 48-51, 54-55.

²⁴⁴ **Exhibit C-055**, Doe Run Peru 2009 Extension Request at 111.

²⁴⁵ **Exhibit C-055**, Doe Run Peru 2009 Extension Request at 112.

²⁴⁶ **Exhibit C-055**, Doe Run Peru 2009 Extension Request at 6.

limits.²⁴⁷ To put this in context, DRP reduced particulate matter emissions from the main stack by 78% compared to 1997 levels.²⁴⁸ DRP reduced lead emissions from the main stack by 68%,²⁴⁹ and arsenic emissions decreased by 93% over the same period.²⁵⁰ DRP even reduced SO₂ emissions by 52%, even though the final SO₂ plant had not yet been completed.²⁵¹

G. IN 2009, PERU TREATED DRP UNFAIRLY AND INEQUITABLY BY GRANTING – AND THEN UNDERMINING – AN EXTENSION OF TIME TO FINISH THE SULFURIC ACID PLANT PROJECT FOR THE COPPER CIRCUIT

1. The Global Financial Crisis Prevented DRP from Finishing the Copper Circuit Sulfuric Acid Plant Project by the October 2009 Deadline

93. Centromin and DRP agreed in Clause 15 of the Stock Transfer Agreement that DRP’s obligation to perform its PAMA projects would be deferred if the performance was “delayed, hindered or obstructed by ... extraordinary economic alterations.” Clause 15, entitled “*Force Majeure*,” provides:

Neither of the contracting parties may demand from the other the fulfillment of the obligations assumed in this contract, when the fulfillment is *delayed, hindered or obstructed* by causes that arise that are not imputable to the obliged party and this obligation [sic] has not been foreseen at the time of the execution of this contract. All those causes are constituted, but not in a restrictive manner, by force or act of god such as earthquakes, floods, fires, . . . *extraordinary economic alterations*, . . . in accordance with the provisions of Article 1135 of the Civil Code. It is expressly agreed, nevertheless, that the fact that the Government of Peru does not supply financing for Centromin’s obligations shall not constitute a case of *force majeure* under this clause. (Emphasis added)

²⁴⁷ Note that “there was periodic non-compliance with emissions, effluents, air quality rates, as well as minor issues with projects.” Mogrovejo Witness Stmt. at ¶ 48 n. 30. “This type of non-compliance is operational, and a normal part of doing business.” *Id.* As Mr. Mogrovejo points out, “[t]hese blips are easier to see where, as here [in the case of the Complex], the [G]overnment is monitoring compliance on a daily basis. As a general matter, monitoring of a facility is done every six months or so, and therefore it is more difficult to detect operational glitches.”). *Id.*

²⁴⁸ **Exhibit C-055**, Doe Run Peru 2009 Extension Request at 76.

²⁴⁹ **Exhibit C-055**, Doe Run Peru 2009 Extension Request at 76.

²⁵⁰ **Exhibit C-055**, Doe Run Peru 2009 Extension Request at 76.

²⁵¹ **Exhibit C-055**, Doe Run Peru 2009 Extension Request at 76.

94. The parties' inclusion of "extraordinary economic alterations" in the list of *force majeure* events signified that a severe economic downturn affecting DRP's financial situation would constitute a *force majeure* event, allowing the performance of its obligations to be "delayed," including its obligation under Clause 5.1 to complete the PAMA projects.

95. The economic *force majeure* provision of the Stock Transfer Agreement is not commonly found in commercial agreements, but it was an important part of the negotiations between the Renco Consortium and Peru and the final agreement that they reached.²⁵² This is because a significant decline in world metals prices would impede or even eliminate DRP's ability to finance the performance of its obligations under the Stock Transfer Agreement.²⁵³ Centromin and Peru understood this, and agreed to incorporate this important and unusual *force majeure* event into the express language of the Stock Transfer Agreement.²⁵⁴

96. It cannot seriously be disputed that the 2008 global financial crisis was an event of *force majeure*, nor has Peru ever done so. Precipitated by the subprime mortgage entanglement in the United States, companies globally were forced to contend with severe government spending cuts and frozen credit markets culminating in a global recession. Mining and smelting companies such as DRP were not spared the impact of the global financial crisis; trade volumes decreased and metal prices dropped abruptly.²⁵⁵ As mining and smelting expert Dr. Partelpoeg explained in his 2021 report, "[i]n 2008, the price of copper and other metals collapsed."²⁵⁶ The economic *force majeure* clause in the Stock Transfer Agreement was designed for exactly this contingency.²⁵⁷

²⁵² See Sadlowski Witness Stmt. at ¶¶ 23-26.

²⁵³ See Sadlowski Witness Stmt. at ¶ 10.

²⁵⁴ See Sadlowski Witness Stmt. at ¶ 10.

²⁵⁵ See Partelpoeg Expert Report, § 7.6.1, at 51-54. See also Neil Witness Stmt. at ¶¶ 35-38; Sadlowski Witness Stmt. at ¶¶ 27-30.

²⁵⁶ Partelpoeg Expert Report, § 7.6.1, at 51.

²⁵⁷ See Sadlowski Witness Stmt. at ¶¶ 23-26 See also Partelpoeg Expert Report, § 7.6.1, at 52 ("While I am not an attorney, and I am not offering a legal opinion regarding DRP's contract, I note that language from the purchase agreement for the CMLO included a specific force majeure clause that acknowledges the possibility of 'extraordinary financial upheaval'. Having directly experienced the effects of the [global financial crisis] on the ability of companies in the mining and smelting sector to complete capital pollution control projects, I can say without reservation that the [global financial crisis] presented a truly exceptional situation. In my opinion, the language in [DRP's contract] could not have been written more clearly to describe the [global financial crisis].") (citations omitted).

97. The crash in metal prices (mainly copper and silver) effectively wiped out profits from DRP's Cobriza mine, which DRP had acquired from the Peruvian Government in September 1998 and which constituted DRP's main source of financing for the PAMA projects.²⁵⁸ At the same time, "the global financial sector was reeling with troubles of their own" and "financing of projects [including metals and mining projects] came to a near standstill."²⁵⁹ DRP's lenders, themselves reeling from the financial crisis, were unwilling to provide financing, because of concerns around the tight PAMA deadline and the Peruvian Government's negative campaign against DRP in the media, not to mention the industry-wide chill on financing mining operations.²⁶⁰ In February 2009, DRP lost its US\$ 75 million revolving line of credit that provided day-to-day liquidity for its ongoing operations²⁶¹ after DRP's lenders informed it that they would not extend the credit agreement, unless DRP obtained a formal extension from the Government of the October 2009 deadline to complete work on the Copper Circuit sulfuric acid plant.²⁶²

²⁵⁸ As explained by Dr. Partelpoeg, "the price of copper and other metals collapsed in conjunction with the global economic crisis." Partelpoeg Expert Report, § 7.6.1, at 51. *See also* Neil Witness Stmt. at ¶ 36.

²⁵⁹ Partelpoeg Expert Report, § 7.6.1, at 51.

²⁶⁰ *See, e.g., Exhibit C-143*, Alex Emery & Heather Walsh, *Doe Run Won't Get Government Bailout, Minister Says*, BLOOMBERG BUSINESS NEWS, April 28, 2009 (*hereinafter* "Apr. 28, 2009 BLOOMBERG BUSINESS NEWS") (reporting Finance Minister Luis Carranza statement that Doe Run Peru would not be "bailed out" by the Government of Peru); *Exhibit C-144, The Multisectoral Commission Will Supervise the PAMA's Progress*, EL COMERCIO, September 26, 2009 (*hereinafter* "Sept. 26, 2009 EL COMERCIO") (reporting that lack of prior government supervision had permitted Doe Run to evade its environmental responsibilities); *see also* Partelpoeg Expert Report, § 7.6.1, at 51-54.

²⁶¹ **Exhibit C-064**, Contract, Amended and Restated Revolving Credit Agreement between Doe Run Peru SRL, BNP Paribas (as Administrative Agent, Letter of Credit Issuer and Lender), Banco de Credito del Peru (as Guarantee Issuing Bank), Standard Bank PLC (as Lender) and Banco de Credito del Peru, Sucursal Panama (as Lender) June 26, 2008 (*hereinafter* "Revolving Credit Agreement") at 29, 120. This financing was critical because Doe Run Peru operated the Complex through long-term supply agreements with mining companies that provided the mineral concentrates processed at the facility. Under these agreements, Doe Run Peru would purchase the raw concentrates and sell the finished metals on the world market after they had been processed and refined. Doe Run Peru thus relied on the revolving line of credit to provide bridge financing, allowing Doe Run Peru to meet its obligations to the mining companies that provided the concentrates (usually about US\$ 45 million per month) before the proceeds from the sale of the finished metals had been received. *See also* Sadlowski Witness Stmt. ¶ 30.

²⁶² **Exhibit C-099**, Letter from J. Stufsky *et al.* (BNP Paribas) to C. Ward *et al.* (Doe Run Peru), February 13, 2009 (*hereinafter* "February 13, 2009 Letter"). *See also* Sadlowski Witness Stmt. at ¶ 30.

98. To address lender concerns, and recognizing the impossibility of completing the Copper Circuit sulfuric acid plant project before October 2009, DRP wrote to the MEM on March 5, 2009, to request that Peru grant an extension of DRP’s deadline to finish the project, as a result of “[t]he sudden and unexpected fall in metals and by-products since October 2008...”²⁶³ DRP also advised the MEM that concentrate suppliers were going to freeze shipments as of March 9 and that the banks required that DRP obtain a formal PAMA extension.²⁶⁴ The MEM refused, claiming that a delay in completing the final PAMA project was unacceptable, notwithstanding the *force majeure* event.²⁶⁵ DRP continued its efforts to find a global solution with the Government and concentrate suppliers.

99. At the end of March 2009, DRP believed that it had reached an agreement with the Peruvian Government, which would include a PAMA extension.²⁶⁶ The Memorandum of Understanding (“MOU”) that DRP represented that agreement acknowledged that DRP was in financial *extremis* “essentially due to the international financial crisis that has caused the reduction of the mineral prices on the markets which, in turn, has caused, among others, the default on its obligations, the loss of its working capital, the accumulation of debt with several suppliers, the cancellation of credit lines on the financial system...”²⁶⁷

100. As part of the MOU, the Peruvian Government insisted on concessions from DRP in connection with DRP’s request for a *force majeure* extension, and DRP acquiesced, although the terms of the Stock Transfer Agreement entitled DRP to an extension of the PAMA period due to the economic *force majeure* event. Specifically, the Government demanded, among other things, that DRP’s debt to Doe Run Cayman Ltd. (“DRCL”), of approximately US\$ 156 million, be 100%

²⁶³ **Exhibit C-007**, Letter from J. Carlos Huyhua (Doe Run Peru) to P. Sanchez (Ministry of Energy & Mines), March 5, 2009 (*hereinafter* “Doe Run Peru Request to Ministry of Energy & Mines for Extension”). *See also* Neil Witness Stmt. at ¶ 39; Sadlowski Witness Stmt. at ¶ 31; Partelpoeg Expert Report, § 7.6.2, at 54-55.

²⁶⁴ **Exhibit C-007**, Doe Run Peru Request to Ministry of Energy & Mines for Extension, Items 4 and 7 at 1-2.

²⁶⁵ Sadlowski Witness Stmt. at ¶ 31.

²⁶⁶ **Exhibit C-111**, MOU.

²⁶⁷ **Exhibit C-111**, MOU, art. 1.4 at 1.

capitalized, and that DRCL pledge 100% of its shares in DRP.²⁶⁸ Only then would the Government comply with its vague promise to provide an extension “for a period to be determined as necessary to complete execution of the PAMA.”²⁶⁹ While DRCL’s capitalization of the debt was to take place prior to any PAMA extension decree, the MEM promised to provide a draft of a PAMA extension for review and DRP advised that a thirty (30) month extension was required.

101. Believing that Peru would support DRP’s efforts to obtain the much-needed financing and issue an extension decree, as Peru had promised to do, DRP and its affiliates DRCL and Doe Run Cayman Holdings executed an MOU with the Peruvian Government on March 27, 2009,²⁷⁰ and provided it to the MEM. DRP reached a separate agreement with its concentrate suppliers just a few days after it signed the MOU with the Government. On April 2, 2009, DRP, the concentrate suppliers, and the Government held a press conference to publicly announce that a solution had been reached.²⁷¹

102. Yet the Government never signed the MOU, and DRP grew concerned when the MEM ignored DRP’s requests for a draft of the PAMA extension or an executed copy of the MOU.²⁷²

103. DRP’s concerns were further heightened when, on April 3, 2009, the Minister of the Environment, Antonio Brack, publicly stated that DRP would receive only a three-month extension.²⁷³ A three-month extension would have been of no value.

104. The MEM and the Ministry of Economy & Finance continued to demand that DRP immediately capitalize the debt of its affiliates and pledge its shares.²⁷⁴ The capitalization was approved by DRP’s shareholders on April 7, 2009. However, because of the Government’s utter lack of transparency and its confrontational stance, the capitalization was subject to a firm

²⁶⁸ Sadlowski Witness Stmt at ¶ 33.

²⁶⁹ Sadlowski Witness Stmt at ¶ 33.

²⁷⁰ **Exhibit C-111**, MOU. *See also* Sadlowski Witness Stmt. at ¶ 34.

²⁷¹ Sadlowski Witness Stmt. at ¶ 35.

²⁷² Sadlowski Witness Stmt. at ¶ 35.

²⁷³ **Exhibit C-067**, *Government to extend for three more months term for Doe Run to complete the PAMA*, EL COMERCIO, April 4, 2009.

²⁷⁴ Sadlowski Witness Stmt. at ¶ 36.

commitment by the Government to expressly grant the PAMA extension that the Government had promised to provide and was obligated to provide under the economic *force majeure* provision of the Stock Transfer Agreement.²⁷⁵

105. The concern by this point was that DRP would capitalize its debt and pledge its shares and that the Government would, in turn, give DRP an unreasonably short extension (or no extension at all) such that DRP would not be able to complete the PAMA.²⁷⁶ If this occurred, DRP would be pushed into bankruptcy, and its main shareholder, DRCL, would not have any voting rights in the bankruptcy proceedings because it would have given up its right to claim as a creditor of DRP. DRCL would thus lose its ability to appoint DRP's management, and ultimately it would lose its entire investment in the company.²⁷⁷

106. In May 2009, other Peruvian Government officials made public statements denying that a PAMA extension would be granted to DRP.²⁷⁸ After publicly threatening to shut down the Complex and well aware of DRP's dire financial situation,²⁷⁹ President Alan Garcia issued an emergency decree restricting the participation of certain related creditors in bankruptcy proceedings.²⁸⁰ This decree clearly and improperly targeted DRP by attempting to eviscerate the significant rights of DRP's shareholder through the US\$ 155 million debt owed to it by DRP.²⁸¹ President Garcia was forced to revoke the decree in March 2010, after significant public criticism.²⁸²

107. In May and June 2009, Bruce Neil and DRP managers had several meetings with Government Representative Jorge del Castillo, Congressman and former Prime Minister, to

²⁷⁵ **Exhibit C-145**, Doe Run Peru, Partners Meeting, April 7, 2009 (*hereinafter* "2009 DRP Partners Meeting") at 3. *See also* Sadlowski Witness Stmt. at ¶ 36.

²⁷⁶ Sadlowski Witness Stmt. at ¶ 37.

²⁷⁷ Sadlowski Witness Stmt. at ¶ 37.

²⁷⁸ **Exhibit C-068**, *Peru shall not grant any more term extensions to Doe Run for Environmental plan*, MINES AND COMMUNITIES, May 20, 2009

²⁷⁹ **Exhibit C-069**, *Government Threatens to Shut Down Doe Run for Environmental Noncompliance - Peru*, BUSINESS NEWS AMERICA, May 21, 2009.

²⁸⁰ **Exhibit C-112**, Emergency Decree No. 061-2009.

²⁸¹ Neil Witness Stmt. at ¶ 41; Sadlowski Witness Stmt. at ¶ 38.

²⁸² Sadlowski Witness Stmt. at ¶ 38.

discuss a global solution to DRP's problems. Renco agreed to provide around US\$ 31 million in funding to serve as working capital for the operations of DRP; however, Mr. del Castillo insisted that the new funding should be used exclusively for the PAMA projects. DRP and the Peruvian Government were unable to reach an agreement.²⁸³

108. Throughout this time, the La Oroya Complex was operating significantly below its capacity because it lacked concentrate supply.²⁸⁴ Because the MEM refused to grant a PAMA extension, DRP was unable to obtain a new revolving loan. Without the revolving loan, DRP was unable to meet its payment obligations under contracts with its suppliers. Under these circumstances, DRP did not have sufficient funds to run the operations at the La Oroya Complex normally. As previously mentioned, DRP defaulted on contracts with suppliers and without the supply of new concentrates, DRP had to drastically reduce the scope of operations in the La Oroya Complex, and eventually discontinue all operations at the La Oroya Complex.

109. On June 3, 2009, almost five months before the PAMA was scheduled to expire, DRP suspended operations at the Complex because it was unable to obtain financing without a PAMA extension and unable to pay its concentrate suppliers without financing.²⁸⁵ DRP negotiated with its workers and proposed alternatives to protect jobs and continue paying a percentage of the salaries during the stoppage.²⁸⁶ In late June 2009, Mr. del Castillo and Pedro Sanchez, the Minister of Energy & Mines, approached the workers and offered that the Peruvian Government grant them the power to manage DRP.²⁸⁷ However, the workers continued to trust the management of DRP and rejected this offer in a company-wide vote.²⁸⁸

²⁸³ Sadlowski Witness Stmt. at ¶ 40; Neil Witness Stmt. at ¶ 43.

²⁸⁴ Sadlowski Witness Stmt. at ¶ 39; Neil Witness Stmt. at ¶¶ 40-42.

²⁸⁵ Neil Witness Stmt. at ¶ 42; Sadlowski Witness Stmt. at ¶¶ 40-41.

²⁸⁶ Doe Run Peru reached important agreements with the workers, which protected their rights during the halt in the operations and guaranteed they would be available to re-start working once the problems were solved.

²⁸⁷ **Exhibit C-072**, *Government proposes Doe Run workers manage company, according to press*, RPP, June 24, 2009 (*hereinafter* "June 2009 RPP").

²⁸⁸ See **Exhibit C-073**, *Metallurgical Workers' Union, Union Referendum Record No. 016-SC-2009, July 6, 2009 (hereinafter "2009 Union Referendum")*.

110. DRP nevertheless continued to request an extension of time to complete the last remaining sulfuric acid plant. On June 25, 2009, DRP wrote to the MEM providing a comprehensive proposal for a 30-month PAMA extension that included a fresh equity injection, and capitalization of the inter-company debt.²⁸⁹ The next day, the MEM rejected the request, stating that DRP did not provide enough specifics.²⁹⁰ In response to the MEM's letter, DRP wrote providing answers to the questions and again asking for an extension.²⁹¹ Several days later, the MEM responded refusing yet again to provide an extension despite having promised one.²⁹²

111. In July 2009, DRP provided the MEM with a comprehensive 162-page report that documented the progress DRP had made in achieving its environmental objectives, the status of the last remaining sulfuric acid plant project for the Copper Circuit (which, was more than 50% complete),²⁹³ and how DRP's progress on this project had been halted by the global financial crisis, which constituted a *force majeure* event.²⁹⁴ DRP again requested a 30-month extension with supporting financial projections from the accounting firm Ernst & Young.

112. Despite the occurrence of a *force majeure* event with the onset of the world financial crisis, the MEM summarily, and improperly, rejected DRP's request to delay completion of the final PAMA project purportedly because it had "no regulatory framework to answer to an extension application or a project extension of the 'Copper Acid Plant and Copper Change' in favor of Doe Run Peru S.R.L."²⁹⁵ The MEM's explanation for its rejection of DRP's request

²⁸⁹ **Exhibit C-074**, Letter from J. Carlos Huyhua (Doe Run Peru) to P. Sanchez et al. (Ministry of Energy & Mines), June 25, 2009 (*hereinafter* "June 25, 2009 Letter").

²⁹⁰ **Exhibit C-075**, Letter from F. Gala Soldevilla (Ministry of Energy & Mines) to J. Carlos Huyhua (Doe Run Peru), June 26, 2009 (*hereinafter* "June 26, 2009 Letter").

²⁹¹ **Exhibit C-100**, Letter from Doe Run Peru to Ministry of Energy and Mines, July 2, 2009 (*hereinafter* "July 2, 2009 Letter"); **Exhibit C-076**, Letter from F.A. Ramirez del Pino (Ministry of Energy & Mines) to J. Mogrovejo (Doe Run Peru), July 15, 2009 (*hereinafter* "July 15, 2009 Letter").

²⁹² **Exhibit C-101**, Letter from Ministry of Energy and Mines to Doe Run Peru, July 6, 2009 (*hereinafter* "July 6, 2009").

²⁹³ Neil Witness Stmt. at ¶ 45.

²⁹⁴ *See generally* **Exhibit C-055**, Doe Run Peru 2009 Request for Extension. *See also* Neil Witness Stmt. at ¶ 45; Sadlowski Witness Stmt. at ¶¶ 40-41; Partelpoeg Expert Report, § 7.6, at 51-57.

²⁹⁵ **Exhibit C-076**, Letter from F.A. Ramirez del Pino (Ministry of Energy & Mines) to J. Mogrovejo (Doe Run Peru), July 15, 2009 (*hereinafter* "July 15, 2009 Letter").

squarely conflicted with its decision to grant a PAMA extension to Centromin in 2000, which it did without even suggesting that additional legal authority was needed.

2. The Peruvian Congress Granted DRP's *Force Majeure* Request for a 30-Month Extension, and the MEM Thereafter Undermined the Extension

113. In late 2009, after DRP had ceased operations at the Complex, the Peruvian Government appointed a Technical Commission to evaluate the La Oroya Complex. The Technical Commission concluded that a minimum 20-month extension to complete the Copper Circuit sulfuric acid plant was necessary with additional time required to obtain financing.²⁹⁶ The Peruvian Congress thereafter passed a law that granted DRP a 30-month extension of the PAMA, and required DRP to restart operations within ten months of its passage.²⁹⁷ Unfortunately for DRP and Renco, the MEM moved quickly to undermine the extension that the Peruvian Congress had granted.²⁹⁸ Under an article entitled “Miscellaneous,” the Peruvian Congress had authorized the MEM to issue “supplementary” regulations to implement the law’s provisions.²⁹⁹ The MEM used this authority to issue a Supreme Decree imposing conditions on DRP’s right to receive the extension Congress had granted, which were extremely difficult, if not impossible, to fulfill. For example, the MEM required DRP to “channel one hundred percent (100%)” of its revenues, “irrespective of [the] source,” into a trust account to be used to fund the completion of the remaining sulfuric acid project.³⁰⁰

²⁹⁶ **Exhibit C-045**, 2009 Technical Commission Report.

²⁹⁷ **Exhibit C-077**, Law No. 29410, art. 2 (“The term for the financing and culmination of the ‘Sulfuric Acid Plant and Modification of the Copper Circuit’ Project at the Metallurgical Complex of La Oroya is hereby extended, as per the directives issued by the La Oroya Technical Commission, created by Supreme Resolution No. 209-2009-PCM. Thus, a non-extendable maximum term of ten (10) months for the financing of the project and the start-up of the metallurgical complex and an additional non-extendable term of twenty (20) months for the construction and start-up of the project are hereby granted.”). *See also* Neil Witness Stmt. at ¶ 48.

²⁹⁸ Sadlowski Witness Stmt. at ¶¶ 44-48.

²⁹⁹ **Exhibit C-077**, Law No. 29410, art. 5 (Sept. 26, 2009) (“Miscellaneous. Through a supreme executive order, the Executive shall issue such supplementary provisions as may be necessary for the enforcement of this Law.”).

³⁰⁰ **Exhibit C-078**, Executive Decree No. 075-2009-EM concerning Implementing Law No. 29410, October 29, 2009 at §4.2 (*hereinafter* “Decree No. 075-2009”).

114. The MEM's decree imposing this "100% trust account" requirement made it all but impossible for DRP to continue its operations and complete work on the sulfuric acid plant. No bank would loan money to DRP without taking a security interest in its assets, but DRP could not pledge any of its revenues as collateral, because the decree required that all of its revenues be channeled into the trust account.³⁰¹ Under those circumstances, DRP could not obtain sufficient credit from its concentrate suppliers. As Dr. Partelpoeg explains: "The conditions imposed by [the MEM] are inconsistent with the way smelters actually operate, and the way large capital projects are conducted at an operating facility... [T]hese conditions directly interfered with DRP's ability to complete the PAMA projects in the time provided and were the kiss of death for DRP's efforts to complete its modernization of the [La Oroya Complex]."³⁰²

115. In addition, while Law No. 29410 provided DRP ten months to obtain financing and restart the Complex, and 20 months thereafter to complete the sulfuric acid plant for the Copper Circuit, the MEM imposed onerous time requirements, not contained in the Technical Report or in Law No. 24910. It subdivided the twenty-month period providing DRP:

- a maximum term of fourteen (14) months, as opposed to twenty (20), to complete construction of the sulfuric acid plant;
- within the fourteen (14) months, it gave DRP a "maximum term" of two (2) months for the "renegotiation and mobilization of the contractors," and "up to twelve (12) months for the construction of the Project," and
- Upon the expiration of the fourteen-month (14) term, the MEM gave DRP "a maximum . . . of six (6) months, for Project Start-up in accordance with the recommendations of the Technical [Commission]."³⁰³

116. As Mr. Mogrovejo explains, having a "specific deadline for each individual activity within the 20 months [] eliminated flexibility, and made compliance more difficult. This permitted the [G]overnment to find that we had not complied and potentially close the Complex if, for example, it took us three months rather than two months to enter into contracts with suppliers."³⁰⁴

³⁰¹ Neil Witness Stmt. at ¶¶ 49-50; Sadlowski Witness Stmt. at ¶ 46.

³⁰² Partelpoeg Expert Report, § 7.6.3, at 56.

³⁰³ **Exhibit C-078**, Decree No. 075-2009, §3.2. *See also* Sadlowski Witness Stmt. at ¶ 47.

³⁰⁴ Mogrovejo Witness Stmt. at ¶ 61.

117. Dr. Partelpoeg echoes this conclusion: “When capital projects are being completed on highly compressed schedules, as DRP’s projects were, smelter owners require flexibility to stage projects and tasks and to enter contracts with suppliers on a schedule that best advances the project in light of the circumstances. Placing arbitrary and mandatory constraints on project contracting and scheduling impedes, rather than ensures, timely completion of the project. Especially when combined with the revenue restrictions discussed above, I am confident that MEM’s conditions directly frustrated DRP’s ability to complete the projects by the deadline.”³⁰⁵

118. DRP did what it could to obtain passage of another law neutralizing the campaign by the MEM to undermine the extension already granted by Congress.³⁰⁶ But the MEM thwarted these efforts too.³⁰⁷

119. On June 11, 2010, less than two months before DRP’s ten-month deadline to restart operations under Congress’s 2009 law expired on July 27, 2010, the Peruvian Government loosened the “100% trust account” requirement, reducing DRP’s required contribution from 100% of its revenues down to 20%.³⁰⁸ But this did not correct the prior mistreatment because the MEM refused to extend the deadline for DRP to restart its operations, thus leaving DRP the impossibly short period of only weeks to secure financing, negotiate agreements with its suppliers, and restart one of the most sophisticated smelting operations anywhere in the world.³⁰⁹

3. Peru Launched a Smear Campaign against DRP, Making DRP’s Task of Securing Financing Even Harder

120. During the ten-month period granted to DRP under Law No. 29410 to obtain financing and restart the Complex, Peru launched a smear campaign against DRP, falsely accusing

³⁰⁵ Partelpoeg Expert Report, § 7.6.3, at 57.

³⁰⁶ See Neil Witness Stmt. at ¶¶ 51-53; Mogrovejo Witness Stmt. at ¶¶ 59-62.

³⁰⁷ Neil Witness Stmt. at ¶¶ 51-53 (“Also in May 2010 DRP agreed to provide guarantees of company assets valued at US\$ 250 million to secure completion of the PAMA. On May 31, 2010, however, MEM insisted on being able to foreclose on the guarantees and take over DRP in the event that we were not able to obtain financing and restart the Complex by July 27, 2010 – which was less than two months away”).

³⁰⁸ See **Exhibit C-082**, Supreme Decree No. 032-2010-EM. See also Neil Witness Stmt. at ¶ 53; Sadlowski Witness Stmt. at ¶¶ 59-61.

³⁰⁹ See, e.g., Neil Witness Stmt. at ¶¶ 51-53; Mogrovejo Witness Stmt. at ¶ 62; Sadlowski Witness Stmt. at ¶¶ 59-61.

DRP of breaching its PAMA obligations and abusing and blackmailing the country. Peru's smear campaign against DRP created a negative image of the company that made DRP's task of securing financing even harder, as a former Peruvian Congressman later acknowledged.³¹⁰

121. Peru launched its smear campaign in May 2010 through Fernando Gala, the Vice-Minister of Mines. When asked whether he thought that DRP could obtain a further extension of time to secure financing, he declared: "I doubt very much that someone would want to propose an additional extension to a company that has had many opportunities and which, despite all the breaks that it has been given, has not yet been able to restart its activities."³¹¹

122. Vice-Minister Gala escalated his rhetoric a few days later, falsely stating that DRP continuously breached its obligations, which allegedly made it difficult for the Government to support DRP with restarting its operations at La Oroya.³¹² He called on DRP's workers not to be "fooled by the company."³¹³

123. In June 2010, the Minister of Energy & Mines Pedro Sánchez echoed Vice-Minister Gala's remarks by falsely declaring that DRP "systematically" breached its undertakings.³¹⁴ Shortly thereafter, Prime Minister Javier Velázquez falsely implied that DRP had asked the Government for a 700-year time period to pay certain tax amounts that it owed.³¹⁵ The Prime Minister's misleading statement was meant to suggest that DRP would never pay its debts, which is obviously untrue. Also in June 2010, President Alan García falsely accused DRP of not complying with time limits and of not investing promised amounts, alleging that DRP had put Peru

³¹⁰ **Exhibit C-146**, *Paralización de Doe Run genera grandes pérdidas*, LA PRIMERA, November 28, 2011.

³¹¹ **Exhibit C-147**, *MEM: Doe Run tiene plazo hasta julio para reiniciar operaciones*, ANDINA - AGENCIA PERUANA DE NOTICIAS, May 6, 2010.

³¹² **Exhibit C-148**, *Doe Run incumple compromisos asumidos con el Ejecutivo y crea confusión*, RPP NOTICIAS, May 14, 2010.

³¹³ **Exhibit C-148**, *Doe Run incumple compromisos asumidos con el Ejecutivo y crea confusión*, RPP NOTICIAS, May 14, 2010.

³¹⁴ **Exhibit C-149**, *Doe Run revive en Perú los fantasmas del rechazo a la gran minería*, EL MUNDO, June 14, 2010.

³¹⁵ **Exhibit C-149**, *Doe Run revive en Perú los fantasmas del rechazo a la gran minería*, EL MUNDO, June 14, 2010.

“up against a wall.”³¹⁶ He also falsely accused DRP of “threatening to close down its operations and mobilizing workers to obtain more benefits and extensions from the government.”³¹⁷

124. Peru’s smear campaign against DRP continued in July 2010. Vice-Minister Gala baselessly claimed that there was “little will” on DRP’s part to execute its PAMA obligations.³¹⁸ On July 28, 2010, Peru’s independence day, President García declared his intention to cancel DRP’s license to operate the Complex in a televised speech to Congress broadcast to the entire nation for the occasion, stating that a “company that abuses the country or plays games like [DRP] should be stopped.”³¹⁹ He also indicated that the Peruvian Government would “not allow [DRP] to blackmail the country.”³²⁰ The President’s speech slandering DRP was reported in the national and international press.³²¹ One week later, Minister Sánchez falsely claimed that Renco and DRP were responsible for the contamination at La Oroya and that the Government would not allow them to “re-contaminate” the area.³²²

125. The smear campaign that Peru engineered against DRP and, by extension, against Renco, created a negative environment that was hostile to DRP and Claimant. In the context of an industry-wide chill on financing mining operations,³²³ Peru’s smear campaign targeting DRP made

³¹⁶ **Exhibit C-150**, *Perú: García dice que Doe Run pretende chantajear al gobierno*, LA NACIÓN, June 14, 2010.

³¹⁷ **Exhibit C-150**, *Perú: García dice que Doe Run pretende chantajear al gobierno*, LA NACIÓN, June 14, 2010.

³¹⁸ **Exhibit C-151**, *El Gobierno de Perú cerrará operaciones de Doe Run si no hay propuesta viable*, INVESTING, July 16, 2010.

³¹⁹ **Exhibit C-152**, *Texto completo del Mensaje a la Nación del Presidente Alan García*, ANDINA, July 28, 2010.

³²⁰ **Exhibit C-152**, *Texto completo del Mensaje a la Nación del Presidente Alan García*, ANDINA, July 28, 2010.

³²¹ **Exhibit C-008**, *Peru’s García Says Doe Run License Being Canceled*, Reuters, July 28, 2010; **Exhibit C-153**, *Presidente Perú anula licencia a minera Doe Run*, REVISTA DINERO, July 28, 2010; **Exhibit C-009**, *Peru cancels Doe Run’s operating license*, ANDINA, July 28, 2010. *See also* Sadlowski Witness Stmt. at ¶ 40.

³²² **Exhibit C-154**, *MEM no dará marcha atrás en cierre de operaciones de Doe Run*, ANDINA, August 4, 2010.

³²³ *See, e.g., Exhibit C-143*, Alex Emery & Heather Walsh, *Doe Run Won’t Get Government Bailout, Minister Says*, BLOOMBERG BUSINESS NEWS, April 28, 2009 (*hereinafter* “Apr. 28, 2009 BLOOMBERG BUSINESS NEWS”) (reporting Finance Minister Luis Carranza statement that Doe Run Peru would not be “bailed out” by the Government of Peru); **Exhibit C-144**, *The Multisectoral Commission Will*

DRP's task of finding financing even harder and, in fact, contributed to prevent DRP from securing the financing that it needed to restart the Complex.

H. PERU WRONGFULLY TOOK CONTROL OF THE BANKRUPTCY BY ASSERTING A MERITLESS CREDIT, BECOMING DRP'S LARGEST CREDITOR

126. The MEM's undermining of the extension of time granted by Congress to DRP forced DRP into bankruptcy. During the bankruptcy proceedings, the MEM asserted a bogus credit claim against DRP in excess of US\$ 163 million for the cost to complete the final PAMA project. As a result, the MEM became DRP's largest creditor. The majority of DRP's other creditors included the Peruvian tax authority,³²⁴ as well as mining companies, mineral traders and suppliers that all were beholden to the MEM given their ongoing operations in Peru.

127. On February 18, 2010, one of DRP's suppliers, Consorcio Minero S.A. ("Cormín"), commenced bankruptcy proceedings against DRP.³²⁵ Several other entities then applied to the *Comisión de Procedimientos Concursales* or "Bankruptcy Commission" of the *Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual* or INDECOPI (which is the Peruvian governmental agency that oversees bankruptcy proceedings) to be recognized as creditors of DRP in the bankruptcy.³²⁶

128. INDECOPI-approved creditors constitute a creditors' committee (the "Creditors' Committee").³²⁷ Different to other countries, the creditors' committee essentially takes control of the company and runs it. The decision-making power of each creditor depends on the size of the credit recognized by INDECOPI. Therefore, the larger a credit is, the bigger decision-making

Supervise the PAMA's Progress, EL COMERCIO, September 26, 2009 (*hereinafter* "Sept. 26, 2009 EL COMERCIO") (reporting that lack of prior government supervision had permitted Doe Run to evade its environmental responsibilities); *see also* Partelpoeg Expert Report, § 7.6, at 51-57.

³²⁴ Superintendencia Nacional de Aduanas y de Administración Tributaria - SUNAT

³²⁵ **Exhibit C-079**, Cormin Notice Regarding Doe Run Peru's Bankruptcy to INDECOPI, February 18, 2010 (*hereinafter* "Feb. 18, 2010 Cormin Notice"). *See also* Neil Witness Stmt. at ¶ 51; Sadlowski Witness Stmt. at ¶ 49.

³²⁶ These entities included, among others, DRP's concentrate suppliers, the Complex workers, companies providing services to execute the PAMA projects, and, ultimately, the MEM and Activos Mineros (Centromin's successor).

³²⁷ *See Exhibit C-155*, List of Doe Run Peru Approved Creditors, January 10, 2012 (*hereinafter* "DRP Approved Creditors").

power a creditor has.³²⁸ The MEM illegally became DRP's largest creditor, with the power to decide on DRP's future.

129. On September 14, 2010,³²⁹ the MEM filed a meritless credit claim against DRP in an amount of US\$ 163,046,495.³³⁰ The MEM alleged that the remaining amount that DRP had planned to invest in the Copper Circuit sulfuric acid plant project constituted a debt in its favor, a position that is not supported by Peruvian bankruptcy law.³³¹

130. DRP opposed the MEM's baseless credit claim.³³² On February 23, 2011, the INDECOPI Bankruptcy Commission dismissed the MEM's bogus credit claim because (i) the

³²⁸ Renco has retained Professor Daniel Schmerler to provide an expert report on Peruvian bankruptcy law, that extensively explains how the system works in Peru. *See* section IV.C.2 of this Memorial.

³²⁹ **Exhibit C-113**, 2010 MEM Request to INDECOPI.

³³⁰ On September 27, 2010, Activos Mineros also filed a similarly meritless credit claim against DRP in the amount of US\$ 10,500,000 for an alleged responsibility to remediate the soil. DRP opposed the Activos Mineros' baseless credit claim. On February 2, 2011, INDECOPI's Bankruptcy Commission dismissed Activos Mineros' claim, because Activos Mineros had failed to demonstrate that DRP had an obligation to remediate the. *See* **Exhibit C-156**, Activos Mineros INDECOPI Application; **Exhibit C-159**, Doe Run Peru's Response to INDECOPI Opposing Claim by Activos Mineros, December 2, 2010; **Exhibit C-166**, Feb. 2011 Activos Mineros Motion to Appeal; **Exhibit C-167**, INDECOPI Resolution regarding Recognition of Credits, September 7, 2011.

³³¹ On September 27, 2010, Activos Mineros also filed a similarly meritless credit claim against DRP in the amount of US\$ 10,500,000 for an alleged responsibility to remediate the soil. DRP opposed the Activos Mineros' baseless credit claim. On February 2, 2011, INDECOPI's Bankruptcy Commission dismissed Activos Mineros' claim, because Activos Mineros had failed to demonstrate that DRP had an obligation to remediate the. *See* **Exhibit C-156**, Activos Mineros INDECOPI Application; **Exhibit C-159**, Doe Run Peru's Response to INDECOPI Opposing Claim by Activos Mineros, December 2, 2010; **Exhibit C-166**, Feb. 2011 Activos Mineros Motion to Appeal; **Exhibit C-167**, INDECOPI Resolution regarding Recognition of Credits, September 7, 2011.

³³² **Exhibit C-157**, Doe Run Peru's Request to INDECOPI Opposing Ministry of Energy & Mines' Request for Recognition of Claims, November 11, 2010 (*hereinafter* "Nov. 2010 DRP Request to INDECOPI"); **Exhibit C-158**, Doe Run Peru's Brief to INDECOPI with Additional Arguments in Support of Opposition to Ministry of Energy & Mines' Claim, November 15, 2010 (*hereinafter* "Nov. 15, 2010 DRP Brief to INDECOPI"); **Exhibit C-160**, Ministry of Energy & Mines Brief to INDECOPI with Clarifications to Request for Recognition of Claims, December 4, 2010 (*hereinafter* "Dec. 4, 2010 MEM Brief to INDECOPI"); **Exhibit C-161**, Ministry of Energy & Mines' Response to INDECOPI to Requirements of Communication and Letter No. 1780-2010/CCO-INDECOPI, December 6, 2010 (*hereinafter* "December 6, 2010 MEM Response to INDECOPI"); **Exhibit C-162**, Doe Run Peru's Brief to INDECOPI in Opposition to Ministry of Energy & Mines Claim, December 15, 2010 (*hereinafter* "December 15, 2010 DRP Brief to INDECOPI"); **Exhibit C-163**, Doe Run Peru's Brief to INDECOPI with Additional Arguments in Support of Opposition to Ministry of Energy & Mines Claim, December 20, 2010 (*hereinafter* "December 20, 2010 DRP Brief to INDECOPI").

obligation to complete the PAMA Project was not a “debt” under Peruvian bankruptcy law;³³³ (ii) there was no obligation for a company that was in breach of its PAMA to have to pay the MEM the cost of completing the PAMA milestone that the company had missed; and (iii) the only remedies available to the MEM in the event of a company’s breach of its PAMA obligations were administrative sanctions, such as fines or shutting down that company’s operations.³³⁴

131. The MEM appealed the INDECOPI Bankruptcy Commission's dismissal of its bogus US\$ 163,046,495 credit claim to INDECOPI’s Chamber No. 1 for the Defense of Competition.³³⁵ On November 18, 2011, a majority of Chamber No. 1 reversed the Bankruptcy Commission’s decision and recognized the MEM’s bogus US\$ 163,046,495 credit claim.³³⁶ However, a minority of Chamber No. 1 issued a strong dissenting opinion rejecting the MEM credit based on a substantially similar reasoning as the INDECOPI Bankruptcy Commission.³³⁷

132. On December 21, 2011, following the split decision of INDECOPI’s Chamber No. 1 for the Defense of Competition, INDECOPI recognized the MEM’s credit claim in the

³³³ **Exhibit C-168**, INDECOPI Resolution 1105-2011/CCO-INDECOPI regarding Recognition of Credits Unfounded, February 23, 2011 (*hereinafter* “Feb. 23, 2011 INDECOPI Resolution”).

³³⁴ **Exhibit C-168**, INDECOPI Resolution 1105-2011/CCO-INDECOPI regarding Recognition of Credits Unfounded, February 23, 2011 (*hereinafter* “Feb. 23, 2011 INDECOPI Resolution”).

³³⁵ **Exhibit C-166**, Feb. 2011 Activos Mineros Motion to Appeal; **Exhibit C-169**, Ministry of Energy & Mines Appeal of INDECOPI Resolution, March 2, 2011 (*hereinafter* “Mar. 2, 2011 MEM Appeal to INDECOPI”); **Exhibit C-170**, Activos Mineros Request to INDECOPI for Oral Presentation, April 1, 2011 (*hereinafter* “Apr. 1, 2011 Activos Mineros Request to INDECOPI”); **Exhibit C-171**, Doe Run Peru’s Response to INDECOPI in Opposition to Appeal by Activos Mineros, May 19, 2011 (*hereinafter* “May 19, 2011 DRP Response to INDECOPI”); **Exhibit C-172**, Doe Run Peru’s Response to Ministry of Energy & Mines Appeal, May 18, 2011 (*hereinafter* “May 18, 2011 DRP Response to MEM Appeal”); **Exhibit C-173**, Doe Run Peru’s Brief to INDECOPI in Opposition to Appeal by Ministry of Energy & Mines, November 16, 2011 (*hereinafter* “Nov. 16, 2011 DRP Brief to INDECOPI”)

³³⁶ **Exhibit C-174**, Resolution 1743-2011/SC1-INDECOPI issued by Chamber No. 1 for the Defense of Competition of INDECOPI, November 18, 2011 (*hereinafter* “Nov. 18, 2011 Resolution by Chamber No. 1”).

³³⁷ **Exhibit C-174**, Resolution 1743-2011/SC1-INDECOPI issued by Chamber No. 1 for the Defense of Competition of INDECOPI, November 18, 2011 (*hereinafter* “Nov. 18, 2011 Resolution by Chamber No. 1”), p. 44.

amount of US\$ 163,046,495 plus US\$ 87,699.29 in interest.³³⁸ Thus, the Peruvian Government became DRP's largest creditor,³³⁹ accounting for approximately 45% of DRP's total liabilities.³⁴⁰

133. With 45% of DRP's total liabilities, the Peruvian Government became by far the largest creditor in the Creditor's Committee and took control of DRP. In addition, most of the mining companies that were creditors of DRP usually supported the MEM's decisions to avoid conflicts with the MEM, which supervised these mining companies' other projects in Peru. As Mr. Mogrovejo clearly explains: "... MEM would have significant influence over many of the other many mining company creditors who would naturally support MEM's anti-DRP positions in the bankruptcy. For these mining companies, acting consistent with MEM in a bankruptcy case would certainly be preferable to creating problems with a regulator as important to their business as MEM..."³⁴¹

134. On January 18, 2012, DRP challenged the INDECOPI Chamber No. 1's split decision in Peruvian court by presenting a "*demanda contencioso administrativa*" against INDECOPI and the MEM.³⁴² The case was assigned to a specially-created "transitory court." Nine months after the DRP's appeal, on October 18, 2012, a judge sitting on this transitory court issued an unsigned decision, in breach of the Peruvian Code of Civil Procedure, upholding the split

³³⁸ **Exhibit C-175**, INDECOPI Resolution No. 9340-2011/COO-INDECOPI, Recognition of Credits - Mandate of the Court for Defense of Competition No. 1, December 21, 2011 (*hereinafter* "Dec. 21, 2011 INDECOPI Resolution").

³³⁹ MEM with an approximate total of 31%; and SUNAT with an approximate total of 13.6%. Note that these percentages may slightly vary over the time per USD exchange rates.

³⁴⁰ *See* **Exhibit C-155**, List of Doe Run Peru Approved Creditors, January 10, 2012; **Exhibit C-176**, List of Doe Run Peru Approved Creditors, September 19, 2014; **Exhibit C-231**, Minutes of Creditors' Meeting of April 9 and 12, 2012. Many mining companies also became DRP's creditors, such as CORMIN (5.7% of DRP's total liabilities), VOLCAN (3.3%), Glencore's AYS (2.8%), Buenaventura (2.6%), and Pan American Silver (1.1%), among others (*see* **Exhibit C-155**, List of Doe Run Peru Approved Creditors, January 10, 2012).

³⁴¹ Mogrovejo Witness Stmt. at ¶ 65, fn. 54.

³⁴² **Exhibit C-177**, ACA Request for Annulment of Ministry of Energy and Mines' Claim, January 16, 2012. On May 24, 2012, DRCL requested intervention into the case as "*tercero coadyuvante*," which application was granted on June 21, 2012 (*see* **Exhibit C-180**, Resolución No. 8 "Decision on intervention of Doe Run Cayman Ltd.," June 21, 2012). Although DRCL was not a party to the case, it was permitted to make a filing in the case in support of DRP's position.

decision of Chamber No. 1.³⁴³ In affirming Chamber No. 1’s split decision, the transitory court judge contradicted an opinion of the Civil District Attorney’s Office issued during the court proceedings,³⁴⁴ which concluded that the MEM was not entitled to receive any compensation as a result of a breach of the PAMA; the MEM could only impose fines on the company or shut down its operations.³⁴⁵ Shortly after issuing this unsigned decision in October 2012, the transitory court was dissolved and converted into a mixed jurisdiction court.³⁴⁶

135. DRP appealed the transitory court’s unsigned judgment.³⁴⁷ The appeal was assigned to the 4th Chamber for Contentious Administrative Actions of the Superior Court of Justice. After the 4th Chamber received the appellate file and the submissions of the parties, and scheduled oral argument for July 3, 2013,³⁴⁸ the Court simply cancelled the hearing the same day of the oral argument, and the case was thereafter reassigned to the newly created 8th Chamber for Contentious Administrative Actions with a Sub-Specialty in INDECOPI matters.³⁴⁹ This patently improper action³⁵⁰ resulted in a delay of over a year before oral argument took place and a decision

³⁴³ **Exhibit C-181**, Judgment of the Annulment of Administrative Act, Case No. 2012-00368, October 18, 2012 (*hereinafter* “Oct. 18, 2012 First Instance Judgment”). The judgment was signed by the Judge’s assistant, and not by the Judge herself. The Judge’s failure to sign the judgment constitutes a breach of the Peruvian Code of Civil Procedure, which provides that a judgment without a judge’s signature is void (*see* **Exhibit C-182**, Peruvian Code of Civil Procedure, Art. 122.7).

³⁴⁴ Supreme Decree No. 013-2008-JUS, which applied at the time of DRP’s case, required the Prosecutor’s Office to issue an opinion, called “Dictamen Fiscal,” for every judicial case in which an administrative decision was being challenged. Although the opinion of the Prosecutor’s Office was not binding, prosecutors who issued these opinions were specialized in administrative cases and usually provided a neutral recommendation to the judges. *See* **Exhibit C-183**, Supreme Decree No. 013-2008-JUS, Art. 16.

³⁴⁵ **Exhibit C-184**, Civil District Attorneys’ Office Opinion No. 362-2012, May 9, 2012.

³⁴⁶ **Exhibit C-185**, Resolution 154-2013-CE-PJ, August 1, 2013, p. 3.

³⁴⁷ **Exhibit C-186**, DRP Appeal to the October 18, 2012 First Instance Judgment, November 5, 2012 (*hereinafter* “Nov. 5, 2012 DRP Appeal”).

³⁴⁸ **Exhibit C-187**, 4th Chamber for Contentious Administrative Actions of the Superior Court of Justice, Resolución No. 9, July 4, 2013; **Exhibit C-232**, 4th Chamber for Contentious Administrative Actions of the Superior Court of Justice, Resolución No. 3, April 12, 2013.

³⁴⁹ **Exhibit C-188**, Resolución Administrativa No. 206-2012-CE-PJ, October 24, 2012; **Exhibit C-189**, Resolución Administrativa No. 102-2013-CE-PJ, June 12, 2013.

³⁵⁰ These incorrect and last-minute transfers from one court to others have been sanctioned by the Peruvian Constitutional Tribunal, the highest court interpreting, protecting and enforcing the Peruvian

rendered on DRP's appeal. In the meantime, the MEM was leading DRP's Creditors' Committee, rejecting DRP's proposed restructuring plans, and undermining DRP's efforts to line up financing.

136. On July 25, 2014, a majority of the 8th Chamber affirmed the transitory court's judgment in a split 3-2 vote, recognizing the MEM credit.³⁵¹ Originally, the court was composed of 3 judges, but because of discord among them, 2 additional judges had to be added to get a three-judge decision. Judges Torres and Hasembank dissented, holding that the transitory court's unsigned judgment should be overturned. In accordance with the prior decisions, they opined that "the only consequence of DRP's breach in the execution of the PAMA is the possibility to impose sanctions,"³⁵² not to obtain compensation.³⁵³

137. In August 2014, DRP and DRCL each appealed the split 3-2 judgment of the 8th Chamber to the Supreme Court of Justice by filing separate *Recurso de Casación*.³⁵⁴ In their applications, DRP and DRCL argued that the majority of the 8th Chamber had incorrectly interpreted and applied Peruvian law.³⁵⁵ They also argued that the majority had committed serious due process violations, including by failing to include the *ratio decidendi* in its judgment and by relying on arguments that the parties had not discussed in the proceeding, thus ruling *ultra petita*.³⁵⁶

138. After 15 months, on November 3, 2015, in a clearly results-oriented decision without any substantive explanation, the Supreme Court of Justice summarily dismissed the

Constitution. See **Exhibit C-233**, Decision of the Constitutional Tribunal, Exp. No. 00041-2012-PA/TC, April 23, 2013.

³⁵¹ **Exhibit C-190**, 8th Chamber of the Lima Superior Court, Decision No. 38, July 25, 2014, p. 6.

³⁵² **Exhibit C-190**, 8th Chamber of the Lima Superior Court, Decision No. 38, July 25, 2014, p. 18.

³⁵³ **Exhibit C-190**, 8th Chamber of the Lima Superior Court, Decision No. 38, July 25, 2014, p. 17-18.

³⁵⁴ **Exhibit C-191**, DRP's *Recurso de Casación* filed before the Peruvian Supreme Court of Justice, August 25, 2014; **Exhibit C-192**, Doe Run Cayman Ltd.'s *Recurso de Casación* filed before the Peruvian Supreme Court of Justice, August 22, 2014.

³⁵⁵ **Exhibit C-191**, DRP's *Recurso de Casación* filed before the Peruvian Supreme Court of Justice, August 25, 2014, pp. 3, 4; **Exhibit C-192**, Doe Run Cayman Ltd.'s *Recurso de Casación* filed before the Peruvian Supreme Court of Justice, August 22, 2014, pp. 9, 12.

³⁵⁶ **Exhibit C-191**, DRP's *Recurso de Casación* filed before the Peruvian Supreme Court of Justice, August 25, 2014, pp. 8-10; **Exhibit C-192**, Doe Run Cayman Ltd.'s *Recurso de Casación* filed before the Peruvian Supreme Court of Justice, August 22, 2014, pp. 16-20.

appeals on patently pretextual grounds, holding that the requisite procedural formalities had not been complied with.³⁵⁷ The Court surprisingly held that the appeal petitions had not allegedly explained what the due process violations were, despite the fact that DRP and DRCL had submitted proper and detailed explanations in its appeal and had complied with all formalities required by Peruvian law.³⁵⁸

139. The Supreme Court of Justice's summary dismissal of the appeal put an end to DRP's efforts to overturn the MEM's bogus US\$ 163 million credit claim, effectively confirming the credit's validity. This denial of justice that Peru committed against DRP caused immeasurable damage to DRP. From November of 2011 through November of 2015, in its illegitimate position as DRP's largest creditor, the MEM baselessly rejected viable restructuring plans, causing DRP to end up in liquidation and Renco's investment to be expropriated. Had the Peruvian judiciary struck down the MEM's sham credit, as it should have, then every vote that the MEM participated in on DRP's Creditors' Committee would have been invalidated by the newly constituted creditors' committee and revotes would have had to take place.

I. PERU EXPROPRIATED RENCO'S INVESTMENT THROUGH THE BANKRUPTCY PROCESS AND THEN REOPENED THE COMPLEX

140. As DRP's largest creditor, the MEM greatly influenced the actions and decisions of the Creditors Committee in the bankruptcy process. In that capacity, the MEM helped to defeat DRP's reasonable restructuring plans and then allowed the liquidator to reopen the Complex.

141. DRP proposed several restructuring plans that would: (i) allow for the continuation of the business, (ii) ensure the completion of the final PAMA project as quickly as possible, and (iii) ensure that all recognized bankruptcy debts would be paid. The MEM, as the largest creditor after having asserted the bogus MEM Credit in order to control the process, opposed every plan, even as DRP showed flexibility by addressing the vast majority of issues raised by the MEM.

³⁵⁷ **Exhibit C-193**, Peruvian Supreme Court of Justice, Decisions on the *Recursos de Casación*, November 3, 2015.

³⁵⁸ **Exhibit C-191**, DRP's *Recurso de Casación* filed before the Peruvian Supreme Court of Justice, August 25, 2014; **Exhibit C-192**, Doe Run Cayman Ltd.'s *Recurso de Casación* filed before the Peruvian Supreme Court of Justice, August 22, 2014.

142. On October 19, 2011, in order to facilitate restructuring and reopening, an agreement was reached whereby both Glencore (a supplier) and Renco would provide lines of credit to DRP that would allow it to restructure its debt.³⁵⁹ The Renco loan would consist of a five-year line of credit for up to US\$ 65 million, and the Glencore loan would consist of a five-year line of credit of up to US\$ 135 million. In addition, Glencore would commit to provide mineral concentrates and DRP would agree to sell a percentage of its production in La Oroya to Glencore.³⁶⁰

143. Thereafter, DRP submitted several restructuring plans in early 2012.³⁶¹ For example, after taking into account the several “observations” raised by the MEM in connection with a restructuring plan submitted by DRP on March 30, 2012, DRP submitted an amended restructuring plan on April 11, 2012. Under that amended plan, the operations of the La Oroya Complex would be restarted no later than the end of June 2012. Notwithstanding the fact that this plan was commercially and financially viable, the MEM, a 45.53% creditor, strongly opposed it, and was not willing to provide the flexibility DRP needed, and to which it was entitled under the economic *force majeure* provision of the Stock Transfer Agreement, with respect to the PAMA obligations. On April 12, 2012, the Creditors Committee rejected the amended restructuring plan proposed by DRP.³⁶²

144. After the April plan was rejected, DRP submitted another amended restructuring plan on May 14, 2012.³⁶³ This new Plan was based on the same business model but removed all of the major items to which the MEM had objected, demonstrating DRP’s continued flexibility and cooperation. The only meaningful right DRP attempted to retain in the new plan was its right to operate all Circuits in the Complex to generate the necessary funds to complete the PAMA. In vetoing the plan, the MEM insisted that the PAMA for the Copper Circuit be completed before

³⁵⁹ **Exhibit C-194**, Letter of Intent among Glencore, DRP, and Renco, October 19, 2011 (*hereinafter* “Letter of Intent”). *See also* Sadlowski Witness Stmt. at ¶ 77.

³⁶⁰ Sadlowski Witness Stmt. at ¶ 77.

³⁶¹ Sadlowski Witness Stmt. at ¶ 76.

³⁶² Sadlowski Witness Stmt. at ¶ 77; **Exhibit C-231**, Minutes of Creditors’ Meeting of April 9 and 12, 2012.

³⁶³ **Exhibit C-114**, 2012 DRP Restructuring Plan.

that Circuit was re-opened.³⁶⁴ The MEM also continued to demand that, upon re-starting, the operations at La Oroya Complex had to be in accordance with all environmental standards in force at the time, including the 80 µg/m³ SO₂ standard, now among the strictest standards in the world. Finally, as a pre-condition to supporting the restructuring plan, the MEM continued to demand that DRP withdraw its *Acción Contencioso Administrativa*, a judicial challenge, described above, that DRP had brought against the sham US\$ 163 million MEM Credit claim requesting the annulment of an INDECOPI resolution which had approved the MEM's claim.³⁶⁵

145. DRP continued its efforts to persuade the MEM to accept its May 2012 restructuring plan.³⁶⁶ However, acting as both creditor and mining regulator, the MEM continued to: (i) refuse to permit DRP to operate the Copper Circuit (which was both unreasonable and inconsistent with the 1993 Regulations, the PAMA extension laws of 2004 and 2009, and the MEM's acquiescence in the La Oroya Complex's full operation while the PAMA projects were being completed); and (ii) insist that DRP immediately comply with all environmental standards in force at the time, including the 80 µg/m³ SO₂ standard, contrary to the intent of the Stock Transfer Agreement that the PAMA projects were to bring the Complex into compliance with the standards in place at the time the Stock Transfer Agreement was executed (October 1997).³⁶⁷ With respect to the final point, if the standards were going to be modified, the MEM would have to give the company a reasonable period of additional time to meet the new standards after completion of the fundamental modifications to the Complex contemplated by the PAMA. All further efforts to gain the MEM's support for DRP's restructuring plan failed.³⁶⁸

³⁶⁴ **Exhibit C-115**, June 26, 2012 Letter.

³⁶⁵ Doe Run Peru challenged INDECOPI's decision to recognize MEM's claim by filing an Administrative Contentious Action (*Acción Contencioso Administrativa*) against MEM and INDECOPI requesting the annulment of the INDECOPI resolution approving MEM's bankruptcy claims. **Exhibit C-115**, June 26, 2012 Letter.

³⁶⁶ **Exhibit C-195**, Letter from D. Sadlowski (Renco) to J. Merino Tafur (Ministry of Energy & Mines), June 28, 2012 (*hereinafter* "June 28, 2012 Letter").

³⁶⁷ **Exhibit C-196**, Letter from D. Sadlowski (Renco) to R. Patiño (Ministry of Energy & Mines), July 17, 2012 (*hereinafter* "July 17, 2012 Letter")

³⁶⁸ **Exhibit C-197**, Letter from D. Sadlowski (Renco) to M. del Rosario Patiño (Ministry of Energy & Mines), August 2, 2012 (*hereinafter* "August 2, 2012 Letter"); **Exhibit C-198**, Letter from D. Sadlowski (Renco) to M. del Rosario Patiño (Ministry of Energy & Mines), August 13, 2012 (*hereinafter* "August 13, 2012 Letter").

146. The creditors, led by the MEM, voted to put DRP into liquidation proceedings under Right Business, a Peruvian entity (there were several other liquidators appointed after Right Business). Right Business described the creditors' reasoning – including the MEM – as follows: “[i]n April, Doe Run Peru was declared by its creditors to be in a process of ‘operational liquidation,’ meaning that while the creditors would not approve the company’s restructuring plan, they would allow the company to resume production while the board of creditors further analyzed Doe Run Peru’s situation and prepare to make a final decision.”³⁶⁹ The Complex was then operated for some time, without a PAMA and without any additional environmental investments or improvements.³⁷⁰ In discussing the reopening, Minister of Energy & Mines Merino noted that “the resumption of operations at the complex was achieved through consensus and the efforts of the management company Right Business, workers at the smelter, and creditors of the company Doe Run Peru, who were all interested in resurrecting a vital investment to the economy of La Oroya.”³⁷¹

147. Since the liquidator’s appointment, Peru has treated DRP, as managed by Right Business and subsequent liquidators, more favorably than under former management and has turned a blind eye to numerous environmental violations, unlike before Right Business’ appointment where the State fined DRP for any minor infraction and had an inspector residing in La Oroya, which is no longer the case.

148. Though the Copper Circuit is still not running, the SO₂ emissions continue to exceed maximum permissible limits. For example, “on January 8, 2013, Doe Run Peru was notified via Sub-directional Resolution No. 0256-2012-OEFA-DFSAI/SDI through which the administrative sanctioning procedure of Doe Run Peru was initiated, for supposed excesses in daily average amounts of concentrations of Sulfur Dioxide (SO₂) on the 9th, 10th, 14th, 16th, 17th, 18th,

³⁶⁹ **Exhibit C-199**, Dorothy Kosich, *After 3 years, Doe Run Peru's La Oroya finally restarts*, MINEWEB, July 30, 2012, available at <http://www.mineweb.com/mineweb/content/en/mineweb-base-metals?oid=156005&sn=Detail&pid=102055> (hereinafter “July 20, 2012 MINEWEB”); **Exhibit C-200**, *Doe Run Peru announces smelter restart*, FOX LATINO NEWS, July 28, 2012, available at <http://latino.foxnews.com/latino/news/2012/07/28/doe-run-peru-announces-smelter-restart> (hereinafter “July 28, 2012 FOX LATINO NEWS”).

³⁷⁰ Mogrovejo Witness Stmt. at ¶¶ 67, 68.

³⁷¹ **Exhibit C-199**, July 20, 2012 MINEWEB; **Exhibit C-200**, July 28, 2012 FOX LATINO NEWS.

20th, and 22nd of October 2012, in relation to the amount established in the current regulation for said parameter.”³⁷² And “[o]n January 28, 2013, Sub-directional Resolution N° 067-2013-OEFA-DFSAI/SDI which extended the administrative sanctioning procedure in respect to the months of August (dates: 9th, 10th, 11th, 13th, 14th, 15th, 19th, and 22nd) and September (dates: 16th, 17th, 18th, 21st, 22nd, 23rd, 24th, and 25th) was issued.”³⁷³ Despite these violations—and despite its claim that DRP should not be allowed to operate until the Complex achieved compliance with the SO₂ limit—the MEM and other creditors continued for some time to operate it without addressing SO₂ emissions.³⁷⁴

149. Moreover, the MEM has implemented regulatory changes to make compliance easier for the creditors operating the Complex. These include a change to the way in which ambient SO₂ concentrations are calculated for high altitude operations, including the Complex—a change that DRP itself requested and the MEM rejected prior to its takeover of the Complex.³⁷⁵ This reversal disregards precisely the principles that the MEM cited to refuse DRP an extension and to denigrate DRP in the media.

150. In yet another example of the MEM’s application of a double standard, the MEM (and the other creditors) ignored the Peruvian Government’s own instructions to fix oven no. 12

³⁷² **Exhibit C-201**, Letter from A. Miguel López-Cano Algorta, et. al (Right Business S.A.) to J. Muñiz Zinches (Doe Run Cayman) and Estudio Muñiz, et. al., February 22, 2013 at 2 (*hereinafter* “February 22, 2013 Letter”).

³⁷³ **Exhibit C-201**, February 22, 2013 Letter.

³⁷⁴ See Sadlowski Witness Stmt. at ¶¶ 80-82.

³⁷⁵ See generally **Exhibit C-202**, *Peru loosens new air pollution limits after industry protests*, CHICAGO TRIBUNE, July 11, 2013, available at http://articles.chicagotribune.com/2013-07-11/news/sns-rt-peru-miningenvironment-20130711_1_la-oroya-doe-run-peru-environment-ministry (*hereinafter* “July 11, 2013 CHICAGO TRIBUNE”) at 1 (“The environment ministry told Reuters . . . that it would not apply 2014 limits on sulfur dioxide emissions . . . in the highland town La Oroya, where Doe Run Peru has a poly-metallic smelter.”); **Exhibit C-203**, Roberto Rosado, *Ministry of the Environment has an Adaptation Mechanism: Guideline to Comply with New Environmental Air Standard is Eased*, GESTIÓN, July 11, 2013 (*hereinafter* “July 11, 2013 GESTIÓN”); **Exhibit C-204**, *Will the environmental standard be made more flexible in favor of Southern Peru?* GATO EN CERRADO, June 20, 2013 (*hereinafter* “June 20, 2013 GATO EN CERRADO”); **Exhibit C-205**, *New Environmental Standard Worries Southern Peru*, EL COMERCIO, June 20, 2013 (*hereinafter* “June 20, 2013 EL COMERCIO”); **Exhibit C-206**, Ministerial Resolution No. 205-2013-MINAM regarding the complementary provisions for the application of the Environmental Air Quality Standards (EQS), July 13, 2013 (*hereinafter* “Resolution No. 205-2013”).

before re-initiating operations at the smelter to avoid fugitive emissions.³⁷⁶ As a result, on November 15, 2012, “[Peruvian Government] personnel arrived at the metallurgical complex and verified that the process continued ‘without adoption of measures to mitigate fugitive emissions.’”³⁷⁷

151. In addition, such inconsistent conduct demonstrating its disparate treatment of DRP continued. For example, Despite Peru’s complete inflexibility and imposition on DRP of the obligation to meet the 80 µg/m³ for SO₂ standard immediately upon restarting the Complex (despite the PAMA providing DRP was to meet the 1997 standard of 365 µg/m³ for SO₂ upon completion of the PAMA), in 2017, the government relaxed the environmental standards a new operator would have to comply with and adopted a 250 µg/m³ standard. Any assertions by Peru that such flexibility was not possible, is therefore simply false.³⁷⁸

152. As a result of the Peruvian Government’s actions, including the MEM’s conduct throughout the bankruptcy process, Renco’s investments, including DRP, have all been expropriated.

J. DESPITE NO EVIDENCE OF WRONGDOING, BASELESS CRIMINAL CHARGES WERE PURSUED AGAINST OFFICERS OF RENCO AND DOE RUN RESOURCES

153. On March 2, 2011, after an exhaustive review of DRP’s and DRCL’s documents, including accounting records, INDECOPI issued a lengthy decision recognizing DRCL as a creditor of DRP and upholding its credit in the bankruptcy proceeding in the amount of US\$ 155,739,617.³⁷⁹ Unhappy with this decision, on April 25, 2011, Cormín (a competitor of DRP) filed a criminal complaint against Renco officer Ira Rennert and Doe Run Resources officer

³⁷⁶ **Exhibit C-207**, *OEFA Warns of the Emissions of Contaminating Gases at La Oroya Complex*, PERU 21, November 15, 2012 (*hereinafter* “November 15, 2012 PERU 21”)

³⁷⁷ **Exhibit C-207**, November 15, 2012 PERU 21.

³⁷⁸ Mogrovejo Witness Statement at ¶ 69; **Exhibit C-224**, *Caso Doe Run: Si Perú flexibiliza los ECA pierde arbitraje con Renco*, RPP NOTICIAS, August 12, 2015; **Exhibit C-225**, Tweet by Manuel Pulgar Vidal @manupulgarvidal, TWITTER, June 10, 2017; **Exhibit C-226**, *Doe Run Perú: Como influyen los nuevos estándares del aire en próxima subasta*, EL COMERCIO, June 13, 2017.

³⁷⁹ **Exhibit C-208**, INDECOPI Resolution regarding Recognition of Credits of Doe Run Cayman Limited, March 2, 2011 (*hereinafter* “Mar. 2, 2011 INDECOPI Resolution”).

Bruce Neil accusing them of crimes related to the INDECOPI bankruptcy proceeding and the intercompany note issued by DRP to DRCL.³⁸⁰

154. The Lima District Attorney ordered police accounting experts to conduct a review of the transactions, even though the extensive investigation by INDECOPI found no irregularities. Despite the earlier INDECOPI decision, two police experts issued an expert accounting report on November 11, 2011 (*Dictamen Pericial Contable*) finding that the debt under the intercompany note was irregular and recommending that the District Attorney indict Messrs. Rennert and Neil.³⁸¹ This report was rife with inaccuracies, including, among other things, a mischaracterization of the Stock Transfer Agreement, and DRP filed complaints against the authors of the reports with the Office of Internal Affairs of the Peruvian National Police and the Prosecutor's office.³⁸²

155. Notwithstanding, the District Attorney issued a criminal indictment (*denuncia*) against Messrs. Rennert and Neil for the alleged crimes of: (i) Fraudulent Insolvency (based on the transactions supporting the debt under an intercompany note issued by DRP to DRCL); and (ii) False Statement in an Administrative Proceeding (based upon the request for recognition before INDECOPI that the debt owed by DRP to DRCL constituted a bankruptcy credit).³⁸³ The case was then assigned to Judge Flores of the 39th Criminal Court in Lima who formally opened a criminal case (*Auto de Apertura de Instrucción*) against Messrs. Rennert and Neil on both charges (the "*Auto de Apertura*").³⁸⁴

156. The *Auto de Apertura* was substantively and procedurally defective. Counsel for Messrs. Rennert and Neil asserted three procedural defenses, namely (i) Preliminary Matter (*Cuestión Previa*) asserting that prior to indicting someone for the claims alleged, the District Attorney must obtain a technical report from INDECOPI with respect to the allegations; (ii) Motion to Dismiss (*Excepción de Naturaleza de Acción*) asserting that the Criminal Court's

³⁸⁰ Sadlowski Witness Statement at ¶ 70.

³⁸¹ Sadlowski Witness Statement at ¶ 71.

³⁸² Sadlowski Witness Statement at ¶ 71.

³⁸³ **Exhibit C-209**, Indictment No. 339-2011 against I. Rennert and B. Neil issued by the District Attorney, November 14, 2011 (*hereinafter* "Indictment No. 339-2011").

³⁸⁴ **Exhibit C-084**, Criminal Case issued by Judge Flores of the 39th Criminal Court in Lima, December 2, 2011 (*hereinafter* "Dec. 2, 2011 Criminal Case").

decision (*Auto de Apertura*) does not sufficiently allege that criminal conduct occurred; and (iii) Nullity Request (*Nulidad*) asserting that the Criminal Court’s decision (*Auto de Apertura*) violates the Constitution because it is too vague and does not state with sufficient clarity conduct attributable to Messrs. Rennert and Neil.

157. The Criminal Court rejected these three procedural defenses and the decision was appealed to the 5th Criminal Chamber of the Superior Court of Lima. After nearly three years, the Superior Court ruled in favor of Messrs. Rennert and Neil.³⁸⁵ Cormín immediately filed three “exceptional writs” with the Permanent Criminal Chamber of the Supreme Court, akin to writ of certiorari, as to all three defenses. Oral argument took place on November 11, 2013 on the first defense, Preliminary Matter. The Supreme Court rejected Cormín’s writ on January 22, 2014, effectively dismissing the crime of Fraudulent Insolvency.³⁸⁶ Ultimately, the remaining two writs were dismissed.

158. Despite the fact the alleged crimes were ultimately dismissed, it is clear that the District Attorney bent over backwards to harass officers of Renco and Doe Run Resources by lodging a bogus indictment based upon the DRCL credit after INDECOPI had already approved and recognized the credit. This constituted rank harassment of Messrs. Rennert and Neil, over a multi-year period, and cost Renco and Doe Run Resources hundreds of thousands of dollars in legal fees and expenses, all on the basis of bogus, trumped up charges lodged by Cormin which should have been dismissed long before they were.

III. THE TRIBUNAL HAS JURISDICTION OVER THIS DISPUTE

A. RENCO COMPLIED WITH THE TREATY’S REQUIREMENTS TO COMMENCE AN ARBITRATION

159. Peru provided its general consent for the submission of a claim to arbitration in Article 10.17 of the Treaty. Renco “consent[ed] in writing to arbitration” in its notice of arbitration pursuant to Articles 10.17(2) and 10.18(2)(a). Moreover, consistent with Article 10.18(2)(b),

³⁸⁵ **Exhibit C-210**, Opinions issued by the Superior Court of Appeals of Lima (*hereinafter* “Superior Court of Appeals Opinions”). *See also* Neil Witness Stmt. at ¶ 56.

³⁸⁶ **Exhibit C-211**, Permanent Criminal Chamber of the Superior Court of Peru Decision on Queja Excepcional No. 311-2013, January 22, 2014 (*hereinafter* “Decision No. 311-2013”).

Renco provided a written waiver of any right to initiate or continue before any administrative tribunal or court under the law of any Party, any proceeding with respect to the measures alleged to constitute a breach. In observance of its waiver and of Article 10.18(4)(a), Renco has not submitted “the same alleged breach” to an administrative tribunal or court of the host State or to any other binding dispute settlement procedure.

160. Renco has also complied with the Treaty’s temporal requirements for commencing an arbitration. Renco provided Peru with written notice of Renco’s intention to submit the claim to arbitration at least 90 days before submitting any claim to arbitration in accordance with Article 10.16(2) of the Treaty. As required by Article 10.16(3), more than six months has elapsed between the time the dispute herein crystallized and the time Renco commenced arbitration.

161. Finally, the limitations set forth in Articles 10.1(3) and 10.18(1) of the Treaty have not been triggered. This is so for the reasons set forth in the Tribunal’s Decision on Expedited Preliminary Objections, wherein the Tribunal dismissed Respondent’s preliminary objections under Articles 10.1(3) and 10.18(1).³⁸⁷ To be clear, (i) the breaches alleged by Claimant in this arbitration occurred after the Treaty entered into force; and (ii) Claimant filed its notice of arbitration within the three-year period allowed by the Treaty.

B. RENCO IS AN INVESTOR THAT MADE AN INVESTMENT IN PERU

162. Renco is an investor as defined in Article 10.28 of the Treaty, which provides that an “investor” is “a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts through concrete action to make, is making, or has made an investment in the territory of another Party.” Renco was a U.S. legal entity both before the dispute arose and on the date on which it consented to arbitration by filing its Notice of Arbitration.

163. Renco has also made an “investment” in Peru. Article 10.28 of the Treaty broadly defines “investment” as follows:

every asset that an investor owns or controls, directly or indirectly,
that has the characteristics of an investment, including [. . .]

(a) an enterprise;

³⁸⁷ Decision on Expedited Preliminary Objections, June 30, 2020, ¶ 256.

- (b) shares, stock, and other forms of equity participation in an enterprise;
- (c) bonds, debentures, other debt instruments, and loans;
- (d) futures, options, and other derivatives;
- (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
- (f) intellectual property rights;
- (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and
- (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges [...]

164. The Treaty defines investment as “every asset,” and thus, Renco’s interest in DRP, as well as the related cash flows, constitute assets protected by the Treaty. Further, DRP is an enterprise owned by Renco and therefore an investment under Article 10.28(a). Renco’s participation in DRP also constitutes an investment in the form of “shares, stock, and other forms of equity participation in an enterprise.” In addition, Renco’s “investments” include the La Oroya Complex and the Cobriza mine, which constitute property rights under Article 10.28(h).

C. THE TRIBUNAL HAS JURISDICTION OVER RENCO’S CLAIMS THAT PERU HAS BREACHED SECTION A OF THE TREATY

165. The Tribunal has jurisdiction over Renco’s claims under Chapter 10, Section A of the Treaty. Chapter 10, Section A of the Treaty provides for the protection of US investors’ investments in Peru. Specifically, Article 10.16 of the Treaty states as follows:

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

- (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim
 - (i) that the respondent has breached
 - (A) an obligation under Section A,
 - (B) an investment authorization, or
 - (C) an investment agreement; and

- (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach[.]

166. Measures taken by Peru have breached a number of Peru's obligations under Section A of the Treaty. First, Peru breached its obligation to provide Renco fair and equitable treatment. Second, Peru breached its obligation not to expropriate or nationalize Renco's investments, either directly or indirectly, through measures equivalent to expropriation or nationalization, save for a public purpose, in a non-discriminatory manner, on payment of prompt, adequate, and effective compensation, and in accordance with due process of law. Third, Peru committed a denial of justice by failing to invalidate the MEM's bogus US\$ 163 million credit claim, thus breaching its obligation under Article 10.5 of the Treaty not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world. Accordingly, the Tribunal has jurisdiction over Renco's claims.

IV. LEGAL ARGUMENT

167. Peru has breached multiple obligations under the Treaty through its unfair treatment of DRP in connection with its requests for an extension of time to complete the final PAMA project. Despite DRP's entitlement to an extension of time to complete its final PAMA project under the broad economic *force majeure* clause contained in the Stock Transfer Agreement, Peru denied multiple requests and then undermined the 2009 extension once finally granted. Peru's treatment of DRP's proposed restructuring plans also breached Peru's Treaty obligations. Thus, Peru's multiple breaches of the Treaty resulted in the unlawful expropriation of Claimant's investments in Peru.

A. PERU’S MISTREATMENT OF DRP IN CONNECTION WITH EXTENSION REQUESTS TO COMPLETE THE FINAL PAMA PROJECT, BASED ON ECONOMIC FORCE MAJEURE, AND DRP’S PROPOSED RESTRUCTURING PLANS, VIOLATED THE TREATY’S FAIR AND EQUITABLE TREATMENT STANDARD

1. The Content of the Fair and Equitable Treatment Standard under Customary International Law

168. Article 10.5 of the Treaty requires Peru to accord covered investments “treatment in accordance with customary international law, including fair and equitable treatment.”³⁸⁸ While the Treaty does not define the phrase “fair and equitable treatment,” it provides that the standard prescribes “the customary international law minimum standard of treatment of aliens,” which it identifies as comprising “all customary international law principles that protect the economic rights and interests of aliens.”³⁸⁹ In addition, the Treaty provides that the fair and equitable treatment standard “includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.”³⁹⁰

a. *Customary International Law Has Evolved to Provide for a Heightened Level of Protection Under the Fair and Equitable Treatment Standard*

169. Investment treaty case law provides a good indication of the current standards of investment protection under customary international law, which, by definition, evolves over time. Notably, the *ADF* tribunal recognized that the customary international law standard of fair and equitable treatment prescribed by Article 1105(1) of the North American Free Trade Agreement (“NAFTA”),³⁹¹ as interpreted by the NAFTA Free Trade Commission in July 2001, “must be disciplined by being based upon State practice and judicial or arbitral case law or other sources of customary or general international law.”³⁹²

³⁸⁸ **CLA-134**, Treaty, art. 10.5(1) at 10-2 to 10-3.

³⁸⁹ **CLA-134**, Treaty, art. 10.5(2) at 10-3; *id.* Annex 10-A at 10-28.

³⁹⁰ **CLA-134**, Treaty, art. 10.5(2)(a) at 10-3.

³⁹¹ **CLA-109**, North American Free Trade Agreement, U.S.-Can.-Mex., art. 1105(1), Dec. 17, 1992, 107 Stat. 2057 (*hereinafter* “NAFTA”).

³⁹² **CLA-048**, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, January 9, 2003 at ¶ 184 (*hereinafter* “*ADF Award*”). *See also* **CLA-104**, *Mondev Int’l Ltd. v. United*

170. In a seminal decision on the content of the customary international law standard of fair and equitable treatment, the NAFTA tribunal in *Waste Management* held that a host State violates this standard if its treatment of an investor or investment is “arbitrary,” “grossly unfair, unjust or idiosyncratic” or “discriminatory,” or if it involves a lack of due process leading to an outcome which offends judicial propriety:

The search here is for the Article 1105 standard of review, and it is not necessary to consider the specific results reached in the cases discussed above. But as this survey shows, despite certain differences of emphasis a general standard for Article 1105 is emerging. Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that *the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.*

Evidently *the standard is to some extent a flexible one which must be adapted to the circumstances of each case.*³⁹³

171. The *Waste Management* tribunal thus acknowledged the uncontroversial fact that “[a] basic obligation of the State . . . is to act in good faith and form, and not deliberately to set out to destroy or frustrate the investment by improper means.”³⁹⁴⁻³⁹⁵

States of America, Case No. ARB(AF)/99/2, Award, October 11, 2002 at ¶ 119 (*hereinafter* “*Mondev Award*”).

³⁹³ **CLA-140**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004 at ¶¶ 98-99 (emphasis added) (*hereinafter* “*Waste Management Award*”).

³⁹⁴ **CLA-140**, *Waste Management Award* at ¶ 138 (emphasis added). The *Waste Management* tribunal also recognized that the standard is an objective one, and “[n]either State practice, the decisions of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment or denial of justice amounting to a breach of international justice.” *See id.* at ¶ 97.

³⁹⁵ The *ADF* and *Waste Management* tribunals’ understanding of the content of the fair and equitable treatment standard was consistent with that of scholars such as Dr. F.A. Mann, who in 1982 concluded

172. The *Teco v. Guatemala* tribunal, interpreting the Dominican Republic-Central American Free Trade Agreement,³⁹⁶ reaffirmed the *Waste Management* standard when interpreting a treaty with nearly identical language to Article 10.5 of the Treaty:

The Arbitral Tribunal considers that *the minimum standard of FET under Article 10.5 of CAFTA-DR is infringed by conduct attributed to the State and harmful to the investor if the conduct is arbitrary, grossly unfair or idiosyncratic, is discriminatory or involves a lack of due process leading to an outcome which offends judicial propriety.*³⁹⁷

173. The *Teco* tribunal also underscored that fair and equitable treatment under customary international law encompasses the principle of good faith:

The Arbitral Tribunal also considers that *the minimum standard is part and parcel of the international principle of good faith.* There is no doubt in the eyes of the Arbitral Tribunal that the principle of good faith is part of customary international law as established by Article 38.1(b) of the Statute of the International Court of Justice, and that a lack of good faith on the part of the State or of one of its organs should be taken into account in order to assess whether the minimum standard was breached.³⁹⁸

174. Arbitral jurisprudence confirms that the minimum standard of treatment has evolved over time, becoming more flexible and broadening its scope of protection. For example, in analyzing NAFTA Article 1105(1), the *Mondev* tribunal held that “the content of the minimum standard today cannot be limited to the content of customary international law as recognized in the arbitral decisions of the 1920s.”³⁹⁹

that the fair and equitable treatment standard “[...] in essence, is a duty imposed by customary international law [...] which in law is unlikely to amount to more than a confirmation of the obligation to act in good faith, or to refrain from abuse or arbitrariness.” See **CLA-093**, *Koch Minerals Sarl and Koch Nitrogen International Sarl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award, 30 October 2017, ¶¶ 8.43 (citing to F.A. Mann, *The Legal Aspect of Money* (4th ed, 1982), p. 510).

³⁹⁶ **CLA-072**, Dominican Republic-Central America Free Trade Agreement, U.S.-Guat.-El Sal.-Hond.-Nicar.-Costa Rica-Dom. Rep., Aug. 5, 2004, 119 Stat. 462 (*hereinafter* “DR-CAFTA”).

³⁹⁷ **CLA-132**, *Teco* Award at ¶ 454.

³⁹⁸ **CLA-132**, *Teco* Award at ¶ 456.

³⁹⁹ **CLA-104**, *Mondev* Award at ¶ 116.

175. In light of its changing nature, the tribunal in *OIEG v. Venezuela* carefully examined the minimum standard of treatment guaranteed by customary international law in order to properly define its content vis-à-vis the fair and equitable treatment standard. The BIT at issue in *OIEG* established that a host State’s treatment “shall be considered to be fair and equitable” within the meaning of Article 3(1) if it conforms with the treatment afforded to investments of the host state’s nationals or those of a third State, and if it conforms with “the minimum standard for treatment of foreign nationals under international law.”⁴⁰⁰ The tribunal interpreted this provision to mean that fair and equitable treatment, “[a]s a general rule, shall equate to the minimum customary standard; [u]nless the investor is able to prove that the treatment guaranteed for the investments of nationals or third States is superior.”⁴⁰¹

176. In discussing the minimum customary standard, the *OIEG* tribunal stated:

The minimum customary standard has not remained frozen. It has developed significantly since its early formulations 100 years ago, driven by the establishment of Human Rights and the implementation of the Rule of Law. [...] What is relevant is not the standard as it was defined in the 20th century, but rather the standard as it exists and is accepted today—since *both Customary International Law and the standard itself are constantly evolving. And it is quite possible that currently the minimum customary standard and the FET envisaged in the treaties have converged, according to the investor with substantially equivalent levels of protection.*⁴⁰²

177. More recently, the *Rusoro v. Venezuela* tribunal interpreted Art. II.2 of the Canada-Venezuela BIT,⁴⁰³ which qualifies Venezuela’s commitment to accord fair and equitable treatment

⁴⁰⁰ **CLA-049**, Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Republic of Venezuela, Ad Article 3(1) (*hereinafter* UK-Venezuela BIT).

⁴⁰¹ **CLA-042**, *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015, ¶ 480.

⁴⁰² **CLA-042**, *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015, ¶ 489 (emphasis added); *see also*, **CLA-083**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 567; **CLA-048**, *ADF Affiliate Group v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, ¶¶ 179-81; **CLA-140**, *Waste Management Award* at ¶ 93.

⁴⁰³ Article II.2 of the Canada-Venezuela BIT provides: (“Each Contracting Party shall, in accordance with the principles of international law, accord investments or returns of investors of the other Contracting Party fair and equitable treatment and full protection and security.”)

by reference to principles of international law, as referring to the customary minimum standard.⁴⁰⁴ In order to define the scope of protection of the fair and equitable treatment standard under this interpretation, the tribunal explained:

[T]he incorporation of the CIM Standard into the definition of the FET does not provoke a major disruption in the level of protection: the CIS Standard has developed and today is indistinguishable from the FET standard and grants investors an equivalent level of protection as the latter. The whole discussion of whether Art. II.2 of the BIT incorporates or fails to incorporate the CIS Standard when defining FET has become dogmatic: there is no substantive difference in the level of protection afforded by both standards.⁴⁰⁵

178. The Tribunal should take into account the current state of customary international law and be mindful of its evolutive and ever-changing nature in interpreting the content of the fair and equitable treatment standard incorporated in the Treaty. If the Tribunal faithfully applies this analytical framework, it should conclude that the contents of the minimum customary standard and the fair and equitable treatment standard are functionally identical.

b. *Claimant Does Not Have to Prove Bad Faith in order to Establish a Violation of the Fair and Equitable Treatment Standard Under Customary International Law*

179. The tribunal in *Neer* provided one of the earliest formulations of the fair and equitable treatment standard under customary international law. Under the *Neer* formulation, a claimant seeking to establish that a host State's acts and omissions amounted to a breach of its

⁴⁰⁴ **CLA-125**, *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, ¶ 520.

⁴⁰⁵ **CLA-125**, *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, ¶ 520; *see also*, **CLA-107**, *Murphy Exploration and Production Company International v. Republic of Ecuador II*, PCA Case No. 2012-16 (formerly AA 434), Partial Final Award, 6 May 2016, ¶ 208 (“The international minimum standard and the treaty standard continue to influence each other, and, in the view of the Tribunal, these standards are increasingly aligned. This view is reflected in the *jurisprudence constante* not only of NAFTA caselaw, as discussed above, but also in the arbitral caselaw associated with bilateral investment treaties. Some tribunals have gone so far as to say that the standards are essentially the same. The Tribunal finds that there is no material difference between the customary international law standard and the FET standard under the present BIT. Certainly, the FET standard of the BIT is not lower than the international minimum standard. The Tribunal does not find it necessary to determine for the purposes of the present case whether the FET standard reflects an autonomous standard above the customary international law standard.”)

treaty rights had to show that the host State's acts and omissions amounted to "an outrage, to bad faith, to willful neglect of duty."⁴⁰⁶ As part of the evolution of the standard, however, scholars and arbitral jurisprudence alike have clarified that this is not in fact the case, and that *a claimant need not prove conduct amounting to bad faith in order to establish a breach of the fair and equitable treatment standard under customary international law*. Indeed, as scholars and arbitral panels have explained, the *Neer* tribunal "did not formulate the minimum standard of treatment after an analysis of State practice[;]"⁴⁰⁷ *Neer's* analysis does not relate to the fair and equitable treatment standard of protection; and the current standard does not equate with the very limited level of protection provided in *Neer*.⁴⁰⁸ In the words of the *Mondev* tribunal:

The Tribunal would observe, however, that the *Neer* case, and other similar cases which were cited, concerned not the treatment of foreign investment as such but the physical security of the alien. [...] Thus, there is *insufficient cause for assuming that provisions of bilateral investment treaties, and of NAFTA, [...], are confined to the Neer standard of outrageous treatment* where the issue is the treatment of foreign investment by the State itself.⁴⁰⁹

180. Numerous arbitral tribunals have accepted this view. For example, in analyzing the applicability of the *Neer* standard to determine the content of the fair and equitable treatment standard under customary international law, the *Gold Reserve* tribunal concluded that:

[P]ublic international law principles have evolved since the *Neer* case and [...] the standard today is broader than that defined in the *Neer* case on which Respondent relies. As authoritatively held, the *Neer* award "had nothing to do with the treatment of foreign investors or investments. It did

⁴⁰⁶ **CLA-138**, *USA (LF Neer) v. Mexico*, UNRIAA, Award, (15 October 1926), Vol. IV.

⁴⁰⁷ **CLA-117**, *Railroad Development Corporation v. Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012, ¶ 216.

⁴⁰⁸ **CLA-126**, S.M. Schwebel, *Is Neer far from Fair and Equitable?*, 27(4) *ARB. INT'L* 555, 555-561 (2011); **CLA-088**, J. Paulsson & G. Petrochilos, *Neer-ly Mised?*, 22(2) *ICSID REV.* 242, 242-257 (2007).

⁴⁰⁹ **CLA-104**, *Mondev* Award at ¶ 115 (emphasis added); *see also*, **CLA-101**, *Merrill & Ring Forestry L.P. v. Canada*, UNCITRAL, Award, 31 March 2010, ¶¶ 197, 204 (noting that the case was "dealing with situations concerning due process of law, denial of justice and physical mistreatment, and only marginally with matters relating to business, trade or investments... No general rule of customary international law can thus be found which applies the *Neer* standard, beyond the strict confines of personal safety, denial of justice and due process").

not address what is fair and equitable”, noting “that Neer is far from what is fair and equitable”. As held by the tribunal in *Mondev* when disregarding the Neer standard as controlling today, “both the substantive and procedural rights of the individual in international law have undergone considerable developments.”⁴¹⁰

181. In light of the above, as the *Mondev* tribunal held, “a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith” because “[t]o the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious.”⁴¹¹

182. In *Mobil v. Argentina*, the arbitral tribunal accepted the position adopted by the tribunals in *CMS*, *Azurix*, *LG&E* and *El Paso*, and confirmed the existence of a trend in ICSID arbitration awards, concluding that:

Although action in bad faith is a violation of fair and equitable treatment, a violation of the standard can be found even if there is a mere objective disregard of the rights enjoyed by the investor under the FET standard. Thus, such a violation does not require bad faith on the part of the State. This has been stated in several ICSID awards.⁴¹²

183. This view coincides with the position adopted by the most recent awards on the issue.⁴¹³ Thus, “[n]either State practice, the decisions of international tribunals nor the opinion of

⁴¹⁰ **CLA-083**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 567 (citing to **CLA-104**, *Mondev* Award at ¶ 116). This paragraph of *Mondev* has been favorably cited by the following tribunals, among others: **CLA-048**, *ADF Affiliate Group v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, ¶¶ 179-81; **CLA-140**, *Waste Management* Award at ¶ 93.

⁴¹¹ **CLA-104**, *Mondev* Award at ¶ 116.

⁴¹² **CLA-103**, *Mobil Exploration and Development Inc. Suc. Argentina & Mobil Argentina S.A. v. Republic of Argentina*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, 10 April 2013, ¶ 934.

⁴¹³ See, e.g., **CLA-122**, *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/04/14, Award 10 December 2010, ¶ 7.2.24; **CLA-074**, *El Paso Energy International Company v. Republic of Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 372; **CLA-064**, *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. India*, Decision on Jurisdiction and the Merits, 25 July 2016, ¶ 467; **CLA-082**, *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Award, 27 March 2020, ¶ 488.

commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment ... amounting to a breach of international justice.”⁴¹⁴

184. In sum, and in accordance with the weight of arbitral precedent,⁴¹⁵ this Tribunal should conclude that it can find Peru liable for violations of the fair and equitable treatment standard under customary international law, even if no bad faith is found, or even alleged.

c. *The Current Content of the Fair and Equitable Treatment Standard Under Customary International Law*

185. Recent awards have expounded on the current content of the fair and equitable treatment standard under international law. The tribunal in *Union Fenosa Gas v. Egypt* reflected on the content of the fair and equitable treatment standard, noting that the standard prohibits conduct that is “*unjust, arbitrary, unfair, discriminatory or in violation of due process, including conduct that frustrates an investor’s ‘legitimate expectations’*.”⁴¹⁶

186. In interpreting the fair and equitable treatment standard under customary international law, investment tribunals have been particularly concerned with the protection of investors’ legitimate expectations, especially when specific representations have been made by the State—and relied upon by the investor—to induce the foreign investment. Thus, the *Waste*

⁴¹⁴ **CLA-045**, *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, at ¶ 132.

⁴¹⁵ See, e.g., **CLA-104**, *Mondev Award* at ¶ 116; **CLA-131**, *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, ¶ 153: (“The Arbitral Tribunal finds that the commitment of fair and equitable treatment included in Article 4(1) of the Agreement is an expression and part of the bona fide principle recognized in international law, although bad faith from the State is not required for its violation”); **CLA-045**, *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, ¶ 132; **CLA-140**, *Waste Management Award* at ¶ 186; **CLA-068**, *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶ 80; **CLA-052**, *Azurix Corp. v. Republic of Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 372; **CLA-096**, *LG&E v. Republic of Argentina*, ICSID Case No. ARB/02/1, Liability Decision, 3 October 2006, ¶ 129; **CLA-116**, *PSEG Global Inc., and Kony Ilgin Elektrik Uretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, ¶ 299; **CLA-076**, *Enron Corporation, Ponderosa Assets, L.P. v. Republic of Argentina*, ICSID Case No. ARB/01/3, Award, 22 May 2007, ¶ 263; **CLA-128**, *Sempra Energy International v. Republic of Argentina*, ICSID Case No. ARB/02/16, Award, 28 September 2007, ¶ 341; **CLA-081**, *Glamis Gold v. United States of America*, UNCITRAL, Award, 8 June 2009, ¶¶ 616, 627.

⁴¹⁶ **CLA-135**, *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 August 2018, ¶ 9.51.

Management tribunal explained that when interpreting the fair and equitable treatment standard in accordance with customary international law, “it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the [c]laimant.”⁴¹⁷ Indeed, numerous tribunals have confirmed that a sovereign state’s revocation of specific representations made to induce a foreign investor’s investment constitutes a violation of the fair and equitable treatment standard.⁴¹⁸ As the *International Thunderbird Gaming Corp v. Mexico* tribunal explained:

Having considered recent investment case law and the good faith principle of international customary law, the concept of “legitimate expectations” relates, within the context of the NAFTA framework, to a situation where a Contracting Party’s conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages.⁴¹⁹

187. The tribunal in *Rusoro v. Venezuela* explained that the obligation to afford fair and equitable treatment binds all branches of the government and can be breached by administrative,

⁴¹⁷ **CLA-140**, *Waste Management* Award at ¶ 98.

⁴¹⁸ See **CLA-060**, Campbell MacLachlan, Laurence Shore, and Matthew Weiniger, *Treatment of Investors*, in INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES at ¶¶ 7.108-7.112 (Oxford University Press, 2007) (*hereinafter* “MacLachlan et al., *Treatment of Investors*”). See also **CLA-123**, Rudolf Dolzer & Christoph Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 146 (Oxford University Press, 2008) (*hereinafter* “Dolzer & Schreuer, PRINCIPLES”); **CLA-102**, *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, August 30, 2000 at ¶ 85 (*hereinafter* “*Metalclad* Award”); **CLA-087**, *International Thunderbird Gaming Corp. v. United Mexican States*, Ad hoc - UNCITRAL, Award, January 26, 2006 ¶ 147 (*hereinafter* “*Thunderbird* Award”); **CLA-101**, *Merrill & Ring Forestry L. P. v. Government of Canada*, ICSID Case No. UNCT/07/1, ICSID Administrated, Award, 31 March 2010, ¶ 242; **CLA-084**, *Grand River Enterprises Six Nations, Ltd. and others v. United States of America*, UNCITRAL, Award, 12 January 2011, ¶141: (“Ordinarily, reasonable or legitimate expectations of the kind protected by NAFTA are those that arise through targeted representations or assurances made explicitly or implicitly by a state party.”).

⁴¹⁹ **CLA-087**, *Thunderbird* Award at ¶ 147 (emphasis added).

judicial, or legislative acts.⁴²⁰ In addition to that, it held that the tribunal must analyze the following factors:⁴²¹

- Whether there has been harassment, coercion, abuse of power or other bad faith conduct by the host State.
- Whether the State had made specific representations to the investor, prior to the investment.
- Whether the State’s actions or omissions can be labelled as arbitrary, discriminatory or inconsistent.
- Whether the State has respected the principles of due process and transparency when adopting the offending measures.
- Whether the State has failed to offer a stable and predictable legal framework, breaching the investor’s legitimate expectations.

188. In summary therefore, the fair and equitable treatment standard under customary international law:

- Prohibits Peru from acting in a manner that is “*arbitrary, grossly unfair, unjust or idiosyncratic*” or “discriminatory.”⁴²²
- Requires Peru “to act in good faith and form, and not deliberately to set out to destroy or frustrate the investment by improper means.”⁴²³
- Obligates Peru to “honour those [reasonable and justifiable] expectations” that the Renco Consortium relied upon in making the investment.⁴²⁴
- Prohibits Peru from acting in a manner that “involves a lack of due process leading to an outcome which offends judicial propriety.”⁴²⁵

⁴²⁰ **CLA-125**, *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, ¶ 523.

⁴²¹ **CLA-125**, *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, ¶ 524.

⁴²² **CLA-087**, *Thunderbird Award* at ¶ 147 (emphasis added).

⁴²³ **CLA-140**, *Waste Management Award* at ¶ 138 (emphasis added).

⁴²⁴ **CLA-087**, *Thunderbird Award* at ¶ 147 (emphasis added).

⁴²⁵ **CLA-140**, *Waste Management Award* at ¶ 98; **CLA-132**, *Teco Award* at ¶ 456.

2. Peru's Mistreatment of DRP In Connection with the Economic *Force Majeure* Extension Requests and Proposed Restructuring Plans Violated Article 10.5's Guarantees of Fair and Equitable Treatment

189. Peru violated the fair and equitable treatment standard prescribed by Article 10.5 of the Treaty by engaging in unfair conduct against DRP. This included, but was not limited to (i) extracting key concessions from DRP as a pre-condition to granting an extension based upon economic *force majeure* as provided in the Stock Transfer Agreement; and (ii) failing to grant DRP an effective extension to finish one of the three sub-projects comprising its final PAMA project. DRP had been forced to suspend its final PAMA project in December 2008 because of the steep decline in world metals prices brought about by the global financial crisis.⁴²⁶ This suspension occurred despite the fact that DRP had already spent more than US\$ 313 million on its PAMA projects and had completed over 50% of the last sub-project of its only remaining PAMA project.⁴²⁷ In addition, the MEM's willful undermining of the 30-month extension that the Peruvian Congress granted constituted grossly unfair and inequitable treatment that prevented DRP from operating the Complex and destroyed the value of Renco's indirect shareholding in the company.

190. As discussed above, Article 10.5 of the Treaty obligates Peru to accord "fair and equitable treatment" to Renco's investments. This obligation undoubtedly (1) prohibits Peru from acting in a manner that is "*arbitrary, grossly unfair, unjust or idiosyncratic*" or "*discriminatory*;"⁴²⁸ (2) requires Peru "*to act in good faith and form, and not deliberately to set out to destroy or frustrate the investment by improper means*;"⁴²⁹ (3) obligates Peru to "*honour those [reasonable and justifiable] expectations*" that an investor relies upon when deciding to make an investment;⁴³⁰ and (4) prohibits Peru from acting in a manner that "*involves a lack of due process leading to an outcome which offends judicial propriety*."⁴³¹ As demonstrated below, given

⁴²⁶ See Section II.J.I.

⁴²⁷ See **Exhibit C-141**, October 2009 PowerPoint Presentation, slides 19, 20.

⁴²⁸ **CLA-087**, *Thunderbird*, Award at ¶147 (emphasis added).

⁴²⁹ **CLA-140**, *Waste Management* Award at ¶138 (emphasis added).

⁴³⁰ **CLA-087**, *Thunderbird* Award at ¶147 (emphasis added).

⁴³¹ **CLA-140**, *Waste Management* Award at ¶ 98; **CLA-132**, *Teco* Award at ¶ 456.

the facts at issue in this case, Peru violated the Treaty's fair and equitable treatment standard through its handling of DRP's PAMA extension.

a. *The MEM's Mistreatment of DRP in Connection With the Extension Requests and Proposed Restructuring Plans Was Grossly Unfair and Arbitrary*

191. As already noted, a host State's treatment of an investor or investment violates the customary international law standard of fair and equitable treatment prescribed by Article 10.5 of the Treaty if it is "grossly unfair" or "arbitrary."⁴³²

192. Here, Peru engaged in grossly unfair and arbitrary treatment of DRP in connection with DRP's requests for an extension of time to complete one of the three sub-projects comprising its final PAMA project. These requests were all based upon economic *force majeure* events brought on by the world financial crisis which began in late 2008.⁴³³ As explained above, the Peruvian Government denied DRP's extension requests starting in March 2009 and then conditioned an extension on DRP, DRCL and Doe Run Holdings signing an MOU requiring that DRP capitalize US\$ 156 million of debt to DRCL and that DRCL pledge 100% of its shares in DRP.⁴³⁴ While DRP and its affiliates signed the MOU with Peru and, in good faith, stood ready to perform, the Peruvian Government refused to provide details regarding the extension and failed to provide a copy of the MOU executed by the Government.⁴³⁵ At the same time, Peruvian officials stated publicly that DRP would receive only a three-month extension (the equivalent of no extension), while other officials stated that DRP would receive no extension at all, and threatened to shut the company down.⁴³⁶

193. As if this were not enough, with the Complex running at a severely diminished capacity due to the crash in metal prices, and then forced to shut down entirely, when Renco

⁴³² **CLA-140**, *Waste Management Award* at ¶ 98; **CLA-132**, *Teco Award* at ¶ 454.

⁴³³ **Exhibit C-007**, Doe Run Peru Request to Ministry of Energy & Mines for Extension, Items 4 and 7 at 1-2; **Exhibit C-111**, MOU, art. 1.4 at 1. *See also* Neil Witness Stmt. at ¶ 39; Sadlowski Witness Stmt. at ¶ 31; Partelpoeg Expert Report, § 7.6, at 51-57.

⁴³⁴ **Exhibit C-111**, MOU, art. 3.2 at 2-3.

⁴³⁵ *See* ¶¶ 173-174; Sadlowski Witness Stmt. at ¶ 35.

⁴³⁶ **Exhibit C-067**, Apr. 4, 2009 EL COMERCIO; **Exhibit C-068**, "May 20, 2009 MINES AND COMMUNITIES.

offered US\$ 31 million in funding, the Peruvian Government restricted use of the funds to the PAMA work only and refused to permit any part to be used as working capital.⁴³⁷ At the same time, with DRP on its heels, President Garcia issued an Emergency Decree (repealed a year later) targeting DRP as it restricted related-entity credit claims in the INDECOPI Bankruptcy Proceedings.⁴³⁸ The Government then approached DRP's workers and offered them the power to manage DRP, but the workers sided with DRP who had been managing the facility for the previous twelve years.⁴³⁹

194. After numerous proposals and rejections,⁴⁴⁰ in July 2009, DRP submitted to the Peruvian Government yet another detailed and comprehensive request for a 30-month extension of time to finish its Copper Circuit sub-project, consisting of the construction of a sulfuric acid plant for the Copper Circuit and the modernization of the copper smelter, on the ground that the steep decline in world metals prices brought about by the global financial crisis constituted an event of *force majeure* under Clause 15 of the Stock Transfer Agreement and Peruvian law.⁴⁴¹

195. DRP's *force majeure* extension request was based on the recommendations of two international project management companies.⁴⁴² Moreover, DRP submitted with its extension request a report by Ernst & Young opining that the company could cover its working capital needs and finish the work on the Copper Circuit sub-project if it obtained financing in the amount of US\$ 135 million for 2009 and US\$ 52 million for 2010.⁴⁴³

196. Though Peru had initially ignored, without refuting, DRP's clear entitlement to an extension of time to finish its Copper circuit sub-project under the doctrine of *force majeure* as a result of the 2008 financial crisis, it ultimately elected to form a technical commission to study the

⁴³⁷ **Exhibit C-111**, MOU, art. 3.2 at 2-3.

⁴³⁸ **Exhibit C-112**, Emergency Decree No. 061-2009.

⁴³⁹ **Exhibit C-072**, June 2009 RPP.

⁴⁴⁰ See e.g., **Exhibit C-100**, July 2, 2009 Letter; **Exhibit C-055**, Doe Run Peru 2009 Extension Request; **Exhibit C-101**, July 6, 2009 Letter.

⁴⁴¹ **Exhibit C-055**, Doe Run Peru 2009 Extension Request; **Exhibit C-105**, Stock Transfer Agreement, Clause 15 at 61-62.

⁴⁴² The two international project management companies were Global Resources Solutions of Australia and CH2M HILL of the U.S. **Exhibit C-055**, Doe Run Peru 2009 Extension Request at 5, 10.

⁴⁴³ **Exhibit C-055**, Doe Run Peru 2009 Extension Request, at 12; *id.* at Annex 10.

issue. In its report dated September 12, 2009, the multi-sectorial commission concluded that DRP would need 20 months to finish the construction phase of the project, and recommended an additional extension so that DRP would have time to obtain the necessary financing.⁴⁴⁴ Confirming the legitimacy of DRP's long-standing extension requests, on September 24, 2009, Congress granted DRP a 30-month extension consisting of (1) a ten-month period to obtain the financing necessary for it to finish the Copper Circuit sub-project and to cover its working capital needs and (2) an additional 20-month period to complete the construction phase of the project.⁴⁴⁵

197. But the MEM acted quickly to undermine the extension, issuing implementing regulations that made it all but impossible for DRP to obtain the necessary financing by, among other things, requiring it to divert 100% of its sales revenues into a trust account controlled by the MEM.⁴⁴⁶ The MEM's conduct prevented DRP from operating the Complex and destroyed the value of Renco's indirect shareholding in the company.

198. Importantly, the Peruvian Government itself later recognized that the trust account requirement imposed by the MEM improperly nullified DRP's rights, and on June 11, 2010, lowered the trust account to 20% of DRP's revenues (not 100%) into the trust account.⁴⁴⁷ But by then, it was too little too late for DRP to obtain financing and recommence operations by the July 26, 2010 deadline, less than two months away. In view of the tight credit markets at the time, this was a woefully inadequate amount of time for DRP to obtain the approximately US\$ 187 million in financing that it needed.⁴⁴⁸

199. The following facts and circumstances make clear that the MEM's undermining of the 30-month extension granted by Congress for DRP to finish the Copper Circuit sub-project,

⁴⁴⁴ **Exhibit C-043**, 2009 Technical Commission Report.

⁴⁴⁵ **Exhibit C-077**, Law No. 29410, art. 2 ("The term for the financing and culmination of the 'Sulfuric Acid Plant and Modification of the Copper Circuit' Project at the Metallurgical Complex of La Oroya is hereby extended, as per the directives issued by the La Oroya Technical Commission, created by Supreme Resolution No. 209-2009-PCM. Thus, a non-extendable maximum term of ten (10) months for the financing of the project and the start-up of the metallurgical complex and an additional non-extendable term of twenty (20) months for the construction and start-up of the project are hereby granted.").

⁴⁴⁶ **Exhibit C-078**, Decree No. 075-2009.

⁴⁴⁷ **Exhibit C-082**, Supreme Decree No. 032-2010-EM.

⁴⁴⁸ Sadlowski Witness Stmt. at ¶¶ 59-61.

described above, constituted grossly unfair and arbitrary treatment amounting to a breach of Article 10.5 of the Treaty:

- (i) Peru's own environmental consultant recognized from the outset that achieving compliance with Peru's *existing* SO₂ standards would require more than the ten-year period granted by the MEM.⁴⁴⁹
- (ii) DRP's undertaking to improve the Complex's environmental performance and the health of the local population was radically transformed during the period from 1997 to 2009, with the adoption of major design and engineering changes, the addition of numerous new environmental and public health projects, and the imposition on DRP of more stringent environmental standards.⁴⁵⁰
- (iii) DRP's actual investments in its PAMA projects during the period from 1997 to 2009 exceeded the required investment of approximately US\$ 107 million by more than US\$ 200 million.⁴⁵¹
- (iv) The 2008 global financial crisis and the resulting steep decline in world metals prices constituted an "extraordinary economic alteration" excusing DRP's inability to finish the Copper Circuit sub-project by October 2009 and requiring a reasonable and effective extension.⁴⁵²
- (v) Peru sought to extract concessions from DRP as conditions to granting the PAMA extension to which DRP was clearly entitled under the economic *force majeure* clause in the Stock Transfer Agreement.⁴⁵³
- (vi) The MEM violated Peruvian law when it issued implementing regulations that made it virtually impossible for DRP to obtain the

⁴⁴⁹ **Exhibit C-108**, Knight Piésold Report for Centromin at 33.

⁴⁵⁰ *See* Section II.G-I.

⁴⁵¹ **Exhibit C-044**, MEM Report No. 1237-99 at 3; **Exhibit C-061**, Order No. 157-2006.

⁴⁵² **Exhibit C-212**, "Three Top Economists Agree 2009 Worst Financial Crisis Since Great Depression; Risks Increase if Right Steps are Taken, Reuters, February 27, 2009 (*hereinafter* "February 27, 2009 Reuters"); Partelpoeg Expert Report, § 7.6, at 51-57.

⁴⁵³ *See e.g.*, **Exhibit C-111**, MOU.

necessary financing by requiring it to divert 100% of its sales revenues into a trust account.

- (vii) Peru's unfair treatment of DRP continued with the MEM's insistence on an unreasonably short period to foreclose on DRP's proposed guarantee.

200. For the sake of clarity and convenience, Doe Run Peru now summarizes the evidence relating to each of these points in sub-sections (i) through (vii).

- (i) Peru's Own Environmental Consultant Recognized that Achieving Compliance with Peru's Existing SO₂ Standards Would Take More Than Ten Years

201. In its September 1996 report, Knight Piésold (a U.S. environmental consulting group hired by Peru's Special Privatization Committee to provide an independent evaluation of the Complex) concluded that compliance with the SO₂ standards issued by Peru in 1996 "may be unrealistic for an older facility such as La Oroya" and "cannot be [achieved] except by multiple process changes and/or modifications to the smelter. *Such changes or modifications will be required over a 10-year period.*"⁴⁵⁴ Importantly, the Copper Circuit sub-project for which DRP requested an extension starting in March 2009 involved precisely the type of "process changes and/or modifications to the smelter" that Knight Piésold concluded would be necessary for the Complex to achieve compliance with Peru's SO₂ standards. In particular, this sub-project consisted of the construction of an entirely new sulfuric acid plant for the Copper Circuit and the modernization of the copper smelter, and its principal purpose was to reduce the Complex's SO₂ emissions.⁴⁵⁵ Moreover, even Knight Piésold significantly *underestimated* the extent of the technological changes that DRP would be required to implement in order to achieve compliance with Peru's SO₂ standards, because in 2008 Peru imposed far more stringent SO₂ standards, lowering the ECA daily value for SO₂ from 365 µg/m³ to 80 µg/m³.⁴⁵⁶

⁴⁵⁴ **Exhibit C-108**, Knight Piésold Report for Centromin at 33 (emphasis added).

⁴⁵⁵ **Exhibit C-055**, Doe Run Peru 2009 Extension Request, art. 1.2 at 7; *see also* Partelpoeg Expert Report, § 6.3, at 24-25.

⁴⁵⁶ **Exhibit C-206**, Resolution No. 205-2013.

(ii) **DRP's Undertaking to Improve the Environmental Performance of the Complex and the Health of the Local Population Was Radically Transformed During the Period from 1997 to 2009**

202. The radical transformation and expansion of DRP's undertaking to improve the Complex's environmental performance and the health of the local population contributes to the grossly unfair and arbitrary character of Peru's failure to grant DRP an effective extension of time to finish its final PAMA project. Notably, during the five-year period after DRP's acquisition of the Complex, the MEM approved major design and engineering changes to DRP's PAMA projects, increasing its investment commitment by 62% from US\$ 107.6 million to US\$ 174.0 million.⁴⁵⁷ In addition, DRP undertook numerous complementary environmental and public health projects outside the scope of its PAMA in order to reduce emissions and improve the health of the local population.⁴⁵⁸ For example, based on the conclusions of a human health risks study that it commissioned in 2003, DRP implemented a series of projects to reduce stack and fugitive emissions of lead.⁴⁵⁹ DRP also established a Hygiene and Environmental Health Department and spent more than US\$ 30 million on social and public health projects during the period from 1998 to 2010.⁴⁶⁰

203. On top of all these changes, the MEM significantly expanded the cost and complexity of DRP's environmental obligations in May 2006, admitting that the original PAMA that it had approved in January 1997 "did not contemplate the remediation of some environmental problems, which in some cases were significant, as they were not completely or adequately identified or characterized."⁴⁶¹ For example, the MEM required DRP to undertake numerous new

⁴⁵⁷ **Exhibit C-044**, MEM Report No. 1237-99 at 3; **C-061**, Order No. 157-2006 at 5.

⁴⁵⁸ **Exhibit C-110**, Memorandum No. 732-2002 at 3.

⁴⁵⁹ **Exhibit C-050**, Detailed Request for a PAMA Extension at 8-9, 64-69; **Exhibit C-059**, Report No. 118-2006 at 35-44; **Exhibit C-051**, 2006 DRP Report to Our Communities at 30. *See also* Neil Witness Stmt. at ¶ 10 (noting that following the study "[Doe Run Peru] began a series of projects outside the scope of the PAMA to immediately reduce fugitive and stack lead emissions from the facility. These projects included paving roads inside the smelter to prevent dusts from being picked up by traffic, carried by winds, and re-deposited, and also installing bag-houses and new ventilation systems.").

⁴⁶⁰ **Exhibit C-137**, 2011 DRP Report to Our Communities at 24.

⁴⁶¹ **Exhibit C-059**, Report No. 118-2006 at 6.

projects to reduce stack and fugitive emissions of particulate matter. At the same time, the MEM granted DRP an extension of only two years and ten months to complete the expanded sulfuric acid plants project, even though the technical consultant hired by the MEM to evaluate DRP's December 2005 extension request considered that five years was a reasonable estimate, and any less was "very aggressive."⁴⁶² Moreover, the MEM subjected DRP to more stringent environmental standards than other companies, requiring it to meet a 0.5 µg/m³ annual lead emission standard by January 1, 2007, rather than the applicable transitory standard of 1.0 µg/m³; and imposing environmental standards related to bismuth, cadmium, antimony and other metals that did not exist under Peruvian law.⁴⁶³⁻⁴⁶⁴

204. DRP's efforts achieved remarkable results as compared with the situation that it inherited from Centromin in 1997. For example, by the end of 2008, DRP had reduced emissions of particulate matter from the main stack by 78% as compared with 1997 levels; it had also reduced emissions of lead and arsenic from the main stack by 68% and 93%, respectively.⁴⁶⁵ DRP had even reduced SO₂ emissions by 52%, despite the fact that it had not yet completed the sulfuric acid plant for the Copper Circuit.⁴⁶⁶ These reductions in emissions resulted in dramatic air quality improvements in the areas around the Complex. DRP's actions also dramatically reduced the release of effluents into the rivers around the Complex.

(iii) DRP's Actual Investments in Its PAMA Projects Exceeded the Required Investment by Over US\$ 200 Million

205. Peru's woeful underestimate of the total cost of DRP's PAMA projects also contributes to the gross unfairness of its failure to grant the company an effective extension of time to finish its final PAMA project. On October 16, 1997 (only one week before the execution of the Stock Transfer Agreement), the MEM issued a resolution officially allocating PAMA projects to

⁴⁶² Partelpoeg Expert Report, §§ 2, 7.4.3, at 44-47.

⁴⁶³ **Exhibit C-059**, Report No. 118-2006 at 20.

⁴⁶⁴ *See* Section II.H.2.

⁴⁶⁵ **Exhibit C-055**, Doe Run Peru 2009 Extension Request at 76.

⁴⁶⁶ **Exhibit C-055**, Doe Run Peru 2009 Extension Request at 76.

Metaloroya with a total estimated cost of US\$ 107 million.⁴⁶⁷ By December 2008, DRP had spent over US\$ 300 million on its PAMA projects and related environmental projects, and it estimated that it would need to spend an additional amount of US\$ 120.6 million to finish the last project.⁴⁶⁸ The total amount invested in the PAMA projects has thus exceeded Peru's original estimate by approximately US\$ 200 million, an amount almost three times more.⁴⁶⁹ Given the exponential increase in the cost of DRP's PAMA projects, and DRP's willingness to dedicate even significantly more financial resources, it was grossly unfair for Peru not to provide the company with an effective extension of time to finish its last project.

- (iv) The Global Financial Crisis and Steep Decline in World Metals Prices Constituted an "Extraordinary Economic Alteration" Excusing DRP's Inability to Finish the Copper Circuit Sub-Project

206. The fact that Peru ignored, without refuting, DRP's entitlement to an extension of time to finish its Copper Circuit sub-project under the doctrine of *force majeure* as a result of the 2008 financial crisis also demonstrates the gross unfairness and arbitrariness of Peru's failure to grant the company an effective extension. Significantly, Centromin and DRP agreed in Clause 15 of the Stock Transfer Agreement that either party's non-performance of its obligations under the agreement would be excused if the performance was "delayed, hindered or obstructed by . . . extraordinary economic alterations."

207. Peru, too, was contractually and legally bound to allow for flexibility in DRP's implementation of its PAMA in the event of "extraordinary economic alterations." First, Peru agreed in Clause 2.1 of the Guaranty Agreement not only to perform the "obligations" undertaken by Centromin in the Stock Transfer Agreement, but also to honor Centromin's "representations, securities [and] guaranties." Accordingly, the Guaranty Agreement bound Peru to honor the broad *force majeure* clause contained in the Stock Transfer Agreement. Second, Article 48 of Peru's Regulations for Environmental Protection in Mining and Metallurgy, as amended, expressly

⁴⁶⁷ **Exhibit C-089**, Resolution No. 334-97. *See also* **Exhibit C-109**, September 19, 1997 Letter at 9-12; **Exhibit C-105**, Stock Transfer Agreement, Clause 5, preamble at 17.

⁴⁶⁸ **Exhibit C-055**, Doe Run Peru 2009 Extension Request at 4, 5, 8, 110, 114.

⁴⁶⁹ **Exhibit C-055**, Doe Run Peru 2009 Extension Request at 4, 5.

provides that a company's non-compliance with its PAMA (including its failure to complete its PAMA by the end of its PAMA period) cannot result in any sanctions "in cases of fortuitous circumstances or *force majeure*."⁴⁷⁰

208. The global financial crisis of 2008 and the resulting steep decline in world metals prices excused DRP's inability to finish the Copper Circuit sub-project by October 2009 because: (1) these events clearly and unmistakably constituted an "extraordinary economic alteration" under the Stock Transfer Agreement and a *force majeure* circumstance under Peruvian law; and (2) they severely impacted DRP's ability to finish the Copper Circuit sub-project by causing its revenues to collapse from US\$ 1.46 billion in 2007 to US\$ 471.8 million in 2009.⁴⁷¹

209. Many economists consider the global financial crisis of 2008 to have been the worst economic crisis since the Great Depression of the 1930s.⁴⁷² Mining experts concur. As Dr. Partelpoeg explains, "the price of copper and other metals collapsed in conjunction with the global economic crisis."⁴⁷³ And, "concurrently with the decline in metal prices, the global financial sector was reeling with troubles of their own—financing of projects came to a near standstill. Financing of projects in the mining and metals industry were severely impacted because of the decline in metal prices" and the impacts were felt "throughout the industry."⁴⁷⁴ The collapse of DRP's revenues in 2008 made it impossible for the company to pay for the remaining work on its Copper Circuit sub-project. As of December 2008, when it suspended its work on this project, DRP estimated that it still needed to spend US\$ 120.6 million in order to finish the project. Moreover, in February 2009, DRP's lenders, themselves reeling from the financial crisis,⁴⁷⁵ informed DRP that they would not extend its US\$ 75 million revolving line of credit that provided

⁴⁷⁰ **Exhibit C-215**, Decree No. 022-2002 at art. 1 at 1-2 (amending Article 48 of Supreme Decree No. 016-93-EM).

⁴⁷¹ **Exhibit C-213**, Doe Run Peru S.R.L. Financial Statements as of October 31, 2008 and 2007, July 6, 2009 (*hereinafter* "DRP 2007-2008 Financial Statements") at 7; **Exhibit C-214**, Doe Run Peru S.R.L. Financial Statements as of October 31, 2010 and 2009, January 30, 2012 (*hereinafter* "DRP 2009-2010 Financial Statements") at 7.

⁴⁷² **Exhibit C-212**, February 27, 2009 REUTERS.

⁴⁷³ Partelpoeg Expert Report, § 7.6.1, at 51.

⁴⁷⁴ Partelpoeg Expert Report, § 7.6.1, at 51.

⁴⁷⁵ Partelpoeg Expert Report, § 7.6.1, at 51.

day-to-day liquidity for its ongoing operations, unless it obtained a formal extension of its October 2009 deadline to finish the Copper Circuit sub-project. Under these circumstances, Peru could not merely stand by while DRP lost its ability to operate the Complex. Instead, it had an obligation under the doctrine of *force majeure* to grant DRP an effective extension of time to finish the project.

- (v) Peru Sought to Extract Concessions from DRP as Conditions to Granting the PAMA Extension to Which DRP Was Clearly Entitled under the Economic *Force Majeure* Clause in the Stock Transfer Agreement

210. Peru never disputed that the 2008 world financial crisis constituted an event of economic *force majeure* under the Stock Transfer Agreement. Yet, instead of working collaboratively with DRP, it adopted an aggressive and confrontational stance by both refusing to grant DRP's extension requests and seeking to extract concessions from DRP before it would agree to the extension to which DRP was entitled.

211. On March 5, 2009, after the impact of the world financial crisis was already taking its toll, DRP advised the MEM that it needed an extension as concentrate suppliers were going to freeze shipments and the banks required that DRP obtain a formal extension.⁴⁷⁶ The MEM refused.⁴⁷⁷ When it did come to the table, it sought a number of concessions from DRP. For example, in late March 2009, the Government and DRP negotiated an MOU (which the Government never signed), but which required that DRP capitalize its Intercompany Note and that DRCL pledge all of its shares in DRP.⁴⁷⁸

212. The Government continued to demand that DRP capitalize its debt and DRCL pledge all its shares, even after making statements that DRP would only be granted a three month

⁴⁷⁶ **Exhibit C-007**, Doe Run Peru Request to Ministry of Energy & Mines for Extension, Items 4 and 7 at 1-2.

⁴⁷⁷ Sadlowski Witness Stmt. at ¶ 31.

⁴⁷⁸ **Exhibit C-111**, MOU, art. 3.2 at 2-3.

extension, and refusing to provide a signed MOU or provide a draft of or any details regarding the extension.⁴⁷⁹ In May 2009, the Government publicly confirmed that no extension was planned.⁴⁸⁰

213. Peru's persistent refusals to grant the promised extension along with its unfounded demands for concessions caused great damage to DRP's business and prohibited it from obtaining a new revolving loan or making payment to its suppliers.⁴⁸¹

(vi) By Imposing the Trust Account Requirement *inter alia*, the MEM Violated Peruvian Law

214. In addition to its demands for concessions, the actions taken by the MEM to undermine the extension that Congress finally granted—including the imposition of an extremely onerous trust account requirement—constitutes cumulative and glaring evidence of the grossly unfair and arbitrary character of the Peruvian Government's failure to grant DRP an effective extension. The MEM's decree required DRP to channel 100% of its revenues into a trust account to be used to pay for the completion of the Copper Circuit sub-project.⁴⁸² This trust account requirement made it impossible for DRP to obtain the financing necessary for it to finish the project and to cover its working capital needs, because DRP would be left without any funds from which to repay its creditors.⁴⁸³

215. By undermining the extension granted by Congress, the MEM violated Peruvian law, because the executive exceeded its powers and breached the principle of legal hierarchy, a basic principle under Peruvian law contemplated by the Constitution.⁴⁸⁴ As the Peruvian Constitutional Tribunal explained: "In order for a higher ranking instrument to achieve its purpose, it is crucial that it cannot be distorted by the lower-ranking instrument that regulates it."⁴⁸⁵

⁴⁷⁹ See Section II.J.

⁴⁸⁰ **Exhibit C-068**, May 20, 2009 MINES AND COMMUNITIES.

⁴⁸¹ See Section II.J.

⁴⁸² **Exhibit C-078**, Decree No. 075-2009, § 4.2 at 2.

⁴⁸³ Sadlowski Witness Stmt. at ¶ 46. See also Partelpoeg Expert Report, § 7.6.3, at 55-57.

⁴⁸⁴ **Exhibit C-216**, Political Constitution of Peru (*hereinafter* "Peru Const."), Art. 51 ("The constitution prevails over any other legal rule, the laws over level provisions, and so on successively. Publication is essential to the enforcement of any legal rule of the State.").

⁴⁸⁵ **Exhibit C-217**, Peruvian Constitutional Tribunal Exp. No. 047-2004-AI/TC, Decision, April 24, 2006 (*hereinafter* "Peruvian Const. Trib. Exp. No. 047-2004") at ¶ 59.

Pursuant to this principle, a lower-ranking instrument that conflicts with a higher-ranking instrument shall not be applied.⁴⁸⁶

216. Importantly, the Peruvian Government itself later recognized that the trust account requirement imposed by the MEM improperly nullified DRP's rights, and reduced the trust requirement to 20% of DRP's revenues (not 100%), in theory allowing DRP to repay its creditors from its remaining revenues.⁴⁸⁷ However, the Government still required DRP to obtain financing and restart in less than two months. This was not nearly enough to obtain the approximately US\$ 187 million needed, in view of the tight credit markets at the time.⁴⁸⁸

(vii) Peru's Unfair Treatment of DRP Continued with the MEM's Insistence on an Unreasonably Short Period to Foreclose on DRP's Proposed Asset Guarantees

217. Another example of Peru's continued unfair treatment of DRP relates to asset guarantees DRP proposed to secure the completion of the final PAMA project. On March 24, 2010, DRP proposed to pledge certain assets (valued at US\$ 250 million) to the MEM as security to complete the PAMA. These guarantees would have covered over 100% of the cost of the project estimated at US\$ 163 million.⁴⁸⁹ The MEM accepted DRP's proposed asset guarantees on April 21, 2010.⁴⁹⁰ Thereafter, DRP and the MEM negotiated a Security Agreement.⁴⁹¹ The MEM, however, insisted that it be able to foreclose on the guarantees if DRP did not obtain financing and restart operations by July 27, 2010, less than two months away.⁴⁹²

⁴⁸⁶ **Exhibit C-218**, Peruvian Supreme Court Case. No. 472-2008, June 5, 2008 (*hereinafter* "Case No. 472-2008"). *See also*, Peru Const., art. 138 (directing judges that "[i]n any proceedings, when incompatibility exists between a constitutional and a legal rule, the judges decide for the first one. Likewise, they choose the legal rule over any other rule of lower rank.").

⁴⁸⁷ **Exhibit C-082**, Supreme Decree No. 032-2010.

⁴⁸⁸ Neil Witness Stmt. at ¶ 53; Sadlowski Witness Stmt. at ¶¶ 46-48.

⁴⁸⁹ **Exhibit C-219**, "Esquema de Asignación de Garantías Entre las Partes Interesadas" dated March 24, 2010 (*hereinafter* "Mar. 24, 2010 Assignment of Guarantees"); Sadlowski Witness Stmt. at ¶ 54.

⁴⁹⁰ **Exhibit C-220**, The Ministry of Energy & Mines "Informe No. 228-2010-the Ministry of Energy & Mines-DGM-DTM" dated April 21, 2010 (*hereinafter* "Report No. 228-2010"); Sadlowski Witness Stmt. at ¶ 54.

⁴⁹¹ **Exhibit C-080**, Real and Personal Property Security Agreement (*hereinafter* "Draft Guaranty")

⁴⁹² **Exhibit C-080**, Draft Guaranty at 2-3.

218. Because DRP already was under the onerous terms of the Supreme Decree, DRP requested that the MEM's right to foreclose on the guarantees be limited to DRP's failure to complete the final PAMA project within 20-months as required by the Extension Law.⁴⁹³ The MEM rejected this request based on the language of Extension Law.⁴⁹⁴ Article 3 provides:

The company Doe Run Perú S.R.L. shall submit the relevant guarantees of full compliance with the terms, commitments, and investments referred to in the above article, *subject to such terms and conditions as may be established by the Ministry of Energy and Mines.*⁴⁹⁵

219. However, Section 5.2 of the Supreme Decree provides:

The guarantees shall remain in full force and effect until full and thorough discharge of the duties of Doe Run Perú S.R.L. with regard to Project construction and startup and until the issuance of the relevant consent by the mining authority.⁴⁹⁶

220. Thus, the Supreme Decree itself provides that the guarantees would remain in effect until the PAMA project was complete and signed off on by the MEM. This is the essence of grossly unfair and inequitable conduct by the Peruvian Government in connection with Renco's investments.

221. While this was happening, Peru was continuing its grossly unfair and arbitrary treatment of DRP in the bankruptcy proceedings.

⁴⁹³ **Exhibit C-080**, Draft Guaranty; Sadlowski Witness Stmt. ¶ 47.

⁴⁹⁴ **Exhibit C-081**, Letter from V. Manuel Vargas (Ministry of Energy and Mines) to J. Carlos Huyhua (Doe Run Peru), May 31, 2010 (*hereinafter* "May 31, 2010 Letter").

⁴⁹⁵ **Exhibit C-077**, Law No. 29410, art. 3 (emphasis added).

⁴⁹⁶ **Exhibit C-078**, Decree No. 075-2009, §5.2.

(viii) Peru's Unfair Treatment of DRP Continued with Its Refusal to Approve DRP's Restructuring Plans

222. After DRP was forced by MEM into the INDECOPI Bankruptcy Proceedings, and the MEM improperly asserted the above-referenced US\$ 163 million credit claim,⁴⁹⁷ Peru continued its unfair treatment of DRP by opposing DRP's restructuring plan.

223. DRP submitted several restructuring plans during early 2012 with the final amended restructuring plan submitted on May 14, 2012.⁴⁹⁸ Despite arranging US\$ 200 million in financing (US\$ 135 million from Glencore and US\$ 65 million from Renco), and submitting plans that would allow for the continuation of the business, ensure completion of the final PAMA project, and ensure that all creditors are paid, the MEM aggressively opposed every plan put forward by DRP, while DRP remained flexible and cooperative in connection with the MEM's concerns.⁴⁹⁹

224. The MEM opposed any plan submitted by DRP and demanded as a pre-condition to supporting any plan that DRP: (i) agree not to operate the Copper Circuit while it completed the remainder of the final PAMA project; (ii) immediately comply with all environmental standards in force at the time, including the 80 $\mu\text{g}/\text{m}^3$ SO₂ standard, which, as of January 1, 2014, would be lowered to 20 $\mu\text{g}/\text{m}^3$; and (iii) agree to drop its challenge to the MEM's bogus US\$ 163 million credit claim.⁵⁰⁰ These demands were patently unfair and inconsistent with the Stock Transfer Agreement, the extension laws of 2004 and 2009, and the practice of the parties over the previous decade whereby DRP used revenues generated by operations as both working capital and to fund the PAMA projects. The requirement that DRP must immediately comply with all existing environmental standards flies in the face of the Stock Transfer Agreement and the PAMA, which contemplated the Complex would be brought into compliance with standards in place in 1997, the time of execution of the Stock Purchase Agreement.⁵⁰¹ Thereafter, DRP would have been given

⁴⁹⁷ **Exhibit C-113**, 2010 MEM Request to INDECOPI. *See also* Sadlowski Witness Stmt. at ¶¶ 69-71.

⁴⁹⁸ **Exhibit C-114**, 2012 DRP Restructuring Plan.

⁴⁹⁹ *See* Section II.K.2.

⁵⁰⁰ *See* Section II.K.2; **Exhibit C-115**, June 26, 2012 Letter.

⁵⁰¹ *See* para. 154.

several years to comply with a standards in effect at the end of the time for completion of the PAMA projects.⁵⁰²

225. Peru's unfair conduct in opposing DRP's restructuring plans and its insistence on patently unreasonable terms that DRP could not possibly comply with constitute breaches of the Treaty.

b. *The MEM's Mistreatment of DRP in Connection With the Extension Requests and Proposed Restructuring Plans Frustrated Renco's Legitimate Expectations*

226. As the *Waste Management* tribunal noted, a host State violates this standard if its conduct breaches "representations made by the host State which were reasonably relied on by the [investor]."⁵⁰³ Subsequent tribunals have confirmed this conclusion.⁵⁰⁴ Thus, the fair and equitable treatment standard under Article 10.5 of the Treaty protects an investor's legitimate expectations based on the host State's representations – particularly those made in order to induce the investor to make the investment in the first place.⁵⁰⁵

⁵⁰² See para. 154.

⁵⁰³ **CLA-140**, *Waste Management* at ¶ 98.

⁵⁰⁴ See **CLA-060**, MacLachlan et al., *Treatment of Investors* at ¶¶ 7.108-7.112. See also **CLA-123**, Dolzer & Schreuer, *PRINCIPLES* at 146; **CLA-102**, *Metalclad Award* at ¶ 85; **CLA-087**, *Thunderbird Award* at ¶ 143. See also **CLA-101**, *Merrill & Ring Forestry L. P. v. Government of Canada*, ICSID Case No. UNCT/07/1, ICSID Administrated, Award, 31 March 2010, ¶ 242; **CLA-084**, *Grand River Enterprises Six Nations, Ltd. and others v. United States of America*, UNCITRAL, Award, 12 January 2011, ¶141.

⁵⁰⁵ Numerous other investment treaty tribunals have held that the fair and equitable treatment standard prohibits host State conduct violating the legitimate and reasonable expectations of investors. See, e.g., **CLA-087**, *Thunderbird Award* at ¶ 147 (applying customary international law standard of fair and equitable treatment); **CLA-110**, *Occidental Exploration & Production Co. v. The Republic of Ecuador*, LCIA Case No. UN3467, Final Award, July 1, 2004 at ¶¶ 183-87 (*hereinafter* "2004 Occidental Exploration Final Award"); **CLA-067**, *CME Czech Rep. B.V. (Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, September 13, 2001 at ¶ 611 (*hereinafter* "CME Czech Partial Award"); **CLA-068**, *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, May 12, 2005 at ¶¶ 274-76 (*hereinafter* "CMS Award"); **CLA-116**, *PSEG Global, Inc. et al. v. Turkey*, ICSID Case No. ARB/02/5, Award, January 19, 2007 at ¶ 240 (*hereinafter* "PSEG Award"); **CLA-106**, *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. The Republic of Chile*, ICSID Case No. ARB/01/7, Award, May 25, 2004 at ¶¶ 113-15 (*hereinafter* "MTD Award"); **CLA-054**, *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Award, December 24, 2007 at ¶¶ 294-300 (*hereinafter* "BG Award"); **CLA-108**, *National Grid v. The Republic of Argentina*, UNCITRAL, Award, November 3, 2008 at ¶ 179 (*hereinafter* "National Grid Award"); **CLA-139**, *Waguieh Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt*, ICSID No. ARB/05/15, Award, June 1, 2009 at ¶ 450 (*hereinafter*

227. When Renco and DRP entered into the Stock Transfer Agreement and the Guaranty Agreement, they had a legitimate expectation that the Peruvian Government would grant DRP an effective extension of time in the event of a steep decline in metals prices affecting DRP's ability to fund its PAMA projects, mainly because the Stock Transfer Agreement so provides. As explained by Mr. Sadlowski, Renco's Vice President of Law:

The original model contract in the bid documents contained no economic *force majeure* provision We were very clear with Centromin/CEPRI that a broad *force majeure* clause, including protection in the event of a depression in metal prices, or other adverse economic conditions, was an essential part of the deal without which, we would not go forward with the purchase. Such events would have an immediate and significant impact upon Doe Run Peru's cash flow and its ability to perform its PAMA obligations in a timely fashion.⁵⁰⁶

228. Mr. Sadlowski further explains that "Centromin/CEPRI agreed with our request for an 'economic' *force majeure* protection[.]"⁵⁰⁷ In particular, Clause 15 of the final, executed version of the Stock Transfer Agreement provides that "[n]either of the contracting parties may demand from the other the fulfillment of the obligations assumed in this contract, when the fulfillment is delayed, hindered or obstructed by . . . *extraordinary economic alterations*" (emphasis added). The term "extraordinary economic alterations" in Clause 15 is broad and clearly encompasses a steep decline in metals prices brought about by a major economic crisis.⁵⁰⁸

229. Importantly, Peru agreed to honor the broad economic *force majeure* clause in the Stock Transfer Agreement. Under Clause 2.1 of the Guaranty Agreement, Peru committed not only to perform the "obligations" undertaken by Centromin in the Stock Transfer Agreement, but also to honor Centromin's "representations, securities [and] guaranties."⁵⁰⁹ Moreover, Peru was also bound under Article 48 of its 1993 Regulations for Environmental Protection in Mining and

"Siag Award"); **CLA-056**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, July 24, 2008 at ¶¶ 602, 615 (*hereinafter* "Biwater Award").

⁵⁰⁶ Sadlowski Witness Stmt. at ¶ 23.

⁵⁰⁷ Sadlowski Witness Stmt. at ¶ 25.

⁵⁰⁸ See Sadlowski Witness Stmt. at ¶ 25; Partelpoeg Expert Report, § 7.6, at 51-57.

⁵⁰⁹ **Exhibit C-106**, Guaranty Agreement art. 2.1 at 2.

Metallurgy to allow DRP additional time to finish its PAMA in the event of a major economic crisis constituting a *force majeure* circumstance.⁵¹⁰

230. As explained by Mr. Sadlowski, “Peru never disagreed that the 2008 financial crisis was a valid economic *force majeure* event under the [Stock Transfer Agreement]” excusing DRP’s inability to finish its Copper Circuit sub-project by October 2009.⁵¹¹ However, Peru nonetheless failed to grant DRP an effective extension of time to finish this project. Because Peru induced Renco to invest in the Complex by representing that it would allow for flexibility in the implementation of DRP’s PAMA in the event of a major economic crisis, its breach of that representation violated the fair and equitable treatment standard under Article 10.5 of the Treaty.

c. *The MEM’s Mistreatment of DRP in Connection With the Extension Requests and Proposed Restructuring Plans Involved a Complete Lack of Transparency and Candor*

231. The *Waste Management* tribunal stated that a “complete lack of transparency and candour in administrative process” constitutes a breach of the customary international law standard of fair and equitable treatment.⁵¹² Similarly, the *Teco* tribunal held that “a willful disregard of the fundamental principles upon which the regulatory framework is based, a complete lack of candor or good faith on the part of the regulator in its dealings with the investor, as well as a total lack of reasoning, would constitute a breach of the minimum standard.”⁵¹³

232. Similarly, when analyzing the content of the fair and equitable treatment standard under customary international law, the tribunal in *Crystallex v. Venezuela* found that “[t]o the extent that they are relevant to the facts at issue in this case, the Tribunal is of the view that *FET comprises*, inter alia, protection of legitimate expectations, protection against arbitrary and discriminatory treatment, *transparency* and consistency.”⁵¹⁴

⁵¹⁰ **Exhibit C-088**, Decree No. 016-93, art. 48 at 13.

⁵¹¹ Sadlowski Witness Stmt. at ¶ 26.

⁵¹² **CLA-140**, *Waste Management* Award at ¶ 98.

⁵¹³ **CLA-132**, *Teco* Award at ¶ 458.

⁵¹⁴ **CLA-071**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 579; **CLA-103**, *Mobil Exploration and Development Inc. Suc. Argentina & Mobil Argentina S.A. v. Republic of Argentina*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, 10 April 2013, ¶ 914.

233. In considering the threshold for finding a violation of the fair and equitable treatment standard under the Netherlands-Czech Republic BIT (which does not refer to customary international law), the tribunal in *Saluka Investments BV v. Czech Republic* quoted the *Waste Management* tribunal’s formulation of the customary international law standard of fair and equitable treatment and then observed as follows:

[I]t appears that the difference between the Treaty standard laid down in Article 3.1 of the [Netherlands-Czech Republic BIT] and the customary minimum standard, when applied to the specific facts of a case, may well be more apparent than real. To the extent that the case law reveals different formulations of the relevant thresholds, an in-depth analysis may well demonstrate that they could be explained by the contextual and factual differences of the cases to which the standards have been applied.⁵¹⁵

234. Although the *Saluka* tribunal went on to hold that the fair and equitable treatment standard in the Netherlands-Czech Republic BIT is an “autonomous Treaty standard and must be interpreted, in light of the object and purpose of the Treaty, so as to avoid conduct of the Czech Republic that clearly provides disincentives to foreign investors,”⁵¹⁶ it defined the content of this “autonomous” standard in terms very similar to those used by the *Waste Management* tribunal to define the content of the customary international law standard of fair and equitable treatment. In particular, the *Saluka* tribunal held that “[a] foreign investor whose interests are protected under the Treaty is entitled to expect that the Czech Republic will not act in a way that is manifestly inconsistent, non-transparent [or] unreasonable (*i.e.*, unrelated to some rational policy).”⁵¹⁷ Thus, both the fair and equitable treatment standard in the Netherlands-Czech Republic BIT and the customary international law standard of fair and equitable treatment prohibit conduct by a host State involving a complete lack of transparency and candor.

235. The *Saluka* tribunal’s application of the fair and equitable treatment standard to the facts of that case sheds further light on the content of the standard. *Saluka* had acquired a troubled

⁵¹⁵ **CLA-127**, *Saluka Investments B.V. (Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, March 17, 2006 at ¶¶ 288, 291 (*hereinafter* “*Saluka* Partial Award”).

⁵¹⁶ **CLA-127**, *Saluka* Partial Award at ¶ 309.

⁵¹⁷ **CLA-127**, *Saluka* Partial Award at ¶ 309.

Czech bank, IPB, with the intention of restructuring it and selling it to a strategic investor.⁵¹⁸ After Saluka's acquisition, the Czech National Bank concluded that IPB was not performing prudently and that it needed to create at least another CZK 40 billion in provisions for its bad loans.⁵¹⁹ Saluka and IPB launched a major effort to secure State aid in order to increase the bank's capital and to make it attractive to a potential strategic investor.⁵²⁰ But instead of negotiating in good faith on the proposals made by IPB and its shareholders, the Czech Ministry of Finance and the Czech National Bank took sides with another Czech bank that was interested in acquiring IPB's business.⁵²¹ Moreover, irresponsible statements by Czech officials caused two runs on IPB.⁵²² The Czech Republic ultimately refused to provide State aid to IPB, and instead placed the bank into forced administration.⁵²³

236. The *Saluka* tribunal held that the Czech Republic violated the fair and equitable treatment standard by unreasonably frustrating IPB's and its shareholders' good faith efforts to resolve the bank's bad debt problem.⁵²⁴ In particular, the Czech Government failed to consider their proposals in an "unbiased, even-handed, transparent and consistent way," and it "unreasonably refused to communicate with IPB and Saluka/Nomura in an adequate manner."⁵²⁵ The tribunal summarized the Czech Republic's violation of the fair and equitable treatment standard as follows:

Saluka was entitled to expect that the Czech Republic took seriously the various proposals that may have had the potential of solving the bank's problem and that these proposals were dealt with in an objective, transparent, unbiased and even-handed way. . . . The Czech Government's conduct lacked even-handedness, consistency and transparency and the Czech Government has refused adequate communication with IPB and its major shareholder, Saluka/Nomura. This made it difficult and even

⁵¹⁸ *CLA-127, Saluka* Partial Award at ¶ 58.

⁵¹⁹ *CLA-127, Saluka* Partial Award at ¶ 88.

⁵²⁰ *CLA-127, Saluka* Partial Award at ¶¶ 89-96.

⁵²¹ *CLA-127, Saluka* Partial Award at ¶¶ 408-416.

⁵²² *CLA-127, Saluka* Partial Award at ¶¶ 94, 100, 126.

⁵²³ *CLA-127, Saluka* Partial Award at ¶ 136.

⁵²⁴ *CLA-127, Saluka* Partial Award at ¶ 407.

⁵²⁵ *CLA-127, Saluka* Partial Award at ¶ 407.

impossible for IPB and Saluka/Nomura to identify the Czech Government's position and to accommodate it.⁵²⁶

237. Like the Czech Government's treatment of Saluka's request for State aid, the treatment of DRP's request for a 30-month extension to finish its final PAMA project involved a complete lack of transparency and candor by the MEM, amounting to a breach of the fair and equitable treatment standard under the Treaty. When DRP first requested the extension on March 5, 2009, the MEM responded that an extension was legally impossible.⁵²⁷ At the end of that month, however, DRP believed it had reached an agreement with the Peruvian Government on an extension.⁵²⁸ The MOU required, among other things, that DRP's debt to DRCL be capitalized. In return, the Peruvian Government would agree to an extension "for a period to be determined as necessary to complete execution of the PAMA." As explained by Mr. Sadlowski:

While capitalization was to take place prior to any PAMA extension decree, [the MEM] promised to provide a draft of a PAMA extension for review...

Because we believed that Peru would, in fact, support Doe Run Peru's efforts to obtain the much needed financing and, as promised, issue an extension decree, I authorized the execution of the MOU on March 27, 2009. I also authorized execution of an agreement with key concentrate suppliers

On April 2, 2009, Doe Run Peru, the concentrate suppliers and the [G]overnment held a press conference to publicly announce that a solution had been reached. However, [the MEM] continued to ignore our requests for a draft of the PAMA extension document (or any feedback on our request for 30 months) or an executed copy of the MOU. Our concerns were heightened when, on April 3, 2009 the Minister of the Environment, Antonio Brack, publicly stated that Doe Run Peru would receive only a three-month extension.⁵²⁹

⁵²⁶ **CLA-127**, *Saluka* Partial Award at ¶ 499.

⁵²⁷ Neil Witness Stmt. at ¶ 39.

⁵²⁸ **Exhibit C-111**, MOU. *See also* Sadlowski Witness Stmt. at ¶¶ 32-39.

⁵²⁹ Sadlowski Witness Stmt. at ¶¶ 33-35.

238. In May 2009, other Peruvian Government officials made public statements denying that DRP would receive any extension of time to finish its last PAMA project.⁵³⁰ In October, after Congress had enacted a law granting DRP a 30-month extension (including a 10-month period to obtain financing), the MEM undermined the extension by issuing implementing regulations that made it next to impossible for DRP to obtain the necessary financing by requiring it to divert 100% of its sales revenues into a trust account.

239. In short, the MEM breached Peru's obligations under the customary international law standard of fair and equitable treatment by failing to treat DRP's extension request in an unbiased, even-handed, transparent, and consistent way.

d. *The MEM's Imposition of the Trust Account Requirement, and Other Erroneous Conditions, Was Not a Proportionate Response*

240. In 2012, the tribunal in *Occidental Petroleum Corporation v. Ecuador* observed "a growing body of arbitral law . . . which holds that the principle of proportionality is applicable to potential breaches" of a contract or domestic law.⁵³¹ It considered that a host State's reaction to an investor's actual or perceived breach of contract or legal violation must be proportionate; a disproportionate response would violate the host State's obligation under international law to treat the investor fairly and equitably.⁵³² The *Occidental Petroleum* tribunal held that Ecuador violated its duty to provide fair and equitable treatment to Occidental's investment by terminating its contract after Occidental violated the laws of Ecuador by transferring certain rights without prior approval.⁵³³ The tribunal considered that Ecuador's termination of the contract, although within its rights, was not a proportionate response to Occidental's violation of the law.⁵³⁴

the overriding principle of proportionality requires that any such administrative goal must be balanced against the Claimants' own interests and against the true nature and effect of the conduct being censured. The Tribunal finds that the price paid by the Claimants—total loss of an

⁵³⁰ **Exhibit C-068**, May 20, 2009 MINES AND COMMUNITIES.

⁵³¹ **CLA-111**, *Occidental Petroleum Corp. v. Ecuador*, ICSID Case No. ARB/06/11, Award, October 5, 2012 at ¶ 404 (*hereinafter* "2012 Occidental Petroleum Award").

⁵³² **CLA-111**, 2012 *Occidental Petroleum Award* at ¶¶ 404, 405.

⁵³³ **CLA-111**, 2012 *Occidental Petroleum Award* at ¶¶ 424-436, 442-451.

⁵³⁴ **CLA-111**, 2012 *Occidental Petroleum Award* at ¶¶ 404-405.

investment worth many hundreds of millions of dollars—was out of proportion to the wrongdoing alleged against OEPC, and similarly out of proportion to the importance and effectiveness of the ‘deterrence message’ which the Respondent might have wished to send to the wider oil and gas community.⁵³⁵

241. The MEM’s imposition of the trust account requirement on DRP was not a proportionate response to DRP’s inability to finish its final PAMA project by October 2009. As discussed above, numerous circumstances beyond DRP’s control contributed to its inability to complete this project on time. Most importantly, the 2008 global financial crisis and the resulting steep decline in world metals prices constituted an “extraordinary economic alteration” excusing DRP’s non-performance under the Stock Transfer Agreement and Peruvian law. Moreover, DRP’s undertaking to improve the Complex’s environmental performance and the health of the local population had been radically transformed and expanded during the period from 1997 to 2009, and its actual investments in its PAMA projects had exceeded Peru’s original estimate by over US\$ 200 million.

242. Notwithstanding these circumstances (among others) justifying DRP’s request for an extension, the MEM imposed a punitive trust account requirement that ensured that DRP could not take advantage of the 30-month extension granted by Congress. This requirement was completely out of proportion to any alleged “wrongdoing” by DRP, and it was also completely out of proportion to the Peruvian Government’s policy interest in ensuring that DRP’s final PAMA project would be completed in a timely manner. In fact, the trust account requirement produced the opposite effect by ensuring that DRP could not obtain the financing necessary to complete the project. Indeed, the Peruvian Government itself acknowledged that the trust account requirement was disproportionate when it issued a decree reducing the percentage of sales revenues that DRP had to divert into the account from 100% to 20%. However, this change was too little, too late, as it left DRP only 45 days to negotiate credit arrangements with its lenders and suppliers, a woefully inadequate amount of time.

⁵³⁵ CLA-111, 2012 *Occidental Petroleum Award* at ¶ 450.

e. *The MEM's Undermining of the Extension Was Inconsistent with the Actions of Congress and the Technical Commission*

243. The fair and equitable treatment standard under the Treaty also requires that a host State treat a covered investor or investment consistently and coherently.⁵³⁶ As held by the tribunal in *Lauder v. Czech Republic*, a host State's inconsistent conduct may violate the obligation of stability contained in the fair and equitable treatment standard.⁵³⁷ The tribunal in *Crystallex v. Venezuela* also found that the standard is infringed by treatment involving inconsistency of action between two arms of the same government.⁵³⁸

244. The MEM's undermining of the extension recommended by the Technical Commission and granted by Congress constituted a breach of the consistency requirement under the fair and equitable treatment standard in Article 10.5 of the Treaty. As discussed above,⁵³⁹ in September 2009, Congress granted DRP a 30-month extension,⁵⁴⁰ yet the MEM acted quickly by

⁵³⁶ **CLA-068**, *CMS Award* at ¶¶ 279, 283-84 (holding that “the Treaty standard of fair and equitable treatment [which requires the host State ‘to act in a consistent manner’] . . . is not different from the international law minimum standard and its evolution under customary law”).

⁵³⁷ **CLA-120**, *Ronald S. Lauder v. Czech Republic*, UNCITRAL Case, Award, 3 September 2001, ¶ 290.

⁵³⁸ **CLA-071**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 579: (“Linked to the notion of transparency is the concept of consistency, which requires that ‘[o]ne arm of the State cannot [...] affirm what another arm denies to the detriment of a foreign investor’”); *see also on the element consistency*: **CLA-054**, *Bosh International, Inc. y B&P, LTD Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award, 25 October 2012, ¶ 212 (“The tribunal in that case set out relevant factors, including ‘whether the State made specific representations to the investor’; ‘whether due process has been denied to the investor’; ‘whether there is an absence of transparency in the legal procedure or in the actions of the State’; ‘whether there has been harassment, coercion, abuse of power or other bad faith conduct by the host State’; and ‘whether any of the actions of the State can be labelled as arbitrary, discriminatory or inconsistent.’”); **CLA-103**, *Mobil Exploration and Development Inc. Suc. Argentina & Mobil Argentina S.A. v. Republic of Argentina*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, 10 April 2013, ¶ 914, **CLA-105**, *Mr. Franck Charles Arif v. Republic of Moldavia*, ICSID Case No. ARB/11/23, Award, 8 April 2013, ¶ 547(b).

⁵³⁹ *See paras. 14, 185, 315, 332.*

⁵⁴⁰ **Exhibit C-077**, Law No. 29410 art. 2 (“The term for the financing and culmination of the ‘Sulfuric Acid Plant and Modification of the Copper Circuit’ Project at the Metallurgical Complex of La Oroya is hereby extended, as per the directives issued by the La Oroya Technical Commission, created by Supreme Resolution No. 209-2009-PCM. Thus, a non-extendable maximum term of ten (10) months for the financing of the project and the start-up of the metallurgical complex and an additional non-extendable term of twenty (20) months for the construction and start-up of the project are hereby granted.”).

issuing onerous regulations that deprived DRP of the extension itself.⁵⁴¹ This inconsistent treatment of DRP's extension request by different arms of the Peruvian Government violated the fair and equitable treatment standard.

f. *Peru Coerced and Harassed Renco and DRP*

245. Freedom from harassment and coercion is another key protection of the fair and equitable treatment standard.⁵⁴² As explained in a treatise on investor-state arbitration: “[o]nce an investment has been made, foreign investors can be vulnerable to [G]overnment pressure or harassment. Particularly in capital-intensive sectors, long-term projects are in some sense hostage to the host State. As one might expect, this type of [G]overnment conduct is precisely one of the areas targeted by investment protection treaties.”⁵⁴³

246. Peru's coercion and harassment of DRP in connection with its request for an extension of time to finish its last PAMA project violated the fair and equitable treatment standard. Notably, after publicly threatening to shut down the Complex, President Garcia issued an emergency decree that deliberately targeted Renco and DRP by restricting the participation of related creditors in the INDECOPI Bankruptcy Proceedings. In addition, Peru pursued baseless criminal charges against Messrs. Rennert and Neil relating to the Intercompany Note.

B. PERU EXPROPRIATED RENCO'S INVESTMENT, DOE RUN PERU, IN BREACH OF ARTICLE 10.7 OF THE TREATY

247. As discussed above, from 1997 to 2009, DRP invested more than US\$ 300 million in the Complex to meet and exceed its environmental obligations and to ensure the commercial viability and longevity of a once-obsolete smelting operation. Despite tremendous practical and

⁵⁴¹ **Exhibit C-078**, Decree No. 075-2009, § 4.2 at 2.

⁵⁴² **CLA-139**, *Siag* Award at ¶ 450. *See also* **CLA-091**, *Joseph Charles Lemire v. Ukraine II*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶¶ 284, 285; **CLA-103**, *Mobil Exploration and Development Inc. Suc. Argentina & Mobil Argentina S.A. v. Republic of Argentina*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, 10 April 2013, ¶ 914; **CLA-099**, *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Dissenting Opinion of Steven A. Hammond, 30 March 2015, ¶ 134; **CLA-125**, *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, ¶ 524; **CLA-094**, *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Excerpts of Award, 2 July 2018, ¶ 638.

⁵⁴³ **CLA-066**, Christopher F. Dugan, Don Wallace, Jr., Noah Rubins, Borzu Sabahi, *INVESTOR-STATE ARBITRATION 523* (Oxford University Press, 2008) (*hereinafter* “Dugan et al., *INVESTOR-STATE*”).

logistical hurdles, DRP was on the verge of transforming a notorious mega-polluter into an up-to-date and environmentally sound industrial complex.

248. Through a variety of measures, including the grossly unfair and arbitrary failure to grant DRP an extension of time to complete its final PAMA project, the undermining of the extension once it was granted by Congress, the assertion of a baseless US\$ 163 million credit claim against DRP in the INDECOPI Bankruptcy Proceedings, the removal of DRP's management, and the opposition to DRP's restructuring plans, Peru unlawfully expropriated Renco's investments, without having paid fair compensation to Renco for the value of its investments.⁵⁴⁴

249. There are two types of unlawful expropriation in international law that give rise to a State's liability: direct and indirect expropriation. The Treaty expressly prohibits both. Article 10.7 of the Treaty provides: "No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization..."⁵⁴⁵

250. As discussed below, Peru's actions that resulted in the expropriation of Renco's investments constitute either a direct or indirect expropriation. Because the Treaty prohibits both types of unlawful expropriation, however, the characterization of the expropriation is largely academic. The result of Peru's actions, regardless of their complexity or motivation, is the decisive factor in the present case, for at the end of the analysis, the Tribunal can only conclude that Renco no longer benefits from its investment. That misconduct, taking over Renco's investments (by whatever means) without paying compensation, is an unlawful expropriation in violation of the Treaty and international law, for which Peru must be held liable.

1. The Legal Standards for Direct and Indirect Expropriation

251. Expropriation in international law refers to a State taking an investor's interests in its property, whether tangible or intangible, either in whole or in substantial part. Direct expropriation has been described as "the compulsory transfer of title to property to the State or a

⁵⁴⁴ **CLA-134**, Treaty, art. 10.7. According to the Treaty, Peru may not expropriate a covered investment except "on payment of prompt, adequate, and effective compensation." As discussed herein, there can be no dispute that Peru has not paid *any* compensation – much less "prompt, adequate, and effective compensation" to Renco. *See also* Sadlowski Witness Stmt. at ¶ 83.

⁵⁴⁵ **CLA-134**, Treaty, art. 10.7 at 10-4 to 10-5.

third party, or the outright seizure of property by the State.”⁵⁴⁶ Many so-called “classic” cases of direct expropriation involve the seizure of tangible or intangible property by formal, government decree.⁵⁴⁷

252. “Indirect expropriation,” by contrast, is widely understood as interference with an investment that “deprives [the investor] of the possibility to utilize the investment in a meaningful way.”⁵⁴⁸ The Iran-US Claims Tribunal has consistently recognized the concept of indirect expropriation as “interference by the Government with the alien’s enjoyment of the incidents of

⁵⁴⁶ **CLA-095**, L. Yves Fortier & Stephen L. Drymer, *Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor*, ICSID Rev. – F.I.L.J. 293, 297 (Fall 2004) (*hereinafter* “Fortier & Drymer, *Indirect Expropriation*”).

⁵⁴⁷ For example, in the case of *Kardassopoulos v. Georgia*, the tribunal found that Georgia directly expropriated the interests one of the claimants held in a company called GTI. Georgia had issued a decree that extinguished the rights of GTI in a pipeline and had issued an order extinguishing GTI’s rights over future pipelines. **CLA-092**, *Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/07/15, Award, February 10, 2010 at ¶ 351 (*hereinafter* “*Kardassopoulos Award*”). The tribunal found that “the circumstances of Mr. Kardassopoulos’ claim present a classic case of direct expropriation, Decree No. 178 having deprived GTI of its rights in the early oil pipeline and Mr. Kardassopoulos’ interest therein.” *Id.* at ¶ 387. Additionally, the tribunal in *Santa Elena v. Costa Rica* found that a direct expropriation had occurred on the date of an expropriation decree, even though the decree still had to be implemented and did not, in itself, formally transfer title of the property in question. **CLA-070**, *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, February 17, 2000 at ¶¶ 76-81 (*hereinafter* “*Santa Elena Award*”). For other examples of cases of direct expropriation, see **CLA-141**, *Wena Hotels, Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, December 8, 2000 at ¶ 99 (*hereinafter* “*Wena Hotels Award*”); **CLA-139**, *Siag Award* at ¶ 448; and **CLA-053**, *Bernardus Henricus Funnekotter et al. v. The Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award, April 22, 2009 at ¶ 98 (*hereinafter* “*Bernardus Award*”).

⁵⁴⁸ **CLA-123**, Dolzer & Schreuer, *PRINCIPLES* at 92. *See also*, **CLA-137**, United Nations Conference on Trade and Development (UNCTAD), *Taking of Property* (New York and Geneva, 2000) (*hereinafter* “UNCTAD, *Property*”).

ownership – such as the use or control of the property, or the income and economic benefits derived therefrom.”⁵⁴⁹ Such interference “constitutes a compensable taking.”⁵⁵⁰

253. As indicated above, the key factor that typically distinguishes a direct expropriation from an indirect expropriation is the extent to which an investor maintains ownership or control over its investment: if the investment has been taken completely, the taking is usually viewed as a direct expropriation; if the investment has not been taken but has merely suffered gross interference from the host State, an indirect expropriation likely has occurred. In both cases, the investor is left without its investment (in whole or in substantial part). That is what has occurred here.

2. Peru Expropriated Renco’s Investments

254. In the present case, Peru’s actions and omissions towards Renco’s ownership interests in the La Oroya Complex embody the hallmarks of both types of expropriation: Renco has been totally deprived of its investments, just as in classic cases of direct expropriation, and Peru effected that taking by a series of measures that indirectly deprived Renco of the benefits of its investments and its “incidents of ownership.”

255. First, in 2009, Peru failed, without justification, to grant DRP an effective extension of time to finish its final PAMA project. That failure and the dilatory tactics employed by the MEM to hinder the extension process, forced DRP to shut down operations at the Complex. The

⁵⁴⁹ **CLA-065**, Charles N. Brower, *Current Developments in the Law of Expropriation and Compensation: A Preliminary Survey of Awards of the Iran-United States Claims Tribunal*, 21 INT’L L. 639, 643 (1987) (*hereinafter* “Brower, *Current Developments*”); **CLA-130**, *Starrett Housing Corp., et al. v. The Islamic Republic of Iran*, 4 IRAN-UNITED STATES CL. TRIB. REP. 112, Final Award, December 20, 1984 at 154 (appointment of a “temporary” manager by Iran) (“... it is recognized in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner”) (*hereinafter* “Starrett Award”); **CLA-133**, *Tippetts, Abbett, McStratton v. TAMS-AFFA*, 6 IRAN-UNITED STATES CL. TRIB. REP. 219, Award No. 141-7-2, June 22, 1984 at 5 (“A deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected. While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral.”) (*hereinafter* “Tippetts Award”).

⁵⁵⁰ **CLA-065**, Brower, *Current Developments* at 643.

MEM then asserted a bogus US\$ 163 million credit claim in the INDECOPI Bankruptcy Proceedings to ensure that it became DRP's largest creditor.⁵⁵¹ Finally, the MEM used its position as DRP's largest creditor to obtain the removal of DRP's management and reject DRP's restructuring plans.

256. Peru's failure to grant DRP an effective extension of time to finish its final PAMA project resulted in the expropriation of Renco's investments. Peru failed to grant an effective extension, and then it seized upon the opportunity to exercise its commanding influence on the Creditors Committee to cause the removal of DRP's management as part of its continuing pattern of actions adverse to Renco's investments. Since international law is clear that acts as well as omissions can amount to unlawful expropriation requiring fair compensation,⁵⁵² Peru is liable to Renco under the Treaty for this taking.

257. In *Metalclad Corp. v. Mexico*, which involved the denial of a construction permit and the classification of land as a national area for the protection of a rare cactus, a NAFTA tribunal found that an indirect expropriation had occurred because Mexico's measures had deprived Metalclad, "in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property[.]" even though the result of those measures did "not necessarily [inure] to the obvious benefit of the host State."⁵⁵³ Likewise, in the case of *CME v. The Czech Republic*, which involved interference with an investor's contractual rights by a regulatory authority, the tribunal held: "measures that do not involve an overt taking but that effectively neutralized the benefit of the property of the foreign owner, are subject to expropriation claims. This is undisputed under international law."⁵⁵⁴ In the present case, Peru deprived Renco of the *whole* of its investments, including all of the reasonably-to-be-expected economic benefits.

⁵⁵¹ Sadlowski Witness Stmt. at ¶¶ 76-79.

⁵⁵² **CLA-068**, *CMS* Award at ¶ 266.

⁵⁵³ **CLA-102**, *Metalclad* Award at ¶ 103. The *Metalclad* Award was partially set aside by the British Columbia Supreme Court on unrelated grounds.

⁵⁵⁴ **CLA-067**, *CME Czech* Partial Award at ¶¶ 604-605.

258. The key question for the Tribunal is whether the actions and omissions of Peru, when viewed as a whole,⁵⁵⁵ have had the effect of depriving Renco, in whole or in significant part, of the use of its investments or the income and economic benefits associated with the investments. While the present case may not be considered a typical example of either “direct” or “indirect” expropriation, its exceptional character should not prevent the Tribunal from concluding that an unlawful expropriation has occurred. Peru violated the Treaty because it “directly or indirectly” expropriated Renco’s investments through its conduct, including the repeated refusals to grant DRP an extension of time to finish its last PAMA project, the undermining of the extension once it was granted by Congress, and the assertion of a baseless US\$ 163 million credit claim by the MEM in the INDECOPI Bankruptcy Proceedings resulting in the MEM’s ability to influence the Bankruptcy proceedings and reject DRP’s restructuring plans. As will be shown in the following section, Peru is liable because its expropriation of Renco’s investments was unlawful.

3. Peru’s Expropriation of Renco’s Investments Was Unlawful

259. Article 10.7 of the Treaty sets forth the conditions that a host State must meet in order for an otherwise prohibited expropriation to be deemed lawful. It states:

No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (“expropriation”) except:

[i] for a public purpose;

[ii] in a non-discriminatory manner;

[iii] on payment of prompt, adequate, and effective compensation; and

[iv] in accordance with due process of law and Article 10.5.⁵⁵⁶

⁵⁵⁵ **CLA-121**, *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. Arb. V079/2005, Final Award, September 12, 2010 at ¶ 410 (where the tribunal found that “an assessment of whether Respondent breached the IPPA can only be effectively made if and after the conduct as a whole is reviewed, rather than isolated aspects . . . the [t]ribunal will . . . turn to its own considerations as to whether Respondent’s measures, seen together and in their cumulative effect, can be considered as a breach of the IPPA.”) (*hereinafter* “*RosInvestCo Award*”).

⁵⁵⁶ **CLA-134**, Treaty, art. 10.7.

260. The terms of Article 10.7, in which the conjunctive “and” is used, require compliance with each of the four listed conditions in order for an expropriation to be deemed lawful and not entail a breach of the Treaty.⁵⁵⁷ Numerous tribunals considering similar treaty provisions in respect of expropriation have confirmed that fact.⁵⁵⁸

261. Thus, a finding that Peru failed to meet any one of the four conditions listed in Article 10.7 of the Treaty is sufficient to trigger its liability for an unlawful expropriation. Peru meets *none* of the four conditions for a lawful expropriation in this case. Its expropriation of Renco’s investments therefore violated Article 10.7 of the Treaty and international law.

a. *Peru’s Expropriation of DRP Was Not “For a Public Purpose”*

262. The requirement that an expropriation be “for a public purpose” in order to be deemed lawful is fundamental. As Garcia Amador has explained, this requirement is “the least” that can be expected of an expropriating state, because a taking for the public good is the very *raison d’être* of permitting a lawful expropriation:

[T]he least that can be required of the State is that it should exercise [the] power [to expropriate] only when the measure is clearly justified by the public interest. Any other view would condone and even facilitate the abusive exercise of the power to expropriate and give legal sanction to manifestly arbitrary acts of expropriation...

[A]ll states should comply with the condition or requirement which is common to all; namely, that the power to expropriate should be exercised only when expropriation is necessary and is justified by a genuinely public purpose or reason. If this *raison d’être* is plainly absent, the measure of expropriation is “arbitrary” and therefore involves the international responsibility of the State.⁵⁵⁹

⁵⁵⁷ See **CLA-136**, United Nations Conference on Trade and Development (UNCTAD), *Bilateral Investment Treaties in the Mid-1990s* 66 (New York and Geneva, 1998) (*hereinafter* “UNCTAD, *BITs*”); **CLA-123**, Dolzer & Schreuer, *PRINCIPLES* at 89-91.

⁵⁵⁸ See, e.g., **CLA-092**, *Kardassopoulos Award* at ¶¶ 407-408. See also **CLA-053**, *Bernardus Award* at ¶ 98 (“The [t]ribunal observes that the conditions enumerated in Article 6 are cumulative. In other terms, if any of those conditions is violated, there is a breach of Article 6.”); **CLA-139**, *Siag Award* at ¶ 428; **CLA-123**, Dolzer & Schreuer, *PRINCIPLES* at 91.

⁵⁵⁹ **CLA-077**, F.V. García Amador, “State Responsibility,” Special Rapporteur’s Report, Int’l Law Commission, Y.B. INT’L L. COMM’N. (1959) at ¶ 59 (*hereinafter* “Amador, State Responsibility”).

263. While the condition that a lawful expropriation must be for a public purpose is paramount, that condition cannot serve as an excuse for a State attempting to escape liability for an unlawful expropriation. As the *ADC* tribunal noted:

. . . a treaty requirement for ‘*public interest*’ requires some genuine interest of the public. If a mere reference to ‘*public interest*’ can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless.⁵⁶⁰

264. In *ADC*, Hungary attempted to justify the alleged expropriation by generally referring to “activities of strategic importance” and “contractual non-performance.”⁵⁶¹ Upon examination, however, the tribunal concluded that “no satisfactory explanation has ever been given for the takeover and none of the reasons now sought to be relied upon are tenable.”⁵⁶² The tribunal found that the expropriation was not proven to be in the public interest, and therefore, was unlawful.⁵⁶³

265. Peru has never claimed that its expropriation of the Complex was for a public purpose, and in any event, Peru cannot satisfy that requirement now. Peru’s unjustified failure to grant DRP an effective extension of time to finish its final PAMA project was directly contrary to the public interest. Since after DRP lost control of the Complex operations, the pollution and health conditions in the area have likely not improved and may have worsened if Right Business and subsequent liquidators did not engage in actions like street washing, upgrades to the facilities, monitoring of the facilities for fugitive emissions from machine glitches or open windows, and

⁵⁶⁰ **CLA-047**, *ADC Affiliate Ltd. & ADC & ADMC Mgmt. Ltd. v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, October 2, 2006 at ¶ 432 (*hereinafter* “*ADC Award*”). In this respect, it is worth noting that the Treaty equates the term it uses, “public purpose,” with the terms “public interest,” “public necessity,” or “public use,” which are sometimes used in domestic legal systems and in analogous investment treaties. See **CLA-134**, Treaty, art. 10.7, n. 5.

⁵⁶¹ **CLA-047**, *ADC Award* at ¶¶ 273-81.

⁵⁶² **CLA-047**, *ADC Award* at ¶ 285.

⁵⁶³ **CLA-047**, *ADC Award* at ¶¶ 429, 433, 445, 476. See also **CLA-129**, *Siemens A.G. v. The Republic of Argentina*, ICSID Case No. ARB/02/08, Award, February 6, 2007 at ¶ 273 (“ . . . there is no evidence of a public purpose in the measures prior to the issuance of Decree 669/01. It was an exercise of public authority to reduce the costs to Argentina of the Contract recently awarded through public competitive bidding, and as part of a change of policy by a new Administration eager to distance itself from its predecessor.”) (*hereinafter* “*Siemens Award*”).

community outreach to address exposures to re-circulated dust and soil. Moreover, contaminated soil and dust remains a significant, unaddressed exposure pathway, given Centromin and Activos Mineros' failure to remediate. Activos Mineros' consultant noted in 2009 that soil exposure alone was predicted to cause a large number of children in the surrounding communities to have elevated blood-lead levels.⁵⁶⁴ Furthermore, Peru's pursuit of baseless bankruptcy claims did not serve any public interest, because the claims were contrived and designed to ensure eventual State control of the Complex.

266. As shown above, the environment and the health of the local population both suffered under State control prior to Renco's investment in the Complex. Every problem that was created by Peru's poor management and neglect, including the obsolete technology, the inefficient operations of the Complex, the extreme environmental contamination, and the poor health of the La Oroya residents, improved while DRP managed the Complex.⁵⁶⁵ Far from fulfilling a public purpose, Peru has acted against it by removing DRP's management.

267. Because Peru's expropriation of DRP was not for a public purpose, the Tribunal should conclude that Peru's expropriation of Renco's investments was unlawful under Article 10.7 of the Treaty and international law.

b. *Peru's Expropriation of DRP Was Discriminatory*

268. Peru's expropriatory measures also were illegal under Article 10.7 of the Treaty and international law because they were discriminatory. As discussed above, Peru's unjustified failure to grant DRP an effective extension of time to finish its final PAMA project contrasts significantly with its decision to grant a PAMA extension to Centromin in 2000.

c. *Peru Has Not Compensated Renco for the Investments It Expropriated*

269. Peru's expropriation of Renco's investments was also unlawful because Peru failed to pay Renco "prompt, adequate and effective compensation," as required by Article 10.7 of the Treaty and international law. Far from meeting that threshold requirement of a lawful

⁵⁶⁴ **Exhibit C-221**, Todd Hamilton, Ground Water Initiative (GWI), Remedación de las Areas Afectadas por Emisiones del CMLO, May 13, 2009 (*hereinafter* "GWI Report").

⁵⁶⁵ Partelpoeg Expert Report, §§ 2, 6, at 3-4, 23-26.

expropriation, Peru has never paid *any* compensation to Renco for the investments that it took over.

270. Article 10.7's requirement that any expropriation be accompanied by "prompt, adequate, and effective compensation" is solidly grounded in international law. The rule has been confirmed by numerous tribunals and recognized by a wide array of international scholars.⁵⁶⁶

⁵⁶⁶ See, e.g., **CLA-123**, Dolzer & Schreuer, *PRINCIPLES* at 110; **CLA-115**, *Pope & Talbot Inc. v. Government of Canada*, NAFTA-UNCITRAL, 40 I.L.M. 258 (2001), Interim Award, June 26, 2000 at ¶ 99 (*hereinafter* "Pope & Talbot Interim Award"); **CLA-070**, *Santa Elena Award* at ¶ 72; **CLA-052**, *Azurix Corp. v. The Republic of Argentina*, ICSID Case No. ARB/01/12, Award, July 14, 2006 at ¶ 309 (*hereinafter* "Azurix Award"); **CLA-131**, *Tecnicas Medioambientales TECMED S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003 at ¶ 121 (*hereinafter* "Tecmed Award"); **CLA-114**, *Phelps Dodge Corp. v. Iran*, Case No. 99, Award No. 217-99-2, 10 IRAN-US CL. TRIB. REP. 121, March 19, 1986 at 30; **CLA-051**, *Amoco Int'l Fin. Corp. v. Iran*, Case No. 56, Partial Award No. 310-56-3, 15 IRAN-UNITED STATES CL. TRIB. REP. 288, July 14, 1987 at ¶¶ 112, 189, 193 ("[A] lawful expropriation must give rise to 'the payment of fair compensation, or of the just price of what was expropriated.' Such an obligation is imposed by a specific rule of the international law of expropriation."); **CLA-055**, *Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre*, UNCITRAL, 95 ILR 189, Award on Jurisdiction and Liability, October 27, 1989 at 208-209 ("*Biloune Award*"); **CLA-075**, Eli Lauterpacht, *Issues of Compensation and Nationality in the Taking of Energy Investments*, 8 J. ENERGY & NAT. RES. L. 241, 243 (1990) ("Whatever the form of the taking by the State of a foreign investment, it is not usually in itself internationally unlawful if it satisfies certain conditions. One is that the taking should be for a public purpose. A second is that it should not be discriminatory. A third is that the taking should be accompanied by compensation.") (*hereinafter* "Lauterpacht, *Compensation and Nationality*"); **CLA-112**, Peter Muchlinski, *MULTINATIONAL ENTERPRISES AND THE LAW* 504 (Wiley-Blackwell 1999) (*hereinafter* "Muchlinski, *MULTINATIONAL ENTERPRISES*"), setting out the elements of lawful expropriation; **CLA-097**, Malcolm N. Shaw, *INTERNATIONAL LAW* 739 (Cambridge Univ. Press, 5th ed. 2004) ("International law will clearly be engaged where the expropriation is unlawful, either because of, for example, the discriminatory manner in which it is carried out or the offering of inadequate or no compensation.") (*hereinafter* "Shaw, *INTERNATIONAL LAW*"); **CLA-085**, Ian Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 519 (Oxford Univ. Press, 6th ed. 2003) ("The majority of states accept the principle of compensation.") (*hereinafter* "Brownlie, *PUBLIC INTERNATIONAL LAW*"); **CLA-059**, C.F. Amerasinghe, *STATE RESPONSIBILITY FOR INJURIES TO ALIENS* 147 (Clarendon Press 1967) ("[T]he practice of the majority of States in paying compensation, whether by treaty or by legislation, lends itself to the conclusion that the rule that that compensation is payable which was applicable to expropriation has not been changed. . . . It is submitted that the rule that there must be compensation permits of no exceptions, and that it applies to all forms of expropriation, including nationalization.") (*hereinafter* "Amerasinghe, *STATE RESPONSIBILITY*"); **CLA-080**, George S. Georgiev, *The Award in Saluka Investments v. Czech Republic in*, *THE REASONS REQUIREMENT IN INTERNATIONAL INVESTMENT ARBITRATION* at 175 *et seq.* (G. Aguilar-Alvarez and M. Reisman, eds., 2008) (*hereinafter* "Georgiev, *Saluka*"); **CLA-053**, *Bernardus Award* at ¶¶ 98, 107; **CLA-092**, *Kardassopoulos Award* at ¶¶ 389-90, 405; **CLA-124**, *Rumeli Telekom A.S. & Telsim Mobil Telekomikasyon Hizmetleri A.S. v. The Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, July 29, 2008 at ¶ 706 (finding that the expropriation was unlawful because "the valuation placed on Claimants' shares was manifestly and grossly inadequate

271. In the present case, there can be no dispute that Peru has never paid any compensation to Renco for the expropriation of its investments.

d. *Peru's Expropriation of Doe Run Peru Was Not in Accordance with Due Process of Law and Article 10.5*

272. The final condition that an expropriation must satisfy in order to be deemed lawful under the Treaty is that it must have been carried out under due process of law and in accordance with Article 10.5 of the Treaty. Peru's expropriatory measures did not meet either requirement.

273. In international law, the notion of due process encompasses both procedural and substantive fairness. In *ADC v. Hungary*, the tribunal described the "due process of law" requirement as follows:

The Tribunal agrees with the Claimants that "*due process of law*," in the expropriation context, demands an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already undertaken or about to be taken against it. Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard. If no legal procedure of such nature exists at all, the argument that "*the actions are taken under due process of law*" rings hollow. And that is exactly what the Tribunal finds in the present case.⁵⁶⁷

274. The failures of due process at issue in this case are markedly more numerous and severe than those at issue in *ADC*. The *ADC* tribunal found that the host State had not given the investors a reasonable opportunity to be heard following an expropriation. In the present case, Renco was given no chance to object to the expropriation that occurred in 2012.

compared to the compensation which the [t]ribunal there holds to be necessary in order to afford adequate compensation under the BIT and the FIL.") (*hereinafter* "Rumeli Award").

⁵⁶⁷ **CLA-047**, *ADC Award* at ¶ 435. See also **CLA-069**, *Compañía de Aguas del Aconquija S.A. and Universal v. The Republic of Argentina*, ICSID Case No. ARB/97/3, Award, November 21, 2000 at 2 (*hereinafter* "Vivendi Award").

275. Furthermore, Peru's expropriatory measures were not carried out in accordance with Article 10.5 of the Treaty. As discussed above, Article 10.5 requires Peru to afford fair and equitable treatment to Renco's investments, and Peru failed to treat Renco and its investments in accordance with that standard. The requirement, under Article 10.7, that any expropriatory measures be carried out in accordance with Article 10.5 means that any expropriation must be accomplished in a fair and equitable manner. The same actions of Peru that violated the fair and equitable treatment standard in Article 10.5 in relation to the extension request also led to the expropriation of Renco's investments in the Complex.

276. In particular, there was nothing fair or equitable in Peru's refusal to grant DRP an effective extension of time to finish its final PAMA project. Additionally, Peru violated its own laws when it asserted a sham US\$ 163 million credit claim against DRP in the INDECOPI Bankruptcy Proceedings, thus ensuring that its acquisition of control over DRP would be accomplished in an unlawful way.

277. The violations of due process that Peru committed and its failure to act fairly or equitably when expropriating Claimant's investments are extraordinary, and they too render Peru's expropriation of Renco's investments illegal under Article 10.7 of the Treaty and international law.

278. In sum, Peru has committed an unlawful expropriation under the Treaty by denying Claimant the benefit of its investments, contrary to a public purpose, in a discriminatory manner, without paying compensation, and in violation of due process and Article 10.5 of the Treaty.

C. PERU'S FAILURE TO INVALIDATE THE MEM'S BOGUS CREDIT AGAINST DRP CONSTITUTES A DENIAL OF JUSTICE, IN BREACH OF ARTICLE 10.5 OF THE TREATY

279. As discussed above, Peru's repeated failure to invalidate the MEM's patently improper US\$ 163 million credit against DRP, thus permitting the MEM to dominate the Creditors Committee in the DRP bankruptcy, constitutes a denial of justice, in breach of Article 10.5 of the Treaty. That provision includes the obligation to "accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security."⁵⁶⁸ Article 10.5 specifies that the fair and equitable treatment obligation

⁵⁶⁸ CLA-134, Treaty, art. 10.5(1).

includes “the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.”⁵⁶⁹

1. The Denial of Justice Standard under International Law

280. A State’s obligation under international law to not deny justice aims to guarantee the existence of “fair courts, readily open to aliens, administering justice honestly, impartially, without bias or political controls.”⁵⁷⁰ The obligation encompasses “all unlawful acts or omissions engaging the State’s responsibility in connection with the entire process of administering justice to aliens.”⁵⁷¹

281. A denial of justice occurs when the State’s instrumentalities “administer justice in a fundamentally unfair manner.”⁵⁷² An internationally-wrongful administration of justice may result from the conduct of a State’s executive, legislature, or judiciary.⁵⁷³ More specifically, the following instances are often found to constitute a denial of justice: a fundamental violation of due process; a court that is not impartial or subject to external influences; a court’s decision that is

⁵⁶⁹ **CLA-134**, Treaty, art. 10.5(2)(a).

⁵⁷⁰ **CLA-073**, Edwin Borchard, *The “Minimum Standard” Of The Treatment Of Aliens*, 33 Proceedings of ASIL at Its Annual Meeting 51, 63 (1939), Michigan Law Rev., Vol. 38, No. 4 (1940) at 460.

⁵⁷¹ **CLA-050**, Alwyn V. Freeman, *The International Responsibility of States for Denial of Justice*, 161 (1938).

⁵⁷² **CLA-038**, Jan Paulsson, *DENIAL OF JUSTICE IN INTERNATIONAL LAW*, 67 (Cambridge 2005); **CLA-118**, *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, CLA-17, ¶ 102; **CLA-094**, *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Excerpts of Award, 2 July 2018, ¶ 445.

⁵⁷³ See **CLA-038**, Jan Paulsson, *DENIAL OF JUSTICE IN INTERNATIONAL LAW*, 40 (Cambridge 2005). See also **CLA-086**, Article 4 of the ILC’s Articles on State Responsibility (Conduct of organs of a State): (“1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.”).

manifestly arbitrary, lacking a legal basis or justification, or in excess of mere judicial error.⁵⁷⁴ Bad faith or malicious intent are not required to establish that a denial of justice occurred.⁵⁷⁵

282. Due process violations that constitute denials of justice are “serious defects in the adjudicative process,”⁵⁷⁶ including “refusal of access to court to defend legal rights, refusal to decide, and unconscionable delay.”⁵⁷⁷ The *Loewen* tribunal held in that regard that a denial of justice exists when there is “[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety.”⁵⁷⁸ Likewise, the *Mondev* tribunal found that a denial of justice amounts to “a willful disregard of due process of law ... which shocks, or at least surprises, a sense of judicial propriety.”⁵⁷⁹

⁵⁷⁴ **CLA-078**, *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award November 18, 2014, ¶ 639. *See also* **CLA-061**, *Case Concerning the Barcelona Traction, Light and Power Company, Limited*, 1970 I.C.J. 3 Separate Opinion of Judge Fitzmaurice at 144 *et seq.* (A “[d]enial of justice occurs in the case of such acts as corruption, threats, unwarrantable delay, flagrant abuse of judicial procedure, a judgment dictated by the executive, or so manifestly unjust that no court which was both competent and honest could have given it...”).

⁵⁷⁵ *See, e.g.*, **CLA-045**, *Loewen v United States* (ICSID Case No ARB(AF)/98/3), Award, June 26, 2003, ¶ 132 (“Neither State practice, the decisions of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment or denial of justice amounting to a breach of international justice”). *See also* *Martini Case*, Vol II UNRIAA 977 (1930), p. 987: (“If the decision of the Venezuelan court is legally founded, the psychological motives of the judges are irrelevant. On the other hand, the decision may be so defective that one can suppose the judges' bad faith; but in this case too, what is decisive is the objective character of the decision”).

⁵⁷⁶ **CLA-094**, *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Excerpts of Award, 2 July 2018, ¶¶ 449, 461.

⁵⁷⁷ **CLA-038**, Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW, 204, 205 (Cambridge 2005). *See also* **CLA-094**, *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Excerpts of Award, 2 July 2018, ¶¶ 449, 461.

⁵⁷⁸ **CLA-045**, *Loewen v United States* (ICSID Case No ARB(AF)/98/3), Award, June 26, 2003 ¶ 132.

⁵⁷⁹ **CLA-104**, *Mondev Int'l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, ¶ 127. *See also* **CLA-079**, *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, March 31, 2011 ¶¶ 312-13; and **CLA-039**, *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador II*, PCA Case No. 2009-23, Second Partial Award on Track II, 30 August 2018, ¶ 8.26: (“...the legal test is whether any shock or surprise to an impartial tribunal occasioned by the Lago Agrio Judgment, with the judgments of the Lago Agrio Appellate, Cassation and Constitutional Courts, leads, on reflection, to justified concerns as to the judicial propriety of the Lago Agrio Judgment, as left materially uncorrected or unremedied within the Respondent's own legal system.”).

283. A court that is subject to external influence, amounting to a denial of justice, is often subservient to pressure from a State's executive.⁵⁸⁰ For example, in the *Idler* case, the United States and Venezuela Claims Commission noted that the Venezuelan government had communicated with the Supreme Court about the case and held that "it was the voice of Idler's opponents which found expression in the judgments ... and not that either of justice or the supreme court of justice."⁵⁸¹ The Commission concluded that Venezuela had committed a denial of justice because of, *inter alia*, these improper communications between the Venezuelan government and the Supreme Court.⁵⁸² Similarly, in the *Robert Brown* case, the South African executive and legislature interfered in a pending court proceeding by removing a judge and retroactively reversing a rule of law.⁵⁸³ The British-American Claims tribunal held that the collusion between the legislative, the executive, and the judiciary—acting in concert to defeat the defendant—gave

⁵⁸⁰ **CLA-038**, Jan Paulsson, *DENIAL OF JUSTICE IN INTERNATIONAL LAW*, 204, 205 (Cambridge 2005).

⁵⁸¹ **CLA-090**, *Jacob Idler v. Venezuela (U.S. v. Venezuela)*, in IV John Bassett Moore, *HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY* (1898) at ¶ 3517.

⁵⁸² **CLA-090**, *Jacob Idler v. Venezuela (U.S. v. Venezuela)*, in IV John Bassett Moore, *HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY* (1898) at ¶¶ 3516-17.

⁵⁸³ **CLA-119**, *Robert E. Brown (U.S. v. Gr. Brit.)*, Award, November 23, 1923, 6 R.I.A.A. ¶¶ 125, 126 (2006).

rise to a denial of justice,⁵⁸⁴ noting “the virtual subjection of the High Court [of South Africa] to the executive power.”⁵⁸⁵

284. A “substantive” denial of justice occurs when a decision misapplies the law “in such an egregiously wrong way, that no honest, competent court could have possibly done so”⁵⁸⁶ or “where the interpretation of [...] law appears patently unjust and adopted merely to the detriment of a party.”⁵⁸⁷ (To the contrary, there is no “substantive” denial of justice when a judgment is “reasoned, understandable, coherent and embedded in a legal system that is characterized by a division between public and private law as well as civil and administrative procedures.”⁵⁸⁸) Many tribunals have held that a court commits a denial of justice if it acts in a grossly incompetent or manifestly unjust manner.⁵⁸⁹

⁵⁸⁴ **CLA-119**, *Robert E. Brown (U.S. v. Gr. Brit.)*, Award, November 23, 1923, 6 R.I.A.A. ¶ 129 (2006): (“The cumulative strength of the numerous steps taken by the Government of the South African Republic with the obvious intent to defeat Brown’s claims, definite denial of justice took place ... all three branches of the Government conspired to ruin his enterprise. The executive department issued proclamations for which no warrant could be found in the Constitution and laws of the country. The Volksraad enacted legislation which, on its face, does violence to the fundamental principles of justice recognised in every enlightened community. The judiciary, at first recalcitrant, was at length reduced to submission and brought into line with a determined policy of the Executive to reach the desired result regardless of Constitutional guarantees and inhibitions.”); *See also* **CLA-113**, *Petrobart v. Kyrgyz Republic*, SCC Case No. 126/2003, Award, March 29, 2005 at ¶ 28: (The tribunal held that collusion between the executive and the court—which had suspended the enforcement of a judgment against the State gas company at the request of the vice prime minister—constituted a “clear breach of the prohibition of denial of justice under international law” as well as a violation of the FET standard in the applicable treaty.)

⁵⁸⁵ **CLA-119**, *Robert E. Brown (U.S. v. Gr. Brit.)*, Award, November 23, 1923, 6 R.I.A.A. ¶¶ 120, 125 (2006).

⁵⁸⁶ **CLA-105**, *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, ¶ 442.

⁵⁸⁷ **CLA-094**, *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Excerpts of Award, 2 July 2018, ¶ 584.

⁵⁸⁸ **CLA-098**, *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, ¶ 769.

⁵⁸⁹ **CLA-090**, *Jacob Idler v. Venezuela (U.S. v. Venezuela)*, in IV John Bassett Moore, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 3491 (1898) at 3505; **CLA-062**, *Case of Cotesworth and Powell*, Award, November 5, 1875, in II John Bassett Moore, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 2050, 2081 Section VII.(3) (1898) at 2083 ¶ 9; **CLA-058**, *Bronner Case (U.S. v. Mexico)*, Award, November 4, 1874, in III John Bassett Moore, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 3134

285. For example, in *Flughafen v. Venezuela*, the claimants argued that a denial of justice had occurred because Venezuela's Supreme Court had improperly decided to hand over control of the Isla Margarita airport to the Venezuelan Ministry of Infrastructure.⁵⁹⁰ The Supreme Court had intervened in a dispute between the Nueva Esparta State Government and the claimants, who had signed a concession contract to operate the airport,⁵⁹¹ by deciding *ex officio* through a certiorari proceeding to hear and decide all pending legal proceedings between the claimants and the local government.⁵⁹² However, three years later, the Supreme Court abruptly terminated the certiorari proceeding, declined jurisdiction to hear the case, and sent the file back to the lower administrative court, while also handing over control of the airport to the Ministry of Infrastructure because the dispute between the claimants and the local government was still pending in the lower courts.⁵⁹³

286. The *Flughafen* tribunal sided with the claimants. The tribunal held that the Supreme Court's decision lacked any underlying logic or meaningful reasoning primarily because the court had not referred to the Venezuelan legal framework in support of its decision.⁵⁹⁴ The tribunal also found that the decision had serious procedural defects, in breach of due process,⁵⁹⁵ and that it had been the product of improper political influence.⁵⁹⁶

(1898); **CLA-063**, *Case of the Orient (U.S. v. Mexico)*, Award, in III John Bassett Moore, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY, 3229-31 (1898).

⁵⁹⁰ **CLA-078**, *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award November 18, 2014, ¶¶ 681, 721.

⁵⁹¹ **CLA-078**, *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award November 18, 2014, ¶¶ 68-88.

⁵⁹² **CLA-078**, *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award November 18, 2014, ¶ 653.

⁵⁹³ **CLA-078**, *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award November 18, 2014, ¶¶ 97-102.

⁵⁹⁴ **CLA-078**, *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award November 18, 2014, ¶ 696-699.

⁵⁹⁵ **CLA-078**, *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award November 18, 2014, ¶¶ 693-695.

⁵⁹⁶ **CLA-078**, *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award November 18, 2014, ¶¶ 692, 700-708.

287. Finally, a denial of justice also may arise in circumstances where serious concerns are raised regarding a judgment which subsequently are left uncorrected or unremedied.⁵⁹⁷ The *Chevron II* tribunal found that the terms “uncorrected” and “unremedied” meant that several local courts had considered the decision at issue, “in full knowledge of the complaints of serious procedural impropriety, without appropriate steps being taken to address the allegations,”⁵⁹⁸ even when they had “sufficient information available to them so as to amount (at least) to a strong *prima facie* case of judicial misconduct, procedural fraud.”⁵⁹⁹

288. In sum, whether a denial of justice occurs depends on “whether, at an international level and having regard to generally-accepted standards of the administration of justice, a tribunal can conclude in light of all the facts that the impugned decision was clearly improper and discreditable.”⁶⁰⁰

289. An additional requirement for denial of justice is the exhaustion of local remedies.⁶⁰¹ According to Jan Paulsson, “[f]or a foreigner’s international grievance to proceed as a claim of denial of justice, the national system must have been tested. Its perceived failings cannot constitute an international wrong unless it has been given a chance to correct itself.”⁶⁰² In other words, exhaustion is necessary to establish that the denial of justice is a deliberate act by the State and that it is willing to let a wrong stand.⁶⁰³ Exhaustion is not required, however, “beyond a point

⁵⁹⁷ **CLA-039**, *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador II*, PCA Case No. 2009-23, Second Partial Award on Track II, 30 August 2018, ¶ 8.26.

⁵⁹⁸ **CLA-039**, *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador II*, PCA Case No. 2009-23, Second Partial Award on Track II, 30 August 2018, ¶ 8.27.

⁵⁹⁹ **CLA-039**, *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador II*, PCA Case No. 2009-23, Second Partial Award on Track II, 30 August 2018, ¶ 8.27.

⁶⁰⁰ **CLA-104**, *Mondev Int’l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, ¶¶ 142, 310.

⁶⁰¹ See **CLA-046**, A.O. Adede, *A Survey of Treaty Provisions on the Rule of Exhaustion of Local Remedies*, 18 Harv. Int’l L. J. 1,1 (1977). See also Claimant’s Counter-Memorial on Peru’s 10.20.5 Objections, February 21, 2020, ¶¶ 166 *et seq.*

⁶⁰² **CLA-038**, Jan Paulsson, *DENIAL OF JUSTICE IN INTERNATIONAL LAW*, 108 (Cambridge 2005).

⁶⁰³ **CLA-089**, J.E.S. Fawcett, *The Exhaustion of Local Remedies: Substance or Procedure?* 31 Brit. Y.B. Int’l L. 452, 452 (1954). See also **CLA-038**, Jan Paulsson, *DENIAL OF JUSTICE IN INTERNATIONAL LAW*, 112 (Cambridge 2005): (“Claims that arise because of the manner in which the national system has administered justice do not fall within the scope of authority of international adjudicators until that

of reasonableness,”⁶⁰⁴ *i.e.*, when the State fails to offer even a “minimally adequate justice system.”⁶⁰⁵

2. The Peruvian judiciary’s failure to strike down the MEM’s bogus credit constitutes a clear denial of justice

290. Throughout the bankruptcy proceedings before INDECOPI and domestic courts, Peru treated DRP in a fundamentally unfair manner by causing unconscionable delay, rendering decisions under Peruvian bankruptcy law that were clearly subject to outside influences (*i.e.*, the State’s executive), and which lacked legal basis or justification in excess of mere judicial error. As described below, serious procedural defects and rank misapplication of the law, including a perfunctory dismissal by the Peruvian Supreme Court, deprived DRP of its most basic due process rights and were adopted merely to the detriment of DRP.

291. When viewed in their proper context, it is clear that the objective of these wrongheaded decisions upholding the MEM’s patently improper \$163 million bankruptcy credit, which as explained below is actually no credit at all, was to cause sufficient delay so that the MEM could exert control over DRP’s fate in the bankruptcy proceeding, not only as regulator evaluating DRP’s restructuring plans, but as the largest creditor of DRP, with influence over other significant creditors, including the Peruvian tax authority and other significant players in the Peruvian mining sector, thus enabling it to make sure none of DRP’s restructuring plans were approved. This ultimately killed Renco’s investment in DRP. Had the courts properly applied the law, the MEM would have been removed as a creditor of DRP, any votes in which the MEM was involved would have been invalidated by the newly constituted creditors’ committee, and DRP, after having already spent over \$300 million, would have been able to get the Complex back into operation.

system has finally disposed of the claim submitted to it, and such an international wrong is not consummated until its remedies have been exhausted”).

⁶⁰⁴ **CLA-037**, *Pantehniki SA Contractors and Engineers v. Albania*, ICSID Case No. ARB/07/21, Award, July 28, 2009, ¶ 96.

⁶⁰⁵ **CLA-037**, *Pantehniki SA Contractors and Engineers v. Albania*, ICSID Case No. ARB/07/21, Award, July 28, 2009, ¶ 94. *See also* **CLA-038**, Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW, 118, 119 (Cambridge 2005), *citing* International Law Commission (Dugard), Third Report on Diplomatic Protection, UN Doc. A/CN.4.523 (2002) at ¶¶ 38-44.

292. Renco has retained Professor Daniel Schmerler to prepare an expert report on Peruvian bankruptcy law.⁶⁰⁶ Professor Schmerler is a Peruvian lawyer, professor of bankruptcy law, and the author of books and scholarly articles on the subject. He has also served as President of the INDECOPI Chamber specialized in bankruptcy proceedings.⁶⁰⁷ Professor Schmerler concluded that the MEM credit should have never been recognized under Peruvian law, and that both INDECOPI and the judiciary issued manifestly incorrect decisions in violation of DRP's due process rights.⁶⁰⁸

a. *The MEM asserted a bogus credit claim which is patently improper under Peruvian law*

293. On February 18, 2010, one of DRP's suppliers, Consorcio Minero S.A. ("Cormín"), commenced bankruptcy proceedings against DRP, invoking an unpaid debt of US\$ 24,222,361.⁶⁰⁹ Several other entities then applied to INDECOPI to be recognized as creditors of DRP in the bankruptcy. Once approved by INDECOPI, entities such as concentrate suppliers, the Complex workers, companies providing services to execute the PAMA projects, and, most importantly, the MEM and Activos Mineros, all constituted a creditors' committee (the "Creditors' Committee").⁶¹⁰

294. On September 14, 2010, in an effort to assert control over DRP's bankruptcy, the MEM filed a meritless credit claim against DRP in an amount of US\$ 163,046,495.⁶¹¹ The MEM alleged that the remaining amount that DRP had planned to invest in the Copper Circuit sulfuric acid plant project constituted a debt in its favor. Specifically, the MEM argued that DRP, a private entity, was obligated either to finish the PAMA project or to pay the MEM an amount equal to the

⁶⁰⁶ Expert Report of Professor Daniel Schmerler, dated January 5, 2021 (hereinafter, "Schmerler Expert Report")

⁶⁰⁷ Schmerler Expert Report, at 2-3.

⁶⁰⁸ Schmerler Expert Report, at 3-8.

⁶⁰⁹ **Exhibit C-079**, Cormin Notice Regarding Doe Run Peru's Bankruptcy to INDECOPI, February 18, 2010 (*hereinafter* "Feb. 18, 2010 Cormin Notice"). *See also* Neil Witness Stmt. at ¶ 51; Sadlowski Witness Stmt. at ¶ 70.

⁶¹⁰ *See* **Exhibit C-155**, List of Doe Run Peru Approved Creditors, January 10, 2012 (*hereinafter* "DRP Approved Creditors").

⁶¹¹ **Exhibit C-113**, 2010 MEM Request to INDECOPI.

cost of finishing the project. But neither the 1993 Regulations nor the approved PAMA provide any support for the MEM's position. To the contrary, the 1993 Regulations made clear that the government may impose fines or shut down a company's operations if it cannot meet its PAMA milestones. DRP has no obligation under either the Stock Transfer Agreement or Peruvian law to pay the MEM for the ultimate cost to complete the PAMA projects.

295. On September 27, 2010, Centromin's successor, Activos Mineros, filed a similarly meritless credit claim against DRP in the amount of US\$ 10,500,000.⁶¹² Activos Mineros based its claim on DRP's alleged responsibility to remediate the soil contamination that occurred between 1997 and 2010.⁶¹³ By raising this allegation, Activos Mineros ignored all of the commitments that Centromin and Peru had made in the Stock Transfer Agreement. In particular, Activos Mineros' suggestion that DRP was responsible for the remediation work is directly contrary to Clause 6.1 of the Stock Transfer Agreement, which states that "Centromin assumes responsibility [for] [c]ompliance with the obligations contained in Centromin's PAMA according to its eventual amendments approved by the relevant authority and the legal applicable requirements in force" and for "[r]emediation of the areas affected by gaseous and particles emissions from the smelting and refining operations that have produced *up until the date of the execution of this contract and of additional emissions during the period that is provided for in the law for Metaloroya's PAMA.*"⁶¹⁴

296. DRP naturally opposed the MEM's and Activos Mineros' baseless credit claims by filing a formal opposition⁶¹⁵ within the INDECOPI proceeding and a constitutional *amparo*

⁶¹² **Exhibit C-156**, Activos Mineros INDECOPI Application.

⁶¹³ **Exhibit C-156**, Activos Mineros INDECOPI Application.

⁶¹⁴ **Exhibit C-105**, Stock Transfer Agreement, Clause 6.1 at 25-27 (emphasis added).

⁶¹⁵ **Exhibit C-157**, Doe Run Peru's Request to INDECOPI Opposing Ministry of Energy & Mines' Request for Recognition of Claims, November 11, 2010 (*hereinafter* "Nov. 2010 DRP Request to INDECOPI"); **Exhibit C-158**, Doe Run Peru's Brief to INDECOPI with Additional Arguments in Support of Opposition to Ministry of Energy & Mines' Claim, November 15, 2010 (*hereinafter* "Nov. 15, 2010 DRP Brief to INDECOPI"); **Exhibit C-159**, Doe Run Peru's Response to INDECOPI Opposing Claim by Activos Mineros, December 2, 2010 (*hereinafter* "Dec. 2, 2010 DRP Response to INDECOPI"); **Exhibit C-160**, Ministry of Energy & Mines Brief to INDECOPI with Clarifications to Request for Recognition of Claims, December 4, 2010 (*hereinafter* "Dec. 4, 2010 MEM Brief to INDECOPI"); **Exhibit C-161**, Ministry of Energy & Mines' Response to INDECOPI to Requirements of Communication and Letter No. 1780-2010/CCO-INDECOPI, December 6, 2010 (*hereinafter* "December 6, 2010 MEM Response to INDECOPI"); **Exhibit C-162**, Doe Run Peru's Brief to

recourse⁶¹⁶ requesting that the MEM be prevented from having its US\$ 163 million credit claim recognized before INDECOPI.

- b. *Peru's First Instance Constitutional Court and INDECOPI's Bankruptcy Commission both recognized that the MEM credit could not possibly constitute a credit under Peruvian bankruptcy law*

297. On January 11, 2011, the First Instance Constitutional Court dismissed DRP's constitutional *amparo* against the MEM credit.⁶¹⁷ The Court declared that the *amparo* was procedurally inadmissible (*improcedente*), noting that Peruvian bankruptcy law does not consider the violation of a PAMA to be a credit.⁶¹⁸ The Court stated that because the Bankruptcy Law itself did not consider the PAMA as a credit, it would have to assume that the INDECOPI's Bankruptcy Commission would recognize the PAMA obligation as a credit in order to admit DRP's *amparo*.⁶¹⁹ The Court's holding clearly implies that it did not believe that the PAMA obligation would be recognized as a credit.

298. On February 2, 2011, INDECOPI's Bankruptcy Commission dismissed Activos Mineros' claim, because Activos Mineros had failed to demonstrate that DRP had an obligation to

INDECOPI in Opposition to Ministry of Energy & Mines Claim, December 15, 2010 (*hereinafter* "December 15, 2010 DRP Brief to INDECOPI"); **Exhibit C-163**, Doe Run Peru's Brief to INDECOPI with Additional Arguments in Support of Opposition to Ministry of Energy & Mines Claim, December 20, 2010 (*hereinafter* "December 20, 2010 DRP Brief to INDECOPI").

⁶¹⁶ **Exhibit C-164**, DRP's constitutional *amparo* recourse, November 22, 2010.

⁶¹⁷ **Exhibit C-165**, Constitutional Amparo Recourse's dismissal, January 11, 2011.

⁶¹⁸ **Exhibit C-165**, Constitutional Amparo Recourse's dismissal, January 11, 2011, p. 2.

⁶¹⁹ **Exhibit C-165**, Constitutional Amparo Recourse's dismissal, January 11, 2011, p. 2. On **March 2, 2011**, Doe Run Peru appealed the First Instance Constitutional Court's ruling. On **August 18, 2011**, the Superior Court of Justice of Lima, First Civil Chamber, affirmed the First Instance Constitutional Court's ruling dismissing Doe Run Peru's *amparo*. The Superior Court's decision was appealed to the Supreme Constitutional Court on **September 15, 2011**. No other action occurred in the case, but we understand that it languished in the Supreme Court and was ultimately dismissed for lack of prosecution.

remediate the soil in and around La Oroya.⁶²⁰ Activos Mineros unsuccessfully appealed this dismissal.⁶²¹

299. On February 23, 2011, the INDECOPI Bankruptcy Commission also dismissed the MEM's bogus credit claim because the obligation to complete the PAMA Project was not a "debt" of DRP and, therefore, not a claim that could be recognized in the context of DRP's bankruptcy.⁶²² The Bankruptcy Commission specifically held that PAMA obligations arise under Peruvian law, not the Stock Transfer Agreement; that there was no obligation under Peruvian law for a company that was in breach of its PAMA obligations to have to pay the MEM the cost of completing the PAMA milestone that the company had missed; and that the only available remedies for a company's breach of its PAMA obligations were administrative sanctions, such as fines or shutting down that company's operations. The Commission also noted that the MEM was not a signatory to the Stock Transfer Agreement and that it did not have any rights thereunder.⁶²³

300. Professor Schmerler agrees with the INDECOPI Commission and concludes that "the origin of the claims invoked by the MEM against DRP has not been proven..."⁶²⁴ He opines that a breach of the PAMA obligations may cause "the imposition of sanctions of a fine or cessation of operations... but in no case does this entail the possibility of generating a debt on behalf of DRP in favor of the MEM or some other entity or person."⁶²⁵

⁶²⁰ **Exhibit C-166**, Feb. 2011 Activos Mineros Motion to Appeal.

⁶²¹ **Exhibit C-167**, INDECOPI Resolution regarding Recognition of Credits, September 7, 2011 (*hereinafter* "Sept. 7, 2011 INDECOPI Resolution") confirming Resolution 507-2011/CCO-INDECOPI, pursuant to which *Activos Mineros*' claim was dismissed).

⁶²² **Exhibit C-168**, INDECOPI Resolution 1105-2011/CCO-INDECOPI regarding Recognition of Credits Unfounded, February 23, 2011 (*hereinafter* "Feb. 23, 2011 INDECOPI Resolution").

⁶²³ **Exhibit C-168**, INDECOPI Resolution 1105-2011/CCO-INDECOPI regarding Recognition of Credits Unfounded, February 23, 2011 (*hereinafter* "Feb. 23, 2011 INDECOPI Resolution").

⁶²⁴ Schmerler Expert Report, § II.12.f, at 4.

⁶²⁵ Schmerler Expert Report, § II.12.f, at 4.

- c. *The MEM appealed the Bankruptcy Commission’s decision to the INDECOPI Chamber No. 1, which recognized the MEM’s patently improper credit*

301. The MEM appealed the INDECOPI Bankruptcy Commission’s dismissal of its US\$ 163,046,495 credit claim to INDECOPI’s Chamber No. 1 for the Defense of Competition.⁶²⁶ On November 18, 2011, a majority of Chamber No. 1 reversed the Bankruptcy Commission’s decision.⁶²⁷ Although the majority agreed that PAMA obligations arise under Peruvian law, it held that DRP had breached its PAMA obligations, and that the MEM had suffered damages as a result, which were compensable under the Peruvian Civil Code. According to the majority, the compensation that DRP owed the MEM amounted to US\$ 163,046,495, *i.e.*, the amount that DRP had calculated that it would cost to complete the last PAMA project. The majority concluded that this amount constituted a credit of the MEM in DRP’s bankruptcy.⁶²⁸

302. A member of INDECOPI’s Chamber No. 1, Maria Soledad Ferreyros, who issued a strong dissent, would have affirmed the INDECOPI Bankruptcy Commission’s dismissal of the MEM’s bogus US\$ 163,046,495 credit claim. She agreed with the Bankruptcy Commission that the only available remedies in light of a company’s breach of its PAMA obligations were administrative sanctions, such as fines or shutting down that company’s operations. She clearly stated that neither Peruvian law nor the Stock Transfer Agreement provided that the breach of the PAMA could give rise to a claim in favor of the MEM or any other public or private entity:

“In this particular case, I agree with the arguments presented in the appealed decision and the arguments presented by DRP in that, since the investment

⁶²⁶ **Exhibit C-166**, Feb. 2011 Activos Mineros Motion to Appeal; **Exhibit C-169**, Ministry of Energy & Mines Appeal of INDECOPI Resolution, March 2, 2011 (*hereinafter* “Mar. 2, 2011 MEM Appeal to INDECOPI”); **Exhibit C-170**, Activos Mineros Request to INDECOPI for Oral Presentation, April 1, 2011 (*hereinafter* “Apr. 1, 2011 Activos Mineros Request to INDECOPI”); **Exhibit C-171**, Doe Run Peru’s Response to INDECOPI in Opposition to Appeal by Activos Mineros, May 19, 2011 (*hereinafter* “May 19, 2011 DRP Response to INDECOPI”); **Exhibit C-172**, Doe Run Peru’s Response to Ministry of Energy & Mines Appeal, May 18, 2011 (*hereinafter* “May 18, 2011 DRP Response to MEM Appeal”); **Exhibit C-173**, Doe Run Peru’s Brief to INDECOPI in Opposition to Appeal by Ministry of Energy & Mines, November 16, 2011 (*hereinafter* “Nov. 16, 2011 DRP Brief to INDECOPI”)

⁶²⁷ **Exhibit C-174**, Resolution 1743-2011/SC1-INDECOPI issued by Chamber No. 1 for the Defense of Competition of INDECOPI, November 18, 2011 (*hereinafter* “Nov. 18, 2011 Resolution by Chamber No. 1”).

⁶²⁸ **Exhibit C-174**, Resolution 1743-2011/SC1-INDECOPI issued by Chamber No. 1 for the Defense of Competition of INDECOPI, November 18, 2011, pp. 28-40.

commitment made by the corporate debtor is a particular legal duty, which seeks to preserve the public interest of protecting the environment, in the context of a set of rules that are exclusively regulatory, the breach of such duty can only result in the regulated corporation being imposed a sanction expressly provided by the law for that purpose, which is the only consequence under the rule of law...”⁶²⁹

303. Ms. Ferreyros, member of the INDECOPI's Chamber No. 1, found that there was no scope to apply the Peruvian Civil Code to award damages to the MEM, as the majority mistakenly had done, because a breach of a PAMA obligation under no circumstances could grant the MEM a credit or a right to compensation.⁶³⁰ She concluded that making the MEM a creditor of DRP by holding that DRP owed compensation to the MEM as a result of DRP's breaches of its PAMA obligations constituted a case of unjust enrichment.⁶³¹

304. On December 21, 2011, following the split decision of INDECOPI's Chamber No. 1 for the Defense of Competition, INDECOPI recognized the MEM's credit claim in the amount of US\$ 163,046,495 plus US\$ 87,699.29 in interest.⁶³² Thus, the Peruvian Government (the MEM and SUNAT) became DRP's largest creditor, accounting for over 45% of DRP's total liabilities.⁶³³

305. Professor Schmerler confirms in his expert report, however, that administrative authorities, like INDECOPI, “cannot under any circumstances determine the existence of compensation derived from civil liability, since this is a function that the Political Constitution of Peru reserves exclusively for the Judicial Power...”⁶³⁴ In connection with this, Professor Schmerler

⁶²⁹ **Exhibit C-174**, Resolution 1743-2011/SC1-INDECOPI issued by Chamber No. 1 for the Defense of Competition of INDECOPI, November 18, 2011, p. 44.

⁶³⁰ **Exhibit C-174**, Resolution 1743-2011/SC1-INDECOPI issued by Chamber No. 1 for the Defense of Competition of INDECOPI, November 18, 2011, p. 44.

⁶³¹ **Exhibit C-174**, Resolution 1743-2011/SC1-INDECOPI issued by Chamber No. 1 for the Defense of Competition of INDECOPI, November 18, 2011, p. 44.

⁶³² **Exhibit C-175**, INDECOPI Resolution No. 9340-2011/COO-INDECOPI, Recognition of Credits - Mandate of the Court for Defense of Competition No. 1, December 21, 2011 (*hereinafter* “Dec. 21, 2011 INDECOPI Resolution”).

⁶³³ *See* **Exhibit C-155**, List of Doe Run Peru Approved Creditors, January 10, 2012; **Exhibit C-176**, List of Doe Run Peru Approved Creditors, September 19, 2014; **Exhibit C-231**, Minutes of Creditors' Meeting of April 9 and 12, 2012.

⁶³⁴ Schmerler Expert Report, § II.12.b, at 3.

also makes clear that the legality principle mandates that “authorities in Peru can only fulfill those functions that the laws confer on them and, in the case of INDECOPI, they do not have the legal power to determine compensation.”⁶³⁵ Professor Schmerler states:

“109. From the evaluation of the set of the aforementioned norms, it is clearly appreciated that the determination of damage, as well as the possible compensation, when dealing with matters pertaining to civil liability, constitute acts of exclusive competence of the Judicial Power. In that order of ideas, to the extent that the administrative authorities do not exercise jurisdictional functions; only the member bodies of the Judicial Power (courts and chambers) can issue compensation, this being prohibited for other types of entities that make up the public administration.”⁶³⁶

306. Professor Schmerler also concludes that, in this case, there is no judgment from a civil judge granting the MEM compensation for DRP’s alleged breach of PAMA obligations. His professional opinion, as former President of the INDECOPI Chamber, is that the MEM could have a right to compensation if and only if “...in the first place, the MEM files a lawsuit before the Judicial Power and in the respective civil process it manages to demonstrate that DRP did not comply with the execution of any supposed benefit in its favor and that, as a result of that omission, damage has been caused to the MEM that is attributable to DRP.”⁶³⁷ Absent a final decision from a civil judge granting compensation to the MEM, INDECOPI should have never recognized the MEM credit for US\$ 163 million. About this matter, Professor Schmerler explained that:

“188. Bearing these considerations in mind, it is clear that there could only be one compensation provision in favor of the MEM against DRP, at some point in the future, if the MEM files a lawsuit before the Judiciary and in the respective civil process in the first place it succeeds in demonstrating that DRP did not comply with the execution of any supposed service in its favor and that, as a result of this omission, a loss has been caused to the MEM that is attributable to DRP.

⁶³⁵ Schmerler Expert Report, § II.12.b, at 3.

⁶³⁶ Schmerler Expert Report, § IV.3.2, at ¶ 109.

⁶³⁷ Schmerler Expert Report, § II.12.f, at 4.

189. Not presenting all those elements at present, the only thing that is evident is that there is no credit right in favor of the MEM against DRP much less a compensation provision capable of giving rise to a recognition in the administrative bankruptcy headquarters, as wrongly stated by the majority of the Members of the INDECOPI Chamber in Resolution No. 1743-2011/SC1-INDECOPI”.⁶³⁸

307. Professor Schmerler further observes that INDECOPI has consistently rejected claims from the MEM requesting the recognition of credits from mining companies based on alleged breaches of environmental obligations.⁶³⁹ Nine years after the INDECOPI’s Chamber No. 1 decision,⁶⁴⁰ INDECOPI is of the position that a breach of environmental obligations (*i.e.*, PAMA obligations) does not constitute a credit under Peruvian bankruptcy law.⁶⁴¹ As Professor Schmerler explains:

“262. It is so evident that the analysis developed by the majority of Members of the INDECOPI Chamber in the Resolution No. 1743-2011/SC1-INDECOPI, suffers from the various defects and deficiencies that have been explained throughout this report, that not even the functional bodies of INDECOPI that are part of the bankruptcy system have taken the arguments of said resolution when there have been subsequent cases in which the MEM has invoked the recognition of credits against other mining companies submitted to bankruptcy.

(...)

273. As can be seen, nine (9) years after the issuance of Resolution No. 1743-2011/SC1-INDECOPI, through which the MEM obtained the recognition of credits against DRP, the MEM has tried to obtain in a similar way the recognition of credits against other bankrupt mining companies, without their action having been successful.

⁶³⁸ Schmerler Expert Report, § IV.3.3.C, at ¶¶ 188-189.

⁶³⁹ Schmerler Expert Report, § II.12.ñ, at 7.

⁶⁴⁰ **Exhibit C-174**, Resolution 1743-2011/SC1-INDECOPI issued by Chamber No. 1 for the Defense of Competition of INDECOPI, November 18, 2011.

⁶⁴¹ Schmerler Expert Report, § II.12.ñ, at 7.

274. On the contrary, the INDECOPI Commission has systematically rejected the requests for recognition made by the MEM against mining companies, indicating that the requesting public entity has not been able to demonstrate that between it and the bankrupt mining companies there is a legal patrimonial relationship capable of configuring a credit right capable of being recognized in accordance with Article 1 of the LGSC, since the only thing that the MEM evidenced in such cases was the existence of duties of another nature of the mining companies, duties that in the cases illustrated they refer to the performance of specific activities conducive to the environmental compliance of a due closure of the mines, in accordance with what the legal system requires.”⁶⁴²

308. Professor Schmerler explains that he is not aware of any other civil law jurisdiction where an administrative agency (like INDECOPI) is entitled to grant compensation arising from civil liability. He states that “[a]s in Peru, in other countries it is considered essential that it be the Judicial Power that determines the existence of a compensation derived from civil liability, prior to its being recognized and accepted as a credit in the respective bankruptcy process.”⁶⁴³

309. Maybe the most egregious due process violation by the INDECOPI Chamber No. 1 is that it ruled *ultra petita* by deciding matters beyond the MEM’s request. Professor Schmerler explains that INDECOPI’s decision did not address the MEM’s request, but rather it decided “... a different topic than what was requested.”⁶⁴⁴ As stated in Resolution 1743-2011/SC1-INDECOPI, Chamber No.1 decided that the MEM credit must be recognized because it constitutes compensation, *i.e.*, damages, that the MEM should receive due to DRP’s breach of the PAMA. However, the MEM confirmed that it was NOT seeking such relief.

⁶⁴² Schmerler Expert Report, § IV.3.6, at ¶¶ 262, 273-274.

⁶⁴³ Schmerler Expert Report, § II.12.p, at 8. Indeed, Professor Schmerler cites examples of Spain and Chile, both civil law jurisdictions, and found that none of those jurisdictions allows the Bankruptcy Agency to determine a compensation. Said action is exclusive to the Judiciary. *See* Schmerler Expert Report, § IV.4, at ¶¶ 280-289.

⁶⁴⁴ Schmerler Expert Report, § II.12.a, at 3.

310. In fact, during the November 9, 2011 hearing before Chamber No. 1, MEM's legal representative could not have been clearer:

Minute 30:20:

In regard to the PAMA breach, we must clarify that we are not requesting acknowledgment of indebtedness as a result of a breach. In other words, when an obligation is not met, the creditor has two options: it can demand compliance with the obligation or it can cancel the contract and sue for damages, which is the appropriate course of action when there is a breach. We are not asserting damages or anything of the sort. What we are saying is that in fact an obligation has been undertaken to make certain investments and to take certain actions, and that there is non-compliance with those actions, that is, they have not been performed and are pending. In other words, the payment of this obligation, the fulfillment of this obligation, is still pending. Given that it is pending, if it is completed, it is susceptible to being the subject of an acknowledgment because it is still owed.

Minute 33:10:

Next, the exercise of determining what happens if the debt is recognized is completed: how it will be paid, how will the creditor committee deal with this matter. The issue is very simple. As we stated in the first part of this report, the acknowledgment of indebtedness does not change the obligation. The obligation is pending and will have to be paid according to its nature. It must be paid in principle by complying with or abiding by PAMA. That is, if this is going to restructuring, this obligation will have to be paid by executing PAMA without any problem. If we are heading towards an ongoing liquidation event, in order to sell to the company, the PAMA can eventually be implemented. And if we are looking at a case of liquidation in which everything is sold and paid for, we will have to see based on the nature of the obligation. In other words, if I have my obligation, I must comply with it. Based on the nature of the obligation, it is no longer appropriate to comply. It is appropriate to apply the consequences of non-compliance and the corresponding consequences will have to be followed.⁶⁴⁵

311. Professor Schmerler explains that INDECOPI "... has recognized a claim for compensation derived from a breach of obligations under the DRP PAMA, which the MEM did not request, since the credits that it expressly invoked in its request for recognition of credits

⁶⁴⁵ **Exhibit C-234**, Extracts from MEM's oral argument at INDECOPI's Chamber No. 1, 30:20 and 33:10. (Emphasis added)

referred to the alleged non-performance of the obligations derived from the PAMA...”⁶⁴⁶ He states that this serious error serves as a ground for nullifying the decision and that the judiciary should not have upheld it.⁶⁴⁷

- d. *DRP challenged the INDECOPI Chamber No. 1 decision by presenting a demanda contencioso administrativa, which was assigned to a transitory court that was dissolved shortly after it rejected DRP’s challenge*

312. On January 18, 2012, DRP challenged the INDECOPI Chamber No. 1’s split decision in Peruvian court by presenting a “*demanda contencioso administrativa*” against INDECOPI and the MEM.⁶⁴⁸ The case was assigned to a specially-created transitory court, which many eminent Peruvian legal scholars considered to be unduly influenced by the Peruvian government.⁶⁴⁹ On May 24, 2012, DRCL requested to intervene in the case as a “*tercero coadyuvante*,” which application was granted on June 21, 2012.⁶⁵⁰ Although DRCL was not a party to the case, it was permitted to make filings in support of DRP’s position that the MEM credit was patently improper.

313. On October 18, 2012, *exactly nine months after DRP filed its appeal*, a judge sitting on this transitory court issued an unsigned decision, in breach of the Peruvian Code of Civil Procedure, upholding the split decision of Chamber No. 1.⁶⁵¹ The judge held that DRP had breached its PAMA obligations and, therefore, was obligated to pay the MEM compensation or damages under the Peruvian Civil Code. Furthermore, the judge concluded that INDECOPI had

⁶⁴⁶ Schmerler Expert Report, § II.12.a, at 3.

⁶⁴⁷ Schmerler Expert Report, § II.12.a, at 3.

⁶⁴⁸ **Exhibit C-177**, ACA Request for Annulment of Ministry of Energy and Mines’ Claim, January 16, 2012.

⁶⁴⁹ See **Exhibit C-178**, “Poder Judicial: Cuidado con las salas transitorias y especializadas,” Instituto de Defensa Legal Magazine, Issue 130, 2000, p. 28 (<https://www.idl.org.pe/idlrev/revistas/130/pag28.htm>).

⁶⁵⁰ **Exhibit C-180**, Resolución No. 8 "Decision on intervention of Doe Run Cayman Ltd.," June 21, 2012.

⁶⁵¹ **Exhibit C-181**, Judgment of the Annulment of Administrative Act, Case No. 2012-00368, October 18, 2012 (*hereinafter* “Oct. 18, 2012 First Instance Judgment”). The judgment was signed by the Judge’s assistant, and not by the Judge herself. The Judge’s failure to sign the judgment constitutes a breach of the Peruvian Code of Civil Procedure, which provides that a judgment without a judge’s signature is void (see **Exhibit C-182**, Peruvian Code of Civil Procedure, Art. 122.7).

legal authority to grant compensation in favor of the MEM.⁶⁵² Shortly after issuing this unsigned decision, the transitory court was dissolved and converted into a mixed jurisdiction court.⁶⁵³

314. In affirming the split decision of Chamber No. 1, the transitory court judge ignored the opinion of the Civil District Attorneys' Office, issued during the court proceedings,⁶⁵⁴ which opined that:

“(...) the intervention of the MEM in the bankruptcy proceeding at INDECOPI infringes the legality principle, due to that there is no express rule that allows its petition to recognize as a credit the obligation of DRP to finish the PAMA project, nor to request enforcement of said obligation or any payment.”⁶⁵⁵

315. Consistent with the position of the INDECOPI Bankruptcy Commission, the Civil District Attorney's Office concluded that the MEM had no legal authority to receive compensation as a result of a company's failure to complete a PAMA, and that, if such a failure occurred, the MEM could only impose fines on the company in breach or shut down its operations.⁶⁵⁶ The Civil District Attorney's Office also opined that the amount of money that DRP had estimated it would cost to complete the PAMA did not entail a recognition of a credit in the MEM's favor.⁶⁵⁷

316. The fact that the INDECOPI decision recognizing the MEM credit was appealed to the judiciary does not mean that the compensation erroneously granted by INDECOPI was judicially confirmed. To the contrary, Professor Schmerler explains that the decisions issued by the Courts in the *demanda contencioso-administrativa* “... does not mean that through such a process, the existence of the alleged compensation ... in favor of the MEM against DRP has been

⁶⁵² **Exhibit C-181**, Judgment of the Annulment of Administrative Act, Case No. 2012-00368, October 18, 2012.

⁶⁵³ **Exhibit C-185**, Resolución 154-2013-CE-PJ, August 1, 2013, at 3.

⁶⁵⁴ Supreme Decree No. 013-2008-JUS, which applied at the time of DRP's case, required the Prosecutor's Office to issue an opinion, called “Dictamen Fiscal,” for every judicial case in which an administrative decision was being challenged. Although the opinion of the Prosecutor's Office was not binding, prosecutors who issued these opinions were specialized in administrative cases and usually provided a neutral recommendation to the judges. See **Exhibit C-183**, Supreme Decree No. 013-2008-JUS, Art. 16.

⁶⁵⁵ **Exhibit C-184**, Civil District Attorneys' Office Opinion No. 362-2012, May 9, 2012, at 10.

⁶⁵⁶ **Exhibit C-184**, Civil District Attorneys' Office Opinion No. 362-2012, May 9, 2012.

⁶⁵⁷ **Exhibit C-184**, Civil District Attorneys' Office Opinion No. 362-2012, May 9, 2012.

validated.”⁶⁵⁸ He explains that the *demanda contencioso-administrativa* “... has not been designed to discuss the existence of compensation for civil liability, since for this purpose there is its own, different way, such as the civil process”⁶⁵⁹ and that “... this did not involve, at any time, reconstructing the way in which INDECOPI determined whether there was an alleged compensation for contractual civil liability...”⁶⁶⁰

- e. *DRP and DRCL appealed the transitory court’s decision, but on the scheduled day for oral argument, DRP’s lawyers were refused entry to the courthouse and the case was transferred to another court, causing even more delays*

317. On November 5, 2012, DRP appealed the transitory court’s unsigned decision.⁶⁶¹ The appeal was assigned to the 4th Chamber for Contentious Administrative Actions of the Superior Court of Justice. After the 4th Chamber received the appellate file and the parties’ submissions, oral argument was scheduled for July 3, 2013.⁶⁶² When DRP’s and DRCL’s lawyers went to the courthouse for oral argument, court personnel refused to let them enter and said the judges were in a meeting and unavailable.⁶⁶³ The case was then reassigned to the newly created 8th Chamber for Contentious Administrative Actions with a Sub-Specialty in INDECOPI matters.⁶⁶⁴

318. This patently improper and illegal action resulted in a delay of over a year before oral argument was heard and a decision rendered on DRP’s appeal.⁶⁶⁵ On July 25, 2014, the 8th

⁶⁵⁸ Schmerler Expert Report, § II.12.m, at 6.

⁶⁵⁹ Schmerler Expert Report, § II.12.n, at 6.

⁶⁶⁰ Schmerler Expert Report, § II.12.n, at 6-7.

⁶⁶¹ **Exhibit C-186**, DRP Appeal to the October 18, 2012 First Instance Judgment, November 5, 2012 (*hereinafter* “Nov. 5, 2012 DRP Appeal”).

⁶⁶² **Exhibit C-187**, 4th Chamber for Contentious Administrative Actions of the Superior Court of Justice, Resolución No. 9, July 4, 2013.

⁶⁶³ Sadlowski Witness Stmt. at ¶ 66; **Exhibit C-187**, 4th Chamber for Contentious Administrative Actions of the Superior Court of Justice, Resolución No. 9, July 4, 2013; **Exhibit C-232**, 4th Chamber for Contentious Administrative Actions of the Superior Court of Justice, Resolución No. 3, April 12, 2013.

⁶⁶⁴ **Exhibit C-188**, Resolución Administrativa No. 206-2012-CE-PJ, October 24, 2012; **Exhibit C-189**, Resolución Administrativa No. 102-2013-CE-PJ, June 12, 2013.

⁶⁶⁵ These incorrect and last-minute transfers from one court to others have been sanctioned by the Peruvian Constitutional Tribunal, the highest court interpreting, protecting and enforcing the Peruvian

Chamber affirmed the transitory court's judgment in a split 3-2 vote. The 8th Chamber majority considered that DRP's PAMA obligations were incorporated into the Stock Transfer Agreement.⁶⁶⁶ Despite Peruvian law being clearly and unequivocally to the contrary, the majority concluded that INDECOPI could grant, and that the MEM could be awarded, compensation for breaches of those PAMA obligations under the Peruvian Civil Code.⁶⁶⁷

319. Judges Torres and Hasembank dissented from the decision of the 8th Chamber majority, holding that the transitory court's unsigned judgment should be overturned. In accordance with the prior decisions, they considered that the source of DRP's PAMA obligations was Peruvian law, and not the Stock Transfer Agreement. The dissenting judges opined that "the only consequence of DRP's breach in the execution of the PAMA is the possibility to impose sanctions."⁶⁶⁸ As a result, they concluded that any breaches of PAMA obligations would only entail administrative sanctions, such as fines or shutting down operations, but would not lead to compensation under the Peruvian Civil Code.⁶⁶⁹ Judges Torres and Hasembank also found that DRP's estimate of US\$ 163 million to complete the PAMA did not constitute a recognition of debt in the MEM's favor.⁶⁷⁰ Because DRP did not have any Civil Code obligations towards the MEM (and, consequently, could not have breached any such obligations), Judges Torres and Hasembank concluded that the MEM was not a creditor of DRP and its \$163 million claim was not a credit.⁶⁷¹

320. Professor Schmerler explains this by presenting a statement of OEFA, the Peruvian environmental regulatory agency, which considers that a breach of the PAMA obligations does not give the right to receive compensation:

Constitution. *See Exhibit C-233*, Decision of the Constitutional Tribunal, Exp. No. 00041-2012-PA/TC, April 23, 2013.

⁶⁶⁶ **Exhibit C-190**, 8th Chamber of the Lima Superior Court, Decision No. 38, July 25, 2014, p. 6.

⁶⁶⁷ **Exhibit C-190**, 8th Chamber of the Lima Superior Court, Decision No. 38, July 25, 2014, p. 7, 9. The 8th Chamber majority also found that administrative sanctions, such as fines or shutting down company operations, were distinct legal remedies from compensation under the Peruvian Civil Code.

⁶⁶⁸ **Exhibit C-190**, 8th Chamber of the Lima Superior Court, Decision No. 38, July 25, 2014, p. 18.

⁶⁶⁹ **Exhibit C-190**, 8th Chamber of the Lima Superior Court, Decision No. 38, July 25, 2014, p. 17-18.

⁶⁷⁰ **Exhibit C-190**, 8th Chamber of the Lima Superior Court, Decision No. 38, July 25, 2014, p. 18.

⁶⁷¹ **Exhibit C-190**, 8th Chamber of the Lima Superior Court, Decision No. 38, July 25, 2014, p. 19.

“177. It is also interesting to know how an entity of the Peruvian public administration that has not participated in the process of recognition of credits raised by the MEM against DRP before INDECOPI analyzes the issue of non-compliance with environmental obligations. We refer specifically to the Environmental Assessment and Enforcement Agency (OEFA), which on the occasion of the detection of non-compliance with environmental obligations associated with the mine closure plan, by a mining company that was also subject to bankruptcy proceedings before INDECOPI, noted that in relation to the bankruptcy procedure in process, this situation does not exempt the bankrupt mining company “from its administrative responsibility, inasmuch as the aforementioned procedure refers only to the recognition and recovery of credits by the debtor in favor of its creditors, whose object is limited to the scope of patrimonial obligations; While this administrative procedure, pursued under the jurisdiction of the OEFA, refers to the verification of compliance with environmental obligations of a non-patrimonial nature, of the company, derived from the regulations on the matter (...).”

178. Indeed, in the OEFA statement discussed here, it is highlighted that environmental obligations have a non-patrimonial nature, which coincides with the analysis developed in the singular vote of the Member of the INDECOPI Chamber María Soledad Ferreyros, as well as in the Dissenting vote of Judges Torres Gamarra and Hasembank Armas of the Eighth Administrative Litigation Chamber and in the opinion of the Civil District Attorneys’ Office, all of whom agreed that the non-execution of the environmental obligations of the PAMA does not give rise to having a legal patrimonial relationship set up, so the non-execution associated with the PAMA cannot give rise to the origin of a credit that can be recognized in the terms of the LGSC.”⁶⁷²

⁶⁷² Schmerler Expert Report, § IV.3.3.B, at ¶¶ 177-178.

- f. *DRP and DRCL appealed to the Supreme Court, which dismissed the appeal on baseless technical grounds and never addressed the merits of the appeal*

321. In August 2014, DRP and DRCL⁶⁷³ appealed the split 3-2 judgment of the 8th Chamber of the Lima Superior Court to the Supreme Court of Justice by filing a *Recurso de Casación*. In their applications, they argued that the majority of the 8th Chamber had incorrectly interpreted and applied Peruvian law on two issues: the existence of a credit and the consequences of a breach of a PAMA obligation.⁶⁷⁴ They also argued that the majority had committed serious due process violations, including by failing to include the *ratio decidendi* in its decision and by relying on arguments that the parties had not discussed in the proceeding.⁶⁷⁵

322. On November 3, 2015, in a clearly results-oriented decision without any substantive explanation, the Supreme Court summarily dismissed both DRP's and DRCL's appeal, holding that their applications did not comply with the requisite procedural formalities and also alleged they had not explained what the due process violations were.⁶⁷⁶ The Supreme Court erroneously concluded that the appeal had not: (i) set out what the correct interpretation of the law would be to conclude that the MEM was not a proper creditor in DRP's bankruptcy;⁶⁷⁷ (ii) established the relevance of the law providing that administrative sanctions are the sole remedy for breaches of

⁶⁷³ **Exhibit C-191**, DRP's *Recurso de Casación* filed before the Peruvian Supreme Court of Justice, August 25, 2014; **Exhibit C-192**, Doe Run Cayman Ltd.'s *Recurso de Casación* filed before the Peruvian Supreme Court of Justice, August 22, 2014.

⁶⁷⁴ **Exhibit C-191**, DRP's *Recurso de Casación* filed before the Peruvian Supreme Court of Justice, August 25, 2014, pp. 3, 4; **Exhibit C-192**, Doe Run Cayman Ltd.'s *Recurso de Casación* filed before the Peruvian Supreme Court of Justice, August 22, 2014, at. 9, 12.

⁶⁷⁵ **Exhibit C-191**, DRP's *Recurso de Casación* filed before the Peruvian Supreme Court of Justice, August 25, 2014, pp. 8-10; **Exhibit C-192**, Doe Run Cayman Ltd.'s *Recurso de Casación* filed before the Peruvian Supreme Court of Justice, August 22, 2014, pp. 16-20.

⁶⁷⁶ **Exhibit C-193**, Peruvian Supreme Court of Justice, Decisions on the *Recursos de Casación*, November 3, 2015.

⁶⁷⁷ **Exhibit C-193**, Peruvian Supreme Court of Justice, Decisions on the *Recursos de Casación*, November 3, 2015, pp. 3, 4.

PAMA obligations;⁶⁷⁸ and (iii) adequately explained the 8th Chamber of the Lima Superior Court's due process violations.⁶⁷⁹

323. The Supreme Court's curt dismissal of the appeal is shocking because both DRP and DRCL included these allegedly missing issues in their appellate submissions. They clearly explained that (i) under Peruvian law, in order for the MEM to be a creditor, there has to be a valid credit, which was not the case here;⁶⁸⁰ (ii) the law providing exclusively for sanctions for breaches of PAMA obligations is relevant because it excludes the type of compensation INDECOPI granted to the MEM;⁶⁸¹ and (iii) the 8th Chamber majority violated DRP's due process rights because (a) it did not state the reasons for its judgment, (b) it approved compensation granted by an administrative agency (INDECOPI) despite the fact that only civil judges are entitled to grant such compensation, and (c) it decided an issue that the MEM had not raised.⁶⁸²

324. The Supreme Court of Justice's summary dismissal of DRP's and DRCL's appeals put an end to DRP's efforts to overturn the MEM's bogus US\$ 163 million credit claim and effectively confirmed its validity. The Peruvian judiciary's failure to nullify that patently absurd credit constitutes a denial of justice, in breach of Article 10.5 of the Treaty.

325. Professor Schmerler concludes: "If the Judicial Power had acted with respect to the Constitution and the laws of Peru and had declared the nullity of Resolution No. 1743-2011/SC1-INDECOPI, the composition of the Creditors' Meeting would have been significantly different from the one that is presented as of 2012 and, therefore, its agreements would have reflected the

⁶⁷⁸ **Exhibit C-193**, Peruvian Supreme Court of Justice, Decisions on the *Recursos de Casación*, November 3, 2015, p. 4.

⁶⁷⁹ **Exhibit C-193**, Peruvian Supreme Court of Justice, Decisions on the *Recursos de Casación*, November 3, 2015, p. 4.

⁶⁸⁰ **Exhibit C-191**, DRP's *Recurso de Casación* filed before the Peruvian Supreme Court of Justice, August 25, 2014, p. 4; **Exhibit C-192**, Doe Run Cayman Ltd.'s *Recurso de Casación* filed before the Peruvian Supreme Court of Justice, August 22, 2014, p. 9.

⁶⁸¹ **Exhibit C-191**, DRP's *Recurso de Casación* filed before the Peruvian Supreme Court of Justice, August 25, 2014, p. 5-9; **Exhibit C-192**, Doe Run Cayman Ltd.'s *Recurso de Casación* filed before the Peruvian Supreme Court of Justice, August 22, 2014, p. 12 - 16.

⁶⁸² **Exhibit C-191**, DRP's *Recurso de Casación* filed before the Peruvian Supreme Court of Justice, August 25, 2014, pp. 9 - 13; **Exhibit C-192**, Doe Run Cayman Ltd.'s *Recurso de Casación* filed before the Peruvian Supreme Court of Justice, August 22, 2014, p. 16 - 20.

will of the true creditors, without the invalidating distortions induced by the MEM as an unreal (also majority) creditor.”⁶⁸³

326. Based on the foregoing, it is clear that Peru administered justice in a fundamentally unfair manner throughout the proceedings detailed above for the purpose of permitting the MEM to maintain its position as DRP’s largest creditor in the DRP bankruptcy proceeding. Both the INDECOPI Chamber No. 1 and the Peruvian judiciary were not impartial, were subject to external influences, kept DRP mired in appeals causing unconscionable delay, and issued decisions contrary to Peruvian law. This conduct constitutes a textbook case of denial of justice in violation of Article 10.5 of the Treaty, which imposes on Peru “the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.”⁶⁸⁴

V. CONCLUSION

327. For the reasons set forth herein, Claimant requests an award, *inter alia*, granting it the following relief:

- A declaration that Peru has violated the fair and equitable treatment standard under Article 10.5 of the Treaty, as a result of (i) Peru’s unwarranted delay in granting, and subsequent undermining of, DRP’s extension of time to finish its final PAMA project; and (ii) Peru’s mistreatment of Claimant in connection with DRP’s restructuring plans.
- A declaration that Peru has violated Article 10.7 of the Treaty by unlawfully expropriating Renco’s investments.
- A declaration that Peru has violated Article 10.5 of the Treaty due to its failure to invalidate the MEM’s patently improper US\$ 163 million credit against DRP, which constitutes a denial of justice.

⁶⁸³ Schmerler Expert Report, § II.12.q, at 8.

⁶⁸⁴ CLA-134, Treaty, art. 10.5(2)(a).

- All costs of this proceeding, including Claimant's attorneys' fees, expert fees, and expenses.
- Pursuant to section 2 of Procedural Order No. 3 dated September 17, 2020, Claimant expressly reserves its right until the damages phase of this proceeding to seek an award of compensation for any and all damages it has suffered and will suffer, for moral damages arising from harm to Claimant's reputation resulting from Peru's unlawful acts, an award of pre-and-post-award interest until the date of Peru's final satisfaction of the award, compounded quarterly, and any other form of recoverable damages or relief to be developed and quantified in the course of the damages phase.

Dated: New York, New York
January 25, 2021



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