

The Renco Group, Inc.

Claimant

v.

The Republic of Peru

Respondent

(UNCT/13/1)

**PERU'S PRELIMINARY OBJECTION
UNDER ARTICLE 10.20.4**

20 February 2014



PERU’S PRELIMINARY OBJECTION UNDER ARTICLE 10.20.4

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	THE STANDARD UNDER ARTICLE 10.20.4	2
III.	FACTS	4
	A. Privatization of the La Oroya Facility	4
	B. The Contract and the Guaranty.....	5
	C. The Missouri Lawsuits.....	7
IV.	RENCO’S CLAIM UNDER ARTICLE 10.16.1(A)(I)(C) “IS NOT A CLAIM FOR WHICH AN AWARD IN FAVOR OF THE CLAIMANT MAY BE MADE” AS A MATTER OF LAW	8
	A. There Is No Investment Agreement Between The Republic Of Peru And Renco.....	9
	B. Renco’s Claims Under Article 10.16.1(a)(i)(C) Fail Because As A Matter of Law An Award In Favor Renco Cannot Be Made.....	14
	1. As A Matter of Law, Peru Could Not Have Breached The Contract	14
	2. As A Matter of Law, Peru Could Not Have Breached The Guaranty	19
V.	REQUEST FOR RELIEF	25

The Renco Group, Inc. v The Republic of Peru

PERU'S PRELIMINARY OBJECTION UNDER ARTICLE 10.20.4

The Republic of Peru (“Peru,” “Respondent,” or the “Republic”) hereby submits its Preliminary Objection under Article 10.20.4 of the Peru-United States Trade Promotion Agreement (the “Treaty”) in accordance with the Tribunal’s Decision as to the Scope of the Respondent’s Preliminary Objections under Article 10.20.4 dated 18 December 2014 (“Decision”),¹ and the schedule established by the Tribunal in its Procedural Order No. 1 dated 22 August 2013, as modified by agreement of the Parties.²

I. INTRODUCTION

1. The Renco Group, Inc. (“Renco” or “Claimant”) seeks an award of unspecified damages for the alleged mistreatment of, and interference with, its alleged investment in Doe Run Peru S.R.LTDA (“DRP”), a Peruvian mining and mineral processing company. In 1997, DRP acquired the smelting and refining complex in La Oroya, Peru (the “La Oroya Facility” or the “Facility”) based upon its specific promises and undertaking of obligations to invest in the development, improvement, modernization, and expansion of the Facility. Critically, it also agreed to comply with an Environmental Remediation and Management Program (“PAMA”) to manage the effluents, emissions, and waste generated by the Facility. Despite multiple extensions of time granted by Peru in good faith, DRP, failed to comply with its specific promises and obligations as required, and ultimately went bankrupt due to its own misrepresentations, mismanagement, and unlawful operations.

2. Renco now seeks to shift responsibility for its own failures to Peru, arguing, among other things, that Peru “failed to observe its obligations to Renco under the Stock Transfer Agreement and the Guaranty,” which allegedly “were contemplated, prepared and executed as part of a single investment transaction,” and thus qualify as “investment agreements” under the Treaty.³

3. All of Renco’s claims in this arbitration are factually and legally meritless, and, for the avoidance of any doubt, Peru reserves all of its rights in this regard. For present purposes, in accordance with the Tribunal’s Decision on the Scope of Article 10.20.4, Peru addresses in this submission only certain claims advanced by Renco relating to Peru’s alleged violation of its alleged “investment agreements.”⁴ As elaborated below, these claims are legally meritless, and should be dismissed at this stage of the arbitration proceedings under Article 10.20.4, so that time, resources, and effort are not expended unnecessarily.

- First, there is no investment agreement between Peru and Renco within the meaning of the Treaty, because neither the Share Transfer Agreement (the “Contract”) nor the Guaranty Agreement (the “Guaranty”) was executed by both Peru and Renco; neither agreement creates an exchange of rights and obligations, binding upon Renco and Peru under Peruvian law; and

¹ Decision as to the Scope of the Respondent’s Preliminary Objections under Article 10.20.4 dated 18 Dec. 2014 (“Decision on the Scope of Article 10.20.4”).

² Procedural Order No. 1 dated 22 Aug. 2013; Letter to the Tribunal dated 2 Jan. 2015.

³ Claimant’s Amended Notice of Arbitration and Statement of Claim dated 9 Aug. 2011 (“Amended Notice of Arbitration and Statement of Claim”), ¶¶ 42, 56.

⁴ Amended Notice of Arbitration and Statement of Claim, ¶ 41.

neither agreement falls within the defined subject matters for investment agreements, as required by the Treaty. As a matter of law, Renco's claim for breach of Article 10.16.1(a)(i)(C) thus fails.

- Second, even if the Contract constituted a valid investment agreement between Peru and Renco under the Treaty, which it does not, Peru, as a matter of law, could not have breached any obligations to Renco under the Contract, and, hence, Article 10.16(1)(a)(i)(C) of the Treaty, because Peru is not a party to the Contract, and because the obligations contained therein run only to DRP and DRC Ltd., and not to Renco.
- Third, even if the Guaranty constituted a valid investment agreement between Peru and Renco under the Treaty, which it does not, Peru, as a matter of law, could not have breached any obligations to Renco under the Guaranty, and, hence, Article 10.16(1)(a)(i)(C) of the Treaty, because the Guaranty is void under Peruvian law, and because Renco's claims under the Guaranty in any event are not ripe or otherwise fail to state a claim.

None of Renco's claims relating to Peru's alleged violation of its purported investment agreements can be sustained. As a matter of law, such claims are not claims for which an award in favor of Renco may be made under Article 10.26, and must be dismissed.⁵

II. THE STANDARD UNDER ARTICLE 10.20.4

4. Article 10.20.4 of the Treaty provides:

Without prejudice to a tribunal's authority to address other objections as a preliminary question, such as an objection that a dispute is not within the tribunal's competence, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26.⁶

As the Tribunal remarked in its Decision on the Scope of Article 10.20.4, "the effect of the principal clause is to establish a special regime that requires a tribunal to deal with certain categories of objections—namely, objections by a respondent to the legal sufficiency of claims brought by the claimant—as preliminary questions."⁷ The object and purpose of this special regime, as the Tribunal found, is to "provide for an efficient mechanism for disposing claims at an early stage in the arbitral proceedings"⁸

5. With respect to the treatment of factual allegations in this procedure, Article 10.20.4, subparagraph (c) provides that, "[i]n deciding an objection under this paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules," and that "[t]he

⁵ Peru-United States Trade Promotion Agreement, entered into force February 1, 2009 (the "Treaty"), Article 10.20.4 (RLA-1); *see also* Supreme Decree No. 009-2009-MINCETUR, Jan. 18, 2009 (RLA-2).

⁶ Treaty, Art. 10.20.4 (RLA-1).

⁷ Decision on the Scope of Article 10.20.4 ¶ 185.

⁸ Decision on the Scope of Article 10.20.4 ¶ 222.

tribunal may also consider any relevant facts not in dispute.”⁹ As the Tribunal noted in its Decision on the Scope of Article 10.20.4, the Tribunal thus “is required to adopt an evidentiary standard which assumes that all of claimant’s factual allegations in support of its claims as set out in the pleadings are true.”¹⁰

6. That foregoing does not mean that the Tribunal must accept all of Claimant’s factual allegations at face value. As the *Pac Rim Cayman v. El Salvador* tribunal observed with respect to the identical article in the Dominican Republic-Central America-United States Free Trade Agreement (“DR-CAFTA”), “factual allegations” do not include “a legal allegation clothed as a factual allegation,” nor do they include “a mere conclusion unsupported by any relevant factual allegation.”¹¹ As that tribunal further noted, “substance must clearly prevail over form under this procedure.”¹² The tribunal in *Trans-Global v. Jordan* similarly observed with respect to a preliminary objection under the ICSID Arbitration Rules that, “as regards disputed facts relevant to the legal merits of a claimant’s claim, the tribunal need not accept at face value any factual allegation which the tribunal regards as (manifestly) incredible, frivolous, vexatious or inaccurate or made in bad faith; nor need a tribunal accept a legal submission dressed up as a factual allegation.”¹³

7. The present case involves a claim under Article 10.16.1(a)(i)(C) of the Treaty that Peru allegedly breached an investment agreement. In this context, the clarification contained in footnote 10 to Article 10.20.4 is relevant. Footnote 10 provides:

For greater certainty, with respect to a claim submitted under Article 10.16.1(a)(i)(C) or 10.16.1(b)(i)(C), an objection that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26 may include, where applicable, an objection provided for under the law of the respondent.¹⁴

Here, Peruvian law is the law governing the Contract and the Guaranty—which allegedly constitute Claimant’s purported “investment agreements” in this arbitration. Pursuant to footnote 10, Peruvian law is not an issue of fact for which the Tribunal shall assume Claimant’s allegations to be true for purposes of Article 10.20.4; rather, Peruvian law is a legal issue, which must be assessed by the Tribunal in determining whether, as a matter of law, Claimant’s claim under 10.16.1(a)(i)(C) is not a claim for which an award in favor of Claimant may be made under Article 10.26.

8. With respect to the standard of review under Article 10.20.4, the *Pac Rim* tribunal remarked that it did “not consider that the standard of review under Article 10.20.4 is limited to ‘frivolous’ claims or ‘legally impossible’ claims,” observing that “[t]hese words could have been used by the Contracting Parties in agreeing CAFTA; but all are significantly absent.”¹⁵ The tribunal further

⁹ Treaty, Art. 10.20.4(c) (RLA-1).

¹⁰ Decision on the Scope of Article 10.20.4 ¶ 189(c).

¹¹ *Pac Rim Cayman LLC v. The Republic of El Salvador* (ICSID Case No. ARB/09/17) Decision on the Respondent’s Preliminary Objections Under CAFTA Articles 10.20.4 and 10.20.5 dated 2 Aug. 2010 ¶ 91 (RLA-9).

¹² *Pac Rim Cayman LLC v. The Republic of El Salvador* (ICSID Case No. ARB/09/17) Decision on the Respondent’s Preliminary Objections Under CAFTA Articles 10.20.4 and 10.20.5 dated 2 Aug. 2010 ¶ 91 (RLA-9).

¹³ *Trans-Global Petroleum Inc. v. The Hashemite Kingdom of Jordan* (ICSID Case No. ARB/07/25) Decision on the Respondent’s Objection under Rule 41(5) of the ICSID Arbitration Rules dated 12 May 2008 ¶¶ 91, 105 (RLA-43).

¹⁴ Treaty, Art. 10.20.4, n.10 (RLA-1).

¹⁵ *Pac Rim Cayman LLC v. The Republic of El Salvador* (ICSID Case No. ARB/09/17) Decision on the Respondent’s Preliminary Objections Under CAFTA Articles 10.20.4 and 10.20.5 dated 2 Aug. 2010 ¶ 108 (RLA-9).

observed that “the implied addition of these or similar words would significantly restrict the arbitral remedy under Article 10.20.4, when the structure of this provision permits a more natural and effective interpretation consistent with its object and purpose.”¹⁶ As the *Pac Rim* tribunal concluded, to grant a preliminary objection, “an award should be made finally dismissing the claimant’s claim at the very outset of the arbitration proceedings, without more.”¹⁷

III. FACTS

9. In accordance with the legal standard articulated above, Peru sets forth below certain facts relevant to its preliminary objection under Article 10.20.4 of the Treaty, which either are undisputed between the parties or taken directly from the factual allegations made by Renco in its Amended Notice of Arbitration and Statement of Claim. The presentation of facts herein is set out solely for purposes of Peru’s preliminary objection under Article 10.20.4, do not reflect the totality of the factual issues in dispute in this case, and should in no way be construed as an acceptance by Peru of Renco’s factual allegations, which, as Peru will demonstrate in a later phase, are meritless. Peru expressly reserves all of its rights in this regard.

A. Privatization of the La Oroya Facility

10. In the early 1990s, Peru sought to privatize and to modernize its mining industry, including the La Oroya Facility. At that time, the Facility was held by Empresa Minera Del Centro Del Perú S.A. (“Centromin”), a State-owned mining and mineral processing company.¹⁸ Peru adopted a new Environmental and Natural Resources Code, as well as new environmental regulations,¹⁹ which were aimed at promoting the economic use of Peru’s natural resources “in a form compatible with ecological balance and development.”²⁰ As part of this process, Peru also required mining and metallurgical companies to conduct an Environmental Impact Assessment (“EIA”), and to submit to the Ministry of Energy and Mines (the “MEM”) a list of proposed environmental projects to bring their facilities within the new environmental standards established by the legal and regulatory framework in the form of a PAMA.²¹

11. On 29 August 1996, Centromin prepared and submitted certain proposed environmental projects for the La Oroya Facility to the MEM,²² and subsequently transferred its interest in the Facility to Empresa Minera Metaloroya La Oroya S.A. (“Metaloroya”), a State-owned company which had been established by Centromin in September 1996 for purposes of Peru’s

¹⁶ *Pac Rim Cayman LLC v. The Republic of El Salvador* (ICSID Case No. ARB/09/17) Decision on the Respondent’s Preliminary Objections Under CAFTA Articles 10.20.4 and 10.20.5 dated 2 Aug. 2010 ¶ 108 (RLA-9).

¹⁷ *Pac Rim Cayman LLC v. The Republic of El Salvador* (ICSID Case No. ARB/09/17) Decision on the Respondent’s Preliminary Objections Under CAFTA Articles 10.20.4 and 10.20.5 dated 2 Aug. 2010 ¶ 110 (RLA-9).

¹⁸ Amended Notice of Arbitration and Statement of Claim ¶ 12.

¹⁹ Amended Notice of Arbitration and Statement of Claim ¶¶ 12-13; *see also* Claimant’s Memorial on Liability of 20 Feb. 2014, ¶ 28; Legislative Decree No. 613 concerning the Environmental and Natural Resources Code dated 9 Sept. 1990 (Exh. C-36); Supreme Decree No. 016-93-EM concerning Regulations for Environmental Protection in Mining and Metallurgy dated 28 Apr. 1993 (Exh. C-37).

²⁰ Legislative Decree No. 613 concerning the Environmental and Natural Resources Code dated 9 Sept. 1990, Art. 1 (Exh. C-36); *see also* Amended Notice of Arbitration and Statement of Claim ¶¶ 12-13.

²¹ Supreme Decree No. 016-93-EM concerning Regulations for Environmental Protection in Mining and Metallurgy dated 28 Apr. 1993, Arts. 6, 9, 20 (Exh. C-37).

²² Amended Notice of Arbitration and Statement of Claim ¶¶ 13-14; Memorial ¶ 46; White Paper concerning the Privatization of Metaloroya dated 1997, at 38 (Exh. C-35).

privatization program.²³ On 13 January 1997, the MEM adopted the PAMA for the La Oroya Facility. The PAMA contained a list of environmental projects aimed at remediating, mitigating, and preventing environmental degradation to be completed over a period of ten years.²⁴ On 27 January 1997, following the adoption of the PAMA, Peru announced the public tender of Metaloroya.²⁵

12. The public tender of Metaloroya was held on 14 April 1997, and, on 10 July 1997, a consortium formed by Renco and its affiliate, Doe Run Resources Corporation (“DRRC”), a company incorporated in St. Louis, Missouri, was notified that it had won the tender process.²⁶ As required under the bidding rules, the consortium then proceeded to establish DRP, a Peruvian company, to acquire Metaloroya’s shares from Centromin.²⁷

B. The Contract and the Guaranty

13. On 23 October 1997, Centromin and DRP executed the Contract with the intervention of Metaloroya, Renco, and DRRC. DRP, as the “Investor,” acquired from Centromin 99.93 percent of Metaloroya’s shares for US\$ 121.4 million,²⁸ and made a separate capital contribution to Metaloroya of US\$ 126.4 million.²⁹ Pursuant to the Contract, DRP undertook to invest US\$ 120 million in Metaloroya within a period of five years from the date of execution of the Contract to develop, improve, modernize, and expand the La Oroya Facility,³⁰ and to implement the PAMA to manage the effluents, emissions, and waste generated by the Facility.³¹ Centromin, in turn, agreed, among other things, to assume the obligations contained in Centromin’s PAMA; to remediate the areas affected by gaseous and particles emissions from the smelting and refining operations produced up until the date of execution of the Contract and additional emissions as required thereunder; and to carry out some of the slag management projects.³² As noted in Clause 11, the Contract is governed by Peruvian law.³³

14. Under the Contract, Centromin, as the “Transferor,” and Metaloroya, as the “Company,” also assumed reciprocal obligations to hold each other harmless and to indemnify each other for third party claims for which they each had assumed liability.³⁴ Clause 5.8 thus provides that

²³ Memorial ¶ 41; White Paper Concerning the Fractional Privatization of Centromin dated 1999, at 8 (Exh. C-6); White Paper Concerning the Privatization of Metaloroya dated 1997, at 7 (Exh. C-35).

²⁴ Amended Notice of Arbitration and Statement of Claim ¶ 15; Memorial ¶ 47; White Paper concerning the Privatization of Metaloroya dated 1997, at 38 (Exh. C-35).

²⁵ Amended Notice of Arbitration and Statement of Claim ¶ 16; Memorial ¶ 51.

²⁶ Amended Notice of Arbitration and Statement of Claim ¶ 17; Memorial ¶ 56.

²⁷ Amended Notice of Arbitration and Statement of Claim ¶ 17; Memorial ¶¶ 4, 56.

²⁸ Contract of Stock Transfer, Capital Stock Increase and Stock Subscription of Empresa Metalurgica La Oroya S.A. “Metaloroya S.A.” (the “Contract”), 23 Oct. 1997, Clauses 1.2-1.3 (Exh. C-2).

²⁹ Contract, Clause 3.2 (Exh. C-2).

³⁰ Amended Notice of Arbitration and Statement of Claim ¶ 18; Memorial ¶ 57; Clauses 3.2, 4.1 (Exh. C-2).

³¹ Contract, Fifth Clause (Exh. C-2).

³² Contract, Clause 6.1 (Exh. C-2); Memorial ¶ 49.

³³ Contract, Clause 11 (Exh. C-2).

³⁴ The Contract allocates liability for third party claims between Centromin and the Company based upon three specific periods of time: (i) the period before the Contract was signed on 23 October 1997; (ii) the period during which the Company was required to implement the PAMA projects; and (iii) the period following the Company’s deadline to implement the PAMA projects. With respect to the first period, Centromin is liable for all third party claims; with respect to the second period, the Company is liable for all third party claims arising directly from (a) the Company’s non-compliance with its PAMA obligations, or its environmental obligations set forth in Clauses 5.1 and 5.2 of the Contract, and (b) the Company’s acts unrelated to the PAMA resulting from standards and practices less protective than those adopted by Centromin; and, with respect to the third period, the Company is liable for all claims that arise directly from (a) the Company’s operation of the La Oroya Facility after the period set forth in the Contract for the conclusion of the Company’s PAMA obligations, and

“[t]he Company [Metaloroya] shall protect and hold Centromin harmless against third party claims and indemnify it for any damage, liability or obligation that may come for which it has assumed liability and obligation,”³⁵ while Clause 6.5 provides that “Centromin will protect and hold the Company [Metaloroya] harmless against third party claims and will indemnify it for any damages, liabilities or obligations that may arise for which it has assumed liability and obligation.”³⁶ In Clause 8.14, the parties further agreed that, “[s]hould the *Company* [Metaloroya] or the *Investor* [DRP] receive any demand or judicial, administrative notice or notice of any kind, related to any act or fact included within the responsibilities, declaration and guarantees offered by Centromin, they pledge to report it to Centromin within a reasonable term which will allow Centromin to exercise its right to a defense, releasing the Company [Metaloroya] or the Investor [DRP] from any obligation with regard to the same and Centromin shall be obliged to immediately assume those obligations as soon as it is notified.”³⁷

15. Also, Clause 5.4.C of the Contract establishes a mechanism to resolve disputes involving third-party claims relating to the La Oroya Facility. As Clause 5.4.C provides, “[i]n those cases in which no consensus [is] reached between Centromin and the Company [Metaloroya] with regard to the causes of the presumed damage that is the subject of the claim or with regard to the manner in which the liability will be shared amongst them, should no agreement be reached within the term of thirty (30) days counted from the reception of the claim, the matter will be submitted to the decision of an expert on this matter that will designated by mutual agreement,” and that “[t]his expert must render a decision as soon as possible.”³⁸ Clause 5.4.C further provides that, “[i]f the amount of the claim were for less than US\$50,000.00, Centromin and the Company [Metaloroya] will be bound by the decision of the expert,” but that, “[i]f the amount of the claim were higher than US\$50,000.00, Centromin and the Company [Metaloroya] may submit the matter to arbitration, in accordance with Clause 12 of this Contract, should one or both parties not be in agreement with the decision of the expert.”³⁹

16. In the Contract’s Additional Clause, Renco and DRRC guaranteed the contractual obligations assumed by DRP thereunder.⁴⁰ As the Additional Clause provides, “[t]he consortium composed by the Doe Run Resources Corporation and the Renco Group, Inc., warrants the compliance with the obligations contracted by the Investor, Doe Run Peru S.R.LTDA., therefore this Contract is subscribed by the Doe Run Resources Corporation [...] and The Renco Group, Inc. [...]”⁴¹ The Additional Clause further provides that, “[i]n accordance with the bidding conditions, Centromin may release any of the members of the consortium from this guaranty, for which a written

(b) the Company’s non-compliance with its PAMA obligations or its environmental obligations set forth in Clauses 5.1 and 5.2 of the Contract. Contract, Clauses 5.3, 5.4, 5.5, 6.2, 6.3 (Exh. C-2); *see also* Amended Notice of Arbitration and Statement of Claim ¶¶ 21-23.

³⁵ Contract, Clause 5.8 (Exh. C-2).

³⁶ Contract, Clause 6.5 (Exh. C-2).

³⁷ Contract, Clause 8.14 (emphasis added) (Exh. C-2).

³⁸ Contract, Clause 5.4.C (Exh. C-2).

³⁹ Contract, Clause 5.4.C (Exh. C-2).

⁴⁰ Contract, Additional Clause (Exh. C-2).

⁴¹ Contract, Additional Clause (Exh. C-2).

communication is sufficient.”⁴² On 27 October 1997, four days after the Contract was concluded, Centromin agreed to release Renco from its guaranty pursuant to a request from Renco.⁴³

17. On 30 December 1997, following Renco’s release as a guarantor, Metaloroya merged with DRP, and DRP thus assumed all of Metaloroya’s rights and obligations as the “Company” under the Contract.⁴⁴ On 1 June 2001, DRP assigned its contractual position as the “Investor” to Doe Run Cayman Ltd. (“DRC Ltd.”), a British Virgin Islands company;⁴⁵ DRC Ltd. thus assumed all of DRP’s rights and obligations as the “Investor” under the Contract.⁴⁶ Finally, on 19 March 2007, Centromin assigned its contractual position to Activos Mineros S.A. (“Activos Mineros”), a State-owned company;⁴⁷ Activos Mineros thus assumed all of Centromin’s rights and obligations under the Contract.⁴⁸

18. On 21 November 1997, in accordance with Presidential Decree No. 042-97-PCM,⁴⁹ Peru entered into a separate Guaranty Agreement with DRP as the “Investor,” pursuant to which Peru guaranteed to DRP “the representations, assurances, guaranties and obligations assumed by” Centromin, as the “Transferor,” in the Contract.⁵⁰ In Clause 2.2 of the Guaranty, Peru also acknowledged that the public tender had been awarded to the consortium formed by Renco and DRRC, and that the members of the winning consortium had assigned their rights in favor of the Investor [DRP] so that the Investor [DRP] could sign the Contract.⁵¹ Clause 3 further provides that any disputes arising under the Guaranty are subject to the arbitration clause set out in Clause 12 of the Contract.⁵²

C. The Missouri Lawsuits

19. In its Amended Notice of Arbitration and Statement of Claim, Renco asserts that, “[o]n October 4, 2007, a group of plaintiffs filed lawsuits in the United States alleging various personal injury damages as a result of alleged lead exposure and environmental contamination from the [La Oroya Facility],” and that “[t]he plaintiffs voluntarily withdrew the lawsuits and then refiled the lawsuits in August and December 2008, which are comprised of 11 cases on behalf of 35 minor plaintiffs—all of whom are citizens and residents of La Oroya—in the Circuit Court of the State of Missouri, Twenty-Second Judicial Circuit, City of St. Louis, Missouri, U.S.A.”⁵³ According to

⁴² Contract, Additional Clause (Exh. C-2).

⁴³ See Modification of the Contract to Transfer Shares, Increase Company Capital and Subscription of Shares of Metaloroya S.A. dated 17 Dec. 1999, at 7 (“[O]n October 27, 1997 and by virtue of the last paragraph of the Additional Clause of the Metaloroya Transfer Contract, the Special Committee of [Centromin] consented to releasing the Renco Group Inc. from obligations it acquired under said Contract, which is the reason why the Renco Group Inc. is no longer a [part] of the same.”) (Exh. C-49).

⁴⁴ Amended Notice of Arbitration and Statement of Claim ¶ 18 n.8; Memorial ¶ 58; Modification of the Contract to Transfer Shares, Increase Company Capital and Subscription of Shares of Metaloroya S.A. dated 17 Dec. 1999, at 7 (Exh. C-49).

⁴⁵ Assignment of Contractual Position between Doe Run Peru S.R.L and Doe Run Cayman Ltd. dated 1 June 2001 (“Contract Assignment”), Clause 2 (Exh. R-13).

⁴⁶ Assignment of Contractual Position between Doe Run Peru S.R.L and Doe Run Cayman Ltd. dated 1 June 2001 (“Contract Assignment”), Clause 2 (Exh. R-13).

⁴⁷ Memorial viii.

⁴⁸ Memorial viii.

⁴⁹ Supreme Decree No. 042-97-PCM, Legal Provisions at 152758 dated 18 Sept. 1997 (Exh. C-162).

⁵⁰ Amended Notice of Arbitration and Statement of Claim ¶ 8; Guaranty Agreement, 21 Nov. 1997 (Exh. C-3).

⁵¹ Guaranty, Clause 2.2 (Exh. C-3).

⁵² Guaranty, Clause 3 (Exh. C-3).

⁵³ Amended Notice of Arbitration and Statement of Claim ¶ 36.

Renco, “[t]he allegations in each lawsuit are virtually identical, stating ‘[t]his is an action to seek recovery from Defendants for injuries, damages and losses suffered by each and every minor plaintiff named herein, who were minors at the time of their initial exposures and injuries as a result of exposure to the release of lead and other toxic substances . . . in the region of La Oroya, Peru.’”⁵⁴

20. Renco further alleges that, “[i]n addition to seeking damages for alleged personal injuries, the plaintiffs seek punitive damages, and name as defendants Renco and Doe Run Resources, as well as their affiliated companies DR Acquisition Corp. and Renco Holdings, Inc., and directors and officers Marvin K. Kaiser, Albert Bruce Neil, Jeffrey L. Zelms, Theodore P. Fox III, Daniel L. Vornberg, and Ira L. Rennert,” but that “[t]he plaintiffs did not bring claims against Activos Mineros, the Republic of Peru, or DRP, choosing instead to sue DRP’s U.S.-based affiliates in the courts of the United States.”⁵⁵

21. The Treaty entered into force on 1 February 2009.⁵⁶

22. Renco filed its Notice of Intent to Commence Arbitration on 29 December 2010. According to Renco, under the Contract and the Guaranty, Activos Mineros and Peru “are obligated to join these Lawsuits, defend the actions, and indemnify, release, protect and hold Renco, DRP and their affiliates harmless from any and all liability,” but have failed to “honor their contractual obligations to take on the defense of the Lawsuits and release, protect and hold harmless Renco and its affiliates from those third-party claims.”⁵⁷ As demonstrated below, Renco’s claims that Peru breached an investment agreement and, hence, violated its Treaty obligations, on the basis of these assertions are wrong, and fail as a matter of law.

* * *

23. Peru reiterates that the facts set forth above do not reflect the totality of the factual issues in dispute in this arbitration, and that nothing in this section should be construed as an acceptance of the factual allegations advanced by Renco in its Amended Notice of Arbitration and Statement of Claim, which, as Peru will demonstrate, are baseless. Peru has complied with its international obligations under the Treaty, including those related to environmental practices, dispute resolution, and transparency. Renco, by contrast, continues to violate its own obligations under the Treaty, including the waiver condition set forth in Article 10.18, through the initiation and continuation of certain proceedings in the Peruvian courts with respect to the measures in dispute in this case, in blatant violation of the Treaty. Peru expressly reserves its rights and procedural options regarding this and other continued violations by Renco.

IV. RENCO’S CLAIM UNDER ARTICLE 10.16.1(A)(I)(C) “IS NOT A CLAIM FOR WHICH AN AWARD IN FAVOR OF THE CLAIMANT MAY BE MADE” AS A MATTER OF LAW

24. Renco has requested arbitration of its claims that Peru allegedly failed to observe its obligations to Renco under the Contract and the Guaranty to, among other things, (1) appear in and

⁵⁴ Amended Notice of Arbitration and Statement of Claim ¶ 36.

⁵⁵ Amended Notice of Arbitration and Statement of Claim ¶ 37 (emphasis added).

⁵⁶ Peru-United States Trade Promotion Agreement, entered into force February 1, 2009 (the “Treaty”), Article 10.20.4 (RLA-1); *see also* Supreme Decree No. 009-2009-MINCETUR, dated 18 Jan. 2009 (RLA-2).

⁵⁷ Amended Notice of Arbitration and Statement of Claim ¶ 40.

defend the lawsuits brought by children in La Oroya against Renco and its affiliates, directors, and officers in the Missouri courts for lead exposure and environmental contamination; (2) assume responsibility and liability for any damages that the plaintiffs may recover in those lawsuits; (3) indemnify, release, protect, and hold Renco and its affiliates harmless from those third-party claims; (4) remediate the soil in and around the town of La Oroya; and (5) honor the *force majeure* clause in the Contract by granting DRP reasonable and adequate extensions of time to fulfill its obligations under the PAMA, in violation of the Treaty.⁵⁸ As elaborated below, Renco’s claims fail as a matter of law, and thus should be dismissed at the very outset of the arbitration proceedings under Article 10.20.4 of the Treaty.⁵⁹

A. There Is No Investment Agreement Between The Republic Of Peru And Renco

25. In its Amended Notice of Arbitration and Statement of Claim, Renco contends that the Contract and the Guaranty, which allegedly “were contemplated, prepared and executed as part of a single investment transaction, qualify as ‘investment agreements’ under the Treaty,”⁶⁰ and that Peru’s actions in this case breached these purported “investment agreements,” in violation of Article 10.16.1(a)(i)(C).⁶¹ Contrary to Renco’s contentions, there is no investment agreement between Peru and Renco within the meaning of the Treaty; as a matter of law, Renco’s claim for breach of Article 10.16.1(a)(i)(C) thus fails.

26. Under Article 10.28 of the Treaty, an “investment agreement” is defined as “a written agreement between a *national authority of a Party* and a covered investment or an investor of another Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor” with respect to (a) “natural resources that a national authority controls, such as for their exploration, extraction, refining, transportation, distribution, or sale;” (b) the supply of “services to the public on behalf of the Party, such as power generation or distribution, water treatment or distribution, or telecommunications;” or (c) “infrastructure projects, such as the construction of roads, bridges, canals, dams, or pipelines, that are not for the exclusive or predominant use and benefit of the government.”⁶²

27. Footnote 16 further provides that a “written agreement” for purposes of the definition of “investment agreement” under Article 10.28 “refers to an agreement in writing, *executed by both parties*, whether in a single instrument or in multiple instruments, that creates an *exchange of rights and obligations, binding on both parties* under the law applicable under Article 10.22.2,”⁶³ which, in this case, is Peruvian law.⁶⁴ In addition, Footnote 17 defines a “national authority” as “an authority at

⁵⁸ Amended Notice of Arbitration and Statement of Claim ¶ 56.

⁵⁹ Treaty, Article 10.20.4 (RLA-1).

⁶⁰ Amended Notice of Arbitration and Statement of Claim ¶ 42.

⁶¹ Amended Notice of Arbitration and Statement of Claim ¶ 57.

⁶² Treaty, Article 10.28 (RLA-1) (emphasis added).

⁶³ Treaty, Article 10.28 (RLA-1) (emphasis added).

⁶⁴ Article 10.22.2 provides that, “[s]ubject to paragraph 3 and the other terms of this Section, when a claim is submitted under Article 10.16.1(a)(i)(B) or (C), or Article 10.16.1(b)(i)(B) or (C), the tribunal shall apply: (a) the rules of law specified in the pertinent investment authorization or investment agreement, or as the disputing parties may otherwise agree; (b) if the rules of law have not been specified or otherwise agreed: (i) the law of the respondent, including its rules on the conflict of laws, and (ii) such rules of international law as may be applicable.” Treaty, Art. 10.22.2 (RLA-1). In the present case, both parties agree that the Contract and the Guaranty are governed by Peruvian law. See Memorial ¶ 240.

the central level of government,”⁶⁵ while Article 1.3 defines the “central level of government” for Peru as “the *national level of government*.”⁶⁶

28. As set forth above, the Contract was entered into by Centromin, not by the Republic of Peru, and subsequently was assigned to Activos Mineros.⁶⁷ Neither Centromin nor Activos Mineros forms part of “the national level of government” of Peru. As Professor Cárdenas confirms in his expert legal opinion, Centromin and Activos Mineros are not State organs, nor do they exercise any elements of Governmental authority;⁶⁸ to the contrary, Centromin and Activos Mineros are State-owned mining companies with their own legal personalities separate and apart from the State.⁶⁹ Neither Centromin nor Activos Mineros thus qualifies as a “national authority” within the meaning of Article 10.28 of the Treaty.

29. Renco also errs in asserting that the Contract and the Guaranty grant Renco and its investment, DRP, “certain rights with respect to the ‘refining’ of natural resources controlled by a national authority of Peru,” as required under Article 10.28 of the Treaty.⁷⁰ Neither the Contract nor the Guaranty grants any rights to exploit, extract, refine, transport, distribute, or sell natural resources controlled by a national authority of Peru; these instruments are not concession contracts, nor are they licenses. To the contrary, the Contract is a contract for the sale and transfer of stock and increase of capital, while the Guaranty is a guarantee agreement governed by Article 1868 *et seq.* of the Peruvian Civil Code.⁷¹ These instruments thus do not qualify as “investment agreements” under Article 10.28 of the Treaty.

30. In addition, while Renco signed the Additional Clause of the Contract as one of the guarantors of DRP’s obligations, Renco itself has no rights under the Contract.⁷² As Professor Cárdenas explains, the rights invoked by Renco in Articles 6.2, 6.3, 6.5 and 8.14 of the Contract⁷³ run specifically to DRC Ltd. as the current “Investor,” or to DRP as the current “Company,” neither of which is a party to this arbitration.⁷⁴ Renco, as one of the guarantors under the Contract, is not entitled to invoke these provisions, nor do the rights contained in these provisions run to the affiliates of DRC Ltd. or DRP in any way.⁷⁵ Because Renco was not granted any rights under the Contract, that instrument cannot qualify as an “investment agreement” under the Treaty.

⁶⁵ Treaty, Article 10.28 (RLA-1).

⁶⁶ Treaty, Article 1.3 (emphasis added) (RLA-1).

⁶⁷ See *supra* § III.B.

⁶⁸ Peruvian law, in fact, expressly prohibits State-owned companies from acting with State authority. See Legislative Decree 757 concerning approval of framework law for increased private investment, dated 13 Nov. 1991, Art. 7 (“In no case shall State-owned companies be granted *ius imperium* attributes or attributes of Public Administration with the exception of the authority delegated by the State for the enforced collection of taxes.”) (Exh. C-181).

⁶⁹ Cárdenas at 10-11.

⁷⁰ Memorial ¶ 228.

⁷¹ Cárdenas at 10, 16-17.

⁷² Cárdenas at 10-11.

⁷³ Amended Notice of Arbitration and Statement of Claim ¶¶ 23-24, 56; Memorial ¶¶ 249-255, 259-26, 274-293.

⁷⁴ Cárdenas at 12-14. As the Tribunal will recall, DRP initially was named as a Claimant in this arbitration; Renco, however, withdrew DRP as a claimant after Peru protested that there was no basis for Renco to consolidate into one single arbitration claims brought pursuant to three different arbitration agreements, which did not involve the same parties or even the same arbitration rules. See Letter from White & Case to King & Spalding, 6 May 2011 at 1; see also Letter from White & Case to King & Spalding, 3 Jun. 2011 (Exh. R-14); Letter from White & Case to King & Spalding, 5 Aug. 2011 (Exh. R-15).

⁷⁵ Cárdenas at 14.

31. Moreover, whatever obligations Renco had under the Contract as a guarantor of DRP's obligations were extinguished when Renco was released from its guaranty by Centromin four days after the Contract was concluded.⁷⁶ Accordingly, the Contract does not give rise to *any* exchange of rights and obligations, binding upon both Peru and Renco under Peruvian law, as required under Article 10.28 of the Treaty;⁷⁷ as a matter of law, the Contract thus does not qualify as an "investment agreement" under the Treaty.

32. The Guaranty similarly does not qualify as an "investment agreement" under the Treaty. While Peru is a party to the Guaranty, Renco—the Claimant in this arbitration—is not, and has no rights thereunder.⁷⁸ Renco specifically invokes the rights contained in Article 2.1 of the Guaranty;⁷⁹ that Article provides, "THE STATE hereby guarantees THE INVESTOR the representations, assurances, guarantees and obligations assumed by THE TRANSFEROR under the Stock Transfer, Capital Increase and Stock Subscription Contract referred to in numeral 1.1 hereof."⁸⁰ As Professor Cárdenas confirms, the rights invoked by Renco in Article 2.1 of the Guaranty run specifically to DRP as the "Investor," which is not a party to this arbitration.⁸¹ Renco, as the guarantor of DRP's obligations under the Contract, is not entitled to invoke the protections of the Guaranty. Nor do the rights contained in the Guaranty run to the affiliates of DRP in any way.⁸²

33. In addition, as elaborated further below, under Peruvian law, the Guaranty was voided by DRP's assignment to DRC Ltd. of its rights as the "Investor."⁸³ As Professor Cárdenas explains, the scope of the Guaranty was to guarantee to DRP, as the "Investor" under the Contract, "the representations, assurances, guaranties and obligations" assumed by Centromin therein;⁸⁴ as a result of its assignment to DRC Ltd., DRP, however, no longer is the "Investor."⁸⁵ Because DRP never requested—and Peru thus never provided—express consent to this assignment, as required under Article 1439 of the Peruvian Civil Code, the Guaranty has become void under Peruvian law.⁸⁶ Accordingly, the Guaranty, like the Contract, does not give rise to *any* exchange of rights and obligations, binding upon both Peru and Renco under Peruvian law, as required under Article 10.28 of the Treaty; as a matter of law, the Guaranty thus does not qualify as an "investment agreement" under the Treaty.

⁷⁶ Modification of the Contract to Transfer Shares, Increase Company Capital and Subscription of Shares of Metaloroya S.A. dated 17 Dec. 1999 at 7 ("[O]n October 27, 1997 and by virtue of the last paragraph of the Additional Clause of the Metaloroya Transfer Contract, the Special Committee of [Centromin] consented to releasing the Renco Group Inc. from obligations it acquired under said Contract, which is the reason why the Renco Group Inc. is no longer a [part] of the same.") (Exh. C-49).

⁷⁷ Treaty, Art. 10.28 (RLA-1).

⁷⁸ Cárdenas at 19.

⁷⁹ Memorial ¶¶ 61, 272, 286, 325, 348, 366.

⁸⁰ Guaranty, Clause 2.1 (emphasis in original) (Exh. C-2).

⁸¹ Cárdenas at 19.

⁸² Cárdenas at 19; Clause 2.1 of the Guaranty provides that "The State hereby guarantees the Investor [defined as DRP at the introductory paragraph] the representations, assurances, guaranties and obligations assumed by the Transferor under the Stock Transfer, Capital Increase and Stock Subscription Contract referred to in numeral 1.1 hereof." Guaranty, Clause 2.1 (Exh. C-3).

⁸³ See *infra* § IV.B.2.

⁸⁴ Guaranty, Clause 2.1 (Exh. C-2).

⁸⁵ See *infra* § IV.B.2

⁸⁶ Cárdenas at 19-20.

34. Moreover, even assuming *arguendo* that the Guaranty were not void under Peruvian law, which is not the case, Renco cannot rely upon the fact that DRP, Renco’s alleged investment in Peru, is a party to the Guaranty for its claims under Article 10.16(1)(a)(i)(C). As Article 10.16(1)(a)(i)(C) reflects, this provision allows a covered investor to submit to arbitration claims “*on its own behalf*” for breach of an investment agreement, while Article 10.16(1)(b)(i)(C) allows a covered investor to submit to arbitration claims “*on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly*” for breach of an investment agreement.⁸⁷

35. As the Tribunal will recall, Renco initially filed claims on behalf of DRP for alleged breach of an investment agreement under Article 10.16(1)(b)(i)(C), but withdrew those claims when it unilaterally withdrew its waiver under 10.18(2)(b)(ii).⁸⁸ By doing so, Renco sought to evade its obligation to have DRP discontinue and refrain from pursuing administrative and court proceedings in Peru related directly to the measures in dispute in this arbitration, in blatant violation of Article 10.18.2(b) of the Treaty.⁸⁹ As Peru indicated in its notification of preliminary objections, Renco’s purported unilateral withdrawal of its waiver is ineffective, and DRP’s actions violate its undertakings and nullify Peru’s consent to arbitrate.⁹⁰ While this objection is reserved for a later phase of these proceedings, having withdrawn its claims under Article 10.16(1)(b)(i)(C), Renco has only asserted—and, indeed, can only assert—claims under Article 10.16(1)(a)(i)(C) for breach of an investment agreement to which Renco itself, as the alleged covered investor, is a party.⁹¹

36. As demonstrated above, Renco is not a party to the Guaranty, and has no rights thereunder.⁹² Thus, even if the Guaranty were valid under Peruvian law, which it is not, as a matter of law, Renco cannot rely upon the Guaranty as the basis for any claim under Article 10.16(1)(a)(i)(C).

37. Finally, Renco’s attempt to combine the Contract and the Guaranty into a single “investment agreement” under the Treaty likewise fails.⁹³ In its Memorial, Renco asserts that, under Annex 10-H, the Contract and the Guaranty “together qualify as an ‘investment agreement,’ as they constitute a written agreement between a national authority (Peru and Centromin) and a covered investment (*i.e.*, Doe Run Peru) and an investor (Renco), on which Renco relied in making its investment.”⁹⁴ Renco further asserts that “these agreements grant Renco’s investment Doe Run Peru and Renco certain rights with respect to the ‘refining’ of natural resources controlled by a national

⁸⁷ Treaty, Art. 10.16(1)(b)(i)(C) (RLA-1).

⁸⁸ Compare Claimant’s Notice of Arbitration and Statement of Claim dated 4 April 2011, ¶¶ 78 (providing that “[a]s required by Article 10.18(2) of the Treaty, Renco and its affiliate DRP waive their right to initiate or continue” certain actions, and seeking, among other things, a declaration that “Activos Mineros breached the Stock Transfer Agreement”) (emphasis added) with Claimant’s Amended Notice of Arbitration and Statement of Claim dated 9 Aug. 2011, ¶¶ 67, 71 (providing that “Renco waives its right to initiate or continue” actions in accordance with Article 10.18 of the Treaty, and seeking, among other things, a “declaration that Peru breached an obligation under Article 10.16(1)(a)(i)(C) of the [Treaty] by breaching its obligations under the Stock Transfer Agreement and the Guaranty”).

⁸⁹ See Peru’s Comments on the Non-Disputing Party Submission dated 3 Oct. 2014, ¶¶ 29-30; Peru’s Submission on the Scope of Preliminary Objections dated 23 Apr. 2014, ¶ 25; Notification of Preliminary Objections from Peru to the Tribunal dated 21 Mar. 2014, at 4-5.

⁹⁰ Notification of Preliminary Objections from Peru to the Tribunal dated 21 Mar. 2014, at 4-5.

⁹¹ Memorial ¶ 216; Amended Notice of Arbitration and Statement of Claim ¶ 67.

⁹² See *supra* § IV.B.1.

⁹³ Memorial ¶ 227.

⁹⁴ Memorial ¶ 228.

authority of Peru,”⁹⁵ and that the “investment agreement” consisting of the Contract and the Guaranty thus “satisfies the requirement in Annex 10-H to the Treaty that ‘one or more of those instruments must grant rights to the covered investment or the investor as defined in subparagraph (a), (b), or (c) of that definition.’”⁹⁶ Renco’s arguments are erroneous.

38. As Annex 10-H reflects, Annex 10-H relates specifically to “stability agreements” entered into between Peru and covered investments or investors of another party pursuant to Legislative Decrees 662 and 757.⁹⁷ Article 4 of Annex 10-H thus provides that a stability agreement “may constitute one of multiple written instruments that make up an ‘investment agreement’ as defined in Article 10.28,” and that, “[w]here that is the case, a breach of such a stability agreement by Peru may constitute a breach of the investment agreement of which it is a part.”⁹⁸ As Professor Cárdenas confirms, neither the Contract nor the Guaranty is a stability agreement under Legislative Decrees 662 and 757; to the contrary, as set forth above, the Contract is a contract for the sale and transfer of stock and increase of capital, while the Guaranty is a guarantee agreement governed by Article 1868 *et seq.* of the Peruvian Civil Code.⁹⁹ Annex 10-H accordingly does not apply to the Contract or to the Guaranty.

39. Renco’s reliance upon Footnote 23 for its argument that the Contract and Guaranty can be considered together to form an investment agreement within the meaning of the Treaty similarly is misplaced.¹⁰⁰ Footnote 23 provides that, “[f]or greater certainty, for multiple written instruments to make up an ‘investment agreement,’ as defined in Article 10.28, one or more of those instruments must grant rights to the covered investment or the investor as defined in subparagraph (a), (b), or (c) of that definition,” and that “[a] stability agreement may constitute one of multiple written instruments that make up an ‘investment agreement,’ even if the stability agreement is not itself the instrument in which such rights are granted.”¹⁰¹ Contrary to Renco’s suggestion, this Footnote merely establishes that, under the definition of “investment agreement” in Article 10.28, each written instrument need not include the rights listed under subparagraph (a), (b), or (c), but may include other rights.¹⁰² This does not mean, however, that each written instrument does not have to be concluded by a national authority and a covered investor or investment, or that each written instrument does not have to create an exchange of binding rights and obligations upon them; to the contrary, as Footnote 16 makes clear, each written instrument *must* be executed by both parties, and *must* create an exchange of rights and obligations, binding upon them under the law applicable under Article 10.22.2.¹⁰³

40. As set forth above, neither the Contract nor the Guaranty was executed by both Peru and Renco, nor does either agreement create an exchange of rights and obligations, binding upon them under Peruvian law.¹⁰⁴ Consequently, there is no “investment agreement” between Peru and Renco

⁹⁵ Memorial ¶ 229.

⁹⁶ Memorial ¶ 230.

⁹⁷ Treaty, Annex 10-H (RLA-1).

⁹⁸ Treaty, Annex 10-H (RLA-1).

⁹⁹ Cárdenas at 10, 16-18.

¹⁰⁰ Treaty, Annex 10-H (RLA-1); Memorial ¶¶ 227-30.

¹⁰¹ Treaty, Annex 10-H (RLA-1).

¹⁰² See Treaty, Article 10.28(a)-(c) (RLA-1).

¹⁰³ Treaty, Article 10.28 (RLA-1).

¹⁰⁴ See *supra* § III.B.

within the definition set out in Article 10.28 of the Treaty. Renco's claims for breach of an investment agreement under Article 10.16(1)(a)(i)(C) of the Treaty accordingly fail as a matter of law, and should be dismissed under Article 10.20.4.

B. Renco's Claims Under Article 10.16.1(a)(i)(C) Fail Because As A Matter of Law An Award In Favor Renco Cannot Be Made

1. As A Matter of Law, Peru Could Not Have Breached The Contract

41. As noted above, in its Amended Notice of Arbitration and Statement of Claim, Renco asserts that Peru breached its obligations to Renco under the Contract in violation of Article 10.16(1)(a)(i)(C) of the Treaty, by failing, among other things, to appear in and defend the lawsuits brought against Renco and its affiliates, directors, and officers in the Missouri courts; assume responsibility and liability for any damages that the plaintiffs may recover in those lawsuits; and indemnify, release, protect, and hold Renco and its affiliates harmless from those third-party claims.¹⁰⁵ Even assuming *arguendo* that the Contract constitutes a valid investment agreement between Peru and Renco under the Treaty, which, as set forth above, it does not, Peru, as a matter of law, could not have breached any obligations to Renco under the Contract, and hence Article 10.16(1)(a)(i)(C) of the Treaty. This is both because Peru is not a party to the Contract, and thus has no obligations thereunder, and because the obligations contained in the Contract run only to DRP and DRC Ltd., and not to Renco. As a matter of law, Renco's claims for breach of the Contract thus fail.

42. First, as elaborated above, Peru is not a party to the Contract; to the contrary, the Contract was entered into by Centromin and subsequently assigned to Activos Mineros,¹⁰⁶ both of which have their own legal personalities separate and apart from the State.¹⁰⁷ Article 1363 of the Peruvian Civil Code, which sets out the principle of privity of contract (*relatividad de los contratos*), expressly provides that "[t]he effects of the contract are limited to its parties and their heirs."¹⁰⁸ As Professor Cárdenas confirms, "[s]uch principle establishes who is subject to the effects produced by the contract; it means that only the parties to the contract are bound by its terms and can enforce the contractual obligations under it."¹⁰⁹ As a matter of law, Peru thus could not have breached the Contract, because Peru is not a party thereto and has no obligations thereunder.

43. Second, even assuming *arguendo* that Peru could be treated as a party to the Contract which has obligations thereunder, which it does not, the obligations assumed by Centromin, and subsequently by Activos Mineros, in the Contract run specifically to DRP as the "Company" and to DRC Ltd. as the "Investor," and not to Renco.¹¹⁰ As set forth above, while Renco signed the Contract as one of the guarantors of DRP's obligations to the "Investor" under the Contract, whatever obligations Renco had under the Contract as a guarantor were extinguished when Renco was released from its guaranty by Centromin four days after the Contract was concluded.¹¹¹ As a matter of law,

¹⁰⁵ Amended Notice of Arbitration and Statement of Claim ¶ 56.

¹⁰⁶ See *supra* § III.B; § IV.A.

¹⁰⁷ Cárdenas at 10-11.

¹⁰⁸ Peruvian Civil Code, Article 1363 ("*Los contratos sólo producen efectos entre las partes que los otorgan y sus herederos, salvo en cuanto a éstos si se trata de derechos y obligaciones no transmisibles.*") (RLA-42).

¹⁰⁹ Cárdenas at 7.

¹¹⁰ Cárdenas at 11-15.

¹¹¹ Modification of the Contract to Transfer Shares, Increase Company Capital and Subscription of Shares of Metaloroya S.A. dated 17 Dec. 1999, at 7 (Exh. C-49).

Peru thus could not have breached any obligations to Renco under the Contract, because Renco has no rights or obligations thereunder. Furthermore, even assuming *arguendo* that Renco had not been released as a guarantor under the Contract, Peru still could not have breached any obligations owed to Renco, because Centromin (and later Activos Mineros) did not undertake any obligations to Renco in the Contract. To the contrary, all of the contractual obligations undertaken by Centromin (and later Activos Mineros) in the Contract run to DRP, as the Company, or to DRC, as the Investor.¹¹²

44. Acknowledging this inherent weakness in its argument, Renco contends that “Centromin’s assumption of liability for third-party damages and claims under Clauses 6.2 and 6.3 [of the Contract] extends to *anyone* who could be sued by a third party for damages falling within the scope of the assumption of liability; especially anyone associated with the Renco Consortium considering the context of the privatization and Renco’s investment in La Oroyo.”¹¹³ Renco thus argues that, in the Contract, Centromin undertook obligations to an unidentified, indeterminate, and limitless number of persons and entities. According to Renco, this interpretation accords not only with the plain text of Clauses 6.2, 6.3, and 6.5 of the Contract, but also with principles of Peruvian and U.S. law.¹¹⁴ Renco’s contentions are meritless.

45. The plain text of Clauses 6.2, 6.3, and 6.5 of the Contract provide:

6.2 During the period approved for the execution of Metaloroya’s PAMA, Centromin will assume liability for any damages and claims by third parties that are attributable to the activities of the Company [DRP], of Centromin and/or its predecessors, except for the damages and third party claims that are the Company’s [DRP’s] responsibility in accordance with numeral 5.3.

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

...

6.5 Centromin will protect and hold the Company [DRP] harmless against third party claims and will indemnify it for any damages, liabilities or obligations that may arise for which it has assumed liability and obligation.¹¹⁵

46. Renco incorrectly reads Clauses 6.2 and 6.3 in isolation, and presumes that these Clauses create a universal obligation to indemnify *any* entity sued by a third party for damages falling within the scope of Centromin/Activos Mineros’s assumption of liability, because no specific indemnitee is identified therein.¹¹⁶ Clauses 6.2, 6.3, and 6.5, however, must be read together in their context, as required under Article 169 of the Peruvian Civil Code.¹¹⁷ As Professor Cárdenas explains,

¹¹² Cárdenas at 11-15.

¹¹³ Memorial ¶ 259 (emphasis added).

¹¹⁴ See, e.g., Memorial ¶¶ 255-262.

¹¹⁵ Contract, Clauses 6.2, 6.3, 6.5 (Exh. C-2).

¹¹⁶ See, e.g., Memorial ¶ 284.

¹¹⁷ Peruvian Civil Code, Article 169 (“The clauses of legal instruments must be construed by reference to each other and the unclear ones must be attributed the meaning that results from the others.”) (“*Las cláusulas de los actos jurídicos se*

the obligation to indemnify arises under Clause 6.5, which names “*the Company*,” *i.e.*, DRP, as the indemnitee, while the scope of liability assumed by Centromin/Activos Mineros is limited to that arising from the activities defined in Clause 6.1, as further circumscribed by the allocation of liability in Clauses 6.2, 6.3, and, by reference, Clauses 5.3 and 5.4.¹¹⁸

47. Clause 8.14, in turn, obliges Centromin/Activos Mineros to defend and release “*the Company or the Investor*,” *i.e.*, DRP or DRC Ltd., from any obligation with respect to claims filed by third parties against them related to any act or fact included “within the responsibilities, declaration and guarantees offered by” Centromin/Activos Mineros.¹¹⁹ Clauses 6.2, 6.3, 6.5, and 8.14, on their face, thus do not grant *any* rights to Renco,¹²⁰ nor do they create a universal obligation to indemnify *any* entity sued by a third party for damages falling within the scope of Centromin/Activos Mineros’s assumption of liability, as Renco erroneously contends.¹²¹ To the contrary, the obligations in these Clauses run specifically to DRP and DRC Ltd. as the “Company” and the “Investor.”¹²²

48. Moreover, while Renco relies upon Article 1361 of the Peruvian Civil Code, as well as the principle of good faith under Peruvian law, in support of its argument that the indemnity provisions in the Contract run to *any* entity sued by a third party for damages falling within the scope of Centromin/Activos Mineros’s assumption of liability,¹²³ these principles do not support, and indeed, contradict, the position advanced by Renco.¹²⁴ As Professor Cárdenas explains, the principle of good faith cannot modify the terms of a contract or the nature of the obligations set forth therein.¹²⁵ To the contrary, Article 1361 of the Peruvian Civil Code expressly provides that “[t]he contract is binding with respect to what is expressed in it,”¹²⁶ which, as Professor Cárdenas notes, is in line with the principle of interpretation contained in Article 168 of the Peruvian Civil Code, according to which “legal instruments must be interpreted according to what is expressed in them.”¹²⁷ Commenting on the meaning of Article 1361, Manuel de la Puente y Lavalle similarly observes that “the content of contractual obligations must be understood strictly and cannot be expanded or narrowed by the judge by means of interpretation or by invoking equitable principles or the nature of the contract itself.”¹²⁸

49. As Manuel de la Puente y Lavalle further explains, while Article 1362 of the Peruvian Civil Code requires that contracts be entered into and performed in good faith, the principle of good

interpretan las unas por medio de las otras, atribuyéndose a las dudosas el sentido que resulte del conjunto de todas.”) (RLA-42).

¹¹⁸ Cárdenas at 12-13.

¹¹⁹ Contract, Clause 8.14 (emphasis added) (Exh. C-2).

¹²⁰ Contract, Clauses 6.2, 6.3, 6.5, 8.14 (Exh. C-2).

¹²¹ Memorial ¶¶ 284-87.

¹²² Contract (Exh. C-2); Cárdenas at 12-13.

¹²³ Memorial ¶ 287.

¹²⁴ Memorial ¶¶ 287-89.

¹²⁵ Cárdenas at 8.

¹²⁶ Peruvian Civil Code, Article 1361 (“*Los contratos son obligatorios en cuanto se haya expresado en ellos.*”) (RLA-42).

¹²⁷ Peruvian Civil Code, Article 168 (“*El acto jurídico debe ser interpretado de acuerdo con lo que se haya expresado en él y según el principio de la buena fe.*”) (RLA-42); Cárdenas at 6.

¹²⁸ Manuel de la Puente y Lavalle, “El Contrato en General, Comentarios a la Sección Primera del Libro VII del Código Civil, Tomo I,” 1991, at 422 (RLA-84).

faith “only applies to the conduct of the parties and does not provide an authorization to alter what is expressed in the contract.”¹²⁹

50. The application of the principle of good faith in the context of the privatization of La Oroya, moreover, confirms that the rights and obligations in Clauses 6.2, 6.3, 6.5, and 8.14 run only to DRP and DRC Ltd. as the “Company” and the “Investor,” respectively, and not to Renco. As set forth above, pursuant to the bidding rules, the winner of the public tender of Metaloroya’s shares was required to establish a Peruvian entity to sign the Contract as the “Investor” with Centromin.¹³⁰ After winning the public tender, the consortium formed by Renco and DRRC thus proceeded to establish DRP in order to acquire Metaloroya’s shares from Centromin, and the consortium subsequently assigned its rights to sign the Contract to DRP for that purpose.¹³¹ Having thus assigned its rights to DRP, the consortium, including Renco, thus was well aware that it would not have any rights under the Contract itself, including any rights under these provisions.

51. As Professor Cárdenas further confirms, Peruvian law provides no basis for Renco to claim benefits under a contract entered into by a separate legal entity with which it is affiliated.¹³² Under Peruvian law, the company, its shareholders, and its affiliates are separate and distinct entities with their own legal rights and obligations.¹³³ As Article 78 of the Peruvian Civil Code provides, “[a] legal entity has a separate legal personality from that of its members and neither the members individually nor collectively have rights to the legal entity’s assets or are obligated to satisfy its debts.”¹³⁴ The legal rights and obligations of one company thus cannot be invoked by one of its shareholders or affiliates.¹³⁵

52. U.S. law similarly does not support Renco’s argument that the indemnity provisions in the Contract run to *any* entity sued by a third party for damages falling within the scope of Centromin/Activos Mineros’s assumption of liability.¹³⁶ Not only are the U.S. authorities upon which Renco relies irrelevant to its claims under the Contract—which, as set forth above, is governed by Peruvian law¹³⁷—but none of the authorities cited by Renco holds that a contractual assumption of liability extends to “*anyone* who could be sued by a third party for damages,” as Renco erroneously contends.¹³⁸ To the contrary, it is well established that, under U.S. law, “contracts purporting to grant immunity from, or limitation of, liability must be strictly construed and limited to intended beneficiaries[.]”¹³⁹ As the United States Federal Court of Appeals for the Fifth Circuit has stated, “it

¹²⁹ Manuel de la Puente y Lavalle, “El Contrato en General, Comentarios a la Sección Primera del Libro VII del Código Civil, Tomo I,” 1991, at 422 (RLA-84).

¹³⁰ Centromin, Public International Bidding PRI-16-97 – Second Round of Consultations and Answers, 26 March 1997, at 6 (Exh. C-47).

¹³¹ Amended Notice of Arbitration and Statement of Claim ¶ 17; Memorial ¶ 4; *see also* Guaranty, Clause 2.2 (Exh. C-3).

¹³² Cárdenas at 14-15.

¹³³ Cárdenas at 14-15.

¹³⁴ Peruvian Civil Code, Article 78 (“La persona jurídica tiene existencia distinta de sus miembros y ninguno de éstos ni todos ellos tienen derecho al patrimonio de ella ni están obligados a satisfacer sus deudas.”) (RLA-42).

¹³⁵ Cárdenas at 14-15.

¹³⁶ Memorial ¶ 284.

¹³⁷ Cárdenas at 15.

¹³⁸ Memorial ¶ 260 (emphasis added).

¹³⁹ *Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297, 302 (1959) (strictly construing indemnity covering “Carrier” of goods, holding “it must be presumed” that if the parties intended to extend indemnity to any “agent” of the carrier, “they would in some way have expressed it in the contract”) (RLA-77); *see also, e.g., Duval v. Northern Assurance Co. of Am.*, 722 F.3d 300, 304-305 (5th Cir. 2013) (refusing to extend indemnity to insurers of indemnitee because “[u]nder

is widely held that a contract of indemnity will not afford protection to an indemnitee against the consequences of his own negligent act unless the contract clearly expresses such an obligation in unequivocal terms.”¹⁴⁰

53. The decision in *Denny’s Inc. v. Avesta Enterprises* illustrates the narrow construction given to indemnity agreements under U.S. law.¹⁴¹ In that case, the underlying claim arose when an employee of a Winchell’s donut shop slipped and fell on cooking grease.¹⁴² The accident occurred in a storage room leased by Winchell’s and Sy’s, another restaurant, from mall owner LaSalle.¹⁴³ The plaintiff sued Denny’s (Winchell’s parent company), Winchell’s, and LaSalle; pursuant to an indemnity agreement with LaSalle, Denny’s and Winchell’s represented LaSalle and settled all claims with the plaintiff.¹⁴⁴ It was uncontested that responsibility for the incident lay with Sy’s.¹⁴⁵ LaSalle, Denny’s, and Winchell’s thus sought indemnification from Sy’s pursuant to an indemnity clause in the lease agreement between Sy’s and LaSalle.¹⁴⁶ In that lease agreement, Sy’s had agreed to indemnify various parties, including LaSalle, as well as “any other department store lessee, owner and/or operator in the Shopping Center.”¹⁴⁷ The Court construed this language strictly, and held that, because Denny’s was not a “department store lessee, owner and/or operator,” the indemnity agreement “does not express any *direct or clear intent to benefit* Denny’s. Accordingly, Denny’s is not a third-party beneficiary to the lease agreement and cannot recover from Sy’s based on the indemnification provision of Sy’s lease with LaSalle.”¹⁴⁸

54. As the Court observed, “the rights extended to a third-party beneficiary are limited to those beneficiaries for whose primary benefit the contracting parties intended to make the contract,” and the third-party beneficiary therefore “must show that the parties to the contract intended the beneficiary to have the right to enforce or recover under the contract.”¹⁴⁹ The Court further observed that, “[w]hile the third-party beneficiary need not be named in the contract, *the terms of the contract must express directly and clearly an intent to benefit the third-party beneficiary.*”¹⁵⁰

55. In the present case, the indemnification provisions in Clauses 6.2, 6.3, and 6.5 of the Contract do not name any party apart from the “Company,” *i.e.*, DRP, and do not specify any other category of covered party.¹⁵¹ The Contract thus does not express a “direct or clear intent to benefit”

the plain language of the [agreement], [the indemnitor’s] indemnification and defense obligations only ran to members of the ‘Contractor Group.’ The parties could have included the Contractor’s insurers within the definition of ‘Contractor Group,’ as parties in other cases have done, but they did not do so”) (citations omitted) (RLA-78); *Mammoet Salvage Americas, Inc. v. Global Diving & Salvage, Inc.*, 2014 A.M.C. 36, 41-42 (S.D. Tex. 2013) (refusing to extend indemnity covering “contractors” to the operator of vessel sub-chartered to the indemnitee) (quoting *Herd*, 359 U.S. 305) (RLA-79).

¹⁴⁰ *Corbitt v. Diamond M. Drilling Co.*, 654 F.2d 329, 333 (5th Cir. 1981) (citing, *inter alia*, *United States v. Seckinger*, 397 U.S. 203, 211-213 (1970)) (RLA-80).

¹⁴¹ *Denny’s Inc. v. Avesta Enters.*, 884 S.W.2d 281, 290 (Mo. Ct. App. 1994) (citations omitted) (RLA-82).

¹⁴² *Denny’s*, 884 S.W.2d at 284 (RLA-82).

¹⁴³ *Denny’s*, 884 S.W.2d at 284 (RLA-82).

¹⁴⁴ *Denny’s*, 884 S.W.2d at 284 (RLA-82).

¹⁴⁵ *Denny’s*, 884 S.W.2d at 284 (RLA-82).

¹⁴⁶ *Denny’s*, 884 S.W.2d at 283-285 (RLA-82).

¹⁴⁷ *Denny’s*, 884 S.W.2d at 290 (RLA-82).

¹⁴⁸ *Denny’s*, 884 S.W.2d at 290. The Court also found that Winchell’s could not recover because it was not a party to Sy’s lease, and its negligence claim, which was subrogated to the plaintiff’s claim, had been extinguished by the plaintiff’s release given at settlement. *Id.* at 289-290. (RLA-82).

¹⁴⁹ *Denny’s Inc. v. Avesta Enters.*, 884 S.W.2d at 290 (RLA-82).

¹⁵⁰ *Denny’s Inc. v. Avesta Enters.*, 884 S.W.2d at 290 (RLA-82).

¹⁵¹ Contract, Clauses 6.2, 6.3, 6.5 (Exh. C-2).

anyone associated with the Renco Consortium, as Renco contends, but rather expresses a direct and clear intent to benefit only DRP.

56. In addition, while Renco relies heavily upon the decision in *Caldwell Trucking PRP v. Rexon Tech. Corp.*,¹⁵² this decision is inapposite.¹⁵³ In *Caldwell Trucking*, the defendant, Pullman, disposed of its subsidiary, Rexon, in an all-stock sale, while agreeing to retain certain liabilities.¹⁵⁴ Renco makes much of the fact that the court affirmed Pullman's obligation to cover Rexon's liability to Caldwell Trucking, "which was not a party to the stock purchase agreement or even related to the parties to the agreement."¹⁵⁵ That the indemnitor, Pullman, was required to pay damages to a third-party *plaintiff* merely illustrates the function of an indemnity clause.¹⁵⁶ *Caldwell Trucking* does not hold that the *indemnitor*, Pullman, would have been obligated to indemnify affiliates or "anyone associated" with the indemnitee, Rexon.

57. Because neither Peru nor Renco has any rights or obligations under the Contract, Peru could not have breached any obligations to Renco thereunder. Renco's claims for breach of the Contract under Article 10.16(1)(a)(i)(C) of the Treaty accordingly fail as a matter of law, and should be dismissed under Article 10.20.4.

2. As A Matter of Law, Peru Could Not Have Breached The Guaranty

58. In its Amended Notice of Arbitration and Statement of Claim, Renco also asserts that Peru breached its obligations to Renco under the Guaranty in violation of Article 10.16(1)(a)(i)(C) of the Treaty, by failing, among other things, to appear in and defend the lawsuits brought against Renco and its affiliates, directors, and officers in the Missouri courts; assume responsibility and liability for any damages that the plaintiffs may recover in those lawsuits; indemnify, release, protect, and hold Renco and its affiliates harmless from those third-party claims; remediate the soil in and around the town of La Oroya; and honor the *force majeure* clause in the Contract by granting DRP reasonable and adequate extensions of time to fulfill the PAMA.¹⁵⁷ Even assuming *arguendo* that the Guaranty constitutes a valid investment agreement between Peru and Renco under the Treaty, which, as set forth above, it does not, Peru, could not have breached any obligations to Renco under the Guaranty, and, hence, Article 10.16(1)(a)(i)(C) of the Treaty; as a matter of law, Renco's claims for breach of the Guaranty thus fail.

¹⁵² 421 F.3d 234 (3d Cir 2005) (CLA-5).

¹⁵³ Memorial ¶¶ 256-257. The other U.S. court decisions cited by Renco also are not on point; those cases all deal with the scope of obligations assumed by a successor-in-interest of the indemnitor, not whether the promise to indemnify covered affiliates or "anyone associated with" the indemnitee. See Memorial n. 34 citing *Lee-Thomas, Inc. v. Hallmark Cards, Inc.*, 275 F.3d 702 (8th Cir. 2002) (applying California law) (CLA-6); *Davis Oil Co. v. TS, Inc.*, 145 F.3d 305 (5th Cir. 1998) (applying Louisiana law) (CLA-7); *Thrifty Rent-A-Car System, Inc. v. Toye*, 1994 U.S. App. LEXIS 8034 (10th Cir. Apr. 19, 1994) (applying Oklahoma law) (CLA-8); *Bouton v. Litton Industries Inc.*, 423 F.2d 643 (3d Cir. 1970) (applying New York law) (CLA-9).

¹⁵⁴ *Caldwell Trucking*, 421 F.3d at 240 (CLA-5).

¹⁵⁵ Memorial ¶ 256; *id.* at ¶ 257 (observing that Pullman was obligated to compensate Caldwell Trucking "even though Pullman did not agree to indemnify Caldwell by name in the stock purchase agreement (or anyone other than Rexon for that matter)").

¹⁵⁶ Responding to Pullman's argument that it could not be sued directly, the court agreed that "the indemnitor is liable to the indemnitee only after judgment has been entered against it and until that has occurred no responsibility exists." *Caldwell Trucking*, 421 F.3d at 241 (CLA-5). The court noted, however, that Rexon was also a party to the claim, and that Pullman was financing its defense, such that "[i]n effect, the two-step process that ordinarily would be accomplished by the use of third-party complaints was consolidated into one." *Id.* The court concluded that "[i]n the circumstances of this case and its status at this juncture we do not find that to be reversible error." *Id.* (emphasis added).

¹⁵⁷ Amended Notice of Arbitration and Statement of Claim ¶ 56.

59. First, as set forth above, under Peruvian law, the Guaranty has been rendered void as a result of DRP's assignment to DRC Ltd. of its rights and obligations as the "Investor" under the Contract.¹⁵⁸ As Professor Cárdenas explains, under Article 1439 of the Peruvian Civil Code, "[t]he guarantees offered by a third party do not pass to the assignee without the express authorization of the third party."¹⁵⁹ Commenting on Article 1439, Luciano Barchi Velaochaga, one of the drafters of the Contract, explains the effect of such assignments under Peruvian law:

The termination of guarantees granted by third parties takes place whenever there is a modification to the contract without the consent of the guarantors. This is so because in light of the principle of privity of contract the modified contract has its effects limited to the parties that agreed to it (Article 1363 of the Civil Code) and cannot extend to those that had no role in it. In order for the effects of the modified contract to reach third parties, those third parties need to consent to it.¹⁶⁰

60. As noted above, following DRP's assignment to DRC Ltd. of its rights and obligations as the "Investor" under the Contract, DRP never requested—and Peru thus never provided—express consent to continue guaranteeing Centromin's obligations under the Contract to the "Investor," which no longer was DRP, but rather had become DRC Ltd.¹⁶¹ As a result, under Article 1439 of the Peruvian Civil Code, the Guaranty entered into between Peru and DRP has become void, and Peru no longer has any obligations under it.¹⁶²

61. This is confirmed by Clause 10 of the Contract. As Clause 10 reflects, the parties to the Contract specifically contemplated the possibility of an assignment of rights, and expressly agreed that Peru's guarantee of the obligations assumed by Centromin in the Guaranty "shall survive the transfer of any of the rights and obligations of Centromin and any liquidation of Centromin."¹⁶³ No such agreement, however, was made with respect to the transfer of DRP's rights and obligations.¹⁶⁴ In the absence of such an agreement, in order for the Guaranty to survive a transfer of DRP's rights and obligations to a third party, Peru, as the guarantor, must provide its express consent to that transfer, as required under Article 1439 of the Peruvian Civil Code.¹⁶⁵ As noted above, in the present case, Peru did not provide express consent to DRP's assignment to DRC Ltd. of its rights and obligations as the "Investor" under the Contract, as required under Article 1439.¹⁶⁶ As a matter of law, Peru thus could not have breached the Guaranty, because the Guaranty is null and void.

62. Second, even assuming *arguendo* that the Guaranty were not null and void, which is not the case, Renco is not a party to the Guaranty, nor is it a beneficiary thereunder.¹⁶⁷ Renco thus has

¹⁵⁸ See *supra* § IV.A.

¹⁵⁹ Peruvian Civil Code, Article 1439 ("*Las garantías constituidas por terceras personas no pasan al cesionario sin la autorización expresa de aquellas.*") (RLA-42).

¹⁶⁰ Luciano Barchi Velaochaga, "Garantías de Terceros en el Contrato de Cesión" in Walter Gutierrez Camacho and Manuel Muro Rojo (eds.), *Código Civil Comentado por los 100 Mejores Especialistas*, 2004 at 581 (RLA-83).

¹⁶¹ Assignment of Contractual Position between Due Run Peru S.R.L and Doe Run Cayman Ltd. dated 1 June 2001 (Exh. R-13).

¹⁶² Cárdenas at 19-20.

¹⁶³ Contract, Clause 10 (Exh. C-2).

¹⁶⁴ Contract, Clause 10 (Exh. C-2).

¹⁶⁵ Peruvian Civil Code, Article 1439 (RLA-42); Cárdenas at 19-20.

¹⁶⁶ See *supra* § IV.A; Peruvian Civil Code, Article 1439 (RLA-42).

¹⁶⁷ Cárdenas at 19.

no standing to seek to enforce the Guaranty against Peru in this arbitration.¹⁶⁸ As Professor Cárdenas confirms, under Article 1873 of the Peruvian Civil Code, a “guarantor is bound only for the obligations that it has expressly assumed,” and guarantees thus are strictly construed under Peruvian law.¹⁶⁹ Article 2.1 of the Guaranty provides that “THE STATE hereby guarantees THE INVESTOR [DRP] the representations, assurances, guarantees and obligations assumed by THE TRANSFEROR [Centromin] under the Stock Transfer, Capital Increase and Stock Subscription Contract referred to in numeral 1.1 hereof.”¹⁷⁰ As Article 2.1 reflects, the rights set out in the Guaranty run specifically to DRP as the “Investor,” and not to Renco; indeed, there are no other parties or beneficiaries even mentioned in the Guaranty.¹⁷¹ Peru thus could not have breached any obligation to Renco under the Guaranty, because Renco, as a matter of law, has no right to invoke the protections set forth therein.

63. That the rights set forth in the Guaranty run only to DRP, and not to Renco, is further confirmed by the specific authorization granted to the Vice Minister of Mines to execute the Guaranty on behalf of the Republic of Peru.¹⁷² As that authorization reflects, DRP—and not Renco—is specifically identified as the beneficiary of the guarantee:

The Vice-Ministry of Mines, Ministry of Energy and Mines, is authorized to sign the contract to which reference is made in Article 1 of this Supreme Decree in representation of the State, with the *Doe Run S.R. Ltda.*, the local company created by the members of the consortium which won the contract emanating from the International Public Tender Process for the protection of private investment in Empresa Metalúrgica La Oroya S.A. (METALOROYA).¹⁷³

64. Moreover, as set forth above, DRP—the only party to the Guaranty—is not a defendant in the Missouri litigation, which forms the basis of Renco’s claims under both the Contract and the Guaranty.¹⁷⁴ Indeed, Renco itself admits that “[t]he plaintiffs did not bring claims against *Activos Mineros, the Republic of Peru, or DRP, choosing instead to sue DRP’s U.S.-based affiliates in the courts of the United States.*”¹⁷⁵ According to Renco, *Activos Mineros* and Peru nonetheless “are obligated to join these Lawsuits, defend the actions, and indemnify, release, protect and hold Renco, DRP and their affiliates harmless from any and all liability” under the Contract and the Guaranty,¹⁷⁶ because “Centromin’s assumption of liability for third-party damages and claims under Clauses 6.2 and 6.3 extends to *anyone* who could be sued by a third party for damages falling within the scope of the assumption of liability” under the Contract.¹⁷⁷ These assertions are erroneous.

¹⁶⁸ Cárdenas at 19.

¹⁶⁹ Peruvian Civil Code, Article 1873 (RLA-42); Cárdenas at 17.

¹⁷⁰ Guaranty, Clause 2.1 (emphasis in original) (Exh. C-2).

¹⁷¹ Cárdenas at 19.

¹⁷² Supreme Decree No. 042-97-PCM concerning Peruvian State Guaranty for the Obligations Assumed by Centromin Peru in Transference of Shares, Contracts for Mining and Metallurgic, and Mining Companies, dated 18 Sept. 1997 (Exh. C-162).

¹⁷³ Supreme Decree No. 042-97-PCM concerning Peruvian State Guaranty for the Obligations Assumed by Centromin Peru in Transference of Shares, Contracts for Mining and Metallurgic, and Mining Companies, dated 18 Sept. 1997, Article 3 (emphasis added) (Exh. C-162).

¹⁷⁴ *See supra* § IV.A.

¹⁷⁵ Amended Notice of Arbitration and Statement of Claim ¶ 37 (emphasis added).

¹⁷⁶ Amended Notice of Arbitration and Statement of Claim ¶ 40.

¹⁷⁷ Memorial ¶ 259 (emphasis added).

65. As elaborated above, the obligations invoked by Renco in Clauses 6.2, 6.3, 6.5, and 8.14 of the Contract run specifically to DRP and to DRC Ltd. as the Company and the Investor, respectively, under the Contract, and not to Renco or its U.S.-based affiliates.¹⁷⁸ Similarly, the obligations invoked by Renco in Article 2.1 of the Guaranty run only to DRP as the Investor, and not to Renco or its U.S.-based affiliates.¹⁷⁹ Moreover, the mere fact that DRP allegedly is “obligated to indemnify the Renco Defendants for any judgment that may be entered against them” in the Missouri litigation does not give Renco or its U.S.-based affiliates the right to invoke the protections set forth in the Contract or the Guaranty, or otherwise transform the nature of the rights set forth therein.¹⁸⁰ Because, as Renco itself admits, neither DRP nor DRC Ltd. is a defendant in the Missouri litigation, the obligations set forth in Clauses 6.2, 6.3, 6.5, and 8.14 of the Contract and Article 2.1 of the Guaranty have not been triggered.¹⁸¹ As a matter of law, neither Activos Mineros nor Peru thus has any obligation “to join these Lawsuits, defend the actions, and indemnify, release, protect and hold Renco, DRP and their affiliates harmless from any and all liability,” as Renco erroneously asserts.¹⁸²

66. The fact that these proceedings have been brought against Renco in the United States and its U.S.-based affiliates, rather than against DRP in Peru, reinforces this conclusion. As Professor Cárdenas explains, given that the Contract was entered into in Peru; that the place of performance is Peru; that the governing law is Peruvian law; that the acquiring and transferring parties are Peruvian entities; and that both original, potential defendants (DRP and Metaloroya) were Peruvian entities, the administrative and judicial actions contemplated under Article 8.14 of the Contract would have been expected to be filed in Peru.¹⁸³ Renco’s attempt to invoke the Guaranty to argue that Peru has an obligation to defend against claims brought against Renco and its U.S.-based affiliates in the U.S. courts thus is at odds with the terms and conditions of those instruments.

67. Indeed, as Mr. Bellinger confirms in his expert legal opinion, Peru has sovereign immunity from the jurisdiction of a U.S. court, and neither the Contract nor the Guaranty contains any express waiver of sovereign immunity such that Peru could be required to defend against claims brought in U.S. courts against Renco and its U.S.-based affiliates.¹⁸⁴ As Mr. Bellinger explains, in the United States, there is an established history of affording foreign States sovereign immunity,¹⁸⁵ and the Foreign Sovereign Immunities Act (“FSIA”) sets out the limited circumstances in which U.S. courts may assert jurisdiction over a foreign State.¹⁸⁶ As Mr. Bellinger remarks, “under the express language of the FSIA and well-established precedent, Peru is presumptively immune from the jurisdiction of U.S. courts,” unless it has waived its sovereign immunity.¹⁸⁷ As Mr. Bellinger confirms, in the present case, “Peru has neither explicitly nor implicitly waived its immunity from the jurisdiction of U.S. courts under the FSIA with respect to the claims filed in Missouri.”¹⁸⁸ And, as he further concludes,

¹⁷⁸ See *supra* § IV.A.

¹⁷⁹ Guaranty, Clause 2.1 (Exh. C-2).

¹⁸⁰ Amended Notice of Arbitration and Statement of Claim ¶ 39.

¹⁸¹ Memorial ¶ 78.

¹⁸² Amended Notice of Arbitration and Statement of Claim ¶ 40.

¹⁸³ Cárdenas at 15.

¹⁸⁴ Bellinger ¶¶ 34-35.

¹⁸⁵ Bellinger ¶¶ 12-14.

¹⁸⁶ Bellinger ¶¶ 14-16; Foreign Sovereign Immunities Act (“FSIA”), Pub. L. No. 94-583, 90 Stat. 2891; S. Rep. No. 94-1310 (RLA-47).

¹⁸⁷ Bellinger ¶ 18.

¹⁸⁸ Bellinger ¶ 34.

because there is no clear waiver here, “it would not be reasonable to conclude that Peru waived its sovereign immunity and actually consented to litigate in U.S. courts.”¹⁸⁹

68. Fourth, even assuming *arguendo* that the Guaranty were not null and void under Peruvian law, which it is; that Renco were entitled to invoke the Guaranty, which it is not; and that the rights with respect to third-party claims under the Contract extend to *anyone* who could be sued by a third party for damages falling within the alleged scope of Activos Mineros’s assumption of liability, which they do not; Peru cannot have breached the Guaranty as a matter of law, because Renco’s claims for breach of the Guaranty are not ripe. As Professor Cárdenas explains, under Peruvian law, a guarantee “has a subsidiary nature,” which “means that the guarantor only responds when the debtor is in default and that the creditor must proceed first against the principal debtor.”¹⁹⁰ This principle is established in Articles 1868 and 1879 of the Peruvian Civil Code, which provide, respectively, that, “[t]hrough the guarantee, the guarantor assumes an obligation to the creditor to do what is specified in order to guarantee an obligation assumed by the debtor, *in case the debtor does not comply*,”¹⁹¹ and that “[t]he guarantor cannot be compelled to pay the creditor without the creditor first seeking payment from the debtor.”¹⁹² Under Articles 1868 and 1879, a creditor thus may not proceed against the guarantor without first establishing the debtor’s failure to comply with its obligations, and seeking but failing to obtain recovery from the debtor.¹⁹³

69. In accordance with Articles 1868 and 1879 of the Peruvian Civil Code, DRP thus cannot invoke the protections set out in the Guaranty until it has been established that Activos Mineros has failed to comply with its obligations under the Contract. This has not been established. Indeed, as Renco itself notes in its Amended Notice of Arbitration and Statement of Claim, Activos Mineros and Renco specifically dispute whether the claims filed in the Missouri litigation against Renco and its U.S.-based affiliates relate to an act or fact “within the responsibilities, declaration and guarantees offered by” Activos Mineros under the Contract.¹⁹⁴ Where such liability is disputed between the parties, the parties are required to follow the expert procedure set out in Clauses 5.3.A, 5.4.C, and 12 of the Contract.¹⁹⁵ The parties have not done so. Renco’s claim that Peru has breached the Guaranty by failing to defend against the claims brought in the Missouri litigation thus is premature, as it has not been established that Activos Mineros has any such obligation under Article 8.14 of the Contract with respect to those proceedings.¹⁹⁶

70. Similarly, there has been no judgment issued in the Missouri litigation establishing liability.¹⁹⁷ Renco’s claims for indemnification under Clauses 6.2, 6.3, and 6.5 of the Contract and Article 2.1 of the Guaranty thus also are premature, as no damages have been awarded giving rise to any obligation to indemnify under the Contract. In addition, as noted above, under Peruvian law, a

¹⁸⁹ Bellinger ¶ 35.

¹⁹⁰ Cárdenas at 17.

¹⁹¹ Peruvian Civil Code, Article 1868 (emphasis added) (“*Por la fianza, el fiador se obliga frente al acreedor a cumplir determinada prestación, en garantía de una obligación ajena, si ésta no es cumplida por el deudor.*”) (RLA-42).

¹⁹² Peruvian Civil Code, Article 1879 (“*El fiador no puede ser compelido a pagar al acreedor sin hacerse antes excusión de los bienes del deudor.*”) (RLA-42).

¹⁹³ Cárdenas at 17-18, 20.

¹⁹⁴ Amended Notice of Arbitration and Statement of Claim ¶ 40; Memorial ¶ 83.

¹⁹⁵ Contract, Clauses 5.3.A and 5.4.C (Exh. C-2); Cárdenas at 20.

¹⁹⁶ Contract, Clause 8.14 (Exh. C-2).

¹⁹⁷ Memorial ¶ 6.

creditor may proceed to enforce its guarantee against the debtor's guarantor only after it has exhausted all means of recourse against the debtor.¹⁹⁸ Even assuming that a judgment had been issued in the Missouri litigation (which is not the case), Renco thus must seek recourse against Activos Mineros under the Contract, before seeking to enforce the Guaranty against Peru.¹⁹⁹ As a matter of law, Renco's claims for breach of the Guaranty thus are not ripe.

71. The same is true with respect to Renco's soil remediation claim.²⁰⁰ Neither Centromin nor Activos Mineros has been found liable for any alleged failure to remediate the soil as required under the Contract. Even assuming that a decision had been issued against Centromin or Activos Mineros finding liability (which is not the case), under Peruvian law, Renco must seek recourse against them under the Contract, before Peru could be found to have breached its obligations under the Guaranty.²⁰¹ As a matter of law, Peru thus cannot be deemed to have breached its obligations under the Guaranty.

72. Finally, even assuming *arguendo* that the Guaranty were not void under Peruvian law, which it is, and that Renco were entitled to invoke the Guaranty, which it is not, Renco's claim that Peru breached its obligations to Renco under the Contract and the Guaranty by failing to honor the *force majeure* clause in the Contract by failing to grant DRP reasonable and adequate extensions of time to fulfill the PAMA fails as a matter of law. As set forth above, Peru is not a party to the Contract, and thus has no obligation to "honor the *force majeure* clause" therein, as Renco erroneously asserts.²⁰² Activos Mineros, moreover, has not been found to have breached its obligations under the Contract with respect to the *force majeure* clause of the Contract. Even assuming that a decision had been issued against Activos Mineros finding liability (which is not the case), under Peruvian law, Renco must seek recourse against Activos Mineros under the Contract, before Peru could be found to have breached its obligations under the Guaranty.²⁰³ As a matter of law, Peru thus cannot be deemed to have breached its obligations under the Guaranty.

73. Furthermore, the Contract does not contain any timeframe by which the parties must fulfill their PAMA obligations; those timeframes are set forth in the PAMA itself.²⁰⁴ Accordingly, the *force majeure* clause in the Contract cannot have been breached by any alleged failure to extend the PAMA deadline, as that deadline is set forth in the PAMA.²⁰⁵ As a matter of law, Peru thus could not have violated the Guaranty by allegedly failing to grant DRP reasonable and adequate extensions of time to fulfill its PAMA obligations, because Activos Mineros itself has no such obligation under the Contract.

74. Because the Guaranty is void, neither Peru nor Renco has any rights or obligations under the Guaranty in any case, and because Renco's claims under the Guaranty in any event are not ripe or otherwise fail to state a claim, Peru could not have breached any obligations to Renco

¹⁹⁸ Peruvian Civil Code, Article 1879 ("El fiador no puede ser compelido a pagar al acreedor sin hacerse antes excusión de los bienes del deudor.") (RLA-42).

¹⁹⁹ Peru notes that consistent with its failure to establish Activos Mineros' liability, Renco has not offered any quantification of the damages it has suffered from the alleged breaches of the Contract. See Memorial ¶ 413.

²⁰⁰ Amended Notice of Arbitration and Statement of Claim ¶¶ 55, 56.

²⁰¹ Cárdenas at 20.

²⁰² Amended Notice of Arbitration and Statement of Claim ¶ 55.

²⁰³ Cárdenas at 20.

²⁰⁴ Contract, Clause 5 (Exh. C-2).

²⁰⁵ Contract, Clause 5 (Exh. C-2).

thereunder. Renco's claims for breach of the Guaranty under Article 10.16(1)(a)(i)(C) of the Treaty accordingly fail as a matter of law, and should be dismissed under Article 10.20.4.

V. REQUEST FOR RELIEF

75. For all the reasons set forth above, Respondent respectfully requests that the Tribunal dismiss Claimant's claims for breach of the Contract and the Guaranty, and, hence, Article 10.16.1(a)(i)(C) of the Treaty, in their entirety under Article 10.20.4 of the Treaty, and award Respondent all the expenses and costs associated with defending against these claims.

Respectfully submitted,



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