INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

The Renco Group, Inc.
Claimant

v.

The Republic of Peru
Respondent

(UNCT/13/1)

PERU'S REPLY ON ITS PRELIMINARY OBJECTION UNDER ARTICLE 10.20.4

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ESTUDIO ECHECOPAR
Lima

WHITE & CASE
Washington, D.C.

The Renco Group, Inc. v. The Republic of Peru

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PERU'S REPLY ON ITS PRELIMINARY OBJECTION UNDER ARTICLE 10.20.4

1. The Republic of Peru ("Peru") hereby submits its Reply on its Preliminary Objection under Article 10.20.4 of the Peru-United States Trade Promotion Agreement (the "Treaty") in accordance with Procedural Orders Nos. 1, 3 and 4, as modified.

I. RENCO MISCHARACTERIZES THE STANDARD UNDER ARTICLE 10.20.4

2. Article 10.20.4 of the Treaty establishes a special regime for disposing of claims that are legally insufficient at an early stage of the arbitral proceedings, so that time, resources, and effort are not expended unnecessarily.[1] As set forth in Peru's Preliminary Objection under Article 10.20.4 ("Preliminary Objection"), the Treaty provides that a tribunal shall assume the claimant's factual allegations set out in its notice of arbitration to be true, in deciding a preliminary objection under Article 10.20.4.[2] In contrast, this assumption does not extend to the claimant's legal allegations,[3] nor does it extend to factual allegations which, in the tribunal's view, are incredible, frivolous, vexatious or inaccurate, or made in bad faith.[4]

3. The standard of review under Article 10.20.4 is not limited to the disposal of frivolous or legally impossible claims.[5] As the Tribunal found, the standard encompasses an examination of "whether the facts as alleged by the Claimant are capable of constituting a breach of a legal right protected by the Treaty."[6]

4. Peruvian law is a legal issue which must be assessed by the Tribunal in determining whether, as a matter of law, Renco's claim under 10.16.1(a)(i)(C) is not a claim for which an award in favor of Renco may be made under Article 10.26.[7] Pursuant to Article 10.20.4, 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.[8]

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[1] Preliminary Objection ¶ 4.

[2] Preliminary Objection ¶¶ 5-6; Peru-United States Trade Promotion Agreement, entered into force February 1, 2009 (the "Treaty"), Article 10.20.4 (RLA-1).

[3] Preliminary Objection ¶¶ 5-6; *Pac Rim Cayman LLC v. The Republic of El Salvador* (ICSID Case No. ARB/09/12), Decision on the Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5 of August 2, 2010 ¶ 91 (observing that, in the context of a preliminary objection under Article 10.20.4 of the 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") (RLA-9).

[4] Preliminary Objection ¶ 6; *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 date 12 May 2008 ¶¶ 91, 105 (RLA-43).

[5] Preliminary Objection ¶ 8; *Pac Rim Cayman LLC v. The Republic of El Salvador* (ICSID Case No. ARB/09/12), Decision on the Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5 of August 2, 2010 ¶ 108 (noting that it did "not consider that the standard of review under Article 10.20.4 [of the DR-CAFTA] is limited to 'frivolous' claims or 'legally impossible' claims," and that "[t]hese words could have been used by the Contracting Parties in agreeing CAFTA; but all are significantly absent") (RLA-9).

[6] Decision on the Scope of Article 10.20.4 ¶ 92.

[7] Preliminary Objection ¶ 7.

[8] Treaty, Art. 10.20.4(c), n.10 ("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

5. At odds with the Treaty, Renco contends in its Opposition that it is "impossible for Peru to meet its burden" under Article 10.20.4, because "the resolution of the issues is dependent on mixed questions of law" and fact, and because there is "a detailed set of facts which must be assumed true by the Tribunal."[9] Renco's contentions are erroneous and merely represent Renco's ongoing effort (as with its contorted effort to defend its waiver violation) to overcomplicate issues of Peruvian law and fact in an effort to obfuscate, evade, and avoid the application of a Treaty provision which is designed to facilitate a procedure for dismissal of claims like those at issue here.

6. Renco proffers a series of new factual allegations in its Opposition and Supplemental Opposition.[10] While a tribunal shall assume the claimant's factual allegations set forth in its notice of arbitration to be true for purposes of a preliminary objection under Article 10.20.4,[11] as the tribunal affirmed in *Pac Rim Cayman v. El Salvador*, "it is only the notice (or amended notice) of arbitration which benefits from a presumption of truthfulness: there is to be no assumption of truth as regards factual allegations made elsewhere, for example in other written or oral submissions made by a claimant to the tribunal under the procedure for addressing the respondent's preliminary objection."[12] Accordingly, the new factual allegations made by Renco do not benefit from any presumption of truthfulness under Article 10.20.4.

7. Fundamentally, as elaborated further below, Peru's preliminary objection is not based upon mixed questions of law and fact, nor does it require the Tribunal to assume a detailed set of facts as true or delve into complex factual inquiries. To the contrary, Peru's preliminary objection arises from the plain language of the Contract and the Guaranty and the parties thereto, which demonstrate that Renco has failed to state a claim for breach of an investment agreement under the Treaty.[13]

II. THE RELEVANT FACTS ARE LIMITED AND NOT DISPUTED

A. The Relevant Facts

8. The facts relevant to the Tribunal's determination under Article 10.20.4 are limited, as set out in Peru's Preliminary Objection,[14] and, as contemplated by the applicable standard, are undisputed.[15] The key relevant facts remain as follows:

- *The Contract.* The Stock Transfer Contract (the "Contract") is dated October 23, 1997 (the "Contract"). The Contract defines the parties thereto as Empresa Minera del Centro del Peru S.A. ("Centromin") and Doe Run Peru S.R. LTDA ("DRP"), with the intervention of Doe Run Resources Corporation ("DRRC") and The Renco Group, Inc. ("Renco").[16]

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claimant may be made under Article 10.26 may include, where applicable, an objection provided for under the law of the respondent.") (RLA-1).

[9] Opposition ¶ 34.

[10] *See*, *e.g.*, Opposition § III(B); Supplemental Opposition § II.

[11] Preliminary Objection ¶¶ 5-6; Treaty, Article 10.20.4(c) (RLA-1).

[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 ¶ 90 (RLA-9).

[13] Preliminary Objection ¶ 40

[14] Preliminary Objection ¶¶ 9-23.

[15] *See supra* § I.

[16] *See* Amended Notice of Arbitration ¶¶ 1, 13, 18; Contract (C-2).

Pursuant to the Additional Clause of the Contract, the intervention of DRRC and Renco was to warrant compliance with the obligations undertaken by DRP.[17] On October 27, 1997, Renco was released from its participation in the Contract as a guarantor of DRP's contractual obligations. On 1 June 2001, DRP assigned its contractual position as the "Investor" under the Contract to Doe Run Cayman Ltd. ("DRC").[18]

- *The Guaranty:* Peru and DRP entered into the Guaranty Agreement dated November 21, 1997 (the "Guaranty").[19]

- *The U.S. Lawsuits*: Beginning in 2007, plaintiffs from La Oroya 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 complex (the "Lawsuits"). The named defendants include Renco and DRRC (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).[20]

- *The Indemnity Claim*: Renco and its affiliates requested that Activos Mineros, the Ministry of Energy and Mines, and the Ministry of Economics and Finance of Peru honor alleged contractual obligations to defend against the Lawsuits and release, protect, and hold harmless Renco and its affiliates.[21] Renco does not allege that the expert procedure established in the Contract has been satisfied.

- *The Treaty Proceeding*: The Treaty entered into force on February 1, 2009. Renco subsequently commenced arbitration against Peru. Renco and DRP submitted a Notice of Arbitration and Statement of Claim dated April 4, 2011 (the "Notice of Arbitration"). Renco subsequently submitted an Amended Notice of Arbitration and Statement of Claim dated August 9, 2011 (the "Amended Notice of Arbitration").[22] Renco claims that Peru breached the Contract and Guaranty and, by extension, Article 10.16.1(A)(I)(C) of the Treaty..[23]

B. Renco's Irrelevant Factual Allegations

9. Despite the focused scope of the allegations relevant to the pending objection, Renco has submitted an expansive and irrelevant factual discussion that spans more than 35 pages across its Opposition and Supplemental Opposition, addresses myriad issues not alleged in the Amended Notice of Arbitration, and relies on numerous documents and witness statements submitted together with Renco's Memorial on Liability.[24]

10. However much Renco may seek to muddy the waters, these factual allegations are irrelevant to Peru's objection that Renco cannot prevail on its claims under Article 10.16.1(a)(i)(C) of the Treaty as a matter of law.

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[17] Contract (C-2).

[18] *See* Modification of the Contract to Transfer Shares, Increase Company Capital and Subscription of Shares of Metaloroya S.A. dated 17 Dec. 1999 (C-49); Assignment of Contractual Position between Due Run Peru S.R.L and Doe Run Cayman Ltd. dated 1 June 2001 ("Contract Assignment"), Clause 2 (R-13).

[19] *See* Amended Notice of Arbitration ¶¶ 1, 18. The Amended Notice of Arbitration attaches the Guaranty as exhibit C-3.

[20] *See* Amended Notice of Arbitration ¶¶ 36-37.

[21] *See* Amended Notice of Arbitration ¶ 40; Contract, Clause 5.4.C (Exh. C-2).

[22] *See* Treaty; Notice of Arbitration ¶ 1; Amended Notice of Arbitration ¶ 1.

[23] Amended Notice of Arbitration ¶ 56.

[24] *See* Opposition ¶¶ 20-58; Supplemental Opposition ¶¶ 26-88.

11. As detailed herein, Renco's assertion that its new factual allegations are relevant, because "[c]onstruction of an ambiguous contract is a question of fact,"[25] is wrong as a matter of Peruvian law. Indeed, it is clear that Renco has raised factual issues merely to cast Peru in a negative light. Its references to the military dictatorship three decades before the Contract was even signed,[26] among other things, clearly are irrelevant to the interpretation of the Contract and are made solely to attack Peru. Several of the laws cited by Renco have not been in force for decades and were no longer in force at the time DRP acquired its participation in the La Oroya Facility.[27]

12. While not necessary to the objection before the Tribunal, the lack of credibility of the witness statements submitted by Renco merely highlights the baselessness of Renco's claims. Dennis Sadlowski relies heavily on hearsay and unsupported assertions, for instance, including with respect to discussions with Centromin as to Clauses 6.2 and 6.3 of the Contract in which he admits he did not participate directly.[28] In any event, as demonstrated below, this witness testimony does not assist Renco in defending against Peru's Article 10.20.4 claim, because Renco's claim for breach of an investment agreement fails as a matter of law.

13. The Tribunal does not need to consider Renco's factual distortions for the purposes of Peru's present objection. As a general matter, Peru has complied with the Treaty and applicable law; Renco has not.[29]

III. RENCO HAS NOT ASSERTED A CLAIM UNDER ARTICLE 10.16.1(a)(i)(C) FOR WHICH AN AWARD IN FAVOR OF RENCO MAY BE MADE

14. The Treaty provides at Article 10.16.1(a)(i)(C) that "the claimant, on its own behalf, may submit to arbitration under this Section a claim [] that the respondent has breached [] an investment agreement."[30] Because there is no investment agreement, no such agreement could be breached by Peru as a matter of law, and the Tribunal thus must dismiss Renco's claims under Article 10.16.1(a)(i)(C).

15. Renco claims that Peru breached the Contract and Guaranty (and, by extension, Article 10.16.1(a)(i)(C) of the Treaty) by allegedly failing to "(1) appear in and defend the Lawsuits; (2) assume responsibility and liability for any damages that the plaintiffs may recover in the Lawsuits; (3) indemnify, re1ease, 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 Stock Transfer Agreement by granting DRP reasonable and adequate extensions of time

[25] *See* Supplemental Opposition ¶ 105.

[26] *See, e.g.*, Supplemental Opposition ¶ 26.

[27] For instance, Presidential Decree No. 20492 dated 24 Dec. 1973 (C-30) cited at Supplemental Opposition, ¶ 26, fn. 18; Organic Law No. 21117 dated 16 Mar. 1975 (C-31) cited at Supplemental Opposition, ¶¶ 27, 28, fns. 19-23, 25-26.

[28] Sadlowski ¶ 27.

[29] For the avoidance of doubt, Peru emphasizes that the facts raised during the focused phases of the proceeding to date do not reflect the totality of the factual issues in dispute in this arbitration. Peru rejects Renco's allegations and nothing herein should be construed as an acceptance of the factual allegations advanced by Renco for anything other than the purposes of this objection.

[30] Treaty, Article 10.16 (RLA-1).

to fulfill the PAMA," as set forth in the Amended Notice of Arbitration.[31] Previously, Renco's Notice of Arbitration made an identical claim (but for the later addition of the *force majeure* element) on behalf of DRP under Article 10.16.1(b)(i)(C) .[32] Subsequently, Renco has insisted that it is not bringing claims on behalf of DRP, as justification for not submitting a waiver by DRP in accordance with Article 10.18 of the Treaty.[33]

A. There Is No Investment Agreement

16. Renco argues that Peru has breached Article 10.16.1(a)(i)(C) of the Treaty by allegedly failing to observe obligations to Renco under the Contract and the Guaranty. Even accepting as true the allegations in Renco's Amended Notice of Arbitration in support of this claim, Renco's claim fails as a matter of law, because neither the Contract nor the Guaranty is an "investment agreement" as defined by the Treaty. Article 10.28 provides as follows:

> **[I]nvestment agreement** means a written agreement[16] between a national authority[17] of a Party and a covered investment or an investor of another Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor:
>
> (a) with respect to natural resources that a national authority controls, such as for their exploration, extraction, refining, transportation, distribution, or sale;
>
> (b) to supply services to the public on behalf of the Party, such as power generation or distribution, water treatment or distribution, or telecommunications; or
>
> (c) to undertake infrastructure projects, such as the construction of roads, bridges, canals, dams, or pipelines, that are not for the exclusive or predominant use and benefit of the government.
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> [16] "Written agreement" refers to an agreement in writing, executed by both parties, whether in a single instrument or in multiple instruments, that creates an exchange of rights and obligations, binding on both parties under the law applicable under Article 10.22.2. For greater certainty, (a) a unilateral act of an administrative or judicial authority, such as a permit, license, or authorization issued by a Party solely in its regulatory capacity, or a decree, order, or judgment, standing alone; and (b) an administrative or judicial consent decree or order, shall not be considered a written agreement."
>
> [17] For purposes of this definition, "national authority" means an authority at the central level of government.[34]

[31] Amended Notice of Arbitration ¶ 56.

[32] Notice of Arbitration ¶ 59-60.

[33] *See, e.g.*, Counter-Memorial on Waiver ¶ 10.

[34] Treaty, Article 10.28 (RLA-1).

17. Because neither the Contract nor the Guaranty, jointly or independently, fall within the Treaty's definition of "investment agreement," Renco's claim under Article 10.16.1(a)(i)(C) cannot result in an award in Renco's favor, and must be dismissed, as elaborated below.

1. The Contract And The Guaranty Are Not Investment Agreements

a. Neither The Contract Nor The Guaranty "Create[s] An Exchange Of Rights And Obligations" Vis-à-Vis Renco

18. Neither the Contract nor the Guaranty constitutes an "investment agreement" pursuant to the Treaty, because neither "create[s] an exchange of rights and obligations" between Renco and a national authority.[35] Under Peruvian Law, contracts create rights and obligations as between the parties (and their heirs).[36] Renco is not a party to either the Contract or the Guaranty, and therefore has neither rights nor obligations thereunder.

19. On its face, the parties to the Contract are "on the one part […] Empresa Minera del Centro del Peru S.A. (Centromin Peru S.A.) […] and on the other part Doe Run Peru S.R.Ltda." Renco is not a listed party.[37] Renco intervened in the Contract pursuant to the Additional Clause, whereby it guaranteed the contractual obligations assumed by DRP under the Contract.[38] Renco's participation as a guarantor under the Additional Clause terminated four days after the Contract was signed, when Renco was released from the guaranty pursuant to its own request.[39] It is undisputed that Renco had no role in the Contract by the time it notified Peru of its intent to commence these proceedings.[40] As a matter of law, Renco is not a party to the Contract, and does not have rights or obligations thereunder.[41]

20. Renco errs in arguing that its signing of the Contract as an intervenor "is sufficient to satisfy this prong of the definition of 'investment agreement.'"[42] As noted, Renco's status as an "intervenor" lasted a mere four days. Its signing of the Contract as an "intervenor", moreover, did not transform Renco into a party to the Contract and, thus, Renco cannot be found to have executed a contract with a national authority, as is required for an investment agreement under the Treaty. Renco's argument, in fact, would allow a claimant to derive Treaty rights by signing a contract in any form, while at the same time foregoing acceptance of corresponding responsibilities under the

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[35] Treaty, Art. 10.28 ("investment agreement means a written agreement *between* a national authority of a Party and a covered investment or *an investor of another Party*") (RLA-1). *See* Preliminary Objection ¶¶ 30-31.

[36] *See* Peruvian Civil Code, Article 1363 (RLA-141); Cárdenas II ¶ 39.

[37] Contract, at 4 (C-2). See also, Cárdenas I at 10; Cárdenas II ¶ 45.

[38] Contract, Additional Clause (providing that "[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*.") (emphasis added) (C-2).

[39] Preliminary Objection ¶ 16. *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).

[40] Notice of Intent to Commence Arbitration dated 29 December 2010.

[41] *See infra* § III(B)(1)(b).

[42] Supplemental Opposition ¶ 130.

contract. In any case, Renco's four-day intervention does not make the Contract an "investment agreement," because the Additional Clause did not grant Renco any rights vis-à-vis Centromin.[43]

21. Indeed, as detailed below, Renco has no rights under the Contract.[44] Even if Renco had rights as a third-party beneficiary, moreover, this would be insufficient to make the Contract an "investment agreement" between Renco and a national authority. This is because any clauses granting third-party beneficiary rights would constitute a unilateral grant by Centromin, without a corresponding obligation on the part of Renco, as is required under Article 10.28 of the Treaty for the instrument to qualify as an "investment agreement."[45]

22. Similarly, Renco is not a party to the Guaranty, and has no rights or obligations thereunder. The Guaranty, which was not "executed" by Renco, on its face is between "the PERUVIAN STATE […] as party of the first part; and DOE RUN PERU S. R. LTDA. […] hereinafter referred to as THE INVESTOR, as party of the second part."[46] Even assuming *arguendo* that Renco has rights under the Guaranty, which it does not, the Guaranty does not "create[] an exchange of rights and obligations, binding on both parties," as required by the Treaty.[47] By its plain terms, the Guaranty only creates obligations on Peru.[48] The mere fact that the Guaranty was memorialized in the form of a contract does not mean, as Renco asserts, that it creates an exchange of rights and obligations between the parties thereto.[49] As in other civil law systems, there is no requirement of consideration under Peruvian contract law,[50] and as a matter of Peruvian Law, guarantees have unilateral effects: the guarantor assumes an obligation to the creditor without the creditor assuming any corresponding obligation towards the guarantor.[51] In any case, the Guaranty has been rendered void by DRP's assignment to DRC Ltd. of its rights and obligations as the "Investor" under the Contract many years before the initiation of this arbitration, as detailed below.[52] Accordingly, even assuming that at its formation the Guaranty created an exchange of rights and obligations – which it failed to do – the Guaranty is now null and void as a result of the assignment and can no longer be the source of any rights and obligations.

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[43] *See infra* § III(A)(2).

[44] *See infra* § III(B)(1)(b).

[45] According to Article 10.28 and its footnote 16, an investment agreement must "create[] an exchange of rights and obligations, binding on both parties under the law applicable under Article 10.22.2 [Peruvian law]."

[46] Guaranty (C-3).

[47] Treaty, Article 10.28 and fn. 16 (RLA-1).

[48] Guaranty, Clause 2.1 ("THE STATE hereby guarantees THE INVESTOR the representations, assurances, guarantees and obligations assumed by [CENTROMIN] under the [Contract].") (C-3).

[49] Supplemental Opposition ¶ 139.

[50] R. E. Saavedra Velazco, "A comparative view of the contract definition," Revista Ius Et Veritas, June 2013, at 193, 195 (noting that notion of a contract in Peruvian law is much broader then in US law because under Peruvian law the agreement between the parties is sufficient to form a contract; there is no requirement of consideration as in US law) (RLA-143).

[51] M. Cervantes Negreiros, COMENTARIO AL ARTÍCULO 1869 DEL CÓDIGO CIVIL, CÓDIGO CIVIL COMENTADO, Tomo IX, Segunda Edición, Mayo 2007, p. 389] ("Although a guarantee contract [*fianza*] constitutes a bilateral legal act, formed by the agreement of the wills of the guarantor and the creditor, at the same time it creates only one obligation, which shall be borne solely by the guarantor") (RLA-142).

[52] Preliminary Objection ¶¶ 33, 59-61. *See* 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).

23. Finally, even to the extent that the Contract and Guaranty otherwise qualify as investment agreements — which they do not – Renco may only make claims on its own behalf under Article 10.16.1(a)(i)(C) where it is a party to the written agreement with a national authority of Peru. The parallel and disjunctive wording of the definition of investment agreement makes clear that there are two separate types of investment agreements – those executed by the investor itself and those executed by the covered investment – reflecting the structure of Article 10.16.1, pursuant to which an investor may make a claim on its own behalf and/or on behalf of its investment:

> **investment agreement** means 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[53]

24. Renco cannot make claims on its own behalf based on alleged investment agreements entered into by DRP, as it purports to do in this case.[54] If Renco wished to make a claim concerning an alleged breach of an investment agreement entered into by DRP, it needed to submit its claim on behalf of DRP pursuant to Article 10.16(b)(i)(C) and to submit a waiver on behalf of DRP, as required by Article 10.18. As the Tribunal is aware, Renco withdrew the waiver submitted by DRP with its initial Notice of Arbitration and amended its Notice of Arbitration to remove references to Article 10.16(b)(i)(C).[55] In these circumstances, Renco cannot now claim that it is entitled to make claims for a breach of a purported investment agreement to which DRP is a party when it removed all references from its Amended Notice of Arbitration to claims made on DRP's behalf, revoked the waiver submitted by DRP, and had DRP commence and continue litigation in Peruvian courts concerning the same measures at issue in this arbitration.

25. This result is not changed by the fact that Renco asserts that it has suffered damages "directly and indirectly" as a result of Peru's alleged breaches of the Contract and Guaranty,[56] because regardless of whether Renco was harmed, the fact remains that the alleged "investment agreement" that Renco claims was breached was entered into by DRP, and not Renco. Renco's reference to NAFTA jurisprudence in this regard[57] is inapposite, because the NAFTA does not contain any provision granting claimants a right to bring claims for breach of an investment agreement.[58]

26. Several international tribunals have recognized, in a variety of contexts, that a parent company cannot invoke a subsidiary's contractual rights.[59] In *Siemens v. Argentina*, for example, the

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[53] Treaty, Art. 10.28 (RLA-1).

[54] *See* Amended Notice of Arbitration ¶ 2; Claimant's Counter-Memorial on Peru's Waiver ¶ 10.

[55] *See* Peru's Memorial on Waiver ¶ 17; *see also* Peru's Reply on Waiver ¶ 19.

[56] *See* Supplemental Opposition ¶¶ 169-173.

[57] *See* Supplemental Opposition ¶¶ 145, 170.

[58] Under Articles 1116 and 1117 of the NAFTA, an investor, on its own behalf or on behalf of its investment, can only bring claims for breach of "an obligation under: (a) Section A or Article 1503(2) (State Enterprises), or (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A." NAFTA, Arts. 1116, 1117 (CLA-11).

[59] *See Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5) Decision on Jurisdiction dated 2 Jun. 2010, ¶¶ 241-248; *Siemens A.G. v. The Argentine Republic* (ICSID Case No. ARB/02/8) Award dated 6 Feb. 2007, ¶ 204; *Impregilo S.p.A. v. The Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3) Decision on Jurisdiction dated 22 Apr. 2005, ¶ 223; *Alpha Projektholding Gmbh v. Ukraine* (ICSID Case No. ARB/07/16) Award dated 8 Nov. 2010, ¶¶ 423-424;

tribunal rejected the parent claimant's attempt to invoke the contractual rights of its local project company, which was constituted to meet the bidding rules requirement and the parent's participation in the bidding process.[60] As the *Siemens* tribunal explained, "to the extent that the obligations assumed by the State party are of a contractual nature, such obligations must originate in a contract between the State party to the Treaty and the foreign investor."[61] Similarly, in *Burlington v. Ecuador*, the tribunal found that the parent claimant was not a party and could not invoke contractual rights of its subsidiaries,[62] despite the fact that the "Claimant has given parent company guarantees," and allegedly was the "real party in interest."[63] Likewise, a parent company cannot invoke a subsidiary's contractual rights under Peruvian law, as explained further below.[64] For all of these reasons, neither the Contract nor the Guaranty is an "investment agreement" as defined by the Treaty, because neither creates rights and obligations vis-à-vis Renco, which is not a party to either agreement.

b. The Contract Was Not Executed By A National Authority

27. As alleged in Renco's Amended Notice of Arbitration, the parties to the Contract were Centromin,[65] which was succeeded by Activos Mineros, and Doe Run Peru (DRP).[66] Neither Centromin nor Activos Mineros qualifies as a "national authority" for purposes of the definition of "investment agreement" under the Treaty, because neither is an "authority at the central level of government." In its Opposition and Supplemental Opposition, Renco does not deny that Centromin and Activos Mineros are State-owned mining companies, and not State organs that exercise any element of Governmental authority, as Peru has shown.[67] The Contract therefore cannot qualify as an investment agreement for purposes of the Treaty.

Limited Liability Company Amto v. Ukraine (SCC Arbitration No. 080/2005) Award dated 26 Mar. 2008, ¶¶ 109-110; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana* (ICSID Case No. ARB/07/24) Award dated 18 Jun. 2010, ¶ 348; *Azurix Corp. v. The Argentine Republic* (ICSID Case No. ARB/01/12) Award dated 14 July 2006, ¶ 384; *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8) Decision of the *Ad Hoc* Committee on the Application for Annulment dated 25 Sep. 2007, ¶ 96; *El Paso Energy International Company v. The Argentine Republic* (ICSID Case No. ARB/03/15) Award dated 31 Oct. 2011, ¶ 538; *EnCana Corporation v. Republic of Ecuador* (UNCITRAL Case) Award, 3 Feb. 2006, ¶ 167.

[60] *See, e.g., Siemens A.G. v. The Argentine Republic* (ICSID Case No. ARB/02/8) Award dated 6 Feb. 2007, ¶¶ 82-84, 204-205.

[61] *Siemens A.G. v. The Argentine Republic* (ICSID Case No. ARB/02/8) Award dated 6 Feb. 2007, ¶ 204.

[62] *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5) Decision on Jurisdiction dated 2 Jun. 2010, ¶¶ 242-248.

[63] *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5) Decision on Jurisdiction dated 2 Jun. 2010, ¶ 241.

[64] *See infra* ¶¶ 54-56.

[65] Amended Notice of Arbitration ¶ 18.

[66] Amended Notice of Arbitration ¶ 8.

[67] Preliminary Objection ¶ 28. Renco cites to Article 2 of Centromin's Bylaws – which provides that "[i]n carrying out its purpose, [Centromin] shall seek to perform its activities in a manner conducive to developing the highest levels of scientific and technological research, fostering the socio-economic development of the regions and municipalities in which it operates, and promoting the wellbeing of its workers" – suggesting that this means that Centromin is a national authority. The fact that Centromin's mission statement includes promoting the development of the areas in which it operates and the wellbeing of its workers, however, does not mean that Centromin is a national authority any more than a wealth of private companies such as, for instance, the Dole Food Company (whose mission is "mission is (1) providing the world with healthy and nutritious foods, (2) offering employees competitive wages, ample benefits and a safe work environment. Honoring our employees' rights, (3) enhancing and empowering our communities to advance and prosper, (4) protecting our natural resources and actively seeking ways to reduce our environmental impact."[67]), and Chevron (whose purpose is to "safely provid[e] energy products vital to sustainable economic progress and human development throughout the world."). Respectively, Centromin's Bylaws, Supreme Decree No. 019-82-EM-VM dated 7 Jul. 1982, Art. 2 (this decree was introduced in the record for the first

28. In arguing otherwise, Renco conflates Peru and Centromin in disregard of the plain language of the Treaty and Peruvian law. Specifically, Renco alleges that "[u]nder control and instructions of national authorities of Peru, Centromin executed the Stock Transfer Agreement,"[68] and that "[t]he Stock Transfer Agreement is a 'written agreement' executed by both a covered investment (Doe Run Peru) and a national authority (Peru through Centromin)."[69] In doing so, Renco distinguishes between a "national authority" and Centromin, which merely confirms that Centromin is not itself a national authority.

29. Moreover, it is irrelevant whether "a national authority controlled Centromin," as Renco alleges.[70] The Treaty requirement is clear: an investment agreement must be "executed by" a "national authority of a Party," not by an entity owned, controlled, or somehow related to a national authority.[71] Nor does ownership or control by a national authority somehow convert an entity into a national authority. A mining company is an "enterprise" as defined by the Treaty, "whether privately-owned or governmentally-owned," *i.e.*, it is not a "national authority."[72]

30. Similarly irrelevant is Renco's allegation that "the Ministries of Energy & Mines, Agriculture, and Health—all authorities at the central level of the Peruvian government—granted the numerous concessions and other rights that are listed in Annex 8.5 of the Stock Transfer Agreement."[73] There is no question that the Ministries of Energy & Mines, Agriculture, and Health did not execute the Contract, and no grant that they may have made would elevate Centromin to the status of a "national authority."

31. Thus, even assuming as true the facts alleged by Renco, there is no basis on which to conclude that the Contract was entered into with a national authority of Peru. Renco's attempt to dismiss Peru's objection as "pedantic"[74] merely confirms Renco's continuing disregard for provisions of the Treaty that are contrary to its positions.

c. Neither The Contract Nor The Guaranty Grants Rights With Respect To Natural Resources That A National Authority Controls

32. Neither the Contract nor the Guaranty constitutes an "investment agreement" pursuant to the Treaty, because neither "grant[s] rights … with respect to natural resources that a

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time with Renco's Supplemental Opposition) (C-192); Dole Mission Statement, available at http://dolecrs.com/approach/mission-statement/ (visited on 27 Oct. 2015); Chevron Vision Statement, available at http://www.chevron.com/about/chevronway/ (visited on 27 Oct. 2015).

[68] Supplemental Opposition ¶ 118.

[69] Supplemental Opposition ¶ 136.

[70] Supplemental Opposition ¶ 136.

[71] Treaty, Art. 10.28 and fn. 16 (RLA-1).

[72] *See* Treaty, Art. 1.3 ("**enterprise** means any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture, or other association") (RLA-1).

[73] Supplemental Opposition ¶ 136.

[74] Supplemental Opposition ¶ 136.

national authority controls," or other delineated rights, as required under the definition of "investment agreement."[75]

33. The Contract is a contract for the sale and transfer of stock and increase of capital.[76] Renco is incorrect as a matter of law in stating that the Contract "granted the numerous concessions and other rights that are listed at Annex 8.5 of the Stock Transfer Agreement."[77] The grants to which Renco refers are certain "surface lands, concessions and mining rights and licenses for water use" that are listed in Annex 8.5 of the Contract.[78] To the extent that the items listed in Annex 8.5 are "unilateral act[s] of an administrative or judicial authority, such as a permit, license, or authorization issued by a Party," [79] they are not "written agreements" within the meaning of the Treaty and, thus, do not qualify as "investment agreements" under the Treaty. The inclusion of these "unilateral acts" in the Annex thus cannot transform the Contract into an "investment agreement." Similarly, insofar as Annex 8.5 "confirmed the transfer of several concessions, licenses, and other governmental authorizations" to DRP, as Renco argues,[80] these transfers were not made as a grant by a pertinent national authority; rather, the alleged transfers accompanied the sale of the assets of Metaloroya. The list in Annex 8.5 of the Contract is not itself a grant from a national authority, but merely a representation as to the status of certain rights.[81]

34. Renco also errs in arguing that the grants "form an 'integral part of the contract.'"[82] Article 18.4, on which Renco relies, provides that "[a]ll the annexes mentioned in this contract are incorporated into and form an integral part of the contract."[83] Because Annex 8.5 is merely "a complete list of all the surface lands, concessions and mining rights and licenses for water use *which refer to* the La Oroya Metallurgical Complex," it is the list that forms part of the Contract, and not the instruments listed therein. For all of these reasons, the Contract is not a grant by a national authority of the rights specified in Article 10.28 and, therefore, does not constitute an "investment agreement" under the Treaty.

35. In turn, the Guaranty "guarantees THE INVESTOR the representations, assurances, guarantees and obligations assumed by [CENTROMIN] under the [Contract]."[84] Renco errs in arguing that the Guaranty is an "investment agreement" because it "grants rights—specifically, a guarantee of contractual obligations—that related to natural resources, public services, and infrastructure."[85] In order to meet the definition of "investment agreement" under the Treaty, the instrument must "grant

[75] Treaty, Article 10.28 (RLA-1).

[76] *See* Contract, Clause 1 (C-2); *see also* Preliminary Objection ¶ 29.

[77] Supplemental Opposition ¶ 136.

[78] Contract, Clause 8.5 (emphasis added) (C-2).

[79] Treaty, Art. 10.28, n.16 (RLA-1).

[80] Supplemental Opposition ¶ 132.

[81] Contract, Clause 8.5 ("All the titles of real estate, concessions and mining rights and water use licenses (I) have been duly transferred and registered by Centromin to the Company; (II) are free from faults, valid, in a correct legal situation and display their effects, and (iii) are free from any burden, lien, attachment mortgage, usufruct, and easement, hereinafter liens, except for those easements which correspond to Centromin's electrical system.") (C-2).

[82] Supplemental Opposition ¶ 132.

[83] Contract, Clause 18.4 (C-2).

[84] Guaranty, Clause 2.1 (C-3).

[85] Supplemental Opposition ¶ 142.

rights to the covered investment or investor [] with respect to natural resources that a national authority controls."[86] According to Renco's own description, the Guaranty does not grant any such rights; at best, the Guaranty grants contractual obligations that "relate" to a supposed grant of such natural resource rights. Consequently, even accepting Renco's allegations as true, the Guaranty does not qualify as an investment agreement, because it is not a grant by a national authority of any of the rights specified in Article 10.28 of the Treaty.

2. The Contract And Guaranty Together Are Not An Investment Agreement

36. As demonstrated above, neither the Contract nor the Guaranty is an "investment agreement" pursuant to the Treaty.[87] Despite this, Renco argues that they "combine to form a single investment agreement under the Treaty."[88] Renco's argument fails for two reasons: (i) the Treaty does not allow combining "multiple agreements" into a single "investment agreement," as Renco claims, and (ii) even together, the Contract and the Guaranty do not satisfy the Treaty requirements to constitute an "investment agreement."

37. Renco's argument that "Multiple Agreements Can Combine To Form A Single Investment Agreement"[89] is premised on the fact that the Treaty provides that a "written agreement" may be "in a single instrument or multiple instruments."[90] The fatal flaw in Renco's argument is that it assumes, absent any justification, that "single *instrument* or multiple *instruments*" is synonymous with "single *agreement* or multiple *agreements*," which is not the case. The terms "investment agreement" and "written agreement" are both singular, and the reference to "multiple instruments" merely recognizes that a single agreement may be memorialized in multiple writings. In addition, the Treaty specifies that the "written agreement" must be "executed by both parties" and "binding on both parties."[91] It logically follows that multiple instruments entered into and binding on the same parties may constitute a single "agreement," but that "multiple instruments" between and among different parties do not.

38. Contrary to its contentions, Renco is not assisted by Annex 10-H(4) of the Treaty.[92] That Annex merely recognizes that a stability agreement may be one of the multiple instruments comprising an investment agreement. Renco's statement that Annex 10-H(4) is "additional evidence in the Treaty's text that multiple instruments can comprise a single 'investment agreement,'" is not in dispute.[93] Annex 10-H(4), however, does not provide that multiple agreements may combine to form an investment agreement.[94]

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[86] Treaty, Art. 10.28 (RLA-1).
[87] *See supra* § III(A)(1).
[88] Supplemental Opposition § V(A).
[89] Supplemental Opposition § V(A).
[90] Treaty, Article 10.28, fn. 16 (RLA-1).
[91] Treaty, Article 10.28, fn. 16 (RLA-1).
[92] Supplemental Opposition ¶ 113.
[93] Supplemental Opposition ¶ 113.
[94] Treaty, Annex 10-H(4) (RLA-1).

39. The only case cited by Renco to support its argument that multiple agreements may combine to form an "investment agreement" under the Treaty is *Chevron v. Ecuador*, which is inapposite to the question. *Chevron* was brought under the Ecuador-United States BIT, which, unlike the Treaty, contains no definition of "investment agreement," as the tribunal in that case noted.[95] Renco also fails to mention that the *Chevron* tribunal premised its consideration of whether an investment agreement existed on "having already decided […] upon the broad interpretation of 'investment' under Article I(1)(a) of the BIT."[96] Accordingly, *Chevron* is of limited use in determining what constitutes an "investment agreement" under the Treaty.

40. The facts of *Chevron* are also distinguishable from the instant case. First, the tribunal in that case found that an investment agreement was comprised of two instruments, the 1973 Concession Agreement and the 1995 Settlement Agreement, to which both TexPet and Ecuador were parties.[97] Ecuador's objection, which the tribunal rejected, was that there was not a single investment agreement, because the 1973 Concession Agreement had expired in 1992.[98] The tribunal found, however, that there was "no doubt" that "if the 1995 Settlement Agreement had been made during the contractual term of the 1973 Concession Agreement (say in 1975), it could only have been regarded as an elaboration of that agreement and thus clearly forming part of one overall investment agreement."[99] This is not the case with the Contract and Guaranty, which involve different parties, grant different rights, and neither of which alone constitutes an investment agreement.

41. Second, the *Chevron* tribunal found that an investment agreement existed between Ecuador and Chevron, despite the fact that Chevron was not a "named or signatory party" to the underlying instruments.[100] Although it was not a party, the tribunal held that Chevron was in a special relationship vis-à-vis the instruments at issue, because it qualified as a "Releasee" under the 1995 Settlement Agreement.[101] This is unlike Renco in the instant case, which has no legal rights under the Guaranty to which Peru was a party. In considering this issue, moreover, the *Chevron* tribunal highlighted that "the broad language of Article VI(1) of the BIT ('relating to') does not require such original contractual privity between Chevron and the Respondent; and moreover the term 'between' in Article VI(1)(a) cannot be interpreted as requiring Chevron to be an actual signatory or named party to the investment agreement."[102] To the contrary, in this case, the Treaty does have narrow language specifying that for a "written agreement" to qualify as an "investment agreement" it must be "*executed* by both parties," and "*binding* on both parties."[103]

42. Finally, Renco's argument that "the agreement can be comprised of multiple instruments and whether the agreement satisfies the elements of an 'investment agreement' under the

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[95] *See Chevron Corp. et al v. Republic of Ecuador*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility, Feb. 27, 2012, ¶ 4.30 (CLA-84).

[96] *Id.* ¶ 4.32.

[97] *Id.* ¶ 4.31-4.32.

[98] *Id.* ¶ 4.33.

[99] *Id.* ¶ 4.33-4.34.

[100] *Id.* ¶ 4.38-4.54.

[101] *Id.* ¶ 4.39.

[102] *Id.* ¶ 4.40.

[103] Treaty, Article 10.28, fn. 16 (emphasis added) (RLA-1).

Treaty must be viewed holistically across the instruments" misses its mark.[104] The question before the Tribunal is not whether an investment agreement may exist when the elements are divided among multiple instruments, because neither the Contract nor the Guaranty, separately or combined, satisfy the elements of an investment agreement.[105] The combination of the Contract and the Guaranty is not more than the sum of its parts:

- The Contract and Guaranty do not "create an exchange of rights" between Peru and Renco. The participation of both Renco and Peru in the Contract and Guaranty, respectively, was at most limited to roles as guarantors for DRP and Centromin, respectively.[106] Neither of them acquired any rights from either the Contract or the Guaranty.

- The Contract and Guaranty are not "between a national authority of a Party and a covered investment or an investor of another Party." There never has been an agreement "between" Peru and Renco, and whatever their participation was it has now ended.

- The Contract and Guaranty do not "grant rights … with respect to natural resources that a national authority controls." Assuming that there was a single transaction, which there was not, it was to transfer the La Oroya facility to DRP, and rights thereto were transferred by Centromin.

43. Arguing that "international investments are complex transactions," Renco seeks to erase the legal distinction between itself and DRP and between Peru and Centromin to create an agreement between two parties that never had an agreement, as to rights that neither ever had. To allow the Treaty to be stretched in this way is contrary to its plain meaning and object and purpose.

B. As A Matter Of Law, Peru Could Not Have Breached The Contract Or Guaranty

44. Renco claims that Peru breached the Contract and Guaranty (and, by extension, Article 10.16.1(a)(i)(C) of the Treaty) by allegedly failing to observe certain obligations to Renco. Specifically, Renco's Amended Notice of Arbitration states:

> Peru has failed to observe its obligations to Renco under the Stock Transfer Agreement and the Guaranty, which were executed as part of a single transaction and are investment agreements, by failing to, *inter alia*, (1) appear in and defend the Lawsuits; (2) assume responsibility and liability for any damages that the plaintiffs may recover in the Lawsuits; (3) indemnify, re1ease, 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 Stock Transfer Agreement by granting DRP reasonable and adequate extensions of time to fulfill the PAMA.[107]

[104] Supplemental Opposition ¶ 122.

[105] *See supra* § III(A)(1).

[106] As discussed below, under Peruvian law, which is applicable by virtue of footnote 16 to Article 10.28, the guarantor assumes an obligation to the creditor without the creditor assuming any corresponding obligation towards the guarantor.

[107] Amended Notice of Arbitration ¶ 56.

45. Even assuming *arguendo* that the Contract and Guaranty are a valid investment agreement for purposes of Article 10.16.1(a)(i)(C), which they are not, Peru could not have breached any such obligations to Renco, as a matter of the governing Peruvian law.[108]

1. Peru Cannot Be Found To Have Breached The Contract

a. Peru Has No Obligations Under The Contract

46. As a matter of law, Peru cannot have breached the Contract, because Peru is not a party to the Contract and therefore has no obligations thereunder.[109] As a matter of Peruvian Law, contracts are not binding on non-parties.[110] Specifically, Article 1363 of the Civil Code provides that "[t]he effects of the contract are limited to its parties and their heirs."[111] As Professor Cárdenas explains, "[t]his provision … establishes the so-called privity of contract principle."[112] Renco's attempt to show the opposite amounts to an attack on a fundamental legal principle of Peruvian law, and must be rejected.

47. On its face, the Contract is between DRP and Centromin,[113] which later assigned its contractual position to Activos Mineros.[114] Both Centromin and Activos Mineros are distinct companies operating in the mining sector, each with its own legal personality separate and apart from the State.[115] Renco's assertion in its Opposition that Peru is a party to the Contract[116] has no basis in fact. Indeed, Renco's factual assertion in its Amended Notice of Arbitration, which is presumed to be correct, confirms that the Contract is "*between Centromin and DRP*, with the intervention of Metaloroya, Doe Run Resources, and Renco."[117]

48. Moreover, Renco misconstrues the Contract and Peruvian law when it asserts that "Peru absolutely has obligations under the Stock Transfer Agreement: it is 'obliged to guarantee all of the obligations of Centromin under this contract.'"[118] Renco's partial citation omits the Contract's express reference that said guarantee is "[b]y reason of Supreme Decree No. 042-97-PCM […] and

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[108] *See* Treaty, Art. 10.22.2 ("[W]hen a claim is submitted under Article 10.16.1(a)(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; or (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.") (RLA-1). If the Contract or the Contract and Guaranty are the pertinent investment agreement, the governing law is the law of the Republic of Peru, because as the Contract provides that "[t]his Contract will be governed and executed in accordance with the laws of the Republic Peru." *See* Contract, Clause 11 (C-2). Because the Guaranty is silent as to governing law, to the extent that it alone is the pertinent investment agreement, the governing law is the law of the Republic of Peru as well as such rules of international law as may be applicable.

[109] *See* Preliminary Objection ¶ 42.

[110] *See* Cárdenas I ¶ 7.

[111] Peruvian Civil Code, Article 1363 (RLA-141).

[112] Cárdenas II at 39.

[113] *See* Contract, Memorandum ("entered into on the one part by Empresa Minera del Centro del Peru (Centromin Peru S.A.) […] and on the other part Doe Run Peru S.R.Ltda.") (C-2).

[114] Preliminary Objection ¶¶ 13, 17, 28, 42.

[115] Preliminary Objection ¶ 42; Cárdenas I at 10-11.

[116] Opposition, heading to Section III.B.2 (emphasis added). *See also* heading to Section III.B.1 and ¶¶ 49, 55, 57.

[117] Memorial at xiii (emphasis added). *See also* ¶ 57 and Amended Notice of Arbitration and Statement of Claim, ¶¶ 1, 18.

[118] Supplemental Opposition ¶ 149 *citing* Contract, Clause 10 (C-2).

the corresponding Guaranty Contract entered into under that Decree,"[119] The clause cited by Renco is thus a reference to the Guaranty rather than the source of any obligations for Peru. Indeed, even Renco admits that "the exact terms of that guarantee are set forth in the Guaranty Agreement."[120] Because Peru is not a party to the Contract, it has not undertaken any obligations under that Contract, and, therefore, cannot be found to have breached that Contract.

b. Renco Has No Rights Under The Contract

i. Renco Is Not A Party To The Contract

49. Renco's claims that Peru has breached the Contract also fail as a matter of law, because the contractual obligations that Renco alleges Peru to have breached run to DRP or to DRC, and not to Renco.[121] As a matter of Peruvian Law, a contract only creates rights as between the parties, except for contracts for the benefit of third parties.[122] Contrary to Renco's contentions, Renco is neither a party nor does it otherwise have any rights under the Contract.

50. As Renco initially acknowledged, the Contract is "*between Centromin and DRP*."[123] Renco seeks to be deemed to be a party to the Contract, "or otherwise be able to claim the benefit of its provisions," because DRP was "formed *simply* in order to comply with Peruvian law."[124] Specifically, Renco alleges that DRP was formed "in order to comply with Peruvian law that the company receiving the property (the shares of Metaloroya) must be a Peruvian company," and that it was Renco that managed the bidding process, negotiated the Contract, and otherwise intervened directly by signing the Contract.[125]

51. Even if Renco's factual allegations are accepted as true,[126] they would not result in Renco having rights under the Contract. Insofar as Peruvian law required that the company receiving shares in Metaloroya be a Peruvian company,[127] this is dispositive proof that Renco *could not* be a party to the Contract, and cannot now be deemed as such, regardless of its participation in the tender process and negotiation of the Contract. Renco's argument to the contrary in effect asks this Tribunal to ignore and render ineffective the very Peruvian law that Renco argues it was compelled to comply with in order for its affiliate to acquire the shares of Metaloroya.

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[119] Contract, Clause 10 (C-2).

[120] Supplemental Opposition ¶ 149.

[121] Preliminary Objection ¶ 43.

[122] *See* Peruvian Civil Code, Article 1363 ("[t]he effects of the contract are limited to its parties and their heirs.") (RLA-141); *see also supra* ¶ 18; Preliminary Objection ¶ 42; Cárdenas I at 7; Cárdenas II ¶ 39.

[123] Amended Notice of Arbitration ¶ 18.

[124] Opposition ¶ 86 (emphasis added).

[125] Supplemental Opposition ¶ 157.

[126] As discussed above, the Tribunal cannot accept as true "a legal allegation clothed as a factual allegation," nor "a mere conclusion unsupported by any relevant factual allegation." *See 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).

[127] Centromin, Public International Bidding PRI-16-97 – Second Round of Consultations and Answers, 26 March 1997, at 6 (Exh. C-47); Amended Notice of Arbitration and Statement of Claim ¶ 17; Memorial ¶¶ 4, 56.

52. Furthermore, Renco's participation in the tender and negotiation is immaterial. As Dr. Hernandez explains:

> Third parties do not become parties to a contract merely because they have negotiated that contract. When that contract is subsequently entered into by the legal entity through its duly empowered representative, the contractual relationship binds the legal entity but not the third parties who negotiated the contract. [….]
>
> Although the Contract was negotiated by representatives of Renco and DRRC, it was only DRP that, acting through a representative, validly executed the Contract. As a matter of Peruvian Law, only DRP acquired rights and assumed obligations under the Contract.[128]

53. Likewise Renco's signing of the Contract does not make it a party thereto. The plain terms of the Contract make clear that Renco intervened as a guarantor of DRP's obligations as the "Investor" under the Contract.[129] As a matter of Peruvian law, a guarantor is not a party to the contract; indeed, a party cannot be a surety for its own performance.[130] Moreover, four days after the Contract was concluded, Centromin released Renco "from the obligations it acquired under [the] Contract, so that the Renco Group Inc. is no longer part of the same."[131] Renco thus is no longer even a guarantor under the Contract. Were Renco still a guarantor, it would have had to participate in the Contract Modification as a matter of Peruvian law, which it did not do.[132]

54. In assuming DRP's rights as its own, Renco treats DRP as a shell, and seeks to be allowed to step into DRP's shoes. Such reverse-veil piercing is contrary to Article 78 of the Peruvian Civil Code, which provides that "[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

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[128] Hernandez ¶¶ 9-10.

[129] *See* Contract, Additional Clause ("[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*. […].") (emphasis added) (Exh. C-2).

[130] *See* Cárdenas II ¶ 84.

[131] Modification of the Contract to Transfer Shares, Increase Company Capital and Subscription of Shares of Metaloroya S.A. dated 17 Dec. 1999 at 6 (emphasis added) (Exh. C-49). Renco's English translation of the quoted paragraph of the Contract Modification is inaccurate, because, among other things, it omits the sentence underlined below, which provides that Renco was no required to sign the modification because it was released from its obligations under the Contract. The original in Spanish reads "en virtud del párrafo final de Cláusula Adicional del Contrato de Transferencia de Metaloroya, el Comite Especial de Centromin Perú S.A. (CEPRI Centromin), dio su consentimiento para liberar a The Renco Group Inc. de las obligaciones adquiridas por ella en el referido Contrato, razón por la cual The Renco Group Inc. ha dejado de ser parte del mismo, no requiriéndose su intervención en el presente documento." *See also* letter from Centromin to Renco dated 27 Oct. 1997 notifying Renco of its release from the guaranty, which is transcribed in the Contract Modification at 22 (stating "the Special Committee on Privatization of Centromin Peru S.A. (CEPRI) has agreed to consent to releasing the Renco Group Inc. from responsibility with respect of the obligations not yet performed and generated by the Contract for the Transfer of Shares, Capital Increase and Subscription of Shares […] and assumed by virtue of the Additional Clause to said Contract.").

[132] *See* Cárdenas II ¶ 50; Peruvian Civil Code, Article 1873 ("[t]he guarantor is only liable for what he has expressly undertaken.") (RLA-141).

or are obligated to satisfy its debts."[133] Consequently, the legal rights and obligations of one company cannot be invoked by or against its shareholders or affiliates.[134] As Dr. Hernandez explains:

> Peruvian Law recognizes that legal entities have a "legal personality" separate and distinct from that of their members. Such separate personality entails that legal entities organized in Peru are legal persons capable of having rights and obligations [….]
>
> As a matter of Peruvian Law, members and affiliates of a legal entity organized as a limited liability business company ("SRL") are not liable for the entity's debts and/or obligations. Nor do they have standing to assert as their own the rights of the SRL, or claim for themselves the fulfilment of third party obligations to the SRL, through judicial, arbitral or other kinds of proceedings. [135]

55. Renco's attempt to step into DRP's shoes directly contravenes basic tenants of Peruvian corporate law. As Dr. Hernández further observes:

> Legal personality is central to legal security in Peru. As a practical matter, the principle of limited liability that applies to SRLs (and most legal entities in the Peruvian legal system) are of critical importance to the structuring of projects in Peru. Investors benefit because they are better able to anticipate and limit the risks of their investment, which in turn facilitates financing. Likewise, public counterparts may have some measure of security from a local entity being incorporated and capitalized in Peru.[136]

56. Indeed, in the U.S. Litigation, Renco itself has highlighted that DRP is a separate legal person in an attempt to avoid liability.[137] Renco's expert, Dr. Trazegnies, thus has submitted to the U.S court that "the general criterion of Peruvian law is that limited liability companies have their own legal existence, distinct from that of their members and officers. Accordingly, *the rights* and duties of the company *do not intermingle with the rights* and duties *of the members* or of the officers."[138]

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[133] 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-141).

[134] Cárdenas I at 14-15.

[135] Hernandez ¶ 8.

[136] Hernandez ¶ 8.

[137] See Defendants' Reply to Plaintiffs' Memorandum in Opposition to Defendants' Motion for a Determination of Foreign Law submitted in *Hermanas Kate Reid and Megan Heeney as Next Friends of A.O.A* et al., *v. The Doe Run Resources Corporation* et al dated 15 Sept. 2014, at 46 (Renco invoking Article 78 of the Peruvian Civil Code) (RLA-36).

[138] Expert Report of Dr. Fernando de Trazegnies Granda submitted in *Hermanas Kate Reid and Megan Heeney as Next Friends of A.O.A et al., v. The Doe Run Resources Corporation et al* dated 26 Jan. 2014, ¶ 10.4 (emphasis added), see also ¶ 10.5 (Exh. R-51). *See also* Second Expert Report of Dr. Fernando de Trazegnies Granda submitted in *Hermanas Kate Reid and Megan Heeney as Next Friends of A.O.A et al., v. The Doe Run Resources Corporation et al* dated 15 Sept. 2014, ¶ 9.6 (Exh. R-52) (stating that disregarding the separate legal personality of companies "certainly does not benefit the social and economic system currently operating in the world. And this would be even more serious if we open a large chasm in the corporate veil in such a way that we consider ties with not only the daughter companies and their mother companies but also with the mother of the mother [which is the case between Renco and DRP] […] thus reaching an absolutely negative situation, built on the basis of confusion due to ties that are said to be understood to be without limit, affecting the legitimate expectation of limited liability that the partners decided on when they created the company.") Renco also has submitted an expert report by Dr. Alfredo Bullard Gonzalez, in which the principle of separate legal personality of the limited liability company is also invoked to dissociate Renco from DRP. Reply Affidavit of Alfredo Bullard Gonzalez in *A.A.Z.A.,* et al *v. Doe Run Resources Corporation* et al dated 7 Mar. 2008, at 27-28 (Exh. R-50).

57. As discussed above, the prohibition on a parent invoking a subsidiary's contractual rights is common, and by no means unique to Peruvian Law, as various international tribunals have recognized.[139] Because Renco is not a party to the Contract, it has no rights under the Contract and, therefore, as a matter of law, cannot prevail on a claim that Peru has breached the Contract.

ii. Renco Is Not A Third-Party Beneficiary To The Contract.

58. Nor can Renco benefit from the Contract and, hence, make a claim for breach of that Contract as a third-party beneficiary. Renco's contention that the principle of privity of contract is not absolute, because Articles 1457 to 1469 of the Peruvian Civil Code recognize contracts for the benefit of third parties, ignores the particular characteristics of such contracts, which are not shared by the Contract at issue here.[140] Contracts for the benefit of third parties under Articles 1457 to 1469 of the Civil Code are entered into by the promisor and promisee for the purpose of bestowing a benefit on a third party.[141] Centromin and DRP, however, did not enter into the Contract to bestow a benefit on Renco, nor has Renco directly argued that this is the case.[142]

59. In particular, Renco is not a third-party beneficiary as to any of the provisions of the Contract that it alleges Peru has breached. Indeed, the only rights that Renco argues accrue to it as a third-party beneficiary are those under Clauses 6.2 and 6.3,[143] which provide as follows:

> 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

[139] *See Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5) Decision on Jurisdiction dated 2 Jun. 2010, ¶¶ 241-248 (RLA-160); *Siemens A.G. v. The Argentine Republic* (ICSID Case No. ARB/02/8) Award dated 6 Feb. 2007, ¶ 204 (CLA-050); *Impregilo S.p.A. v. The Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3) Decision on Jurisdiction dated 22 Apr. 2005, ¶ 223 (RLA-157); *Alpha Projektholding Gmbh v. Ukraine* (ICSID Case No. ARB/07/16) Award dated 8 Nov. 2010, ¶¶ 423-424 (RLA-162); *Limited Liability Company Amto v. Ukraine* (SCC Arbitration No. 080/2005) Award dated 26 Mar. 2008, ¶¶ 109-110 (RLA-159); *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana* (ICSID Case No. ARB/07/24) Award dated 18 Jun. 2010, ¶ 348 (RLA-161); *Azurix Corp. v. The Argentine Republic* (ICSID Case No. ARB/01/12) Award dated 14 July 2006, ¶ 384 (CLA-052); *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8) Decision of the *Ad Hoc* Committee on the Application for Annulment dated 25 Sep. 2007, ¶ 96 (CLA-119); *El Paso Energy International Company v. The Argentine Republic* (ICSID Case No. ARB/03/15) Award dated 31 Oct. 2011, ¶ 538 (RLA-163); *EnCana Corporation v. Republic of Ecuador* (UNCITRAL Case) Award, 3 Feb. 2006, ¶ 167 (RLA-158).

[140] Opposition ¶ 89.

[141] Peruvian Civil Code, Articles 1458 and 1464 (RLA-141); *see also* Cárdenas II ¶ 43 ("Pursuant to Articles 1457 through 1469 of the Civil Code, under a contract for the benefit of a third-party the promisor agrees with the promisee (which are the parties to the contract) to perform an obligation for the benefit of a third-party (who is not a party to the contract)").

[142] *See* Opposition ¶¶ 89-91.

[143] *See* Supplemental Opposition ¶¶ 162-165.

> 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.[144]

60. Renco argues that these clauses mean that Centromin has assumed liability for damages and claims brought by third parties against "*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."[145] As a matter of Peruvian law, however, Professor Cárdenas notes that "a provision establishing the liability of a party must be interpreted restrictively rather than expansively,"[146] and in this case there is no basis to construe these contractual undertakings to extend to an unidentified, indeterminate, and limitless number of persons and entities.[147] Consequently, there is no basis to construe the Contract as one for the benefit of a third party.

61. Renco also invokes the concept of good faith to make itself a beneficiary of Clauses 6.2 and 6.3.[148] In doing so, however, Renco disregards the Peruvian Civil Code's rules of interpretation, including particularly Article 168, which provides that a contract "must be interpreted according to what is expressed in it and according to the principle of good faith."[149] As Professor Cárdenas explains:

> Article 168 requires interpreting legal instruments according to what is expressed in them and pursuant to good faith. This does not mean that good faith overrides what is expressed in the text. It means that the text must be understood in harmony with good faith. Because good faith is objective, the text should be read according to its ordinary meaning.[150]

62. Likewise, according to Dr. Alfredo Bullard, who Renco quotes selectively, "the text is the front *and* the back door" to contract interpretation.[151] Dr. Bullard explains that:

> [T]he process of interpretation starts with text of the contract through an exercise to determine whether the text allows for more than one interpretation. If the text allows for only one reasonable interpretation, the interpretative task is complete. […] In this context, there is no need to resort to the context. The text is sufficient to resolve the problem. If the interpreter were to resort to context, they would move beyond interpretation into the task of modifying the contract through the means of interpretation.[152]

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[144] Contract, Clauses 6.2, 6.3, 6.5 (Exh. C-2).

[145] Memorial, ¶ 259 (emphasis added); Opposition ¶¶ 60, 68.

[146] Cárdenas II ¶ 64.

[147] *See* Peruvian Civil Code, Arts. 1459-1460 (RLA-141); Cárdenas II ¶ 43 ("The third-party's right arises from the execution of the contract alone and requires in order to be enforceable that the third-party accept the benefit. The third-party's right is transferable to his/her heirs, unless the parties agree otherwise (Article 1459.) If the third-party chooses not to enforce the right, the promisee may seek enforcement for his/her own benefit (Article 1460.)").

[148] Opposition ¶¶ 62-63, 69-70.

[149] Peruvian Civil Code, Article 168 (RLA-141).

[150] Cárdenas II ¶ 3.

[151] A. Bullard, "Agreeing not to agree: economic analysis of contract interpretation" in C. Soto (ed.), *Treatise on the Interpretation of Contracts in Latin America* (2007) at 1743 (emphasis added) (CLA-68); *see also* F. Vidal Ramírez, *El Acto Jurídico* (2013), at 260-261, 377 (RLA-148).

[152] A. Bullard, "Agreeing not to agree: economic analysis of contract interpretation" in C. Soto (ed.), *Treatise on the Interpretation of Contracts in Latin America* (2007) at 1760 (CLA-68).

63. Likewise, Renco's own expert has elsewhere acknowledged that "it is not possible to ignore the text of the contract, replace it or adopt an interpretation that conflicts with its own words."[153]

64. Clauses 6.2 and 6.3 of the Contract do not mean, as Renco argues, that Centromin has assumed liability for damages and claims brought by third parties against "anyone who could be sued by a third party for damages falling within the scope of the assumption of liability."[154] As Professor Cárdenas explains, "[t]he Contract is not one for the benefit of a third party. As regards clauses 6.2, 6.3 and 6.5, an objective interpretation rejects that the rights and obligations resulting under the Contract can be invoked by third parties."[155]

> I reiterate that in order for someone to be able to invoke a contract, such person must be a party to it or, in any event, such right must exceptionally and clearly be provided for in the contract. Renco and DRRC are not parties to the Contract and the text of the Contract does not clearly provide for such exceptional benefit.[156]

65. If Clauses 6.2 and 6.3 were not clear enough in isolation, the same conclusion results from considering these provisions in the context of the other clauses of the Contract, in particular Clause 6.5. It is appropriate to interpret one provision of a contract in light of the other provisions, in accordance with Article 169 of the Civil Code, which provides that "[t]he 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."[157] As Professor Cárdenas explains, "[s]ystematic interpretation in accordance with Article 169 requires interpreting the clauses in an interdependent manner, ascribing to the ambiguous ones the scope of the group of clauses."[158] Likewise, Dr. Bullard explains that "if the reading of a contract's clause alone leaves its meaning uncertain, then the interpreter resorts to systematic interpretation to seek to establish the meaning of the clause by reference to other contractual clauses."[159] Clause 6.5 of the Contract states that:

> 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.[160]

66. It is apparent that Clause 6.5 identifies the instances in which Centromin agrees to hold DRP harmless. In this context, it is thus clear that, whereas Clauses 6.2 and 6.3 set forth the situations in which "Centromin *will assume liability* for any damages and claims by third parties,"[161] Clause 6.5 establishes that Centromin will "hold the *Company [DRP]* harmless against third party

[153] F. de Trazegnies Granda, "Desacralizando la Buena Fe en el Derecho," (2007) Avocatus 17 at 139 (DTZ-7).

[154] Memorial, ¶ 259 (emphasis added); Opposition ¶¶ 60, 68.

[155] Cárdenas II ¶ 4.

[156] Cárdenas II ¶ 59.

[157] Peruvian Civil Code, Article 169 (RLA-141).

[158] Cárdenas II ¶ 3.

[159] A. Bullard, "Agreeing not to agree: economic analysis of contract interpretation" in C. Soto (ed.), *Treatise on the Interpretation of Contracts in Latin America* (2007) at 1760-1761 (CLA-68).

[160] Contract, Clauses 6.2, 6.3, 6.5 (emphasis added) (Exh. C-2).

[161] Contract, Clauses 6.2, 6.3 (emphasis added) (Exh. C-2).

claims and will indemnify *it* for any damages, liabilities or obligations that may arise for which it *has assumed liability* and obligation."[162] Centromin's assumption of liability for damages and claims therefore refers to claims brought by third parties against "*the Company*," *i.e.*, DRP, and not Renco.[163] As Professor Cárdenas explains:

> It is clause 6.5 that defines the beneficiary of such assumption of liability. If the intention of the parties had been that third parties, *i.e.*, non-parties to the contract, would be able to benefit from such assumption of liability, they would have expressly stated so in clause 6.5. However, clause 6.5 does not contain any statement in this regard; the only beneficiary mentioned in clause 6.5 is "the Company".
>
> Clause 8.14 confirms the meaning of the clauses mentioned above when it establishes the procedure to be followed upon the notification of any claims included within the scope of Centromin's liability as well as the arrangements for Centromin to take on the defense against third party claims made against the Investor or the Company; no reference is made to any other legal person.[164]

67. Renco ignores the ordinary language of the Contract's provisions, read in context, and instead argues that the Tribunal ought to ascribe to the Contract its preferred meaning, because Renco allegedly understood the Contract to mean what it now claims and would not have had its affiliate, DRP, enter into the Contract were that not the case. Article 1361 of the Civil Code provides, however, that "[c]ontracts are binding as to the statements contained therein," and not to statements that a third party might wish were included, and that "[i]t is presumed that the express words of the contract correspond to the common intention of the parties and the party who denies that has the burden of proving it."[165] This presumption does not mean that the interpreter should substitute the subjective intention of a party for the express words of the contract, as Renco suggests.[166] Article 1361 is not a rule of interpretation, but rather addresses the lack of correspondence between the parties' declarations and their intention, a question which *concerns the existence of the contract.*[167] As Professor Cárdenas explains:

> Article 1361 provides that what the parties express in a contract is obligatory. A party may rebut the presumption that the expressed corresponds to their common will. If a lack of correspondence between declaration and intention is proven, however, the result is that the contract is not formed.[168]

68. Likewise, Professor Cárdenas explains that the decision of the Civil Court of Appeals in Appeal No. 1465-2007 cited selectively by Renco's expert, Dr. Trazegnies, when read in its

[162] Contract, Clause 6.5 (emphasis added) (Exh. C-2). Renco's reading of Clauses 6.2 and 6.3 would, moreover, render Clause 6.5 meaningless, because, according to Renco, by assuming liability under Clauses 6.2 and 6.3 Centromin would already have an obligation to hold DRP (as well as Renco and an unidentified and limitless number of persons and entities) harmless and indemnify it for damages arising from third party claims.

[163] Contract, Clause 6.5(emphasis added) (Exh. C-2). *See* Preliminary Objection ¶¶ 46-47.

[164] Cárdenas II ¶¶ 62-63.

[165] Peruvian Civil Code, Article 1361 (RLA-141).

[166] Opposition ¶¶ 73-84.

[167] Cárdenas II ¶ 3.

[168] Cárdenas II ¶ 3.

entirety, clearly demonstrates that Article 1361 of the Peruvian Civil Code concerns the validity, rather than the interpretation, of a contract.[169] Accordingly, ignoring for the moment that Renco is not even a party to the Contract, if Renco's allegations that the Contract's text does not correspond to the parties' intentions were proven (or, in this case, deemed) to be true then *there is no contract*,[170] and there could not be a breach by Centromin (let alone Peru).[171] Peruvian law does not permit a contract to be rewritten to accord with the parties' intentions, simply because a party has demonstrated that the Contract's text does not conform with the intentions of the parties.

69. Moreover, the "*common* intention of the parties" referenced in Article 1361[172] does not mean the intention of only one of the parties as Renco's assertions suggest. As one of the commentators cited by Renco's legal expert explains, "the common intention of the parties […] does not refer […] to the purpose that each contracting party seeks for him/herself," but instead refers to "the identical aims sought by the contracting parties that are expressed in the statement that they make when entering into the contract."[173] Therefore, even if the Tribunal were to assume as true the allegation in the Sadlowski Statement that DRP would not have entered into the Contract if Centromin had not agreed to assume responsibility for claims brought against DRP's parent entities or other third parties,[174] according to Peruvian law, those statements are irrelevant to the interpretation of the Contract.[175]

70. Finally, although Renco relies on U.S. law in support of its arguments that it should be deemed a third-party beneficiary to the Contract, U.S. law does not govern the Contract[176] and, in any event, 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 Minero's assumption of liability.[177] In its Opposition, Renco argues that "U.S. courts clearly distinguish between assumption of liability clauses (such as Clauses 6.2 and 6.3 of the Stock Transfer Agreement) and indemnity and 'hold harmless' clauses (such as Clause 6.5),"[178] and that "[i]t is also well-settled

[169] Cárdenas II ¶¶ 31-34.

[170] *See* Cárdenas II ¶¶ 29, 37.

[171] Even if this were not the case, Renco's self-serving argument – which seeks to muddy the water to avoid a decision that it has not presented a valid claim as a matter of law – is also absurd because it means that a mere assertion by one of the parties that there are conflicting interpretations of any contractual provision, even the clearest ones, would require consideration of all types of facts and circumstances.

[172] Peruvian Civil Code, Article 1361 (emphasis added) (RLA-141).

[173] M. A. Schreiber Pezet, "Codigo Civil Peruano de 1984: Exegesis," at 111 (DTZ-5).

[174] Sadlowski Witness Statement, ¶¶ 23, 27, 42 (cited by Renco in Opposition ¶¶ 49, 55, 57).

[175] In addition, even a cursory analysis of the negotiating history of the Contract demonstrates that Mr. Sadlowski is wrong to say that the language of Clauses 6.2 and 6.3 responds to DRP's alleged request during the negotiation of the Contract. Sadlowski Witness Statement, ¶ 27. This is apparent because the Model Contract which predates Renco's participation in the bidding, already contained a clause similar to Clauses 6.2 and 6.3. *See* Bid Documents, Contract Models, received by Mr. Sadlowski on 7 March 1997, at Clause 4.2 ("CENTROMIN assumes the responsibility of third person claims that do not correspond to THE COMPANY in accordance with number 3.2 of the hereby contract.") (C-071).

[176] *See supra* nn. 109.

[177] Peru's Preliminary Objection under Article 10.20.4 dated 20 February 2015 ("Preliminary Objection"), ¶¶ 52-56.

[178] Claimant's Opposition ¶ 94.

that assumption of liability clauses entitle third parties to assert claims directly against the party that has assumed (or retained) the relevant liability."[179]

71. Renco cites to four additional cases under the laws of various U.S. states to support its argument that assumption of liability clauses are broader than indemnity clauses and therefore can be utilized by third parties.[180] In addition to being irrelevant, the cases provide no support for Renco's defense. In all four cases, U.S. courts determined which party had assumed or retained liability for claims brought by third parties, such as injured plaintiffs in product liability claims.[181] None of the cases, however, considers whether an entity that is not a party to the relevant contract can use the contractual clause as a shield against third-party claims.[182] In the context of this dispute, the U.S. court cases relied upon by Renco would be deciding whether Centromin/Activos Mineros or DRP was responsible for third-party claims under the Contract, which is not the issue before the Tribunal in connection with Peru's Article 10.20.4 objection.[183] Those cases shed no light on the question as to whether a third party, such as Renco, could rely upon the assumption of liability or indemnity clause in the Contract to shield itself from third-party lawsuits.

72. Renco's insistence on *Caldwell Trucking v. Rexon Technology Corporation* is similarly misleading and irrelevant.[184] According to Renco, "the Court of Appeals for the Third Circuit expressly distinguished in *Caldwell Trucking* between the assumption of liability and indemnity provisions in a stock purchase agreement," which was "completely consistent with the well-settled rule that an assumption of liability clause entitles third parties to assert claims directly against the party that has assumed (or retained) the relevant liability."[185]

73. Renco's reference to "third parties," however, is irrelevant to the issues before the Tribunal. As Renco itself acknowledges, *Caldwell Trucking* involved a cause of action for contribution filed after a determination of liability.[186] The "third party" in that case was Caldwell

[179] Claimant's Opposition ¶ 95.

[180] Claimant's Opposition, nn. 131 & 132.

[181] *See Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420 (7th Cir. 1993) (holding that the seller of assets expressly retained liability and, therefore, the purchaser-defendant had no liability towards a landowner-plaintiff for an oil spill) (CLA-71); *Girard v. Allis Chalmers Corp.*, 787 F. Supp. 482 (W.D. Pa. 1992) (denying a successor's request for summary judgment because the court could not ascertain whether an agreement between the original and successor manufacturer transferred liability for products liability claims) (CLA-70); *Goodman v. Challenger Int'l*, 1995 WL 4052510, No. CIV. A. 94-1262 (E.D. Pa. July 5, 1995), a*ff'd, 106 F.3d 385 (3d Cir. 1996)* (granting the motion for summary judgment by a defendant against a co-defendant because another party had assumed the co-defendant's liability for product liability claims) (CLA-69); *United States v. Sunoco, Inc.*, 637 F. Supp. 2d 282 (E.D. Pa. 2009) (finding that an indemnity clause in a settlement agreement between an oil refinery and its purchasing company did not create successor liability in a contribution claim brought by the United States) (CLA-72).

[182] In these instances, the defendants raising the retention or assumption of liability as a defense were signatories to the relevant contractual provisions. *See Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420 (7th Cir. 1993) (CLA-71); *Girard v. Allis Chalmers Corp.*, 787 F. Supp. 482 (W.D. Pa. 1992) (CLA-70); *Goodman v. Challenger Int'l*, 1995 WL 4052510, No. CIV. A. 94-1262 (E.D. Pa. July 5, 1995), a*ff'd, 106 F.3d 385 (3d Cir. 1996)* (CLA-69); *United States v. Sunoco, Inc.*, 637 F. Supp. 2d 282 (E.D. Pa. 2009) (CLA-72).

[183] Peru expressly reserves its rights to develop this point in subsequent phases of this arbitration, as necessary, including the jurisdiction and merits phase.

[184] Claimant's Opposition ¶¶ 96-97.

[185] Claimant's Opposition ¶¶ 96-97.

[186] Claimant's Opposition ¶ 97; *Caldwell Trucking PRP v. Rexon Technology Corp.*, 421 F.3d 234, 240 (3d Cir. 2005) (CLA-5).

Trucking, a company that provided liquid waste disposal services at its premises.[187] Rexon was a manufacturer whose components were disposed by Caldwell on its property.[188] Subsequently, Pullman purchased Rexon.[189] The U.S. government ordered remediation of contamination on Caldwell's property.[190] The Caldwell group, in turn, sought contribution from its customers, including defendants Pullman and Rexon.[191] The issue before the Court was "the interpretation of a provision in the 1989 stock purchase agreement assigning responsibility for environmental claims against Pullman and Rexon."[192] The Court held that the contractual provisions made Pullman liable to the Caldwell Group for Rexon's obligations.[193] Importantly, the Court held that "[t]he Caldwell Group's claims and the judgment in its favor are not based on the parent/subsidiary relationship between Pullman and Rexon, but rather on Pullman's contractual assumption of liability."[194] As can be seen from the facts, procedural posture, and contractual provision in *Caldwell Trucking*, that case provides no information relevant to the case before this Tribunal. There, the entity seeking to avail itself of the assumption of liability or indemnity clause was a signatory thereto. Whether the plaintiffs were third parties to the relevant contract was of no significance, as they were not trying to exercise contractual rights that did not belong to them. That Renco has provided no cases resembling its posture and argument in the present arbitration is telling. Because Renco has not – and cannot – establish that it is a third-party beneficiary to the Contract, its claims for breach of that Contract fail as a matter of law.

2. Peru Cannot Be Found To Have Breached The Guaranty

a. The Guaranty Is Void Under Peruvian Law

74. Renco has failed to show that Peru owes any obligations under the Guaranty such that Article 10.16.1(a)(i)(C) of the Treaty could be breached, even assuming *arguendo* that the Guaranty was an "investment agreement," because, among other reasons, the Guaranty is void as a matter of Peruvian law. On 1 June 2001, DRP "assign[ed] its *contractual position* as 'Investor' under the Contract" to DRC, which "assume[d] all of the 'Investor's' *rights and obligations* under the Contract."[195] As Peru has demonstrated,[196] such an assignment terminates the Guaranty, in accordance with Article 1439 of the Peruvian Civil Code, which provides that "[t]he guarantees offered by a third party do not pass to the assignee without the express authorization of the third party."[197] Each of the arguments articulated by Renco to the contrary fail as a matter of law.

75. *First*, Renco is incorrect to argue that Article 1439 does not apply on the ground that "Peru is not a 'third-party guarantor' to the business deal that Renco and Peru reached and

[187] *Caldwell Trucking PRP v. Rexon Technology Corp.*, 421 F.3d 234, 240 (3d Cir. 2005) (CLA-5).
[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] *Id.*
[192] *Id.* at 241.
[193] *Id.* at 244.
[194] *Id.* at 241.
[195] Assignment of Contractual Position between Due Run Peru S.R.L and Doe Run Cayman Ltd. dated 1 June 2001 ("Contract Assignment"), Clause 2 (emphasis added) (R-13).
[196] Preliminary Objection ¶¶ 59-61.
[197] Peruvian Civil Code, Article 1439 (RLA-141); Preliminary Objection ¶¶ 33, 59-61; Cárdenas I at 19-20; Cárdenas II ¶ 90.

memorialized in the Stock Transfer Agreement," because Peru was an "essential and necessary party to the Stock Transfer Agreement."[198] Renco is inventing a legal relationship out of whole cloth: Peru was not a party—essential or otherwise—to the Contract, which was between Centromin and DRP, as explained above.[199] Indeed, Renco also was not a party to the Contract,[200] and it therefore defies logic to speak of either non-party memorializing anything in the Contract. Renco's argument also is contradicted by its own assertion that Peru was "one and the same with the debtor—Centromin—and Peru's guarantee of Centromin's obligations […] was tantamount to the debtor guaranteeing its own obligations."[201] Not only does Centromin have a distinct legal personality,[202] it is in any case impossible for a party to provide a personal guaranty (as opposed to an *in rem* guaranty such as a pawn or mortgage) of its own obligations as a matter of Peruvian law; the existence of the Guaranty thus demonstrates that Peru and Centromin are distinct entities.[203]

76. *Second*, Renco's reliance on Article 1211 of the Civil Code is also misguided.[204] That provision provides that "the assignment of rights includes the transfer to the assignee of all privileges, *in rem* and personal guarantees and ancillary elements of the assigned rights, except for any provision to the contrary."[205] As Professor Cárdenas explains, that provision does not apply to the assignment of a contractual position, but rather applies to the assignment of rights only, which is regulated by a separate part of the Civil Code.[206]

77. *Third*, Renco is wrong in arguing that Article 1439 "is triggered only if the debtor–not the creditor–assigns its rights and obligations to another party."[207] Renco's statement is based on a single passage from an article providing *an example* of an assignment of a contractual position and its effects on a guaranty; that article nowhere states that Article 1439 applies only when the assignor is the debtor.[208] Renco's argument is unsupported by the Civil Code, which straightforwardly provides that "[t]he guarantees […] do not pass to the assignee without the express authorization of the third party," without limiting its application to a debtor, as opposed to a creditor.[209] Notably, Article 1439 is part of the Civil Code section on "Assignment of the Contractual Position," the first article of which

[198] Supplemental Opposition ¶¶ 179-180.

[199] *See supra*.

[200] *See supra*.

[201] Supplemental Opposition ¶ 180.

[202] Hernandez ¶ 8 ("Peruvian Law recognizes that legal entities have a 'legal personality' separate and distinct from that of their members. Such separate personality entails that legal entities organized in Peru are legal persons capable of having rights and obligations.").

[203] Cárdenas II, ¶¶ 52-54.

[204] Supplemental Opposition ¶ 181.

[205] Peruvian Civil Code, Article 1211 (RLA-141).

[206] Cárdenas II ¶¶ 102 ("This rule only applies to the concept of assignment of rights rather than the different concept of assignment of a contractual position, and, as its name indicates, is limited to the transfer of ownership of a right regulated by a different chapter of the Civil Code (articles 1206 to 1216). However, in the assignment of contractual positions (articles 1435 to 1439), what is being assigned is the capacity to be a party, fully or partially, which comprises, as it occurs in the case under analysis, not only rights but also obligations. Precisely because they refer to different concepts, the solutions and scope contemplated by articles 1211 and 1439 are markedly different.").

[207] Supplemental Opposition ¶ 182.

[208] *See* "Contrato de Cesión de Posición Contractual," Revista Jurídica del Perú, December 2008, at 426 (CLA-89).

[209] Peruvian Civil Code, Article 1439 (RLA-141).

states that "any of the parties may assign its contractual position to a third-party."[210] It is thus clear that the scope of the Section and Article are not limited to assignments by debtors. Mr. Barchi – who is misquoted by Renco[211] – explains the rationale behind Article 1439, which rationale applies equally to assignments by the creditor or debtor:

> 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.[212]

78. As Professor Cárdenas explains:

> Article 1439 does not distinguish between an assignee that is the grantor to the secured debtor or the creditor beneficiary of the guarantee. The article does not state that it only applies if the person who transfers its contractual position (grantor) is the debtor backed by the third party. Moreover, in a contract like the one subject of this analysis, which typifies one of reciprocal considerations, both parties are simultaneously creditor and debtor of one another (and therefore, at the same time credit and debt holders), which requires and justifies not making any distinction: *ubi lex non distinguit nec non distinguere debemus.*
>
> The presence of a different person to the one that originally was a party to the Contract by direct and immediate effect of the assignment, and as to who the guarantor constituted its guarantee, qualifies as a particularly relevant circumstance that fully justifies the need for the express consent of the guarantor and the reason behind the Civil Code rule that frees the third party if such consent does not exist. It implies a substantial modification of the conditions in which the guarantee was established.[213]

79. *Fourth*, Renco is incorrect to assert that if Article 1439 applies, "Peru granted this consent, in advance" through Clause 10 of the Contract.[214] Notably, Clause 10 of the Contract provides that "[t]he Investor and the Company grant their approval, in advance, to the substitution of the contractual position derived from this contract […] and Centromin grants the corresponding rights and approvals to the Investor and the Company, subject to the applicable law."[215] Accordingly, even assuming that it is true that "the parties contemplated the possibility that a company affiliated with the Renco Consortium […] would hold shares in the Complex in lieu of Doe Run Peru," as Renco

[210] Peruvian Civil Code, Article 1435 (RLA-141)

[211] In paragraph 180 of the Supplementary Opposition, Renco affirms that in his commentary to Article 1439, Mr. Barchi states that guarantees survive assignments by the debtor. This is, however, is not what Mr. Barchi argues. Mr. Barchi states that, in contrast to personal guarantees (such as the *fianza*), which are terminated by unauthorized assignments, "*in rem* guarantees provided by the debtor itself do survive the assignment, just as the rules that govern the economic relationship between the parties."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).

[212] 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).

[213] Cárdenas II ¶¶ 92-93.

[214] Supplemental Opposition ¶ 186.

[215] Contract, Clause 10 (C-2).

alleges,[216] Peru was not one of the parties to the Contract, so could not have consented to the assignment by virtue of that clause in the Contract. As Professor Cárdenas explains:

> The fact that the final paragraph of the tenth clause of the Contract states that the Government of Peru's guaranty "will survive the transfer of any of the rights and obligations of Centromin and any liquidation of Centromin", neither constitutes express authorization by the third party guarantor for the guaranty to subsist in all cases.
>
> Regarding the final part of that provision and as regards the survival of the guarantee upon the transfer of any of Centromin's rights and any liquidation of Centromin, it is important to draw attention to the fact that contemplates circumstances pertaining exclusively to that contracting party. The idea, which is clearly expressed in the stipulation, is that the Peruvian State's guarantee remains in force in case of transfer of the rights and obligations of Centromin to a third party and even in the event that Centromin dissolves. But what the contract definitely does not contemplate is that the guarantee will survive in the event of a transfer of the contractual position from the beneficiary of such guarantee –DRP– to a third party.[217]

80. Moreover, neither Peru's alleged contemplation of the possibility of an assignment nor its tacit approval would be sufficient for the purposes of Article 1439, which requires "express authorization."[218] As indicated by Professor Cárdenas, had the intention truly been that Peru's guarantee would transfer if DRP assigned its rights, such express authorization could have been included in the Guaranty itself.[219]

b. Renco Has No Rights Under The Guaranty

81. Renco's claim for breach of the Guaranty also fails as a matter of law, because Renco itself has no rights under the Guaranty. The parties to the Guaranty were "the PERUVIAN STATE […] as party of the first part; and DOE RUN PERU S. R. LTDA. […] hereinafter referred to as THE INVESTOR, as party of the second part."[220] The Guaranty, moreover, specifically provides that "THE STATE hereby guarantees THE INVESTOR."[221] The rights under the Guaranty thus run to DRP, and not to Renco.[222] As shown above, Peruvian law recognizes the separate legal identities of distinct entities. Consequently, a parent company cannot invoke its subsidiary's legal rights. Because Renco was not a party to the Guaranty, it has no rights under that Guaranty and, as a matter of law, cannot make a claim for breach of that Guaranty.

82. In addition even assuming *arguendo* that Peru and Renco had obligations and rights, respectively, under the Guaranty, which they do not, Renco's claim for breach of the Guaranty still fails as a matter of law, because its claims are not ripe.[223] In accordance with Article 1868 and 1879

[216] Supplemental Opposition ¶ 186.

[217] Cárdenas II ¶¶ 96-99.

[218] Peruvian Civil Code, Article 1439 (RLA-141).

[219] Cárdenas II ¶ 94.

[220] Guaranty (C-3).

[221] Guaranty, Clause 2.1 (C-3).

[222] *See* Preliminary Objection ¶¶ 63-67.

[223] *See* Preliminary Objection ¶¶ 68-73.

of the Civil Code, a party claiming a breach of a guarantee first would be required to show that the debtor failed to comply with its obligations, and the guarantor would not be liable under the Guaranty unless the party first sought payment from the debtor.[224] Here, however, Renco has neither sought compliance through the appropriate legal means from Activos Mineros nor shown that Activos Mineros was found to have failed to comply with its obligations under the Contract, which Peru has guaranteed through the Guaranty.

83. Renco is wrong to deny that Articles 1868 and 1879 apply, because "the Guaranty Agreement is a specific type of government guaranty that is provided in the context of a privatization," and that "[t]he scope and purpose of Privatization Government Guaranties differ from those of *fianza* (surety) agreements and thus call for the application of different rules and principles."[225] As Professor Cárdenas explains, the mere fact that the State required an authorization to grant guarantees does not mean "that it should be concluded that a guarantee by the State has a different nature than a personal guarantee (*fianza*)," and the legal framework under which the authorization is issued "does not have any rule on State guarantees."[226] He concludes that "what the State does is support the 'representations, assurances, guarantees and obligations' that Centromin assumed in the Contract, like any guarantor in a personal guarantee contract (*fianza*) […] it is inevitable to conclude, as a result of the wording of the guarantee, in accordance with what was provided in the Contract, that what the Peruvian State does is nothing more than assume the position of guarantor to Centromin."[227]

84. Renco is also incorrect to state that it "has satisfied all legal requirements to assert a claim against Peru," because "Peru's obligations are not subsidiary to Centromin's, but rather Peru has a joint and several obligation to honor Centromin's/Activos Mineros' obligations under the Stock Transfer Agreement."[228] Contrary to Renco assertion, Peru does not have joint and several liability along with Centromin/Activos Mineros. As a matter of Peruvian Law, joint and several liability must be express, in accordance with Article 1183 of the Civil Code.[229] Accordingly, the so-called *beneficio de excusión* applies, and Renco cannot make a claim against Peru until it first demonstrates that it has been unable to recover from Activos Mineros.[230] In this connection, Renco also cannot invoke the protections of the Guaranty until it has established that Activos Mineros has failed to comply with its obligations under the Contract.[231] Renco, however, has not made any factual allegations (let alone demonstrated) that Activos Mineros has been found liable by any court or tribunal for any alleged failure to remediate the soil as required under the Contract or for failure to honor the *force majeure* clause of the Contract. As regards Renco's *force majeure* argument, Activos Mineros cannot be held

[224] Peruvian Civil Code, Articles 1868 and 1879 (RLA-141).

[225] Supplemental Opposition ¶¶ 189-202.

[226] Cárdenas II ¶¶ 76-77.

[227] Cárdenas II ¶¶ 80-81.

[228] Supplemental Opposition, ¶¶ 203-206.

[229] Peruvian Civil Code, Article 1183 ("Joint and several liability is not presumed. Only the law or the title of the obligation establish it in an express manner") (RLA-141); Cárdenas II ¶ 85.Cárdenas

[230] Cárdenas I, at 4, 18-20; Cárdenas II, ¶¶ 84-89.

[231] Preliminary Objection, ¶¶ 69-72.

responsible for failing to extend a deadline which was not set in the Contract and which it did not have the power to extend.[232]

85. Renco also cannot, as matter of law, demonstrate a breach for failure to reimburse "millions of dollars of litigation costs and expenses" in connection with the defense in the Missouri Lawsuits,[233] because it is has not been demonstrated in the Missouri Litigation that the damages claimed concern situations for which Activos Mineros, rather than DRP, assumed liability under the Contract.[234]

86. Finally, Renco is wrong to assert that "the expert procedure constitutes a precondition *only* if a dispute is submitted to arbitration in accordance with Clause 12 of the Stock Transfer Agreement" and, therefore, its claims are ripe despite its failure to submit its claim to the expert procedure set out in the Contract.[235] The expert procedures set out in Clauses 5.3(A) or 5.4(C) are preconditions to any assumption of liability by the Company, independent of the possibility that the parties may submit the expert decision to arbitration.[236] It is undisputed that neither Renco nor DRP has invoked the expert procedures set forth in the Contract.

87. Accordingly, Peru cannot be found to have breached the Guaranty, as a matter of law, because Renco has not taken the necessary steps to trigger Activos Mineros' obligation to perform under the Contract. Renco is not entitled to skip such steps and elevate the dispute to the Treaty level.

IV. PERU'S OBJECTION FALLS WITHIN THE SCOPE OF ARTICLE 10.20.4

88. As elaborated in Peru's Preliminary Objection and above, Renco's claim for breach of an investment agreement under Article 10.16.1(a)(i)(C) of the Treaty fails as a matter of law, and its claim therefore should be dismissed under Article 10.20.4.[237] In an attempt to avoid this consequence, Renco argues in its Opposition and Supplemental Opposition that Peru, in its Preliminary Objection, has "raised not only the sole objection permitted under the Tribunal's Scope Decision (which relates to whether the Stock Transfer Agreement requires Peru and Centromin to assume liability for the St. Louis Lawsuits), but also several additional objections that are unrelated to this objection and were previously disallowed by the Tribunal, or were never raised at all by Peru during the entire 10.20(4) scope phase."[238] According to Renco, Peru has attempted to shoehorn these "additional objections into its sole permitted objection," by recasting that "objection in such broad terms that it encompasses the competence objections that the Tribunal has held fell outside the scope of Article 10.20(4)."[239] Renco further argues that "it is clear from the fact of Peru's submissions that each of its additional objections relates to the Tribunal's competence (*i.e.*, to the Tribunal's

[232] Preliminary Objection, ¶ 73.

[233] Supplemental Opposition, ¶ 210.

[234] *See* Contract, Clauses Fifth and Sixth (dividing responsibility for damages between Centromin and DRP) (C-2).

[235] Supplemental Opposition ¶¶ 207-209.

[236] *See* Contract, Clauses 5.3 and 5.4 (C-2).

[237] Preliminary Objection ¶ 24.

[238] Supplemental Opposition ¶ 90.

[239] Supplemental Opposition ¶ 93.

jurisdiction and/or to the admissibility of Renco's claims) and therefore falls outside the scope of Article 10.20(4)."[240] Renco's assertions are misleading and erroneous.

89. In briefing its preliminary objection, Peru has acted consistently with the Tribunal's Decision. In its Decision, the Tribunal ruled that Peru's preliminary objection relating to "Claimant's alleged failure to state a claim for breach of the investment agreement[] will be considered and decided in the Article 10.20.4 Phase of these proceedings."[241] Noting that both Parties had agreed "that this objection properly falls within the scope of Article 10.20.4," the Tribunal held that "this objection shall be briefed and heard as a preliminary objection in the Article 10.20.4 Phase of these proceedings in accordance with a timetable to be set by the Tribunal following further submissions from the Parties."[242] Consistent with the Tribunal's Decision, Peru has demonstrated that Renco's claims relating to Peru's alleged violation of its purported investment agreements are not claims for which an award in favor of Renco may be made under Article 10.26, and therefore should be dismissed under Article 10.20.4, through three legal arguments.[243] These legal arguments, however, are not *separate* objections under Article 10.20.4, nor are they designed to "shoehorn" impermissible competence objections into the Article 10.20.4 phase of these proceedings, as Renco erroneously contends.

90. To the contrary, as set forth above, each of these legal arguments supports Peru's preliminary objection that none of Renco's claims relating to Peru's alleged violation of Renco's purported investment agreements can be sustained as a matter of law:

- First, there is no investment agreement between Peru and Renco within the meaning of Article 10.28 of the Treaty, because neither the Contract nor the Guaranty was executed by both Peru and Renco; neither agreement creates an exchange of rights and obligations binding upon Peru and Renco under Peruvian law; and neither agreement falls within the defined subject matters for covered 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.[244]

- Second, even if the Contract constituted a valid investment agreement, 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, and not to Renco. As a matter of law, Renco's claim for breach of Article 10.16.1(a)(i)(C) thus fails.[245]

- Third, even if the Guaranty constituted a valid investment agreement, 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

[240] Supplemental Opposition ¶¶ 94, 95.
[241] Decision ¶ 255.
[242] Decision ¶ 252.
[243] Preliminary Objection ¶ 24.
[244] Preliminary Objection ¶¶ 25-40.
[245] Preliminary Objection ¶¶ 41-57.

fail to state a claim. As a matter of law, Renco's claim for breach of Article 10.16.1(a)(i)(C) thus fails.[246]

91. These legal arguments each accord with the parameters set forth in Article 10.20.4, *i.e.*, they each require the dismissal of claims strictly as a matter of law, and assume the truth of the facts alleged by Renco, or otherwise rely upon undisputed facts. While Renco continues to complain that these legal arguments were not raised by Peru during the Article 10.20.4 scope phase,[247] Peru was not required to brief in full all of its legal arguments in support of its preliminary objection during the Article 10.20.4 scope phase. Indeed, the legal arguments presented by Peru in its submissions during that phase were expressly illustrative and not exhaustive; in its Notification of Intention to Make Preliminary Objections under Article 10.20.4, Peru noted, for example, that it would "discuss and amplify in its submissions" how Renco's allegations that "Peru's refusal to assume liability for the claims in the St. Louis Lawsuits violates the Treaty because it breaches the Guaranty Agreement and the Stock Transfer Agreement, which together constitute an Investment Agreement" failed as a matter of law.[248] After the Tribunal ruled that "Claimant's alleged failure to state a claim for breach of the investment agreement[] will be considered and decided in the Article 10.20.4 Phase of these proceedings,"[249] Peru was entitled to develop and to present in full all of its legal arguments in support of that preliminary objection.

92. In addition, as the record reflects, it was Renco, not Peru, which divided Peru's initial preliminary objections into six separate categories, the fifth category being Renco's "failure to state a claim for breach of the investment agreement."[250] As noted above, the Tribunal found that both Parties had agreed "that this objection properly falls within the scope of Article 10.20.4."[251] Having thus expressly agreed that this objection properly falls within the scope of Article 10.20.4, Renco cannot now limit the scope of Peru's legal arguments in support of that objection.

93. Finally, as reflected in Peru's Preliminary Objection and above, Peru's legal arguments in support of its preliminary objection do not relate to the Tribunal's competence or to the admissibility of Renco's claims, as Renco erroneously asserts. To the contrary, Peru has argued that, as a matter of law, none of Renco's claims relating to Peru's alleged violation of Renco's purported investment agreements can be sustained. Notably, as the Tribunal observed in its Decision on Respondent's Request for Relief, Renco's position is that "the only argument that Peru should be permitted to make in support of its objection is that Peru, as a matter of law, could not have breached any obligation to Renco under the Contract, and hence under the Treaty, because the obligations contained in the Contract run only to Doe Run Peru and DRC, and not to Renco."[252] According to Renco, Peru's other legal arguments, *i.e.*, there is no investment agreement between Peru and Renco within the meaning of the Treaty; neither the Contract nor the Guaranty was executed by both Peru

[246] Preliminary Objection ¶¶58-74.

[247] Supplemental Opposition ¶ 90.

[248] Notification of Intention to Make Preliminary Objections under Article 10.20.4 dated 21 Mar. 2014, at 5; *see also* Submission on the Scope of Preliminary Objections dated 23 Apr. 2014, ¶ 3 ("Renco's contract claims fail as a matter of law, *inter alia*, because […]").

[249] Decision ¶ 255.

[250] *See* Request, at 4.

[251] Decision ¶ 252.

[252] Decision on Respondent's Request for Relief ¶ 63.

and Renco; and the Guaranty is void, however, fall outside the scope of the Article 10.20.4 phase.[253] Renco's position is misguided.

94. First, having accepted that Peru is entitled to bring a preliminary objection that Peru, as a matter of law, could not have breached any obligation to Renco under the Contract, and hence under the Treaty, because the obligations contained in the Contract run only to DRP and DRC, and not to Renco, Renco cannot object to Peru's argument that neither the Contract nor the Guaranty was executed by both Peru and Renco, as this argument relates to the very same issue, *i.e.*, the proper parties to the Contract and the Guaranty. As set forth above, on their face, neither the Contract nor the Guaranty creates an exchange of rights and obligations binding upon Peru and Renco under Peruvian law; Peru, as a matter of law, thus could not have breached any obligation to Renco under the Contract or the Guaranty, and hence the Treaty, because there are *no* binding obligations to be honored by Peru to Renco thereunder.[254]

95. Second, Peru's argument that, as a matter of law, Peru could not have breached any obligation under the Guaranty, because the Guaranty is void, does not "relate[] directly to the question of whether the Tribunal has jurisdiction over Renco's claims for breach of an investment agreement," as Renco erroneously asserts.[255] Rather, as elaborated above, Peru's argument is that, because DRP assigned its rights and obligations as the "Investor" under the Contract to DRC, the Guaranty is void under Peruvian law.[256] Accordingly, as a matter of law, Peru could not have breached any obligations under the Guaranty to Renco, and hence the Treaty, because the Guaranty is null and void.

96. Third, Peru's argument that, as a matter of law, there is no investment agreement between Peru and Renco within the meaning of Article 10.28 of the Treaty likewise does not constitute a jurisdictional objection. As set forth above, Peru's argument is that, as a matter of law, Peru could not have breached Article 10.16.1(a)(i)(C) of the Treaty, because neither the Contract nor the Guaranty was executed by both Peru and Renco, and because neither the Contract nor the Guaranty grants Renco any rights to exploit, extract, refine, transport, distribute, or sell natural resources controlled by a national authority of Peru, as required under the Treaty.[257]

97. Finally, Peru's argument that, as a matter of law, Peru could not have breached any obligation under the Guaranty, because Renco's claims for breach of the Guaranty are not ripe, does not relate to the admissibility of Renco's claims, as Renco contends.[258] To the contrary, Peru's argument is that, as a matter of law, Peru could not have breached any obligation under the Guaranty, because the Guaranty is triggered only after Activos Mineros has failed to comply with its obligations under the Contract. It is undisputed that this has not been established.[259] Accordingly, as a matter of law, Peru could not have breached any obligation under the Guaranty, and hence the Treaty.

[253] Decision on Respondent's Request for Relief ¶ 62.
[254] Preliminary Objection ¶¶ 41-74.
[255] Supplemental Opposition ¶ 98.
[256] Preliminary Objection ¶¶ 58-61.
[257] Preliminary Objection ¶¶ 41-74.
[258] Supplemental Opposition ¶ 99.
[259] Preliminary Objection ¶ 69.

V. REQUEST FOR RELIEF

98. For the foregoing reasons, Renco's claims under Article 10.16.1(a)(i)(C) of the Treaty cannot result in an award in favor of Renco. Peru respectfully requests that the Tribunal render an award dismissing Renco's claims under Article 10.16.1(a)(i)(C) in their entirety, with an award of costs in favor of Peru.

Respectfully submitted,

WHITE & CASE
Washington, D.C.

701 Thirteenth Street, N.W.
Washington, D.C. 20005
U.S.A.

Counsel to The Republic of Peru

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