

**IN THE MATTER OF
AN ARBITRATION UNDER THE RULES OF THE
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
UNCT/13/1**

THE RENCO GROUP, INC.

Claimant

v.

THE REPUBLIC OF PERU

Respondent

Claimant's Rejoinder to Peru's Preliminary 10.20(4) Objection

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1. Claimant, the Renco Group, Inc. (“Claimant” or “Renco”), respectfully submits this Rejoinder to Peru’s Preliminary Objection Under Article 10.20(4) of the Treaty dated February 20, 2015.

I. THE STANDARD OF REVIEW APPLICABLE UNDER ARTICLE 10.20(4)

A. THE TRIBUNAL MUST ASSUME THE TRUTH OF RENCO’S FACTUAL ALLEGATIONS

2. Article 10.20(4)(c) provides that “[i]n deciding an objection under [Article 10.20(4)], the tribunal shall assume to be true claimant’s factual allegations in support of any claim in the notice of arbitration”¹ As the Tribunal explained in its Decision as to the Scope of the Respondent’s Preliminary Objections Under Article 10.20.4, dated December 18, 2014 (the “Scope Decision”), this Article requires the Tribunal “to adopt an evidentiary standard which assumes that all of claimant’s factual allegations in support of its claim as set out in the pleadings are true.”² Peru previously has accepted this standard of review. In its March 21, 2014 “notice of intention” letter, Peru stated that “[u]nder Article 10.20.4, when deciding preliminary objections, the Tribunal shall assume to be true claimant’s factual allegations in support of any claim, and may also consider any factual allegations not in dispute.”³

3. In its Reply on its Preliminary Objection Under Article 10.20(4) dated October 27, 2015 (“Peru’s Reply”), however, Peru contends that “this assumption [of truth] does not extend to . . . factual allegations which, in the tribunal’s view, are incredible, frivolous, vexatious or inaccurate, or made in bad faith.”⁴ While Peru does not claim that any of Renco’s factual allegations are incredible, frivolous, vexations or made in bad faith, it challenges the reliability and accuracy of one of the witness statements submitted by Renco with its Memorial on Liability.⁵

4. However, Peru’s new position regarding the standard of review under Article 10.20(4) contradicts the express wording of Article 10.20(4)(c), which provides that the tribunal

¹ **CLA-001**, Trade Promotion Agreement, U.S.-Peru, Apr. 12, 2006, Article 10.20(4) (“Treaty”).

² Tribunal’s Decision as to the Scope of the Respondent’s Preliminary Objection Under Article 10.20(4), Dec. 18, 2014 at ¶ 189(c) (“Scope Decision”).

³ Letter from White & Case to ICSID (Secretary of the Tribunal), Mar. 21, 2014 (internal quotation marks omitted).

⁴ Peru’s Reply on its Preliminary Objection Under Article 10.20(4), Oct. 27, 201 at ¶ 2 (“Peru’s Reply”).

⁵ *Id.* at ¶¶ 12, 69 n.175.

“shall” assume the truth of the claimant’s factual allegations, without exception or limitation.⁶ In an Article 10.20(4) setting, a tribunal is not called upon to make determinations regarding the credibility, accuracy or good faith of factual allegations. A tribunal cannot be faithful to Article 10.20(4)(c)’s requirement that it assume the truth of the claimant’s factual allegations, while simultaneously making determinations regarding their reliability and accuracy. Stated differently, if a tribunal were to make determinations regarding the reliability and accuracy of the claimant’s factual allegations in deciding a preliminary objection under Article 10.20(4), it would violate Article 10.20(4)(c)’s requirement to assume the truth of the claimant’s factual allegations.

5. In support of its position, Peru cites the Decision on the Respondent’s Objection Under Rule 41(5) of the ICSID Arbitration Rules in *Trans-Global v. Jordan*.⁷ Peru’s reliance on *Trans-Global v. Jordan* is misplaced. In that case, the tribunal applied Rule 41(5) of the ICSID Arbitration Rules, which is worded differently from Article 10.20(4) of the Treaty. In particular, unlike Article 10.20(4), Rule 41(5) does not require a tribunal to assume the truth of the claimant’s factual allegations. Rather, Rule 41(5) entitles a party to “file an objection that a claim is manifestly without legal merit,” but does not issue any directive to the tribunal deciding such an objection.⁸

⁶ **CLA-001**, Treaty, Article 10.20(4).

⁷ Peru’s Reply at ¶ 2 n.4 (citing **RLA-43**, *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, May 12, 2008 ¶¶ 91, 105 (Donald McRae, James Crawford, V.V. Veeder (President)) (“*Trans-Global v. Jordan*”).

⁸ Rule 41(5) of the ICSID Arbitration Rules provides in pertinent part as follows:

[A] party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection.

Because of the different wording of CAFTA Article 10.20(4) and ICSID Rule 41(5), the tribunal in *Pac Rim v. El Salvador* “placed no reliance” on the *Trans-Global v. Jordan* decision. **CLA-066**, *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/17, Decision on the Respondent’s Preliminary Objection under CAFTA Articles 10.20.4 and 10.20.5, Aug. 2, 2010 ¶ 118 (Guido Tawil, Brigitte Stern, V.V. Veeder (President)) (“*Pac Rim v. El Salvador*”).

Moreover, the *Trans-Global v. Jordan* tribunal held only that under Rule 41(5), it “need not accept at face value the truth of any allegation which the tribunal regards as (manifestly) incredible, frivolous, vexatious or inaccurate or made in bad faith.” **RLA-43**, *Trans-Global v. Jordan* at ¶ 105 (emphasis added). In paraphrasing this holding in its Reply, Peru omits the word “manifestly.”

B. THE TRIBUNAL MUST CONSIDER ALL OF RENCO'S FACTUAL ALLEGATIONS, INCLUDING THOSE DISPUTED BY PERU AND THOSE REGARDING THE COMMON SUBJECTIVE INTENTION OF THE PARTIES

6. As Renco explained in its Opposition dated April 17, 2015 and in its Supplemental Opposition dated July 30, 2015, the universe of factual allegations relevant to Peru's preliminary objection includes all of the factual allegations set out in Renco's prior submissions, including its Memorial on Liability, witness statements, expert reports and other supporting documents.⁹ In its Supplemental Opposition dated July 30, 2015, Renco summarized the factual allegations that are relevant to Peru's preliminary objection under Article 10.20(4) and that it had set out in its prior submissions.¹⁰

7. In its Reply, Peru seeks to limit the relevant facts to five bullet-point paragraphs spanning less than one page.¹¹ Peru advances three overlapping, erroneous arguments to support its attempt to confine the relevant facts to these five paragraphs. In particular, Peru argues that: (1) the Tribunal should consider only "undisputed" facts; (2) the Tribunal should disregard all factual allegations regarding the common intention of the parties; and (3) the Tribunal should disregard all factual allegations that Renco did not make in its Amended Notice of Arbitration.

8. Peru contends that "[t]he facts relevant to the Tribunal's determination under Article 10.20.4 are limited, as set out in Peru's Preliminary Objection, and, as contemplated by the applicable standard, undisputed."¹² But Peru's assertion that the Tribunal should consider only "undisputed" facts in deciding Peru's preliminary objection does not constitute the applicable standard. Article 10.20(4)(c) requires the Tribunal to assume to be true the "claimant's factual allegations" in support of its claim, irrespective of whether these allegations are disputed by the respondent. The text does not circumscribe the "claimant's factual allegations" that the Tribunal must assume to be true only to "undisputed" facts. This is made clear in the second sentence of Article 10.20(4)(c), which further provides that "[t]he tribunal may also consider any relevant facts not in dispute." Thus, while the tribunal "shall" consider all

⁹ Claimant's Opposition to Peru's 10.20(4) Objection, Apr. 17, 2015 at ¶¶ 25-26 ("Renco's Opposition"); Claimant's Supplemental Opposition to Peru's Preliminary 10.20(4) Objection, July 30, 2015 at ¶ 102 ("Renco's Supplemental Opposition").

¹⁰ See Renco's Supplemental Opposition at ¶¶ 26-88.

¹¹ See Peru's Reply at ¶ 8.

¹² *Id.* (emphasis added).

of the claimant’s factual allegations (and assume their truth), it “may” (but need not) consider also any relevant facts not in dispute.

9. Peru also contends that Renco’s factual allegations are not relevant to its preliminary objection because the Tribunal should not consider any extrinsic evidence of the parties’ common subjective intention at the time that they concluded the Stock Transfer Agreement and the Guaranty Agreement.¹³ In particular, Peru claims that its preliminary objection “arises from the plain language of the Contract and the Guaranty and the parties thereto.”¹⁴

10. As Renco explained in its previous submissions and as further explained below, however, the plain language of the Stock Transfer Agreement and the Guaranty Agreement supports Renco’s interpretation of these agreements.¹⁵ Moreover, even if the language were ambiguous or supported Peru’s interpretation (which it does not), its meaning under Peruvian law would depend on the common subjective intention of the parties at the time they concluded the agreements, a quintessential factual issue.¹⁶ Professor Oquendo, who is an expert in Latin American and comparative law, confirms this rule:

Latin American law, as part of its civil law heritage, usually requires reading a contract on the basis of the parties’ joint intention. It commands enforcing the latter, when plainly demonstrable, even if at odds with the ultimately undersigned document. Along parallel lines, the Peruvian legal system necessitates disregarding the contractual wording upon proof of a contrary intent...Latin American civil codes, true to their civil law roots, ordinarily mandate reading a contract through the parties’ joint intent. They treat the underlying written instrument as both the primary evidence of and subservient to the latter.¹⁷

¹³ Peru’s Reply at ¶ 11.

¹⁴ *Id.* at ¶ 7.

¹⁵ See Sections III.A.1 and III.A.2 below; Renco’s Opposition at ¶¶ 35-38; Renco’s Supplemental Opposition at ¶¶ 162-165, 174.

¹⁶ See Section III.A.1 below; Legal Report of Dr. Fernando de Trazegnies, Apr. 14, 2015, § 3.2 at 11-12 (“Dr. de Trazegnies First Report”); Supplemental Legal Report of Dr. Fernando de Trazegnies, Nov. 23, 2015, § 1.1 at 2 (“Dr. de Trazegnies Second Report”); Legal Report of Dr. Ángel R. Oquendo, Nov. 23, 2015, § IV.A at 7-10 (“Dr. Oquendo Report”).

¹⁷ Dr. Oquendo Report, §§ III, IV.A at 6-7.

Further, extrinsic evidence, *i.e.*, evidence outside the four corners of the Stock Transfer Agreement and the Guaranty Agreement, is admissible under Peruvian law to prove the parties' intentions.¹⁸ As Professor Oquendo states, "the legal order in these jurisdictions does not impose any special restrictions, such as the common law 'parol evidence rule,' on the submission of proof in the inquiry into the aim of the signatories."¹⁹ Accordingly, in deciding Peru's preliminary objection, the Tribunal must consider (and assume the truth of) all of Renco's factual allegations regarding the common subjective intention of the parties.

11. As Peru has recognized in this arbitration, Article 10.20(4) "is similar to a motion to dismiss a claim for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure."²⁰ It is well settled that construction of an ambiguous contract is a question of fact that precludes dismissal of claims as a matter of law under Rule 12(b)(6). *See, e.g., Martin Marietta Corp. v. Int'l Telecoms. Satellite Org.*, 991 F. 2d 94, 98 (4th Cir. 1992)²¹; *Kirby v. Frontier Medex, Inc.*, Case No. ELH-13-00012, 2013 U.S. Dist. LEXIS 155357, at *19 (D. Md. Oct. 30, 2013) ("In the context of a motion to dismiss, the construction of an ambiguous contract is a question of fact which, if disputed, is not susceptible of resolution under a motion to dismiss for failure to state a claim.") (internal quotation marks and citation omitted)²²; *Grant & Eisenhofer v. Bernstein Liebhard LLP et al.*, 14-CV-9839 (JMF), 2015 U.S. Dist. LEXIS 51685, at *7 (S.D.N.Y. Apr. 20, 2015) ("But 'when the language of a contract is ambiguous, its construction presents a question of fact, which of course precludes summary dismissal' on a Rule 12(b)(6) motion."²³ Likewise, construction of the Stock Transfer Agreement and the Guaranty Agreement presents questions of fact under Peruvian law, precluding dismissal of Renco's claims for breach of an investment agreement under Article 10.20(4).

¹⁸ See Dr. de Trazegnies First Report, § 4.1 at 12-14; Dr. de Trazegnies Second Report at § 1.1 at 2; Dr. Oquendo Report, § IV.A at 9.

¹⁹ Dr. Oquendo Report, § IV.A at 9.

²⁰ Letter from White & Case to ICSID (Secretary of the Tribunal), Mar. 21, 2014, n.20.

²¹ **CLA-073**, *Martin Marietta Corp. v. Int'l Telecoms. Satellite Org.*, 991 F. 2d 94, 97 (4th Cir. 1992).

²² **CLA-074**, *Kirby v. Frontier Medex, Inc.*, Case No. ELH-13-00012, 2013 U.S. Dist. LEXIS 155357, at *19 (D. Md. Oct. 30, 2013).

²³ **CLA-075**, *Grant & Eisenhofer v. Bernstein Liebhard LLP et al.*, 14-CV-9839 (JMF), 2015 U.S. Dist. LEXIS 51685, at *7 (S.D.N.Y. Apr. 20, 2015).

C. THE TRIBUNAL MUST CONSIDER ALL OF RENCO'S FACTUAL ALLEGATIONS SUMMARIZED IN ITS SUPPLEMENTAL OPPOSITION

12. Peru contends in its Reply that “Renco proffers a series of new factual allegations in its Opposition and Supplemental Opposition” and that the Tribunal should disregard these “new” factual allegations in deciding Peru’s preliminary objection.²⁴ Quoting the tribunal’s decision in *Pac Rim v. El Salvador*, Peru contends further that “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.”²⁵ Peru’s arguments lack merit for numerous reasons.

13. First, contrary to Peru’s position, none of the factual allegations that Renco summarized in its Opposition and Supplemental Opposition is “new.” To the contrary, Renco already had set out all of these factual allegations in its prior submissions, including its Amended Notice of Arbitration, Memorial on Liability, and witness statements. In accordance with the Tribunal’s Procedural Order No. 1, Renco filed the last of these prior submissions (its Memorial on Liability, witness statements, and other supporting documents) on February 20, 2014, one year before Peru filed its preliminary objection under Article 10.20(4). Accordingly, the factual premise for Peru’s position is incorrect.

14. Second, Peru’s position contravenes the plain language of Article 10.20(4)(c) and accepted canons of treaty interpretation. Article 10.20(4)(c) provides that a tribunal shall assume the truth of “claimant’s factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules.” As a matter of normal grammar and usage, the entire prepositional phrase beginning with “in the notice of arbitration” and ending with “Article 18 of the UNCITRAL Arbitration Rules” modifies the term “any claim” that immediately precedes it. Accordingly, factual allegations benefit from the assumption of truth if they support a claim that was asserted in the claimant’s notice of arbitration or statement of claim.

²⁴ Peru’s Reply at ¶ 6. *See also id.* at ¶¶ 9-10.

²⁵ *Id.* at ¶ 6 (quoting **CLA-066**, *Pac Rim v. El Salvador* ¶ 90).

15. Contrary to this plain reading of Article 10.20(4)(c), Peru interprets the entire prepositional phrase beginning with “in the notice of arbitration” as modifying the term “factual allegations,” from which it is separated by the phrase “in support of any claim.” On this basis, Peru contends that the assumption of truth only extends to factual allegations set out in the claimant’s notice (or amended notice) of arbitration or in its statement of claim, and not to factual allegations set out in any of its subsequent submissions.

16. Peru’s interpretation of Article 10.20(4)(c) violates the principle of effectiveness (*effet utile*), which the Tribunal has already noted is “broadly accepted as a fundamental principle of treaty interpretation,”²⁶ because it renders the phrase “in support of any claim” superfluous and without effect. In short, under Peru’s reading, Article 10.20(4)(c) would have the same meaning and effect if the phrase “in support of any claim” were deleted. Because the principle of effectiveness requires a treaty to be interpreted so as to give effect to all of its terms, the Tribunal should reject Peru’s interpretation.

17. Third, Peru’s current position is contrary to the position that it has adopted up to this point in its Article 10.20(4) submissions. For example, in its “notice of intention” letter dated March 21, 2014 (one month after the filing of Renco’s Memorial on Liability), Peru stated as follows:

Under Article 10.20.4, when deciding preliminary objections, the Tribunal “shall assume to be true claimant’s factual allegations in support of any claim,” and “may also consider relevant facts not in dispute.” The mandatory scope of Article 10.20.4 objections is thus clear. As long as any objection, including jurisdictional objections, assumes the facts as pled by a claimant without the need to consider or weigh disputed evidence, it falls within the scope of Article 10.20.4.

Peru’s preliminary objections assume Renco’s allegations (however inaccurate) to be true, pursuant to the Treaty. Renco is also bound by the same facts it has pled and may not now amplify or change its facts in response to Peru’s preliminary objections in an attempt to create an issue of disputed fact, where none now exists.²⁷

²⁶ Scope Decision at ¶ 177.

²⁷ Letter from White & Case to ICSID (Secretary of the Tribunal), Mar. 21, 2014 at 3 (emphasis added).

18. Peru's March 21, 2014 letter also includes several citations to the factual allegations in Renco's Memorial on Liability.²⁸ Similarly, in its February 20, 2015 Preliminary Objection Under Article 10.20.4 ("Preliminary Objection"), Peru quoted the Tribunal's conclusion that it "is required to adopt an evidentiary standard which assumes that all of claimant's factual allegations in support of its claims as set out in the pleadings are true,"²⁹ and it cited to Renco's Memorial on Liability and supporting documents more than 50 times.³⁰ Prior to the filing of its Reply, Peru thus plainly accepted that in deciding its preliminary objection, the Tribunal must consider (and assume the truth of) the factual allegations set out in Renco's Memorial on Liability and supporting documents.

19. Fourth, Peru's position conflicts with the object and purpose of Article 10.20(4), which is intended to allow tribunals to dispose quickly of frivolous claims, not to impose technical pleading requirements on claimants.³¹ Peru does not, and cannot, suggest any reason why the drafters of the Treaty would have intended to require a tribunal addressing a preliminary objection under Article 10.20(4) to disregard the factual allegations set out in the claimant's memorial on the merits and witness statements and other supporting documents. The Tribunal should not adopt an interpretation of Article 10.20(4)(c) that converts the Article 10.20(4) procedure into a technical pleading exercise and elevates form over substance.

20. Fifth, even assuming that Peru's current interpretation of Article 10.20(4)(c) were correct (which it is not), the Tribunal should consider (and assume the truth of) the factual allegations set out in Renco's Memorial on Liability and in its witness statements and other supporting documents, because Renco has brought this dispute under the UNCITRAL Arbitration Rules (2010 version). Article 10.20(4)(c) provides that a tribunal shall assume the truth of "claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules." Article 18 of

²⁸ See *id.* nn.12, 15, 16, 17, 19.

²⁹ Peru's Preliminary Objection Under Article 10.20(4), Feb. 20, 2015 at ¶ 5 ("Peru's Preliminary Objection") (quoting Scope Decision at ¶ 189(c) (emphasis added)).

³⁰ See, e.g., *id.* at nn.19-27, 30, 32, 44, 47-49.

³¹ See **CLA-079**, United States-Peru Trade Promotion Agreement Implementation Act, Dec. 14, 2007 at 22 (stating that Chapter 10 of the Treaty includes "provisions similar to those used in U.S. courts to dispose quickly of claims a tribunal finds to be frivolous").

the 1976 UNCITRAL Rules has been replaced by Article 20 of the 2010 UNCITRAL Rules, which provides that “[t]he statement of claim should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant.”³² Because a statement of claim under the UNCITRAL Rules should contain the claimant’s detailed legal and factual submissions, and should be supported by witness statements and other evidence, the Tribunal should treat Renco’s Memorial on Liability as its statement of claim for purposes of deciding Peru’s preliminary objection.

21. Sixth, Peru is estopped from contending that the Tribunal should disregard the factual allegations set out in Renco’s Memorial on Liability, witness statements and other supporting documents, because Peru itself requested that Renco make these submissions before the commencement of the Article 10.20(4) phase of these proceedings, so that Peru could rely upon them in crafting its Article 10.20(4) objections. Specifically, at the preliminary conference held in London on July 18, 2013, counsel for Peru stated as follows:

[W]e are certainly under no obligation, at this point in time, to preview any objection we may or may not have [under Article 10.20(4)]. All we have is a Request for Arbitration. That is about 20 pages. We haven’t seen [Renco’s] memorial. You know, all – both the rules and the treaty certainly give us the time to determine later [whether to bring an objection under Article 10.20(4)]. . . .

[T]his case has been sitting for 139 weeks, so far, on a 20 page Request for Arbitration. And so we are going to see the memorial, and then we are going to determine what might fit into this box [Article 10.20(4)], and consider whether anything would come later.³³

22. Consistent with these statements and with the procedural schedule ordered by the Tribunal after the July 18, 2013 preliminary conference, Peru notified its intention to make preliminary objections under Article 10.20(4) by letter dated March 21, 2014, one month after the filing of Renco’s Memorial on Liability.³⁴ And, as noted above, Peru cited Renco’s Memorial on Liability and supporting documents more than 50 times in its Preliminary

³² **CLA-065**, 2010 UNCITRAL Rules, Article 20(4).

³³ Transcript of July 18, 2013 Preliminary Conference at 152:4-10 (statement by Andrea Menaker, counsel for Peru), 178:12-16 (statement by Jonathan Hamilton, counsel for Peru).

³⁴ Letter from White & Case to ICSID (Secretary of the Tribunal), Mar. 21, 2014.

Objection dated February 20, 2015.³⁵ Peru cannot rely on the factual allegations set out in Renco's Memorial on Liability and supporting documents to frame its Article 10.20(4) objection, while asking the Tribunal to disregard those same allegations in deciding the objection.

23. Seventh, the Tribunal should not give any weight to the *Pac Rim v. El Salvador* tribunal's discussion of the factual allegations relevant to a preliminary objection under Article 10.20(4) because: (1) the *Pac Rim* tribunal did not have to decide whether a tribunal must consider factual allegations set out in the claimant's memorial on the merits and the documents submitted in support; (2) the *Pac Rim* tribunal never parsed the language of Article 10.20(4)(c); and (3) in any event, the *Pac Rim* tribunal noted that a claimant can amend its notice of arbitration at any time up to the issuance of the tribunal's decision under Article 10.20(4), thus rendering largely irrelevant its statement that a tribunal should not consider new factual allegations set out by the claimant for the first time in its opposition to a preliminary objection.³⁶

24. Finally, even if the Tribunal considers only the factual allegations in Renco's Amended Notice of Arbitration, it must still deny Peru's preliminary objection under Article 10.20(4). Key factual allegations in Renco's Amended Notice of Arbitration supporting its claims for breach of an investment agreement include the following:

- “As a critical inducement to encourage U.S. investors to purchase the Complex in light of existing and ongoing contamination, Centromin and the Republic of Peru contractually committed themselves to clean up the area in and around the town of La Oroya. They also retained and assumed all responsibility and liability for any and all claims that third parties might bring not only during the period that the new owners completed environmental projects to improve the Complex, but also for the time thereafter.”³⁷
- “Centromin, its successor Activos Mineros, and the Republic of Peru have refused to remediate the soil in and around the town of La Oroya, and also have refused to accept responsibility for the claims brought by the citizens living in and near the town of La Oroya who claim various injuries resulting from alleged exposure to environmental contamination from the Complex.”³⁸

³⁵ See, e.g., Peru's Preliminary Objection at nn.19-27, 30, 32, 44, 47-49.

³⁶ See **CLA-066**, *Pac Rim v. El Salvador* ¶¶ 87-90.

³⁷ Renco's Amended Notice of Arbitration and Statement of Claim, Aug. 9, 2011 at ¶ 5 (“Renco's Amended Notice of Arbitration”).

³⁸ *Id.* at ¶ 6.

- “In the early 1990s, Peru sought to privatize its mining industry, including the La Oroya Complex. Given the extent of the contamination affecting La Oroya, Peru could not elicit the desired interest from private investors in the Complex without a proper environmental legal framework, and without agreeing to retain liability for claims, including claims for personal injury and any other claims of harm or injury resulting from many years of continuous environmental contamination.”³⁹
- “On October 23, 1997, DRP, Doe Run Resources, Renco and Centromin executed the Stock Transfer Agreement, pursuant to which DRP acquired the majority shares of the Company for a purchase price of US\$ 121.4 million. The buyer then invoked its rights to acquire the remaining shares for US\$ 126.4 million. As part of that transaction, Peru issued the Guaranty, which guaranteed the ‘representations, assurances, guaranties and obligations assumed by’ Centromin under the Stock Transfer Agreement. Renco would not have agreed to acquire the Complex without the guaranty of Peru.”⁴⁰
- “The Stock Transfer Agreement contained various ongoing commitments by both parties, including the allocation of the environmental PAMA projects among the parties, and Centromin’s agreement to retain and assume responsibility and liability for all third-party claims of injury, including personal injury arising from contamination.”⁴¹
- “[D]uring the period approved for DRP to complete its PAMA projects . . . Centromin and Peru agreed to retain and immediately assume responsibility for defending against third party claims, accept liability for any and all third-party claims attributable to the activities of DRP, Centromin, and its predecessors, and to release DRP and its affiliates from any obligation regarding those claims. . . . Moreover, Centromin’s and Peru’s obligations to take full responsibility for all third-party claims extend to claims that third parties may bring even *after* the period approved for DRP to complete the PAMA projects has expired”⁴²
- “Without these critically important commitments by Centromin and Peru as to potential claims by third parties, Renco and its affiliates would not have agreed to purchase the Company, which was well-known to have polluted the area.”⁴³

25. Renco’s Amended Notice of Arbitration thus sets out in general terms the same basic factual allegations that Renco expanded upon in its Memorial on Liability, witness statements, expert reports and other supporting documents. As discussed in Sections III and IV below, these factual allegations both establish the existence of an “investment agreement” within

³⁹ *Id.* at ¶ 12.

⁴⁰ *Id.* at ¶ 18.

⁴¹ *Id.* at ¶ 19.

⁴² *Id.* at ¶ 23 (emphasis in original).

⁴³ *Id.* at ¶ 25.

the meaning of Article 10.28 of the Treaty and suffice to state claims against Peru for the breach of Renco's and Doe Run Peru's rights under the investment agreement.

D. THE TRIBUNAL SHOULD NOT DECIDE COMPLEX ISSUES OF PERUVIAN LAW AT THIS STAGE OF THE PROCEEDINGS

26. Peru contends further that the Tribunal must “assess” Peruvian law in deciding its preliminary objection under Article 10.20(4).⁴⁴ While the Tribunal may decide pure issues of Peruvian law under Article 10.20(4), it cannot decide mixed questions of law and disputed facts that depend on making factual findings, or legal issues that depend on making factual findings.⁴⁵ This is because, as already explained, Article 10.20(4)(c) requires the Tribunal to assume the truth of Renco's factual allegations.

27. Moreover, the Tribunal should exercise its discretion under Article 10.20(4) not to decide complex issues of Peruvian law at this stage of the proceedings. Article 10.20(4) provides that a tribunal will assess any objection by respondent that, “as a matter of law, [a] claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26.” As Renco explained in its previous submissions on Peru's preliminary objection, the use of the word “may” in Article 10.20(4) affords the Tribunal considerable discretion to deny Peru's preliminary objection if it considers that an award could eventually be made upholding Renco's claim or, equally, if it considers that it would be premature at this stage of the proceedings to decide whether or not such an award could be made.⁴⁶

28. In exercising its discretion under Article 10.20(4), the Tribunal should decline to decide complex issues of Peruvian law at this stage of the proceedings because (1) the precise contours of the relevant Peruvian legal issues likely will evolve after Peru submits its initial evidence in this case, and (2) the interpretation of the Stock Transfer Agreement and the Guaranty Agreement under Peruvian law depends on the common subjective intention of the parties at the time the agreements were concluded.⁴⁷ Intent of the parties is a quintessential factual issue which the Tribunal may not resolve in deciding Peru's preliminary objection under

⁴⁴ Peru's Reply at ¶ 4.

⁴⁵ See **CLA-066**, *Pac Rim v. El Salvador* at ¶ 112; Peru's Reply at ¶ 7.

⁴⁶ Renco's Opposition at ¶¶ 30-31; Renco's Supplemental Opposition at ¶¶ 106-108. See also **CLA-066**, *Pac Rim v. El Salvador* at ¶¶ 109-110.

⁴⁷ See Sections III.A.1 and III.A.2 below.

Article 10.20(4) and which clearly precludes dismissal of Renco’s claims for breach of the investment agreements.

II. THE EXISTENCE OF AN “INVESTMENT AGREEMENT”

29. Peru argues in its Reply that no “investment agreement” exists within the meaning of Article 10.28 of the Treaty.⁴⁸ The question whether the Stock Transfer Agreement and the Guaranty Agreement, either together or each standing alone, constitute an “investment agreement” under the Treaty is a jurisdictional issue because Article 10.16.1(a)(i)(C) of the Treaty (pursuant to which Renco brings its claims for breach of an investment agreement) only allows a claimant to submit to arbitration “a claim . . . that the respondent has breached . . . an investment agreement.” In its Scope Decision, the Tribunal squarely held that “objections as to a tribunal’s competence are outside the scope of Article 10.20.4.”⁴⁹ Because Peru’s “no investment agreement” argument implicates the Tribunal’s jurisdiction over Renco’s claims under Article 10.16.1(a)(i)(C), it falls outside the scope of Article 10.20(4) and should not be addressed at this stage of the proceedings.⁵⁰

A. MULTIPLE AGREEMENTS CAN COMBINE TO FORM A SINGLE INVESTMENT AGREEMENT UNDER THE TREATY

30. Addressing the merits of Peru’s jurisdictional objection concerning the investment agreement, Renco explained in its Supplemental Opposition that “investment agreements” must be viewed together, and not in isolation.⁵¹ In particular, the Treaty’s text, structure and purpose, negotiating history, and jurisprudence support that approach.⁵² It is consistent with the text because the definition of “written agreement,” which is an element of the definition of “investment agreement,” expressly provides that the agreement may be “in one or multiple instruments,” and Annex 10-H(4) identifies a stability agreement as an example of a contract that

⁴⁸ See Peru’s Reply at ¶¶ 16-43.

⁴⁹ Scope Decision at ¶¶ 213, 240.

⁵⁰ See generally Section V below.

⁵¹ Renco’s Supplemental Opposition at ¶¶ 110-25.

⁵² As stated in Renco’s Supplemental Opposition, the rules of treaty interpretation codified in Articles 31-33 of the Vienna Convention on the Law of Treaties require that a treaty be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.” **CLA-083**, Vienna Convention on the Law of Treaties, Art. 31(1). Under Article 31(4) of the Vienna Convention, “[a] special meaning shall be given to a term if it is established that the parties so intended.” *Id.* at Article 31(4).

may constitute part of a larger, single “investment agreement” even without satisfying all of the elements of an investment agreement by itself.⁵³ Further, this interpretation is consistent with the Treaty’s structure and purpose because various aspects of the Treaty demonstrate that it has been designed to apply to complex international investments and that such investments—especially those regarding natural resources, public services, or infrastructure—inevitably are memorialized in multiple, related contracts and other instruments.⁵⁴ This interpretation also is consistent with the Treaty’s negotiating history because Peru expressly identified “mining concession contracts . . . and all contracts related to such contracts in which the investor relies to develop its investment” as an example of the types of agreements that would constitute an “investment agreement” under the Treaty.⁵⁵ And this interpretation comports with the Tribunal’s analysis in the *Chevron v. Ecuador (Lago Agrio)* arbitration.⁵⁶

31. In its Reply, Peru admits that “multiple instruments can comprise a single ‘investment agreement,’” and that “a single agreement may be memorialized in multiple writings.”⁵⁷ But Peru now argues that every instrument that comprises a single “investment agreement” must be between the same parties. Because the Treaty specifies that a “written agreement” must be “executed by both parties” and “binding on both parties,” according to Peru, “[i]t 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.”⁵⁸

32. Peru cites no authority for its novel interpretation and, to Renco’s knowledge, none exists. Neither logic nor basic rules of grammar usage support Peru’s interpretation. “Written agreement” is defined as “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”⁵⁹ The phrase “executed by both parties” does not qualify the word

⁵³ Renco’s Supplemental Opposition at ¶¶ 112-13.

⁵⁴ *Id.* at ¶¶ 114.

⁵⁵ *Id.* at ¶ 116.

⁵⁶ *Id.* at ¶ 117.

⁵⁷ Peru’s Reply at ¶¶ 37-38.

⁵⁸ *Id.* at ¶ 37.

⁵⁹ **CLA-001**, Treaty, Article 10.28 at 10-25 and 10-26.

“instruments” in the phrase “whether in a single instrument or in multiple instruments.” Rather, the phrases “executed by both parties” and “whether in a single instrument or in multiple instruments” both qualify the word “agreement” at the beginning of the definition. Thus, it is the overall “agreement”—not every instrument that constitutes a part of that agreement—that must be executed by both parties. Further, nothing in the Treaty’s text provides that an “investment agreement” comprised of multiple instruments must be between two and only two parties. To the contrary, it is more logical to conclude that one should examine all of the multiple instruments together to determine if, when viewed together, a national authority and covered investment or covered investor have executed an “agreement” in writing that creates an exchange of rights and obligations.

33. This interpretation accords with the analysis of several investment tribunals that have interpreted the concept of “investment” in a holistic manner.⁶⁰ For example, the tribunal in the *Chevron v. Ecuador (Commercial Cases)* arbitration interpreted the claimants’ “investments” as comprising both a 25-year concession and claims for money in the form of lawsuits arising out of the oil extraction and production activities that continued after the concession contract expired and most of the claimants’ investment had already been liquidated.⁶¹ Similarly, the *CSOB v. Slovakia* tribunal stated:

An investment is frequently a rather complex operation, composed of various interrelated transactions, each element of which, standing alone, might not in all cases qualify as an investment. Hence, a dispute that is brought before the Centre must be deemed to arise directly out of an investment even when it is based on a transaction which, standing alone, would not qualify as an investment under the Convention, provided that

⁶⁰ See, e.g., **CLA-082**, *Mondev Int’l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award, Oct. 11, 2002 (Ninian Stephen (President); James R. Crawford; and Stephen M. Schwebel), at ¶ 81; **CLA-172**, *Chevron Corp. et al. v. Rep. of Ecuador (Commercial Cases)*, PCA Case No. AA277, UNCITRAL Arbitration Rules, Interim Award, Dec. 1, 2008 (Karl-Heinz Bockstiegel (Chairman); Albert Jan Van den Berg; and Charles N. Brower), at ¶¶ 185-86; **CLA-084**, *Chevron Corp. et al. v. Rep. of Ecuador (Lago Agrio)*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility, Feb. 27, 2012, ¶ 4.13.

⁶¹ **CLA-172**, *Chevron Corp. et al. v. Rep. of Ecuador (Commercial Cases)*, PCA Case No. AA277, UNCITRAL Arbitration Rules, Interim Award, Dec. 1, 2008 (Karl-Heinz Bockstiegel (Chairman); Albert Jan Van den Berg; and Charles N. Brower), at ¶¶ 185-86.

the particular transaction forms an integral part of an overall operation that qualifies as an investment.⁶²

34. In *Enron Corporation v. Argentina*, the tribunal found that “an investment is indeed a complex process including various arrangements This particular aspect was explained by an ICSID tribunal as ‘the general unity of an investment operation’ and by another tribunal considering an investment based on several instruments as constituting an ‘indivisible whole.’”⁶³ Professor Schreuer has described this doctrine as the “general unity of an investment operation” and opined that it is well-established in international investment law. Specifically, he stated:

It follows from this consistent case law that tribunals, when examining the existence of an investment for purposes of their jurisdiction, have not looked at specific transactions but at the overall operation. Tribunals have refused to dissect an investment into individual steps taken by the investor, even if these steps were identifiable as separate legal transactions. What mattered for the identification and protection of the investment was the entire operation directed at the investment’s overall economic goal.⁶⁴

35. Or, as the *Ambiente Ufficio v. Argentina* tribunal stated, “when a tribunal is in presence of a complex operation, it is required to look at the economic substance of the operation in question in a holistic manner.”⁶⁵ If investment tribunals interpret “investments” in a holistic manner, it stands to reason that “investment agreements” also should be interpreted holistically.

36. The Treaty’s context, object and purpose, negotiating history, and jurisprudence confirm this interpretation. A holistic interpretation comports with the purpose of applying the Treaty to complex transactions, which often include multiple, related parties.

⁶² **CLA-173**, *Ceskoslovenska obchodni banka, A.S. v. Slovakia*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, May 24, 1999 at ¶ 72.

⁶³ **CLA-114**, *Enron Corporation and Ponderosa Assets, L.P. v. Argentina*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, Jan. 14, 2004 at ¶ 70.

⁶⁴ **CLA-174**, Christoph Schreuer & Ursula Kriebaum, *At what time must legitimate expectations exist?*, in *A LIBER AMICORUM: THOMAS WALDE. LAW BEYOND CONVENTIONAL THOUGHT* (Jacques Werner & Arif Hyder Ali eds., 2010) 265 at 272.

⁶⁵ **CLA-175**, *Ambiente Ufficio S.P.A. and Others v. Argentina*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, Feb. 8, 2013 at ¶ 428.

37. Peru's only response to Renco's "structure and purpose" argument is that 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."⁶⁶ Renco's argument does not erase the distinction between Renco and Doe Run Peru. Renco's argument is that multiple, distinct parties might be parties or otherwise have rights under multiple instruments and that these instruments may constitute a single "investment agreement" under the Treaty so long as the various agreements satisfy all of the Treaty's requirements when viewed together. In contrast, Peru's conclusory response fails to explain how its hyper-technical interpretation comports with the Treaty's object and purpose in any way.

38. Peru also does not attempt to explain how its interpretation comports with the Treaty's negotiating history. Specifically, Peru's Ministry of External Commerce and Tourism stated at the final round of negotiations regarding the Treaty that:

This mechanism [of investor-state arbitration] also applies, by extension, to breaches, by a state, of a promise assumed in a particular manner with an investor who has acquired rights with respect to the exploration of natural resources, provision of public services, or development of infrastructure (investment agreements). Under this concept, mining concession contracts . . . and all contracts related to such contracts on which the investor relies to develop its investment are covered.⁶⁷

39. Mining concession contracts and all contracts related to such contracts often involve more than two parties as the Renco / Doe Run Peru / Doe Run Cayman / Metaloroya / Centromin / Peru transaction illustrates, with a Stock Transfer Agreement that incorporated dozens of concessions, authorizations, and licenses involving numerous governmental agencies as an "integral part" of that agreement. The Treaty's negotiating history confirms that all of these instruments constitute a single, "investment agreement" provided that the investor relied on them to develop its investment, and, in its Reply, Peru does not dispute that Renco relied on the Stock Transfer Agreement (including its annexes) and the Guaranty Agreement to develop its investment.

⁶⁶ Peru's Reply at ¶ 43.

⁶⁷ Renco's Supplemental Opposition at ¶¶ 116 (citing **Exhibit C-196**, 13th (final) Round of Negotiations of the Treaty) (emphasis added).

40. In its Supplemental Opposition, Renco cited the *Chevron v. Ecuador (Lago Agrio)* case in which that tribunal held that a concession executed in 1973 and a settlement agreement executed in 1995 comprised one single investment agreement because there was an “inextricable link” between the two instruments.⁶⁸ In its Reply, Peru argues that *Chevron* is distinguishable because that tribunal found “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.’ 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.”⁶⁹

41. Peru cites distinctions that make no difference. As the quote in Peru’s Reply demonstrates, the key rationale for why the *Chevron* tribunal held that the 1973 Concession and the 1995 Settlement Agreement constituted a single “investment agreement” was the “inextricable link” between the two. The Stock Transfer Agreement and the Guaranty Agreement are much more of an “elaboration” and part of “one overall investment agreement” than the relationship between a Concession executed in 1973 and a Settlement Agreement executed 22 years later. The Guaranty Agreement was executed within weeks of the Stock Transfer Agreement.⁷⁰ The Stock Transfer Agreement provides that Peru will guarantee all of Centromin’s obligations, and the Guaranty Agreement expressly refers to the Stock Transfer Agreement and guarantees all of Centromin’s obligations under that contract.⁷¹ And, as Renco’s witnesses have testified, the Guaranty Agreement was a *sine qua non* of Renco’s agreement to invest in the project.⁷²

⁶⁸ Renco’s Supplemental Opposition at ¶ 117.

⁶⁹ *Id.* at ¶ 40.

⁷⁰ **Exhibit C-002**, Contract of Stock Transfer between Empresa Minera del Centro del Peru S.A., Doe Run Peru S.R.L.TDA, The Doe Run Resources Corporation and The Renco Group, Inc., Oct. 23, 1997 at 66 (“Stock Transfer Agreement”); **Exhibit C-003**, Guaranty Agreement between the Republic of Peru and Doe Run Peru S.R. Ltda., Nov. 21, 1997, Clause 4 (“Guaranty Agreement”).

⁷¹ **Exhibit C-002**, Stock Transfer Agreement, Clause 10 at 58; **Exhibit C-003**, Guaranty Agreement, Clause 2.

⁷² Witness Statement of Mr. Dennis Sadlowski, Claimant’s Memorial on Liability, Annex-D, Feb. 19, 2014 at ¶ 12 (“Sادلowski Witness Statement”).

42. In short, multiple instruments may constitute a single “investment agreement” under the Treaty even if more than two parties are involved, as long as these multiple instruments, when viewed holistically, satisfy all of the elements of an “investment agreement.”

B. THE STOCK TRANSFER AGREEMENT AND THE GUARANTY AGREEMENT TOGETHER CONSTITUTE AN INVESTMENT AGREEMENT UNDER ARTICLE 10.28 OF THE TREATY

43. In its Supplemental Opposition, Renco demonstrated that the Stock Transfer Agreement (including its annexes) and the Guaranty Agreement satisfy the four key elements of an “investment agreement” under the Treaty.⁷³ In particular, they constitute: 1) a written agreement, 2) between a national authority and a covered investment or an investor, 3) on which the investment or investor relied in making the investment, and 4) which grants rights regarding natural resources, public services, and infrastructure.⁷⁴

44. In its Reply, Peru argues that the Stock Transfer Agreement and the Guaranty Agreement, considered either alone or together, do not satisfy three of these four elements. Peru does not dispute that Renco and Doe Run Peru relied on the Stock Transfer Agreement (including its annexes) and the Guaranty Agreement when they made their investment. As detailed below, Peru’s arguments regarding the remaining three elements fail.

1. A “Written Agreement”

45. As noted above, the Treaty defines “written agreement” as “an agreement in writing, executed by both parties, . . . that creates an exchange of rights and obligations, binding on both parties”⁷⁵ Peru contends that the Stock Transfer Agreement and the Guaranty Agreement do not satisfy this definition because they do not create an exchange of “rights” between Peru and Renco. In support of this contention, Peru asserts that the roles of Peru and Renco were “limited to roles as guarantors” and that “[n]either of them acquired any rights from either the Contract or the Guaranty.”⁷⁶

⁷³ Renco’s Supplemental Opposition at ¶¶ 126-134.

⁷⁴ *Id.*

⁷⁵ **CLA-001**, Treaty, Article 10.28 at 10-25 and 10-26.

⁷⁶ Peru’s Reply at ¶ 42.

46. Peru's contention lacks merit. First, Article 10.28 provides that an "investment agreement" may be an agreement between a "covered investment" and a national authority. Here, it is undisputed that Doe Run Peru qualifies as Renco's "covered investment"; Doe Run Peru acquired rights as a party to both the Stock Transfer Agreement and the Guaranty Agreement; and Doe Run Peru is bound by its obligations under the Stock Transfer Agreement.

47. Second, Peru acquired rights and is bound by its obligations under the Guaranty Agreement, the Stock Transfer Agreement and the concessions annexed to the Stock Transfer Agreement. Peru's assertion that it obtained no "rights" under the Guaranty Agreement and the Stock Transfer Agreement (including its annexes) is incorrect and belied by its own conduct. The Ministry of Energy and Mines (an authority at the central level of government) successfully argued in Doe Run Peru's bankruptcy proceeding that Doe Run Peru owes the Ministry US\$ 164 million for Doe Run Peru's failure to complete the final PAMA project.⁷⁷ On Peru's own case, this is a "right" that Peru acquired via these agreements.

48. Together, the Stock Transfer Agreement (including its annexes) and the Guaranty Agreement thus create an exchange of rights and obligations binding on both Doe Run Peru and the Republic of Peru. Moreover, even if Peru did not obtain any "rights" under these agreements (which is not true), the agreements still create an exchange of rights and obligations binding on both Doe Run Peru and the Republic of Peru because it is undisputed that: (1) Doe Run Peru acquired rights and assumed obligations under the agreements; and (2) Peru assumed obligations under the agreements. That is sufficient to satisfy this element of the Treaty's definition of "written agreement"; the definition does not require that both parties have acquired "rights" under the agreements.

49. In addition, Renco is a beneficiary of both the Stock Transfer Agreement and the Guaranty Agreement, with rights under Peruvian law, because the parties to those agreements intended to confer benefits upon Renco (an issue of fact that Renco will prove in this arbitration and that must be assumed as true during the 10.20(4) process).⁷⁸ Renco also undertook obligations as a signatory to the Stock Transfer Agreement and as a guarantor of Doe Run Peru's

⁷⁷ **Exhibit C-025**, Application filed by Ministry of Energy & Mines ("MEM") for Recognition of Claim, Comisión de Procedimientos Concursales del INDECOPI, Sept. 14, 2010.

⁷⁸ See Sections IV.A.1 and IV.A.2 below.

obligations under that agreement. Accordingly, the Stock Transfer Agreement (including its annexes) and the Guaranty Agreement also create an exchange of rights and obligations between Renco and the Republic of Peru.

2. “Between a National Authority of a Party and a Covered Investment or an Investor of Another Party”

50. Peru next argues that the Stock Transfer Agreement and the Guaranty Agreement are not between a national authority and a covered investment or an investor of the other Party.⁷⁹ This argument fails on its face. Doe Run Peru (Renco’s covered investment) and Renco (the U.S. investor) executed the Stock Transfer Agreement. Peru also is a party to several of the concessions that are annexed to the Stock Transfer Agreement. And the Guaranty Agreement is between the Republic of Peru and Doe Run Peru.

3. “That Grants Rights to the Covered Investment or Investor”

51. Peru contends that the Stock Transfer Agreement and the Guaranty Agreement do not grant rights with respect to natural resources that a national authority controls because this transaction was nothing more than a transfer of the La Oroya facility by Centromin.⁸⁰ This contention ignores that these two agreements are two key instruments that implement the privatization of an enormous, state-owned smelting and mining complex. The Treaty provides that the “investment agreement” must grant “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.” Through the Stock Transfer Agreement and the Guaranty Agreement, Doe Run Peru acquired from Peru numerous rights with respect to several natural resources including rights related to their exploration, extraction, refining, transportation, distribution, and sale.

52. Peru’s contention also ignores that the Stock Transfer Agreement confirmed the transfer of several concessions, licenses, and governmental authorizations and incorporated those

⁷⁹ Peru’s Reply at ¶ 42.

⁸⁰ *Id.*

instruments in annexes. Specifically, the Stock Transfer Agreement provides that: “All the annexes mentioned in this contract are incorporated into and form an integral part of contract.”⁸¹

53. Peru argues that, because Annex 8.5 is merely a “list” of the concessions—rather than the concessions themselves—only the list forms “an integral part of the contract,” not the actual concessions.⁸² Beyond this mere assertion, Peru makes no effort to explain how its restrictive reading of “integral part of the contract” comports with the mutual intent of the parties or any other rule of contract interpretation as opposed to the more natural reading that the concessions themselves form an integral part of the contract. But it is a moot point. The issue is not whether the annexed concessions constitute a technical “part” of the Stock Transfer Agreement under Peruvian law. The issue is whether they form part of the “investment agreement” under the Treaty. Because they were transferred to Doe Run Peru as part of a single transaction and because Renco relied on those instruments when making its investment, they form part of Renco’s “investment agreement.” And because national authorities grant rights with respect to natural resources in those instruments, Renco’s “investment agreement” satisfies this element of the Treaty’s definition of investment agreement.

54. In its Reply, Peru asserts that any “unilateral acts of an administrative or judiciary authority” listed in the annexes cannot constitute a “written agreement” under the Treaty citing to the definition of “written agreement” in footnote 16 of Article 10.28 of the Treaty.⁸³ Yet Peru ignores two key words in that definition. The second sentence of footnote 16 provides: “For greater certainty, (a) a unilateral act of an administrative or judiciary 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 . . . shall not be considered a written agreement.”⁸⁴ None of the legal instruments granting rights related to natural resources in the annexes is “standing alone.” They are only some of the instruments that together constitute Renco’s “investment agreement.”

⁸¹ **Exhibit C-002**, Stock Transfer Agreement, Clause 18.4 at 65.

⁸² Peru’s Reply at ¶ 34.

⁸³ *Id.* at ¶ 33.

⁸⁴ **CLA-001**, Treaty n.16.

55. In its Supplemental Opposition, Renco explained how its “investment agreement” also satisfies the “public services” and “infrastructure” prongs of the “investment agreement” definition under the Treaty.⁸⁵ In its Reply, Peru ignored these arguments entirely.

56. In sum, the Stock Transfer Agreement (including its annexes) and the Guaranty Agreement comprise Renco’s investment agreement. Those instruments are in writing and create an exchange of rights and obligations. They are between several national authorities and a covered investment. They grant rights related to natural resources, public services, and infrastructure. As such, they satisfy every element of an “investment agreement” under the Treaty.

C. THE STOCK TRANSFER AGREEMENT CONSTITUTES AN INVESTMENT AGREEMENT

57. Even though the Stock Transfer Agreement and the Guaranty Agreement must be considered together and holistically, the Stock Transfer Agreement in isolation also constitutes an investment agreement. Peru argues that a national authority did not execute the Stock Transfer Agreement because Centromin is not an authority at the central level of government and that “there is no question that” the Ministries of Energy & Mines, Agriculture, and Health—who executed various of the concessions, licenses, and authorizations in Stock Transfer Agreement’s annexes—“did not execute the Contract”⁸⁶ It does not matter whether these Ministries “executed” the Stock Transfer Agreement. Those Ministries executed the concessions, licenses, and authorizations in the annexes. Those concessions, licenses, and authorizations create an exchange of rights and obligations with respect to natural resources, public services, and infrastructure, and those instruments constitute an “integral part of the contract.”

D. THE GUARANTY AGREEMENT CONSTITUTES AN INVESTMENT AGREEMENT

58. Although the Guaranty Agreement, like the Stock Transfer Agreement, should not be viewed in isolation, it also satisfies the definition of “investment agreement” standing alone. The Republic of Peru and Renco’s covered investment (Doe Run Peru) executed it, and it confers benefits on Renco and Doe Run Peru via Peru’s guarantee of Centromin’s obligations under the

⁸⁵ Renco’s Supplemental Opposition at ¶ 133.

⁸⁶ Peru’s Reply at ¶ 30.

Stock Transfer Agreement. Peru argues that the Guaranty Agreement does not constitute an “investment agreement” because it does not “grant” rights with respect to natural resources. According to Peru, “at best, the Guaranty grants contractual obligations that ‘relate to’ natural resources.”⁸⁷ Peru again adopts an unwarranted narrow interpretation of the Treaty’s text and makes no effort to support that interpretation with the Treaty’s context or object and purpose. The term “with respect to” is synonymous with “relate to.” “Investment agreements” under the Treaty are not limited to instruments that “grant” direct rights to exploit natural resources. It is sufficient that they grant rights “with respect to” or that “relate to” natural resources. The non-exhaustive list under the Treaty’s definition (“such as their exploration, extraction, refining, transportation, distribution, or sale”) confirms that textual analysis. And, again, the fact that the Treaty is designed to apply to complex international investments in the real world reinforces that textual analysis. Simply put, for the sole purpose of inducing a foreign investor to invest in a project of important public significance on which no one would even bid, the Peruvian State guaranteed all of a state-owned mining company’s obligations contained in an agreement that transferred to a U.S. investor the right to indirectly own and operate a massive smelting and mining operation. That is more than sufficient for purposes of this element.

III. RENCO’S CLAIMS FOR BREACH OF THE INVESTMENT AGREEMENT

A. RENCO HAS STATED CLAIMS AGAINST PERU FOR BREACH OF RENCO’S RIGHTS UNDER THE INVESTMENT AGREEMENT

59. As explained above, the Stock Transfer Agreement and the Guaranty Agreement together constitute an “investment agreement” under Article 10.28 of the Treaty. In its Reply, Peru contends that, as a matter of Peruvian law, it cannot have breached any obligation to Renco under the investment agreement.⁸⁸ In support of this contention, Peru makes four main arguments, which are addressed in turn below.

⁸⁷ Peru’s Reply at ¶ 35.

⁸⁸ *Id.* at ¶ 45.

1. Renco Has Rights Under the Stock Transfer Agreement

a. *Renco is a party to the Stock Transfer Agreement*

60. Peru contends in its Reply that Renco does not have any rights under the Stock Transfer Agreement because it is not a party to the agreement.⁸⁹ In support of this contention, Peru asserts that Renco signed the Stock Transfer Agreement only as guarantor of Doe Run Peru's obligations and that Renco had no further role in the agreement after it was released as guarantor on October 27, 1997.⁹⁰ Peru's contention lacks merit for several reasons.

61. First, it is undisputed that Marvin Koenig signed the Stock Transfer Agreement on behalf of Renco.⁹¹ The agreement thus created rights and obligations as between Renco and Centromin as signatories and parties thereto. The fact that Centromin subsequently released Renco from its obligations as guarantor under the Stock Transfer Agreement does not negate Renco's status as a signatory and party to the agreement, with the right to enforce any provision of the agreement that inures to its benefit.

62. Second, the facts and circumstances relating to Renco's signature of the Stock Transfer Agreement confirm that it signed the agreement as a party with both rights and obligations thereunder. In particular, the following facts and circumstances confirm Renco's status as a party with rights under the Stock Transfer Agreement: (i) Renco and Doe Run Resources were awarded the bid for Metaloroya;⁹² (ii) Renco and Doe Run Resources negotiated the Stock Transfer Agreement point by point with representatives of Centromin and Peru;⁹³ (iii) Renco and Doe Run Resources formed Doe Run Peru in order to comply with a requirement under Peruvian law that the company purchasing the shares of Metaloroya must be a Peruvian company;⁹⁴ (iv) the plain language of the Stock Transfer Agreement establishes that Renco and

⁸⁹ Peru's Reply at ¶¶ 49-57.

⁹⁰ *Id.* at ¶ 53.

⁹¹ **Exhibit C-002**, Stock Transfer Agreement at 71.

⁹² Sadlowski Witness Statement at ¶ 19.

⁹³ *Id.* at ¶ 19-22; Witness Statement of Mr. Kenneth Buckley, Claimant's Memorial on Liability, Annex-A, Feb. 10, 2014 at ¶¶ 8-9 ("Buckley Witness Statement").

⁹⁴ **Exhibit C-047**, Consultation Round 2, Question Consultation No. 7 at 5 ("If the bidder that is Awarded the Bid or the subsidiary to which it transfers said award, is not Peruvian, and there is an intent to acquire shares that CENTROMIN possesses in the COMPANY, one or the other must establish a Peruvian subsidiary in order to

Doe Run Resources are intended beneficiaries of Centromin’s assumption of liability;⁹⁵ and (v) witness testimony establishes that it was the common intention of all signatories to the Stock Transfer Agreement (*i.e.*, Centromin, Metaloroya, Doe Run Peru, Renco and Doe Run Resources) that Centromin would assume liability for any third-party damages or claims against Renco and Doe Run Resources.⁹⁶

63. Third, Dr. de Trazegnies, a leading expert on Peruvian civil law, concludes on the basis of Renco’s and Doe Run Resources’ signature of the Stock Transfer Agreement and the other facts and circumstances discussed above that “it cannot be said that the role of Renco and Doe Run Resources was necessarily limited to appearing in the CONTRACT to grant a guarantee to the Peruvian Government.”⁹⁷

64. Accordingly, assuming the truth of all facts alleged by Claimant, Renco signed the Stock Transfer Agreement as a party with rights and obligations thereunder, not solely as a guarantor of Doe Run Peru’s obligations.

b. *Renco is an intended beneficiary of Centromin’s assumption of liability under Clauses 6.2 and 6.3 of the Stock Transfer Agreement*

65. As Renco explained in its Opposition and Supplemental Opposition, the facts alleged by Renco establish that it is an intended beneficiary of Centromin’s assumption of liability for third-party claims under Clauses 6.2 and 6.3 of the Stock Transfer Agreement.⁹⁸ The relevant factual allegations include:

- In July 1997, Peru’s Special Privatization Committee (“CEPRI”) awarded the bid for Metaloroya, the company holding the La Oroya Complex, to the Renco Consortium, which comprised Renco and The Doe Run Resources Corporation (“Doe Run Resources”).⁹⁹
- Representatives of the Renco Consortium, including Dennis Sadlowski (Vice President of Law for Renco) and Kenneth Buckley (Vice President of Smelting

execute the contract”); **Exhibit C-048**, Deed of Incorporation for Doe Run Peru, S.A., September 8, 1997. See also Buckley Witness Statement at ¶ 8; Sadlowski Witness Statement at ¶¶ 7-8.

⁹⁵ **Exhibit C-002**, Stock Transfer Agreement, Clauses 6.2 and 6.2 at 27.

⁹⁶ Sadlowski Witness Statement at ¶¶ 16, 23, 27, 30; Buckley Witness Statement at ¶ 12.

⁹⁷ Dr. de Trazegnies First Report, § 5.4 at 20. See Renco’s Supplemental Opposition at ¶¶ 156-159.

⁹⁸ See Renco’s Opposition at ¶¶ 35-58; Renco’s Supplemental Opposition at ¶¶ 35-52.

⁹⁹ Sadlowski Witness Statement at ¶ 19.

for Doe Run Resources), then negotiated the Stock Transfer Agreement with representatives of CEPRI and Centromin.¹⁰⁰

- During the negotiations, the representatives of the Renco Consortium “insisted that Centromin retain liability for third-party claims and that such protection must extend to Doe Run Peru, Renco, Doe Run Resources (all signatories to the STA), or any related parties.”¹⁰¹ In order “to ensure that the necessary clarification was there, Centromin agreed to draft [Clauses] 6.2 and 6.3 of the STA broadly, so that they encompassed claims against parent entities, or other third parties.”¹⁰² Centromin also agreed to draft Clauses 6.2 and 6.3 as “standalone” provisions,¹⁰³ separate from the indemnity clause (6.5) in the Stock Transfer Agreement.
- Marvin Koenig and Jeffrey Zelms signed the Stock Transfer Agreement on behalf of Renco and Doe Run Resources, respectively.¹⁰⁴
- Clauses 6.2 and 6.3 of the Stock Transfer Agreement broadly provide that “Centromin will assume liability for any damages and claims by third parties” relating to environmental contamination, irrespective of which member of the Renco Consortium is sued, except for the narrowly-defined damages and claims for which Doe Run Peru assumes liability under Clauses 5.3 and 5.4.¹⁰⁵
- Clause 18.1 of the Stock Transfer Agreement provides that Centromin’s written answers to the written questions by various bidders during the privatization and sale process of the La Oroya Facility have “supplemental validity” in the interpretation of the contract.¹⁰⁶ In one such answer, Centromin stated that it would “accept responsibility for all the contaminated land, water and air until the end of the period covered by the PAMA,” provided that “METALOROYA would fulfill the PAMA’s obligations which are their responsibility, otherwise, METALOROYA will be responsible from the date of non-compliance of the obligation.”¹⁰⁷

¹⁰⁰ *Id.* at ¶¶ 19-22; Buckley Witness Statement at ¶¶ 8-9.

¹⁰¹ Sadlowski Witness Statement at ¶ 16. *See also id.* at ¶ 23; Buckley Witness Statement at ¶ 12.

¹⁰² Sadlowski Witness Statement at ¶ 27.

¹⁰³ *Id.* at ¶ 30.

¹⁰⁴ **Exhibit C-002**, Stock Transfer Agreement at 71.

¹⁰⁵ **Exhibit C-002**, Stock Transfer Agreement, Clauses 6.2 and 6.3 at 27 (emphasis added).

¹⁰⁶ **Exhibit C-002**, Stock Transfer Agreement, Clause 18.1(A) at 64.

¹⁰⁷ **Exhibit C-047**, Centromin, Public International Bidding PRI-16-97 – Second Round of Consultation and Answers, Mar. 26, 1997, Question 41 at 41 (“Consultation Round 2”).

c. *Peru wrongly seeks to limit the relevant factual allegations*

66. In its Reply, Peru contends that the Tribunal should disregard the foregoing factual allegations, which it claims are “irrelevant” to its preliminary objection.¹⁰⁸ As discussed in Section II above, however, Article 10.20(4)(c) of the Treaty requires the Tribunal to consider all of Renco’s factual allegations (and to assume their truth) in deciding Peru’s objection.

67. Peru contends also that: (1) Mr. Sadlowski’s witness statement is unreliable because he “relies heavily on hearsay and unsupported assertions”;¹⁰⁹ and (2) his testimony regarding the common intention of the parties at the time that they concluded the Stock Transfer Agreement is “wrong” because it conflicts with the negotiating history of Clauses 6.2 and 6.3.¹¹⁰ Both of these contentions are without merit at this stage of the proceedings because Article 10.20(4)(c) requires the Tribunal to assume the truth of all of Renco’s factual allegations, including the factual allegations contained in Mr. Sadlowski’s witness statement.¹¹¹

68. In any event, Mr. Sadlowski’s testimony undermines Peru’s assertion that he “relies heavily on hearsay and unsupported assertions.” As Mr. Sadlowski explains in his witness statement:

I was personally involved in, and directed, on behalf of Renco and [Doe Run Resources], the negotiations of [the Stock Transfer Agreement] with [Centromin] that privatized the [La Oroya Complex]. I spent significant amounts of time in Peru in April 1997, when the bid documents were finalized and submitted, spent approximately two months living in Peru between July and September 1997, and spent an additional six weeks prior to the signing of the STA, during which time I attended numerous meetings with Centromin/CEPRI officials. While I do not speak Spanish, I directed the negotiations for Renco and Doe Run Resources, and Spanish-speaking counsel from the United States and Peru carried out my instructions.¹¹²

¹⁰⁸ Peru’s Reply at ¶¶ 8-10.

¹⁰⁹ *Id.* at ¶ 12.

¹¹⁰ *Id.* at ¶ 69 n.175.

¹¹¹ See Sections I and II above.

¹¹² Sadlowski Witness Statement at ¶ 6 (emphasis added).

I was present at most of the negotiating sessions concerning the STA, or was briefed upon the completion of each session.¹¹³

69. Peru's contention that Mr. Sadlowski's testimony conflicts with the negotiating history of Clauses 6.2 and 6.3 likewise lacks merit. Peru asserts that "Mr. Sadlowski is wrong to say that that the language of Clauses 6.2 and 6.3 responds to DRP's request [to extend protection from third-party damages and claims to Renco and Doe Run Resources] during the negotiation of the Contract . . . because the Model Contract which predates Renco's participation in the bidding, already contained a clause similar to Clauses 6.2 and 6.3."¹¹⁴ While true that the Model Contract contained an assumption of liability clause, the parties significantly modified the language of that clause during the negotiation of the Stock Transfer Agreement, ultimately agreeing to include four separate assumption of liability clauses (5.3, 5.4, 6.2 and 6.3) in the final version of the agreement.¹¹⁵ Moreover, as Mr. Sadlowski explains in his witness statement, Centromin agreed to draft Clauses 6.2 and 6.3 as "standalone" provisions, separate from the indemnity clause (6.5) which the parties added to the Stock Transfer Agreement during the negotiations.¹¹⁶ Accordingly, the negotiating history of Clauses 6.2 and 6.3 fully accords with Mr. Sadlowski's testimony that the parties drafted these clauses broadly to ensure that they encompassed third-party damages and claims against Renco and Doe Run Resources.

d. *Renco is an intended beneficiary of the Stock Transfer Agreement even if it is not a party to that agreement*

70. While Renco signed and is a party to the Stock Transfer Agreement, its status as a party is irrelevant to Peru's preliminary objection because Peru recognizes that a contract creates rights in favor of an intended beneficiary, even if the intended beneficiary is not a party to the agreement. In particular, Peru states that "[c]ontracts for the benefit of third parties under

¹¹³ *Id.* at ¶ 22 (emphasis added).

¹¹⁴ Peru's Reply at ¶ 69 n.175.

¹¹⁵ Compare **Exhibit C-071**, Model Contract, Capital Increase and Share Subscription Contract of Empresa Metalurgica La Oroya S.A, February 6, 1997 ("Model Contract"), Clause 4.2 at 5, with **Exhibit C-002**, Stock Transfer Agreement, Clauses 5.3, 5.4, 6.2 and 6.3 at 21-23, 27.

¹¹⁶ Sadlowski Witness Statement at ¶ 30. The Model Contract contained an assumption of liability clause but not an indemnity clause. See **Exhibit C-071**, Model Contract, Clause 4.2 at 5.

Articles 1457 to 1469 of the [Peruvian] Civil Code are entered into by the promisor and promisee for the purpose of bestowing a benefit on a third party.”¹¹⁷

71. Peru contends that Renco is not an intended beneficiary of the Stock Transfer Agreement because Centromin and Doe Run Peru “did not enter into the Contract to bestow a benefit on Renco.”¹¹⁸ However, Peru’s bald assertion regarding the parties’ intentions is directly contrary to the text of Clauses 6.2 and 6.3 of the Stock Transfer Agreement in the context of the agreement as a whole, as well as Mr. Sadlowski’s testimony that “Centromin agreed to draft [Clauses] 6.2 and 6.3 broadly, so that they encompassed claims against parent entities, or other third parties.”¹¹⁹ Peru’s assertion conflicts also with Renco’s other factual allegations (summarized above) establishing that it is an intended beneficiary of Centromin’s assumption of liability under Clauses 6.2 and 6.3, including that: (1) Centromin assured investors when answering questions during the bidding process that it would assume liability for all damages and claims relating to environmental contamination until the end of the period covered by the PAMA; (2) representatives of Renco and Doe Run Resources negotiated the Stock Transfer Agreement; and (3) Renco and Doe Run Resources signed the Stock Transfer Agreement.¹²⁰

72. Quoting Professor Cárdenas’ second report, Peru also contends that Renco is not an intended beneficiary of Centromin’s assumption of liability under Clauses 6.2 and 6.3 of the Stock Transfer Agreement because “the text of the Contract does not clearly provide for such exceptional benefit.”¹²¹ However, Professor Cárdenas fails to cite any authority for his statement that a right in favor of an intended beneficiary must be “clearly” provided for in the text of the contract,¹²² and that statement is incorrect as a matter of Peruvian law. As Dr. de Trazegnies explains in his second report dated November 23, 2015, while the Peruvian Civil Code contains 13 articles referring to contracts in favor of an intended beneficiary, it does not include any

¹¹⁷ Peru’s Reply at ¶ 58.

¹¹⁸ *Id.*

¹¹⁹ Sadlowski Witness Statement at ¶ 27.

¹²⁰ See ¶ 65 *supra*; Renco’s Opposition at ¶¶ 35-58; Renco’s Supplemental Opposition at ¶¶ 35-52.

¹²¹ Peru’s Reply at ¶ 64 (quoting Cárdenas Second Legal Opinion at ¶ 59).

¹²² See Second Legal Opinion of Carlos Cárdenas Quirós, Oct. 27, 2015 at ¶ 59 (“Cárdenas Second Legal Opinion”).

special rules of interpretation applicable to such contracts.¹²³ Instead, the normal rules of contract interpretation under Peruvian law, including those set forth in Articles 168, 170, 1361 and 1362 of the Civil Code, apply to contracts in favor of an intended beneficiary.¹²⁴ Professor Oquendo confirms that this is the applicable rule under Peruvian law and in the rest of Latin America: “ordinary interpretation principles, which privilege the parties’ intent, apply when determining whom the contract benefits or entitles and to what exactly.”¹²⁵ As Renco explained in its Opposition dated April 17, 2015, these rules require Clauses 6.2 and 6.3 of the Stock Transfer Agreement to be interpreted in accordance with (i) their plain terms; (ii) the principle of good faith; (iii) the nature and purpose of the agreement; and (iv) the common intention of the parties at the time they concluded the agreement.¹²⁶

73. Moreover, even assuming that a right in favor of an intended beneficiary must be “clearly” provided for in the text of the contract, Renco qualifies as an intended beneficiary of Centromin’s assumption of liability under Clauses 6.2 and 6.3 of the Stock Transfer Agreement. The following textual factors clearly establish Renco’s intended beneficiary status:

- Clauses 6.2 and 6.3 broadly provide, in clear and unambiguous terms, that “Centromin will assume liability for any damages and claims by third parties” relating to environmental contamination, except for the narrowly-defined damages and claims for which Doe Run Peru assumes liability under Clauses 5.3 and 5.4.¹²⁷ The phrase “any damages and claims by third parties” in Clauses 6.2 and 6.3 encompasses third-party damages and claims against Renco and Doe Run Resources, not least because: (1) Renco and Doe Run Resources were awarded the bid for Metaloroya, which they then assigned to Doe Run Peru, a locally incorporated entity, in accordance with Peruvian law; (2) representatives of Renco and Doe Run Resources negotiated the Stock Transfer Agreement; and (3) Renco and Doe Run Resources both signed the Stock Transfer Agreement.
- If the parties had intended to exclude third-party damages and claims against Renco and Doe Run Resources from the scope of Centromin’s assumption of liability under Clauses 6.2 and 6.3, they would have omitted the word “any” and added the phrase “against the Company” (*i.e.*, Metaloroya or Doe Run Peru, after the merger of Metaloroya and Doe Run Peru). Clauses 6.2 and 6.3 then would

¹²³ Dr. de Trazegnies Second Report § 1.4 at 12. *See also* **Exhibit C-159**, Peruvian Civil Code, Articles 1457 to 1469.

¹²⁴ Dr. de Trazegnies Second Report § 1.4 at 12.

¹²⁵ Dr. Oquendo Report, § IV.B at 15.

¹²⁶ *See* Renco’s Opposition at ¶¶ 61-84.

¹²⁷ **Exhibit C-002**, Stock Transfer Agreement, Clauses 6.2 and 6.3 at 27 (emphasis added).

have provided as follows: “Centromin will assume liability for damages and claims by third parties against the Company”

- If the parties had intended for the assumption of liability clauses merely to define the scope of Centromin’s obligation to indemnify Doe Run Peru under Clause 6.5, as Peru contends,¹²⁸ they would have drafted the former clauses as sub-paragraphs of the latter clause. Instead, the parties drafted the assumption of liability clauses as independently-numbered clauses (6.2 and 6.3) that precede Clause 6.5 and are separated from it by an unrelated provision (Clause 6.4). The placement of the assumption of liability clauses in the text confirms that the parties intended these clauses to have independent, operative effect.
- The text of the Model Contract likewise confirms that the parties intended the assumption of liability clauses in the Stock Transfer Agreement to have independent, operative effect. The Model Contract (which Peru and Centromin prepared) contained an assumption of liability clause (4.2) but not an indemnity clause.¹²⁹ Peru and Centromin cannot have intended the assumption of liability clause in the Model Contract merely to define the scope of Centromin’s (non-existent) indemnity obligation. Moreover, it would be unreasonable to conclude that the addition of the separate indemnity clause (6.5) during the negotiation of the Stock Transfer Agreement was intended to deprive the assumption of liability clauses (6.2 and 6.3) of their independent, operative effect.

e. *Peru and Professor Cárdenas mischaracterize Peruvian contract interpretation principles*

74. Relying on Professor Cárdenas’ second report, Peru contends that: (1) liability-creating provisions must be interpreted “restrictively rather than expansively” under Peruvian law; and (2) “in this case there is no basis to construe [Centromin’s assumption of liability] to extend to an unidentified, indeterminate and limitless number of persons and entities.”¹³⁰ Again, however, Professor Cárdenas fails to cite any authority for his statement as to Peruvian contract law, while Professor de Trazegnies explains that no special rule of interpretation applies to liability-creating provisions.¹³¹ In any event, Renco’s factual allegations provide a solid foundation for construing Clauses 6.2 and 6.3 as extending protection to anyone who could be sued by a third party for damages and claims falling within the scope of Centromin’s assumption of liability. Above all, the plain language of Clauses 6.2 and 6.3 supports this interpretation

¹²⁸ See Peru’s Reply at ¶¶ 65-66.

¹²⁹ See **Exhibit C-071**, Model Contract, Clause 4.2 at 5.

¹³⁰ Peru’s Reply at ¶ 60.

¹³¹ Dr. de Trazegnies Second Report at § 1.2 at 9.

because it provides that “Centromin will assume liability for any damages and claims by third parties,” irrespective of who is sued. Moreover, Mr. Sadlowski testifies that “Centromin agreed to draft [Clauses] 6.2 and 6.3 of the STA broadly, so that they encompassed claims against parent entities, or other third parties.”¹³²

75. Peru and Professor Cárdenas also contend that if the words of a contract do not correspond to the parties’ common intention, “the result [under Article 1361 of the Civil Code] is that the contract is not formed.”¹³³ This contention is incorrect as a matter of Peruvian law. As Professor de Trazegnies explains, Article 1361 establishes the fundamental principle that a contract must be interpreted in accordance with the common intention of the parties, even if the words of the contract do not correspond to that intention.¹³⁴ In any event, Peru’s and Professor Cárdenas’ mischaracterization of Article 1361 of the Civil Code has no relevance to Peru’s preliminary objection because the text of Clauses 6.2 and 6.3 of the Stock Transfer Agreement comports with the evidence of the parties’ common intention.

f. *Peru mischaracterizes U.S. case law*

76. Peru contends that the U.S. cases cited by Renco in its Opposition “provide no support for Renco’s defense” because “[n]one of the cases . . . considers whether an entity that is not a party to the relevant contract can use the contractual [assumption of liability] clause as a shield against third-party claims.”¹³⁵ This contention is incorrect. As Renco explained in its Opposition, the Court of Appeals for the Third Circuit concluded in *Caldwell Trucking v. Rexon Technology Corporation* that the plaintiff, a non-party to the stock purchase agreement, was entitled to assert a contribution claim for environmental liabilities directly against the polluter’s former parent company on the basis of the parent company’s express assumption of liability in the stock purchase agreement.¹³⁶

77. Peru’s attempt to distinguish the other U.S. cases that Renco cited on this basis also is illogical because it would mean that while a third party (Party C) could invoke an

¹³² Sadlowski Witness Statement at ¶ 27 (emphasis added).

¹³³ Peru’s Reply at ¶ 67 (quoting Cárdenas Second Legal Opinion at ¶ 3).

¹³⁴ Dr. de Trazegnies Second Report at §§ 1.1, 1.2 at 6, 7-9.

¹³⁵ Peru’s Reply at ¶ 71.

¹³⁶ **CLA-005**, *Caldwell Trucking PRP v. Rexon Technology Corp.*, 421 F.3d 234, 243-44 (3d Cir. 2005). *See also* Renco’s Opposition at ¶¶ 96-97.

assumption of liability clause in a contract by bringing an action directly against the party to the contract that assumed the liability (Party A), the other party to the contract (Party B) could not invoke that same clause if Party C sued it instead of suing Party A. Given that Party B negotiated and contracted with Party A for the assumption of liability clause, it would be illogical to conclude that the parties intended that clause to extend protection only to third parties but not to Party B. Similarly, it would be illogical to interpret an assumption of liability clause in a contract as extending protection to any third party who may be injured by environmental contamination, but not to a party to the contract or its parent company who is sued by such a third party for damages falling within the scope of the assumption of liability. Not surprisingly, the Court in *Caldwell Trucking* rejected that interpretation.

2. Renco Has Rights Under the Guaranty Agreement

78. Peru contends that Renco “has no rights under the Guaranty” because Clause 2.1 of the Guaranty Agreement provides that “THE STATE hereby guarantees THE INVESTOR [i.e., Doe Run Peru] the representations, assurances, guarantees and obligations assumed by THE TRANSFEROR [i.e., Centromin] under the [Stock Transfer Agreement].”¹³⁷ Based on the language of Clause 2.1, and in particular the words “THE INVESTOR,” Peru contends that “[t]he rights under the Guaranty . . . run to DRP, and not to Renco.”¹³⁸

79. As discussed above, however, Renco was not only a signatory to the Stock Purchase Agreement, Renco was an intended beneficiary of Centromin’s assumption of liability under Clauses 6.2 and 6.3 of the Stock Transfer Agreement.¹³⁹ Clause 2.1 of the Guaranty Agreement provides that Peru “guarantees” all of Centromin’s “obligations” under the Stock Transfer Agreement, including its obligation under Clauses 6.2 and 6.3 to assume liability for third-party damages and claims relating to environmental contamination. Given that Peru actively participated in the negotiation of the Stock Transfer Agreement, and that it was therefore aware of Renco’s status as an intended beneficiary of Clauses 6.2 and 6.3, it can clearly be inferred that the Republic of Peru and Doe Run Peru (the parties to the Guaranty Agreement)

¹³⁷ Peru’s Reply at ¶ 81.

¹³⁸ *Id.*

¹³⁹ See Sections III.A.1.a and III.A.1.b above.

intended that Peru’s guarantee of Centromin’s obligations under the Stock Transfer Agreement would inure to the benefit of Renco.

3. The Guaranty Agreement Is Not Void

80. In an attempt to avoid its obligations under the Guaranty Agreement, Peru argues that the Guaranty Agreement is void under Peruvian law as a result of Doe Run Peru’s assignment to Doe Run Cayman of its rights and obligations under the Stock Transfer Agreement. Peru argues that Article 1439 of the Peruvian Civil Code governs the Guaranty Agreement and requires express consent by the guarantor—here Peru—to the assignment, failing which the Guaranty Agreement is void. But contrary to Peru’s assertions, Article 1439 of the Peruvian Civil Code does not apply to the Guaranty Agreement because Article 1439 applies only if: (a) Peru is a third party to the Stock Transfer Agreement (which it is not); and (b) the assignor is the debtor of the guaranteed obligation, not the creditor. In any event, even if Article 1439 were to apply, the Guaranty Agreement would be valid because: (c) Peru consented in advance to Doe Run Peru’s assignment of its position as Investor under the Stock Transfer Agreement; and (d) an unauthorized assignment does not void the guaranty under Article 1439.

a. *Peru is not a “third party” with respect to Centromin*

81. Article 1439 of the Peruvian Civil Code applies guarantees offered by *third parties* in favor of the secured creditor: “[t]he guarantees offered by a third party do not pass to the assignee without the express authorization of the third party.”¹⁴⁰ The threshold question as to the applicability of Article 1439 to the Guaranty Agreement is thus whether the Guaranty Agreement was “offered by a third party.” In its Supplemental Opposition, Renco demonstrated that Peru was not a “third-party” guarantor to the business deal that Renco and Peru reached and memorialized in the Stock Transfer Agreement.¹⁴¹ Rather, Peru was an essential and necessary party to the Stock Transfer Agreement, and of course, the Guaranty Agreement. It was one and the same with the debtor—Centromin—and Peru’s guarantee of Centromin’s obligations under the Stock Transfer Agreement was tantamount to the debtor guaranteeing its own obligations.

¹⁴⁰ **RLA-42**, Peruvian Civil Code, Article 1439 (“*Las garantías constituidas por terceras personas no pasan al cesionario sin la autorización expresa de aquellas*”).

¹⁴¹ Renco’s Supplemental Opposition at ¶¶ 178-181.

82. In its Reply, Peru acknowledges that Article 1439 applies only to third-party guaranties, but it insists that “Peru was not a party – essential or otherwise – to the [Stock Transfer Agreement.]”¹⁴² In making this argument, Peru relies on the formal separateness between Centromin and the Republic of Peru to argue that Article 1439 of the Peruvian Civil Code applies to the Guaranty Agreement. Peru’s argument should be rejected because it elevates form over substance.

83. As Renco explained in its Supplemental Opposition, the Stock Transfer Agreement is not a simple share purchase agreement between two private, commercial companies.¹⁴³ It was the result of a long and carefully planned Peruvian privatization process, resulting from a political decision taken at the highest levels of the Peruvian Government and closely directed by Peru. Peru—through COPRI, CEPRI, and its Ministry of Energy & Mines—decided to privatize Centromin, and when its attempt failed, it decided to privatize only the Complex (and Centromin pliantly followed Peru’s lead and change of strategy). The bidding procedures, the negotiations, and the final terms of the deal were all driven by Peru directly and indirectly through its various organs and instruments.¹⁴⁴ For Renco, the State guaranty was a key component of the deal going forward. In fact, the Guaranty Agreement was issued under a *special* regulatory framework designed to give special guaranties and securities to investors, particularly in the context of privatizations.¹⁴⁵ Article 1439 has simply no place in this context.

84. Contrary to Peru’s assertions, the existence of the Guaranty Agreement does not negate Peru’s role in the privatization.¹⁴⁶ Rather, it confirms that Peru not only planned and

¹⁴² Peru’s Reply at ¶ 75.

¹⁴³ Renco’s Supplemental Opposition at ¶¶ 179-181.

¹⁴⁴ The terms of the Guaranty Agreement explicitly recognize Peru’s role in the Stock Transfer Agreement:

The STATE hereby acknowledges and guaranties that the Special Committee established pursuant to the provisions set forth in Supreme Resolution 102-92-PCM, carried out the International Public Bidding for Private Investment Promotion in Empresa Metalurgica La Oroya S.A. – METALOROYA, and the bid was awarded to the consortium formed by THE RENCO GROUP INC and THE DOE RUN RESOURCES CORP.

Exhibit C-003, Guaranty Agreement, Clause 2.2.

¹⁴⁵ See **Exhibit C-193**, Legislative Decree No. 674, Sept. 27, 1991; **Exhibit C-226**, Law Decree 25570; **Exhibit C-198**, Law 26438, Jan. 16, 1995 and **Exhibit C-159**, Peruvian Civil Code, Article 1357.

¹⁴⁶ Peru argues “the existence of the Guaranty thus demonstrates that Peru and Centromin are distinct entities.” Peru’s Reply at ¶ 75. Renco does not deny Centromin’s distinct legal personality. However, this is irrelevant for purposes of the analysis under Article 1439 of the Peruvian Civil Code.

directed the privatization, but also saw fit to provide assurances and guaranties to the winning bidder. As Renco’s factual allegations establish, the Stock Transfer Agreement would never have been concluded without Peru’s essential role in the transaction.¹⁴⁷

85. In addition, Peruvian law does not prohibit a legal person from acting in multiple capacities in a single transaction.¹⁴⁸ There is no prohibition on a person or entity being both a party to a contract and also a guarantor of another party’s obligations under the contract.

b. *Article 1439 applies only when the assignor is the debtor of guaranteed obligation, not the creditor*

86. In its Supplemental Opposition, Renco demonstrated that Article 1439 of the Peruvian Civil Code is triggered only if the debtor—not the creditor—assigns its rights and obligations to another party.¹⁴⁹ Indeed, Article 1439 is intended to protect a guarantor that has already done diligence on the debtor’s solvency and ability to perform the contractual obligations that are to be guaranteed. If the identity of the debtor changes, it is fair to allow the guarantor to perform a new assessment of risk and decide whether the guarantee should remain in place for the new debtor. The same concerns are not present, however, if the identity of the secured creditor changes—the diligence underlying the guarantor’s decision to issue the guaranty is not impacted by a change of creditor, only by a change of debtor.

87. In its Reply, Peru responds that Article 1439 is not limited to assignments by debtors but also extends to assignments by creditors.¹⁵⁰ Professor Cárdenas similarly asserts that Article 1439 does not distinguish between the debtor whose debt is guaranteed and the beneficiary of the guaranty.¹⁵¹ However, such a literal reading of Article 1439 ignores its object and purpose. As Professor De Trazegnies explains:

[T]he norms [of the Civil Code] should be interpreted taking into account the concrete situation and the results expected from it. In the case of [Article 1439], logically, the situation of the guarantor is very different if

¹⁴⁷ Sadlowski Witness Statement at ¶ 12.

¹⁴⁸ **Exhibit C-159**, Peruvian Civil Code, Article 1354: “The parties are free to determine the content of the contract, provided it is not contrary to a mandatory legal rule.”

¹⁴⁹ Renco’s Supplemental Opposition at ¶¶ 182-185.

¹⁵⁰ Peru’s Reply at ¶ 77.

¹⁵¹ Cárdenas Second Legal Opinion at ¶ 92.

we speak of the assignment of the guaranteed debtor or the creditor benefiting from the guarantee. Therefore, it can be understood that the norm seeks to protect the guarantor before an assignment of the debtor, in other words the part for which it should cover, being that this is the situation that represents a risk for the guarantor. The assignment on the part of the creditor of the guarantee would not affect the guarantor in the same manner, and, therefore no reason would exist to apply the norm in this supposition.¹⁵²

88. As Renco explained in its Supplemental Opposition,¹⁵³ the purpose of Article 1439 is to protect the guarantor from the risk that the debtor will assign its guaranteed obligations to a party that may be unknown to the guarantor and that may have a greater risk of default, thereby exposing the guarantor to a greater risk. This is precisely the example given by commentators to Article 1439 of the Peruvian Civil Code:

[A]ccording to article 1439 of the Civil Code, guarantees granted by third parties do not pass to the assignee without the guarantor's consent. This is explained by a matter of trust, as described above. For example, if in a lease agreement "D" is the guarantor of the debt assumed by "A" in favor of "B" (which is to pay rent) and now "A's contractual position is assigned to "C", it is not reasonable to oblige "D" to keep the guarantee originally granted in favor of "A," now in favor of "C." It is evident that "D" had a certain level of trust in "A," but "C," however, could be a complete stranger to "D."¹⁵⁴

Thus, Article 1439 is triggered only when the party whose debt is guaranteed assigns its contractual position.

89. Professor Cárdenas further opines that there is no reason for the distinction between assignments by debtors and assignments by creditors, stating that in a contract of "reciprocal considerations both parties are simultaneously creditor and debtor of one another."¹⁵⁵ However, this remark is inapposite for purposes of the Guaranty Agreement. The Guaranty Agreement guarantees Centromin's obligations under the Stock Transfer Agreement, *i.e.*, Centromin is clearly the debtor under the Guaranty Agreement.

¹⁵² Dr. de Trazegnies Second Report at § 2.2 at 15.

¹⁵³ Renco's Supplemental Opposition at ¶ 182.

¹⁵⁴ **CLA-089**, Revista Jurídica del Perú, 94 GACETA JURÍDICA 426 (2008) (emphasis added).

¹⁵⁵ Cárdenas Second Legal Opinion at ¶ 92.

c. *Peru has given its express consent in advance*

90. In any event, even if Peru's consent were needed for Doe Run Peru's assignment of rights to Doe Run Cayman (which it was not), Peru granted its advance consent to the assignment. As Renco explained in its Supplemental Opposition, Peru consented to an assignment by Doe Run Peru of its position as the "Investor" through Clauses 10 and 7.2 of the Stock Transfer Agreement.¹⁵⁶ Read together, these two clauses make it clear that Peru (on its own and through Centromin) accepted and approved in advance Doe Run Peru's assignment of its rights and obligations under the Stock Transfer Agreement to an affiliated company (here, Doe Run Cayman). Among the contractual rights that Doe Run Peru has and could assign (and did assign) is the right to be protected by the Guaranty Agreement as contemplated in Clause 10 of the Stock Transfer Agreement. And the Guaranty Agreement expressly recognized that it "shall be in force as long as, pursuant to the [Stock Transfer Agreement] mentioned in numeral 1.1. hereof, [Centromin] has pending obligations,"¹⁵⁷ which Centromin certainly has to this day.

91. Peru contends that it could not have given consent to assignment through the Stock Transfer Agreement because it is not a party to that agreement¹⁵⁸ and that any such consent had to be included in the Guaranty Agreement.¹⁵⁹

92. First, as stated above, Peru expressly agreed that that Guaranty Agreement "shall be in force" for as long as Centromin "has pending obligations."¹⁶⁰ This unqualified language reflects the Parties' common intent and understanding that the Guaranty Agreement is to remain in place as long as Centromin has obligations under the Stock Transfer Agreement. Any non-mandatory provision contained in the Civil Code contrary to this agreement (such as Article 1439, as interpreted by Peru) is inapplicable.

93. Second, under Clause 2.1 of the Guaranty Agreement, Peru expressly guaranteed Centromin's "representations" and "assurances" in the Stock Transfer Agreement.¹⁶¹ These "representations" and "assurances" included the consents to assignment that Centromin granted

¹⁵⁶ Renco's Supplemental Opposition at ¶¶ 185-187.

¹⁵⁷ **Exhibit C-003**, Guaranty Agreement, Article 4.

¹⁵⁸ Peru's Reply at ¶ 79.

¹⁵⁹ Peru's Reply at ¶ 80; Cárdenas Second Legal Opinion at ¶ 94.

¹⁶⁰ **Exhibit C-003**, Guaranty Agreement Clause 4.

¹⁶¹ *Id.* at Clause 2.1.

in Clause 10 of the Stock Transfer Agreement. Moreover, as Renco's factual allegations (which must be assumed as true) establish, Peru actively participated in the negotiation of the Stock Transfer Agreement, which had already been signed at the time Peru signed the Guaranty Agreement.¹⁶² Peru thus expressly consented in advance to the assignment through Clause 2.1 of the Guaranty Agreement and Clause 10 of the Stock Transfer Agreement.

d. *Article 1439 does not void guaranties*

94. As Renco explained in its Supplemental Opposition, Article 1439 does not invalidate, void, or extinguish guaranties in case of assignment without approval.¹⁶³ Rather, as Article 1439 specifically sets forth, the consequence in case of non-approval of an assignment is that the guaranties "do not pass" to the assignee.¹⁶⁴ Thus, contrary to what Peru argues, the guaranty is not void; its effects are limited with respect to the assignee, *i.e.*, the assignee will not benefit from the guaranty. Nothing in Article 1439 suggests that co-beneficiaries of the guaranty (here, Renco and Doe Run Resources) would not be entitled to assert claims under the guaranty. Peru does not even address Renco's argument in its Reply.

95. Professor De Trazegnies explains that:

[T]he legal consequence that the Civil Code establishes is that the guarantee "does not transfer" to the assignee. As Prof. Cardenas affirms in his second report, this means that the guarantees 'are non-transferable.' However, later in his report, Prof. Cardenas states that as a consequence of the application of this article, the guarantee issued by the State, 'has become automatically extinguished after producing a total assignment of the contractual position of an 'investor' from DRP to Doe Run Cayman Ltd.' I personally disagree with this opinion. In my opinion, according to this article, the guarantee is maintained in the name of the original beneficiaries, without transferring to the name of the assignee, however it is not extinguished.¹⁶⁵

96. Peru's reading of Article 1439 is improper under Peruvian law. Because Article 1439 clearly enunciates that non-approval of an assignment results only in the guaranties not

¹⁶² Sadlowski Witness Statement at ¶ 6, 22-23.

¹⁶³ Renco's Supplemental Opposition at n.308.

¹⁶⁴ **Exhibit C-159**, Peruvian Civil Code, Article 1439.

¹⁶⁵ Dr. de Trazegnies Second Report at §2.2 at 15-16 (citations omitted).

“passing” to the assignee,¹⁶⁶ the guaranties thus continue to inure to the benefit of any original co-beneficiaries.

4. Renco’s Claims for Breach of the Guaranty Agreement Are Ripe

97. Although Renco has explained why it is not required to submit its claims to the expert procedure set forth in the Stock Transfer Agreement, Peru continues to assert that “the expert procedures set out in clauses 5.3(A) or 5.4(C) are preconditions to any assumption of liability.”¹⁶⁷ This is incorrect. The expert procedure constitutes a precondition only if a dispute is submitted to arbitration in accordance with Clause 12 of the Stock Transfer Agreement. Here, Renco has submitted its dispute with Peru to arbitration in accordance with Article 10.16.1 of the Treaty, not Clause 12 of the Stock Transfer Agreement. Accordingly, the expert procedure contained in the Stock Transfer Agreement is inapplicable and has no bearing on the ripeness of Renco’s claim. In any event, because Activos Mineros categorically has denied that it has any responsibility whatsoever for claims asserted against Renco in the St. Louis Lawsuits, it would be futile for Renco to initiate an expert procedure under Clauses 5.3(A) and 5.4(C) of the Stock Transfer Agreement.¹⁶⁸

98. With respect to Renco’s claim that Peru failed to honor the *force majeure* clause in the Stock Transfer Agreement by failing to grant Doe Run Peru a PAMA extension, Peru makes only one statement in its Reply, namely that this claim cannot succeed because “Activos Mineros cannot be held responsible for failing to extend a deadline which was not set in the Contract and which it did not have the power to extend.”¹⁶⁹ However, in its Supplemental Opposition, Renco explained that Centromin agreed that, in cases of economic *force majeure*, it would not insist on Doe Run Peru fulfilling its obligations under the Stock Transfer Agreement.¹⁷⁰ Peru guaranteed that undertaking, *i.e.*, Peru agreed that Centromin—which Peru used as a vehicle to implement its privatization policy—would not insist on performance in cases

¹⁶⁶ **Exhibit C-159**, Peruvian Civil Code, Article 1439. Peru’s argument also conflicts with Article 219 of the Peruvian Civil Code, which provides the limited grounds for nullity of a legal act. **Exhibit C-159**, Peruvian Civil Code, Article 219.

¹⁶⁷ Peru’s Reply at ¶ 86.

¹⁶⁸ Renco’s Supplemental Opposition at ¶¶ 207-209.

¹⁶⁹ Peru’s Reply at ¶ 84.

¹⁷⁰ **Exhibit C-002**, Stock Transfer Agreement, Clause 15.

of economic *force majeure*. As Renco detailed in its Supplemental Opposition, Peru cannot, on the one hand, agree to excuse Doe Run Peru from its contractual obligations in cases of economic *force majeure*, while at the same time insist on Doe Run Peru's performance of these obligations by refusing to grant the PAMA extension. Peru simply does not address this argument in its Reply.

99. Peru initially pointed to the absence of a judgment in the St. Louis Lawsuits to argue that no indemnification obligation had arisen. Now, after Renco has shown that it has already suffered damage in the form of millions of dollars of litigation costs and expenses, Peru argues this claim is not ripe because “it 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.”¹⁷¹ But, as Renco explained in detail in its Memorial on Liability, the claims asserted in the St. Louis Lawsuits fall within the scope of Centromin's assumption of liability under the Stock Transfer Agreement.¹⁷²

100. Finally, on the basis of an erroneous interpretation of Peruvian law, Peru maintains that Renco's claims are not ripe because Renco first must seek recovery from Activos Mineros. This position is untenable as further detailed immediately below.

a. *Fianza rules do not apply*

101. In its Supplemental Opposition, Renco explained that Articles 1868 and 1879 of the Peruvian Civil Code (and all those referring to “*fianzas*”) apply only to *fianza* or surety agreements, and are not generally applicable to every type of guaranty. Peru does not disagree.¹⁷³

102. However, Peru continues erroneously to argue that the Guaranty Agreement is a *fianza*. Peru has not even attempted to explain how it reaches this conclusion. Its legal expert, Professor Cárdenas, also fails to explain how he reaches such conclusion.¹⁷⁴ As Renco explained

¹⁷¹ Peru's Reply at ¶ 85.

¹⁷² Renco's Memorial on Liability at ¶¶ 76-90 and at ¶¶ 276-281.

¹⁷³ Cárdenas expressly acknowledges these articles are applicable to *fianzas*. See Cárdenas Second Legal Opinion at ¶ 82.

¹⁷⁴ Cárdenas appears to conclude that because the Guaranty Agreement does not contain stabilization provisions (stabilizing for example a certain tax regime) it should not be considered as a *contrato-ley*. Cárdenas Second Legal Opinion at ¶ 80. This directly contradicts what the legal framework specifically referenced in the Guaranty Agreement mandates. Under Peruvian law, *contratos-ley* are not limited to stabilization provisions.

in detail in its Supplemental Opposition, the Guaranty Agreement is not a *fianza*. Rather, the Guaranty Agreement is a specific type of government guaranty that is provided in the context of a privatization under a specific regulatory framework, constituted by Legislative Decree No. 675, Law Decree 25570, Law 26438 and Article 1357 of the Peruvian Civil Code.¹⁷⁵ It was issued under a legal framework that pursues specific objectives and, thus, has its own set of rules.

103. Peru portrays the legal framework applicable to Privatization Government Guaranties as a mere authorization by the State which, it argues, does not mean that the Guaranty Agreement has a different nature than a *fianza*.¹⁷⁶ This is incorrect, and Peru improperly seeks to limit the effectiveness of the Guaranty Agreement by imposing requirements that do not apply.¹⁷⁷ Those rules are not limited to defining the proceedings to grant the State's authorization. For example, Privatization Government Guaranties in general, and the Guaranty Agreement in particular, have a broader scope than *fianzas*, which may only guarantee the performance of "obligations" pursuant to the Civil Code.¹⁷⁸ Peru has not explained how the Guaranty Agreement can be a *fianza* when it clearly exceeds the scope of a *fianza* agreement as provided in the Civil Code.¹⁷⁹

104. The legal framework applicable to Privatization Government Guaranties establishes that Peru has assumed joint and several liability with Centromin (Activos Mineros). The purpose of this legal framework was to grant guaranties to investors. Therefore, Renco does not need to seek recovery from Activos Mineros first. Peru argues that joint and severability should have been expressly provided.¹⁸⁰ This is incorrect. The Peruvian Constitutional Tribunal has established clearly that *contratos-ley* such as the Guaranty Agreement shall be interpreted in a manner that optimizes their effectiveness.¹⁸¹ Imposing the *beneficio de excusión* (i.e., requiring the creditor to seek payment first from the debtor before turning to the guarantor) to a

¹⁷⁵ Renco's Supplemental Opposition at ¶¶ 190-192.

¹⁷⁶ Peru's Reply at ¶ 83.

¹⁷⁷ **Exhibit C-204**, Constitutional Tribunal ruling in Case No. 005-2003-AI/TC, Oct. 3, 2003 at ¶ 34. The Peruvian Constitutional Tribunal has clearly established that *contratos-ley* such as the Guaranty Agreement shall be interpreted in a manner that optimizes their effectiveness.

¹⁷⁸ Renco's Supplemental Opposition at ¶¶ 197-199.

¹⁷⁹ **Exhibit C-159**, Peruvian Civil Code, Article 1868.

¹⁸⁰ Peru's Reply at ¶ 84.

¹⁸¹ **Exhibit C-204**, Constitutional Tribunal ruling in Case No. 005-2003-AI/TC, Oct. 3, 2003 at ¶ 34.

Privatization Government Guaranty clearly limits its effectiveness, in contravention of its object and purpose.

b. *Renco has complied with all requirements applicable to fianzas*

105. Even if the rules applicable to *fianza* (or surety) agreements were applicable (they are not), Renco has complied with these rules. Thus, its claims against Peru are ripe.

106. First, Peru attempts to seek the protection of the “*beneficio de excusión*” (applicable to *fianzas* in certain cases). However, Peru has not met the necessary requirements in order to invoke this defense. As Renco explained in its Supplemental Opposition, this benefit (when applicable) allows the guarantor in a *fianza* to assert a formal defense against the creditor until the creditor first seeks payment from the original debtor. However, Peruvian law imposes certain conditions on the guarantor which Peru has not satisfied and their legal expert does not mention.¹⁸²

107. Second, even if Peru could properly invoke the *beneficio de excusión*, Renco has sought compliance from Activos Mineros before making claims against Peru under the Guaranty Agreement. But Activos Mineros has failed to comply with its obligations under the Stock Transfer Agreement. Thus, the *beneficio de excusión* is not a valid defense in this case. Peru argues that Renco’s requests against Activos Mineros are insufficient and that Renco needs to demonstrate further that “Activos Mineros has been found liable by any court or tribunal for any alleged failure”¹⁸³ This is incorrect under Peruvian law.¹⁸⁴ As Professor de Trazegnies explains, Article 1880 of the Civil Code does not provide that one must file a formal lawsuit against the debtor before suing the guarantor.¹⁸⁵ Rather, if the guarantor is sued and wishes to invoke the

¹⁸² For a description of these requirements, see Renco’s Supplemental Opposition, footnote 362.

¹⁸³ Peru’s Reply at ¶ 84. *See also* Peru’s Reply at ¶ 82 (“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.”).

¹⁸⁴ Peru’s own expert, Professor Cárdenas, opines that the *beneficio de excusión* may be invoked when the guarantor in a *fianza* “files an action directly against the guarantor without having filed any action against the primary debtor.” Cárdenas Second Legal Opinion at ¶ 89.

¹⁸⁵ Dr. de Trazegnies Second Report at §2.4 at 18.

beneficio de excusión, the guarantor must identify assets of the debtor within the territory of Peru that are sufficient to satisfy the obligation.¹⁸⁶

B. RENCO HAS STATED CLAIMS AGAINST PERU FOR BREACH OF DOE RUN PERU’S RIGHTS UNDER THE INVESTMENT AGREEMENT

108. Peru incorrectly contends that “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.”¹⁸⁷

109. Article 10.28 of the Treaty defines “investment agreement” to mean:

[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...¹⁸⁸

110. Article 10.28 thus clearly provides that an “investment agreement” includes both (1) an agreement between a national authority and an investor and (2) an agreement between a national authority and a covered investment.

111. Article 10.16.1(a)(i)(C) of the Treaty provides that an investor may make a claim “on its own behalf . . . that the respondent has breached . . . an investment agreement,” provided that “the claimant has incurred loss or damage by reason of, or arising out of, that breach.” Read together with the definition of “investment agreement” in Article 10.28, Article 10.16.1(a)(i)(C) thus plainly provides that an investor may bring a claim on its own behalf for the breach of a covered investment’s rights under an investment agreement between the covered investment and the respondent, provided that the investor has incurred loss or damage by reason of that breach.

112. Contrary to Peru’s position, Article 10.16.1(a)(i)(C) does not provide that an investor may only bring a claim on its own behalf for the breach of its own rights under an investment agreement. Had the parties to the Treaty intended that result, they easily could have added the words “between the claimant and the respondent” after the words “investment

¹⁸⁶ *Id.*

¹⁸⁷ Peru’s Reply at ¶ 23.

¹⁸⁸ CLA-001, Treaty, Section C, Article 10.28 (emphasis added).

agreement” in Article 10.16.1(a)(i)(C). They did not do so. Instead, the parties to the Treaty expressly provided that an investor may bring a claim on its own behalf for the breach of an “investment agreement,” which expressly includes an investment agreement between a national authority and the investor’s “covered investment.”

113. Moreover, as Renco explained in its Supplemental Opposition, Renco has suffered damages both directly and indirectly as a result of Peru’s breaches of Doe Run Peru’s rights under the investment agreement comprised of the Stock Transfer Agreement and the Guaranty Agreement.¹⁸⁹ These breaches include: (1) Centromin’s and Peru’s failure to remediate the areas surrounding the La Oroya Complex; (2) Centromin’s and Peru’s failure to assume liability for the St. Louis Lawsuits; and (3) Centromin’s and Peru’s failure to honor the *force majeure* clause in the Stock Transfer Agreement by refusing to grant PAMA extensions to Doe Run Peru. Peru does not deny that Renco has suffered damages as a result of these alleged breaches, but insists that, “regardless of whether Renco was harmed,” it cannot assert a claim for the breach of Doe Run Peru’s rights under the investment agreement.¹⁹⁰

114. Peru attempts to support its position by relying on investment treaty decisions holding that parent companies cannot invoke the contractual rights of their subsidiaries.¹⁹¹ None of these decisions, however, was made under a treaty that contains wording similar to that of Article 10.16.1(a)(i)(C) of the Treaty.¹⁹² For example, Article VI(1) of the U.S.-Ecuador BIT at issue in *Burlington v. Ecuador* provides that “an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to . . . an investment agreement between that Party and such national or company” (emphasis added).¹⁹³ On the basis of this provision, and in particular the phrase “and such national or company,” the *Burlington* tribunal concluded that production sharing contracts between Ecuador and the claimant’s

¹⁸⁹ Renco’s Supplemental Opposition at ¶¶ 169-173.

¹⁹⁰ See Peru’s Reply at ¶ 25.

¹⁹¹ *Id.* at ¶¶ 25-26.

¹⁹² See Peru’s Reply at ¶ 26.

¹⁹³ **CLA-176**, Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, entered into force May 11, 1997, Article VI(1) (“U.S.-Ecuador BIT”).

subsidiaries did not qualify as “investment agreements” under the U.S.-Ecuador BIT.¹⁹⁴ Because Article 10.28 of the Treaty specifically defines “investment agreement” as including an agreement between a national authority and a “covered investment,” the decisions relied upon by Peru have no relevance to the question of whether Renco can bring claims on its own behalf under Article 10.16.1(a)(i)(C) of the Treaty for the breach of Doe Run Peru’s rights under the investment agreements.¹⁹⁵

IV. THE SCOPE OF PERU’S ARTICLE 10.20(4) OBJECTIONS

115. In its Scope Decision, the Tribunal held that “even if an objection to a tribunal’s competence provides a basis for ‘dismissal as a matter of law’, Article 10.20.4 only requires a tribunal to decide as a preliminary question an objection which is directed to the legal sustainability of a claim, not the tribunal’s jurisdiction.”¹⁹⁶ In support of this conclusion, the Tribunal noted that a “meaningful distinction” exists between an objection to the sustainability of a claim, on the one hand, and an objection to a tribunal’s competence to hear the claim, on the other.¹⁹⁷ In particular, “when addressing an Article 10.20.4 objection for legal sufficiency of a claim, a tribunal will be called upon to decide whether the claim is ‘legally hopeless,’” whereas “[c]onsideration of an objection to competence . . . requires a tribunal to ask a different kind of question: whether the [claim] is ‘hearable’ at all, irrespective of a party’s substantive Treaty rights or the legal merit of the claim.”¹⁹⁸

116. As Renco explained in its Supplemental Opposition dated July 30, 2015, Peru raised four additional objections (or “legal arguments,” as Peru erroneously characterizes them) for the first time in its Preliminary Objection dated February 20, 2015, all of which fall outside

¹⁹⁴ **CLA-177**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, Jun. 2, 2010, ¶ 235.

¹⁹⁵ Even assuming that Renco cannot bring a claim under Article 10.16.1(a)(i)(C) for the breach of Doe Run Peru’s rights under the investment agreement, Renco can clearly bring a claim under Article 10.16.1(a)(i)(C) for the breach of its own rights under the investment agreement, whether it is deemed a party to that agreement or an intended beneficiary. *See* Section III.A above.

¹⁹⁶ Scope Decision at ¶ 207.

¹⁹⁷ *Id.* at ¶ 205.

¹⁹⁸ *Id.* at ¶ 206.

the scope of Article 10.20(4) because they implicate the Tribunal’s competence to hear Renco’s claims for breach of an investment agreement.¹⁹⁹

117. In its Reply, Peru insists that its “legal arguments in support of its preliminary objection do not relate to the Tribunal’s competence or to the admissibility of Renco’s claims,” because “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.”²⁰⁰ Peru contends that its objections that (i) there is no investment agreement, (ii) Peru is not a party to the Stock Transfer Agreement, (iii) the Guaranty Agreement is void, and (iv) Renco’s claims are not ripe, are not jurisdictional objections, but rather go to Peru’s single objection that, as a matter of law, Peru could not have breached an investment agreement as defined by the Treaty.²⁰¹

118. Peru’s contentions lack merit for two reasons. First, regardless of how it chooses to characterize them, each of Peru’s four additional objections relates to the Tribunal’s competence and thus clearly falls outside the scope of Article 10.20(4). Peru’s objection that there is no “investment agreement” within the meaning of Article 10.28 of the Treaty constitutes a quintessential jurisdictional objection, because Article 10.16.1(a)(C) only confers jurisdiction on the Tribunal over claims for breach of an “investment agreement,” not over claims for breach of other types of contracts. Peru’s objection that it is not a party to the Stock Transfer Agreement likewise constitutes a jurisdiction objection, because Article 10.28 defines an “investment agreement” as an agreement between a “national authority of a Party” and a covered investment or an investor of the other Party.

119. Peru’s objection that the Guaranty Agreement is “void” under Peruvian law likewise concerns the Tribunal’s jurisdiction, because the Guaranty Agreement forms part of the “investment agreement” upon which Renco bases its claims under Article 10.16.1(a)(C). Indeed, Peru itself specifically contends on the basis of the alleged voidness of the Guaranty Agreement that “as a matter of law, the Guaranty [Agreement] . . . does not qualify as an ‘investment agreement’ under the Treaty.”²⁰² And Peru’s objection that Renco’s claims are not ripe plainly

¹⁹⁹ See Renco’s Supplemental Opposition at ¶¶ 93, 96-100.

²⁰⁰ Peru’s Reply at ¶ 93.

²⁰¹ *Id.* at ¶¶ 95-97.

²⁰² Peru’s Preliminary Objection at ¶ 33.

relates to the admissibility of Renco's claims, *i.e.*, whether they are ready to be heard at this time, not to the question whether Renco's claims have merit.

120. Because Peru's four additional objections require the Tribunal to consider whether Renco's claims are hearable, not whether they are legally sustainable, they fall outside the scope of Article 10.20(4).²⁰³

121. Peru's contentions amount to an inappropriate collateral attack on the Tribunal's Scope Decision. In its Scope Decision, the Tribunal rejected Peru's argument that an objection to the tribunal's competence falls within the scope of Article 10.20(4) if it would require dismissal of the claimant's claims as a matter of law.²⁰⁴ Peru now repackages this same argument, contending that an objection does not constitute an objection to the tribunal's competence, if (i) the respondent frames the objection as an objection to the sustainability of the claimant's claims and (ii) the objection would require dismissal of the claimant's claims as a matter of law. If Peru's contention were correct, however, then a respondent could bring any competence objection under Article 10.20(4), including the five competence objections that the Tribunal specifically disallowed Peru from bringing in its Scope Decision, by simply framing it as an objection to the sustainability of the claimant's claims. That result would completely nullify the effect of the Tribunal's Scope Decision.

122. Peru contends also that its objection based on its status as a non-signatory of the Stock Transfer Agreement falls within the scope of Article 10.20(4) because it "relates to the very same issue" as Peru's sole permitted objection under the Tribunal's Scope Decision.²⁰⁵ This contention is incorrect. Whereas Peru's sole permitted objection relates to the interpretation of Clauses 6.2 and 6.3 of the Stock Transfer Agreement, Peru's objection based on its status as a non-signatory of the Stock Transfer Agreement relates to the very different question of whether an "investment agreement" exists within the meaning of Article 10.28 of the Treaty. As explained above, the latter question is jurisdictional.

²⁰³ See Scope Decision at ¶¶ 213, 240, 249.

²⁰⁴ Peru's Submission on the Scope of Preliminary Objections, April 23, 2014 at ¶ 23; Scope Decision at ¶ 207.

²⁰⁵ Peru's Reply at ¶ 94.

123. Finally, Peru contends that it “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.”²⁰⁶ However, Renco never asserted that Peru was required “to brief in full” its preliminary objections during the 10.20(4) scope phase. Instead, Renco contends that Peru was required to provide sufficient notice of its objections so that the parties and the Tribunal could address whether those objections fall within the scope of Article 10.20(4).²⁰⁷ The whole objective of the 10.20(4) scope phase was to spare the parties the time and expense of litigating preliminary objections that fall outside the scope of Article 10.20(4). Peru’s failure to provide any notice of its additional objections (or “legal arguments”) in the 10.20(4) scope phase has undermined this objective and caused Renco to incur substantial fees and costs in responding substantively to Peru’s impermissible additional objections falling outside the scope of Article 10.20(4).

124. Renco respectfully requests that the Tribunal sanction Peru’s inappropriate failure to provide any notice of its four impermissible additional objections during the 10.20(4) scope phase by ordering it to indemnify Renco for the fees and costs it has incurred in responding substantively to these objections.

V. PRAYER FOR RELIEF

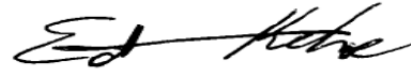
125. For the foregoing reasons, Peru has failed to make the requisite showing that Renco’s claims fail as a matter of law. Renco respectfully requests that Peru’s 10.20(4) Objection be dismissed, in its entirety, and that the Tribunal award Renco its fees and costs associated with its need to address substantively Peru’s four impermissible additional objections.

²⁰⁶ *Id.* at ¶ 91.

²⁰⁷ *See* Renco’s Opposition at ¶¶ 11-21; Renco’s Supplemental Opposition at ¶ 94.

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New York, New York

Respectfully submitted,



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