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 Opposition to Peru's 10.20(4) Objection

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I. INTRODUCTION

1. Claimant, the Renco Group, Inc. ("Claimant" or "Renco"), respectfully submits this Opposition to the Preliminary Objection Under Article 10.20(4) dated February 20, 2015 asserted by Respondent,[1] the Republic of Peru ("Respondent" or "Peru") pursuant to Procedural Order No. 1 dated August 22, 2013 ("P.O. No. 1").

2. For over a year, the Parties engaged in a lengthy process to determine which objections Peru could bring under Article 10.20(4) of the United States-Peru Trade Promotion Agreement signed on April 12, 2006 (the "Treaty").[2] Per agreement between the Parties, as reflected in the schedule attached as Annex A to P.O. No. 1, Renco filed its Memorial on Liability on February 20, 2014. Thereafter, on March 21, 2014, again in accordance with the agreement reached and reflected in Annex A to P.O. No.1, Peru filed its Notice of Intention to File Preliminary Objections Pursuant to Article 10.20(4) of the Treaty (the "Notice of Intention").[3]

3. In its Notice of Intention, Peru listed all of the preliminary objections that it proposed to bring under Article 10.20(4), and as the Tribunal required, Respondent's Notice of Intention described its proposed preliminary objections in sufficient detail so that Claimant could assess whether or not it believed that the objection properly fell within the mandatory ambit of Article 10.20(4).

4. From March through October 2014, the Parties made extensive written submissions concerning whether any of these objections fell within the scope of Article 10.20(4). The Parties' submissions included written comments on the U.S. Government's submission dated September 10, 2014 interpreting the scope of Article 10.20(4).[4]

5. On December 18, 2014, in its "Decision as to the Scope of the Respondent's Preliminary Objections Under Article 10.20.4" (the "Scope Decision"), the Tribunal ruled

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[1] Peru's Preliminary Objection Under Article 10.20(4), February 20, 2015 (*hereinafter* "Peru's 10.20(4) Objection, February 20, 2015").

[2] **CLA-001**, Trade Promotion Agreement, U.S.-Peru, April 12, 2006, 121 Stat. 1455, Article 10.20(4) (*hereinafter* the "Treaty").

[3] Letter from White & Case to ICSID (Secretary of the Tribunal), March 21, 2014 (*hereinafter* "Peru's Notice of Intention, March 21, 2014").

[4] *See* Renco's Comments on the Submission of the United States of America regarding the Interpretation of Article 10.20(4), October 3, 2014; Peru's Comments on the Non-Disputing Party Submission, October 3, 2014.

conclusively that five of the six objections notified by Peru relate to the Tribunal's competence and fall outside the mandatory scope of Article 10.20(4).[5] Accordingly, the Tribunal concluded that only one of Peru's six enumerated preliminary objections properly falls within the mandatory scope of Article 10.20(4) and shall be briefed and heard at this time.[6]

6. Thus, in accordance with the Tribunal's Scope Decision, the only objection that Peru is permitted to make is that:

> [T]he plain language of Clauses 6.5 and 8.14 of the Contract[7] concern[s] third-party claims relating to Doe Run Peru, the entity referred to in those clauses. However, because Doe Run Peru is not a party to the St. Louis Lawsuits, even assuming the facts alleged by Renco are true, Peru, as a matter of law could not have breached the Contract.[8]

7. In addition to the permitted objection quoted above, Peru now attempts to lodge three additional patently improper objections, which go largely to the competence of the Tribunal. Peru did not notify Claimant or the Tribunal of its intention to raise these three objections during the 10.20(4) scope phase of this proceeding; the Parties did not have an opportunity to brief whether these three objections fall within the scope of Article 10.20(4); and the Tribunal did not rule upon this question in its Scope Decision. By raising objections that it failed to notify in accordance with P.O. No. 1, Peru undermines the integrity of the 10.20(4) process, to which Respondent agreed, ignores the Tribunal's Scope Decision allowing Peru to assert only a single objection, and again seeks to disadvantage Claimant in these proceedings. Accordingly, Claimant objects to Peru's attempt to lodge these three additional objections.

8. As set forth more fully below, the sole 10.20(4) objection that the Tribunal permitted Peru to make lacks merit. Renco asserts that the assumption of liability language of Clauses 6.2 and 6.3 of the Stock Transfer Agreement (the "Stock Transfer Agreement" or the

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[5] Tribunal's Decision as to the Scope of the Respondent's Preliminary Objection under Article 10.20.4, December 18, 2014 at ¶¶250, 254 (*hereinafter* "Scope Decision, December 18, 2014").

[6] *Id.* at ¶¶251, 253, 255.

[7] Referring to **Exhibit C-002**, Contract of Stock Transfer between Empresa Minera del Centro del Peru S.A., Doe Run Peru S.R. Ltda., The Doe Run Resources Corporation, and The Renco Group, Inc., October 23, 1997, Clauses 6.2, 6.3 at 27 (*hereinafter* the "Stock Transfer Agreement, October 23, 1997" or the "Contract").

[8] Scope Decision, December 18, 2014 at ¶54.

"Contract")[9] broadly covers all members of the Renco Consortium (the "Renco Consortium" is composed of Renco, The Doe Run Resources Corporation ("Doe Run Resources") and Doe Run Peru S.R. Ltda. ("Doe Run Peru" or "DRP")). Accordingly, Centromin (now Activos Mineros) and Peru (hereinafter collectively referred to as "Peru") must assume liability for all third-party claims brought, to date, by over 1,000 Peruvian plaintiffs in separate lawsuits pending in the United States District Court for the Eastern District of Missouri, located in St. Louis (the "St. Louis Lawsuits"). Peru, on the other hand, puts forth a different interpretation of the Stock Transfer Agreement. Peru asserts that its obligations with respect to responsibility for third-party claims, such as those asserted in the St. Louis Lawsuits, do not cover all members of the Renco Consortium, but only run to Doe Run Peru, and because Doe Run Peru was not sued in the St. Louis Lawsuits, Renco's claim fails as a matter of law, *i.e.*, it is legally impossible.

9. However, as set forth herein, a good faith determination of which of two contractual interpretations is correct is a quintessentially fact-driven exercise and does not warrant dismissal of Renco's claim at this early stage in the proceedings. In light of the express terms of the governing Contract, as well as all of the factual evidence presented by Renco related to the privatization process of Peru's state-owned entity Centromin, Renco's and Doe Run Resources' direct and active participation in the bidding process, their negotiation of the Stock Transfer Agreement, including the specific provisions at issue – all facts which must be assumed true – Renco's claim that Peru assumed liability for the third-party claims in the St. Louis lawsuits is legally viable.

10. Accordingly, Peru simply cannot discharge its heavy burden of persuading the Tribunal that it should dismiss Renco's claim relating to Peru's liability concerning the St. Louis Lawsuits as a matter of law pursuant to Article 10.20(4).

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[9] **Exhibit C-002**, Stock Transfer Agreement, October 23, 1997.

II. ONLY ONE OF PERU'S OBJECTIONS IS PERMITTED BY THE TRIBUNAL'S SCOPE DECISION

A. The Procedural Framework Established by the Parties and the Tribunal to Determine Whether Peru's Proposed Objections Fall within the Scope of Article 10.20(4)

11. At the first hearing, held in London on July 18, 2013, the Parties agreed that the Tribunal would address competence objections during the merits phase of the case, except to the extent that the Treaty requires the Tribunal to decide its competence as a preliminary matter under Article 10.20.4. Based on that agreement, P.O. No. 1 established a schedule by which Renco would file its Memorial on Liability, and thereafter Peru would notify Claimant and the Tribunal of all preliminary objections Peru wished to make under Article 10.20.4, including sufficient detail so that Claimant could adequately object to any preliminary objections that it believed fell outside the mandatory scope of Article 10.20.4.

12. After Renco filed its Memorial on Liability on February 20, 2014, Peru filed its Notice of Intention asserting six objections that Peru claimed were within the mandatory scope of Article 10.20(4), namely: (1) presentation of an invalid waiver; (2) violation of the waiver; (3) lack of jurisdiction *ratione temporis*; (4) violation of the Treaty's three-year limitations period; (5) failure to state a claim for breach of the investment agreement; and (6) failure to submit two factual issues for determination by a technical expert prior to commencement of the arbitration.[10]

13. On April 3, 2014, Renco asserted that five of six of Peru's objections were improper jurisdictional or admissibility objections that were beyond the mandatory scope of Article 10.20(4), such that the Tribunal should not consider them in the 10.20(4) phase but only later in the merits phase as the Parties agreed and as the Tribunal reflected in P.O. No. 1 ("Renco's 10.20(4) Scope Objection").[11] Renco contended, among other things, that allowing Peru to assert objections as to the Tribunal's competence "would be inconsistent with the terms of the Treaty and would prejudice Claimant unfairly."[12] Renco argued successfully that, with the exception of the fifth objection, all of Peru's objections fell outside the mandatory scope of

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[10] Peru's Notice of Intention, March 21, 2014 at 4-7.

[11] Letter from King & Spalding to ICSID (Secretary of the Tribunal), April 3, 2014 (*hereinafter* "Renco's 10.20(4) Scope Objection, April 3, 2014").

[12] *Id.* at 2. *See also* Renco's Reply on Scope of Respondent's Article 10.20(4) Objections, May 7, 2014 at 7, 10-13.

Article 10.20(4) and could only be raised, if at all, when Peru submitted its Counter-Memorial on Liability.[13]

14. Peru framed its fifth objection consistently and clearly throughout the 10.20(4) scope debate. In its Notice of Intention dated March 21, 2014, Peru described this objection as follows:

> The plain language of Contract Clauses 6.5 and 8.14 concerns third-party claims in relation to Doe Run Peru, which is the entity referred to in these clauses as the "Company" or "Investor." Doe Run Peru is not a party to the St. Louis Lawsuits. Thus, even assuming the facts as alleged by Renco to be true, Peru, as a matter of law, could not have breached this Contract.[14]

15. In its next submission, dated April 23, 2014, Peru framed its objection as follows:

> **(3) Contract claim failures as a matter of law.** Renco raises Treaty claims based on alleged breaches of the Stock Transfer Agreement (the "Contract") in connection with certain U.S. lawsuits. Even assuming the truth of the facts as alleged, Renco's contract claims fail as a matter of law, *inter alia*, because Doe Run Peru S.R.L is not a party to the U.S. lawsuits ...[15]

16. Likewise, in its third submission dated October 3, 2014, Peru again set forth this objection:

> Renco raises Treaty claims based on alleged breaches of, *inter alia*, third-party claim provisions in the Stock [Transfer] Agreement ("Contract") in connection with lawsuits that are proceeding against Renco and its affiliates in U.S. court. Even assuming the truth of the facts as Renco has alleged, the claims fail under the plain language of the Contract, and thus warrant dismissal as a matter of law .... Doe Run Peru (the party to the Contract) is not a party to the U.S. lawsuits ....[16]

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[13] *See, e.g.*, Renco's 10.20(4) Scope Objection, April 3, 2014 at 2, 11; Renco's Reply on Scope of Respondent's Article 10.20.4 Objections, May 7, 2014 at 29-30.

[14] Peru's Notice of Intention, March 21, 2014 at 6.

[15] Peru's Submission on the Scope of Preliminary Objections, April 23, 2014 at 2.

[16] Peru's Comments on the Non-Disputing Party Submission, October 3, 2014 at ¶32.

17. In its Scope Decision, the Tribunal considered two issues:

> (1) Does Article 10.20.4 of the Treaty encompass within its scope preliminary objections which may be characterized as relating to competence?
>
> (2) Which, if any, of the preliminary objections raised by the Respondent should be permitted to proceed to scheduling and full briefing for final decision in the Article 10.20.4 Phase of these proceedings?[17]

After weighing extensive submissions by the Parties and "the question of which of the Respondent's preliminary objections should proceed to scheduling and briefing,"[18] the Tribunal ruled that five of Respondent's six objections concerned competence,[19] and that only one objection could go forward.

18. The Tribunal ruled in its Scope Decision that the only objection that Peru may raise in its submission pursuant to Article 10.20(4) is:

> [T]he plain language of 6.5 and 8.14 of the [Stock Transfer Agreement] concern third-party claims relating to Doe Run Peru, the entity referred to in those clauses. However, because Doe Run Peru is not a party to the St. Louis Lawsuits, even assuming the facts alleged are true, Peru, as a matter of law, could not have breached the Contract.[20]

19. Despite the Tribunal's directive, Peru now seeks to side-step the Scope Decision by asserting three additional objections that it did not raise previously; which the Parties did not brief; and which the Tribunal did not rule upon in its Scope Decision. Peru had its chance to raise these objections during the 10.20(4) scope phase, but it did not do so. It therefore is patently improper and unfair for Peru to attempt to raise them now.

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[17] Scope Decision, December 18, 2014 at ¶165.

[18] *Id.* at ¶242.

[19] *Id.* at ¶254 ("Having carefully considered all of the submissions of both Parties, the Tribunal decides that on a proper interpretation of the Treaty provisions the Respondent's objections as to the Tribunal's competence fall outside the scope of Article 10.20.4.").

[20] *Id.* at ¶54. *See also* Peru's Notice of Intention, March 21, 2014 at 6.

B. Three of Peru's Four Purported 10.20(4) Objections Are Improper

20. In Peru's Preliminary Objection Under Article 10.20(4), dated February 20, 2015 ("Peru's 10.20.4 Objection"), Peru groups its four objections together by calling them "Renco's claims relating to Peru's alleged violation of its purported investment agreements."[21] Peru's specific objections are:

> 1. There is no investment agreement between Peru and Renco within the meaning of the Treaty and Renco's claim for breach of Article 10.16.1(a)(i)(C) fails as a matter of law.
>
> 2. *Peru, as a matter of law, could not have breached any obligations to Renco under the Contract, and, hence, Article 10.16(1)(a)(i)(C) of the Treaty, because the obligations contained therein run only to DRP and DRC Ltd., and not to Renco.*
>
> 3. Peru is not a party to the Contract.
>
> 4. Even if the Guaranty constituted a valid investment agreement between Peru and Renco under the Treaty, which it does not, Peru, as a matter of law, could not have breached any obligations to Renco under the Guaranty, and, hence, Article 10.16(1)(a)(i)(C) of the Treaty, because the Guaranty is void under Peruvian law, and because Renco's claims under the Guaranty in any event are not ripe or otherwise fail to state a claim.[22]

21. Only the second objection is properly before this Tribunal during the 10.20(4) phase because only the second objection was the subject of the 10.20(4) notice process and the Tribunal's Scope Decision. Moreover, the additional three objections relate to the Tribunal's competence,[23] and therefore would fall outside the scope of permitted 10.20(4) objections even if Peru had raised these objections earlier and timely, which it did not.[24]

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21 Peru's 10.20(4) Objection, February 20, 2015 at ¶3.

22 *Id.* (emphasis added).

23 *See* Scope Decision, December 18, 2014 at ¶240 ("...The Tribunal has concluded that objections to a tribunal's competence fall outside the scope of Article 10.20.4. Therefore, the Treaty does not mandate or require this Tribunal to address and decide objections as to competence in the Article 10.20.4 Phase of the arbitration proceedings.").

24 In connection with its inappropriate objection that the Guaranty is void as a matter of Peruvian law – clearly a competence objection – Peru seeks to resurrect an argument under a provision in the Stock Transfer Agreement related to an expert determination procedure, asserting that Renco violated that procedure. However, the

22. Accordingly, Renco addresses herein the only objection which the Scope Decision authorizes Peru to make, namely:

> [T]he plain language of 6.5 and 8.14 of the [Stock Transfer Agreement] concern third-party claims relating to Doe Run Peru, the entity referred to in those clauses. However, because Doe Run Peru is not a party to the St. Louis Lawsuits, even assuming the facts alleged are true, Peru, as a matter of law, could not have breached the Contract.[25]

23. Should the Tribunal determine that it wishes Renco to address any of the other objections Peru raises now for the first time, Renco reserves the right to request an appropriate revision to the briefing schedule in order to permit it to do so. However, further delaying these proceedings, and condoning Peru's attempt to subvert the entire 10.20(4) process agreed to by the Parties and put in place by the Tribunal would be fundamentally unfair to Renco.

III. PERU'S OBJECTION UNDER ARTICLE 10.20(4) FAILS

24. Peru's sole authorized objection must fail because when all facts alleged by Renco are accepted as true, Renco has stated a claim for which an award in its favor may be made under Article 10.26 of the Treaty.

A. Standard of Review under Article 10.20(4)

1. All facts alleged by Renco must be accepted as true

25. Under Article 10.20(4)(c), all allegations in Renco's submissions to date are presumed to be true.[26] This includes all facts alleged by Renco to this point in the proceedings,

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Tribunal already specifically disallowed this objection (Peru's sixth objection) in its previous filings, as beyond the scope of Article 10.20(4) because it "is one of admissibility" and "clearly goes to the competency of the Tribunal." *See* Scope Decision, December 18, 2014 at ¶249. This is another example of Peru's persistent attempts to disadvantage Claimant in these proceedings.

[25] Scope Decision, December 18, 2014 at ¶54. *See also* Peru's Notice of Intention, March 21, 2014 at 6. This objection is addressed by Peru in ¶¶41-57 of Peru's 10.20(4) Objection and §§2-3 at 6-15 of the accompanying Legal Opinion of Carlos Cárdenas Quirós (*hereinafter* "Cárdenas Opinion, February 20, 2015").

[26] *See* **CLA-001**, Treaty, Article 10.20(4); **CLA-065**, 2010 UNCITRAL Rules, Article 20. This proceeding is governed by the UNCITRAL Arbitration Rules, as revised in 2010. Article 10.20(4)(c) references Article 18 of the 1976 UNCITRAL Rules and requires the Tribunal to assume as true all of the factual allegations in all of its pleadings to date, including those contained in Renco's 192-page Memorial on Liability, including the 190 factual exhibits, four fact witness statements and three expert reports that Renco submitted in support thereof. Article 18 of the 1976 UNCITRAL Rules, which sets forth the content of a statement of claim, has been superseded by Article 20 in the 2010 UNCITRAL Rules.

including those contained in the Memorial on Liability, witness statements, expert reports and documents submitted in support.[27]

26. This Tribunal recognized this standard in its Scope Decision when it stated 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."[28]

27. Renco's claim should survive Peru's 10.20(4) Objection because it states a claim for which relief may be granted. That is all Renco is required to do. Renco is not required to prove its claim in the 10.20(4) phase.

2. Discretion to dismiss a claim pursuant to Article 10.20(4) should be exercised cautiously in order not to deprive Claimant of due process

28. The principal clause of Article 10.20(4) states:

> [A] tribunal shall address and decide as a preliminary question 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.[29]

29. The Tribunal noted in its Scope Decision that, "when addressing an Article 10.20.4 objection for legal insufficiency of a claim, a tribunal will be called to decide whether the claim is 'legally hopeless.'"[30] In other words, "the question under Article 10.20.4 is whether the facts as alleged by the Claimant are capable of constituting a breach of a legal right protected by the Treaty."[31] Applying this standard to the case at hand, and as discussed more fully below, Renco's claim must withstand Peru's 10.20(4) Objection. Merely presenting an alternative

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27 **CLA-065**, 2010 UNCITRAL Rules, Article 20 (superseding Article 18 of the 1976 UNCITRAL Rules which are referenced in the Treaty at Article 10.20.4(c)).

28 Scope Decision, December 18, 2014 at ¶189(c).

29 Footnote 10 of the Treaty clarifies that "as a matter of law" may include the law of the Respondent (i.e., Peruvian law). Footnote 10 of the Treaty states in full:

> For greater certainty, with respect to a claim submitted under Article 10.16.1(a)(i)(C) or 10.16.l(b)(i)(C), an objection that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26 may include, where applicable, an objection provided for under the law of the respondent.

CLA-001, Treaty, Article 10.20(4), fn 10 (emphasis added).

30 Scope Decision, December 18, 2014 at ¶206.

31 *Id.* at ¶92.

interpretation of the Stock Transfer Agreement, as Peru does in its 10.20.4 Objection, cannot render Renco's claim "legally hopeless."

30. The word 'may' in Article 10.20(4), by its nature, affords the Tribunal considerable discretion in determining whether to grant or deny a preliminary objection and such discretion must be exercised cautiously. In *Pac Rim v. El Salvador*, in denying respondent's 10.20(4) objection under that treaty, the tribunal observed that "the word ['may'] recognizes a position where a tribunal considers that an award could eventually be made upholding a claimant's claim or, equally, where the tribunal considers that it was premature at this early stage of the arbitration proceedings to decide whether or not such an award could not be made."[32]

31. The *Pac Rim* tribunal stressed the gravity of granting a preliminary objection under Article 10.20(4) recognizing that "a tribunal must have reached a position, both as to all relevant questions of law and all relevant alleged or undisputed facts, that an award should be made finally dismissing the claimant's claim at the very outset of the arbitration proceedings, without more" and that "there are many reasons why a tribunal might reasonably decide not to exercise such a power against a claimant, even where it considered that such a claim appeared likely (but not certain) to fail if assessed only at the time of the preliminary objection."[33]

32. Furthermore, the "burden of persuading the tribunal to grant the preliminary objection must rest on the party making that objection, namely the respondent."[34] The *Pac Rim* tribunal further observed that:

> [A]s the party invoking these procedures it is of course for the Respondent to discharge the burden of satisfying the Tribunal that it should make a final decision dismissing the relevant claim or claims pleaded by the Claimant in these arbitration proceedings.[35]

33. In attempting to satisfy the burden of persuasion, "there can be no evidence from the respondent contradicting the assumed facts alleged in the notice of arbitration; and it should

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[32] *See e.g.*, **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, August 2, 2010 at ¶109.

[33] *Id.* at ¶110.

[34] *Id.* at ¶111.

[35] *Id.* at ¶114.

not ordinarily be necessary to address at length complex issues of law, still less legal issues dependent on complex questions of fact or mixed questions of law and fact."[36]

34. Here, the intention of the Parties in connection with the relevant provisions of the Stock Transfer Agreement involve not only complex legal issues, but the resolution of the issues is dependent on mixed questions of law, and a detailed set of facts which must be assumed true by the Tribunal. Taken as true, these facts support Renco's claim for full reparation of all losses resulting from the third-party claims asserted against it in the St. Louis Lawsuits. This alone makes it impossible for Peru to meet its burden and the Tribunal therefore should not grant Peru's 10.20(4) Objection.

B. Facts Relevant to Renco's Claim and Peru's Objection

35. Renco puts forward an extensive factual record to support its claims, starting with the relevant language of the Stock Transfer Agreement.

36. Clause 6.2 of the Stock Transfer Agreement states:

> During the period approved for the execution of Metaloroya's PAMA, Centromin will assume liability for any damages and claims by third parties that are attributable to the activities of the Company, of Centromin and/or its predecessors, except for the damages and third-party claims that are the Company's responsibility in accordance with Numeral 5.3.[37]

37. Clause 6.3 of the Stock Transfer Agreement states:

> After the expiration of the legal term of Metaloroya's PAMA, Centromin will assume liability for any damages and third party claims attributable to Centromin's and/or its predecessors' activities except for the damages and third party claims for which the company is liable in accordance with numeral 5.4. In the case that damages may be attributable to Centromin and the Company, the provisions set forth in numeral 5.4.C shall apply.[38]

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[36] *Id.* at ¶112

[37] **Exhibit C-002**, Stock Transfer Agreement, October 23, 1997, Clause 6.2 at 27.

[38] *Id.*, Clause 6.3 at 27.

38. On a plain reading, Clauses 6.2 and 6.3 require Peru to "assume liability" for third-party claims relating to environmental contamination, irrespective of which member of the Renco Consortium is sued. Moreover, the facts and circumstances leading up to the signing of the Stock Transfer Agreement, including the negotiation of Clauses 6.2 and 6.3, are key to understanding why Peru agreed to retain and assume this liability. Renco's (and Doe Run Resources') insistence on such protection as a condition to purchasing the La Oroya Complex is equally important.

39. Peru argues that the language of the Stock Transfer Agreement means something different. Peru asserts that the plain language of the Stock Transfer Agreement, in particular Clauses 6.5 and 8.14, refer only to Doe Run Peru, and because Doe Run Peru is not a party to the St. Louis Lawsuits, Renco's claim fails as a matter of law.[39] But Peru's position entirely ignores Renco's interpretation of Clauses 6.2 and 6.3 of the Stock Transfer Agreement and the specific facts and circumstances alleged by Renco that support its interpretation of Clauses 6.2 and 6.3. Although Peru purports to assume all facts alleged by Renco to be true for purposes of its objection, Peru is not actually doing so.

40. As set forth more fully below, these competing interpretations of the language in the Stock Transfer Agreement require an analysis of the Contract language itself, as well as the facts and circumstances concerning execution of the Contract, as set forth in Renco's Statement of Claim and Memorial on Liability, including documents and witness testimony. The need for the Tribunal to engage in such an analysis precludes dismissal of Renco's claim as a matter of law.

1. Peru's broad retention and assumption of liability for third-party claims arising out of the operation of the La Oroya Complex was essential to the success of Peru's privatization strategy for Centromin

41. Peru attempted to privatize Centromin in 1994, but those efforts failed.[40]

42. As Peru later explained in its 1997 and 1999 White Papers, no investor even submitted a bid to purchase Centromin, in part because the liability associated with

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[39] Scope Decision, December 18, 2014 at ¶54. *See also* Peru's Notice of Intention, March 21, 2014 at 6.

[40] **Exhibit C-006**, Government of Peru, White Paper concerning the Fractional Privatization of Centromin, 1999 at 20 (*hereinafter* "1999 White Paper"). *See also* Sadlowski Witness Stmt. ¶¶10, 15-18.

environmental contamination claims was too great and the scope and complexity of managing Centromin's operations was too burdensome.[41]

43. Thereafter, Peru revised its privatization strategy and began to implement measures to address potential investors' concerns with the La Oroya Complex, noting overwhelming market concern with "the existence and problems arising from the environmental, labor and social liabilities."[42] As part of the new privatization strategy, Peru implemented a second bidding round. During that process, Centromin answered questions from bidders, including publishing two rounds of bidders' questions and official answers about the La Oroya Complex.[43] The Stock Transfer Agreement considered these consultations to be of "supplemental validity."[44] Centromin's answers to bidders' questions provide guidance on how Centromin understood its contractual obligations.

44. In Consultation Round 2, some seven months before Renco, Doe Run Resources and Doe Run Peru signed the Stock Transfer Agreement, it became clear that Peru agreed to assume liability for all contamination. For example, in Consultation Round 2, Centromin stated:

> Question No. 41. Taking into account that CENTROMIN will assume responsibility for the existing contamination at La Oroya's Smelter, and the new operator will be obligated later on to continue with the same contamination practices for a period of time, as authorized by PAMA's terms ... Would CENTROMIN accept responsibility for all the contaminated land, water and air until the end of the period covered by the PAMA or how can it determine which part corresponds to whom?
>
> Answer. Affirmative, 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, according to the competent

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[41] **Exhibit C-035**, Government of Peru, White Paper concerning the Privatization of Metaloroya, 1997 at 6, 20 (*hereinafter* "1997 White Paper") ("[T]he main aspects which led to possible investors rejecting [the purchase] were: the size of the Company, the complexity of its operations, the accumulated environmental liabilities and the social setting.")

[42] **Exhibit C-006**, 1999 White Paper at 34-35

[43] **Exhibit C-046**, Centromin, Public International Bidding PRI-16-97 – First Round of Consultations and Answers, February 27, 1997 (*hereinafter* "Consultation Round 1"); **Exhibit C-047**, Centromin, Public International Bidding PRI-16-97 – Second Round of Consultations and Answers, March 26, 1997 (*hereinafter* "Consultation Round 2, March 26, 1997")

[44] **Exhibit C-002**, Stock Transfer Agreement, October 23, 1997, Clause 18.1(A) at 64.

> authority's opinion (Clauses 3.3. (5.3) and 4.2 (6.2) of the Models of the Contract).[45]

2. Peru agreed to retain and assume liability for third-party claims relating to contamination at the La Oroya Complex

45. In April 1997, the formal bidding process was conducted and the winning bidder was Servicios Industriales Peñoles S.A. de C.V. from Mexico ("Peñoles"), but Peñoles withdrew its bid on July 9, 1997.[46] The Renco Consortium, the second place bidder, was then notified that Peñoles had withdrawn and the Renco Consortium agreed to enter into negotiations with Peru's Special Privatization Committee to acquire Metaloroya through a Stock Transfer Agreement.[47] As required by the bidding conditions, the Renco Consortium also agreed to establish Doe Run Peru, a Peruvian acquisition vehicle.[48] Throughout the negotiation of the Stock Transfer Agreement, it was understood by both sides that Centromin (and Peru by way of the Guaranty) would take responsibility for "clean-up and assume liability for all claims relating to the contamination."[49]

46. Dennis Sadlowski, Vice President of Law for Renco, has provided fact testimony in this arbitration, putting the negotiations between Peru and the Renco Consortium in their proper context:

> Because the Complex had been operating since 1922 without any environmental controls, its cumulative environmental contamination impact was tremendous by the 1990s. During my several visits to La Oroya prior to the execution of the STA, it was clear that there had not been much in the way of environmentally protective practices or controls instituted under Centromin. The homes and streets near the Complex were filthy and covered with dust and smelter outfall, and the worker facilities at the Complex were rudimentary, extremely dirty, and contaminated from years of neglect. It was against this backdrop that Peru confronted serious difficulties in selling the Complex to a private company. In fact,

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45 **Exhibit C-047**, Consultation Round 2, March 26, 1997, Question 41 at 41 (emphasis added).

46 **Exhibit C-035**, 1997 White Paper at 51; Witness Statement of Mr. Dennis A. Sadlowski, Vice President of Law for Renco, February 19, 2014, Claimant's Memorial on Liability, Annex-D at ¶18 (*hereinafter* "Sadlowski Witness Stmt.").

47 Sadlowski Witness Stmt. at ¶19.

48 *Id.*

49 Witness Statement of Mr. Kenneth Buckley, Former General Manager and President of Doe Run Peru, February 10, 2014, Claimant's Memorial on Liability, Annex-A at ¶11 (*hereinafter* "Buckley Witness Stmt.").

> the government initially attempted to sell off Centromin and all of its holdings as one company, but no bids were received due to the obvious, and enormous, environmental liability. Thus, when we agreed to purchase the Complex, we 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.[50]

47. Both Mr. Sadlowski and Mr. Kenneth Buckley, President and General Manager of Doe Run Peru, made clear to Peru during the negotiation of the Stock Transfer Agreement that it would have to retain and assume liability for third-party claims relating to environmental contamination. Mr. Sadlowski, who was actively involved in the negotiations between Peru and the Renco Consortium, testified that:

> Throughout the negotiations with Centromin/CEPRI of the STA, we made it absolutely clear to the representatives of Centromin that there would be no purchase of the Complex without Centromin retaining responsibility for any third-party claims related to historical environmental contamination in and around the Complex, as well as contamination occurring during the term of the PAMA, so long as Doe Run Peru was operating under standards and practices at least as protective as those of Centromin. This was not an issue of serious contention. Centromin and Peru had already announced to prospective investors (to generate investor interest in purchasing La Oroya, one of the most polluted sites on the planet) that Centromin and Peru would retain liability for third-party environmental claims.[51]

48. Mr. Buckley also was a key member of the Renco Consortium team that negotiated the Stock Transfer Agreement in 1997.[52] Mr. Buckley has provided the following testimony:

> During a few of our negotiation sessions with the government and Centromin prior to the acquisition, we specifically discussed liability for environmental contamination, including protection against third-party claims, which were a big concern of ours because of the historical contamination present in the town and the

[50] Sadlowski Witness Stmt. at ¶¶15-16 (emphasis added).

[51] *Id.* at ¶25 (emphasis added). *See also* **Exhibit C-047**, Consultation Round 2, March 26, 1997.

[52] Buckley Witness Stmt. at ¶8.

> surrounding areas. We knew that the clean-up of the town and surrounding areas would be expensive and that, in addition, the new owner of the Complex could face significant claims by third parties for harms caused by the historical contamination. For these reasons, we insisted at our meetings with the government and Centromin that they had to do the clean-up and assume liability for all claims relating to the contamination caused by the operation of the Complex over the previous 75 years, as well [as] contamination occurring while we upgraded the facility to ultimately bring it into compliance with environmental regulations.[53]

49. Peru's agreement to retain and assume liability for claims relating to environmental contamination was fundamental to the Renco Consortium's decision to execute the Stock Transfer Agreement. Without this agreement, the Renco Consortium would not have proceeded with its acquisition of the La Oroya Complex. Mr. Sadlowski's testimony confirmed:

> Throughout the negotiations, we communicated to Centromin and CEPRI representatives that we would not proceed with the purchase unless: (i) Centromin retained the liability, and undertook the responsibility, for remediation of the historical contamination in and around La Oroya; (ii) Centromin retained and assumed liability for any and all third-party claims related to the environmental condition at La Oroya (including, of course, claims against the entities conducting the negotiations—Renco and Doe Run Resources) .... [54]

50. Similarly, Mr. Buckley testified:

> ... We made it very clear ... that the Renco Consortium would "walk" (i.e., we would not agree to acquire the Complex) unless Centromin agreed (1) to retain and assume liability for all third party claims relating to historical contamination and (2) to remediate the areas in and around the town of La Oroya .... I personally reiterated the same points for the benefit of Mr. Merino[, the General Manager of Centromin,] and told him that this was a "deal-breaker" if they did not agree to these key terms .... Mr. Merino said that Centromin would agree to assume liability for past harm and harm that occurred while DRP was

[53] *Id.* at ¶11.

[54] Sadlowski Witness Stmt. at ¶23.

upgrading the outdated facility to control its emissions, and to remediate the town and surrounding areas.[55]

51. The express terms of the Stock Transfer Agreement confirm this narrative as well,[56] as discussed below.

3. Peru agreed to include Clause 6.2 and Clause 6.3 in the Stock Transfer Agreement to protect the Renco Consortium from third-party liability

52. When negotiating the Stock Transfer Agreement, the Parties discussed and mutually agreed to introduce Clause 6.2 and Clause 6.3 into the Stock Transfer Agreement in order to protect the Renco Consortium from third-party liability. Mr. Sadlowski stated, "[w]e agreed with Centromin that Centromin and Peru would retain and assume any and all liability for third-party claims, except for those specifically carved out by Clauses 5.3 and 5.4."[57]

53. Clause 6.2 of the Stock Transfer Agreement concerns liability for third-party claims arising during the PAMA period.[58] The clause provides in its entirety that:

> During the period approved for the execution of Metaloroya's PAMA, Centromin will assume liability for any damages and claims by third parties that are attributable to the activities of the Company, of Centromin and/or its predecessors, except for the damages and third-party claims that are the Company's responsibility in accordance with Numeral 5.3.[59]

54. Clause 6.3 of the Stock Transfer Agreement concerns liability for third-party claims arising after the expiration of the PAMA period.[60] Clause 6.3 states in full that:

> After the expiration of the legal term of Metaloroya's PAMA, Centromin will assume liability for any damages and third party claims attributable to Centromin's and/or its predecessors' activities except for the damages and third party claims for which the company is liable in accordance with numeral 5.4. In the case

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55 Buckley Witness Stmt. at ¶12.

56 **Exhibit C-002** Stock Transfer Agreement, October 23, 1997, Clauses 6.2 and 6.3 at 27.

57 *See, e.g., id.*, Clauses 6.2 and 6.3 at 27; Sadlowski Witness Stmt. at ¶30.

58 Claimant's Memorial on Liability, February 20, 2014 at ¶¶250-252.

59 **Exhibit C-002**, Stock Transfer Agreement, October 23, 1997, Clause 6.2 at 27.

60 Claimant's Memorial on Liability, February 20, 2014 at ¶¶253-254.

> that damages may be attributable to Centromin and the Company, the provisions set forth in numeral 5.4.C shall apply.[61]

55. When negotiating with Peru, the Renco Consortium explained to Peru that the protections offered by Clauses 6.2 and 6.3 were a *sine qua non* without which the Renco Consortium would not proceed with the acquisition of the La Oroya Complex. Mr. Sadlowski recalled that:

> [Renco representatives,] Craig Johnson and Raul Ferrero, at my direction, discussed … with Centromin/CEPRI representatives and were unequivocal that this protection [from third-party environmental claims] had to extend to the Renco Consortium members and any related parties. [T]he response was that under Peruvian law, a parent or affiliate cannot be held liable for the acts of a subsidiary, so we should not be concerned about parent or related entity liability for third-party claims. We advised them we were concerned about, among other things, potential lawsuits against Renco and others in the United States, or elsewhere, and that without such protection we would not go forward with the deal. It was a challenge to explain to the government why such a clause would be necessary, given their background in Peruvian law. <u>Nevertheless, and to ensure that the necessary clarification was there, Centromin agreed to draft 6.2 and 6.3 of the STA broadly, so that they encompassed claims against parent entities, or other third parties</u>.[62]

56. According to Mr. Sadlowski, with the addition of Clauses 6.2 and 6.3, the Renco Consortium "felt comfortable that it was clear that Centromin and Peru were retaining responsibility for all third-party claims against any party, including DRP's parent entities. Any other understanding would have been absurd."[63]

57. Despite the clear language of Clauses 6.2 and 6.3 and the representations Peru made during the negotiation process, Peru has failed to assume liability for third-party claims and damages arising in the St. Louis Lawsuits. Peru contends that the obligations contained in

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61 **Exhibit C-002**, Stock Transfer Agreement, October 23, 1997, Clause 6.3 at 27.

62 Sadlowski Witness Stmt. at ¶27 (emphasis added).

63 *Id.* at ¶38.

the Stock Transfer Agreement "run only to DRP and DRC Ltd., and not to Renco."[64] According to Mr. Sadlowski:

> This position is completely inconsistent with the deal that we negotiated as well as the letter and spirit of the STA, which was negotiated and executed by Renco and Doe Run Resources. (Doe Run Resources had created Doe Run Peru at the request of Peru as part of the Renco Consortium's bid and ultimate investment) .... [B]oth Renco and Doe Run Resources are signatories .... Marvin M. Koenig signed the STA on behalf of Renco and Jeffery L. Zelms signed it on behalf of Doe Run Resources. Even if Renco and Doe Run Resources had not been signatories to the STA, Centromin specifically agreed that it would assume liability for all third-party claims. This assumption of liability was not limited to liability in favor of only Doe Run Peru. That is not what Clause 6.2 ... states and that is not what the parties intended. It is Centromin's and Peru's liability, period. What ... Peru [is] now claiming (i.e., that the Renco Consortium members and related entities are somehow liable for third-party environmental claims that ... Peru agreed to retain) is exactly the type of scenario that we advised [Peru] was unacceptable and would result in the purchase of La Oroya not moving forward.[65]

58. Thus, the factual record in this case demonstrates that Clauses 6.2 and 6.3 were heavily negotiated by the Parties and clearly designed to cover the Renco Consortium.

C. Each of Peru's Arguments in Support of Its 10.20(4) Objection Fails

59. In its 10.20(4) Objection, Peru alleges that even if all factual allegations made by Renco are assumed to be true, Renco's claim fails, as a matter of law, because under the plain language of the Stock Transfer Agreement, the obligations in the Stock Transfer Agreement assuming liability for third-party claims do not run to Renco (or Doe Run Resources) and an award in favor of Renco cannot be made. In support, Peru asserts:

> 1. Renco's claim fails as a matter of law because, "the obligations assumed by Centromin, and subsequently by Activos

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64 Peru's 10.20(4) Objection, February 20, 2015 at ¶3. *See also* Claimant's Memorial on Liability, February 20, 2014 at ¶¶79-90.

65 Sadlowski Witness Stmt. at ¶42 (emphasis added).

Mineros, in the Contract, run specifically to DRP as the 'Company' and to DRC Ltd. as the 'Investor,' and not to Renco."[66]

2. Renco signed the Stock Transfer Agreement solely as a guarantor of DRP's obligations, was released from its guaranty by Centromin and therefore, as a matter of law, "Peru thus could not have breached any obligations to Renco under the [Stock Transfer Agreement], because Renco has no rights or obligations thereunder. Furthermore, even assuming *arguendo* that Renco had not been released as a guarantor under the [Stock Transfer Agreement], Peru still could not have breached any obligations owed to Renco because Centromin (and later Activos Mineros) did not undertake any obligations to Renco in the Contract. To the contrary, all of the contractual obligations undertaken by Centromin (and later Activos Mineros) in the Contract run to DRP, as the Company, or to DRC, as the Investor."[67]

3. "[C]lauses 6.2, 6.3, 6.5 and 8.14, on their face, thus do not grant any rights to Renco .... To the contrary, the obligations in these Clauses run specifically to DRP and DRC Ltd. as the 'Company' and the 'Investor.'"[68]

4. Pursuant to Article 1361 of the Peruvian Civil Code "the principle of good faith cannot modify the terms of a contract or the nature of the obligations set forth therein" and Article 168 of the Peruvian Civil Code provides that, "legal instruments must be interpreted according to what is expressed in them."[69] In addition, Article 1362 of the Peruvian Civil Code provides that the principle of good faith, "only applies to the conduct of the parties and does not provide an authorization to alter what is expressed in the contract."[70]

5. "The application of the principle of good faith in the context of the privatization of La Oroya, moreover, confirms that the rights and obligations in Clauses 6.2, 6.3, 6.5 and 8.14 run only to DRP and DRC Ltd. as the 'Company' and the 'Investor,'

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66 Peru's 10.20(4) Objection, February 20, 2015 at ¶43. *See also id.* at ¶41; Cárdenas Opinion, February 20, 2015, §III.B.1 at 12-13.

67 Peru's 10.20(4) Objection, February 20, 2015 at ¶43. *See also id.* at ¶¶45-47; Cárdenas Opinion, February 20, 2015, §III.A at 10-11.

68 Peru's 10.20(4) Objection, February 20, 2015 at ¶47. *See also id.* at ¶¶41, 43, 45; Cárdenas Opinion, February 20, 2015, §III.B.1 at 11-13.

69 Peru's 10.20(4) Objection, February 20, 2015 at ¶48. *See also id.* at ¶¶49-50; Cárdenas Opinion, February 20, 2015, §II.A at 6-9.

70 Peru's 10.20(4) Objection, February 20, 2015 at ¶49.

respectively, and not to Renco."[71] Peru alleges that the bidding rules required Renco "to establish a Peruvian entity to sign the [Stock Transfer Agreement] as the 'Investor' with Centromin" and because the Renco Consortium assigned that right to Doe Run Peru, "the consortium, including Renco, thus was well aware that it would not have any rights under the Contract itself, including any rights under these provisions."[72]

6. Article 78 of the Peruvian Civil Code provides no basis for Renco to claim benefits under a contract entered into by a separate legal entity with which it is affiliated.[73]

7. Finally, Peru raises arguments under U.S. law allegedly supporting its position that indemnity provisions must be "strictly construed and limited to intended beneficiaries"[74] and "Clauses 6.2, 6.3 and 6.5 of the Contract do not name any party apart from the 'Company,' *i.e.*, DRP, and do not specify any other category of covered party."[75]

60. Peru uses all of these points to argue that Renco's interpretation of Clauses 6.2 and 6.3 of the Stock Transfer Agreement is legally impossible pursuant to Peruvian contract law principles and therefore Renco's claim fails as a matter of law. Renco asserts, on the other hand, that the language in Clauses 6.2 and 6.3 broadly covers all members of the Renco Consortium and that therefore, Peru must assume liability for the third-party claims in the St. Louis Lawsuits. Resolution of this issue is a quintessential factual dispute that cannot be decided as a matter of law.

1. Fundamental principles of Peruvian contract law support Renco's interpretation of the Stock Transfer Agreement

61. With respect to the application of Peruvian law principles, Renco submits the legal report of Dr. Fernando de Trazegnies, Principal Professor of the School of Law of Pontificia Universidad Católica of Peru since 1964 and one of the most prominent legal scholars

[71] *Id.* at ¶50.

[72] *Id. See also* Cárdenas Opinion, February 20, 2015, §III.B.2 at 14.

[73] Peru's 10.20(4) Objection, February 20, 2015 at ¶51. *See also* Cárdenas Opinion, February 20, 2015, §III.B.2 at 14-15.

[74] Peru's 10.20(4) Objection, February 20, 2015 at ¶52. *See also id.* at ¶¶53-56.

[75] *Id.* at ¶55. *See also id.* at ¶¶52-54, ¶56.

in Peru.[76] In addition to his many academic posts, Dr. de Trazegnies was a member of the Official Commission for the reform of the Peruvian Civil Code which has been in force and effect in Peru since 1984.

62. The Peruvian Civil Code of 1984 (the "Civil Code") requires the Stock Transfer Agreement to be interpreted in accordance with (*i*) its plain terms; (*ii*) the principle of good faith; and (*iii*) the parties' shared intentions judged at the time the agreements were concluded. Certain relevant provisions of the Civil Code state as follows:

> Article 168. The legal act [including contracts] should be interpreted according to what has been expressed therein, and [in accordance with] the principle of good faith.[77]
>
> Article 1361. Contracts are binding [as to the statements] expressed therein. It is presumed that the declaration expressed in the contract corresponds to the shared will of the parties, and [the party who] denies such concurrence[] should prove otherwise.[78]
>
> Article 1362. [C]ontracts should be negotiated, signed[,] executed [and performed] according to the rules of good faith and [the] shared intention between the parties.[79]

63. The principle of good faith in Peruvian law provides the foundation for "all the elements and criteria that the interpreter must take into consideration."[80] Good faith requires that the Stock Transfer Agreement be interpreted in a reasonable manner, taking into consideration the circumstances of the case, on the basis of which the parties have reasonably placed their trust.[81]

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76 *See* Legal Report of Dr. Fernando de Trazegnies, April 14, 2015 (*hereinafter* "Dr. de Trazegnies Report, April 14, 2015")

77 **Exhibit C-159**, Peruvian Civil Code, July 24, 1984, Article 168 (*hereinafter* "Civil Code").

78 *Id.*, Article 1361.

79 *Id.*, Article 1362.

80 **CLA-002**, Juan Guillermo Lohmann Luca de Tena, EL NEGOCIO JURÍDICO 196-197 (1st ed. 1986) ("On this pillar lie, undoubtedly, all the elements and criteria that the interpreter must take into consideration in his work.") (*hereinafter* "Lohmann, JURÍDICO").

81 **CLA-004**, Fernando de Trazegnies Granda, *La verdad construida. Algunas reflexiones heterodoxas sobre la Interpretación Legal*, *in* TRATADO DE LA INTERPRETACIÓN DEL CONTRATO EN AMÉRICA LATINA: VOLUME III 1618 (Carlos Alberto Soto Coaguila, ed., 2007) ("[G]ood faith, understood as the proper representation each party exercises from its own point of view facing the other, is a general principle of Law that cannot be eluded

64. In addition to the requirement of good faith interpretation, Peruvian law mandates construing the Stock Transfer Agreement in accordance with the "shared intention between the parties" at the time of its conclusion.[82] Specifically, contractual provisions must be interpreted both "systematically" and "functionally."

65. The "systematic interpretation" approach requires consistency between the different parts of a single contract.[83] In this way, contractual terms must be ascribed meanings that make sense in light of the other provisions contained within the same instrument and related contract provisions.[84]

66. "Functional interpretation," on the other hand, requires that in circumstances in which contract terms are subject to more than one interpretation, they shall be interpreted in a manner that accords with the contract's ultimate purpose and function.[85]

67. From these principles of interpretation, it is clear that, under Peruvian law, extrinsic evidence is not only appropriate, but crucial to interpret a contract. For example, in ascertaining the "common intention of the parties," and a contract's "purpose and function," the

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in any of the legal relationships, whatever the branch of Law or the type of relationship formed or to be formed.").

[82] *See* **Exhibit C-159**, Civil Code, Article 1362

[83] For a systematic interpretation of the Stock Transfer Agreement one should take into account all the provisions in the Contract, its Annexes, the Bidding Conditions and the Answers to Consultations circulated by CEPRI-CENTROMIN. For example, the Stock Transfer Agreement states:

> EIGHTEENTH CLAUSE - CONTRACT INTERPRETATION:
>
> 18.1 In the interpretation of this contract and in what is not expressly stipulated therein, the parties will acknowledge supplemental validity to the following documents:
>
> (A) The answers to the consultations with official character, circulated by CEPRI-CENTROMIN among those pre-qualified bidders; and
>
> (B) The bidding conditions of the international public bidding No. PRI-16-97 for the promotion of private investment in the company.
>
> (C) If there were a controversy between the bidding conditions and the contract, the latter shall prevail.

Exhibit C-002, Stock Transfer Agreement, October 23, 1997, Clause 18.1 at 64.

[84] **Exhibit C-159**, Civil Code, Article 169 ("The clauses of the legal acts are to be construed by reference to each other, attributing the meaning resulting from the entirety of the clauses wherever doubt arises.").

[85] *Id.*, Article 170 ("Expressions that have various meanings should be understood [in the manner] the most fitting for the nature and purpose of the act.").

interpreter must evaluate facts concerning the parties' conduct before, during and after execution of the contract, including negotiation documents, correspondence and drafts.[86]

68. Renco's interpretation of the pertinent language is consistent with the language of the contract because the broad terms of Clauses 6.2 and 6.3 impose distinct obligations on Centromin and Peru as opposed to Clauses 6.5 and 8.14. With Clauses 6.2 and 6.3, Peru contractually agreed to retain and assume liability for all third-party damages and claims arising from contamination from operation of the La Oroya Complex.[87] With Clause 6.5, Peru contractually agreed to indemnify Doe Run Peru for damages and liabilities related to third-party claims.[88] As discussed below in *Section C.5*, an assumption of liability clause, such as Clause 6.2, is distinct from and broader than, an indemnification provision, such as Clause 6.5.[89] Thus, Renco maintains that the language of the Stock Transfer Agreement, namely the broad language used in Clauses 6.2 and 6.3, corresponds to the common intention of the parties.

69. Dr. de Trazegnies highlights the role of good faith in contract interpretation under Peruvian law[90] and analyzes Clause 6.2 as follows:

> Clause 6.2 of the CONTRACT is clearly general in nature, as can be seen from its wording because it refers to CENTROMIN's liability for all the damage attributable to the operations performed by Metaloroya (the "Company"), as well as by Centromin and/or its predecessors. This clause does not indicate that the beneficiary is merely the Company, therefore it can be construed that it also includes Renco and Doe Run Resources, signatories of the CONTRACT .... [91]

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86 *See* **CLA-002**, Lohmann, JURÍDICO at 190 ("To specify the agent's intention based on that stated or expressed, one must value his entire behavior, even subsequent to the conclusion of the act. An entire behavior that, undoubtedly, is not solely [a behavior] prior or subsequent to the expression of will, but also the coetaneous conduct through which the will with greater or lesser fidelity materializes and is made evident—express itself, according to the article."). *See also* **CLA-003**, Gastón Fernández Cruz, *Introducción al estudio de la interpretación en el Código Civil peruano in,* ESTUDIOS SOBRE EL CONTRATO EN GENERAL: POR LOS SESENTA AÑOS DEL CÓDIGO CIVIL ITALIANO 265 (1942-2002) (Leysser L. León, ed. & trans., Ara Editores, 2d ed. 2004) (selected excerpts) at 813.

87 Claimant's Memorial on Liability, 20 February 2014 at ¶¶250-254, 259-261.

88 *Id.* at ¶¶255-261.

89 *Id.*

90 Dr. de Trazegnies Report, April 14, 2015, §3.1 at 10-11.

91 *Id.*, §4.3 at 16.

70. As Dr. de Trazegnies explains throughout his report, when there are conflicting interpretations of contractual provisions, as exist now with respect to Renco's and Peru's interpretations of the relevant provisions in the Stock Transfer Agreement, the language at issue must be interpreted looking to the context in which the contract was signed and other available evidence of the parties' intention such as the evidence referenced above in *Section III.B.1-3*.

2. Peru and its expert ignore or misapply fundamental principles of contract interpretation under Peruvian law as they relate to the instant case

71. In an attempt to avoid consideration of the plethora of facts supporting Renco's claim, Peru and its legal expert, Carlos Cárdenas Quirós, apply an overly restrictive and selective interpretation of the Civil Code. Professor Cárdenas cites Article 1361 of the Civil Code:

> Contracts are binding as to the statements contained therein. It is presumed that the express words of the contract correspond to the common intention of the parties and the party who denies that has the burden of proving it.[92]

72. Professor Cárdenas focuses solely on the first part of Article 1361 for the proposition that contract interpretation and performance require "strict observance to what is expressed in them."[93] He also cites Article 168[94] for the proposition that the "express words of the parties are the principle basis for the determination of the scope of the contract."[95]

73. Dr. de Trazegnies observes that Article 1361 is not as restrictive as Professor Cárdenas would claim, because when a party denies that a statement contained in a contract corresponds to the common intention of the parties, the party alleging the divergence between the text of the contract and the intention of the parties must be afforded the opportunity to prove

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92 Cárdenas Opinion, February 20, 2015, §II.A at 6.

93 *Id.*

94 **Exhibit C-159**, Civil Code, Article 168 ("The legal act should be interpreted according to what has been expressed therein, and [according to] the principle of good faith.").

95 Cárdenas Opinion, February 20, 2015, §II.C at 8.

this.[96] This means that the common intention of the parties can be something other than the exact statements contained in the contract.

74. With respect to Article 1361, Dr. de Trazegnies observes:

> To presume implies that that the text does not constitute an absolute truth, but rather it presents different perspectives among which one must adopt using the principle of good faith as an aid to establish the true agreements in the contract, beyond the literal text. To presume is not to make a truth clear but rather to realize that there can be different interpretations; that, they are possible but obviously they must be adequately discussed and proved.[97]

75. Dr. de Trazegnies also cites Peruvian Supreme Court jurisprudence holding that, "Article 1361 itself makes it possible to [dis]prove [the presumption], that is, that one of the parties holds that [what] is stated in the contract is not a true reflection of its actual will; which point must be analyzed in light of the principle of Good Faith..."[98] And if a party proves this, the real intention of the parties must prevail over the text of the contract. Obviously, one way to prove otherwise is to consider extrinsic evidence, *i.e.*, documents testimony or other facts relevant to the formation or performance of the agreement.

76. Professor Cárdenas also asserts that the reference to "good faith" is to "objective" as opposed to "subjective" good faith.[99] He cites legal scholar, Fernando Vidal Ramírez, for the proposition that pursuant to Article 168 an objective assessment can only be made based upon "what is expressed" and "from the terms expressed."[100]

77. Article 1362 of the Civil Code, which is conspicuously absent from Professor Cárdenas' report, provides that "the rules of good faith and [the] shared intention between the

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[96] **Exhibit C-159**, Civil Code, Article 1361 ("It is presumed that the declaration expressed in the contract corresponds to the shared will of the parties, and whosoever denies such concurrence, should prove otherwise.").

[97] Dr. de Trazegnies Report, April 14, 2015, §4.1 at 13.

[98] *Id.*, §2.4 at 10.

[99] Cárdenas Opinion, §II.C. at 8.

[100] *Id.*, §II.C. at 8-9 (*citing* **RLA-86**, Vidal Ramírez, Fernando, EL ACTO JURÍDICO, Ninth Edition, Gaceta Jurídica S.A. Lima, Peru, August 2013 at 377).

parties" apply to the negotiation, signature and execution of contracts.[101] In considering Article 1362, Dr. de Trazegnies explains:

> In other words, those who sign a contract, at all times, from its negotiation through its performance, must be motivated by reciprocal good faith and by the common intent of the parties which must be discovered not through rereading the text but rather through an adequate interpretation.[102]

78. In a further attempt to deflect attention from the factual record that clearly supports Renco's claim, Professor Cárdenas quotes commentary from Fernando Vidal Ramírez regarding Article 168 where Vidal Ramírez states:

> [T]he adjudicator is not supposed to determine the actual intention that was not declared, but rather determine the expressed intention based on the assumption that the latter constitutes the intention of the party or parties that executed the legal instrument in question. [...][103]

79. Tellingly, Professor Cárdenas references only in passing Article 170 of the Civil Code[104] which provides that, "[e]xpressions that have various meanings should be understood as the most fitting for the nature and purpose of the act."[105] Dr. de Trazegnies explains:

> Article 170 expressly indicates that statements can have several meanings – therefore dry literalness does not count – and it sets as a fundamental basis for interpretation that the legal acts (contracts) "*be construed in the manner most suitable to the nature and purpose of the act.*"[106]

80. Vidal Ramírez, who Professor Cárdenas cites, states that Article 170 of the Civil Code, which complements Article 168, ratifies the "general rule" that "expressions that have several meanings must be construed in the one most suitable to the nature and purpose of the

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[101] **Exhibit C-159**, Civil Code, Article 1362.
[102] Dr. de Trazegnies Report, April 14, 2015, §4.1 at 14.
[103] Cárdenas Opinion, February 20, 2015, §C at 8.
[104] *See, e.g.*, Dr. de Trazegnies Report, April 14, 2015, §2.11 at 6, 8 and §4.1 at 13; **Exhibit C-159**, Civil Code, Article 170 and Article 1362.
[105] **Exhibit C-159**, Civil Code, Article 170.
[106] Dr. de Trazegnies Report, April 14, 2015, §4.1 at 13.

[contract]."[107] Vidal Ramírez also states that, "[T]he 'purpose,' or better yet the aim according to the clarification we have made, has to do with the intention of the parties contained in their own statements. In sum, what the rule seeks is that defective wording or the improper use of language in 'what is stated' can be corrected, through hermeneutic work."[108]

81. Another jurist and Professor of Law, Alfredo Bullard, advises:

> As can be seen, this criterion of interpretation [teleological or functional interpretation regulated in Article 170 of the Civil Code] **seeks to define the clause of the contract or the raison d'être of the clause which is subject to interpretation**. In that sense, this method is similar to the one called *ratio legis* or reason for the law, applicable to the interpretation of legal precepts. In the interpretation of contracts, **that implies seeking the functions that the contract must achieve**[.][109]

82. Professor Bullard also notes:

> *If the text of the contract is clear, the practical end that is sought is clear, because it derives from the precept to be applied. If the text is unclear, the search for the actual will* ***is a way to find such aim assigned by the parties to the content of the contract, and help in giving it meaning*****.**[110]

83. It is clear therefore that Peru and its expert quote selectively from various sources in an effort to restrict the Tribunal's analysis to only the text of the Stock Transfer Agreement. While the text of Clauses 6.2 and 6.3 fully supports Renco's interpretation, even if it did not, the negotiating history of the Stock Transfer Agreement establishes that these clauses were intended to protect the members of the Renco Consortium from liability for damages and claims relating

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107 **CLA-067**, Vidal Ramírez, Fernando, *The Interpretation of Contracts in Peruvian Law, in* Soto Coaguila, Carlos (ed.), TREATISE ON THE INTERPRETATION OF CONTRACTS IN LATIN AMERICA (Editorial Jurídica Grijley, 2007) at 1652.

108 *Id.*

109 **CLA-068**, Bullard González, Alfredo, *"Agreeing not to agree: Economic analysis of contract interpretation" in* Soto Coaguila, Carlos (ed.), TREATISE ON THE INTERPRETATION OF CONTRACTS IN LATIN AMERICA (Editorial Jurídica Grijley, 2007) at 1749.

110 *Id.*

to environmental contamination. Under Peruvian law, in the present circumstances, the negotiating history must be considered in determining the meaning of the language at issue.[111]

84. In short, under Peruvian law, the only proper way to interpret contract language that is subject to more than one reading is by looking to the facts and circumstances related to the negotiation of the contract. These facts and circumstances reveal the nature and purpose of the contractual language. Here, the testimony of Messrs. Sadlowski and Buckley – which is presumed to be true – confirms that the parties agreed to include Clause 6.2 and Clause 6.3 in response to Renco's insistence that Peru accept responsibility for claims arising out of the massive historical contamination at and around the La Oroya Complex and with the purpose to protect not only Doe Run Peru, but also Renco and other related companies.

3. Renco and Doe Run Resources are, in fact, parties to the Stock Transfer Agreement, and their status as parties undermines Peru's argument that they cannot demand performance under the Stock Transfer Agreement

85. Professor Cárdenas cites to Article 1363 of the Civil Code for the proposition that "the parties to a contract are the only ones entitled to demand performance of the obligations arising from the contract."[112] He concludes that because Renco and Doe Run Resources are not parties to the Stock Transfer Agreement, they "cannot demand performance from Centromin/Activos Mineros of its obligation to assume responsibility for third-party claims attributable to the activities of the Company..."[113] He also says, "my view is that it is not possible to conclude that the obligations and warranties contained in the Contract apply to parties other than those mentioned in the relevant clauses of the Contract. An interpretation according to the express words of the Contract does not allow such conclusion."[114] Professor Cárdenas further asserts that Renco and Doe Run Resources "were involved in the Contract, solely and exclusively, in order to establish themselves as guarantors of the buyer/Investor (DRP)."[115]

86. In determining that Renco and Doe Run Resources are parties to the Stock Transfer Agreement, or otherwise able to claim the benefit of its provisions, Dr. de Trazegnies

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[111] *See* **Exhibit C-159**, Civil Code, Article 1362. *See also* Dr. de Trazegnies Report, April 14, 2015, §4.1 at 20-21.

[112] Cárdenas Opinion, February 20, 2015, §III.B.2 at 12-14.

[113] *Id.* at 13.

[114] *Id.* at 14

[115] *Id.* at 10.

takes into account the following factors, among others: (*i*) Doe Run Peru was formed simply in order to comply with Peruvian law that the company receiving property (the shares of Metaloroya) must be a Peruvian company; (*ii*) the bidding process was managed by Renco and Doe Run Resources; (*iii*) the Stock Transfer Agreement was negotiated point by point by Renco and Doe Run Resources; (*iv*) Doe Run Peru was created afterward; (*v*) Renco and Doe Run Resources intervened directly and signed the Stock Transfer Agreement; and (*vi*) based on witness testimony it was clear to all involved that Renco and Doe Run Resources would benefit from the provisions of the Stock Transfer Agreement exempting them from liability for third-party claims.[116]

87. Thus, Dr. de Trazegnies concludes that based on all of these facts and circumstances "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."[117] In any event, there is simply nothing that suggests that Renco and Doe Run Resources signed the Stock Transfer Agreement for the "sole purpose" of establishing themselves as guarantors and that because Renco was released as a guarantor it "no longer had any role in the contract."[118]

88. To the contrary, Dr. de Trazegnies concludes:

> Thus, it is possible to interpret that the obligations and liabilities contracted by CENTROMIN in the CONTRACT were not only with D[oe] R[un] P[eru], but rather the two foreign companies intervened directly and also signed the CONTRACT. According to what the witnesses have stated, it was clear to all parties involved in the CONTRACT, without there being any doubt whatsoever that Renco and Doe Run Resources would also benefit from the provisions of the CONTRACT that exempted them from liability for prior environmental damages and for such as occurred through the end of the PAMA.[119]

89. Even if one were to assume that Renco and Doe Run Resources are not parties to the Stock Transfer Agreement, which they are, the principle of contractual privity under

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[116] Dr. de Trazegnies Report, April 14, 2015, §5.4 at 19-20.

[117] *Id.*, §5.4 at 20.

[118] Cárdenas Opinion, February 20, 2015, §I.A at 3. *See also* Peru's 10.20(4) Objection, February 20, 2015 at ¶30.

[119] Dr. de Trazegnies Report, April 14, 2015, §5.4 at 20.

Peruvian law, referenced by Professor Cárdenas, is not absolute.[120] In certain cases, contracts may confer rights upon third parties. For example, Articles 1457 to 1469 of the Civil Code refer expressly to contracts in favor of a third party.[121] That is, under Peruvian law, in certain cases, third parties may directly enforce contractual provisions contained in contracts to which they are not parties or where they did not participate.

90. Article 1457 states that:

> In a contract in favor of a third party, the promisor commits to the promisee to perform an obligation in favor of a third party.[122]

91. Article 1457 thus recognizes that third parties may invoke rights under a contract. The doctrine of third-party beneficiaries is not unique to Peruvian law; it is widely recognized in various jurisdictions.[123]

4. Clauses 6.2 and 6.3 clearly cover third-party claims asserted outside of Peru

92. Professor Cárdenas asserts that there is nothing in the Stock Transfer Agreement specifying *where* third-party claims that would trigger liability might be filed and that it is *implied* that such third-party claims would be initiated in Peru.[124]

93. To the contrary, the broad language of the Stock Transfer Agreement recognizes that third-party claims could be filed anywhere. This is especially true in light of Mr. Sadlowski's testimony that:

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[120] Cárdenas Opinion, February 20, 2015, §II.B at 7.

[121] *See, e.g.*, **Exhibit C-159**, Civil Code, Article 1457.

[122] *Id.*

[123] *See, e.g.*, **Exhibit C-191**, French Civil Code, Article 1121. Article 1121 of the French Civil Code, which codifies the third-party beneficiary doctrine into French law, permits a party to a contract to confer a benefit, through that contract, onto a third party, even though that third party is not a party to the contract. Article 1121 states:

> One may likewise stipulate for the benefit of a third party when such is the condition for a stipulation that one makes for oneself or for a donation which one makes to another. He who made that stipulation may no longer revoke it if the third party has declared that he wishes to take advantage of it.

See also Claimant's Memorial on Liability, February 20, 2014 at ¶¶256-261 (citing various U.S. cases applying the third-party beneficiary doctrine). *Compare* Peru's 10.20(4) Objection, February 20, 2015 at ¶¶52-56 *with* Claimant's Memorial on Liability, February 20, 2014 at ¶¶255-261.

[124] Cárdenas Opinion, February 20, 2015, §II.C at 15.

> We advised them we were concerned about, among other things, potential lawsuits against Renco and others in the United States, or elsewhere, and that without such protection we would not go forward with the deal. It was a challenge to explain to the government why such a clause would be necessary, given their background in Peruvian law. Nevertheless, and to ensure that the necessary clarification was there, Centromin agreed to draft 6.2 and 6.3 of the STA broadly, so that they encompassed claims against parent entities, or other third parties.[125]

5. Peru ignores the clear distinction recognized by U.S. courts between assumption of liability clauses and indemnity clauses.

94. U.S. courts clearly distinguish between assumption of liability clauses (such as Clauses 6.2 and 6.3 of the Stock Transfer Agreement) and indemnity and "hold harmless" clauses (such as Clause 6.5). Nevertheless, Peru contends that "U.S. law ... does not support Renco's argument that the indemnity provisions in the Contract run to *any* entity sued by a third party for damages falling within the scope of Centromin/Activos Mineros's assumption of liability."[126] In support of this position, Peru cites several U.S. cases holding that indemnity clauses must be "strictly construed and limited to intended beneficiaries."[127] Peru also provides a detailed summary of *Denny's Inc. v. Avesta Enterprises*, a case in which the Missouri Court of Appeals held that a third party could not recover under an indemnity clause in a restaurant lease agreement because the clause did "not express *any direct or clear intent to benefit* [the third party]."[128] Applying these principles to the present case, Peru contends that because "the indemnification provisions in Clauses 6.2, 6.3 and 6.5 of the Contract do not name any party apart from the 'Company,' i.e., DRP, and do not specify any other category of covered party," the Stock Transfer Agreement "does not express a 'direct or clear intent to benefit' anyone associated with the Renco Consortium."[129]

95. In making these contentions, Peru ignores the clear distinction between assumption of liability clauses and indemnity and "hold harmless" clauses. Stock purchase agreements (such as the Stock Transfer Agreement at issue here) and asset purchase agreements

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[125] Sadlowski Witness Stmt. at ¶27 (emphasis added).
[126] Peru's 10.20.4 Objection, February 20, 2015 at ¶52 (underlining added; italics in original).
[127] *Id.* at ¶52 and fn 139; *see also id.* at ¶¶53-54.
[128] *Id.* at ¶53 (emphasis in original); *see also id.* at ¶54.
[129] *Id.* at ¶55 (underlining added).

(whereby one company purchases all or substantially all of another company's assets) frequently contain an assumption of liability clause specifying whether third-party liabilities are to be retained by the seller or assumed by the buyer.[130] As explained by Renco in its Memorial on Liability, it is well-settled that such clauses are distinct from, and broader than, indemnity and hold harmless clauses.[131] It is also well-settled that assumption of liability clauses entitle third parties to assert claims directly against the party that has assumed (or retained) the relevant liability. This differs from indemnity and hold harmless clauses, which generally only create rights as between the parties to the agreement.[132] As explained by a federal district judge applying Pennsylvania law, "[a]ssumption of liability by consent means that the acquiring entity agrees to be liable to third parties, whereas an agreement to defend and hold harmless [or an indemnity agreement] is an agreement that governs the relationship between the two contracting parties and does not create third party beneficiaries."[133]

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130 *See, e.g.*, **CLA-005**, *Caldwell Trucking PRP v. Rexon Technology Corp.*, 421 F.3d 234, 241-42 (3d Cir. 2005) (stock purchase agreement contained "retention of liabilities" clause specifying that seller "agrees to assume ... any and all liabilities and obligations ... arising out of or relating to ... any actual or alleged violation of or non-compliance by [the acquired company] with any Environmental Laws as of or prior to the Closing Date"); **CLA-006**, *Lee-Thomas, Inc. v. Hallmark Cards, Inc.*, 275 F.3d 702, 705 (8th Cir. 2002) (asset purchase agreement contained "assumption of liabilities" clause specifying that "buyer shall assume all the liabilities of the seller existing on the date of the closing, and liabilities arising solely out of the business conducted by seller prior to the closing"); **CLA-008**, *Thrifty Rent-A-Car System, Inc. v. Toye*, 1994 U.S. App. LEXIS 8034, at *14-19 (10th Cir. Apr. 19, 1994) (asset purchase agreement contained "assumption of liability" clause specifying that "Buyer agrees to assume ... the liabilities listed on Exhibit C to this Agreement").

131 *See* Claimant's Memorial on Liability, February 20, 2014 at ¶¶255-58. *See also* **CLA-005**, *Caldwell Trucking*, 421 F.3d at 243 (distinguishing between assumption of liabilities clause and indemnity provision in stock purchase agreement and holding that assumption of liabilities clause "has a more expansive scope than a mere indemnification provision"); **CLA-069**, *Goodman v. Challenger Int'l*, 1995 WL 402510, No. CIV. A. 94-1262, at *4 (E.D. Pa. July 5, 1995) (noting that "courts have distinguished these assumption arrangements from mere indemnification agreements"), *aff'd*, 106 F.3d 385 (3d Cir. 1996); **CLA-009**, *Bouton v. Litton Industries Inc.*, 423 F.2d 643, 651 (3d Cir. 1970) ("[O]ne who assumes a liability, as distinguished from one who agrees to indemnify against it, takes the obligation of the transferor unto himself, including the obligation to conduct litigation.").

132 *See, e.g.*, **CLA-070**, *Girard v. Allis Chalmers Corp.*, 787 F. Supp. 482, 488-89 (W.D. Pa. 1992) ("It is ... indisputable that when an agreement provides for the assumption of 'all debts, obligations and liabilities,' it ... transfers direct responsibility for contingent product liability claims unless they are expressly excluded.") (emphasis added); **CLA-005**, *Caldwell Trucking*, 421 F.3d at 241-42 (third party entitled to assert contribution claim for environmental liabilities against polluter's former parent company on basis of former parent company's express assumption of environmental liabilities in stock purchase agreement); **CLA-006**, *Lee-Thomas*, 275 F.3d at 705-06 (third party entitled to assert product liability claims against purchaser of manufacturer's assets on basis of purchaser's express assumption of manufacturer's liabilities in asset purchase agreement); **CLA-071**, *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1425 (7th Cir. 1993) ("If ... the parties have specified whether liabilities are to be retained by the seller or assumed by the buyer, the court will enforce the specified allocation[.]").

133 **CLA-072**, *United States v. Sunoco, Inc.*, 637 F. Supp. 2d 282, 288 (E.D. Pa. 2009).

96. In an attempt to muddy the clear and well-settled distinction between assumption of liability clauses and indemnity clauses, Peru contends that the decision in *Caldwell Trucking v. Rexon Technology Corporation* is "inapposite" because it "merely illustrates the function of an indemnity clause."[134] Peru's contention is based on its complete misreading of the *Caldwell Trucking* decision. As explained in Renco's Memorial on Liability, the Court of Appeals for the Third Circuit expressly distinguished in *Caldwell Trucking* between the assumption of liability and indemnity provisions in a stock purchase agreement, holding that "Section 1.05 of the stock purchase agreement [which was captioned '[Seller] Retention of Certain Liabilities'] has a more expansive scope than a mere indemnification provision."[135] The Court noted that in *Bouton v. Litton Industries*, it had "distinguished between indemnity and assumption provisions" and had held that "one who assumes a liability, as distinguished from one who agrees to indemnify against it, takes the obligation of the transferor unto himself."[136]

97. The Court in *Caldwell Trucking* concluded 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.[137] While the Court went on to address the parent company's argument that "as indemnitor, it [could] not be sued directly" by a non-party, that part of the Court's decision was clearly *obiter dicta*, given its prior conclusion that the plaintiff could bring a direct action against the parent company on the basis of its express assumption of liability.[138] Accordingly, contrary to Peru's erroneous assertion, the *Caldwell Trucking* decision is completely consistent with the well-settled rule that an assumption of liability clause entitles third parties to assert claims directly against the party that has assumed (or retained) the relevant liability.

98. Accordingly, Peru's assertion on this point is clearly without merit. In conclusion, the Parties disagree whether the Stock Transfer Agreement requires Peru to assume liability for third-party claims asserted against Renco and Doe Run Resources. All of the facts

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134 Peru's 10.20.4 Objection, February 20, 2015 at ¶56.

135 *See* Claimant's Memorial on Liability, February 20, 2014 at ¶¶256-57. *See also* **CLA-005**, *Caldwell Trucking*, 421 F.3d at 243.

136 **CLA-005**, *Caldwell Trucking*, 421 F.3d at 243 (*quoting* **CLA-009**, *Bouton*, 423 F.2d at 651).

137 **CLA-005**, *Caldwell Trucking*, 421 F.3d at 243-44.

138 *Id.* at 244.

submitted by Renco in support of its interpretation of the contractual language at issue, which must be assumed to be true, should be considered by the Tribunal. Completion of that exercise leads to the inexorable conclusion that Renco's claim does not fail as a matter of law and Peru's 10.20.(4) Objection must be dismissed.

IV. PRAYER FOR RELIEF

99. For the foregoing reasons, Peru has failed to make the requisite showing that Renco's claim fails as a matter of law. Renco respectfully requests that Respondent's 10.20(4) Objection be dismissed, in its entirety, and Renco be afforded the opportunity to present its claim at the merits stage of these proceedings.

100. Renco reserves the right to petition the Tribunal for fees and costs associated with the 10.20(4) phase of this proceeding, which at its conclusion will have lasted over a year and a half, based upon Peru's assertion of utterly meritless objections in the 10.20(4) scope phase, which was exacerbated by Peru's misconduct in lodging improper and unauthorized objections in its 10.20(4) Objection.

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New York, New York

Respectfully submitted,

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