MINISTERIO DE ECONOMIA Y FINANZAS
DIRECCION GENERAL DE ASUNTOS DE ECONOMÍA
INTERNACIONAL, COMPETENCIA Y PRODUCTIVIDAD

"AÑO DEL BUEN SERVICIO AL CIUDADANO"

April 03, 2017

Letter No. 070-2017-EF/CE-36

MR. PATRICK W. PEARSALL
Chief of Investment Arbitration
Office of the Legal Adviser
Department of State
600 19th Street NW, Suite 5.600
Washington, D.C. 20522
United States of America

Dear Mr. Pearsall:

The Republic of Peru hereby conveys to the United States Department of State certain materials further to Article 10.21 of the Peru-United States Trade Promotion Agreement (the "Treaty"), in connection with the referenced investment dispute thereunder, as set forth in the attachment hereto.

This communication is conveyed by the Special Commission that Represents the State in International Investment Disputes, which represents the Republic of Peru in international investment disputes in accordance with Law N° 28933 and Supreme Decree N° 125-2008-EF.

Please accept the assurances of our highest consideration.

Sincerely,

RICARDO AMPUERO LLERENA
Presidente
Comisión Especial- Ley N°28933

cc: Embassy of Peru to the United States

Peru-United States Trade Promotion Agreement

Republic of Peru/The Renco Group, Inc.

Further to the Peru-United States Trade Promotion Agreement (the "Treaty"), which entered into force on February 1, 2009, the Republic of Peru ("Peru" or the "State") hereby conveys to the United States Department of State materials in connection with the investment dispute which arose thereunder with respect to The Renco Group, Inc. ("Renco") and a metallurgical facility at La Oroya, Peru (the "Facility").

It bears emphasizing that the Republic of Peru is a reliable treaty and trading partner of the United States. Peru has maintained a macroeconomic policy and legal framework facilitating opportunities for investment. Given that Peru and the United States are Contracting Parties to the Treaty, and the nature of the issues in dispute, including before U.S. courts, Peru hereby conveys this communication to the State Department further to Article 10.21 of the Treaty, taking into account the range of issues implicated in the city of La Oroya and the investment dispute.

Peru and Renco were parties to a proceeding under the Treaty styled as *The Renco Group, Inc. v. Republic of Peru* (ICSID Case No. UNCT/13/1). The Tribunal ruled in a Partial Award dated July 15, 2016 that Renco's claims must be dismissed. On November 9, 2016, the Tribunal issued the Final Award in the referenced proceeding. For your reference, the Final Award and the Partial Award are attached hereto respectively as Annexes A and B. A record of the proceeding is available on the web site of the International Centre for Settlement of Investment Disputes.

Renco also sent Peru two notices (collectively, the "Notices") in 2016. Specifically, Renco sent Peru a new Notice of Intent to Commence Arbitration under the Treaty dated August 12, 2016; and Renco and Doe Run Resources Corporation ("DRRC") sent Peru and Activos Mineros S.A.C. ("Activos Mineros") a notice dated August 12, 2016, regarding a dispute under a certain Stock Transfer Agreement and Guaranty Agreement. For your reference, the Notices are attached hereto as Annexes C and D.

The Treaty provides in Article 10.15 that, "[i]n the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation." Following receipt of the Notices, Peru and Activos Mineros advised that they disagreed with the allegations set forth in the Notices and confirmed their continuous reservation of all of their rights. They also advised that the resolution of the prior arbitration proceeding facilitated a renewed opportunity to focus on dispute resolution and solutions related to La Oroya. Accordingly, Peru and Activos Mineros have engaged in amicable consultations with Renco and DRRC to explore a possible amicable resolution with respect to the Notices in an effort to resolve disputes among them.

In this context, in accordance with applicable law, contracts and the Treaty, Peru has sought to resolve issues related to La Oroya, and balance diverse factors including, among other things, the economic development of La Oroya, investment factors, and environmental issues relating to air pollution from the Facility. Concurrently, there is an ongoing creditor-controlled process for the liquidation of Doe Run Peru S.R.L. ("DRP"), a subsidiary of Renco. The Ministry of Energy and Mines ("MEM"), as a creditor, has continued to seek consensus to facilitate the liquidation and the sale of assets of DRP.

Concurrently, there are ongoing proceedings before the Inter-American Commission on Human Rights brought by citizens of Peru. There also are ongoing civil actions in the United States, with origins dating back to 2007-08, brought by or on behalf of citizens of Peru seeking recovery against Renco, other affiliates, and certain directors for personal injury and other damage claims relating to losses allegedly suffered in Peru as the result of pollution and environmental damage from the Facility (the "Actions"). Peru is not a party to the Actions and has not consented to such jurisdiction.

The dispute over claims at issue in the Actions dates back to 2007, when plaintiffs first brought suit in the state courts of Missouri. Peru has long emphasized and maintains the importance of its sovereign rights with respect to these issues, including as reflected in the Treaty ratified thereafter and conveyed in arbitration. Peru understands that the Actions were removed to the United States District Court for the Eastern District of Missouri, with reference to Renco's preliminary notice related to arbitration under the Treaty. The Court concluded that the Actions were removable under the Federal Arbitration Act.

In the prior arbitration, Renco made certain allegations in connection with the claims at issue in the Actions, including that Peru should appear in U.S. court or assume liability. As Peru explained in that context, there is no legal basis for such allegations, either as a matter of Peruvian law, as a matter of contract, or as a matter of international law. Indeed, Peru never consented to the jurisdiction of the courts of the United States or waived its sovereign immunity, such that Peru cannot be required to intervene in claims brought in U.S. courts against Renco and its U.S.-based affiliates. *See, e.g.*, Peru's Preliminary Objection Under Article 10.20.4, February 20, 2015, § IV.B. Peru's position in this regard was supported by the Legal Opinion of John B. Bellinger III, former Legal Adviser to the U.S. Department of State. As Mr. Bellinger explained, there is an established history in the United States of affording foreign States sovereign immunity, and the Foreign Sovereign Immunities Act ("FSIA") sets out the limited circumstances in which U.S. courts may assert jurisdiction over a foreign State. Mr. Bellinger stated that, "[i]n my experience, whenever sovereign States agree to litigate in U.S. courts, they indicate that intent by expressly waiving their sovereign immunity," and concluded that "Peru has neither explicitly nor implicitly waived its immunity from the jurisdiction of U.S. courts under the FSIA with respect to the claims filed in Missouri" and that "it would not be reasonable to conclude that Peru waived its sovereign immunity and actually consented to litigate in U.S. courts." Legal Opinion of John B. Bellinger III, February 20, 2015, ¶¶ 34-35.

Peru and the United States previously have agreed on various issues that may be relevant to the Notices and the Actions. The Treaty provides that Peru and the United States each have sovereign rights and responsibilities with respect to their natural resources, and recognizes "the sovereign right of each Party to establish its own levels of domestic environmental protection and environmental development priorities, and to adopt or modify accordingly its environmental laws and policies." Treaty, Art. 18.1. With respect to the enforcement of environmental laws by Peru and the United States, Article 18.3 of the Treaty provides:

> *1. (b) (i) The Parties recognize that each Party retains the right to exercise prosecutorial discretion and to make decisions regarding the allocation of environmental enforcement resources with respect to other environmental laws determined to have higher priorities. [....]*
>
> *5. Nothing in this Chapter shall be construed to empower a Party's authorities to undertake environmental law enforcement activities in the territory of another*

Party other than as specifically provided in Annex 18.3.4. [which sets out additional provisions with respect to forest sector governance.]

Moreover, the Treaty recognizes that Peru and the United States are responsible for providing remedies and adjudicating claims relating to environmental violations in their respective jurisdictions. With respect to remedies for environmental law violations, Article 18.4 of the Treaty provides, *inter alia*:

2. Each Party shall ensure that judicial, quasi-judicial, or administrative proceedings are available under its law to provide sanctions or remedies for violations of its environmental laws. [....]

4. Each Party shall provide persons with a legally recognized interest under its law in a particular matter appropriate and effective access to remedies for violations of that Party's environmental laws or for violations of a legal duty under that Party's law relating to the environment or environmental conditions affecting human health [....]

5. Each Party shall provide appropriate and effective sanctions or remedies for violations of that Party's environmental laws that (a) take into consideration, as appropriate, the nature and gravity of the violation, any economic benefit the violator has derived from the violation, the economic condition of the violator, and other relevant factors; and (b) may include administrative, civil, and criminal remedies and sanctions, such as compliance agreements, penalties, fines, imprisonment, injunctions, closure of facilities, or requirements to take remedial action or pay for the cost of containing or cleaning up pollution.

Such provisions are consistent with the Treaty's objective of seeking to promote "broad-based economic development" and "sustainable development," as recognized in the Preamble of the Treaty. Article 10.11 of the Treaty provides: "Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns." The negotiating history of the Treaty confirms that "the sovereign right of each country over its natural resources is recognized," and that "countries commit to provide judicial or administrative proceedings to sanction or repair violations of environmental laws in accordance with its domestic laws." MINCETUR, 13th Round of Negotiations, December 2005.

The Treaty is consistent with the sovereign rights of States with respect to the exploitation of natural resources and environmental policy in their own jurisdiction to achieve sustainable development that was recognized in the Rio Declaration on Environment and Development (the "Rio Declaration"), which was adopted by the United Nations Conference on Environment and Development on 14 June 1992, with the participation of Peru and the United States. Among other things, the Rio Declaration provides:

PRINCIPLE 2: States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Likewise, the Rio Declaration declares that each sovereign is itself responsible for implementing its own environmental laws and policies, which includes enabling relevant judicial and administrative proceedings, as well as adjudicating liability and compensation for the victims of pollution. *See, e.g.*, Principles 10-13.

There is an interest, as a matter of Peruvian law and under the Treaty, in preserving the integrity of sovereignty, including rights to safeguard public health, establish environmental policy and develop policies with respect to the development of natural resources. These elements are enshrined in the Constitution of Peru (the "Constitution"). Natural resources "are patrimony of the Nation," and "[t]he State is sovereign in their utilization." Constitution, Art. 66. Accordingly, the Constitution provides that "[t]he State determines the national environmental policy. It promotes the sustainable use of its natural resources." Constitution, Art. 67. The Constitution further provides, among other things, that the "essential purpose [of the State] is the comprehensive development of the Nation." Constitution, Art. 188. It is fundamental that "the State guides the development of the country." Constitution, Art. 58.

To these ends, Peru has enacted laws and regulations in various sectors, and implemented public policies that take into account interests relating to, without limitation, the safeguarding of rights and public health and long-term preservation of the environment and promotion of responsible and comprehensive natural resource development. For example, Peru has enacted the General Law of the Environment, which, among other things, defines basic rights and principles under Peruvian Law, including access to justice related to the environment, *see*, Preliminary Title of Law Nº 28611, and has established the National Policy for the Environment and Environmental Management (Title I), and the Regime for Liability for Environmental Damage. (Title IV).

The Organization of American States recognizes Peru's system of government as a "unitary, representative, decentralized, and organized according to the principle of the separation of powers," and states that "the power to administer justice emanates from the people and is exercised by the Judiciary through its hierarchical divisions in accordance with the Constitution and the law." Courts of the United States repeatedly have declined to exercise jurisdiction over actions that could properly be brought in Peru, finding that the courts of Peru are adequate. Peru has an effective judicial system that respects due process and is competent to adjudicate claims for damages in accordance with the Peruvian law of civil liability, including by persons claiming to have been harmed by pollution, contamination, or environmental damage in Peru. Section VI of Book VII of the Civil Code of Peru, for example, provides for compensation for damages in cases of extra-contractual liability, including as to co-authors, jointly responsible parties, or others whose orders resulted in the harm. *See e.g.*, Civil Code, Arts. 1969, 1970, 1978, 1981, 1983, 1985. The courts of Peru also have jurisdiction over defendants that are not domiciled in Peru in cases where a sufficient link to Peru exists. *See* Civil Code Art. 2058.

As summarized above, Peru and the United States agreed on the principles set forth in Article 18 of the Treaty, and its provisions with respect to various sovereign rights and responsibilities regarding environmental regulation and remedies for environmental damages, among other things. Without commenting on the merits of the Actions, Peru observes that it has articulated its position on the environmental situation in La Oroya and exercised its sovereignty and control over its natural resources and mining and metallurgical activities conducted within its jurisdiction, including, with respect to air pollution and environmental damage from the Facility. Peru has acted diligently as a sovereign in relation to the environment and public health of its citizens, including supervising and regulating private sector activities and providing direct assistance to the population affected by environmental contamination. Peru sought to foster compliance with applicable environmental requirements, and competent entities correspondingly coordinated enforcement. Likewise, Peru has taken measures to provide assistance, preparation and support to the population affected by the Facility's operation, to protect them and preserve their rights, while encouraging compliance with applicable law.

It appears that the Actions might require a court of the United States to pass judgment on the official acts and policies of the Peruvian State, rule on arguments relating to compliance with the laws and regulations of Peru, or interpret specific regulatory statements, policies, decisions and actions of Peru in connection with La Oroya. Such steps could affect the availability of appropriate and effective remedies for environmental contamination under applicable law, and could be considered to be inconsistent with the text and spirit of the Treaty and the Rio Declaration.

The claims at issue in the Actions were addressed in a communication by Peruvian authorities to the U.S. Government a decade ago. In a letter to the Ambassador of the United States to Peru dated 31 October 2007, the Presidency of the Council of Ministers of Peru, the Ministry of the Executive Branch that coordinates national and sectoral policy and coordinates among the various branches of the State, explained that "Peruvian authorities should hear the facts of this case," noting that the "children that are represented by the plaintiffs are Peruvian citizens and reside permanently in Peru," and "the facts that are the basis of the petition have taken place in Peru, and are regulated and/or defined by the laws of the Republic of Peru." The letter stated that "any claim and/or lawsuit with respect to those acts must be the exclusive jurisdiction of the administrative and/or jurisdictional authorities of Peru."

Peru appreciates the cooperative relationship that it has shared for many years with the United States in matters relating to trade, investment, development, and environmental protection, among others, as embodied in the Treaty, which reflects the States' agreement on a broad range of issues negotiated over a period of years. The situation in La Oroya relates to national concerns and policies, and the State is accordingly continuing to seek solutions that protect the environment, public health, and sustainable economic development in and around La Oroya. In particular, the State, through its competent entities, has undertaken and continuously engages in diligent actions to supervise and regulate compliance with environmental obligations, including, among other things, pertinent measures with respect to the Facility, for the benefit of the citizens of La Oroya.

Peru continues to maintain a macroeconomic policy and legal framework that facilitates opportunities for investment, while reasonably expecting that investors comply with applicable and legal obligations, including environmental laws, regulations, and standards. Peru maintains a sovereign interest in addressing matters relating to its applicable laws.

Peru also confirms its disagreement with the allegations in the Notices and its emphasis on solutions relating to La Oroya. Peru (together with Activos Mineros) has established a framework with Renco and DRRC addressing issues and facilitating further consultations. The Treaty provides for consultations and dispute proceedings. In keeping with the role of the United States as a Non-Disputing Party, Peru will provide further information to the State Department as relevant pursuant to Article 10.21 of the Treaty.